CASES

ON

THE LAW OF TORTS

SELECTED FROM DECISIONS OF

ENGLISH AND AMERICAN COURTS

BY

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AMERICAN CASEBOOK SERIES

WILLIAM R. VANCE

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(HEPB.TORTS)

THE AMERICAN CASEBOOK SERIES

THE first of the American Casebook Series, Mikell's Cases on Criminal Law, issued in December, 1908, contained in its preface an able argument by Mr. James Brown Scott, the General Editor of the Series, in favor of the case method of law teaching. This preface has appeared in each of the volumes published in the series up to the present time. But the teachers of law have moved onward, and the argument that was necessary in 1908 has now become needless. That such is the case becomes strikingly manifest to one examining three important documents that fittingly mark the progress of legal education in America. In 1893 the United States Bureau of Education published a report on Legal Education prepared by the American Bar Association's Committee on Legal Education, and manifestly the work of that Committee's accomplished chairman, William G. Hammond, in which the three methods of teaching law then in vogue—that is, by lectures, by text-book, and by selected cases—were described and commented upon, but without indication of preference. The next report of the Bureau of Education dealing with legal education, published in 1914, contains these unequivocal statements.

"To-day the case method forms the principal, if not the exclusive, method of teaching in nearly all of the stronger law schools of the country. Lectures on special subjects are of course still delivered in all law schools, and this doubtless always will be the case. But for staple instruction in the important branches of common law the case has proved itself as the best available material for use practically everywhere. * * * The case method is to-day the principal method of instruction in the great majority of the schools of this country."

But the most striking evidence of the present stage of development of legal instruction in American Law Schools is to be found in the special report, made by Professor Redlich to the Carnegie Foundation for the Advancement of Teaching, on "The Case Method in American Law Schools." Professor Redlich, of the Faculty of Law in the University of Vienna, was brought to this country to make a special study of methods of legal instruction in the United States from the standpoint of one free from those prejudices necessarily engendered in American teachers through their relation to the struggle for supremacy so long, and at one time so vehemently, waged among the rival systems. From this masterly report, so replete with brilliant analysis

and discriminating comment, the following brief extracts are taken. Speaking of the text-book method Professor Redlich says:

"The principles are laid down in the text-book and in the professor's lectures, ready made and neatly rounded, the predigested essence of many judicial decisions. The pupil has simply to accept them and to inscribe them so far as possible in his memory. In this way the scientific element of instruction is apparently excluded from the very first. Even though the representatives of this instruction certainly do regard law as a science—that is to say, as a system of thought, a grouping of concepts to be satisfactorily explained by historical research and logical deduction—they are not willing to teach this science, but only its results. The inevitable danger which appears to accompany this method of teaching is that of developing a mechanical, superficial instruction in abstract maxims, instead of a genuine intellectual probing of the subject-matter of the law, fulfilling the requirements of a science."

Turning to the case method Professor Redlich comments as follows:

"It emphasizes the scientific character of legal thought; it goes now a step further, however, and demands that law, just because it is a science, must also be taught scientifically. From this point of view it very properly rejects the elementary school type of existing legal education as inadequate to develop the specific legal mode of thinking, as inadequate to make the basis, the logical foundation, of the separate legal principles really intelligible to the students. Consequently, as the method was developed, it laid the main emphasis upon precisely that aspect of the training which the older text-book school entirely neglected—the training of the student in intellectual independence, in individual thinking, in digging out the principles through penetrating analysis of the material found within separate cases; material which contains, all mixed in with one another, both the facts, as life creates them, which generate the law, and at the same time rules of the law itself, component parts of the general system. In the fact that, as has been said before, it has actually accomplished this purpose, lies the great success of the case method. For it really teaches the pupil to think in the way that any practical lawyer—whether dealing with written or with unwritten law—ought to and has to think. It prepares the student in precisely the way which, in a country of case law, leads to full powers of legal understanding and legal acumen; that is to say, by making the law pupil familiar with the law through incessant practice in the analysis of law cases, where the concepts, principles, and rules of Anglo-American law are recorded, not as dry abstractions, but as cardinal realities in the inexhaustibly rich, ceaselessly fluctuating, social and economic life of man. Thus in the modern American law school professional practice is preceded by a genuine course of study, the methods of which are perfectly adapted to the nature of the common law."

The general purpose and scope of this series were clearly stated in the original announcement:

"The General Editor takes pleasure in announcing a series of scholarly casebooks, prepared with special reference to the needs and limitations of the classroom, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. The collection will develop the law historically and scientifically; English cases will give the origin and development of the law in England; American cases will trace its expansion and modification in America; notes and annotations will suggest phases omitted in the printed case. Cumulative references will be avoided, for the footnote may not hope to rival the digest. The law will thus be presented as an organic growth, and the necessary connection between the past and the present will be obvious.

"The importance and difficulty of the subject as well as the time that can properly be devoted to it will be carefully considered so that each book may be completed within the time allotted to the particular subject. * * * If it be granted that all, or nearly all, the studies required for admission to the bar should be studied in course by every student—and the soundness of this contention can hardly be seriously doubted—it follows necessarily that the preparation and publication of collections of cases exactly adapted to the purpose would be a genuine and by no means unimportant service to the cause of legal education. And this result can best be obtained by the preparation of a systematic series of casebooks constructed upon a uniform plan under the supervision of an editor in chief. * * *

"The following subjects are deemed essential in that a knowledge of them (with the exception of International Law and General Jurisprudence) is universally required for admission to the bar:

Administrative Law.
Agency.
Bills and Notes.
Carriers.
Contracts.
Corporations.
Constitutional Law.
Criminal Law.
Criminal Procedure.
Common-Law Pleading.
Conflict of Laws.
Code Pleading.
Damages.
Domestic Relations.
Equity.
Equity Pleading.
Evidence.
Insurance.
International Law.
Jurisprudence.
Mortgages.
Partnership.
Personal Property.
Real Property. { 1st Year. / 2d " / 3d "
Public Corporations.
Quasi Contracts.
Sales.
Suretyship.
Torts.
Trusts.
Wills and Administration.

"International Law is included in the list of essentials from its intrinsic importance in our system of law. As its principles are simple in comparison with municipal law, as their application is less technical, and as the cases are generally interesting, it is thought that the book may be larger than otherwise would be the case.

"As an introduction to the series a book of Selections on General Jurisprudence of about 500 pages is deemed essential to completeness.

"The preparation of the casebooks has been intrusted to experienced and well-known teachers of the various subjects included, so that the experience of the classroom and the needs of the students will furnish a sound basis of selection."

Since this announcement of the Series was first made there have been published, or put in press, books on the following subjects:

Administrative Law. By Ernst Freund, Professor of Law, University of Chicago.

Agency. By Edwin C. Goddard, Professor of Law, University of Michigan.

Bills and Notes. By Howard L. Smith, Professor of Law, University of Wisconsin, and William U. Moore, Professor of Law, University of Chicago.

Carriers. By Frederick Green, Professor of Law, University of Illinois.

Conflict of Laws. By Ernest G. Lorenzen, Professor of Law, University of Minnesota.

Constitutional Law. By James Parker Hall, Dean of the University of Chicago Law School.

Corporations. By Harry S. Richards, Dean of the University of Wisconsin Law School.

Criminal Law. By William E. Mikell, Dean of the University of Pennsylvania Law School.

Criminal Procedure. By William E. Mikell, Dean of the University of Pennsylvania Law School.

Damages. By Floyd R. Mechem, Professor of Law, Chicago University, and Barry Gilbert, Professor of Law, University of California.

Equity. By George H. Boke, Professor of Law, University of California.

Insurance. By W. R. Vance, Dean of the University of Minnesota Law School.

Partnership. By Eugene A. Gilmore, Professor of Law, University of Wisconsin.

Persons (including *Marriage and Divorce*). By Albert M. Kales, Professor of Law, Northwestern University, and Chester G. Vernier, Professor of Law, University of Illinois.

Pleading (Common Law). By Clarke B. Whittier, Professor of Law, Stanford University.

Sales. By Frederic C. Woodward, Dean of Stanford University Law School.

Suretyship. By Crawford D. Hening, Professor of Law, University of Pennsylvania.

Torts. By Charles M. Hepburn, Professor of Law, University of Indiana.

Trusts. By Thaddeus D. Kenneson, Professor of Law, University of New York.

Wills and Administration. By George P. Costigan, Jr., Professor of Law, Northwestern University.

It is earnestly hoped and believed that the books thus far published in this series, with the sincere purpose of furthering scientific training in the law, have not been without their influence in bringing about a fuller understanding and a wider use of the case method.

The following well-known teachers of law are at present actively engaged in the preparation of casebooks on the subjects indicated below:

Frank Irvine, Dean, Cornell University Law School. Subject, *Evidence.*

Charles Thaddeus Terry, Professor of Law, Columbia University. Subject, *Contracts.*

James Brown Scott, Professor of International Law, Johns Hopkins University. Subject, *International Law.*

Edward S. Thurston, Professor of Law, University of Minnesota. Subject, *Quasi Contracts.*

Henry Wade Rogers, Dean, Yale Law School. Subject, *Public Corporations.*

Albert M. Kales, Professor of Law, Northwestern University. Subject, *Property.*

Harry A. Bigelow, Professor of Law, University of Chicago. Subject, *Property.*

Ralph W. Aigler, Professor of Law, University of Michigan. Subject, *Property.*

WILLIAM R. VANCE,
General Editor.

MINNEAPOLIS, September, 1915.

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AUTHOR'S PREFATORY NOTE

In selecting and classifying the materials for this book, I have had in mind especially the first year law students. If "the classification of actionable wrongs," as Sir Frederick Pollock remarks, "is perplexing, not because it is difficult to find a scheme of division, but because it is easier to find many than to adhere to any one of them," the problem is hardly less difficult when it has to do with the presentation of the principles of Torts, through a collection of cases extending from the Year Books to the present day. But when the needs of a class of first year law students are considered there are two or three guiding principles which tend to settle the scheme of division.

It appears to be clear that the beginning student in Torts, however it may be in other subjects, should have some assistance, at the very outset, in marking the place which is occupied by Torts in the general field of the law. Perhaps this assistance might be given him through a collection of cases, but for the immediate purpose of this volume it seems best to use a number of reading selections. This I have attempted in an Introductory, dealing with the meaning of the word "tort" as an historical term of law, with the difference between torts and moral wrongs, and between torts and other forms of legal wrong, and with the effect which the common law action for damages has had on our theory of torts. I have added a short note on the classification of torts.

It appears to be reasonably clear also that the beginning student needs, in his study of the individual torts, a simple and broad classification based on historical lines. In his inductive study of the cases, he will profit by following in the main the historical development of our law of torts. This has led me to pass by several classifications of torts which are evidently of interest and stimulating value for advanced students, and to take the broadest lines of division and, for a starting point, the causes in trespass.

The cases on the individual torts have been arranged, therefore, in two main divisions. In the first I have placed the trespasses, and in a subdivision after them the other torts which rest on an act of absolute liability.

In the second main division I have placed those torts, chiefly of modern development, in which the plaintiff cannot show any act

of absolute liability committed by the defendant, but, in order to make out a valid prima facie cause, must show "negligence" or "malice."

From this two-fold scheme of division, one departure has been made. For the sake of convenience in teaching, the consideration of the causal relation in torts has been treated as a distinct division of the subject, and is placed between the first and the second of the divisions just indicated. CHARLES M. HEPBURN.

INDIANA UNIVERSITY SCHOOL OF LAW,
August, 1915.

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CASES ON TORTS

INTRODUCTORY

I

"TORTS" AND "WRONGS"

"Rectum" is a proper and significant word for the right that any hath,[1] and wrong or injury is in French aptly called "tort;" [2] because injury and wrong is wrested or crooked, being contrary to that which is right and straight.

Coke upon Littleton (1628) 158b.

"Tort" is nothing but the French equivalent of our English word "wrong," and was freely used by Spenser as a poetical synonym for it. In common speech everything is a wrong, or wrongful, which is thought to do violence to any right. Manslaying, false witness, breach of covenant, are wrongs in this case. But thus we should include all breaches of all duties, and therefore should not even be on the road to any distinction that could serve as the base of a legal classification.

Sir Frederick Pollock, Torts (3d Ed.) 2.

[1] "Since conduct which is straightforward came to be spoken of eulogistically as being 'rectum,' 'directum' (whence 'droit'), 'recht,' and 'right,' conduct of the opposite character naturally came to be expressed by the terms 'delictum,' 'delit,' as deviating from the right path, and 'wrong' or 'tort,' as twisted out of the straight line." Holland, Jurisprudence (1906) 318.

For the scope and use of the term "delict," "delictum," see Pollock on Torts (8th Ed.) 16, 17; Terry's Leading Principles of Anglo-Am. Law, 104; Black's Law Dictionary, 348, 349; and compare "Action Ex Delicto," 1 Words and Phrases, 141.

[2] "'Tort,' from the Latin 'tortus,' a French word for injury or wrong, as 'de son tort demesne,' in his own wrong." Jacob's Law Dictionary (1811) vol. 6, p. 251.

It is not surprising, in any case, that a complete theory of torts is yet to seek, for the subject is altogether modern. The earliest text-book I have been able to find is a meagre and unthinking digest of "The Law of Actions on the Case for Torts and Wrongs," published in 1720, remarkable chiefly for the depths of historical ignorance which it occasionally reveals. The really scientific treatment of principles begins only with the decisions of the last fifty years; their development belongs to that classical period of our jurisprudence which in England came between the Common Law Procedure Act and the Judicature Act.

Sir Frederick Pollock,[3] Introduction to the first edition of his Torts.

Take the law of tort or civil liability for damages apart from contract and the like. Is there any general theory of such liability, or are the cases in which it exists simply to be enumerated, and to be explained each on its special ground, as is easy to believe from the fact that the right of action for certain well-known classes of wrongs like trespass or slander has its special history for each class? I think that there is a general theory to be discovered, although resting in tendency rather than established and accepted. I think that the law regards the infliction of temporal damage by a responsible person as actionable, if under the circumstances known to him the danger of his act is manifest according to common experience, or according to his own experience if it is more than common, except in cases where upon special grounds of policy the law refuses to protect the plaintiff or grants a privilege to the defendant. I think that commonly malice, intent, and negligence mean only that the danger was manifest to a greater or less degree, under the circumstances known to the actor, although in some cases of privilege malice may mean an actual malevolent motive, and such a motive may take away a permission knowingly to inflict harm, which otherwise would be granted on this or that ground of dominant public good. But when I stated my view to a very eminent English judge the other day, he said: "You are discussing what the law ought to be; as the law is, you must show a right. A man is not

[3] In his "open letter," addressed to Mr. Justice Holmes, introducing the first edition of Pollock on Torts. The professed aim of this book, published in 1887, was "to show that there really is a Law of Torts, not merely a number of rules of law about various kinds of torts—that this is a true living branch of the Common Law, not a collection of heterogeneous instances."

"We read in the books of various forms of actions for violations of non-contract legal duties, and of classified civil wrongs of this sort. We had, as we still have, Assault and Battery, Slander and Libel, Deceit, Malicious Prosecution, Trespass, and so on, all pertaining to minor divisions within the subject of this volume. In 1859 was published the first treatise on the 'Law of Torts.' It was by Francis Hilliard. It was, as all know, an American book. The English Addison on Torts appeared in 1860." Bishop, Non-Contract Law (1889) 1, 2.

liable for negligence unless he is subject to a duty." If our difference was more than a difference in words, or with regard to the proportion between the exceptions and the rule, then, in his opinion, liability for an act cannot be referred to the manifest tendency of the act to cause temporal damage in general as a sufficient explanation, but must be referred to the special nature of the damage, or must be derived from some special circumstances outside of the tendency of the act, for which no generalized explanation exists. I think that such a view is wrong, but it is familiar, and I dare say, generally accepted in England.[4]

Mr. Justice Holmes, "The Path of the Law," 10 Harv. Law Rev. 457, 471 (1897).

The English Law of Contract and (within its very modest limits) the English Law of Quasi-Contract, are scientific. The English Law of Torts is arbitrary, and (in the historical sense of the word) barbaric. That is to say, it is possible to define, in simple language, what is a contract according to English Law, and to say that every arrangement which satisfies that definition will be a legally enforceable contract. Thus we may say, that whenever an adult and normal person enters into an agreement, with only a lawful object in view, for the purpose of affecting his legal relations, then, if that agreement is either motived by pecuniary consideration or is embodied in a deed, it will create a contract legally binding on him. That is a definition which an educated layman may fairly be expected to understand; and it really tells him something.

No such definition of a tort can be offered. A tort, in English Law, can only be defined in terms which really tell us nothing. A tort is a breach of a duty (other than a contractual or quasi-contractual duty) which gives rise to an action for damages. That is, obviously, a merely procedural definition, of no value to the layman. The latter wants to know the nature of those breaches of duty which give rise to actions for damages. And the only answer that can be given to him is: "Read this and the preceding volume." To put it briefly, there is no English Law of Tort; there is merely an English Law of Torts, i. e., a list of acts and omissions which, in certain conditions, are actionable. Any attempt to generalize further, however interesting from a

[4] In 1904, Mr. Justice Holmes, delivering the opinion in Aikens v. Wisconsin, 195 U. S. 194, 204, 25 Sup. Ct. 3, 5 (49 L. Ed. 159), remarked as follows: "It has been considered that prima facie the intentional infliction of temporal damage is a cause of action, which as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape."

See the remarks of Bowen, L. J., in Skinner & Co. v. Shew & Co. (1893) 1 ch. 413, 422; the remarks of Professor Ames in 18 Harv. Law Rev. (1905) 411 et seq. See, also, 26 Harv. Law Rev. (1913) 740-742. For an examination of the principle involved, see infra, Part III, Chapter II, "Torts through Malice."

speculative standpoint, would be profoundly unsafe as a practical guide. * * *

English Law stumbled on her definition of contract by an accident of genius; for six hundred years she has been seeking in vain for a definition of tort. We may well be impatient; and yet, when we think of the dangers involved, on the one hand in narrowness, and, on the other, in vagueness, we shall hesitate long before committing ourselves to an irrevocable definition.[5]

J. C. Miles, Digest Eng. Civil Law, Bk. II, pp. xiv, xv (1910).

II

TORTS AND MORAL WRONGS

Primitive law regards the word and the act of the individual; it searches not his heart. "The thought of a man shall not be tried," said Chief Justice Brian, one of the best of the mediæval lawyers, "for the devil himself knoweth not the thought of man."

James Barr Ames, "Law and Morals" (1908) 22 Harvard Law Review, 97.*

The law of torts abounds in moral phraseology. It has much to say of wrongs, of malice, fraud, intent, and negligence. Hence it may naturally be supposed that the risk of a man's conduct is thrown upon him as the result of some moral short-coming. But while this notion has been entertained, the extreme opposite will be found to have been a far more popular opinion; I mean the notion that a man is answerable for all the consequences of his acts, or, in other words, that he acts at his peril always, and wholly irrespective of the state of his consciousness upon the matter.

Oliver Wendell Holmes, Jr., The Common Law (1881) 79, 80.

[5] "It is true that it is not yet possible to give an unexceptionable definition of a tort. But we think Mr. Miles goes too far in saying 'there is no English Law of Tort; there is merely an English Law of Torts, i. e., a list of acts and omissions which, in certain conditions, are actionable.' In our judgment the Common Law is coming, if it has not already come, to hold that a man who wilfully or negligently causes temporal damage of any kind is liable unless he can show justification or excuse. The real difficulty is not to find a verbal definition of tort in general, but to define the substantial principles of justification and excuse and the limits of their application." Sir Frederick Pollock, 26 Law Quart. Rev. 420 (1910).

See, also, the article, by Sir Frederick Pollock, on Torts, in 27 Encyl. Brit. (11th Ed. 1911) 64.

*Republished in Lectures on Legal History, 434 (1915).

To-day we may say that the old law has been radically transformed. The early law asked simply, "Did the defendant do the physical act which damaged the plaintiff?" The law of to-day, except in certain cases based upon public policy, asks the further question, "Was the act blameworthy?" The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril.[6]

James Barr Ames, Law and Morals, 22 Harv. Law Rev. 99 (1908).[7]

The theory of torts may be summed up very simply. At the two extremes of the law are rules determined by policy without reference of any kind to morality. Certain harms a man may inflict even wickedly; for certain others he must answer, although his conduct has been prudent and beneficial to the community.

But in the main the law started from those intentional wrongs which are the simplest and most pronounced cases, as well as the nearest to the feeling of revenge which leads to self-redress. It thus naturally adopted the vocabulary, and in some degree the tests, of morals. But as the law has grown, even when its standards have continued to model themselves upon those of morality, they have necessarily become external, because they have considered, not the actual condition of the particular defendant, but whether his conduct would have been wrong in the fair average member of the community, whom he is expected to equal at his peril.

In general, this question will be determined by considering the degree of danger attending the act or conduct under the known circumstances. If there is danger that harm to another will follow, the act is generally wrong in the sense of the law.

But in some cases the defendant's conduct may not have been morally wrong, and yet he may have chosen to inflict the harm, as where he has acted in fear of his life. In such cases he will be liable,

[6] On this remark by Professor Ames, in 1908, Professor Roscoe Pound has this comment in 1914: "But the ethical standard of which he wrote, which came into the law in the period of infusion of morals, was an individualist ethical standard. To-day there is a strong and growing tendency to revive the idea of liability without fault, not only in the form of wide responsibility for agencies employed, but in placing upon an enterprise the burden of repairing injuries without fault of him who conducts it, which are incident to the undertaking. There is a strong and growing tendency, where there is no blame on either side, to ask, in view of the exigencies of social justice, who can best bear the loss, and hence to shift the loss by creating liability where there has been no fault. The whole matter of workmen's compensation and employer's liability, as dealt with in modern legislation, illustrates this." Roscoe Pound, "The End of the Law," 27 Harv. Law Rev. 233 (1914). For the development of the doctrine of liability without fault, see Part I, Torts through Acts of Absolute Liability. For the development of the doctrine of liability through blameworthiness, see Part III, Torts through Acts of Conditional Liability.

[7] Republished in Lectures on Legal History, 437 (1915).

or not, according as the law makes moral blameworthiness, within the limits explained above, the ground of liability, or deems it sufficient if the defendant has had reasonable warning of danger before acting. This distinction, however, is generally unimportant, and the known tendency of the act under the known circumstances to do harm may be accepted as the general test of conduct.

The tendency of a given act to cause harm under given circumstances must be determined by experience. And experience either at first hand or through the voice of the jury is continually working out concrete rules, which in form are still more external, and still more remote from a reference to the moral condition of the defendant, than even the test of the prudent man which makes the first stage of the division between law and morals. It does this in the domain of wrongs described as intentional, as systematically as in those styled unintentional or negligent.

But while the law is thus continually adding to its specific rules, it does not adopt the coarse and impolitic principle that a man acts always at his peril. On the contrary, its concrete rules, as well as the general questions addressed to the jury, show that the defendant must have had at least a fair chance of avoiding the infliction of harm before he becomes answerable for such a consequence of his conduct. And it is certainly arguable that even a fair chance to avoid bringing harm to pass is not sufficient to throw upon a person the peril of his conduct, unless, judged by average standards, he is also to blame for what he does.

Oliver Wendell Holmes, Jr., The Common Law (1881) 161.

There must be not only a thing done amiss, but also a damage either already fallen upon the party, or else inevitable. And therefore 19 H.6 44 if a man forge a bond in my name, I can have no action upon the case yet, but if I am sued, I may for the wrong and damage, though I may avoid it by plea.

Hobart, C. J., in Waterer v. Freeman (1619) Hob. 266, 267.[8]

[8] The case was this: Waterer brought an action of the case against Freeman, and declared that the defendant had sued out at Westm. a fieri fac. upon a judgment given against him for the defendant, for a trespass in Oxfordshire, in the King's Bench to the Sheriffs of Oxfordshire, who by virtue thereof took goods of the plaintiff to the value of the damage, and so made his return, and that the goods remained in his hands pro defectu emptoris, and that the defendant well knowing this (to the intent to vex and double charge him) afterwards did sue out another fieri fac. to the same sheriff, and delivered it to him to be executed, who did thereupon levy the money of other goods of the plaintiff and paid it over to the defendant whereby the now plaintiff was double charged; whereupon the defendant pleaded not guilty, and it was found against him. See Hobart, 205. On this there was a judgment for the plaintiff. Hobart, 266, 80 Reprint, 352.

It seems to me that the rule laid down by Croke, J., in Baily v. Merrell (1615) 3 Bulst. 95, is a sound and solid principle, namely, that fraud without damage, or damage without fraud, will not found an action; but where both concur, an action will lie.

Ashhurst, J., in Pasley v. Freeman (1789) 3 T. R. 51, 61.[9]

The law of torts exists for the purpose of preventing men from hurting one another, whether in respect of their property, their persons, their reputations, or anything else which is theirs. The fundamental principle of this branch of the law is "Alterum non lædere"—to hurt nobody by word or deed. An action of tort, therefore, is usually a claim for pecuniary compensation in respect of damage so suffered.

John W. Salmond, Law of Torts (1910) 7.

III

TORTS AND OTHER LEGAL WRONGS

The Law of Torts forms a portion of what is called private law, or that which is concerned with questions between man and man, as distinguished from public law, which is concerned with questions (1) between individuals and the community, as in criminal law, constitutional law, ecclesiastical law, and military law; or (2) between the community and another community, as in public international law.

We may regard law, whether public or private, as consisting of two portions, one of which, called substantive law, deals with rights, and the other, called adjective law, with the methods by which substantive law is administered. For instance, the law of contracts, the law of torts, the law of trusts, the law of succession, and the law of landlord and tenant, are all parts of the substantive portion of Private Law; while the rules relating to the procedure by which the rights under those several branches of law are secured, and redress for wrong is given, are called Adjective Law.

The Law of Torts forms a part of the substantive portion of Private Law.

[9] The defendant had made a false affirmation with intent to defraud the plaintiffs, who acted upon it to their damage. The plaintiffs' actual damage was established. There was no evidence that the defendant had benefited by his deceit or had colluded with those who had received a benefit. A judgment for the plaintiffs was sustained.

The substantive portion of private law comprises—(1) Rights in rem, or rights as against all the world, or indeterminate persons; (2) rights arising out of agreements or relations between two or more determinate persons.

Rights in rem comprise rights of (i) person, (ii) reputation, (iii) family or other domestic relations (as against the outside world), (iv) rights to the due performance of public duties, (v) and rights in objects, privileges, and advantages.

Rights as between determinate persons arise (a) out of voluntary gifts and promises; out of assignments not voluntary; out of grants; out of testamentary dispositions; (b) out of a contract (as when A. arranges with B. that B. shall do a certain piece of work for him for so much money); (c) out of family relations (as between one member of the family and another); (d) out of fiduciary relations; out of trusts.

A tort is usually said to be "A wrong independent of contract," i. e., the violation of a right independent of contract; and it will be seen by this statement that the rights, of which a tort is a violation, are, in fact, distinct from those arising out of contract. But they are also, as will be seen, distinct from a vast array of other rights; so that the usual definition is as defective as would be a definition of the horse as "A class of animal independent of horned cattle."

Innes, Principles of Torts (1891) 3, 5, 6.

By some writers a tort has been defined as the violation of a right in rem, giving rise to an obligation to pay damages. There is a tempting simplicity and neatness in this application of the distinction between rights in rem and in personam, but it may be gravely doubted whether it does in truth conform to the actual contents of the English law of torts. Most torts undoubtedly are violations of rights in rem, because most rights in personam are created by contract. But there are rights in personam which are not contractual, and the violation of which, if it gives rise to an action for damages, must be classed as a tort. The refusal of an innkeeper to receive a guest is a tort, yet it is merely the breach of a noncontractual right in personam. So with any actionable refusal or neglect on the part of a public official to perform his statutory duties on behalf of the plaintiff.

John W. Salmond, Jurisprudence (1910) 437, note.

All civilized systems agree in drawing a distinction between offenses against the State or Community and offenses against the Individual, and the two classes of injuries, thus kept apart, I may here, without pretending that the terms have always been employed consistently in jurisprudence, call Crimes and Wrongs, crimina and delic-

ta. Now the penal Law of ancient communities is not the law of Crimes; it is the law of Wrongs, or, to use the English technical word, of Torts. The person injured proceeds against the wrong-doer by an ordinary civil action, and recovers compensation in the shape of money damages if he succeeds. If the Commentaries of Gaius be opened at the place where the writer treats of the penal jurisprudence founded on the Twelve Tables, it will be seen that at the head of the civil Wrongs recognized by the Roman law stood Furtum or Theft. Offenses which we are accustomed to regard exclusively as crimes are exclusively treated as torts and not theft only, but assault and violent robbery, are associated by the jurisconsult with trespass, libel, and slander. * * * If, therefore, the criterion of a delict, wrong, or tort, be that the person who suffers it, and not the state, is conceived to be wronged, it may be asserted that in the infancy of jurisprudence, the citizen depends for protection against violence or fraud, not on the Law of Crime but on the Law of Tort.

Maine, Ancient Law (1884) 357, 359.

Torts are distinguished in the modern law from criminal offences. In the mediæval period the procedure whereby redress was obtained for many of the injuries now classified as torts bore plain traces of a criminal or quasi-criminal character, the defendant against whom judgment passed being liable not only to compensate the plaintiff, but to pay a fine to the king. Public and private law were, in truth, but imperfectly distinguished. In the modern law, however, it is settled that a tort, as such, is not a criminal offence. There are various acts which may give rise to a civil action of tort and to a criminal prosecution, or to the one or the other at the injured party's option; but the civil suit and the criminal prosecution belong to different jurisdictions, and are guided by different rules of procedure.

Sir Frederick Pollock, Law of Torts (1904) pp. 4, 5.[10]

[10] See, also, Holland's Jurisprudence, 319, 320: "The distinction between those wrongs which are generically called 'torts' and those which are called 'crimes' may at first sight appear to be a fine one. The same set of circumstances will, in fact, from one point of view constitute a tort, while from another point of view they amount to a crime. In the case, for instance, of assault, the right violated is that which every man has that his bodily safety shall be respected, and for the wrong done to this right the sufferer is entitled to get damages. But this is not all. The act of violence is a menace to the safety of society generally, and will therefore be punished by the State. So a libel is said to violate not only the right of an individual not to be defamed, but also the right of the State that no incentive shall be given to a breach of the peace. It is sometimes alleged by books of authority that the difference between a tort and a crime is a matter of procedure, the former being redressed by the civil, while the latter is punished by the criminal courts. But the distinction lies deeper, and is well expressed by Blackstone, who says that 'torts are an infringement or privation of the private, or civil rights belonging to individuals, considered as individuals; crimes are a breach of public rights and duties which affect the whole community, con-

In capital causes, in favorem vitæ, the law will not punish in so high a degree, except the malice of the will and the intention do appear; but in civil trespasses and injuries that are of an inferior nature, the law doth rather consider the damage of the party wronged, than the malice of him that was the wrong-doer.

And therefore the law makes a difference between killing a man upon malice forethought, and upon a present heat: but if I give a man slanderous words, whereby I damnify him in his name and credit, it is not material whether I use them upon sudden choler and provocation or of set malice; but in an action upon the case I shall render damages alike.

So if a man be killed by misadventure, as by an arrow at butts, this hath a pardon of course: but if a man be hurt or maimed only, an action of trespass lieth, though it be done against the party's mind and will, and he shall be punished in the same as deeply as if he had done it of malice.

So if a surgeon authorized to practice do, through negligence in his cure, cause the party to die, the surgeon shall not be brought in question of his life; and yet if he do only hurt the wound, whereby the cure is cast back and death ensues not, he is subject to an action upon the case for his misfeasance.

So if baron and feme be, and they commit felony together, the feme is neither principal nor accessory, in regard of her obedience to the will of her husband: but if baron and feme join in committing a trespass upon land or otherwise, the action may be brought against them both.

So if an infant within years of discretion, or a madman, kill another, he shall not be impeached thereof: but if he put out a man's eye, or do him like corporal hurt, he shall be punished in trespass.

Sir Francis Bacon, Maxims of the Law (1596) Regula VII, 14 Bacon's Works (Spedding's Ed.) 219.

The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties due to the whole community, considered as a community, in its social aggregate capacity.

sidered as a community.' The right which is violated by a tort is always a different right from that which is violated by a crime. The person of inherence in the former case is an individual, in the latter case the State. In a French criminal trial there may accordingly appear not only the public prosecuter, representing the State and demanding the punishment of the offender, but also the injured individual, as 'partie civile,' asking for damages for the loss which he has personally sustained."

As, if I detain a field from another man, to which the law has given him a right, this is a civil injury, and not a crime; for here only the right of an individual is concerned, and it is immaterial to the public which of us is in possession of the land: but treason, murder, and robbery are properly ranked among crimes; since, besides the injury done to individuals, they strike at the very being of society, which cannot possibly subsist where actions of this sort are suffered to escape with impunity.

In all cases the crime includes an injury: every public offence is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community.[11] Thus, treason in imagining the king's death involves in it conspiracy against an individual, which is also a civil injury; but, as this species of treason, in its consequences, principally tends to the dissolution of government, and the destruction thereby of the order and peace of society, this denominates it a crime of the highest magnitude. Murder is an injury to the life of an individual; but the law of society considers principally the loss which the state sustains by being deprived of a member, and the pernicious example thereby set for others to do the like. Robbery may be considered in the same view: it is an injury to private proper-

[11] See Lord Mansfield's opinion in Rex v. Wheatly (1761) 2 Burr. 1126. This was an indictment against a brewer for fraudulently delivering "sixteen gallons and no more" of beer as and for eighteen gallons, the defendant "then and there well knowing the same liquor so by him sold and delivered to want two gallons of the due and just measure as aforesaid." The defendant being convicted, moved in arrest of judgment. Lord Mansfield: "The question is, whether the fact here alledged be an indictable crime or not. * * * The offence that is indictable must be such a one as affects the public. As if a man uses false weights and measures and sells by them to all or to many of his customers, or uses them in the general course of his dealing: so, if a man defrauds another, under false tokens. For these are deceptions that common care and prudence are not sufficient to guard against. So, if there be a conspiracy to cheat: for ordinary care and caution is no guard against this. Those cases are much more than mere private injuries: they are public offences. But here, it is a mere private imposition or deception: no false weights or measures are used; no false tokens given; no conspiracy; only an imposition upon the person he was dealing with, in delivering him a less quantity instead of a greater which the other carelessly accepted. It is only a non-performance of his contract: for which non-performance, he may bring his action. The selling an unsound horse, as and for a sound one, is not indictable: the buyer should be more upon his guard. The several cases cited are alone sufficient to prove, that the offence here charged is not an indictable offence. But besides these, my brother Denison informs me of another case, that has not been mentioned at the Bar. It was Mich. Term, 6 Geo. 1, B. R. Rex v. Wilders, a Brewer: he was indicted for a cheat, in sending in, to Mr. Hicks, an ale-house keeper, so many vessels of ale marked as containing such a measure, and writing a letter to Mr. Hicks, assuring him that they did contain that measure; when in fact they did not contain such measure, but so much less, etc. This indictment was quashed on argument, upon a motion: which is a stronger case than the present. Therefore the law is clearly established and settled; and I think on right grounds: but on whatever grounds it might have been originally established, yet it ought to be adhered to, after it is established and settled. Therefore (though I may be sorry for it in the present case, as circumstanced) the judgment must be arrested."

ty; but, were that all, a civil satisfaction in damages might atone for it; the public mischief is the thing for the prevention of which our laws have made it a capital offence. In these gross and atrocious injuries the private wrong is swallowed up in the public: we seldom hear any mention made of satisfaction to the individual, the satisfaction to the community being so very great. And indeed, as the public crime is not otherwise avenged than by forfeiture of life and property, it is impossible afterwards to make any reparation for the private wrong, which can only be had from the body or goods of the aggressor. But there are crimes of an inferior nature, in which the public punishment is not so severe but it affords room for a private compensation also; and herein the distinction of crimes from civil injuries is very apparent. For instance: in the case of battery, or beating another, the aggressor may be indicted for this at the suit of the king, for disturbing the public peace, and be punished criminally by fine and imprisonment; and the party beaten may also have his private remedy by action of trespass for the injury which he in particular sustains, and recover a civil satisfaction in damages. So also, in case of a public nuisance, as digging a ditch across a highway: this is punishable by indictment as a common offence to the whole kingdom and all his majesty's subjects; but if any individual sustains any special damage thereby, as laming his horse, breaking his carriage, or the like, the offender may be compelled to make ample satisfaction, as well for the private injury as for the public wrong.

Upon the whole, we may observe that, in taking cognizance of all wrongs or unlawful acts, the law has a double view, viz.: not only to redress the party injured by either restoring to him his right, if possible, or by giving him an equivalent, * * * but also to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws which the sovereign power has thought proper to establish for the government and tranquillity of the whole.

Sir William Blackstone, Commentaries (1765) bk. 4, p. 5.

The distinction between civil and criminal wrongs depends on the nature of the appropriate remedy provided by law. A civil wrong is one which gives rise to civil proceedings—proceedings, that is to say, which have as their purpose the enforcement of some right claimed by the plaintiff as against the defendant: for example, an action for the recovery of a debt, or the restitution of property, or for the specific performance of a contract, or for an injunction against a threatened injury, or for the recovery of damages for an injury committed. Criminal proceedings, on the other hand, are those which have for their object the punishment of the defendant for some act of which he is accused. He who proceeds civilly is a claimant, de-

manding the enforcement of some right vested in himself; he who proceeds criminally is an accuser, demanding nothing for himself, but merely the punishment of the defendant for a wrong committed by him.

It is often the case that the same wrong is both civil and criminal—capable of being made the subject of proceedings of both kinds. Assault, libel, theft, and malicious injury to property, for example, are wrongs of this kind. Speaking generally, in all such cases the civil and criminal remedies are not alternative but concurrent, each being independent of the other. The wrongdoer may be punished criminally by imprisonment or otherwise, and also compelled in a civil action to make compensation or restitution to the injured person.[12]

John W. Salmond, Law of Torts (1910) 1, 2.

The duty, whatever else it may be, is a duty towards our neighbor. Breach of it will entitle some one to bring an action for redress. An offence punishable by the State may not create any such private right. If it does not, it is no civil wrong; and this is in fact the case with some of the gravest public offences. Also in cases of tort the duty that has been violated is general. It is owed either to all our fellow-subjects, or to some considerable class of them, and it is fixed by the law and the law alone. Here lies the difference between civil wrongs, properly so called, and breaches of contract. It is not right to break

[12] Frequently the tort and the crime bear the same name, yet with a difference. Compare, for instance, the crimes of "assault," "battery," "champerty," "conspiracy," "false imprisonment," "libel," "nuisance," "trespass" (see Mikell's Cas. Crim. Law, passim), with the torts of the same name, given infra.

But compare the following cases, in which substantially the same act was held to be a crime, but not a tort: Deaton v. State (1908) 53 Tex. Cr. R. 393, 110 S. W. 69, and Robertson v. Edelstein (1899) 104 Wis. 440, 80 N. W. 725 (D. had uttered violent and abusive but not defamatory language of P.).

Compare also the following, in which substantially the same act was held a tort but not a crime:

Whittington v. Gladwin (1826) 5 B. & C. 29 R. R. 211, and State v. McArthur (1893) 5 Wash. 558, 32 Pac. 367 (D. had orally imputed insolvency to P.)

Beach v. Hancock (1853) 27 N. H. 223, 59 Am. Dec. 373, and Chapman v. State (1884) 78 Ala. 463, Mikell's Cas. Crim. Law 296 (D. had pointed at P., in a threatening manner and within shooting distance, a gun which D. knew, but P did not know to be unloaded). But see, also, State v. Shepard (1859) 10 Iowa, 126; Com. v. White (1813) 110 Mass. 409; State v. Smith (1841) 2 Humph. (Tenn.) 457—where the act was deemed a crime.

Garrett v. State (1906) 49 Tex. Cr. R. 235, 91 S. W. 577, and Baseley v. Clarkson (1681) 3 Lev. 37 (D. had inadvertently entered upon the premises of P.).

Malcom v. Spoor (1847) 12 Metc. (Mass.) 279, 46 Am. Dec. 675, and Milton v. State (1898) 40 Fla. 251, 24 South. 60, Mikell's Cas. Crim. Law 186 (D., an officer, after entering P.'s property by authority of the law, abused the liberty which the law gave him: held, a tort [trespass ab initio] but not a crime).

one's contract, though in cases of honest error due to the parties' intentions not being clearly expressed or otherwise, or of innocent disability preventing performance, there may be legal liability without any moral blame. But breach of contract, wilful or not, is the breach of duties which the parties have fixed for themselves. Duties under a contract may have to be interpreted or supplemented by artificial rules of law, but they cannot be superseded while there is any contract in being. The duties broken by the commission of civil wrongs are fixed by law, and independent of the will of parties; and this is so even where they arise out of circumstances in which the responsible party's own act has placed him. Again, these general duties are different in other important respects from those which arise out of the domestic relations, although they agree with them in not depending on the will of the parties. For the mutual duties of husband and wife, parents and children, and the like, are strictly personal, and moreover only part of them can be or is dealt with at all by positive rules of law. Down to modern times they were regarded in this country as not belonging to the ordinary jurisdiction of temporal courts; marital and parental authority were incidentally recognised but matrimony and matrimonial causes were "spiritual" matters.

Sir Frederick Pollock, The Law of Torts (7th Ed.) 2.

No civil wrong is a tort, if it is exclusively the breach of a contract. The law of contracts stands by itself, as a separate department of our legal system, over against the law of torts; and to a large extent liability for breaches of contract and liability for torts are governed by different principles. It may well happen, however, that the same act is both a tort and a breach of contract, and this is so in at least two classes of cases.

(a) The first and simplest of these is that in which a man undertakes by contract the performance of a duty which lies on him already, independently of any contract. Thus he who refuses to return a borrowed chattel commits both a breach of contract and also the tort known as conversion: a breach of contract, because he promised expressly or impliedly to return the chattel; but not merely a breach of contract, and therefore also a tort, because he would have been equally liable for detaining another man's property, even if he had made no such contract at all.

(b) The second class of cases is one which involves considerable difficulty, and the law on this point cannot yet be said to have been thoroughly developed. In certain instances the breach of a contract made with one person creates liability towards another person, who is no party to the contract. It is a fundamental principle, indeed, that no person can sue on an obligatio ex contractu, except a party to the

contract; nevertheless it sometimes happens that one person can sue ex delicto for the breach of a contract which was not made with him, but from the breach of which he has suffered unlawful damage. That is to say a man may take upon himself, by a contract with A., a duty which does not already or otherwise rest upon him, but which, when it has once been undertaken, he cannot break without doing such damage to B., a third person, as the law deems actionable. Thus, if X. lends his horse to Y., who delivers it to Z., a livery stablekeeper, to be looked after and fed, and the horse is injured or killed by insufficient feeding, presumably Z. is liable for this, not only in contract to Y., but also in tort to X., the owner of the horse. It is true that, apart from his contract with Y., Z. was under no obligation to feed the animal; apart from the contract, this was a mere omission to do an act which he was not bound to do. Yet having taken this duty upon himself, he has thereby put himself in such a situation that he cannot break the duty without inflicting on the owner of the horse damage of a kind which the law deems wrongful. The omission to feed the horse, therefore, although a breach of contract, is not exclusively such, and is therefore a tort, inasmuch as it can be sued on by a person who is no party to the contract.

John W. Salmond, Jurisprudence (3d Ed.) 436.

IV

TORTS AND THE COMMON LAW ACTION FOR DAMAGES

No civil injury is to be classed as a tort unless the appropriate remedy for it is an action for damages. Such an action is an essential characteristic of every true tort. * * * No civil injury is to be classed as a tort if it is merely a breach of trust or a breach of some other merely equitable obligation. The reason of this exclusion is historical only. The law of torts is in its origin a part of the common law, as distinguished from equity, and it was unknown to the Court of Chancery. Wrongs, therefore, such as breach of trust, which fell exclusively within the jurisdiction of that court, stand outside the category of tort, and are governed, just as the breach of contract is, by a body of special rules differing in sundry respects from those which have been developed by the common law of torts. And although at the present day the difference between equitable and common-law jurisdiction has disappeared, it is still requisite to preserve the memory of it in defining the limits of the law of torts.

John W. Salmond, Law of Torts (1910) 2, 5, 6.

The body of the act provides that "a married woman may maintain an action in her own name, and without joining her husband therein, for all torts committed against her, or her separate property, in the same manner as she lawfully might if a feme sole." * * * The word "torts" in legal phraseology has a well-defined meaning. It does not include all wrongful acts done by one person to the injury of another, but only those for which individuals may demand legal redress; or, stated in another way, those which give rise to an action for damages. Cooley on Torts, p. 2; Add. on Torts, p. 3. Substituting the definition of the word in place of the word itself, the statute provides that a married woman may maintain an action in her own name, and without joining her husband therein, for all wrongful acts which give rise to an action for damages committed against her or her separate property, in the same manner as she lawfully might if a feme sole. In our judgment no legislative intent is to be perceived, either in the title of this act or in its body, to confer upon a married woman any right of action which did not exist previous to its enactment. The defendants are entitled to judgment upon the demurrer.

Gummere, J., in Sims v. Sims (1909) 77 N. J. Law, 251, 72 Atl. 424.[13]

In addition to the remedy by action for damages in respect of torts which have actually been committed, there is, in certain cases, an ancillary remedy by way of injunction to prevent the commission of torts which are threatened or anticipated, or in cases of continuing injuries to restrain their continuance.

The principle upon which such injunction is granted is that the injury, if suffered to be inflicted, would be of such a character that the plaintiff could not practically be compensated in damages. In

[13] Delivering the opinion of the Supreme Court, 77 N. J. Law, 251, 72 Atl. 424. The action was by a married woman for the alienation of her husband's affections. The plaintiff based her right to sue upon the statute quoted in the text. On error (79 N. J. Law, 577, 76 Atl. 1063, 29 L. R. A. [N. S.] 842) the judgment of the Supreme Court was reversed, the Court of Errors and Appeals holding that the wife had at common law a legal right in such a case but that a rule of common law procedure stood in the way of its enforcement by her, and that the statute merely removed this obstacle.

Compare the ratio decidendi of this case and the following definitions or descriptions of a tort, found in standard treatises of to-day:

(1) "A tort may be described as a wrong independent of contract, for which the appropriate remedy is a common-law action." Clerk & Lindsell, Law of Torts (1906) 1.

(2) "A tort may be said to be a breach of duty established by municipal law for which a suit for damages can be maintained." Bigelow, Law of Torts (1907) 61.

(3) "A tort is an act or omission which unlawfully violates a person's right, created by the law, and for which the appropriate remedy is a common-law action for damages by the injured person." Burdick, Law of Torts (1908) 11.

(4) "A tort is a breach of duty (other than a contractual or quasi contractual duty) creating an obligation, and giving rise to an action for damages." J. C. Miles, Dig. Eng. Civ. Law (1908) § 722.

some cases the injunction takes a mandatory form, where the defendant has created a permanent source of injury, such as the erection of a building to the nuisance of the plaintiff's lights or to the obstruction of his right of way, and orders him to restore the plaintiff to his right by removing the offending building or other source of damage.

Clerk and Lindsell, Law of Torts (1906) 783.

In Edward I's day, at the end of the thirteenth century, three great courts have come into existence, the King's Bench, the Common Bench or Court of Common Pleas and the Exchequer. Each of these has its own proper sphere, but as time goes on each of them attempts to extend its sphere and before the middle ages are over a plaintiff has often a choice between these three courts and each of them will deal with his case in the same way and by the same rules. The law which these courts administer is in part traditional law, in part statute law. Already in Edward I's day the phrase "common law" is current. It is a phrase that has been borrowed from the canonists—who used "jus commune" to denote the general law of the Catholic Church; it describes that part of the law that is unenacted, non-statutory, that is common to the whole land and to all Englishmen. It is contrasted with statute, with local custom, with royal prerogative. It is not as yet contrasted with equity, for as yet there is no body of rules which bears this name.

One of the three courts, namely, the Exchequer, is more than a court of law. From our modern point of view it is not only a court of law but a "government office," an administrative or executive bureau; our modern Treasury is an offshoot from the old Exchequer. What we should call the "civil service" of the country is transacted by two great offices or "departments"; there is the Exchequer which is the fiscal department, there is the Chancery which is the secretarial department, while above these there rises the king's permanent Council. At the head of the Chancery stands the Chancellor, usually a bishop; he is we may say the king's secretary of state for all departments, he keeps the king's great seal and all the already great mass of writing that has to be done in the king's name has to be done under his supervision.

He is not as yet a judge, but already he by himself or his subordinates has a great deal of work to do which brings him into a close connexion with the administration of justice. One of the duties of that great staff of clerks over which he presides is to draw up and issue those writs whereby actions are begun in the courts of law—such writs are sealed with the king's seal. A man who wishes to begin an action must go to the Chancery and obtain a writ. Many writs there are which have been formulated long ago; such writs

are writs of course (brevia de cursu), one obtains them by asking for them of the clerks—called Cursitors—and paying the proper fees. But the Chancery has a certain limited power of inventing new writs to meet new cases as they arise. That power is consecrated by a famous clause of the Second Statute of Westminster authorising writs "in consimili casu." Thus the Chancellor may often have to consider whether the case is one in which some new and some specially worded writ should be framed. This however is not judicial business. The Chancellor does not hear both sides of the story, he only hears the plaintiff's application, and if he grants a writ the courts of law may afterwards quash that writ as being contrary to the law of the land.

But by another route the Chancellor is brought into still closer contact with the administration of justice. Though these great courts of law have been established there is still a reserve of justice in the king. Those who can not get relief elsewhere present their petitions to the king and his council praying for some remedy. Already by the end of the thirteenth century the number of such petitions presented in every year is very large, and the work of reading them and considering them is very laborious. In practice a great share of this labour falls on the Chancellor. He is the king's prime minister, he is a member of the council, and the specially learned member of the council. It is in dealing with these petitions that the Chancellor begins to develop his judicial powers. * * *

We ought not to think of common law and equity as of two rival systems. Equity was not a self-sufficient system, at every point it presupposed the existence of common law. Common law was a self-sufficient system. I mean this: that if the legislature had passed a short act saying "Equity is hereby abolished," we might still have got on fairly well; in some respects our law would have been barbarous, unjust, absurd, but still the great elementary rights, the right to immunity from violence, the right to one's good name, the rights of ownership and of possession would have been decently protected and contract would have been enforced. On the other hand had the legislature said, "Common law is hereby abolished," this decree if obeyed would have meant anarchy. At every point equity presupposed the existence of common law. Take the case of the trust. It's of no use for Equity to say that A is a trustee of Blackacre for B, unless there be some court that can say that A is the owner of Blackacre. Equity without common law would have been a castle in the air, an impossibility.

For this reason I do not think that any one has expounded or ever will expound equity as a single, consistent system, an articulate body of law. It is a collection of appendixes between which there is no very close connexion. If we suppose all our law put into systematic order, we shall find that some chapters of it have been copiously glossed by equity, while others are quite free from equitable glosses. Since the destruction of the Star Chamber we have had no criminal equity. The Court of Chancery kept very clear of the province of crime, and

since the province of crime and the province of tort overlap, it kept very clear of large portions of the province of tort. For example, before 1875 it would grant no injunction to restrain the publication of a libel, for normally the libel which is a tort is also a crime and it was thought, and rightly thought, that such a matter should not be brought before a court where a judge without any jury tried both fact and law. Indeed if you will look at your books on tort you will find that on the whole—if we except the province of fraud—equity has had little to do with tort, though it has granted injunctions to restrain the commission of nuisances and the like. The law of contract has been more richly provided with equitable appendixes. The power of the Chancery to compel specific performance, and its power to decree the cancellation or rectification of agreements brought numerous cases of contract before it, and then it had special doctrines about mortgages, and penalties, and stipulations concerning time. Property law was yet more richly glossed. One vast appendix was added to it under the title of trusts. The bond which kept these various appendixes together under the head of Equity was the jurisdictional and procedural bond. All these matters were within the cognizance of courts of equity, and they were not within the cognizance of the courts of common law. That bond is now broken by the Judicature Acts. Instead of it we find but a mere historical bond—"these rules used to be dealt with by the Court of Chancery"—and the strength of that bond is being diminished year by year. The day will come when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of common law: suffice it that it is a well-established rule administered by the High Court of Justice. * * *

A very large part of the whole province of Tort is a proper field for the injunction.[14] I should say that the only torts which lie outside the field of injunctions are assault and battery, false imprisonment, and malicious prosecution. I do not think that an injunction has been used or could be used to prevent these torts, which if they be torts will also at least in most cases be crimes. Here there are other remedies. If you go in fear of a man you can have him bound over to keep the peace, while if you are wrongfully imprisoned the writ of habeas corpus with its rapid procedure should serve your turn. A civil court, again, must not prohibit a man from instituting criminal proceedings. The Attorney-General's nolle prosequi should be a sufficient preventive check on criminal proceedings of an obviously vexatious kind. But with these exceptions it would be hard to find a tort which might not in a given case be a proper subject for an injunction. Of libel I have already spoken, and something I have said of trespass and of waste. It was the Chancery's power of is-

[14] In the thirteenth edition of Story's Equity Jurisprudence, § 873 (1886), the following are enumerated among the principal objects of an injunction: "To restrain waste, to restrain nuisances, to restrain trespasses, and to prevent other irreparable mischiefs."

suing injunctions against acts of waste that begot the doctrine of equitable waste. Sometimes the Chancery would give an injunction against waste for which a Court of Law would give no damages. Nuisance is a fertile field, so is the infringement of copyright, of patents, of trade marks. Indeed there are many rights which are chiefly, though not solely, protected by an injunction—the remedy by action for damages being but a poor one. Damages and injunction are not, you will understand, alternative remedies—in old times you could get the one from the Courts of Common Law, the other from the Court of Equity; now-a-days you may well get both from the same court, the same division of the court in the same action, damages to compensate you for wrong suffered, and an injunction to prevent a continuance of the wrong, it may be a mandatory injunction to prevent the continued existence of a wrongful state of things. But while the remedy by damages is a matter of strict right, the remedy by injunction is not. This is best seen by referring to the cases in which a plaintiff can recover nominal damages. He has not really been hurt; he has not been made the poorer; but still his rights have been infringed and the court pronounces a judgment in his favour. But the court will not interfere by injunction where the tort complained of, though a tort, is one which does no real damage, and it will not interfere by injunction if damages will clearly be an adequate remedy. Then again it may consider the plaintiff's conduct, and in particular any delay of his in bringing the action. To an action for damages delay is no defence unless the case has been brought within one of the Statutes of Limitation. Either the plaintiff still is entitled to the remedy or it has been taken from him by a statute, and you can fix the precise moment of time at which the statute takes effect—one moment he has a remedy, the next moment he has none. It is not so with the injunction; the court may well hold for example that my neighbour must pay me damages for having blocked out light from my ancient windows, and yet, as I stood by and let him build, it would be inequitable to compel him to pull down his wall. Especially when a mandatory injunction is to be sought, the plaintiff must at once take action and prosecute his action diligently. The court, it is said, in granting a mandatory injunction may look at the balance of convenience. The defendant is by supposition in the wrong, but on the whole and considering the conduct of both parties, shall we not be inflicting on him more harm than he deserves if we compel him to pull down his wall?

F. W. Maitland, Equity, 2, 19, 261 (1910).*

*The "province of Tort as a proper field for the injunction" is developed in Chapter IV, pages 798-1136, "Injunction in Relation to Torts," in Professor Boke's Cases on Equity.

V

CLASSIFICATION OF TORTS

The older books treat the different specific torts under the heads of the different forms of action. Our present doctrine is apparently coming to a view of torts as an individual branch of the law, but it has not yet settled upon a general principle of division applicable to all specific torts. As a result, the current classifications of torts are many and varied. But since the broad generalization by Mr. Justice Blackburn, in Fletcher v. Rylands, L. R. 1 Ex. 265, when that famous case was in the Exchequer-Chamber, nearly a half century ago, there has been authority for a distribution of torts into two main categories. The characteristic of the torts in the first category is that the duty which the law casts upon the defendant is an absolute duty to do or to refrain from doing a certain thing. Here the defendant's act is an act at peril—an act of absolute liability. The plaintiff's prima facie cause is complete with a showing of the defendant's act, except that in some cases, although not regularly in the older torts in this class, actual damage resulting from the act must be shown.

In the second class the defendant's liability does not turn on the mere question whether he has done or omitted to do a certain thing. The defendant may have acted, and harm may have come to the plaintiff as the proximate result of this act, but his prima facie cause is not complete unless something further appears in the defendant's act.

The nature and extent of this additional element are not yet fully determined. Perhaps, all its aspects cannot be exactly marked until the doctrine of torts has ceased to grow. But in general, as the cases now stand, the torts which turn upon an act of conditional liability show two markedly different classes, first, torts in which the plaintiff, in order to show a prima facie case, must allege and prove negligence on the part of the defendant, and, secondly, torts in which, to show his prima facie case, the plaintiff must allege and prove an act, in some form, of intentional harm by the defendant.

The classification then which will be used in the following pages, as a setting for the cases on the elements of the specific torts, will be primarily two-fold: (1) Torts through Acts of Absolute Liability; (2) Torts through Acts of Conditional Liability. The torts within the first category fall into various groups which may be roughly classified as Trespasses and Absolute Torts other than Trespasses. The second category has the two main divisions already indicated, Torts

through Negligence, and Torts through Act of Intentional Harm.[15]—[*Ed.*

[15] See Holland's Elements of Jurisprudence (10th Ed., 1906) 320, where five different principles for the classification of wrongs are suggested, and Halsbury's Laws of England (1913) vol. 27, p. 472. Working classifications will be found in Pollock on Torts (8th Ed.) 7; Clerk & Lindsell's Law of Torts (3d Ed.) 7; Bigelow on Torts (8th Ed.) 35; Jaggard on Torts, 107. See, also, Mr. Justice Holmes' early article on "The Theory of Torts" (1873) 7 Am. Law. Rev. 652, 663, afterwards developed in "The Common Law" (1881); Piggott's Law of Torts (1885) 382; Innes' Principles of the Law of Torts (1891) xxxii, p. 146; Wigmore's General Analysis of Tort Relations (1895) 8 Harv. Law Rev. 377; Salmond's Jurisprudence (1910) 339.

In Fletcher v. Rylands the question was put in this form: "The plaintiff, though free from all blame on his part, must bear the loss, unless he can establish that it was the consequence of some default for which the defendants are responsible. 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. If the first be the law, the person who has brought on his land and kept there something dangerous, and failed to keep it in, is responsible for all the natural consequences of its escape. If the second be the limit of his duty, he would not be answerable except on proof of negligence, and consequently would not be answerable for escape arising from any latent defect which ordinary prudence and skill could not detect." Per Blackburn, J., Fletcher v. Rylands (1866) L. R. 1 Ex. 265, 279.

PART I

TORTS THROUGH ACTS OF ABSOLUTE LIABILITY

CHAPTER I

TRESPASSES

SECTION 1.—TRESPASSES IN GENERAL

I. Historical

With the punishable offence we contrast the "tort" which gives rise to a civil action, though the tort may also be, and very often is, a punishable offence. Torts again fall into two classes, and only those which involve some violence—the violence may be exceedingly small—are known as trespasses.

In the thirteenth century we see but the germs of this scheme. "Trespass" ("transgressio") is the most general term that there is; it will cover all or almost all wrongful acts and defaults. Every felony, says Bracton, is a trespass, though every trespass is not a felony. In a narrower sense therefore "trespass" is used as a contrast to "felony." The word "misdemeanor" belongs as a term of art to a much later age. * * *

The writs of trespass are closely connected with the appeals for felony. The action of trespass is, we may say, an attenuated appeal. The charge of "felonia" is omitted; no battle is offered; but the basis of the action is a wrong done to the plaintiff in his body, his goods or his land "by force and arms and against the king's peace." In course of time these sonorous words will become little better than a hollow sound; there will be a trespass with force and arms if a man's body, goods or land have been unlawfully touched. From this we may gather that the court had never taken very seriously the "arms" of the writ or fixed a minimum for the "force" that would beget an action. Still the action was aimed at serious breaches of the king's peace, and, so far as we can see, the court in Henry III.'s reign was seldom, if ever, troubled with "technical trespasses" or claims for "nominal damages." * * *

In the days when the writ of trespass was taking a foremost place in the scheme of actions, the king's court had its hands full if it was to redress and punish the wrongs done by gentlemen who at the head of armed bands of retainers ravaged the manors of their neighbors. We must not therefore expect to find cases which indicate the limits of trespass. We may guess that some self-defence was permissible, while all self-help, unless it took the form of the timely ejectment of a disseisor, was strictly prohibited. Also we may guess that this somewhat terrible action could not have been used against those who were not to be charged with any assault on a person, entry on land or asportation of goods, but were guilty of some misfeasance while engaged in a lawful operation. In later days, slowly and with difficulty, the court gave an action against the clumsy smith who lames the horse that he is shoeing, against the stupid surgeon who poisons the wound that he should cure. Such persons could not be charged with breaking the king's peace by force and arms.

Pollock and Maitland, 2 Hist. Eng. Law. 511, 526, 527.[1]

[1] "All civil injuries are of two kinds, the one *without force* or violence, as slander or breach of contract; the other coupled *with force* and violence, as batteries or false imprisonment. Which latter species savor something of the criminal kind, being always attended with some violation of the peace; for which in strictness of law a fine ought to be paid to the king, as well as a private satisfaction to the party injured." 3 Bl. Com. (1765) 118, 119.

"The recorded instances of trespass in the royal courts prior to 1252 are very few. In the 'Abbreviatio Placitorum' some twenty-five cases of appeals of different kinds are mentioned, belonging to the period 1194–1252, but not a single case of trespass. In the year 37 Henry III. (1252–1253) no fewer than twenty-five cases of trespass are recorded, and from this time on the action is frequent, while appeals are rarely brought. It is reasonable to suppose that the writ of trespass was at first granted as a special favor, and became, soon after the middle of the fourteenth century, a writ of course.

"The introduction of this action was a very simple matter. An original writ issued out of Chancery directing the sheriff to attach the defendant to appear in the King's Bench to answer the plaintiff. The jurisdiction of the King's Court was based upon the commission of an act vi et armis and contra pacem regis, for which the unsuccessful defendant had to pay a fine. These words were therefore invariably inserted in the declaration. Indeed, the count in trespass was identical with the corresponding appeal, except that it omitted the offer of battle, concluded with an ad damnum clause, and substituted the words "vi et armis" for the words of felony,—"feloniter," "felonice," "in felonia," or "in robberia." The count in the appeal was doubtless borrowed from the ancient count in the popular or communal courts, the words of felony and "contra pacem regis" being added to bring the case within the jurisdiction of the royal courts.

"The procedure of the King's Courts was much more expeditious than that of the popular courts, the trial was by jury instead of by wager of law, and judgment was satisfied by levy of execution and sale of the defendant's property, whereas in the popular courts distress and outlawry were the limits of the plaintiff's rights. As an appeal might be brought for the theft of any chattel worth 12d. or more, and as the owner now had an option to bring trespass where an appeal would lie, there was danger that the royal courts would be encumbered with a mass of petty litigation. To meet this threatened evil the Statute 6 Ed. I. c. 8, was passed, providing that no one should have writs of trespass before justices unless he swore by his faith that the goods taken away were worth 40s. at the least."

James Barr Ames, "The History of Trover," 11 Harv. Law Rev. 277, 282; 3 Anglo-Amer. Legal Essays, 417, 422.

The writ of trespass was fast coming into use in the course of Henry III.'s reign. During the twenty-two years between the middle of the century and his death it became common. We think of an action of trespass nowadays as a purely civil remedy, a means of recovering damages if the plaintiff succeeds; and that was no doubt its main object and advantage even from the first. But it was also a penal and semi-criminal proceeding, and preserved traces of this character down to modern times. The trespass was complained of and dealt with as a punishable breach of the king's peace, and the plaintiff was bound to allege force and arms and breach of the peace in order to give the king's court jurisdiction; without those words it was only a matter for the county court. In fact this action was, in its original form, closely connected with the distinctly criminal procedure by way of "appeal" for felony. One might almost regard it, using the analogy of modern French procedure, as the civil side of such an appeal, which became separated by some ingenious experiment or happy accident, and started on a new career of its own.

Sir Frederick Pollock, "The King's Peace," 13 H. L. R. 177, 185; 2 Legal Essays, 403, 412.

In their determination to win all litigation for the king's courts, the royal justices, at the very end of this period, invented or adopted a new writ, destined to be of enormous importance in all branches of our law. This was the Writ of Trespass, which makes its appearance in the middle of the thirteenth century, just at the outbreak of the Barons' War. Doubtless, in those troubled times, offences of violence were unusually frequent; whilst the old methods of redress only tended to aggravate the disorder. The notion of the "peace" or suspension of hostilities was very familiar in theory; whatever its rarity in practice. And, of all "peaces" the peace of the king was the most powerful and best protected. If the royal officials could once establish the rule, that any interference with possession, however slight, was a breach of the king's peace, and subjected the offender to be summoned before the king's justices, the ultimate triumph of the royal courts was secure. With a little ingenious straining, almost any offence known in a simple state of society could be treated as a breach of the peace. The notion of the sanctity of possession had, as has been seen, been growing by means of the protection afforded to "seisin" by the "petty (or 'possessory') assises" and the Writs of Entry. But the notion of seisin was becoming technical. It was, for special reasons, gradually being restricted to the possession of land (as distinct from chattels), and of land by a freeholder, or a man who claimed as such. Moreover, the notion of "diseisin" was held to imply a deliberate attempt to assert a right of possession. Something simpler was wanted—some process which should make a mere casual raid or blow punishable by sharp and speedy process in the royal courts.

This is exactly what the Writ of Trespass did, as the following form will show:

If A. gives pledges to prosecute his complaint, then put B. by gage and pledge that he (B.) be before our Justices at Westminster (on such a day) prepared to show why with force and arms he assaulted the said A. at N. (or broke the close of A. at N., or took and carried away the sheep of A.) and other enormities to him did, to the grave damage of the said A., and against our peace. * * *

It [the Writ of Trespass] aimed originally and, to some extent, aims still, at punishment, rather than compensation—at fine and imprisonment, rather than "damages" in the modern sense. It was not long before English Law took the one step needed to produce the modern scheme of legal remedies. And when it did, it used the Writ of Trespass as the starting point.

Edward Jenks, Short Hist. Eng. Law (1912) 52, 67.[2]

II. Jurisdictional Features of a Cause in Trespass

INCLEDON v. BURGESS.

(Court of King's Bench, 1688. 2 Salk. 636, 91 Reprint, 536.)

Trespass for breaking, entering, and depasturing, 36 Car. 2, continuando the depasturing till 4 Jac. 2, contra pacem domini Regis nunc, which was K. James the Second. This was held naught, for then there is no contra pacem to the trespass tempore Caroli Secundi, but it is omitted, and contra pacem is substance. Vide Cro. Car. 325; Cro. Jac. 426, 443, 537.

[2] "The king's courts were approaching the field of tort through the field of crime"; in the closing years of the seventeenth century, the unsuccessful defendant in a civil action of trespass is nominally still a criminal. The preamble of the statute of 5 & 6 W. & M. c. 12 (1694), runs thus: "Whereas there are divers suits and actions of trespass, ejectment, assault, and false imprisonment, brought by party against party in the respective courts of law at Westminster, and upon judgment entered against the defendant or defendants in such suits or actions, the respective courts aforesaid do (ex officio) issue out process against such defendant and defendants, for a fine to the crown, for a breach of the peace thereby committed, which is not ascertained, but is usually compounded for a small sum of money by some officer in each of the said courts, but never estreated into the Exchequer; which officers or some of them, do very often outlaw the defendants for the same, to their very great damage." For this fine the statute substitutes a fee of 6s. and 8d., to be paid by the plaintiff and taxed as costs against the defendant.—[*Ed.*

WILDGOOSE v. KELLAWAY.

(Court of King's Bench, 1691. 2 Salk. 636, 91 Reprint, 537.)

Trespass for breaking his house and taking away his dishes; the defendant justified under a by-law, but that being ill, the plaintiff demurred; but the defendant took exception to the declaration, because it wanted the words "vi et armis"; and the court held it naught on a general demurrer, being an omission of the substance; for it alters the judgment from a capiatur to a misericordia. Item, it belongs to the jurisdiction of the County Court, if it be a trespass without vi et armis.

DAND v. SEXTON.

(Court of King's Bench, 1789. 3 Term R. 37, 100 Reprint, 442.)

This was an action of trespass vi et armis for beating the plaintiff's dog, whereby the dog was hurt, and the plaintiff lost the use of him. The defendant pleaded the general issue. On the trial the plaintiff recovered 1s. damages; and Lord Kenyon, Ch. J., certified under the 43 Eliz. c. 6,[3] that the damages were under 40s.

Shepherd moved last term for a rule to shew cause why the certificate should not be set aside, on the ground that the statute only applied to those actions which could be brought in the County Court, and that of course it did not extend to an action vi et armis. And a case of Delamotte v. Dixon [4] was cited, in which Buller, J., under an idea that the statute had been understood to be thus confined, refused to grant a certificate.

Lord KENYON, Ch. J. It seems to me that this case comes within the statute, which extends to all personal actions, not being for any title of lands, nor for any battery. And, on the maxim exceptio probat regulam, it includes all other actions vi et armis. It is true indeed that an action vi et armis cannot be brought in a County Court; but there are other Inferior Courts which by charter have a power of trying actions vi et armis. But, as some of the Judges have entertained doubts upon the question, take a rule to shew cause.

[3] By this statute, passed in 1601, it was provided that "If upon any action personal to be brought in any of her Majesty's Courts at Westminster, not being for any title or interest of lands, nor concerning the free hold or inheritance of any lands nor for any battery, it shall appear to the judges for the same court, and so signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein in the same court, shall not amount to the sum of forty shillings or above," then the judges should not award for costs to the plaintiff any greater sum than "the debt or damages so recovered shall amount unto."

[4] Sittings after Mich., 27 Geo. III, B. R.

Cause was to have been shewn this day, but the Court were extremely clear, on the authorities of Walker v. Robinson, 1 Wils. 93, White v. Smith, 1 Wils. 94, and Bartlet v. Robins, 2 Wils. 258, that the statute extended to the present cases; and they

Discharged the rule.

E. III. Characteristics of a Cause in Trespass

I. DE S. and WIFE v. W. DE S.

(At the Assizes, Coram Thorpe, C. J., 1348 or 1349. Y. B. Lib. Ass. fol. 99, pl. 60.)

I. De S. & M. uxor ejus querunt de W. De S. de eo quod idem W. anno, etc., vi et armis, etc., apud S., in ipsam M. insultum fecit, et ipsam verberavit, etc. And W. pleaded not guilty. And it was found by verdict of the inquest that the said W. came in the night to the house of the said I., and would have bought some wine, but the door of the tavern was closed; and he pounded on the door with a hatchet, which he had in his hand, and the female plaintiff put her head out at a window and told him to stop; and he saw her and aimed at her with the hatchet, but did not hit her. Whereupon the inquest said that it seemed to them that there was no trespass, since there was no harm done.

Thorpe, C. J. There is harm done, and a trespass for which they shall recover damages, since he made an assault upon the woman, as it is found, although he did no other harm. Wherefore tax his damages, etc. And they taxed the damages at half a mark. Thorpe, C. J., awarded that they should recover their damages, etc., and that the other should be taken. Et sic nota, that for an assault one shall recover damages.[5]

NORVELL v. THOMPSON.

(Court of Appeals of South Carolina, 1834. 2 Hill, 470.)

The presiding judge made the following report:

Trespass quare clausum fregit. The trespass was committed on the woodlands of the plaintiffs, and consisted in cutting a few saplings and bushes along an old path, in order to open it sufficiently for the passage of wagons, carts, etc. The defendant supposed the land belonged to another person, to whom he applied for permission and obtained it, both being under a misapprehension as to the plaintiffs' line. None of the witnesses could venture to assess the value of the timber cut, or estimate the damage. I instructed the jury if there were actually no damage done, or if it were so inconsiderable that it could not be estimated, as the defendant set up no claim to the land, and supposed he had permission of the real owner, they might find a verdict for the defendant; and they did so.

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[5] This case is reprinted from Ames' Cases on Torts (3d Ed.) p. 1.

The plaintiffs gave notice of an appeal in this case, and that they would move the Court of Appeals for a new trial, on the following grounds:

1. Because a trespass having been proven, the verdict could not legally be for the defendant.

2. Because his honor was mistaken in law, in charging the jury that where the trespass was very small they might find for defendant.

HARPER, J. This is a very unimportant case, but in strictness of law I suppose the plaintiffs are entitled to their motion. If a trespass be proved, the plaintiffs are entitled to some damages, though they may be merely nominal. Some damage was certainly proved, though very trifling. In some cases, where the jury has been rightly instructed on the point of law, but in cases of very trifling trespass has thought proper to find for the defendant, this Court, being satisfied that substantial justice was done, has refused to interfere. But this is the privilege of the jury. The Court is bound to afford relief against an erroneous instruction by the Court on a point of law. There is something in the reasoning of the plaintiffs' counsel. No trespass can be conceived more trifling than the mere passing over the unclosed land of another, and it would be impossible to estimate the damage resulting from a particular act of this sort. Yet, if no recovery could be had in a case of this sort, the trespasser, by repetition of the act and the lapse of time, might acquire the right of way, in spite of anything that could be done to prevent it.

The motion is granted.

SMITH v. STONE.

(Court of King's Bench, 1648. Style, 65, 82 Reprint, 533.)

Smith brought an action of trespasse against Stone pedibus ambulando, the defendant pleads this speciall plea in justification, viz. that he was carryed upon the land of the plaintiff by force, and violence of others, and was not there voluntarily, which is the same trespasse, for which the plaintiff brings his action. The plaintiff demurs to this plea: in this case Roll Iustice said, that it is the trespasse of the party that carryed the defendant upon the land, and not the trespasse of the defendant: as he that drives my cattel into another mans land is the trespassor against him, and not I who am the owner of the cattell.

GILBERT v. STONE.

(Court of King's Bench, 1648. Style, 72, 82 Reprint, 539.)

Gilbert brought an action of trespasse quare clausum fregit, and taking of a gelding, against Stone. The defendant pleads that he for fear of his life, and wounding of twelve armed men, who threatened to kill him if he did not the fact, went into the house of the plaintiff,

and took the gelding. The plaintiff demurred to this plea; Roll Iustice, This is no plea to justify the defendant; for I may not do a trespasse to one for fear of threatenings of another, for by this means the party injured shall have no satisfaction, for he cannot have it of the party that threatened. Therefore let the plaintiff have his judgment.[6]

GIBBONS v. PEPPER.

(Court of King's Bench, 1694. 4 Mod. 405, 87 Reprint, 469.)

Assault and battery. The defendant pleaded, that he was riding on a horse in the highway, and that on a sudden fright the horse started and run upon the plaintiff, who continued in the way after he was called to go out, which was the same assault. To this plea the plaintiff demurred.

It was moved in behalf of the defendant, that what he had pleaded was a sufficient excuse; for it was no neglect in him, and the mischief done was inevitable. It is like the case of Weaver v. Ward,

[6] In the case of The Eliza Lines (1905) 199 U. S. 119, 130, 26 Sup. Ct. 8, 50 L. Ed. 115, 4 Ann. Cas. 406, it was argued that for a crew to leave a ship under stress of perils of the sea was not distinguishable in principle from being torn bodily away from it by the tempest. "This," said Mr. Justice Holmes, "is one of the oldest fallacies of the law. The difference between the two is the difference between an act and no act. The distinction is well settled in the parallel instance of duress by threats, as distinguished from overmastering physical force applied to a man's body and imparting to it the motion sought to be attributed to him. In the former case there is a choice and therefore an act, no less when the motive commonly is recognized as very strong or even generally overpowering, than when it is one that would affect the particular person only, and not the public at large. It has been held on this ground that duress created by fear of immediate death did not excuse a trespass. Gilbert v. Stone, Aleyn, 35, Style, 72; Scott v. Shepherd (1763) 2 W. Bl. 892, 896. See Miller v. Horton (1891) 152 Mass. 540, 547, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. Rep. 850. It has been held that a similar plea in the case of shipwrecked men at sea did not prevent the killing of one of them from being murder. Queen v. Dudley (1884) L. R. 14 Q. B. Div. 273. See United States v. Holmes (1842) 1 Wall. Jr. 1, Fed. Cas. No. 15,383. It is clear that a contract induced by such fear is voidable only, not void, and that the ground of avoidance being like fraud, that the party has been subjected to an improper motive for action, when that motive has been created by a stranger, and is unknown to the party, the contract stands. Keilwey, 154a, pl. 3; Fairbanks v. Snow (1887) 145 Mass. 153, 13 N. E. 596, 1 Am. St. Rep. 446. So a conveyance induced by duress is operative until avoided, and can not be set aside when the property has passed to a purchaser without notice. Bainbrigge v. Browne (1881) L. R. 18 Ch. Div. 188, 197; 2 Wms. Vend. & P. 767; Clark v. Pease (1860) 41 N. H. 414. The distinction is as old as the Roman law. Tamen coactus volui. D. 4, 2. 21, § 5; 1 Windscheid, Pandekten, § 80."

See also an early application of the principle, in English law, in Y. B. 20 Edw. IV (1481) f. 11, pl. 10, an action of trespass because the defendant's cattle came upon the plaintiff's land, in an effort to escape from the dogs of a third person. The prima facie trespass here was admitted and the question before the court was whether the facts if pleaded would make a defense—a question which a chief justice of Edward the Fourth's reign answered in the negative.

Hobart, 134, where in trespass, assault, and battery, the defendant pleaded, that he was a trained soldier, and that he and the plaintiff were under one captain, and in mustering he discharged his gun, which casualiter, et per infortunium, et contra voluntatem suam, did hurt the plaintiff; and it was there held, that if the defendant had pleaded that he could not have avoided it, or that the plaintiff had run across the gun when it was discharging, or had set forth the circumstances so that it might appear to the Court to be inevitable, that such a plea had been a sufficient justification.

But it was answered, that case was not parallel with this, because the fact was confessed there; but the battery is not answered here. He should have pleaded the general issue, for if the horse run away against his will, he would have been found not guilty, because in such a case, it cannot be said with any colour of reason to be a battery in the rider.[7]

The plaintiff had judgment.

UNDERWOOD v. HEWSON.

(At Nisi Prius, in Middlesex, 1723. Coram Fortescue et Raymond, Justices. 1 Stra. 596; 93 Reprint, 722.)

The defendant was uncocking a gun and the plaintiff standing to see it, it went off and wounded him: and at the trial it was held that the plaintiff might maintain trespass. Strange pro defendente.

GREGORY v. PIPER.

(Court of King's Bench, 1829. 9 Barn. & C. 591, 109 Reprint, 220, 33 R. R. 268, 17 E. C. L. 266.)

Trespass for casting rubbish against the plaintiff's wall. Plea, not guilty. At the trial it appeared that the plaintiff occupied a public-house called the "Rising Sun," in Newmarket, with a stable-yard belonging to it, where he put up the horses of his guests. The way to the stable was by the back gate from High Street, through a yard called the Old King's Yard. A wall belonging to the plaintiff separated his stable yard from the Old King's Yard. The defendant having purchased the property surrounding the Old King's Yard, disputed the plaintiff's right to pass along the same to his stable, and employed one Stubbings, a labourer, to lay down a quantity of rubbish, consisting of bricks, mortar, stones, and dirt, near the plaintiff's

[7] This case is reported also in 1 Ld. Raym. 38, and Salk. 637; 91 Reprint, 922 and 539.

Compare Holmes v. Mather (1875) L. R. 9 Ex. 261, and notes, given infra.

stable-yard, in order to obstruct the way; and Stubbings, on the 26th of April, and several days following, laid down rubbish accordingly, part of which rolled against the plaintiff's wall and gates. It lay about two feet high against the plaintiff's wall for about five or six yards in length. Stubbings being called as a witness on the part of the plaintiff, stated that he was employed by the defendant to lay rubbish in the yard; that the defendant had given him orders not to let any rubbish touch the plaintiff's wall, that he executed those orders as nearly as he could, and accordingly laid the rubbish at first at the distance of a yard and a half from the wall; and that the rubbish, being of a loose kind, as it became dry naturally shingled down toward and ran against the wall. He added that some of it would of course run against the wall. It further appeared that on the 3rd of May, when an application was made by the plaintiff to the defendant to remove the rubbish, the latter said he was determined not to remove it. Upon this evidence it was objected by the defendant that trespass was not maintainable, inasmuch as the defendant had given express orders to the servant not to let the rubbish touch the plaintiff's wall; that, therefore, the touching of the wall was occasioned by the negligence of the defendant's servant, and that case, not trespass, was therefore maintainable.

The Lord Chief Baron directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit. A rule nisi was obtained for that purpose.

Bayley, J. The only question is whether the trespass was the act of the master. The master desired the servant to lay down the rubbish so as not to let it touch or lean against the wall of the plaintiff. But if in execution of the order it was the necessary or natural consequence of the act ordered to be done that the rubbish should go against the wall, the master is answerable in trespass. The evidence shews that it was the natural consequence. The rule must, therefore, be discharged.

Parke, J. I think that the defendant is liable in this form of action. If a single stone had been put against the wall it would have been sufficient. Independently of Stubbing's evidence there was sufficient evidence to satisfy the jury that the rubbish was placed there by the defendant, for he expressed his determination not to remove it. It does not rest there. Stubbings said he was desired not to let the rubbish touch the wall. But it appeared to be of a loose kind, and it was probable that some of it naturally might run against the wall. Stubbings said that some of it of course would go against the wall. Now the defendant must be taken to have contemplated all the probable consequences of the act which he had ordered to be done, and one of these probable consequences was, that the rubbish would touch the plaintiff's wall. If that was so, then the laying of the rubbish against the wall was as much the defendant's act as if it had been done by

his express command. The defendant, therefore, was the person who caused the act to be done, and for the necessary or natural consequence of his own act he is responsible as a trespasser.

Rule discharged.

PAGE v. HOLLINGSWORTH.

(Supreme Court of Indiana, 1855. 7 Ind. 317.)

DAVISON, J. Trespass. The complaint is that the defendant's cattle broke and entered the plaintiffs' close and destroyed their corn. Verdict for the defendant. New trial refused and judgment.

It appeared that in January, 1852, the defendant was the owner of three hundred and eighteen head of cattle, from three to four years old, and had rented from Page, one of the plaintiffs, a stock field for pasture, which was inclosed by an indifferent fence; that the cattle were pastured in this field in the day time, and there watched by Peter and Thomas Kennedy, who were employed by the defendant to take care of them, but at night they were put into a stubble field furnished by Page, which was inclosed by a good fence, such as careful husbandmen generally keep; that the corn field, in which the trespasses were committed, belonged jointly to the plaintiffs, and adjoined the stubble field in which the cattle were kept in the night time; that the Kennedys went round this field every evening, saw that the fences were up and that the rails which the cattle had knocked off the night before were all put up again; and that on a stormy night, a few days after the cattle had been at Page's, they broke through the fence from the stubble field into the plaintiffs' corn field and destroyed a quantity of their corn. Upon the trial, there was evidence sufficient to warrant the jury in finding that the cattle were not breachy; that they were carefully attended by the defendant's employés; and that on his part there was no want of care.

There is in the record a bill of exceptions, which shows that the Court instructed the jury as follows:

1. If the defendant exercised all the attention and care over the cattle that was necessary, in their situation, to keep that number of cattle from trespassing or breaking the inclosure, and was guilty of no wrongful act or omission of duty in the premises, and the damages were done unavoidably, by circumstances which the defendant could not control or avoid, the law is with the defendant.

2. There must be some positive wrong on the part of the defendant in this cause, before a verdict can be found against him.

If the trespass in this case had been committed against the person or personal property of the plaintiffs, and not against their real estate, the instructions would have been clearly right, because cattle, such as those charged with having broken and entered the plaintiffs' close, viz., cows, oxen, steers, and the like, are regarded mansuetæ naturæ, not naturally inclined to commit mischief. And the owner, for

such trespass merely against the person or personal property, would not be held liable, unless it could be shown that he previously had notice of their viciousness, or that the injury was attributable to some neglect on his part. 1 Chit. Pl. 82, 83; Bac. Ab. tit. Trespass, 1; Vrooman v. Lawyer, 13 Johns. (N. Y.) 339; Lyke v. Van Leuven, 4 Denio (N. Y.) 127.

But this rule does not apply to the case before us. Here a close was broken and entered by such animals; and though their owner may not know when they are inclined to commit mischief, still it is said "they have a natural and notorious propensity to rove," which he is always presumed to know. Hence, he is bound, at his peril, to confine them on his own land; for if they escape and commit a trespass on the land of another, unless through the defect of fences which the latter ought to repair, the law deems the owner himself a trespasser, and holds him liable in trespass quare clausum fregit, though he had no notice in fact of such propensity. 3 Bl. Comm. 211; Rust v. Low, 6 Mass. 90; Thayer v. Arnold, 4 Metc. (Mass.) 589; Sheridan v. Bean, 8 id. 284, 41 Am. Dec. 507; Chit. Pl. 83. This is the common law rule on the subject, and we have heretofore decided that, as a general rule, it prevails in Indiana. Williams v. New Albany, etc., R. Co., 5 Ind. 111; Lafayette, etc., R. Co. v. Shriner, 6 Ind. 141.

If the principles above stated are sound, as we think they are, the ruling of the Common Pleas can not be sustained. Against the plaintiffs, no delinquency was shown. The fence through which the cattle broke and entered the corn field, was considered by the parties sufficient and in good repair, and the authorities we have cited establish the principle, that the owner of such cattle can not, in defence of a suit like the present, set up the care and diligence which he may have exercised in an unavailing effort to confine them on his own land. Indeed the defendant in this case may have been entirely innocent; yet his cattle having broken and entered the close, and therein destroyed corn, the plaintiffs not being in fault, the law holds him responsible for the trespass. The jury, in our opinion, were improperly instructed.

The judgment is reversed with costs.[8]

[8] Accord: Ellis v. Loftus Iron Co. (1874) L. R. 10 C. P. 10, the facts of which are given infra; Brady v. Warren (1900) 2 I. R. 630 (tame deer kept by D. stray upon the land of P.); Wells v. Howell (1822) 19 Johns. (N. Y.) 385, the facts of which appear infra; Dolph v. Ferris (1844) 7 Watts & S. (Pa.) 367, 42 Am. Dec. 246 (D.'s bull jumped a fence into P.'s inclosure and gored his horse).

On the question whether accident or mistake will excuse the prima facie trespass, see infra, "The Different Kinds of Justification or Excuse in Trespass."

"There is one case of absolute liability for accident which deserves special notice by reason of its historical origin. Every man is absolutely responsible for the trespasses of his cattle. If my horse or my ox escapes from my land to that of another man, I am answerable for it without any proof of

COX v. BURBIDGE.

(Court of Common Pleas, 1863. 13 C. B. [N. S.] 430, 143 Reprint, 171, 134 R. R. 586.)

A horse belonging to the defendant was grazing on a newly made road which led to some houses, and which had for some time been used as a road, but not adopted by the parish. The plaintiff, a little boy about five years of age, was playing in the road, when the horse, which was on the foot-path, struck out and kicked him in the face, injuring him very severely. There was no evidence to show how the horse got to the spot, or that the defendant knew he was there, or that the animal was at all vicious, or that the child had done anything to irritate it.

Under these circumstances, it was submitted on the part of the defendant that there was no case to go to the jury. The learned Judge, however, did not like to withdraw the case; but he reserved the question of liability; and the jury returned a verdict for the plaintiff for £20. The defendant obtained a rule nisi to enter a non suit.

negligence. Such a rule may probably be justified as based on a reasonable presumption of law that all such trespasses are the outcome of negligent keeping. Viewed historically, however, the rule is worth notice as one of the last relics of the ancient principle that a man is answerable for all damage done by his property. In the theory of ancient law I am liable for the trespasses of my cattle, not because of my negligent keeping of them, but because of my ownership of them. For the same reason in Roman law a master was liable for the offences of his slaves. The case is really, in its historical origin, one of vicarious liability." Salmond, Jurisprudence (1910) 378. And see the question whether accident excuses a trespass, discussed infra, "The Different Kinds of Justification or Excuse in Trespass."

For the limits of the doctrine, see the remarks of Willes, J., in Read v. Edwards (1864) 17 C. B. (N. S.) 245, 260: "The question was much argued whether the owner of a dog is answerable in trespass for every unauthorized entry of the animal into the land of another, as in the case of an ox. And reasons were offered, which we need not now estimate, for a distinction in this respect between oxen and dogs or cats, on account, first, of the difficulty or impossibility of keeping the latter under restraint, secondly, the slightness of the damage which their wandering ordinarily causes, thirdly, the common usage of mankind to allow them a wider liberty, and lastly, their not being considered in law so absolutely the chattels of the owner, as to be the subject of larceny.

"It is not, however, necessary in the principal case to answer this question; because it was proved at the trial that the dog which did the damage was of a peculiarly mischievous disposition, being accustomed to chase and destroy game on its own account, that that vice was known to its owner, the defendant, and that he notwithstanding allowed it to be at large in the neighbourhood of the plaintiff's wood, in which there were game: so that the entry of the dog into the wood, and the destruction of the game, was the natural and immediate result of the animal's peculiarly mischievous disposition, which his owner knew of, and did not control."

See also the remarks of Palles, C. B., in Brady v. Warren, [1900] 2 I. R. 632, 659 (rabbits from D.'s land trespass upon P.'s land).

For other distinctions and cases in the doctrine see 2 Cyc. 376, note 38; and Key-No., "Animals," § 97.

WILLIAMS, J. * * * If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour; and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence, is altogether immaterial. I am clearly liable for the trespass, and for all the ordinary consequences of the trespass, subject to a distinction which is taken very early in the books, that the animal is such that the owner may have a property in it which is recognizable by law. May v. Burdett, 9 Q. B. 101. For instance, if a man's cattle, or sheep, or poultry, stray into his neighbour's land or garden, and do such damage as might ordinarily be expected to be done by things of that sort, the owner is liable to his neighbour for the consequences.

The question, then, is, whether the injury which is the subject of this action falls within that rule. Upon the result of the authorities, I am of opinion that it does not. We must assume that the injury to the plaintiff was caused by the horse having viciously kicked him, as a horse of ordinary temper would not have done. Taking that to be so, I am of opinion that the plaintiff cannot maintain the action because he has not shown that the defendant knew that the horse was subject to that infirmity of temper. That brings the case within the ordinary rule by which it is established that the owner is not liable unless it can be shown that he was aware of the irritable temper and vice of the animal. There is no trace to be found in the books of an owner being held liable beyond the consequences of ordinary trespasses, in the absence of such evidence as I have above pointed out: and I think we ought not to introduce a new ground of action.[9]

HAY v. COHOES CO.

(Court of Appeals of New York, 1849. 2 N. Y. 159, 51 Am. Dec. 279.)

Hay sued the Cohoes Company, a New York corporation, in the court of common pleas of Albany county. The declaration alleged that the defendants, by their agents, wrongfully and unjustly blasted and threw large quantities of earth, and stones upon the dwelling house and premises of the plaintiff, and broke the windows, doors, etc., to the plaintiff's damage. Plea, not guilty. On the trial the plaintiff gave evidence tending to prove his declaration, and, among other things, that the agents of the defendants, in excavating a canal on land of which they claimed to be the owners, knocked down the stoop of plaintiff's house and part of his chimney. The defendants moved for a nonsuit, insisting that to make them liable the plaintiff

[9] The statement of the case, which was framed in negligence, is abridged. The concurring opinions of Erle, C. J., and Willes, J., are omitted.

must both aver and prove that there was negligence, unskillfulness, or wantonness on the part of the defendants, and this the plaintiff failed to do. The common pleas nonsuited the plaintiff. On error, the supreme court reversed the judgment, and granted a new trial, from which decision the defendants appealed.[10]

GARDINER, J. The defendants insist that they had the right to excavate the canal upon their own land, and were not responsible for injuries to third persons, unless they occurred through their negligence and want of skill, or that of their agents and servants.

It is an elementary principle in reference to private rights, that every individual is entitled to the undisturbed possession and lawful enjoyment of his own property. The mode of enjoyment is necessarily limited by the rights of others—otherwise it might be made destructive of their rights altogether. Hence the maxim sic utere tuo, etc. The defendants had the right to dig the canal. The plaintiff had the right to the undisturbed possession of his property. If these two rights conflict, the former must yield to the latter, as the more important of the two, since, upon grounds of public policy, it is better that one man should surrender a particular use of his land, than that another should be deprived of the beneficial use of his property altogether, which might be the consequence if the privilege of the former should be wholly unrestricted. The case before us illustrates this principle. For if the defendants in excavating their canal, in itself a lawful use of their land, could, in the manner mentioned by the witnesses, demolish the stoop of the plaintiff with impunity, they might, for the same purpose, on the exercise of reasonable care, demolish his house, and thus deprive him of all use of his property.

The use of land by the proprietor is not therefore an absolute right, but qualified and limited by the higher right of others to the lawful possession of their property. To this possession the law prohibits all direct injury, without regard to its extent or the motives of the aggressor. A man may prosecute such business as he chooses upon his premises, but he cannot erect a nuisance to the annoyance of the adjoining proprietor, even for the purpose of a lawful trade. Aldred's Case, 9 Coke, 58. He may excavate a canal, but he cannot cast the dirt or stones upon the land of his neighbor, either by human agency or the force of gunpowder. If he cannot construct the work without the adoption of such means, he must abandon that mode of using his property, or be held responsible for all damages resulting therefrom.

[10] The declaration was in case. Whether this form of action was proper for the cause asserted was questioned by the Supreme Court; and the action was saved with difficulty. See the report of the case in Hay v. Cohoes Co. (1848) 3 Barb. (N. Y.) 45–49. For the principle of pleading involved, see Whittier's Cases on Common Law Pleading.

The act of the New York Legislature incorporating the defendant company authorized it to excavate canals on its own land. See Hay v. Cohoes Co. (1848) 3 Barb. (N. Y.) 42, 46.

The statement of facts is slightly abridged. Part of the opinion is omitted.

He will not be permitted to accomplish a legal object in an unlawful manner. * * *

In this case, the plaintiff was in the lawful possession and use of his own property. The land was his, and, as against the defendant, by an absolute right from the center usque ad cœlum. The defendants could not directly infringe that right by any means or for any purpose. They could not pollute the air upon the plaintiff's premises, Morley v. Pragnell, Cro. Car. 510, nor abstract any portion of the soil, Rol. Abr. 565, note; Thurston v. Hancock, 12 Mass. 221; nor cast anything upon the land, Lambert v. Bessy, Sir T. Raymond, 421, by any act of their agents, neglect, or otherwise. For this would violate the right of domain. Subject to this qualification the defendants were at liberty to use their land in a reasonable manner, according to their pleasure. If the exercise of such a right upon their part, operated to restrict the plaintiff in some particular mode of enjoying his property, they would not be liable. It would be damnum absque injuria.

No one questions that the improvement contemplated by the defendants upon their own premises was proper and lawful. The means by which it was prosecuted were illegal notwithstanding. For they disturbed the rightful possession of the plaintiff and caused a direct and immediate injury to his property. For the damages thus resulting, the defendants are liable. * * *†

Judgment affirmed.

BOOTH v. ROME, W. & O. T. R. CO.

(Court of Appeals of New York, 1893. 140 N. Y. 267, 35 N. E. 592, 24 L. R. A. 105, 37 Am. St. Rep. 552.)

In making a lawful excavation on its own land, in order to remove rock, the defendant railway company loosened the rock by blasting. In consequence of this blasting the plaintiff's house, on an adjoining lot, was seriously damaged, the foundations being cracked, the beams and joists pulled apart, the plaster loosened. No rocks or materials, however, were thrown upon the plaintiff's lot or against his house. The inference was that the damage to the plaintiff's house was caused by

† Accord: Henry Hall Sons' Co. v. Sundstrom Co. (1910) 138 App. Div. 548, 123 N. Y. Supp. 390: The complaint alleged that the defendant was blasting near the plaintiff's factory, and that this "blasting was conducted in such a manner by reason of the negligence of the defendant that large rocks, stones and other material were thrown" upon and against the plaintiff's factory. The character of the cause was held to be trespass, notwithstanding the isolated allegation of negligence.

Langhorne v. Turman (1911) 141 Ky. 809, 133 S. W. 1008, 34 L. R. A. (N. S.) 211: D., a railway company, was blasting upon its right of way, and thereby caused soil and rocks to be thrown upon P.'s land. The instruction authorized a recovery without regard to whether the blasting in the right of way was done negligently.

For other cases, see Dec. Dig., Key No., "Explosives," § 12.

the jarring of the ground or the concussion of the atmosphere created by the explosion, or by both causes combined. It was conceded that the defendant exercised due care in the blasting, and that blasting was necessary in order to remove the rock.

In an action to recover for the damage thus sustained the trial judge instructed the jury that the defendant in using powerful explosives in blasting the rock used them at its peril, and that if the plaintiff's house was injured thereby the defendant was liable for the damages occasioned, and "that it made no difference whether the work was done carefully or negligently." Exception was taken by the defendant to this instruction. The jury found that the damage to the house from the blasting was $1,750, and this sum was included in the verdict.[11] A judgment for the plaintiff upon this verdict was affirmed by the General Term of the Supreme Court. The defendant appealed.[12]

ANDREWS, C. J. * * * The plaintiff, upon the findings of the jury, sustained a serious injury. It is true that witnesses on the part of the defendant gave evidence tending to show that the house was imperfectly constructed, and that the foundation walls were giving way before the excavation was commenced. But the verdict having been affirmed by the General Term, there can be no controversy here that the blasting caused damage to the house to the amount of the verdict. But mere proof that the house was damaged by the blasting

[11] This statement is substituted for a longer statement by the reporter. The arguments of counsel and portions of the opinion are omitted.

[12] "When an examination is made of the cases in which the exact point raised in the case at bar has been at issue, viz., whether one, who, by blasting with powerful explosives, produces severe concussions or vibrations in surrounding earth and air, and so materially damages buildings belonging to others, is liable irrespective of negligence on his part, a sharp and irreconcilable conflict of authority is disclosed. The point seems to have come up first in the lower courts of New York, where it was decided in favor of the plaintiff, following the reasoning of Hay v. Cohoes Co., supra, [(1849) 2 N. Y. 159, 51 Am. Dec. 279], and other cases. Morgan v. Bowes, 62 Hun, 623, 17 N. Y. Supp. 22 (Sup. Ct. 1891); Booth v. Rome, etc., R. Co., 63 Hun, 624, 17 N. Y. Supp. 336 (Sup. Ct. 1892). In the former of these two cases the Supreme Court says: 'The appellants claim reversal upon two grounds: * * * Second, that an action for damages caused by blasting on one's own land will only lie when an actual trespass upon the res is committed, as where rock or soil is blown over into the adjoining lot or against the adjoining house. * * * We think the second point taken by the appellants also is untenable. The rules which have been laid down upon the subject of private nuisances, causing damage to individuals, do not limit the right of action as thus contended for. It is true that in Hay v. Cohoes Co. (1849) 2 N. Y. 159 [51 Am. Dec. 279], fragments of the rock blasted by the defendants were actually thrown against and injured the adjoining building, which belonged to the plaintiff. The observations of the learned court were made with reference to that fact; but it was by no means intimated that such an action could not be maintained, where the same damage was produced by violent and continuous concussions. On the contrary, the disturbance of the plaintiff's rightful possession, and the direct and immediate injury to his property, were the grounds upon which the right of recovery was placed. There the plaintiff's stoop was demolished. It was certainly unimportant whether such demolition resulted from the direct attack of broken rock or from the concussion caused by the blast.'" Per Johnson, J., delivering the opinion in Hickey v. McCabe (1910) 30 R. I. 346, 75 Atl. 404, 27 L. R. A. (N. S.) 425, 19 Ann. Cas. 783.

would not alone sustain the action. It must further appear that the defendant in using explosives violated a duty owing by him to the plaintiff in respect of her property, or failed to exercise due care. Wrong and damage must concur to create a cause of action.

If the injury was occasioned by the omission to use due care, this alone would sustain the action, even if the right of the defendant to use explosives in removing the rock was conceded. If one by carelessness in making an excavation on his own land causes injury to an adjoining building, even where the owner of the house has no easement of support, he will be liable. Leader v. Moxon, 3 Wils. 460; Lawrence v. Great Northern Railway Co., 16 Ad. & El. 643–653; Leake's Law of Real Prop. 248. The law exacts from a person who undertakes to do even a lawful act on his own premises, which may produce injury to his neighbor, the exercise of a degree of care measured by the danger, to prevent or mitigate the injury. The defendant could not conduct the operation of blasting on its own premises, from which injury might be apprehended to the property of his neighbor, without the most cautious regard for his neighbor's rights. This would be reasonable care only under the circumstances. If it was practicable in a business sense for the defendant to have removed the rock without blasting, although at a somewhat increased cost, the defendant would, we think, in view of the situation, and especially after having been informed of the injury that was being done, have been bound to resort to some other method. * * * The plaintiff, however, on this record, is precluded from claiming that the judgment may be sustained because of negligence in the mode of blasting. It must be assumed from concessions made on the trial and from the rule of law laid down by the court, that blasting was the only mode of removing the rock practically available, that it was conducted with due care, and that it was necessary to enable the defendant to conform the roadbed to the established grade. * * *

The rule announced by the trial judge, that the use, by an owner of property, of explosives in excavating his land, is at his peril and imposes liability for any injury caused thereby to adjacent property irrespective of negligence, is far reaching. It would constitute, if sustained, a serious restriction upon the use of property, and in many cases greatly impair its value. The situation in the city of New York furnishes an apt illustration. The rocky surface of the upper part of Manhattan Island makes blasting necessary in the work of excavation, and, unless permitted, the value of lots, especially for business uses, would be seriously affected. May the man who has first built a store or warehouse or dwelling on his lot and has blasted the rock for a basement or cellar, prevent his neighbor from doing the same thing when he comes to build on his lot adjoining, on the ground that by so doing his own structure will be injured? Such a rule would enable the first occupant to control the uses of the adjoining property, to the serious injury of the owner, and prevent or tend to prevent the

improvement of property. The first occupant in building on his lot exercised an undoubted legal right. But his prior occupation deprived his neighbor of no legal right in his property. The first occupant acquires no right to exclude an adjoining proprietor from the free use of his land, nor to use his own land to the injury of his neighbor subsequently coming there. Platt v. Johnson, 15 Johns. 213, 8 Am. Dec. 233; Thurston v. Hancock, 12 Mass. 220; Tipping v. St. Helen's Smelting Co., L. R. (1 Ch. App.) 66; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567. The fact of proximity imposes an obligation of care, so that one engaged in improving his own lot shall do no unnecessary damage to his neighbor's dwelling, but it cannot, we think, exclude the former from employing the necessary and usual means to adapt his lot to any lawful use, although the means used may endanger the house of his neighbor.

We have found no case directly in point upon the interesting and important practical question involved in this appeal. It was held in the leading case of Hay v. Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279, that the right of property did not justify the owner of land in committing a trespass on the land of his neighbor by casting rocks thereon in blasting for a canal on his own land for the use of his mill, although he exercised all due care in executing the work. In that case there was a physical invasion by the defendant of the land of the plaintiff. This the court held could not be justified by any consideration of convenience or necessity connected with the work in which the defendant was engaged. In the conflict of rights the court considered that public policy required that the right of the defendant to dig the canal on his own land must yield to the superior right of the plaintiff to be protected against an invasion of his possession by the act of the defendant. * * *

Many of the cases cited by the counsel are cases of the permanent appropriation of property, for damages, or noxious uses causing damage. The distinction between such cases and those where the injury arises from acts done in the necessary adjustment of property for a lawful use by means necessary, and not unusual, but involving damage to adjacent property, has been adverted to. We recognize the difficulty of formulating a general rule regulating the rights of adjacent landowners in the use of their property, and we realize how narrow the margin is which separates this from some decided cases. In Marvin v. Brewster Iron Co., 55 N. Y. 557, the opinion of the learned judge who wrote in that case sustains the conclusion we have reached in this case. But the point was not necessarily involved, since it was held that the defendant there had acquired by grant the right to employ blasting in removing the mineral, and that the plaintiff, a subsequent grantee of the surface, could not complain of injury to his house therefrom, in the absence of negligence on the part of the defendant in conducting the work. Judge Folger, in that case, said: "Whatever it is necessary for him [defendant] to do for the profitable and beneficial

enjoyment of his own possession, and which he may do with no ill effect to the adjacent surface in its natural state, that he may do, though it harm erections lately put there." If the learned judge intended to lay down the rule that the owner of land may do anything on his own land which would do no injury to the adjacent property if it had remained in its natural state, the proposition is probably too broad. One may do in a barren waste many things which he could not lawfully do in or near an inhabited town.

But the defendant here was engaged in a lawful act. It was done on its own land, to fit it for a lawful business. It was not an act which, under all circumstances, would produce injury to his neighbor, as is shown by the fact that other buildings near by were not injured. The immediate act was confined to its own land; but the blasts, by setting the air in motion, or in some other unexplained way, caused an injury to the plaintiff's house. The lot of the defendant could not be used for its roadbed until it was excavated and graded. It was to be devoted to a common use; that is, to a business use. The blasting was necessary, was carefully done, and the injury was consequential. There was no technical trespass. Under these circumstances, we think, the plaintiff has no legal ground of complaint. The protection of property is doubtless one of the great reasons for government. But it is equal protection to all which the law seeks to secure. The rule governing the rights of adjacent landowners in the use of their property seeks an adjustment of conflicting interests through a reconciliation by compromise, each surrendering something of his absolute freedom so that both may live. To exclude the defendant from blasting to adapt its lot to the contemplated uses, at the instance of the plaintiff, would not be a compromise between conflicting rights, but an extinguishment of the right of the one for the benefit of the other. This sacrifice, we think, the law does not exact. Public policy is sustained by the building up of towns and cities and the improvement of property. Any unnecessary restraint on freedom of action of a property owner hinders this. The law is interested, also, in the preservation of property and property rights from injury. Will it, in this case, protect the plaintiff's house by depriving the defendant of his right to adapt his property to a lawful use, through means necessary, usual, and generally harmless? We think not.

The judgment should be reversed, and a new trial ordered, with costs to abide the event. All concur.

Judgment reversed.[13]

[13] Accord: Simon v. Henry (1898) 62 N. J. Law, 486, 41 Atl. 692: "The temporary use of explosives in the blasting of rock, provided reasonable care be exercised, is lawful, and damage resulting from concussion thereby produced is damnum absque injuria." And see Derrick v. Kelly (1910) 136 App. Div. 433, 120 N. Y. Supp. 996 (D. is blasting rock on his own property, without negligence. The concussion of the blast breaks a water main under the sidewalk. The water floods P.'s cellar); Bleak v. Runde (1912) 78 Misc. Rep.

CLISSOLD v. CRATCHLEY and RICHARDS.

(High Court of Justice, King's Bench Division. [1910] 1 K. B. 374.)

In an earlier action by the plaintiff, against Mrs. Cratchley, the Court had ordered Clissold to pay costs amounting to £27. 12s. 4d. This order was equivalent to a judgment. Mrs. Cratchley's solicitor, Richards, who had an office in London with a branch office in Gloucestershire, wrote from his London office to plaintiff's agents in London demanding payment by 11 A. M. of December 16. At 3:45 P. M. of that day, thinking that payment had not been made, Richards took out a writ of fi. fa. in London. This writ was sent to the sheriff of Gloucestershire, where Clissold resided, and an execution was there levied upon personal property belonging to Clissold, on December 17. About noon of December 16, Clissold had paid the full amount of the costs to Richard's agent in Gloucestershire, and taken a receipt; and this agent had at least implied authority to receive payment and give a receipt. He did not, however, notify Richards of the payment until after the levy of the execution. Richards then telegraphed

358, 138 N. Y. Supp. 413 (P.'s damage was caused by D.'s hammering on the joists of his adjoining house. "In the absence of evidence that this hammering was excessive, there can be no recovery for this damage. The defendant has a right to alter her house if she did so without negligence." Per Lehman, J.).

On the application of the principle of Booth v. Rome R. R. Co., see, also, French v. Vix (1894) 143 N. Y. 90, 93, 37 N. E. 612; Holland House v. Baird (1901) 169 N. Y. 136, 140, 62 N. E. 149; Page v. Dempsey (1906) 184 N. Y. 249, 251, 77 N. E. 11; Dec. Dig., Key No., "Explosives," § 12; "Adjoining Landowners," § 8; 19 Cyc. 7, 8, note 32.

But in some cases the historic reason for the distinction taken, because of the technical trespass, in Hay v. Cohoes Co. and Booth v. Railway Co. is disregarded. Thus, it is remarked, per Holloway, J., in Longtin v. Persell (1904) 30 Mont. 306, 76 Pac. 699, 65 L. R. A. 655, 104 Am. St. Rep. 723, 2 Ann. Cas. 198: "If the damages to plaintiff's property had been caused by fragments of rock thrown upon his property or against his dwelling house by the blasting which defendants were doing, the authorities are practically unanimous in holding that the defendants would be liable even though they exercised reasonable care in their operations. Cooley on Torts, 332. We can see no reason whatever for adopting that view, and at the same time holding that they are not liable for damages occasioned by the vibrations of the ground or the concussion of the air. The agency employed in either case is the same, and the danger as imminent in one case as in the other." And see Hickey v. McCabe (1910) 30 R. I. 346, 75 Atl. 404, 27 L. R. A. (N. S.) 425, 19 Ann. Cas. 783; Patrick v. Smith (1913) 75 Wash. 407, 134 Pac. 1076, 48 L. R. A. (N. S.) 740; 10 Columbia Law Rev. 465, 27 Harvard Law Rev. 188. The result is either to widen our inherited doctrine of trespass, imposing a civil liability irrespective of the question of blameworthiness, or to bring the concussion of the air, through the defendant's intentional act, into the historic class of acts vi et armis. "Probably the reason for the distinction is that the courts have felt themselves fettered by precedent in the case of the technical trespass, and yet have been unwilling to extend the doctrine of the vibration cases." 27 Harvard Law Rev. 189.

For cases developing the doctrine, see Key No., Dec. Dig., "Adjoining Landowners," § 8; and see 19 Cyc. 8, note 32.

the sheriff to withdraw from possession immediately, and this was accordingly done.[14]

DARLING, J. (after stating the facts). Upon these facts an action is brought by the plaintiff against the two defendants, and it is contended that they are liable inasmuch as the debt was paid before the writ of fi. fa. was issued, and that therefore the writ was irregular and void. Many authorities have been referred to which seem to me to establish this, that an action on the case will not lie against a person suing out a writ after the debt has been paid unless malice on his part is proved. * * *[15]

It is contended, however, that the plaintiff is entitled to maintain an action of trespass. That contention is based upon this, that Richards indorsed upon the writ of fi. fa. a direction to the sheriff to levy the amount specified therein as being due and payable, whereas in fact it was not then due and payable, and that such direction to the sheriff to levy execution when no debt existed made Richards, who gave the direction, and his client trespassers. I was at first rather captivated by that argument, and thought that the plaintiff might perhaps maintain an action of trespass, but I have upon further reflection come to the conclusion that, before he can do so, he must distinguish the present case from Gibson v. Chaters.[16] I do not think that he has succeeded in distinguishing that case. It was said that that case was distinguishable by reason of the fact that the affidavit of the defendant upon which the writ was issued was made before the debt was paid. That is true, but the affidavit was not the ground of the action. The ground of the action was this, that the affidavit having been made by the defendant while the debt was unpaid and a writ of capias having been issued upon it, inasmuch as that writ could not be executed, afterwards when the debt had been paid an alias writ was taken out by the defendant's attorney grounded upon the former affidavit, and the plaintiff was arrested under this latter writ. It was not the making of the affidavit, but the issue of the alias writ, which caused the plaintiff to be arrested. In the present case Richards has done nothing more than was done by the defendant's attorney in that case. Richards by mistake, thinking that the debt of £27. 12s. 4d. had not been paid, sued out a writ of fi. fa., indorsing upon the writ a statement that the debt was due and payable in order to entitle him to have the writ issued. So too the attorney in the case of Gibson v. Chaters could not have taken out the alias writ unless he had stated that the debt was unpaid. Therefore, unless Gibson was entitled to maintain an action of trespass against Chaters, this action will not lie against the present defendants. It was not sug-

[14] The statement of facts has been abridged; the arguments of counsel are omitted.

[15] See infra, "Malicious Prosecution."

[16] Gibson v. Chaters (1800) 2 Bos. & P. 129, 126 Reprint, 1196. See infra, "Malicious Prosecution."

gested in Gibson v. Chaters that an action of trespass would lie if the action on the case was not maintainable. Therefore I am of opinion that that case is not distinguishable and that the plaintiff cannot maintain this action for trespass. * * *[17]

CLISSOLD v. CRATCHLEY and RICHARDS.

(Court of Appeal [1910]. 2 K. B. 244.)

The Divisional Court (Darling and Phillimore, JJ.) having held that the defendants were not liable in trespass, the plaintiff appealed.[18]

VAUGHAN WILLIAMS, L. J. I am of opinion that this appeal must be allowed, although I do not think that the principles of law upon which I base my judgment are in any way contravened by the judgments delivered in the Divisional Court. When those judgments are read, it is clear that both of them recognize the distinction between an action on the case and an action of trespass; they recognize that in an action on the case for maliciously suing out process the allegation of malice is one of fact which must be proved by the plaintiff, and that, if it is not proved, the action cannot be supported. They further recognize that, if an action for maliciously suing out process is not an action on the case but an action of trespass, malice is in no sense essential to its maintenance. I am not sure how it came to pass that, recognizing these distinctions, the judges in the Divisional Court decided the present case on the basis that this action could not succeed without proof of malice. The plaint in the action shews that there were alternative causes of action alleged: the action was in part for maliciously issuing process, and alternatively for trespass: the county court judge in terms recognized this fact in his judgment, which was delivered as a judgment in an action of trespass. Arriving, as I do, at the conclusion that this was an action of trespass, and that it was totally unnecessary for the plaintiff to give evidence of malice, it is necessary to see whether anything can be relied on as shewing that a judgment in trespass was wrong. I can see nothing at all to warrant such a conclusion. It is suggested that, when execution was issued, the judgment against the plaintiff was still in force, notwithstanding that the total amount of debt and costs ordered by it to be paid by the plaintiff had in fact been paid, and a receipt had been given for it by a person authorized to receive the money and give the receipt. It is said that, notwithstanding that fact, there was a still existing judgment which would support the writ of execution, and which was still in force. But common sense, wholly apart from

[17] Part of the opinion of Darling, J., and the concurring opinion of Phillimore, J., are omitted.

[18] The statement of facts, the arguments of counsel, and the concurring opinion of Farwell, J., are omitted.

authority, tells one that, when the total amount has been paid which is ordered by a judgment to be paid, the judgment ought no longer to be of any force or effect. But, as it has been argued that a writ of execution is good so long as the judgment under which the moneys have been paid has not in law been set aside, it is convenient to shew the authority for the proposition that, when the total amount of a judgment debt has been paid, the judgment ceases to be of any avail. In Tebbutt v. Holt (1844) 1 Car. & K. 280, at p. 289, Parke, B., said, "The law also is that, if the debt and costs are paid or satisfied, the judgment is at an end." This judgment is at an end. And in Bullen and Leake's Precedents (3d Ed.) at p. 353, I find this statement: "An action will not lie for an arrest on final process upon a subsisting unsatisfied judgment (Blanchenay v. Burt [1843] 4 Q. B. 707; Huffer v. Allen L. R. 2 Ex. 15, 36 L. J. Ex. 17); but if the party arrested can get the judgment set aside for irregularity or on any other ground, or can shew that the judgment was satisfied by payment or otherwise before the arrest, he may then maintain an action: the arrest in such case would in general support an action of trespass." Under the circumstances it seems unnecessary to add anything. The cases on which reliance has been placed on behalf of the defendants are all instances of actions on the case for maliciously issuing process; not a single authority has been cited to justify the proposition that a satisfied judgment is nevertheless still an existing judgment for the purpose of issuing a writ of execution. If the judgment was not an existing judgment, it is manifest that the writ of execution issued under it was void ab initio, and that an entry has been made upon the plaintiff's premises under a writ void ab initio. The defendants are consequently liable in an action of trespass.

Fletcher Moulton, L. J. I am of the same opinion. The acts complained of clearly constituted a trespass, and it was for the defendants to justify their action. The sole defence relied on is that there was an order for payment of costs which was equivalent to a judgment, and that a writ of execution was sued out, under which the defendants acted. The plaintiff replies that (as is now admitted to be the case) prior to the suing out of the writ the order had been obeyed. I am satisfied that in this state of things the order was dead for all purposes, and that the suing out of a writ of execution under an order which had already been obeyed was an act void ab initio and could justify nothing. This is therefore, in my opinion, an undefended action of trespass. The judges in the Divisional Court did not, I think, realize that at the date of the decision of Gibson v. Chaters [19] the form of an action was of prime importance in the eyes of the Court, nor did they realize how great would be considered the difference between actions for maliciously holding to bail or actions on the case in which malice is alleged, on the one hand, and actions

[19] 1800, 2 Bos. & P. 129, 126 Reprint, 1196.

of trespass, on the other. No case, however, was cited either in the Divisional Court or before us which in any way contravenes the proposition that a writ of execution upon a satisfied judgment is null and void.

Appeal allowed.

SECTION 2.—ELEMENTS OF A PRIMA FACIE CAUSE IN TRESPASS

I. In Trespass to the Person

(A) In Assault

SMITH v. NEWSAM.

(Court of King's Bench, 1674. 3 Keble, 283, 84 Reprint, 722.)

In trespass of assault and battery, on verdict of the assault, and not guilty of the battery, being only of a woman's shaking a sword against the plaintiff in a cutlers shop, being on the other side of the street.

Hale, Chief Justice, certified the assault well proved: and now Saunders prayed no more costs than damages, which was a noble; and per curiam it was granted: and Hale, Chief Justice, said he certified industriously, thinking this not within the statute unless the battery had been found.[20]

TOMBS v. PAINTER.

(Court of King's Bench, 1810. 13 East, 1, 104 Reprint, 265.)

Debt on bond, in the penalty of £100., conditioned not to assault, molest, or injure the person of the plaintiff wilfully or designedly in anywise howsoever. Plea, that the defendant had not done so. Replication, that the defendant on such a day, assaulted, molested, and injured the person of the plaintiff wilfully and designedly, by then and there with force and arms wilfully and designedly beating, bruising, wounding, and otherwise ill-treating him. Rejoinder, that the de-

[20] The statute referred to is the act of 1670 (22–23 Car. II, c. 9), which provided that "in all actions of trespass, assault and battery, and other personal actions," if the jury found the damages to be under 40s., the plaintiff should have no more costs than damages, unless the judge "shall find and certify under his hand upon the back of the record that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question." That the question was a troublesome one, see Newsam v. Smith (1674) 3 Keble, 292; Smith v. Nusam (1674) 3 Keble, 303.

fendant did not assault, molest, or injure the person of the plaintiff, wilfully and designedly, modo et forma; and concluding to the country.

At the trial, the evidence was that these parties being in the same public-house in different parts of the room, the defendant jumped up from his seat, with his fist clenched, as if to strike the plaintiff, but was pulled back to his seat by another person, and did not get within reach of the plaintiff; but he abused him and swore at him, and drank the beer out of his cup. This, it was contended, did not support the issue of the plaintiff, which was that the defendant assaulted, molested, and injured the plaintiff's person by beating, etc., "and otherwise ill-treating" him. But the learned Judge thought that the evidence satisfied the latter words, and the plaintiff took a verdict with one shilling damages for the detention of the debt and one shilling damages upon the breach assigned. And now,

Lens, Serjt., moved, by leave, to set aside the verdict and enter a nonsuit; and, first, renewed the objection, that the evidence did not sustain the issue, which was confined to an ill treatment of the plaintiff's person.

LORD ELLENBOROUGH, C. J. The clenching his fist at the plaintiff was an assault, and an act of personal offence. * * *

Rule refused.

LEWIS v. HOOVER.

(Supreme Court of Indiana, 1834. 3 Blackf. 407.)

Trespass, assault and battery. Plea, not guilty. Verdict and judgment for the defendant. The plaintiff asked the Court to charge the jury that if they thought from the evidence that the defendant struck at the plaintiff with a stick, in a violent and angry manner, within striking distance of him, they ought to find for the plaintiff. This charge the Court gave, but added, as an additional charge, that if no damage was proved to have resulted from the said assault, they ought to find for the defendant. To this additional and latter charge the plaintiff excepted, and prosecuted a writ of error.

STEVENS, J. The only question to be determined is, whether that latter and additional charge of the Court was correct? An assault is an attempt or offer with violence to do a corporal hurt to another, as if one lift up his cane or fist at another in a threatening manner, or strike at him with a stick, his fist, or any weapon, within striking distance, but miss him. This is called an unlawful setting upon one's person, and is an inchoate violence for which the party assaulted may have redress by an action of trespass vi et armis, and shall recover damages as a compensation, although no actual suffering or injury is proved. The damages are not assessed for the mere corporal injury or pecuniary loss, but for the malicious and insulting conduct of the defendant. 3 Bl. Com. 120; 1 Bac. Abr. 242; 1 Saund. on

Pl. & Ev. 103, 104. From this it appears that the above additional and latter charge of the Circuit Court to the jury is incorrect, and should not have been given.

PER CURIAM. The judgment is reversed, and the verdict set aside, with costs. Cause remanded, etc.

TUBERVILLE v. SAVAGE.

(Court of King's Bench, 1669. 1 Mod. 3, 86 Reprint, 684.)

Action of assault, battery, and wounding. The evidence to prove provocation was, that the plaintiff put his hand upon his sword and said, "If it were not assize-time, I would not take such language from you." The question was, If that were an assault?

The Court agreed that it was not; for the declaration of the plaintiff was, that he would not assault him, the Judges being in town; and the intention as well as the act makes an assault. Therefore if one strike another upon the hand, or arm, or breast in discourse, it is no assault, there being no *intention* to assault; but if one, intending to assault, strike *at* another and miss him, this is an assault: so if he hold up his hand against another in a threatening manner and say nothing, it is an assault.

In the principal case the plaintiff had judgment.[21]

UNITED STATES v. MYERS.

(Circuit Court, District of Columbia, 1806. 1 Cranch, C. C. 310, 27 Fed. Cas. 43.)

Presentment, for an assault on Jane McGrath. The evidence was that the defendant (Samuel Myers) doubled his fist and ran it towards the witness, saying, "If you say so again, I will knock you down."

Mr. Key, for defendant, contended that it was not an assault. The words explain the act, and show the intention not to be to commit a battery. It was like the case of the man putting his hand on his sword, and saying, "If it were not term time or assizes, I would kill you," etc.; and he moved the court to instruct the jury that it was no assault.

The Court (nem. con.) refused to give the instruction.

Verdict, "Guilty." Fined five dollars.[22]

[21] Compare Keep v. Quallman (1887) 68 Wis. 451, 32 N. W. 233, the facts of which are given infra, "Defence of the Person."

[22] Accord: United States v. Richardson (1837) 5 Cranch, C. C. 348, 27 Fed. Cas. 798 (D. raised a club over the head of a woman, within striking distance, and threatened to strike her if she opened her mouth); State v. Morgan (1842) 3 Ired. (25 N. C.) 186, 38 Am. Dec. 714 (D., stepping within reach of P.

and holding an ax up in a position to strike, said to P.: "Give up the gun, or I'll split you down"); Keefe v. State (1857) 19 Ark. 190 (K. drew a pistol, cocked it, pointed it towards the breast of F., and said: "If you do not pay me my money I will have your life").

On the reason for the rule, see the remarks of Gaston, J., in State v. Morgan, ante: "There are several ancient cases in which it was held, that an assault might be committed by threats of future violence; but it has long been settled, that words alone can not constitute an assault. They may endanger the public peace, but do not break it. There is no assault, unless there be some act, amounting to an attempt or offer to commit personal violence. The instances usually given of such attempts or offers to do wrong to the person of another, are 'by the striking at him with or without a weapon, or presenting a gun at him within a distance which the gun will carry, or pointing a pitchfork at him standing within the reach of it, or by holding up one's fist at him in an angry, threatening manner.' 1 Hawk., c. 15. The law regards these acts as breaches of the peace, because they directly invade that personal security, which the law guarantees to every citizen. They do not excite an apprehension that his person may be attacked on a future occasion, and thus authorize a resort to cautionary remedies against it; but they are the beginnings of an attack, excite terror of immediate personal harm or disgrace, and justify a resort to actual violence to repel the impending injury and insult. But even acts, which prima facie and unexplained are undoubtedly assaults, like other acts which are not unequivocal in their character, may be shown to be in truth different from what they purport to be; that they are not attempts or offers to do harm, but merely angry gestures without any accompanying purpose of mischief. The attending circumstances may plainly show this, and, among other circumstances, the declarations of the party at the time, inasmuch as such declarations are ordinarily indicative of the party's purpose, are very proper to be considered and weighed. The ordinary illustration of the doctrine, that a seeming assault may be explained away by the declarations of the supposed assailant, is the very familiar case, where a man laid his hand on his sword and said to the person, with whom he was quarreling: 'If it were not assize-time, I would not take such language from you.' There is also an illustration of it in the case of the State v. Crow (1841) 23 N. C. 375, where the defendant, when he raised the whip, used the words: 'If you were not an old man, I would knock you down.' In both it was held to be a fair subject of inquiry, whether, at the time these acts were done, there was a present purpose of doing harm, and that, if there was not, the acts did not amount to an assault. But these, and all the cases within our recollection where this doctrine has been held, were cases, in which there was a declared intent not to do harm at the time. The present case is one of a very different character. The act was not only apparently a most dangerous assault, but accompanied with a present purpose to do great bodily harm; and the only declaration, by which its character is attempted to be changed, is, that the assailant was not determined to execute his savage purpose unconditionally and without a moment's delay. He had commenced the attack and raised the deadly weapon and was in the attitude to strike, but suspended the blow, to afford the object of his vengeance an opportunity to buy his safety, by compliance with the defendant's terms. To hold that such an act, under such circumstances, was not an offer of violence—not an attempt to commit violence—would be, we think, to outrage principle and manifest an utter want of that solicitude for the preservation of peace which characterizes our law, and which should animate its administrators. To every purpose—both in fact and in law—the attack on the prosecutor was begun; and in the pause, which intervened before its consummation, most happily for both parties an arrangement was made, which prevented the probably fatal result. But this pause—though intentional, and announced when the attack began—does not prevent that attack from being an offer or attempt to strike. If a ruffian were to level his rifle at a traveler, and announce to him that he might have fifteen minutes to make his peace with his God—and the unfortunate man should save his life by prayers, by remonstrance, by money, or by any other means before the expiration of that time, could it be pretended that there had been no attempt nor offer to hurt him, because the intent was not to kill instantaneously, and therefore

BEACH v. HANCOCK.

(Supreme Court of Judicature of New Hampshire, 1853. 27 N. H. 223, 59 Am. Dec. 373.)

Trespass for an assault. At the trial it appeared that the plaintiff and the defendant were engaged in an angry altercation, when the defendant stepped into his office and brought forth a gun, which he pointed in an excited and threatening manner at the plaintiff, who was standing three or four rods distant. The gun was not loaded, but this fact was not known to the plaintiff. The evidence tended to show that the defendant snapped the gun twice at the plaintiff. The court ruled that pointing a gun, in an angry and threatening manner, at a person three or four rods distant, who was ignorant whether the gun was loaded or not, was an assault, though it should appear that the gun was not loaded, and that it made no difference whether the gun was snapped or not. The court further instructed the jury that, in assessing the damages, it was their right and duty to consider the effect which the finding of light or trivial damages would have to encourage disturbances and breaches of the peace. Defendant excepted to both of these instructions.

GILCHRIST, C. J. * * * One of the most important objects to be attained by the enactment of laws and the institutions of civilized society is, that each of us shall feel secure against unlawful assaults. Without such security, society loses most of its value. Peace and order and domestic happiness, inexpressibly more precious than mere forms of government, cannot be enjoyed without the sense of perfect security. We have a right to live in society without being put in fear of personal harm. But it must be a reasonable fear of which we complain. And surely it is not unreasonable for a person to entertain a fear of personal injury when a pistol is pointed at him in a threatening manner, when, for aught he knows, it may be loaded, and may occasion his immediate death. The business of the world could not be carried on with comfort if such things could be done with impunity.

We think the defendant guilty of an assault, and we perceive no reason for taking any exception to the remarks of the court. Finding trivial damages for breaches of the peace, damages incommensurate

did not accompany the act? Will it be doubted, if a bully should present his pistol at a citizen and order him, under pain of death, not to walk on the same side of the street with him, whether there was an offer of violence, because the purpose to kill was not absolute but conditional merely? Whether the act is done in part execution of a purpose of violence—whether that purpose be absolute or provisional—makes no difference as respects the question, whether the act be an assault. In both cases the assailant equally violates the public peace. In both he breaks down the barrier which the law has erected for the security of the citizen. In the former he sets up none in its place. In the latter, he substitutes for it the protection of his grace and favor."

with the injury sustained, would certainly lead the ill disposed to consider an assault as a thing that might be committed with impunity. But at all events, it was proper for the jury to consider whether such a result would or would not be produced: Flanders v. Colby, 28 N. H. 34.

Judgment on the verdict.[23]

WHITE v. SANDER (two cases).

(Supreme Judicial Court of Massachusetts, 1897. 168 Mass. 296, 47 N. E. 90.)

These were two actions of tort, one by Benjamin White, and the other by Emma White, his wife, against Sander, to recover damages for personal injuries from fright caused by the defendant throwing a stone into a room where the wife was. The jury returned a verdict for the husband for $179.30 and for the wife for $847.47, and the defendant excepted.

ALLEN, J. There was no evidence that the defendant had any intention to injure the female plaintiff, or that he was aware of her condition of health. The house did not belong to her, but to her father, with whom the defendant had an altercation. The defendant's declared purpose was to injure the house, and he threw a large stone against it, in her presence. She then ran into the front room, with her little child, whereupon a large stone was willfully thrown by the defendant, which passed through one of the blinds, all of the blinds upon the front windows being closed. This greatly frightened her, though she was not struck or touched. We do not understand by the bill of exceptions that the defendant knew that she was in that room, or that he had any purpose either to hit or to frighten her, or that it was designed to present to us a case of an intentional injury to her or to her property. These elements being absent, the defendant was not responsible in damages for her fright or the consequent injury to her health. Spade v. Railroad Co., 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393. Under the order taking off the default, the defendant was responsible for nominal damages. Exceptions sustained.

NELSON v. CRAWFORD.

(Supreme Court of Michigan, 1899. 122 Mich. 466, 81 N. W. 335, 80 Am. St. Rep. 577.)

Action for personal injuries by Sarah Nelson against Robert Crawford. From a judgment for defendant, plaintiff brings error.

Plaintiff and her husband resided on a farm about 40 rods from the residence of defendant. One evening defendant, dressed in woman's

[23] The statement of the case is abridged. Only so much of the opinion is given as relates to the one point.

clothes, navy blue bicycle skirt, light waist, sailor hat, with flowers on it, and thin, black face veil, took a parasol, and went to her house. He had been a frequent visitor there and was accustomed to play with her children. Although for many years he had been adjudged insane or incompetent, his malady was of a harmless character, and it had never been considered necessary to restrain him. There is no testimony to show that he acted from malicious motives, or with any intent to do injury to plaintiff or any one. He said to others, shortly afterwards, "I did it to have a little fun; to see if they had any nerve." As he approached the back of the house, plaintiff stepped to the back door, and saw defendant standing three or four rods away. She spoke to him, but he made no reply, * * * only "mumbled." She testified that she was frightened and ran into the house, and into her bedroom, where her husband was in bed; that she called to her husband to get up, telling that "there is something here; I don't know what it is;" that defendant followed her into the house, and to the bedroom door; that her husband took up a stick of wood, raised it, and told defendant to get out of the house; that defendant then gave his name; that she was made ill by fright; and that on October 22d, 42 days after the fright, she had a miscarriage, which she attributes to the fright. The only demonstration he made was by tapping the end of his parasol on the ground or floor. This suit is brought to recover damages resulting from the fright. The court directed a verdict for the defendant.

GRANT, C. J. We think the court properly held that no violence was offered or threatened, and therefore there was no assault.[24]

[24] Only so much of the case is given as relates to the one point.

In the omitted portion of the opinion, the court considers the question whether fright unaccompanied by physical injury is recognized by the law as a basis for damages. The answer was in the negative.

Compare the query of Chief Justice Jervis, in Read v. Coker (1853) 13 C. B. 850, 854: "If a man comes into a room, and lays his cane on the table, and says to another, 'If you don't go out I will knock you on the head' would not that be an assault?" And consider the answer of Sergeant Byles: "Clearly not: it is a mere threat unaccompanied by any gesture or action towards carrying it into effect."

In Read v. Coker, the plaintiff was in the defendant's workshop and refused to leave when ordered by the defendant; thereupon the defendant and his servants surrounded the plaintiff, and tucking up their sleeves and aprons threatened to break his neck if he did not go out; "fearing that the men would strike him if he did not do so, the plaintiff went out."

Compare, also, Plonty v. Murphy (1901) 82 Minn. 268, 84 N. W. 1005 (The defendant, a man 78 years of age, was the owner of tenements near the house in which the plaintiff, a woman of 38 years, resided with her husband and children. A pailful of banana peelings and other refuse had been emptied in the yard of one of these tenements. Defendant went to the plaintiff's house, unceremoniously entered the kitchen, where she was at work alone, demanded that her boy, aged 5 years, remove this refuse, and notified her that if he again found the boy in that yard he would "thrash" him. The plaintiff informed him that the boy would do as requested. Defendant remained in the house about 10 minutes, talking in an excited and angry manner, shook his fist at plaintiff

MITCHELL v. MITCHELL.

(Supreme Court of Minnesota, 1890. 45 Minn. 50, 47 N. W. 308.)

GILFILLAN, C. J. But the general allegation that they "assaulted her" standing alone would be sufficient. Whether they assaulted her is, so far as pleading is concerned, a conclusion of fact, or statement of an ultimate fact, although it may have to be arrived at by applying rules of law to minor or proved facts or details of fact, just as, for the purposes of pleading, title to real or personal property is ordinarily a pleadable fact, although to establish it may require the application of rules of law to the proved facts. The general allegation of an assault may, of course, be qualified by a specification of the acts which it is claimed constituted the assault. One of the particulars specified is that defendants shook their fists in plaintiff's face, accompanied with a threat to strike her. It is to be understood from this that they shook their fists at her face in close proximity to it; within reach of it. That would constitute an assault.[25]

when within striking distance, raised his hand as if he would strike her, and she testified that she was afraid he would strike).

And see State v. Daniel (1904) 136 N. C. 571, 48 S. E. 544, 103 Am. St. Rep. 970: P., a colored man in a southern State, on a Sunday morning went to feed his hogs. As P. was leaving the pig pen, D., a white man, who with another was near by, called to P. bidding him come. P., instead of returning, said that he was in a hurry to go home and dress for church. Thereupon D. responded: "You come here." P. replied, "Yes, boss-man, of course if you order me to come, I'll come," and taking off his hat went to D., who cursed him and said, "Why can't you come when I call you." The trial court instructed the jury that if D. cursed P. and ordered him to come to him, and P. obeyed through fear, then D. was guilty of an assault. The defendant excepted.

[25] "It is not necessary to aver in a complaint to recover damages for an alleged assault and battery, that the beating was unlawful and wrongful." Carey v. Sheets (1877) 60 Ind. 17.

An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another. When it is charged that the defendant assaulted and beat the plaintiff, the legal implication is that the act was unlawful, and the burden of justifying his conduct is cast upon the defendant. Benson v. Bacon (1884) 99 Ind. 156; 3 Works Pr. 28.

Compare Singer Sewing Machine Co. v. Phipps (1911) 49 Ind. App. 116, 94 N. E. 793, where a complaint alleging that the defendant "did wrongfully and unlawfully make an assault on this plaintiff" was met with the objection on the part of the defendant that it stated a mere conclusion.

It has been the practice from an early day to plead an assault and a battery together, and to permit a recovery on whichever cause is proven. "For every battery includes an assault; therefore, if the assault be ill laid, and the battery good, it is sufficient." Jacob's Law Dictionary (1809) "Assault," 135.

See the declaration in Trespass for Assault and Battery in Whittier's Cases in Common Law Pl. 25. Compare the Statement of Claim for an assault in Cunningham & Mattinson's Precedents under the Judicature Acts (1884) 131: "The plaintiff has suffered damage from personal injuries to the plaintiff, caused by the defendant assaulting him on the 1st of May, 1882, and beating him about the head and shoulders." And see the form of Petition recommended by the Ohio Code Commissioners in 1853 for Assault and Battery: "Plaintiff says that on * * * at * * * the defendant assaulted and beat the plaintiff by which he says he is damaged to the amount of * * * dollars, for which he asks judgment."

(B) In Battery

PURSELL v. HORN et ux.

(Court of Queen's Bench, 1838. 8 Adol. & E. 602, 112 Reprint, 966.)

Trespass. The declaration stated that the defendant Elizabeth assaulted the plaintiff, "and then cast and threw divers large quantities of boiling water on the plaintiff, and then also wetted, damaged, and spoiled the clothes and wearing apparel, to wit, one great coat, which the plaintiff then wore:" by means of which he was hurt, scalded, etc., and forced to expend money in endeavoring to cure himself. Plea of not guilty, with a verdict for the plaintiff for one farthing above his costs and 40s. costs.

On argument whether the case was within the statute of 22 & 23 Car. II., c. 9, which deprived of costs "in all actions of trespass, assault and battery, and other personal actions," where the damages were found below 40s. and the judge does not certify "that an assault and battery was sufficiently proved."

Waddington, for the defendant, obtained a rule nisi for amending the postea by substituting one farthing costs for 40s.

Humfrey, for the plaintiff, argued that this was not a case within the statute, because no battery was alleged. It is laid down in Com. Dig. Battery (C), that, "If a man strike at another, and do not touch him, it is no battery, but it will be an assault." So, "If he throws stones, water, or other liquor upon him." (Lord Denman, C. J. Is it no battery, if a man throws a stone at another and breaks his arm? The notion must have been that battery could not be committed except with something that the party held in his hand at the time; but that cannot be maintained.)

Waddington, contra, argued that "the words 'upon him,' in Com. Dig. Battery (C), must have been used by mistake."

LORD DENMAN, C. J. I think that a battery does not necessarily mean something done cominus. But it must imply personal violence. * * *

LITTLEDALE, J. The argument for the plaintiff on the first point would go the length of saying that to shoot at a person and hit him would be no battery. PATTESON and WILLIAMS, JJ., concurred.

Rule absolute.[26]

[26] The statement of facts has been abridged, and only so much of the case is given as relates to the one point.

Compare Smith v. Newsam (1674) 3 Keble, 283, given ante, page 47, "Assault."

SCOTT, an Infant, by His Next Friend, v. SHEPHERD, an Infant, by His Guardian.

(Court of Common Pleas, 1773. 3 Wils. 403, 95 Reprint, 1124.)

Trespass and assault for throwing a lighted squib against the plaintiff and striking him therewith on the face and so burning one of his eyes that he lost the sight of it.

The defendant by his guardian pleaded not guilty, whereupon issue being joined, this cause came on to be tried at the last Summer Assizes for the county of Somerset, before Mr. Justice Nares; when it appeared by the plaintiff's evidence that in the evening of the 28th day of October 1770, at Milborne Port in the said county, it being the day the fair was held there, the defendant threw a lighted serpent, being a large squib, consisting of gunpowder and other combustible materials, 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 end and on both sides, when a large concourse of people were then assembled; and that the said lighted serpent or squib, so thrown by the defendant, fell upon the standing there of one William Yates, who was then exposing to sale gingerbread, cakes, pies and other pastry wares upon his said standing; that one James Willis instantly, and to prevent injury to himself and to the said wares of the said William Yates, took the said lighted serpent or squib from off the said standing, and then threw it across the said market-house, when it fell upon another standing there, of one James Ryall, on which he was also exposing the same sort of wares to sale; that the said James Ryall instantly, and to save himself and his goods from being injured, took up the said lighted serpent or squib from off the said standing, and then threw it to another part of the said market-house, and in so throwing it struck the plaintiff then in the said market-house in the face therewith, and the said lighted serpent or squib so striking against the plaintiff's face, and the combustible matter therein then bursting put out one of the plaintiff's eyes.

Upon this evidence the jury found a verdict for the plaintiff with £100. damages, subject to the opinion of this Court; whether upon these facts this action is maintainable against the defendant.

NARES, J. * * * I am of the opinion that this action of trespass vi et armis doth well lie against the defendant. * * * It is objected that the plaintiff's eye was not put out by the immediate act of the defendant but by the immediate act of James Ryall, and therefore this action will not lie against the defendant, but would well have laid against Ryall.

I answer, that the act of throwing the squib into the market place was of a mischievous nature, and bespeaks a bad intention, and whether the plaintiff's eye was put out mediately or immediately thereby, the defendant, who first threw the squib, is answerable in

this action: but supposing the defendant had no bad or mischievous intention when he threw the squib, yet as the injury done was not inevitable, this action well lies against him; for the malus animus of a defendant is not necessary to be alleged, proved or taken into consideration in this action; "but in felony it shall be considered, as where a man shoots [with a bow] arrows at butts and kills a man it is not felony, and it should be construed that he had no intent to kill him; and so of a tyler upon a house who with a tyle kills a man unknowingly, it is not felony: but where a man shoots at butts, and wounds a man, although that it be against his will, he shall be said to be a trespasser. 21 Hen. 7, 28 a." If the injury done be not inevitable, the person who doth it, or is the immediate cause thereof, even by accident, misfortune, and against his will is answerable in this action of trespass vi et armis; so is Stran. 596, Underwood v. Hewson, Hob. 134, Weaver v. Ward, Sir Thomas Jones, 205, Dickenson v. Watson, 6 Ed. 4, 7, 8. Sir Thomas Raym. 422. 4 Mod. 404, 5. If the act in the first instance be unlawful, trespass will lie; but if the act is prima facie lawful, and the prejudice to another is not immediate, but consequential, it must be an action upon the case, and this is the distinction laid down by Lord Chief Justice Raymond in Reynolds v. Clarke, 1 Stran. 635, 2 Ld. Raym. 1399, S. C. * * *

BLACKSTONE, J. I am of a different opinion. I take it here is no verdict; the declaration and special case are stated for the opinion of the Court, whether the facts in the case amount to an assault and battery vi et armis by the defendant upon the plaintiff?

The declaration alleges that the defendant threw, cast and tossed a lighted squib against the plaintiff, and struck him on the face therewith, whereby he lost his eye; this is laid as an immediate injury done by the defendant to the plaintiff, which is the gist of this action of assault and battery; for if the injury received from the act of the defendant was not immediate, but a consequence, trespass vi et armis will not lie, but it must be an action on the case; and my Lord Raymond, in the case of Reynolds v. Clarke, 2 Ld. Raym. 1402, puts the difference where he says, "The distinction in law is, where the immediate act itself occasions a prejudice or is an injury to the plaintiff's person, house, land, etc., and where the act itself is not an injury, but a consequence from that act is prejudicial to the plaintiff's person, house, land, etc. In the first case trespass vi et armis will lie; in the last it will not, but the plaintiff's proper remedy is by action on the case." And this distinction runs through all the cases which have been cited.

The lawfulness or unlawfulness of an act is not the criterion between these two actions, for a man may become an immediate trespasser vi et armis by doing a lawful act; as if a man doing an act lawful in itself, hurts another by accident, misfortune, and against the will of the actor, yet he shall be answerable in trespass vi et armis for immediate injury done; unless the injury was inevitable,

27 Hen. 7, 28a. 1 Stran. 596, and many other cases in the books to this purpose. Trespass on the case will lie for doing an unlawful act, if the damage sustained thereby be not immediate but consequential, 11 Mod. 108. The first act in the present case (I allow) was unlawful; but the squib by the first act did not strike the plaintiff, the first act was complete when it lay on Yates' stall, afterwards Willis a bystander threw it across the market-house, it fell on the stall of another man who threw it to another part of the market-house and struck the plaintiff therewith and put out his eye. Willis who took up the squib and threw it across the market-house is not answerable in trespass vi et armis, for he did that act to prevent injury to himself, and did no harm to any body. Willis and Yates gave the squib two new directions, acting as free agents, not by the instigation, command, request, or as servants of the defendant, but in defence of their persons, so the injury which happened to the plaintiff was the consequence of, and not done immediately by the first act of the defendant.

It is said the first act is not complete until the explosion of the squib; I admit the squib had no power to do mischief until the explosion; but it doth not follow from thence that the first act was not complete, at the instant the squib received a new direction from a second act. Suppose several persons are playing at foot-ball, which is tossed by many, and at last breaks windows; trespass vi et armis will only lie against the man who struck it against the windows. The throwing the squib against Yates' stall was the only act the defendant did. * * *

GOULD, J. I differ with my Brother BLACKSTONE, but with the utmost respect to his sentiments. I think that neither Willis nor Ryall are liable to an action in this case; if that be so, and this action will not lie against the defendant Shepherd who did the first act, which was unlawful, the plaintiff who has been greatly injured will be without remedy. The damage done did instantly arise by and from the act of the defendant: Willis and Ryall in defence of themselves and their goods, being in a state of fear, without power of recollection, instantly tossed and threw the squib away from themselves, what they did was inevitable, as it seemeth to me. Suppose a burning squib thrown into a coach passing along the street, and one of the persons therein throws it out, and the like misfortune as this happens; surely the person throwing the squib out of the coach might justify or excuse himself by pleading; though this is not so strong a case I think as the present. The defendant is the only wrong doer; his act put Willis and Ryall under an inevitable necessity of acting as they did, so neither of them is liable to an action: upon the whole I am of opinion judgment must be for the plaintiff.

LORD CHIEF JUSTICE DE GREY. The distinction between actions of trespass on the case, and trespass vi et armis should be most carefully and precisely observed, otherwise we shall introduce much con-

fusion and uncertainty; this is that kind of injury where the distinction is very nice. It strikes me thus; trespass vi et armis lies against the person from whom an injury is received by force. So the question is, whether this personal injury was received by the plaintiff by force from the defendant? Or whether the injury was received from, or resulting from a new force of another?

The real or true question (I think) is not whether the first act of throwing the squib by the defendant was lawful or not; for I see, that in doing a lawful act, trespass vi et armis will, in some cases, lie against the actor; and yet there are cases where trespass vi et armis will not lie against a person for doing an unlawful act. * * *

The throwing the squib by the defendant was an unlawful act at common law, the squib had a natural power and tendency to do mischief indiscriminately; but what mischief, or where it would fall, none could know; the fault egreditur è persona of him who threw the squib, it would naturally produce a defence to be made by every person in danger of being hurt thereby, and no line can be drawn as to the mischief likely to happen to any person in such danger; the two persons Willis and Ryall, did not act with or in combination with the defendant, and their removal of the squib for fear of danger to themselves seems to me to be a continuation of the first act of the defendant until the explosion of the squib; no man contracts guilt in defending himself; the second and third man were not guilty of any trespass, but all the injury was done by the first act of the defendant; here I lay the stress, and here I differ with my brother Blackstone; for I conceive all the facts of throwing the squib must be considered as one single act, namely the act of the defendant; the same as if it had been a cracker made with gunpowder which had bounded and rebounded again and again before it struck out the plaintiff's eye. I am of opinion that judgment must be for the plaintiff, and the postea was accordingly delivered to him, by the opinion of three judges against one.[27]

[27] Part of the opinion is omitted. The statement of the plaintiff's pleading is abridged.

This case is fully reported, also, in 2 Wm. Bl. 892, whose report is followed in 1 Smith L. C. (8th Ed.) 737. Compare Blackstone's statement of the principle in 3 Bl. Com. 123: "It is a settled distinction that where an act is done which is in itself an immediate injury to another's person or property, there the remedy is usually an action of trespass vi et armis; but where there is no act done, but only a culpable omission, or where the act is not immediately injurious, but only by consequence and collaterally; there no action of trespass vi et armis will lie, but an action on the special case, for the damages consequent on such omission or act."

See Holmes' Common Law, 104: "In the latter case [Scott v. Shepherd], it is pretty clear that the majority of the court considered that to repel personal danger by instantaneously tossing away a squib thrown by another upon one's stall was not a trespass, although a new motion was thereby imparted to the squib, and the plaintiff's eye was put out in consequence."

See, also, Terry's Leading Principles of Anglo-American Law, 75: "If one person wrongfully causes another to make one of those bodily movements which

HOPPER et ux. v. REEVE.

(Court of Common Pleas, 1817. 7 Taunt. 698, 18 R. R. 629, 129 Reprint, 278.)

The plaintiff declared that the defendant with force and arms drove a gig against a carriage in which the plaintiff's wife was riding, and overturned it, and greatly hurt the plaintiff's wife.

After verdict for the plaintiff Pell, Serjt., moved in arrest of judgment, upon the ground that this ought not to have been an action of trespass, but an action on the case, for that the declaration did not state that the carriage in which the plaintiff's wife was riding was the carriage of the plaintiff, nor aver any injury to the carriage, but was solely for an injury to the wife. Though that injury received by the plaintiff's wife arose out of an act of the defendant, yet it was in consequence of the defendant having run against the carriage of some other person, for such it must be intended to be, not being stated to be the carriage of the plaintiff, and no act could be more consequential in its nature, than this injury to the plaintiff's wife. The case of Scott v. Shepherd, 2 W. Bl. 892, 3 Wils. 403, went beyond the law, but not so far as this. The Court granted a rule nisi.

GIBBS, Ch. J. I do not think I could point out any defect in the legal argument of either of the counsel, but the facts are not brought within the law stated by the defendant's counsel; for I am of opinion that he who throws over a chair or a carriage in which another person is sitting, commits a direct trespass against the person of him who is sitting in that carriage or chair, and that the action of trespass may be well maintained for it.

Rule discharged.[28]

we have called instinctive, whether or not the movement is reckoned as an act of the doer of it, it is imputed as an act of the person who so caused it. This was decided in the famous case of Scott v. Shepherd, which has been followed in later cases."

[28] Accord: Dodwell v. Burford (1669) 1 Mod. 24, 86 Reprint, 703 (In trespass for a battery, P. declared that D. struck the horse whereon P. rode, so that the horse ran away with her, whereby she was thrown down and another horse ran over her); Marentille v. Oliver (1808) 1 Penn. (2 N. J. Law) 358, 359 (D. struck with a club the horse before a carriage in which P. was sitting); Smith v. Kahn (1913) 141 N. Y. Supp. 520 (D. pushed down a window onto P.'s hand).

Compare:

Bull v. Colton (1856) 22 Barb. (N. Y.) 94: D. with a hoe beat P.'s horse, hitched to a buggy in which P. was sitting. The action was before a justice of the peace, who had jurisdiction in trespass to property, but no jurisdiction in trespass for an assault and battery upon the person.

Kirland v. State (1873) 43 Ind. 146, 13 Am. Rep. 386: The court had instructed the jury that if the defendant beat the horses of the prosecuting witness while he was driving his team in the field, in the act of gathering corn, the defendant was guilty of an assault and battery. Held, error. "In the case under consideration," said Buskirk, J., after an elaborate review of the authorities, "the court ignores all these things and instructs the jury to convict on proof alone of the striking of the horses of the prosecuting witness. It is not even necessary, according to this charge, that the prosecuting witness should have been in the wagon or holding the lines, or connected with or attached to the horses in any way. That Bein was driving his team and gathering his

STATE v. MONROE.

(Supreme Court of North Carolina, 1897. 121 N. C. 677, 28 S. E. 547; 43 L. R. A. 861, 61 Am. St. Rep. 686.)

FAIRCLOTH, C. J. Will Horn administered to Ernest Barrett a dose of croton oil, and the oil had an injurious effect on Barrett. Defendant admits he sold the oil to Horn, and at his request dropped it into a piece of candy. * * * Defendant is indicted for an assault on Barrett. If guilty, he must be so as a principal, and not as an accessory. His guilt, then, depends upon whether he knew or had reason to believe that the dose was intended for Barrett or some other person as a trick, and not for medicinal purposes.

The whole evidence was submitted to a jury who rendered a verdict of guilty. His honor instructed the jury that when the defendant sold the oil, if he "knew or had reason to believe, and did believe that it was intended for Barrett or some other person by way of a trick or joke, and not for a medicinal purpose, the defendant would be guilty of assault and battery."

He also charged that it was not necessary that it should be a poisonous or deadly dose; that it was sufficient if it was an unusual dose, likely to produce serious injury. To this instruction we see no objection. * * *[29]

DYK v. DE YOUNG.

(Appellate Court of Illinois, First District, 1889. 35 Ill. App. 138.)

GRAY, P. J. * * * The husband of the appellee was to pay the appellant $5. The appellant wrote a receipt which (whether against the will of the appellant or not was disputed) the husband took into his hands. The husband gave it to the appellee and she said something about it (but what, is also disputed), and the appellant then attempted to take it from her by pulling it out of her grasp. In this attempt the receipt was torn, but no injury came to the appellee from the force thus used. * * *

The appellant complained of the refusal of this instruction:

"The jury are further instructed that if they believe from the evidence that the plaintiff, with force, and without the consent of the defendant, obtained the possession of the receipt in question, with the intention of keeping the same without paying the money described in the receipt for the purpose of fraudulently using the same at some future time, then the defendant had a right to obtain the same, using no more force or violence than was necessary to obtain the same."

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corn does not necessarily so connect him with the horses that the touching of the horses would be an assault and battery on him. He may have been, as is frequently done, driving his horses from one pile of corn to another, by words of command, without being in the wagon or having hold of the lines."

[29] Part of the opinion is omitted.

There was no evidence that she by force obtained the possession of the receipt. If he was entitled to it, and she withheld it, a request must, in such a case, precede the exercise of force. Tullay v. Reed, 1 C. & P. 6, and cases cited in 2 Ch. Pl. 698 et seq., 16th Am. from 7th Lond. Ed.

The mere snatching of the paper, or a part of it, from her, was a technical assault, 1 Selw. N. P. 27; Respublica v. De Longchamps, 1 Dallas, 114, 1 L. Ed. 59; State v. Davis, 1 Hill (S. C.) 46, and though no injury followed, would entitle the appellee to some damages. There is no error and the judgment must be affirmed.

Judgment affirmed.[30]

INNES v. WYLIE et al.

(At Nisi Prius, 1844. 1 Car. & Kir. 257, 70 R. R. 786.)

Assault. The declaration stated that the defendants, on the 30th day of November, 1843,—

"assaulted the plaintiff, he then being a member of a certain society of persons lawfully and voluntarily associated together and called and known by the name of 'The Caledonian Society of London,' he the plaintiff then being about to enter into a certain room situated in and forming part of a certain hotel or public-house called and known by the name of 'Radley's Hotel,' and situated in the city of London, for the purpose of attending at, and partaking of, a public general meeting and dinner of the members of the said society which was then about to be held and take place in the said room, and into which said room the said plaintiff as such member of the said society as aforesaid then was lawfully entitled and then had a legal right to enter, for the purpose of attending at, and partaking of, the said public general meeting and dinner of the members of the said society, and which said public general meeting and dinner the said plaintiff, as such member of the said society as aforesaid, then was lawfully entitled, and then had a legal right to attend and partake of, and then pushed and shoved the plaintiff from the said room, and hindered and prevented the plaintiff from entering the said room, and from attending at, and partaking of, the said public general meeting and dinner of the members of the said society, whereby the plaintiff was totally hindered, prevented, and excluded from attending at, and partaking of, the said public general meeting and dinner of the members of the said society, and from enjoying and participating in the advantages, benefits, and privileges of the said society at the said public general meeting and dinner, and other wrongs to the plaintiff then did, against the peace," etc.

The defendant pleaded, first, "not guilty," and secondly that the plaintiff had been expelled from the society before the said meeting. Replication de injuria.

Lord Denman, Ch. J. (in summing up). * * * The society was, in my opinion, wrong in removing him without giving him dis-

[30] Part of the opinion is omitted.

Compare the remark of McKean, C. J., in Respublica v. De Longchamps (1784) 1 Dallas, 111, 114 (1 L. Ed. 59): "As to the assault [the defendant had struck a cane in the hand of the complainant] this is, perhaps, one of the kind in which the insult is more to be considered than the actual damage; for, though no great bodily pain is suffered by a blow on the palm of the hand, or the skirt of the coat, yet these are clearly within the legal definition of assault and battery, and among gentlemen too often induce duelling and terminate in murder."

tinct and positive notice that he was to come and answer the charge that was made against him, and I hold that he should have been told what the charge was, and called on to answer it, and told that it was meant to remove him if he did not make his defence. No proceeding in the nature of a judicial proceeding can be valid unless the party charged is told that he is so charged, is called on to answer the charge, and is warned of the consequences of refusing to do so. As no such notice was given here, I think that the removal was altogether a void act, and I am therefore of opinion that the plaintiff is still a member of the society. Being so, it appears that he went to one of its meetings on the 30th of November, 1843, and was then prevented, by a policeman acting under the orders of the defendants, from entering the room. You will say, whether, on the evidence, you think that the policeman committed an assault on the plaintiff, or was merely passive. If the policeman was entirely passive like a door or a wall put to prevent the plaintiff from entering the room, and simply obstructing the entrance of the plaintiff, no assault has been committed on the plaintiff, and your verdict will be for the defendant. The question is, did the policeman take any active measures to prevent the plaintiff from entering the room, or did he stand in the door way passive, and not move at all.

Verdict for the plaintiff. Damages, 40s.[31]

THE LORD DERBY.

(United States Circuit Court, E. D. Louisiana, 1883. 17 Fed. 265.)

Admiralty Appeal.

The libelant, a pilot, was taken on board the steamship at the mouth of the Mississippi, and while on the voyage up the river to New Orleans he was very seriously bitten by a dog, which had been brought from Europe for sale in this country, and which was kept in the cabin, chained under the table. This suit was brought against the vessel in rem for damages suffered thereby by the libelant.

PARDEE, J. The questions presented in this case are: First. Is the proceeding properly brought against the ship?[32] * * *

1. It is contended that the case, as presented in the libel, shows a case of assault and battery, which, under the sixteenth admiralty rule, "shall be in personam only." The ingenuity which suggested the point has not failed to supply the court with an ingenious argument to support it. This definition is given of assault and battery, as taken from 3 East (Leame v. Bray) 593:

"Whenever one willfully or negligently puts in motion a force, the direct result of which is an injury, it constitutes an assault and battery, and the action brought should be trespass vi et armis."

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[31] Part of the opinion is omitted.

[32] Only so much of the case is given as relates to the one point.

An examination of the case shows that the brief goes further than the authority cited. The question before the court was whether the action was properly brought in trespass, and all the judges agreed that where an injury results directly from force trespass lies, but nothing is said of assault and battery. The other cases cited (Gibbons v. Pepper, 1 Ld. Raym. 39; Blackman v. Simmons, 3 Car. & P. 138) are also cases of trespass. An assault and battery is where one intentionally inflicts unlawful violence upon another, and if there is a case in the books which goes further than this, it is an unsafe case to follow. That there may be such gross negligence that an intent to injure may be inferred therefrom, may be conceded, and perhaps Blackman v. Simmons, supra, shows such gross negligence; but the case made by the libel does not show such negligence, nor does it bring such negligence home to any particular individual, as would be necessary in a case of assault and battery.

In my opinion the case made in the libel is very far from a case of "assaulting and beating," within the sixteenth admiralty rule. And the case, as disclosed by the evidence, seems to me to be a clear case of liability on the part of the ship. The dog inflicting the injuries on libelant was brought over on the ship, with the consent of the masters and owners, to be disposed of in this port. It was part of the cargo. The libelant was lawfully on board as pilot, and entitled to be carried safely. An injury to him from carelessness, or negligence in handling or caring for the dog, would entitle him to remuneration from the ship the same as if his injuries had resulted from goods falling on him, or from defective spars or rigging. * * *

A decree will be entered for the libelant.

HOLMES et ux. v. MATHER.

(Court of Exchequer, 1875. L. R. 10 Exch. 261.)

The first count of the declaration alleged that the female plaintiff was passing along a highway, and the defendant so negligently drove a carriage and horses in the highway that they ran against her and threw her down, whereby she and the male plaintiff were damnified. The second count alleged that the defendant drove a carriage with great force and violence against the female plaintiff and wounded her, whereby, etc. Plea, not guilty, and issue thereon.

At the trial the following facts were proved: In July, 1874, the defendant kept two horses at a livery stable in North Shields, and wishing to try them for the first time in double harness, had them harnessed together in his carriage. At his request a groom drove, the defendant sitting on the box beside him. After driving for a short time, the horses, being startled by a dog which suddenly ran out and barked at them, ran away and became so unmanageable that the groom could not stop them, though he could to some extent guide

them. The groom begged the defendant to leave the management to him, and the defendant accordingly did not interfere. The groom succeeded in turning the horses safely around several corners, and at last guided them into Spring Terrace, at the end of which and at right angles runs Albion Street, a shop in Albion Street being opposite the end of Spring Terrace. When they arrived at the end of Spring Terrace the horses made a sudden swerve to the right, and the groom then pulled them more to the right, thinking that was the best course, and tried to guide them safely round the corner. He was unable to accomplish this and the horses were going so fast that the carriage was dashed against the palisades in front of the shop; one of the horses fell, and at the same time the female plaintiff, who was on the pavement near the shop, was knocked down by the horses and severely injured. The jury stopped the case before the close of the evidence offered on the defendant's part, and said that in their opinion there was no negligence in anyone. The plaintiff's counsel contended that since the groom had given the horses the direction which guided them against the female plaintiff, that was a trespass which entitled the plaintiffs to a verdict on the second count.

The verdict was entered for the defendant, leave being reserved to the plaintiffs to move to enter it for them for £50. on the second count, the Court to be at liberty to draw inferences of fact, and to make any amendment in the pleadings necessary to enable the defendant to raise any defence that ought to be raised.

Herschell, Q. C., having obtained a rule nisi to enter the verdict for the plaintiffs for £50., pursuant to leave reserved, on the ground that, upon the facts proved, the plaintiffs were entitled to a verdict on the trespass count,

C. Russell, Q. C., and Crompton, for the defendant, shewed cause.

BRAMWELL, B. I am inclined to think, upon the authorities, that the defendant is in the same situation as the man driving; but, without deciding that question, I assume, for the purposes of the opinion I am about to express, that he is as much liable as if he had been driving.

Now, what do we find to be the facts? The driver is absolutely free from all blame in the matter; not only does he not do anything wrong, but he endeavours to do what is best to be done under the circumstances. The misfortune happens through the horses being so startled by the barking of a dog that they run away with the groom and the defendant who is sitting beside him. Now, if the plaintiff under such circumstances can bring an action, I really cannot see why she could not bring an action because a splash of mud, in the ordinary course of driving, was thown upon her dress or got into her eye and so injured it. It seems manifest that, under such circumstances, she could not maintain an action. For the convenience of mankind in carrying on the affairs of life, people as they go along

roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid. I think the present action not to be maintainable.

That is the general view of the case. Now I will put it a little more specifically, and address myself to the argument of Mr. Herschell. Here, he says, if the driver had done nothing, there is no reason to suppose this mischief would have happened to the woman; but he did give the horses a pull, or inclination, in the direction of the plaintiff—he drove them there. It is true that he endeavoured to drive them further away from the place by getting them to turn to the right, but he did not succeed in doing that. The argument, therefore, is, if he had not given that impulse or direction to them, they would not have come where the plaintiff was. Now, it seems to me, that argument is not tenable, and I think one can deal with it in this way. Here, as in almost all cases, you must look at the immediate act that did the mischief, at what the driver was doing before the mischief happened, and not to what he was doing next before what he was then doing. If you looked to the last act but one, you might as well argue that if the driver had not started on that morning, or had not turned down that particular street, this mischief would not have happened.

I think the proper answer is, You cannot complain of me unless I was immediately doing the act which did the mischief to you. Now the driver was not doing that. What I take to be the case is this: he did not guide the horses upon the plaintiff; he guided them away from her, in another direction; but they ran away with him, upon her, in spite of his efforts to take them away from where she was. It is not the case where a person has to make a choice of two evils, and singles the plaintiff out, and drives to the spot where she is standing. That is not the case at all. The driver was endeavoring to guide them indeed, but he was taken there in spite of himself. I think the observation made by my Brother POLLOCK during the argument is irresistible, that if Mr. Herschell's contention is right, it would come to this: if I am being run away with, and sit quiet and let the horses run wherever they think fit, clearly I am not liable, because it is they, and not I, who guide them; but if I unfortunately do my best to avoid injury to myself and other persons, then, it may be said that it is my act of guiding them that brings them to the place where the accident happens. Surely it is impossible.

As to the cases cited, most of them are really decisions on the form of action, whether case or trespass. The result of them is this, and it is intelligible enough: if the act that does an injury is an act of direct force vi et armis, trespass is the proper remedy (if there is any remedy) where the act is wrongful, either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper form of action if it were wrongful. That is the

effect of the decisions. In Sharrod v. London and North Western Ry. Co., 4 Ex. 580, the master was not present. In M'Laughlin v. Pryor, 4 Man. & G. 48, the defendant was present, and was supposed to be taking part in the control of the animals. In Leame v. Bray, 3 East, 593, 599, there was an act of direct force vi et armis, and there was negligence. I think, therefore, that our judgment should be for the defendant.

I think I could distinguish the case cited from the Year Book, but I will only say that there the defendant let out animals, liable to stray, whether frightened or not, in a place not inclosed, and without anybody to keep them in bounds.[33]

CLEASBY, B. I would only add a word as to a point on which my Brother BRAMWELL has not given judgment, and that is this. This is not a case where the act that is done must be justified, as where a man does a particular thing to avoid something else, but it is a case where it must be shewn that it was the act of the defendant himself. I sum up all in these words: in my opinion the horses were not driven there by the defendant's servant, but they went there in spite of him, so far as he directed them at all.

Rule discharged.

[33] The "case cited from the Year Book" is the case in Y. B. 21 Hen. VIII, with the comment upon it by Grose, J., in Leame v. Bray (1803) 3 East, 593, 599. See infra, "Inevitable Accident."

The arguments of counsel are omitted.

Accord: Goodman v. Taylor (1832) 5 Car. & P. 410: Trespass, because P.'s horse had been hit by D.'s pony and chaise. Plea, not guilty. The evidence showed that P.'s wife stood by the head of the pony holding it by the rein when a Punch and Judy show coming by frightened the pony so that he ran away, breaking from D.'s wife notwithstanding her best efforts to hold him. Chief Justice Denman was inclined to consider this "as an inevitable accident." See infra, "The Different Forms of Justification or Excuse in Trespass."

Steudle v. Rentchler (1872) 64 Ill. 161: D.'s horses had run over P. The evidence showed that a boy had hit one of the horses with some missile. He began to kick and frightened the other horse. The driver jumped from the vehicle and seized them by the head. They overpowered him and ran away.

Compare Vincent v. Stinehour (1835) 7 Vt. 62, 64 (29 Am. Dec. 145), where Williams, C. J., remarks: "The principle of law, which is laid down by all the writers upon this subject, and which is gathered from and confirmed by the whole series of reported cases, is that no one can be made responsible, in the action of trespass for consequences, where he could not have prevented those consequences by prudence and care. Thus it has been laid down, that if a horse, upon a sudden surprise, run away with his rider, and runs against a man and hurts him, this is no battery. Where a person, in doing an act which it is his duty to perform, hurts another, he is not guilty of battery. A man falling out of a window, without any imprudence, injures another—there is no trespass. A soldier, in exercise, hurts his companion—no recovery can be had against him. In the case of Gibbons v. Pepper (1695) 4 Mod. 405, it was distinctly decided, that if a horse runs away with his rider, against his will, and he could not have avoided it, and runs against another, it is no battery in the rider, and he can defend under the general issue. In the case of Wakeman v. Robinson (1823) 1 Bing. 213, in trespass for driving against plaintiff's horse, and injuring him with shafts of a gig, it was considered a good defence, that the horse was frightened by the noisy and rapid approach of a butcher's cart, and became ungovernable, so that the injury was occasioned by unavoidable accident."

SULLIVAN v. DUNHAM et al.

(Court of Appeals of New York, 1900. 161 N. Y. 290, 55 N. E. 923, 47 L. R. A. 715, 76 Am. St. Rep. 274.)

Action by the administratrix of Annie E. Harten against Carroll Dunham and others. From a judgment of the appellate division (36 App. Div. 639, 56 N. Y. Supp. 1117) affirming a judgment in plaintiff's favor, defendants appeal.

The plaintiff's intestate, a young lady 19 years of age, while traveling on a public highway near the village of Irvington, was killed by a blow from a section of a tree which fell upon her after it had been hurled more than 400 feet by a blast. The defendants Dinkel & Jewell, as co-partners, had been employed by the defendant Dunham, the owner of a tract of rough land, to blast out certain trees standing upon it. On the south side of the tract, about 300 feet from the nearest point of the highway in question, there was a large living elm tree, from 60 to 70 feet in height, between which and the highway was some woodland. Dynamite was placed under the roots of this tree and exploded, shattering it and throwing a section of the stump over the intervening forest, a distance of 412 feet, to a point in the highway where the plaintiff's intestate was traveling. She was struck by it with such force as to cause her death within a few hours.

This action was brought to recover damages for the benefit of the next of kin on account of the death of the plaintiff's intestate, caused, as alleged, by the wrongful act of the defendants. Notwithstanding their objection and exception, the case was submitted to the jury on the theory that it was not essential for the plaintiff to establish negligence in order to make out a cause of action. The judgment rendered in favor of the plaintiff upon the first trial was reversed by the appellate division on account of erroneous rulings (10 App. Div. 438, 41 N. Y. Supp. 1083), but the judgment rendered in her favor upon the second trial was unanimously affirmed; and the defendants, having first obtained leave, now come here.

VANN, J. The main question presented by this appeal is whether one who, for a lawful purpose, and without negligence or want of skill, explodes a blast upon his own land, and thereby causes a piece of wood to fall upon a person lawfully traveling in a public highway, is liable for the injury thus inflicted.

The statute authorizes the personal representative of a decedent to "maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued." Code Civ. Proc. § 1902. It covers any action of trespass upon the person which the deceased could have maintained if she had

survived the accident. Stated in another form, therefore, the question before us is whether the defendants are liable as trespassers.

This is not a new question, for it has been considered, directly or indirectly, so many times by this court that a reference to the earlier authorities is unnecessary. In the leading case upon the subject the defendant, in order to dig a canal authorized by its charter, necessarily blasted out rocks from its own land with gunpowder, and thus threw fragments against the plaintiff's house, which stood upon the adjoining premises. Although there was no proof of negligence or want of skill, the defendant was held liable for the injury sustained. All the judges concurred in the opinion of Gardiner, J., who said: "The defendants had the right to dig the canal; the plaintiff, the right to the undisturbed possession of his property. If these rights conflict, the former must yield to the latter, as the more important of the two, since, upon grounds of public policy, it is better that one man should surrender a particular use of his land than that another should be deprived of the beneficial use of his property altogether, which might be the consequence if the privilege of the former should be wholly unrestricted. The case before us illustrates this principle; for if the defendants, in excavating their canal, in itself a lawful use of their land, could, in the manner mentioned by the witnesses, demolish the stoop of the plaintiff with impunity, they might, for the same purpose, on the exercise of reasonable care, demolish his house, and thus deprive him of all use of his property. The use of land by the proprietor is not, therefore, an absolute right, but qualified and limited by the higher right of others to the lawful possession of their property. To this possession the law prohibits all direct injury, without regard to its extent or the motives of the aggressor. * * * He may excavate a canal, but he cannot cast the dirt or stones upon the land of his neighbor, either by human agency or the force of gunpowder. If he cannot construct the work without the adoption of such means, he must abandon that mode of using his property, or be held responsible for all damages resulting therefrom. He will not be permitted to accomplish a legal object in an unlawful manner." Hay v. Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279. This case was followed immediately by Tremain v. Same, 2 N. Y. 163, 51 Am. Dec. 284,—a similar action against the same defendant,—which offered to show upon the trial "that the work was done in the best and most careful manner." It was held that the evidence was properly excluded, because the manner in which the defendant performed its work was of no consequence, as what it did to the plaintiff's injury was the sole question.

These were cases of trespass upon lands, while the case before us involves trespass upon the person of a human being, when she was where she had the same right to protection from injury as if she had been walking upon her own land. As the safety of the person

is more sacred than the safety of property, the cases cited should govern our decision, unless they are no longer the law. * * *

We think that the Hay Case has always been recognized by this court as a sound and valuable authority. After standing for 50 years as the law of the state upon the subject, it should not be disturbed, and we have no inclination to disturb it. It rests upon the principle, founded in public policy, that the safety of property generally is superior in right to a particular use of a single piece of property by its owner. It renders the enjoyment of all property more secure, by preventing such a use of one piece by one man as may injure all his neighbors. It makes human life safer, by tending to prevent a landowner from casting, either with or without negligence a part of his land upon the person of one who is where he has a right to be. It so applies the maxim of "Sic utere tuo" as to protect person and property from direct physical violence, which, although accidental, has the same effect as if it were intentional. It lessens the hardship by placing absolute liability upon the one who causes the injury. The accident in question was a misfortune to the defendants, but it was a greater misfortune to the young woman who was killed. The safety of travelers upon the public highway is more important to the state than the improvement of one piece of property by a special method is to its owner. As was said by the supreme court of Indiana, in following the Hay Case: "The public travel must not be endangered to accommodate the private rights of individuals." Wright v. Compton, 53 Ind. 337.

We think the courts below were right in holding the defendants liable as trespassers, regardless of the care they may have used in doing the work. Their action was a direct invasion of the rights of the person injured, who was lawfully in a public highway, which was a safe place until they made it otherwise by throwing into it the section of a tree. * * *

The judgment is right and should be affirmed, with costs.

Judgment affirmed.[34]

[34] Part of the opinion is omitted.

Accord: Wright v. Compton (1876) 53 Ind. 337 (D., quarrying stone near a public highway, by a blast of gunpowder threw fragments of stone against a traveller passing along the highway. Said the Court: "The question involved is not one of negligence on the part of the defendants. The act charged against them is itself unlawful—not the act of blasting and quarrying stone, but the act of casting fragments of rock against the plaintiff. * * * The defendants could not lawfully so use their stone quarry as to embarrass the rights of travellers along the public highway"); Hoffman v. Walsh (1906) 117 Mo. App. 278, 93 S. W. 853 (A blast lawfully set off, by D., without negligence, caused a piece of rock to strike P., standing on a scaffold, on the inside of a wall, some 500 feet distant).

Compare Cleghorn v. Thompson (1901) 62 Kan. 727, 64 Pac. 605, 54 L. R. A. 402: Dogs trespassing on D.'s land around his slaughter house had caused trouble. To get rid of the dogs, D. shot at one of them. The bullet, missing the dog, struck a stone, was deflected at a wide angle, and hit and killed P. There was no negligence on the part of D. *Held*, in the absence of negligence, there can be no recovery.

BELL v. MILLER.

(Supreme Court of Ohio, 1831. 5 Ohio, 250.)

The action was for an assault and battery; verdict for the plaintiff. Three reasons were assigned for a new trial:

1. That the court charged the jury, that if the defendant incited or in any degree promoted the commission of the assault and battery upon the plaintiff, he was liable in this action, though not in a situation to afford any actual aid to the person who committed it. * * *

By THE COURT. All concerned in the commission of a trespass are considered principals. An assault and battery may be committed by a party not present, if he be a principal actor in or advisor and promoter of making the attack. If one person employ another to commit an assault and battery or any other trespass, and the act is perpetrated, both are guilty, and both responsible in damages. It was not supposed that this was now a debatable question. There is no error in the charge of the court. * * *

New trial refused.[35]

DAINGERFIELD v. THOMPSON.

(Supreme Court of Appeals of Virginia, 1880. 33 Grat. 136, 36 Am. Rep. 783.)

Thompson sued Daingerfield and Harrison for an alleged assault and battery. The facts, in brief, were as follows: Daingerfield and Harrison, about midnight, came to Thompson's restaurant. It was closed but a light was burning within. They demanded admission, pounding on the door. Failing to get in, Daingerfield said to Harrison, "Fire a salute." Harrison thereupon fired a pistol at the door. Thompson, who was just opening the door, was struck by the ball and badly hurt. Daingerfield subsequently testified that he had not supposed that Harrison "was fool enough to shoot into the house."

Both parties appeared by their attorneys, and the defendant Daingerfield moved the court that the cause be tried as to each of the defendants separately. This motion the court granted, and the cause was continued as to the defendant Harrison, and was proceeded with as to the defendant Daingerfield, upon the issue of not guilty as to him. And upon this issue the jury, after hearing the evidence, found a verdict for the plaintiff (the defendant in error), against the defendant Daingerfield, and assessed his damages at the sum of $8,000. Upon this verdict the Circuit Court entered its judgment for the sum of $8,000—the damages by the jury in their verdict ascertained, with costs. To this judgment a writ of error was awarded by one of the judges of this court.

[35] The statement of facts is abridged and part of the opinion is omitted.

CHRISTIAN, J. * * * It is earnestly insisted however by the learned counsel for the plaintiff in error (Daingerfield), that the evidence against him does not sustain the charge in the declaration, and in each count thereof, of assault and battery; that while such assault is proved against Harrison, who fired the pistol, it is not proved against Daingerfield; that he committed no assault, but simply advised and instigated an act which was in itself harmless, to wit: "Fire a salute," and that this act was not a trespass or assault as far as Daingerfield was concerned; that he did not direct Harrison to shoot Thompson, or to fire into his house, but simply to "fire a salute," and that Harrison did another and different act from the one which was advised and instigated by Daingerfield, and that the injury resulted from Harrison's act done differently from the act directed by Daingerfield, and consequently Daingerfield cannot be held liable in this action.

Now, the fatal defect in this argument is that the firing of a pistol in the streets of a city is not a harmless act, but, on the contrary, is an unlawful and dangerous act, prohibited and made unlawful by express ordinance. And besides, the evidence abundantly shows that even before the firing of the pistol Daingerfield and Harrison were joint trespassers upon the premises of Thompson. The firing of the pistol was an aggravation of the trespass, and being in itself an unlawful act (and that unlawful act causing the fatal injury), being instigated and prompted by Daingerfield, he is equally responsible with Harrison for its unhappy consequences, although it was not done maliciously and not done by the hand of Daingerfield.

The law is well settled that any person who is present at the commission of a trespass, encouraging or inciting the same by words, gestures, looks or signs, or who in any way or by any means countenances or approves the same, is in law deemed to be an aider and abettor, and liable as principal. 1 Hale P. C. 438; 3 Greenl. §§ 40, 41; McMannus v. Lee, 43 Mo. 206, 97 Am. Dec. 386, and cases there cited.

There seems indeed to be no principle of law better settled, and for which numerous authorities may be cited if necessary, than this: That all persons who wrongfully contribute in any manner to the commission of a trespass are responsible as principals, and each one is liable to the extent of the injury done.

The defendant Daingerfield being present, aiding and abetting and instigating Harrison, was equally guilty with him of an assault to the same degree as if he had fired the fatal shot himself. * * *

Judgment affirmed.[36]

[36] The statement of facts is rewritten and part of the opinion is omitted.

Compare Bird v. Lynn (1850) 10 B. Mon. (Ky.) 422: A boy who had been whipped by a man sued him in assault and battery and made a Mrs. Jouett a co-defendant. There was no evidence that Mrs. Jouett was present when the boy was whipped. But the court charged that if she "encouraged the trespass" she was a party to it. The verdict and the judgment went against her, and she

FORDE v. SKINNER et al.

(At Nisi Prius, 1830. 4 Car. & P. 239, 34 R. R. 791.)

False imprisonment, with a count for a common assault. Plea, general issue.

The defendants were the parish officers of the parish of Ninfield, in Sussex, and the plaintiff was a young woman, who was a pauper in the poor-house there. The false imprisonment was not proved; and the assault complained of was, that, on the 10th of December, 1829, the defendants sent for the plaintiff into a room in the poor-house, and by force, and against her consent, cut off her hair; and it appeared, that in the struggle, occasioned by her resisting, one of her arms was bruised. It was shewn that the plaintiff wore long hair, and kept it in a clean and neat state; and there was also evidence given that when the plaintiff had, shortly before, gone with two of the defendants before the magistrates at Battle, one of the defendants said, alluding to the plaintiff and her sister, who was also in the poor-house, that he would soon do something "to take their pride down." It also appeared that the sister's hair was cut off in a similar way.

BAYLEY, J. (in summing up). However desirable such a regulation as that of cutting off the hair of persons in a poor-house may be with regard to health and cleanliness, yet it is altogether unauthorized by law and is a wrongful act, if done without the consent of the party. If, in this case, it was done violently and with force, and with the malicious intent imputed, namely, "of taking down their pride,"

appealed. Marshall, C. J., delivering the opinion of the Court of Appeals, remarked as follows: "As Mrs. Jouett was not present when the trespass was committed, the word 'encourage' seems to be not sufficiently definite to express the true ground of liability. If Mrs. Jouett had directed Bird to whip or beat the plaintiff, and he had done it in consequence, this would, undoubtedly, have been an encouragement of the trespass, which would make her a party. If she had said in Bird's presence that the plaintiff was a bad boy and deserved a whipping, or that he had mistreated her, and she wished somebody would whip him, in consequence of which Bird had beaten him, this might, in some sense, have been deemed an encouragement of the trespass, and yet, unless she had used this language for the purpose or with the intention of inciting Bird to commit the act and of thus producing or procuring the trespass, we apprehend that Bird, though in fact committing the act, in consequence of what she had said, should be regarded as a mere volunteer, and that she would not be a co-trespasser on the ground of having encouraged the trespass. To make Mrs. Jouett liable as having encouraged the trespass by words used on a prior occasion, those words must have had a direct relation to the trespass, and have been calculated and intended to produce it by stimulating or exciting some person hearing them to do the act or procure it to be done. If it were sufficient that the act was done in consequence of the words spoken, then one person might be made a trespasser and even a felon against his or her consent, and by the mere rashness or precipitancy or overheated zeal of another, and the mere expression of just anger or resentment, or the statement of a fact calculated to excite indignation against an individual, and to create an opinion or desire that he should be chastised might make the party using such expressions or making the statement liable for the inconsiderate act of another."

and not with a view to cleanliness, that will be an aggravation, and ought to increase the damages. You will therefore decide on the motives which actuated the defendants, and according to that decision you will estimate the amount of damages.

Verdict for the plaintiff. Damages £60.[37]

ANDERSON v. ARNOLD'S EX'R.

(Court of Appeals of Kentucky, 1881. 79 Ky. 370.)

JUDGE PRYOR delivered the opinion of the court. Section 1 of chapter 10, General Statutes, provides: "No right of action for personal injury, or injury to real or personal estate, shall cease or die with the person injuring or the person injured, except actions for assault and battery, slander, criminal conversation, and so much of the action for malicious prosecution as is intended to recover for the personal injury; but for any injury other than those excepted, an action may be brought or revived by the personal representative, or against the personal representative, heir, or devisee, in the same manner as causes of action founded on contract."

The appellant, James Anderson, instituted his action in the Hardin circuit court, in which he alleges that on the ——— day of ———, in the year 1878, the appellee's testator negligently and recklessly, but not intentionally, inflicted a wound upon the body of the plaintiff (appellant) with a pistol; in other words, that the appellee's testator shot the plaintiff with a pistol, causing him great pain and bodily suffering, and for which he asks a judgment, etc. On the hearing of the cause, a demurrer was filed and sustained to the petition on the

[37] Compare the remark of Holt, C. J., in Cole v. Turner (1704) 6 Mod. 149: "The least touching of another in anger is a battery."

In Courtney v. Kneib (1908) 131 Mo. App. 204, 110 S. W. 665, an action for assault and battery, the defendant pleaded that the plaintiff made the first assault. The trial court refused to give the following instructions asked by the defendant: "The court instructs the jury that when the plaintiff got into the wagon of Phillip Kneib, Sr., for the purpose of taking the corn away from Philip Kneib, Sr., and Philip Kneib, Sr., then undertook to prevent him from so doing, and the plaintiff laid his hands upon the person of the said Philip Kneib, Sr., the plaintiff then committed an assault and battery upon the said Philip Kneib, Sr., and his conduct was in violation of the law." On this, Broaddus, P. J., delivering the opinion of the Kansas City Court of Appeals, remarked: "There is one very serious objection to said instruction, and that is that it seeks to make an assault and battery out of the fact that plaintiff merely laid his hand on defendant's father, Philip Kneib, Sr. Such an act of itself did not constitute an assault and battery. In order to have it made such, the act must have been accompanied with anger or some other circumstance of the kind evincing hostility. All concur."

And see In re Murphy (1884) 109 Ill. 31, 34: In our judgment malice was the gist of the action (for assault and battery) within the sense (in which) the word "malice" is used in the statute (as to arrests in civil action when malice "is not the gist of the action"). See, also, 3 Cyc. 1068: "Malice is the gist of the action for assault and battery."

ground that the cause of action died with the person, and no action could be maintained against Arnold's personal representative.

Counsel for the plaintiff proceeded on the idea that the injury must be intentional in order to constitute it an assault and battery, and if involuntary, the remedy was by an action on the case: as if A. shoot at B. and wound C., the shooting of C. being unintentional is not an assault and battery on C., but the result of an assault on B.

The various statutes authorizing actions by the widow, heirs, and personal representative of one whose life has been lost by the negligence of another are not involved in the question presented in this case, and there is no reason why the court should depart from the common law rule in defining what constitutes an assault and battery, although the appellant may have sustained great injury. The action of trespass lies for injuries committed by force, and generally is only for such as are immediate. (Chitty's Pleadings, vol. 1, p. 190.) When the act complained of, and not the consequences of the act, causes the injury, the remedy is trespass and not case. "Nor," says Chitty, "is the motive, intent, or design of the wrong-doer towards the complainant the criterion as to the form of the remedy; and it is clear that the mind need not in general concur in the act that causes an injury to another; and if the action occasion an immediate injury, trespass is the proper remedy without reference to the intent." (Chitty's Pleadings, vol. 1, p. 147.) When on uncocking a gun it went off accidentally and wounded a bystander, it was held that the action was properly brought in trespass. So when the defendant, in firing his musket, accidentally wounded the plaintiff, trespass and not case was the remedy.

The familiar illustrations given in the elementary books as to the distinction between trespass and case settle the question here. When a log is thrown in the highway, and in the act of throwing it strikes one, it is a trespass; but if, when placed in the highway, one is injured by falling over it, case is the proper remedy. So of the lighted squib that was thrown in the market space, and afterwards thrown about by others in self-defense; the new impetus given to it by others was held to be a continuance of the original force, and trespass was the remedy. Following, therefore, this common law definition, it was an assault and battery committed upon the plaintiff, although the shot was fired at a third person; and the meaning of the words "assault and battery" will not be restricted to an actual and intentional beating of another so as to authorize the recovery. If an assault and battery at common law, the action does not survive, and that it was there can be no doubt.

Judgment affirmed.

VOSBURG v. PUTNEY.

(Supreme Court of Wisconsin, 1891. 80 Wis. 523, 50 N. W. 403, 14 L. R. A. 226, 27 Am. St. Rep. 47.)

The action was brought to recover damages for an assault and battery, alleged to have been committed by the defendant upon the plaintiff on February 20, 1889. The answer is a general denial. At the date of the alleged assault the plaintiff was a little more than 14 years of age, and the defendant a little less than 12 years of age. The injury complained of was caused by a kick inflicted by defendant upon the leg of the plaintiff, a little below the knee. The transaction occurred in a school-room in Waukesha, during school hours, both parties being pupils in the school. A former trial of the cause resulted in a verdict and judgment for the plaintiff for $2,800. The defendant appealed from such judgment to this court, and the same was reversed for error, and a new trial awarded. 78 Wis. 84, 47 N. W. 99. The case has been again tried in the circuit court, and the trial resulted in a verdict for plaintiff for $2,500.

On the last trial the jury found a special verdict, as follows: "(1) Had the plaintiff during the month of January, 1889, received an injury just above the knee, which became inflamed and produced pus? Answer. Yes. (2) Had such injury on the 20th day of February, 1889, nearly healed at the point of the injury? A. Yes. (3) Was the plaintiff, before said 20th of February, lame, as the result of such injury? A. No. (4) Had the tibia in the plaintiff's right leg become inflamed or diseased to some extent before he received the blow or kick from the defendant? A. No. (5) What was the exciting cause of the injury to the plaintiff's leg? A. Kick. (6) Did the defendant, in touching the plaintiff with his foot, intend to do him any harm? A. No. (7) At what sum do you assess the damages of the plaintiff? A. Twenty-five hundred dollars." The defendant moved for judgment in his favor on the verdict, and also for a new trial. The plaintiff moved for judgment on the verdict in his favor. The motions of defendant were overruled, and that of the plaintiff granted. Thereupon judgment for plaintiff, for $2,500 damages and costs of suit, was duly entered. The defendant appeals from the judgment.

LYON, J. Several errors are assigned, only three of which will be considered.

I. The jury having found that the defendant, in touching the plaintiff with his foot, did not intend to do him any harm, counsel for defendant maintain that the plaintiff has no cause of action, and that defendant's motion for judgment on the special verdict should have been granted. In support of this proposition counsel quote from 2 Greenl. Ev. § 83, the rule that "the intention to do harm is of the essence of an assault." Such is the rule, no doubt, in actions or prosecutions for mere assaults. But this is an action to recover damages

for an alleged assault and battery. In such case the rule is correctly stated, in many of the authorities cited by counsel, that plaintiff must show either that the intention was unlawful, or that the defendant is in fault. If the intended act is unlawful, the intention to commit it must necessarily be unlawful.

Hence, as applied to this case, if the kicking of the plaintiff by the defendant was an unlawful act, the intention of defendant to kick him was also unlawful. Had the parties been upon the playgrounds of the school, engaged in the usual boyish sports, the defendant being free from malice, wantonness, or negligence, and intending no harm to plaintiff in what he did, we should hesitate to hold the act of the defendant unlawful, or that he could be held liable in this action. Some consideration is due to the implied license of the playgrounds. But it appears that the injury was inflicted in the school, after it had been called to order by the teacher, and after the regular exercises of the school had commenced. Under these circumstances, no implied license to do the act complained of existed, and such act was a violation of the order and decorum of the school, and necessarily unlawful. Hence we are of the opinion that, under the evidence and verdict, the action may be sustained. * * *[38]

RICHMOND v. FISKE.

(Supreme Judicial Court of Massachusetts, 1893. 160 Mass. 34, 35 N. E. 103.)

Trespass by Richmond against Fiske. From a judgment in defendant's favor, plaintiff appeals.

The case was submitted upon the following agreed statement of facts:

"Plaintiff was in the rightful possession of a tenement on the second floor of No. 152 Hancock street, Springfield. His tenement was reached by a flight of stairs, at the head of which was a door opening into a hall 12 or 15 feet long, at one end of which a door opened into the kitchen, and at the other end a door opened into plaintiff's sleeping room. The hallway was part of the plaintiff's premises, and the outer entrance was about midway of its length. Defendant was a milkman in the employ of the Springfield Milk Association, and he delivered milk to plaintiff at an early hour every morning. The hall and kitchen doors were left unlocked, so that defendant could enter, and leave the milk in the kitchen. For some time prior to the act complained of, defendant had, with plaintiff's permission, occasionally entered plaintiff's sleeping room, through the door from the hall, for the purpose of collecting the milk bills. Prior to the alleged trespass, plaintiff had forbidden defendant entering the sleeping room any more, and requested him to keep out. On the morning in question, after a night of suffering from sick headache, the plaintiff had dropped off into sleep, when defendant, entering the sleeping room from the hall, after having left milk in the kitchen as usual, and finding plaintiff asleep, took hold of his arm and shoulders, and used sufficient force to awaken the plaintiff for the purpose of presenting a milk bill. If, upon these facts, defendant was guilty of a trespass, as alleged, plaintiff is to be awarded such sum for damages as to the court shall seem just; otherwise judgment is to be for defendant."

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[38] Part of the opinion is omitted.

FIELD, C. J. The declaration contains two counts,—one for an assault and battery upon the plaintiff, and the other for forcibly entering the plaintiff's close. The agreed facts show that the defendant entered the plaintiff's close by his permission. The fact that after the defendant entered, by permission, through the outer door into the hall, he went, against the commands of the plaintiff, into the plaintiff's sleeping room, does not constitute a trespass upon the close. Smith v. Pierce, 110 Mass. 35.

But the facts show a trespass upon the person of the plaintiff. Com. v. Clark, 2 Metc. (Mass.) 23. On the facts agreed, it must be taken that the defendant, against the express commands of the plaintiff, entered the plaintiff's sleeping room, and "took hold of his arm and shoulders, and used sufficient force to awaken the plaintiff, for the purpose of presenting a milk bill." If there were any circumstances which would justify this, they do not appear in the agreed statement of facts. Although the trespass is slight, the damages are not necessarily nominal, and they should be left to be assessed by the superior court.

The judgment should be reversed, and, in accordance with the agreed statement, the plaintiff's damages should be assessed under the first count. So ordered.

MOHR v. WILLIAMS.

(Supreme Court of Minnesota, 1905. 95 Minn. 261, 104 N. W. 12, 1 L. R. A. [N. S.] 439, 111 Am. St. Rep. 462, 5 Ann. Cas. 303.)

Action to recover damages for an alleged assault and battery. There was a verdict for plaintiff for $14,322.50, whereupon the defendant moved for judgment notwithstanding the verdict, on the ground that, on the evidence presented, plaintiff was not entitled to recover, or, if that relief was denied, for a new trial on the ground, among others, that the verdict was excessive. The trial court denied the motion for judgment, but granted a new trial on the ground, as stated in the order, that the damages were excessive. Defendant appealed from the order denying the motion for judgment, and plaintiff appealed from the order granting a new trial.

BROWN, J. Defendant is a physician and surgeon of standing and character, making disorders of the ear a specialty, and having an extensive practice in the city of St. Paul. He was consulted by plaintiff, who complained to him of trouble with her right ear, and, at her request, made an examination of that organ for the purpose of ascertaining its condition. He also at the same time examined her left ear, but, owing to foreign substances therein, was unable to make a full and complete diagnosis at that time. The examination of her right ear disclosed a large perforation in the lower portion of the drum membrane, and a large polyp in the middle ear, which indicated that some of the small bones of the middle ear (ossicles) were proba-

bly diseased. He informed plaintiff of the result of his examination, and advised an operation for the purpose of removing the polyp and diseased ossicles. After consultation with her family physician, and one or two further consultations with defendant, plaintiff decided to submit to the proposed operation. She was not informed that her left ear was in any way diseased, and understood that the necessity for an operation applied to her right ear only. She repaired to the hospital, and was placed under the influence of anæsthetics; and, after being made unconscious, defendant made a thorough examination of her left ear, and found it in a more serious condition than her right one. A small perforation was discovered high up in the drum membrane, hooded, and with granulated edges, and the bone of the inner wall of the middle ear was diseased and dead. He called this discovery to the attention of Dr. Davis—plaintiff's family physician, who attended the operation at her request—who also examined the ear, and confirmed defendant in his diagnosis. Defendant also further examined the right ear, and found its condition less serious than expected, and finally concluded that the left, instead of the right, should be operated upon; devoting to the right ear other treatment. He then performed the operation of ossiculectomy on plaintiff's left ear; removing a portion of the drum membrane, and scraping away the diseased portion of the inner wall of the ear. The operation was in every way successful and skillfully performed. It is claimed by plaintiff that the operation greatly impaired her hearing, seriously injured her person, and, not having been consented to by her, was wrongful and unlawful, constituting an assault and battery; and she brought this action to recover damages therefor. * * *

The last contention of defendant is that the act complained of did not amount to an assault and battery. This is based upon the theory that, as plaintiff's left ear was in fact diseased, in a condition dangerous and threatening to her health, the operation was necessary, and, having been skillfully performed at a time when plaintiff had requested a like operation on the other ear, the charge of assault and battery cannot be sustained; that, in view of these conditions, and the claim that there was no negligence on the part of defendant, and an entire absence of any evidence tending to show an evil intent, the court should say, as a matter of law, that no assault and battery was committed, even though she did not consent to the operation. In other words, that the absence of a showing that defendant was actuated by a wrongful intent, or guilty of negligence, relieves the act of defendant from the charge of an unlawful assault and battery.

We are unable to reach that conclusion, though the contention is not without merit. It would seem to follow from what has been said on the other features of the case[39] that the act of defendant

[39] These features are given infra, in connection with the different forms of justification or excuse in trespass.

amounted at least to a technical assault and battery.[40] If the operation was performed without plaintiff's consent, and the circumstances were not such as to justify its performance without, it was wrongful; and, if it was wrongful, it was unlawful. As remarked in 1 Jaggard on Torts, 437, every person has a right to complete immunity of his person from physical interference of others, except in so far as contact may be necessary under the general doctrine of privilege; and any unlawful or unauthorized touching of the person of another, except it be in the spirit of pleasantry, constitutes an assault and battery. In the case at bar, as we have already seen, the question whether defendant's act in performing the operation upon plaintiff was authorized was a question for the jury to determine. If it was unauthorized, then it was, within what we have said, unlawful. It was a violent assault, not a mere pleasantry; and, even though no negligence is shown, it was wrongful and unlawful. The case is unlike a criminal prosecution for assault and battery, for there an unlawful intent must be shown. But that rule does not apply to a civil action, to maintain which it is sufficient to show that the assault complained of was wrongful and unlawful or the result of negligence. 1 Addison on Torts, 689; Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156; Vosburg v. Putney, 80 Wis. 523, 50 N. W. 403, 14 L. R. A. 226, 27 Am. St. Rep. 47. * * *

(C) In False Imprisonment

(a) In General

WRIGHT v. WILSON.

(Summer Assizes at Lincoln, 1699. 1 Ld. Raym. 739, 91 Reprint, 1394.)

A. has a chamber adjoining to the chamber of B. and has a door that opens into it, by which there is a passage to go out; and A. has another door, which C. stops, so that A. cannot go out by that. This is no imprisonment of A. by C. because A. may go out by the door in the chamber of B. though he be a trespasser by doing it. But A. may have a special action upon his case against C. Ruled by

[40] On the general principle, see also, Schloendorff v. Society of New York Hospital (N. Y. 1914) 105 N. E. 92: A patient to whom ether was being administered in the surgical ward of a hospital said to the attendant that there must be no operation but only an ether examination. The surgeon in charge operated while the patient was unconscious. "In the case at hand," said Cardozo, J., "the wrong complained of is not merely negligence. It is trespass. Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." See, also, Pratt v. Davis (1906) 224 Ill. 300, 79 N. E. 562, 7 L. R. A. (N. S.) 609, 8 Ann. Cas. 197; Rolater v. Strain (1913) 39 Okl. 572, 137 Pac. 96, 50 L. R. A. (N. S.) 880.

Holt, Chief Justice, in evidence at the trial in an action of false imprisonment. And the plaintiff was nonsuit.[41]

[41] See Bird v. Jones (1845) 7 Q. B. 742, 68 R. R. 564, 115 Reprint, 668:

A part of Hammersmith Bridge which was ordinarily used as a public footway was appropriated for seats to view a regatta, and was separated for that purpose from the carriage way by a temporary fence. The plaintiff insisted in passing along the part so appropriated, and attempted to climb over the fence. The defendant then stationed two policemen to prevent, and they did prevent, the plaintiff from proceeding forward along the footpath; but he was told that he might go back to the carriage way, and proceed to the other side of the bridge if he pleased.

Coleridge, J. "* * * I am of opinion that there was no imprisonment. To call it so appears to me to confound partial obstruction and disturbance with total obstruction and detention. A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only; it may itself be movable or fixed: but a boundary it must have; and that boundary the party imprisoned must be prevented from passing; he must be prevented from leaving that place, within the ambit of which the party imprisoning would confine him, except by prison breach. Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom: it is one part of the definition of freedom to be able to go withersoever one pleases; but imprisonment is something more than the mere loss of this power; it includes the notion of restraint within some limits defined by a will or power exterior to our own. * * * If in the course of a night, both ends of a street were walled up, and there was no egress from the house but into the street, I should have no difficulty in saying that the inhabitants were thereby imprisoned; but, if only one end were walled up, and an armed force stationed outside to prevent any scaling of the wall or passage that way, I should feel equally clear that there was no imprisonment. If there were the street would obviously be the prison; and yet, as obviously, none would be confined to it. * * *"

Lord Denman, C. J. "* * * But this liberty to do something else does not appear to me to affect the question of imprisonment. As long as I am prevented from doing what I have a right to do, of what importance is it that I am permitted to do something else? How does the imposition of an unlawful condition show that I am not restrained? If I am locked in a room, am I not imprisoned because I might effect my escape through a window, or because I might find an exit dangerous or inconvenient to myself, as by wading through water or by taking a route so circuitous that my necessary affairs would suffer by delay? It appears to me that this is a total deprivation of liberty with reference to the purpose for which he lawfully wished to employ his liberty: and, being effected by force, it is not the mere obstruction of a way, but a restraint of the person. The case cited as occurring before Chief Justice Tindal, as I understand it, is much in point. He held it an imprisonment where the defendant stopped the plaintiff on his road till he had read a libel to him. Yet he did not prevent his escaping in another direction." * * *

And see 19 Cyc. 322, note 24.

Compare Norton v. Union Ry. Co. (1908) 58 Misc. Rep. 188, 109 N. Y. Supp. 73 (P., having a transfer neither asked for nor exhibited, boarded a trolley car which was not run farther, but, after P. and all intending passengers had been asked to take another car, there standing, it was put upon a siding. Here P. and three others sat for an hour or more. P. claims false imprisonment)'; Crossett v. Campbell (1908) 122 La. 659, 666, 48 South. 141, 143, 20 L. R. A. (N. S.) 967, 129 Am. St. Rep. 362 (P. entered upon grounds which were lawfully in possession of schoolboys, who were giving a free picnic, and who had given notice, in advance, that later in the day a game of baseball would be played, to which a trifling admission fee would be charged. When the game was about to begin he refused, though repeatedly requested so to do, to pay the fee or go out, and he was thereupon taken by the arm by a citizen—one of the assembled guests or patrons—acting in behalf of the boys, though

HERRING v. BOYLE.

(Court of Exchequer, 1834. 1 Cr. M. & R. 377, 40 R. R. 610.)

Trespass for assault and false imprisonment. Plea, the general issue. At the trial, the following appeared to be the facts of the case:

The plaintiff, who sued by his next friend, was an infant about ten years old. He was placed by his mother, who was a widow, at a school kept by the defendant. The terms of the defendant's school were twenty guineas a year, payable quarterly. The first quarter, which became due on the 29th of September, 1833, was duly paid. On the 24th of December in the same year, the plaintiff's mother went to the school and asked the defendant to permit the plaintiff to go home with her for a few days. The defendant refused, and would not permit the mother to see the son, and told the mother that he would not allow him to go home, unless the quarter ending on the 25th of December was paid. The mother remonstrated, and said she would pay the quarter's schooling in a short time, but it was not due until the next day. A few days afterwards, the mother went again to the defendant at his school, and demanded from him to see her son, and be allowed to take him home with her. The defendant refused. On the 31st of December, the mother went again with a friend, and made the same demand; but the defendant refused to let her see the plaintiff, or to allow her to take him home, and he then claimed another quarter's schooling, as a few days of the quarter after the 25th of December had then elapsed, and he insisted on keeping the plaintiff until that amount also should be paid. A formal demand was afterwards made, and on a writ of habeas corpus being sued out, the plaintiff was sent home, seventeen days having elapsed after the first demand by his mother. No proof was given that the plaintiff knew of the denial of his mother, nor was there any evidence of any actual restraint upon him.

On these facts the learned Baron was of opinion that there was no evidence of an imprisonment to go to the jury, and he nonsuited the plaintiff.

Comyn obtained a rule to set aside the nonsuit and for a new trial, against which cause was now shewn by

Hutchinson, for the defendant: The nonsuit was right. There was no corporal touch or restraint on the plaintiff. The form of the proceeding in trespass shews that there must be an actual force. It must be laid contra pacem and vi et armis. Here there was no force or restraint for which either an indictment or action of trespass vi et armis was maintainable.

Comyn and Butt, contra: The boy was sent by his mother to the defendant's school. She had authority to place him in the care of the schoolmaster, and she had authority to determine his continuance there. Now it was proved that the authority from the mother to the master was withdrawn, and the defendant could not justify the detention after such authority was withdrawn. * * * Here, when the authority to keep the boy was withdrawn, the master persisted in detaining him for the purpose of extortion. (ALDERSON, B. The

without special authority, and led in the direction of the gate, always with the privilege of paying and staying, and the alternative of not paying and going. Before reaching the gate, he paid the fee, and thereafter stayed and witnessed the game. Held, P. had no ground for an action for false imprisonment).

fallacy seems to me to be, that you assume, for the purpose of your argument, that every boy at school is in prison. If that were so, you would go a long way to convince us that when the authority to keep him there is at an end, his remaining at school might be an imprisonment. That however is not so with regard to a boy at school. In the case of a lunatic perhaps it might be different. A person of full age restrained as a lunatic, might probably be taken prima facie to be detained against his will.) The assent of a child of such tender years may perhaps be assumed, in the first instance, because the law will presume the assent of an infant to what is for his benefit; but that assent must be taken to be revoked when the contract for schooling is determined by the act of the mother. In the present case, the plaintiff was detained during the holidays, and it may fairly be presumed that keeping at school during the holidays, is against the will of a school-boy. (BOLLAND, B. The evidence did not bring the schoolmaster and the plaintiff into contact, so as to shew that there was any the least restraint of the one upon the other.) Every detention against the will is a false imprisonment, and every false imprisonment includes an assault in point of law, so that any argument to be derived from the form of the action for assault is totally unfounded. The only question is, whether there was any evidence to go to the jury of a detention against the will of the plaintiff. It is submitted that there was. The child was kept through the holidays, and it ought to have been left to the jury, whether that was not against the plaintiff's will. Besides, in the case of a child of such tender years, the will of the parent is to be considered as the will of the child, and in this case the will of the mother was sufficiently expressed. The master declared distinctly that he would detain him until he was compelled by habeas corpus to deliver him up; and he was detained at school, and such declaration of the master, coupled with the fact of the boy remaining at school during the holidays, was surely evidence to go to the jury that the master had acted on such declaration and had kept the boy there against the will both of his mother and himself. (ALDERSON, B. It is clear that the assent of the plaintiff would put an end to an action in this form; that shews that the will of the mother is not the will of the child. In the present case there was no proof that the master conducted himself to the boy in a different manner in any respect before and after the refusal to deliver him up to his mother; as against the mother he detained him unlawfully; he says in respect to the mother, I will not give him up to you without a habeas corpus. That might however be with or without the assent of the boy. The plaintiff was bound to prove his dissent, and not to leave that question in ambiguity.) Cur. adv. vult.

The judgment of the Court was delivered on the next day:

BOLLAND, B. This was an action of trespass for assault and false imprisonment, brought by an infant by his next friend. * * * There

are many cases which shew that it is not necessary, to constitute an imprisonment, that the hand should be laid upon the person; but in no case has any conduct been held to amount to an imprisonment in the absence of the party supposed to be imprisoned. An officer may make an arrest without laying his hand on the party arrested; but in the present case, as far as we know, the boy may have been willing to stay; he does not appear to have been cognizant of any restraint, and there was no evidence of any act whatsoever done by the defendant in his presence. I think that we cannot construe the refusal to the mother in the boy's absence, and without his being cognizant of any restraint, to be an imprisonment of him against his will; and therefore I am of opinion that the rule must be discharged.[42]

MOSES v. DUBOIS.

(Court of Appeals of South Carolina, 1838. Dud. 209.)

False imprisonment against the captain of a steamboat for carrying the plaintiff, a deputy-sheriff, to sea against his will. Verdict for $100. Motion for a new trial.

EARLE, J. Every unlawful restraint of personal liberty is an imprisonment, whether accompanied by corporal touch or not; whether in a house, in a ship, or in the street. But force of some sort must be used, and it must be a detention against the will; and it is indispensable that these two circumstances should unite. The force may be exhibited in a variety of ways without actual assault or corporal touch,—by locking a door after enticing one within, and refusing to open it for his departure; by setting sail or pushing off from shore, having one on board, and refusing to allow him to go ashore; or

[42] The concurring opinions of Alderson and Gurney, BB., are omitted. Lord Lyndhurst concurred in the judgment.

Compare:

Com. v. Nickerson (1862) 5 Allen (Mass.) 518: N. entered a school room and forcibly seized and carried away a boy of nine years, who had been placed in the school by his father, the legal custodian of the child. N.'s acts were under the direction of the mother of the boy, who, when he learned the purpose of the seizure, wished to have it carried out. N. had no actual knowledge that his acts were violating the father's legal rights. Held that such evidence sustained an indictment for false imprisonment. "Being in the actual custody of his father, whose will alone was to govern as to his place of residence and the selection of a teacher and custodian, this child of nine years of age was incapable of assenting to a forcible removal from the custody of his teacher, and a transfer to other persons forbidden by law to take such custody. He was under illegal restraint, when taken away from the lawful custody and against the will of his rightful custodian; and such taking is in law deemed to be forcible and against the will of the child." Per Dewey, J., 5 Allen, page 526.

Wood v. Cummings (1908) 197 Mass. 80, 83 N. E. 318: D. locked the outside door of a building while P. was within, not to detain P., but as a means of protection against interference from without; the door was unlocked as soon as P. made known his desire to go out.

by detaining one on the highway by threats of personal violence if he departed. And it is equally essential that the person should be detained against his will; for if he voluntarily place himself in a situation where another may lawfully do that which has the effect of restraining liberty, especially if he refuse to depart when he may, he cannot complain that he is unlawfully imprisoned against his will. A sheriff's officer goes to the house of A. on the evening of an entertainment, with a bail process against one of his guests, and enters, as he lawfully may, and makes the arrest, A. refusing to assist him, but offering no hinderance; being unable to remove his prisoner, he chooses to remain until the close of the entertainment, expecting then to accomplish his purpose on the departure of the guests; but the prisoner, being on a visit there, remains. The officer, being informed that the doors are about to be closed, is requested to depart with his prisoner, if he can take him, else without him; but he is unable to take, and refuses to go without him. If A. should lock his doors and retire to rest, could the officer complain of false imprisonment if A. should refuse to rise at a late hour of the night, at his request, to open the door? I should think not. If a man enters a tavern and continues there all night against the will of the landlord, it is a trespass,—could he complain if the landlord shuts his door upon him? The general rule is, that a trespass will not lie for a mere nonfeasance; and it seems to follow from that proposition that when an act has been done, in the first instance lawful in itself, it cannot be rendered unlawful ab initio, except by some positive act incompatible with the exercise of the legal right to do the first act. Gates v. Lounsbury, 20 John. 429; Gardner v. Campbell, 15 ib. 401.

In the case made by the evidence it does not appear that the plaintiff was carried from the shore against his will, but the reverse. The destination of the boat was known,—the accustomed hour of departure was passed; the boat was in the act of getting under way; at that moment the plaintiff chose to go on board to arrest a person on a bail process, evidently under the mistaken impression as to the extent of his authority; and, seeing the boat leaving the wharf, he chooses to remain. Here, then, there was no unlawful detention, according to the principles I have laid down: the defendant was in discharge of his known and accustomed duty, and therefore in the performance of a lawful act, and the plaintiff was not detained against his will. At what time did the false imprisonment commence? After the boat had proceeded into the stream some distance from the wharf, the defendant came and proposed to the plaintiff to send him ashore with his prisoner, if he could take him, else to send him alone. The plaintiff refused to go unless the defendant would aid him in carrying his prisoner. It need not be repeated that this the defendant was not bound to do. It was his duty to interpose no obstacle to the ar-

rest or the removal of the prisoner, but rather to afford such facilities as he could to the service of legal process. This he seems to have done, and more could hardly have been expected. On the refusal of the plaintiff to go ashore, the defendant proceeded on his voyage,—one on which the plaintiff knew the boat was in the act of departing when he went aboard. This was also the accustomed duty, the office of the defendant, and was therefore a lawful act.

If the defendant was not bound to aid in the arrest and removal of the prisoner, I do not perceive that he was bound either to delay his voyage or put back his boat to enable the plaintiff to procure assistance. When the boat had arrived at the mouth of the harbor, near Sullivan's Island, the plaintiff demanded to be put ashore, which the defendant then refused; here commenced the detention of the plaintiff against his will. Was it unlawful? I think it cannot be so held; the defendant only proceeded on his voyage. His refusal to send the plaintiff ashore at that time, which would have delayed his progress and put him in trouble, was a mere non-feasance, which if he had been guilty of no trespass up to that time, did not render him a trespasser ab initio: it was not a positive act, incompatible with the legal exercise of the right to proceed from the wharf, the plaintiff being on board.

Motion for a new trial granted.[43]

[43] Compare:

Spoor v. Spooner (1847) 12 Metc. (Mass.) 281: A ship was on the point of sailing when P., a constable, came on board with a civil process to arrest the steward. The sails were set and the fasts, by which the ship was held to the wharf, were singled. P. immediately upon going on board, found and arrested the steward, but remained standing with him ten or twelve minutes without attempting to leave. In common with others, P. had repeated notice that the fasts were about to be cast off, and that all persons not belonging on board should quit the ship. After full notice, the fasts were cast off and the ship sailed with P. still on board. He sues the master in trespass for false imprisonment.

Williams v. Powell (1869) 101 Mass. 467, 3 Am. Rep. 396: P., a constable, attached the desk and law books of an attorney, in the office of D., an insurance broker, and placed a keeper over them. The property attached did not amount to more than $200 in value; but P. neglected to remove them during the five hours of daylight. P. then demanded of D. a key to the door of the office, that he might continue his possession through the night, and on being refused procured a key from a locksmith. It being near sunset, D. put another lock on the door and gave P. notice to remove the attached chattels immediately and leave the office. P. refused to leave, saying that he could not move the goods that night, but would move them early in the morning. D. then secured the door for the night, locking in P. and the keeper. P. sues for false imprisonment.

Robinson v. Balmain Ferry Company (1910) A. C. 295, the facts of which are given infra.

And see "Leave and License," infra.

GARNIER v. SQUIRES.

(Supreme Court of Kansas, 1900. 62 Kan. 321, 62 Pac. 1005.)

Action by Garnier against Squires on three causes of action: First, for slander in charging plaintiff with the larceny of $500; second, for false imprisonment; third, for an unlawful search of plaintiff's premises. There was a judgment for defendant, and plaintiff brings error.

JOHNSTON, J. * * * The facts out of which the controversy arose are substantially as follows: On the night of February 14, 1878, Squires claimed that when he retired he had $500 in his vest pocket; that it was taken therefrom at some time during the night; that Garnier was in the house, and knew that defendant had the money; that the doors of the house were securely locked, and there was no one else in the house who could or would have taken the money. And he charged that Garnier stole it from him. On the next morning after missing his money Squires went to Garnier's place of business, and pointed a loaded revolver at Garnier's head and demanded $500 which he said Garnier had stolen from him. He admits in his pleading and in his testimony that he followed Garnier to his office, accused him of stealing his money, and that he threatened to shoot him if he did not unlock the safe and give him the money. The plaintiff says that about 9 o'clock in the morning, and while he was busy, some one approached him with an oath, saying, "If you don't give me that five hundred dollars you stole from me, I will blow you full of holes," and that when he looked around he was facing a revolver in the hands of Mr. Squires; that Squires held a revolver on him and made him unlock the safe; that he was scared and thought Squires was going to kill him. But the money was not found in the safe or on the premises, and no direct proof was offered of the stealing of the money by any one. The defendant alleged that he honestly believed, and still believes, that Garnier stole the money from him.

After the testimony was received the court instructed the jury:

"If you believe from the evidence that the defendant lost said sum of $500, and had reasonable grounds for believing that the plaintiff had stolen it from him, and without malice towards the plaintiff, but in an endeavor to recover said sum of $500, went to the place of business of the plaintiff and there demanded a return of said money, and there accused the plaintiff of having stolen said money, and detained the plaintiff by pointing at him a loaded revolver, then you should render a verdict for the defendant."

Objection was made to this instruction when it was given, and it constitutes the principal ground assigned for the reversal of the judgment that was rendered against the plaintiff. It was intended to apply to the testimony given in support of the count for false imprisonment, and we think it does not correctly state the law applicable to that phase of the case. The testimony in the case justified a charge as to what were the constituent elements of false imprison-

ment, chief of which are the detention and restraint, and the unlawfulness of such detention and restraint. The testimony for the plaintiff tended to show actual restraint for a short time, accomplished through fear of violence and bodily harm. It is true, there was no judicial proceeding, no warrant of arrest, nor any manual touching or taking into custody. But these are not essential elements. "False imprisonment is necessarily a wrongful interference with the personal liberty of an individual. The wrong may be committed by words alone or by acts alone, or by both, and by merely operating on the will of the individual, or by personal violence, or by both. It is not necessary that the individual be confined within a prison or within walls, or that he be assaulted or even touched. It is not necessary that there should be any injury done to the individual's person or to his character or reputation; nor is it necessary that the wrongful act be committed with malice or ill will, or even with the slightest wrongful intention; nor is it necessary that the act be under color of any legal or judicial proceeding. All that is necessary is that the individual be restrained of his liberty without any sufficient legal cause therefor, and by words or acts which he fears to disregard." Comer v. Knowles, 17 Kan. 436.[44]

Judgment reversed.

SMITH v. STATE.

(Supreme Court of Tennessee, 1846. 7 Humph. 43.)

Rodgers, with horse and carryall, was carried over the Chucky river by Smith in his ferry boat. Smith was the keeper of a public ferry. When over, Smith demanded the ferriage, which Rodgers said was already paid; on this a dispute occurred, and Smith told him he should not go on till he paid the ferriage. Some other conversation ensued, when Rodgers paid the ferriage demanded. Rodgers was detained ten or fifteen minutes.

An indictment was found against Smith for an assault and false imprisonment. Rodgers stated on the trial that Smith had not touched his bridle or his horse; that he made no effort to strike or touch his person or his horse; and that he made no threats of personal violence, but that he was afraid of a difficulty with Smith. Smith told Rodgers, after he had paid the charge, that if he had not paid it he had determined to have put his carryall and horse back into the boat, and to have carried them back. A verdict and judgment were rendered for the state, and defendant appealed.

GREEN, J. The court charged the jury:

"That, to make out the offence as charged, no actual force was necessary, but that a man might be assaulted by being beset by another; and if the

[44] A portion of the opinion, mainly on other points, is omitted.

opposition to the prosecutor's going forward was such as a prudent man would not risk, then the defendant would, in contemplation of law, be guilty of false imprisonment."

This charge is correct in all its parts, and the facts were fairly left to the jury. A verdict of guilty has been pronounced, and we do not feel authorized to disturb it. The prosecutor and defendant disputed about the ferriage defendant claimed. Smith insisted upon his demand, and said he did not choose to sue every man that crossed at his ferry. Although he did not take hold of the prosecutor, or offer violence to his person, yet his manner may have operated as a moral force to detain the prosecutor.

And this appears the more probable, as, after the affair was settled, the prosecutor inquired what defendant would have done if he had not paid the ferriage demanded, to which the defendant replied, "he would have put his carryall and horse back into the boat and taken them across the river again." As this determination existed in his mind, it doubtless was exhibited in the manner of the defendant, and thus operated upon the fears of the prosecutor.

Affirm the judgment.[45]

[45] Compare Hebrew v. Pulis (1906) 73 N. J. Law, 621, 64 Atl. 121, 7 L. R. A. (N. S.) 580, 118 Am. St. Rep. 716: P., a maid servant in the employ of S., was suspected by S. of stealing a ring. S. called in a policeman in uniform, D., and summoned P. to their presence. D. asked P. if she had the ring. P. denied having it or knowing where it was. After further parley D. roughly ordered P. to go to her room "and strip herself to the hide," remarking: "We are going to search every piece of clothing you own. I am going to find that ring." P. protested but made no physical resistance, and the search was made by S. as directed, D. meanwhile standing at the door. On the question whether there was an imprisonment although D. did not lay a hand on P., Swayze, J., remarked: "The fact that Pulis [D.] was a police officer and known to the plaintiff to be such, that she was confronted not only by him, but her employers, that she was suspected of larceny for which the officer might arrest her if he had reasonable ground to believe that the crime had been committed, warranted her in believing that if she failed to submit to Pulis' demands she would be actually arrested. The emphatic language in which the officer commanded her to strip to the hide was calculated to terrorize a girl in her situation, and the very fact that the officer, wholly without right, asserted such authority and gave such a command justifies the inference that he and his employers and codefendants intended to terrorize the plaintiff and to secure the effect of a search without legal process. If it was only intended to secure the consent of the plaintiff to a thorough search, the presence of the police officer was quite unnecessary. The appeal of the Misses Sands would have been as persuasive as the command of the officer, but for his seeming authority. We think the case at least presents a question for the jury, and that the reason given by the learned trial judge is not sufficient to justify his conclusion. We think, further, that the nonsuit cannot be sustained on any other ground. There is, indeed, no proof that the defendants laid hands on the plaintiff; but that is unnecessary. Whatever doubt may have been thrown upon this question by some of the earlier English cases is now removed by the later authorities. Grainger v. Hill (1838) 4 Bingham, N. C., 212; Warner v. Riddiford (1858) 4 Common Bench, N. S., 180. The American cases are to the same effect. Bissell v. Gold (1828) 1 Wend. (N. Y.) 210, 19 Am. Dec. 480; Pike v. Hanson (1838) 9 N. H. 491; Brushaber v. Stegemann (1871) 22 Mich. 266; Johnson v. Tompkins (1833) Baldw. 571, 601, 602, Fed. Cas. No. 7,416. The essential thing is the constraint of the person. This constraint may be caused by threats, as well as by actual force; and the threats may be

FOTHERINGHAM v. ADAMS EXPRESS CO.

(United States Circuit Court, E. D. Missouri, 1888. 36 Fed. 252, 1 L. R. A. 474.)

Action by Fotheringham against the Adams Express Company. Verdict for the plaintiff. Motion for a new trial.

THAYER, J. * * * I entertain no doubt that the jury were warranted in finding that plaintiff was unlawfully restrained of his liberty from about the 27th or 28th of October until the 10th of November following; that is to say, for a period of about two weeks. The testimony in the case clearly showed that during that period he was constantly guarded by detectives employed by defendant for that purpose; that he was at no time free to come and go as he pleased; that his movements were at all times subject to the control and direction of those who had him in charge; that he was urged by them on several occasions to confess his guilt, and make known his confederates; and that he was subjected to repeated examinations and cross-examinations touching the robbery, of such character as clearly to imply that he was regarded as a criminal, and that force would be used to detain him if he attempted to assert his liberty. The jury in all probability found (as they were warranted in doing) that during the time plaintiff remained in company with the detectives, he was in fact deprived of all real freedom of action, and that whatever consent he gave to such restraint was an enforced consent, and did not justify the detention without a warrant. It is manifest that the court ought not to disturb the finding on that issue. * * *

Motion overruled.[46]

by conduct or by words. If the words or conduct are such as to induce a reasonable apprehension of force, and the means of coercion are at hand, a person may be as effectually restrained and deprived of liberty as by prison bars. Unless it is clear that there is no reasonable apprehension of force, it is a question for the jury whether the submission was a voluntary act, or brought about by fear that force would be used. No doubt cases may arise where it will be a question of difficulty to determine how far the free will of the plaintiff was overcome, but that determination rests with the jury."

[46] Part of the opinion is omitted.

The verdict was for $20,000 damages. The court overruled the motion for a new trial only on condition that the plaintiff "remit at least 40 per cent. of the verdict within the next five days."

Compare Schultz v. Frankfort Marine Ins. Co. (1913) 151 Wis. 537, 139 N. W. 386, 43 L. R. A. (N. S.) 520: P. had been a witness adverse to D. in an action. While a motion for a new trial was pending in this action P. was "rough shadowed," at D.'s instance, by detectives. The court asks, and answers in the affirmative, the question whether, "omitting all alleged restraint of personal liability" any personal right is "violated by openly and publicly following and watching one." See "Defamation," infra, and 13 Col. Law Rev. 336, 337.

YOUNG v. ROSSI.

WILLARD v. ROSSI.

(United States District Court, E. D. New York, 1887. 30 Fed. 231.)

In Admiralty.

BENEDICT, J. These cases can be disposed of together. In each case the libelant seeks to recover of the defendant damages for false imprisonment. The wrongful detention of the men on board his vessel by the defendant is admitted. But it is not a case for large damages; no loss resulted to the libelants from their detention. If $100 be paid each libelant, a sufficient remuneration will be received for the infringement of their personal rights and any inconvenience to which they were put.

Let each libelant have a decree for $100, and his costs.

TALCOTT v. NATIONAL EXHIBITION CO.

(Supreme Court of New York. Appellate Division, 1911. 144 App. Div. 337. 128 N. Y. Supp. 1059.)

CARR, J. The defendant appeals from a judgment of a Trial Term of the Supreme Court in Westchester county, entered upon a verdict of a jury in an action for false imprisonment, and from an order denying a motion for a new trial. The facts are as follows:

On the morning of the 8th of October, 1908, the plaintiff went into the inclosure of the defendant in the city of New York to buy some reserved seats for a baseball game which was to be held there in the afternoon of that day. These seats were sold at a number of booths within the inclosure. The plaintiff was unsuccessful in his quest, as all the reserved seats had been sold. He tried to leave the inclosure through some gates used generally for ingress and exit. A considerable number of other persons were trying to leave the inclosure through the same gates at the same time. It appears that the baseball game which was to take place was one of very great importance to those interested in such games, and a vast outpouring of people were attracted to it. Many thousands of these came early in the day to seek admittance to the ball grounds, and the result was that the various gates used generally for entrance or exit were thronged with a dense mass of people coming in. The plaintiff was prevented by the servants of the defendant from attempting to pass out through this throng, and as a result of this interference he was detained in the inclosure for an hour or more, much to his annoyance and personal inconvenience. The plaintiff and those similarly situated made many attempts to get out through these gates, and in the restraint put upon them to defeat their efforts they were subjected to some hauling and

pushing by the defendant's special policemen. Finally the plaintiff and the others were taken through a club house within the inclosure and allowed to go out through the entrance to the club house to the street.

Concededly the plaintiff had a legal right to leave the inclosure, and the defendant had no legal right to detain him therein against his will. But the right of each had corresponding duties. A temporary interference with the plaintiff's legal right of egress could be justified as a proper police measure, if the plaintiff sought to exercise such right under circumstances likely to create disorder and danger. Assuming, however, that the defendant was justified in preventing the plaintiff from passing out through the gates in question, it should have directed him to pass out through some other means of exit, if there were any. The plaintiff told the agents of the defendant of his desire to get out, but received no directions or suggestions how to get out. The defendant claims that the plaintiff might have gone out through other gates in another portion of the field used for the entrance of motor cars and other vehicles; but the plaintiff swears that he did not know of the other gates, and there is no proof that his attention was called to them in any way when he and the others sought to go out. He got out in the end, not through the gates for vehicles, but through the club house, on the permission and direction of the defendant. Granting that the restraint placed upon the plaintiff in preventing his going out through the gateways through which he sought exit was justifiable as a police measure, yet the defendant owed him an active duty to point out the other existing methods of egress. It could not stand idly by and simply detain and imprison the plaintiff against his will.

Judgment affirmed.

ROBINSON v. BALMAIN NEW FERRY CO., Limited.

(Judicial Committee of the Privy Council [1910] A. C. 295.)

Appeal by special leave from an order of the High Court of Australia, reversing a judgment of the Supreme Court of New South Wales which discharged a rule nisi for a new trial or a verdict for the defendants in an action by the appellant, a barrister-at-law of the State of New South Wales, for assault and false imprisonment.

The respondents carry on the business of a harbour steam ferry between the city of Sydney and Balmain and have on the Sydney side of their steam ferry a wharf and premises held by them under lease from the Sydney Harbour Trust Commissioners. A barrier with two turnstiles separates the wharf from the street. Persons coming upon the wharf enter it by one of the turnstiles and leave it by the other. There is also a gate with a door in it opening parallel to the street

and at right angles to the turnstiles. At each turnstile an officer of the respondents is stationed. By the lawful regulations of the respondents, one penny has to be paid by all persons entering the wharf to the officer at the entry turnstile and by all persons leaving the wharf to the officer at the exit turnstile. No other charge is made for the use of the ferry, either to or from Balmain. The turnstiles automatically register the number of persons passing through them and so check the takings of the two officers.

A few feet above the two turnstiles and on each side of the barrier is a notice board placed so as to be seen by passengers, on which is painted the words "Notice. A fare of one penny must be paid on entering or leaving the wharf. No exception will be made to this rule, whether the passenger has travelled by the ferry or not."

On June 5, 1905, at about 7:45 P. M., the appellant entered the wharf by the entry turnstile, intending to cross to Balmain by one of the respondents' steamers. He paid one penny to Penson, the officer of the respondents in charge of the entry turnstile. Finding that the next steamer would not start for some twenty minutes, the appellant informed Penson of his wish to leave the wharf, and was directed by him to the exit turnstile. Anderson, the officer in charge thereof, demanded a penny, which the appellant declined to pay. He then endeavoured to force his way past the two officers, who for a time prevented him. Eventually he succeeded in getting past them and squeezed himself through a narrow space between the entry turnstile and the bulkhead into the street.

At the trial Darley, C. J., refused to nonsuit, directing the jury that there was no evidence that the appellant knew of the notice when he went onto the respondents' wharf. The jury found a verdict for the appellant for £100.

The judgment of their Lordships was delivered by

LORD LOREBURN, L. C. * * * The plaintiff paid a penny on entering the wharf to stay there till the boat should start and then be taken by the boat to the other side. The defendants were admittedly always ready and willing to carry out their part of this contract. Then the plaintiff changed his mind and wished to go back. The rules as to the exit from the wharf by the turnstile required a penny for any person who went through. This the plaintiff refused to pay, and he was by force prevented from going through the turnstile. He then claimed damages for assault and false imprisonment.

There was no complaint, at all events there was no question left to the jury by the plaintiff's request, of any excessive violence, and in the circumstances admitted it is clear to their Lordships that there was no false imprisonment at all. The plaintiff was merely called upon to leave the wharf in the way in which he contracted to leave it. There is no law requiring the defendants to make the exit from their premises gratuitous to people who come there upon a definite contract

which involves their leaving the wharf by another way; and the defendants were entitled to resist a forcible passage through their turnstile.

The question whether the notice which was affixed to these premises was brought home to the knowledge of the plaintiff is immaterial, because the notice itself is immaterial.

When the plaintiff entered the defendants' premises there was nothing agreed as to the terms on which he might go back, because neither party contemplated his going back. When he desired to do so the defendants were entitled to impose a reasonable condition before allowing him to pass through their turnstile from a place to which he had gone of his own free will. The payment of a penny was a quite fair condition, and if he did not choose to comply with it the defendants were not bound to let him through. He could proceed on the journey he had contracted for.

Under these circumstances their Lordships consider that, when the defendants at the end of the case submitted that there ought to be a nonsuit, the learned judge ought to have nonsuited the plaintiff. * * *

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.[47]

WHITMAN v. ATCHISON, T. & S. F. RY. CO.

(Supreme Court of Kansas, 1911. 85 Kan. 150, 116 Pac. 234, 34 L. R. A. [N. S.] 1029, Ann. Cas. 1912D, 722.)

Action by Whitman against the railway company for a personal injury. Judgment for the plaintiff and defendant appealed.

The plaintiff recovered a judgment against the railway company for $400 on account of injuries received in alighting from the caboose of a freight train at the station of Cherryvale. At the time of the injury, he was 75 years of age. When the train reached Cherryvale about dusk, it did not stop at the depot, but continued across Main street in order not to block that street, and came to a stop about 275 feet from the depot. The plaintiff expected the train to stop at the depot, and, fearing that he would be carried past his station, left his seat and went upon the platform. Thinking that the train was going slowly enough he attempted to get off, and was thrown or fell to the ground, and sustained a fracture of the leg. When he came out on the platform, the conductor was standing there, facing toward the front of the train and signaling to the engineer with a lantern. After the train stopped and the conductor learned that some one had been hurt, he went to where the plaintiff lay upon the pavement, and

[47] The statement of the case is abridged, and the arguments are omitted.

informed him that he would have to obtain a statement in regard to the accident; that the law required the conductor to obtain such statement from every injured passenger. A cab was called, plaintiff, at his request, was lifted into it, and, at the direction of the conductor, he was driven to where the caboose was standing. The conductor brought his papers from the caboose, got into the cab with the plaintiff, and filled out the blank forms, which the plaintiff then signed. One of these was a personal injury report required by the company's rules, and the other was a report required by the Interstate Commerce Commission. Immediately after the statements were signed, plaintiff was taken to his home. When plaintiff purchased his ticket at Independence, he signed a freight train release authorized by a statute then in force, releasing the company from liability for loss or damage to his person while on such train, or while going to or from the same, except in case of willful negligence.

Plaintiff relied upon two causes of action. The first was based upon an alleged willful injury, the second, upon an alleged unlawful restraint by the conductor.

PORTER, J. * * * In the case at bar it appears from the evidence that the rules of the company required the conductor to send in a report of all accidents, and the company furnished him with a blank for the purpose of obtaining a statement of any passenger who might be injured, with instructions that: "This blank should be filled out immediately upon the happening of the accident, if the injured party is able. If not, then at the earliest time thereafter." The company also furnished the conductor a blank prepared in conformity with the interstate commerce law, to be signed by the injured passenger, which contained the following statement: "To Passengers: The law requires railway companies to report accidents to the Interstate Commerce Commission. That this law may be complied with you are requested to fill the following blank." The rules of the company authorized the conductor to obtain from any injured passenger a statement in writing; but there was no law nor any rule of the company which required a passenger to make either statement, and it will not be seriously contended that what the conductor told the plaintiff as to the law was true. It was a misrepresentation which, according to the plaintiff's evidence, induced him to consent, while suffering from his injuries and desiring needed medical attention, to remain there until what he had been falsely informed was a requirement of the law had been complied with. This amounted to an unlawful restraint of his personal liberty, and it is obvious that the same principle should apply as though he had suffered an unlawful imprisonment, notwithstanding there is no evidence of such coercion by the conductor as to bring the case squarely within the rules which ordinarily govern in cases of false imprisonment. The conductor had the right to request him, if able, to make the statement, but had no right to induce

him to remain and make the statements by misrepresenting that the law of the state required him to make them at that time and place.

Probably the injuries sustained by plaintiff by reason of this unlawful detention were slight; but that does not affect the principle involved. If he had sustained a severed artery which required immediate attention to prevent him from bleeding to death, and the conductor had used the same unlawful means to detain him, and procured the statement against his will, the case would only differ in degree, but not in principle. The giving of the instruction complained of cannot, therefore, be regarded as error, although it might have been worded differently in order to apply to the actual facts in evidence. All that was necessary, in order for the plaintiff to recover upon the second cause of action, was to show that he was unlawfully restrained of his liberty without any sufficient legal cause therefor, and by words or acts which he feared to disregard. He testified that he agreed to remain and make the statements, because he had been informed that the law required him to do so. This, in connection with his age, his suffering, and his helpless condition, and all the circumstances in evidence, would warrant a jury in finding that he was restrained by words and acts which he feared to disregard.

The defendant contends further that, if the acts of the conductor amounted to an unlawful restraint of the plaintiff, they were not within the scope of his authority. The evidence shows that the printed instructions of the conductor were to obtain a statement from the injured passengers; the instructions reading: "All conductors of trains carrying passengers must have a supply of this form on hand at all times when on duty, and as soon as possible after the occurrence of an accident, the conductor will obtain from each passenger, * * * whether injured or not, a statement hereon and forward by the first train to the superintendent." The defendant having instructed its servant and employé to obtain the statement from any injured passenger must be held to have authorized him to use what he considered necessary means to obtain it. Defendant relies upon the recent case of Crelly v. Telephone Co., 84 Kan. 19, 113 Pac. 386, 33 L. R. A. (N. S.) 328, where the local manager of a telephone company was held not to have been acting in the scope of his employment when he violently assaulted and beat an operator who was about to quit the service, because she refused to sign a voucher for the compensation due her. The opinion in that case quotes Collette v. Rebori, 107 Mo. App. 711, 82 S. W. 552, holding that the master is liable for the tortious acts of his servant when it is shown that the act complained of was done as a means or for the purpose of doing the work assigned by the master. The conductor was authorized to obtain from the passenger the statement, and, for the purpose of obtaining it, he represented to him that the law required the statement to be made. This is far different in principle from the act of a servant in commit-

ting an assault which would be unlikely to bring about the accomplishment of the purpose. The representation that the law required the report to be signed by the passenger was something quite likely to induce compliance with the request, and which the company might well have anticipated its servant would do. The tendency of modern decisions is to a wider interpretation of the implied authority of the servant in cases of this kind (19 Cyc. 329), especially where the relation of carrier and passenger exists. A., T. & S. F. R. Co. v. Henry, 55 Kan. 715, 723, 41 Pac. 952, 29 L. R. A. 465. Unquestionably the plaintiff was a passenger at the time the conductor detained him. He was injured in alighting from the train at his destination. Before he had been removed from the company's right of way, the conductor took control over him for the purpose of obtaining a statement from him as an injured passenger, and we think the relation of carrier and passenger continued during the time the conductor detained him. We think the acts of the conductor were fairly and reasonably within the scope of his employment.[48]

BENNETT v. AUSTRO AMERICANA S. S. CO.

(Supreme Court of New York, Appellate Division, 1914. 147 N. Y. Supp. 193.)

Bennett brought an action in New York for an alleged false imprisonment. From a judgment dismissing the complaint, the plaintiff appeals.

CARR, J. On the trial of this action, the complaint was dismissed by the trial court at the close of the defendant's evidence, and judgment was entered accordingly, from which the plaintiff appeals. The only question involved in the case before us is whether, considering the plaintiff's proofs in their most favorable aspect, he has made out a cause of action. He is a nonresident of the state, the defendant is a foreign corporation, and the facts set forth in the complaint happened and the action was brought before the recent amendment to section 1780 of the Code of Civil Procedure. Hence this court had no jurisdiction of the plaintiff's cause of action unless it arose within this state. Payne v. N. Y., S. & W. R. R. Co., 157 App. Div. 302, 142 N. Y. Supp. 241.

The facts appearing in the plaintiff's proofs show that in August, 1908, he was a second cabin passenger on one of the defendant's steamships journeying from a port in Greece to the port of New York. The vessel was crowded with emigrants and a large number

[48] The statement of facts is abridged. A portion of the opinion is omitted. The first cause was held open to a demurrer to the evidence. As the verdict was general with nothing to indicate how much of the damages allowed was apportioned to the first cause, the judgment was reversed, and remanded for further proceedings on the cause for false imprisonment.

There was a dissent in part from Burch and Porter, JJ.

of second cabin passengers. The latter, or a large number of them, became dissatisfied with the food furnished to them, and with other matters, and claimed improper attention to their needs and comfort on the part of the ship's officers. A letter was framed for the purpose of complaint and publication on the arrival of the ship at the port of New York, and the plaintiff undertook to get signatures to it, even from first-class passengers. He was told that a Mr. Allen, a first-class passenger, would sign this letter. The ship was then on the high seas, nearing the port of New York. The plaintiff went to the first cabin music room, where he found Mr. Allen and tendered him the letter for signature. The latter took the letter and began to read it before signing it. Thereupon the ship's captain entered the music room and took the letter from Mr. Allen and ordered the plaintiff from the room, on the ground that he, as a second-class passenger, had no right to be in the first cabin quarters. The plaintiff answered that he would not leave the room until he got back his letter. The captain refused to return it, and again ordered the plaintiff to leave the room, and on his refusal to go the captain struck him and ordered his removal forcibly by members of the crew. He was then confined in a stateroom, and the imprisonment continued while the vessel entered the port and for several hours after it had docked in New York City. The respondent contends that if the plaintiff has any cause of action it "arose" upon the high seas and this court had no jurisdiction of it. The appellant contends that he has a cause of action for false imprisonment to the extent of such imprisonment while within the jurisdiction of this state, even though such imprisonment began outside the jurisdiction, for its continuance made a fresh cause of action in his favor as long as it lasted, and, if it continued within this jurisdiction, a fresh cause of action arose within this jurisdiction to the extent of the continued imprisonment. In this contention we think the appellant is correct. Hardy v. Ryle, 9 B. & C. 608; Huggins v. Toler, 64 Ky. (1 Bush) 192; Dusenbury v. Keiley, 8 Daly, 537; s. c., 85 N. Y. 383; Van Ingen v. Snyder, 24 Hun, 81. * * *[49]

Judgment reversed and new trial granted.[50]

[49] Compare Regina v. Lesley (1860) Bell, 220, 8 Cox, C. C. 269: P. and others, being in Chili and subjects of that state, were banished by the government of Chili to England. D., the master of an English merchant vessel lying in the territorial waters of Chili, contracted with that government to take P. and his companions from Valparaiso to Liverpool and they were accordingly brought on board D.'s vessel by the officers of the government and carried by D. to Liverpool under his contract. Assuming that D.'s act within Chilian waters was justified the question was whether D. was liable, in an English court, on a charge of false imprisonment for what was done on the high seas?

[50] Part of the opinion, on a question of excess, is omitted.

HARNESS v. STEELE.

(Supreme Court of Indiana, 1902. 159 Ind. 286, 64 N. E. 875.)

The action was by Steele. There was a judgment for the plaintiff and the defendant appealed.

JORDAN, J. Appellee, a minor, by his next friend, sued appellant, the sheriff of Howard county, together with one Strubbs, to recover damages for false imprisonment. A trial before a jury resulted in a verdict against appellant for $400, and a finding in favor of the defendant Strubbs. Over appellant's motion for a new trial, wherein he assigns various reasons, the court rendered judgment on the verdict, from which appellant appealed to the appellate court. The appeal was transferred to this court under the act of March 13, 1901.

The first error argued by counsel for appellant is the overruling of the demurrer to the first paragraph of the amended complaint. This complaint consists of two paragraphs. The first, omitting the caption, is as follows: "Plaintiff, for his amended complaint, complains of the defendant, and says that on the 15th day of May, 1900, the defendant unlawfully imprisoned the plaintiff and deprived him of his liberty for the space of one hour, to his damage in the sum of $2,000, for which he demands judgment." It is contended that this paragraph contains no facts to show that appellee was falsely imprisoned and deprived of his liberty, but consists merely of conclusions. While the paragraph is somewhat terse, it is an exact copy of the form given in 3 Works, Prac. p. 152. It may also be said that it substantially follows the averments in a form given in 1 Estes, Pl. & Forms, p. 561, with the exception that the latter form does not contain the word "unlawfully," and states that the imprisonment was "without probable cause," and also gives the place at which the plaintiff was imprisoned. The charge that "the defendants * * * imprisoned the plaintiff and deprived him of his liberty for the space of one hour" is certainly not a mere conclusion of the pleader, but is a composite statement of an ultimate fact, the imprisonment of the plaintiff. The word "unlawful" is not essential, and may be omitted from the pleading, for the rule is settled in this state that a complaint for false imprisonment is sufficient without alleging that the act complained of was illegal, or wrongful, or that the arrest or imprisonment was without competent authority, or malicious, or without probable cause. Colter v. Lower, 35 Ind. 285, 9 Am. Rep. 735; Gallimore v. Ammerman, 39 Ind. 323; Boaz v. Tate, 43 Ind. 60. The paragraph in controversy is at least sufficient on demurrer. It might possibly have been open to the objection, upon a motion to make it more specific, that it did not state the venue where the alleged wrong was perpetrated by the defendants; but in respect to this question we do not decide. * * *[51]

[51] Part of the opinion is omitted.

(b) IN ARREST

GENNER v. SPARKES.

(Court of King's Bench, 1704. 1 Salk. 79, 91 Reprint, 74.)

Genner, a bailiff having a warrant against Sparkes, went to him in his yard, and being at some distance told him, he had a warrant, and said he arrested him. Sparkes having a fork in his hand, keeps off the bailiff from touching him, and retreats into his house. And this was moved as a contempt. Et per Cur. The bailiff cannot have an attachment, for here was no arrest nor rescous. Bare words will not make an arrest; but if the bailiff had touched him, that had been an arrest, and the retreat a rescous, and the bailiff might have pursued and broken open the house; or might have had an attachment or rescous against him; but as this case is, the bailiff has no remedy but an action for assault; for the holding up of the fork against him when he was within reach, is good evidence of that.

HUNTINGTON v. SHULTZ.

(Constitutional Court of South Carolina, 1824. Harp. 452, 18 Am. Dec. 660.)

The defendant was served with a capias ad respondendum when he was attending on court, as a party to a suit. He moved to set aside the service of the writ, on the ground that he was privileged from the service of this writ during his attendance on the court. The court granted the motion, and the plaintiff appealed.

RICHARDSON, J. The question in this case depends upon the act of 1791: 1 Faust, 44; 1 Brevard, 223; which enacts that "all persons necessarily going to, attending on, or returning from the same" (referring to the superior courts), "shall be freed from arrest in any civil action." Now, what does the term "arrest" mean? Wood (see Institutes, 595) defines it: "A detention of the person." And Blackstone, vol. 3, p. 288, says: "An arrest must be by corporal seizing the defendant's body; after which the sheriff may justify breaking open the house, in order to take him;" and in page 289, he says: "When the defendant is arrested, he must either go to prison, or put in special bail to the sheriff." These authorities show that an arrest is synonymous with actual detention of the person of the party arrested; and does not mean merely a summons, or citation.

The scope and object of the act of 1791, too, evidently require no more than that the person of the party attending court shall be free from detention; and he may be cited or summoned without any detention of his person. * * *

The motion is granted.

RUSSEN v. LUCAS.

(At Nisi Prius, Sittings after Hilary Term, 1824. 1 Car. & P. 153, 12 E. C. L. 98.)

Action against a sheriff for an escape. The only point in dispute was, whether a person named Hamer was arrested by the sheriff's officer, and escaped.

The officer having the warrant went to the One Tun tavern in Jermyn street, where Hamer was sitting. He said, "Mr. Hamer, I want you." Hamer replied, "Wait for me outside the door, and I will come to you." The officer went out to wait, and Hamer went out at another door, and got away.

ABBOTT, C. J. Mere words will not constitute an arrest; and if the officer says, "I arrest you," and the party runs away, it is no escape; but if the party acquiesces in the arrest, and goes with the officer, it will be a good arrest. If Hamer had gone even into the passage, the arrest would have been complete: but, on these facts, if I had been applied to for an escape-warrant I would not have granted it.

Nonsuit.

WHITHEAD v. KEYES.

(Supreme Judicial Court of Massachusetts, 1862. 3 Allen, 495, 81 Am. Dec. 672.)

Tort against a sheriff for an escape suffered by his deputy. * * *

The defendant also requested the court to instruct the jury that if the hold taken by Stoddard by the officer was only for an instant, and Stoddard broke away from that hold by superior force, or was rescued therefrom by the interference of others, this would be a sufficient retaking by the officer to allow him to return a rescue. The judge declined so to rule, and instructed the jury that to enable the defendant to set up a rearrest of Stoddard by the officer, the hold by the officer would not be sufficient unless Stoddard was held and stopped, or the officer had such a hold on him that it was in his power to stop him.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

METCALF, J. * * * We are also of the opinion that the jury were wrongly instructed that to enable the defendant to set up a rearrest of the debtor (Stoddard) by the officer (Thomas) the hold of the debtor by the officer would not be sufficient, unless the debtor was held and stopped, or the officer had such a hold on him, that it was in his power to stop him.

There cannot be either an escape or a rescue of a person unless he is first arrested. If an arrest is prevented by a party's avoidance or resistance of an officer, or by the interference of others, the party does not escape, and the officer is not liable in an action for an escape, but is liable, if at all, in an action for negligence in not making an arrest when he might and ought. And the law is the same in regard to a rescue. An officer cannot legally return a rescue of a party whom he had not arrested. Such a return would be false. We have therefore, in deciding on this last instruction given to the jury, to consider the question—what constitutes an arrest? And our opinion is, that an officer effects an arrest of a person whom he has authority to arrest, by laying his hand on him for the purpose of arresting him, though he may not succeed in stopping and holding him. 1 Hale P. C. 459. Genner v. Sparkes, 1 Salk. 79, and 6 Mod. 173. Sheriff of Hampshire v. Godfrey, 7 Mod. (Leach's Ed.) 289. Williams v. Jones, Rep. Temp. Hardw. 301. Bul. N. P. 62. Watson's Sheriff, 90. United States v. Benner, Bald. 239, Fed. Cas. No. 14,568. And we need not express an opinion as to what else will or will not amount to an arrest. We think that the instruction, prayed for on this point by the defendant, should have been granted, and that the exception taken to the instruction that was given must be sustained.

New trial granted.[52]

GOODELL v. TOWER.

(Supreme Court of Vermont, 1904. 77 Vt. 61, 58 Atl. 790, 107 Am. St. Rep. 745.)

Goodell brought trespass for a false imprisonment against Tower, Hastings and another. There was a judgment in favor of the plaintiff. The defendants bring exceptions.

TYLER, J. * * * It is contended in defendant Hastings' behalf that he did not restrain the plaintiff of his liberty. The trial court found that, having the complaint and warrant signed respectively by the other two defendants, he met the plaintiff and stopped him by speaking to him, as he was driving along on a business errand, read the paper to him, and told him he would have to go with him, Hastings; that the plaintiff told the officer that he would have to get someone to take his team; that the officer permitted him to do his errand, but directed him to return as soon as he could; that the plaintiff then drove along; that Hastings became impatient, and went to meet him, turned in behind the plaintiff's team and followed him to the village; that he went to the place of trial with the plaintiff, delivered the paper to the justice and informed him that the plaintiff was present; that this was all that Hastings did besides making his return upon the warrant; that he understood that the plaintiff was in his custody.

[52] The statement of facts is abridged and part of the opinion is omitted.

The action of the officer constituted a false imprisonment of the plaintiff. It was not necessary that he should lay his hands upon him. It was sufficient that the plaintiff was within his power and submitted to the arrest: Mowry v. Chase, 100 Mass. 79. Every restraint upon a man's liberty is, in the eye of law, an imprisonment, wherever may be the place or whatever may be the manner in which the restraint is effected: 2 Kent's Commentaries, 26. And see Pike v. Hanson, 9 N. H. 491, cited in the notes, where it was held that the words may constitute an imprisonment, if they impose a restraint upon the person, and he is accordingly restrained and submits. The law is so well settled upon this point that it is hardly necessary to cite authorities, but the notes in Bissell v. Gold, 1 Wend. (N. Y.) 210, 19 Am. Dec. 480, are interesting and clearly elucidate the rule that to constitute an arrest there must be some real or pretended legal authority for taking the party into custody; that he must be restrained of his liberty; that if he submits and is within the power of the officer it is sufficient without an actual touching of his person. This is the rule laid down by Savage, C. J., in the main case, and it has not been departed from in recent authorities. * * *

Judgment affirmed.[53]

(c) IMPRISONMENT—DISTINGUISHED FROM MALICIOUS PROSECUTION

LOCK v. ASHTON.

(Court of Queen's Bench, 1848. 12 Q. B. 871, 116 Reprint, 1097, 76 R. R. 434.)

Trespass for an alleged imprisonment. Plea, not guilty. On the trial it appeared that the plaintiff, being servant to the defendant, who was a corn dealer, was sent by him with a cart to the premises of Messrs. Rosling and Watson, also corn dealers, for twenty sacks of oats. The whole quantity was not delivered; and the plaintiff signed a receipt note for eighteen. On his return to the defendant's it was found that only seventeen sacks were in the cart. Messrs. Rosling and Watson, on enquiry by the defendant, insisted that they had delivered eighteen sacks. The plaintiff, being further questioned, made unsatisfactory answers: and the defendant then gave him into custody, and had him conveyed to a station house, and from thence to a police office. The magistrate, after hearing witnesses, remanded the plaintiff for further examination. He was again brought up for examination, and a second time remanded. Before the third hearing, Messrs. Rosling and Watson, discovered that the missing sack had remained on their premises undelivered; they communicated this to

[53] Part of the opinion is omitted.

the defendant; and he stated it to the magistrate on the third examination: and the plaintiff was thereupon discharged. There was no evidence to show that the defendant had induced the magistrate to remand the plaintiff on the first or second examination, or that he had unduly delayed making the statement on which the plaintiff was liberated. It was urged, on the defendant's behalf, that in this action he could be liable only for the first imprisonment and taking before the magistrate, not for the remand or the subsequent detention, these being the acts of the justice. Lord Denman, Ch. J., asked if there was any authority for this position; and, none being cited, he left the case to the jury on the whole matter of complaint. Verdict for the plaintiff, damages £10.

Whitehurst, in support of a rule for a new trial: It is true that the defendant may be liable for all that happened till the parties appeared before the magistrate. After that, the justice acted in the discharge of his official duty; and the acts done were his. He was bound to retain the plaintiff, even if the defendant had pressed for his release. A mistake was discovered; but before that time the case was out of the defendant's control. The argument for the plaintiff would make a prosecutor in such a case answerable for the detention even to the time of trial. The remands, then, not being his acts, could not be the subject of an action of trespass; case might have lain; but then malice and want of probable cause must have been alleged and shown. This appears by the well known series of cases in which persons having wrongfully, as was alleged, put a Court in motion, have been sued in case or trespass, and trespass has been held not to lie. * * * (Coleridge, J.: Suppose the defendant takes the plaintiff to a police office on a day when he knows that, as a matter of course, there will be a remand.) That would be evidence of malice in an action for malicious prosecution. (Erle, J.: If the arresting were a trespass, and the remand were ground only for an action on the case, the same course of prosecution would be trespass on Saturday and case on Monday.) It would. (Coleridge, J.: Is not the remand a matter by which to measure the damages?) It was so treated, but mistakenly. The defendant was not liable, as to the remand, in trespass, or in any form, if he arrested bona fide in the first instance. (Erle, J.: A turning point here may be, whether or not the remand was at defendant's instance.)

Lord Denman, Ch. J. Much may depend on that. * * * If the remand here is considered as the independent judicial act of the magistrate, it will be difficult to say that the defendant is liable in this form of action. We will look at the declaration and the Judge's notes.

Cur. adv. vult.

Lord Denman, Ch. J. (on the last day of the Term). The verdict in this case cannot be sustained, the action being trespass, and the

jury having given damages not only for the trespass in arresting, but for the remand, which was the act of the magistrate.

Rule absolute.[54]

II. In Trespass to Property

(*A*) *In Trespass to Real Property*

WINCKWORTH v. MAN.

(Court of Common Pleas, 1608. 1 Brownl. & G. 210, 123 Reprint, 759.)

The plaintiff declares for a trespass in one acre of land in D. and abuts that, east, west, north and south; and upon not guilty pleaded, the jury found the defendant guilty in half an acre within written, and moved in arrest of judgment, because upon the matter no trespass had been found, for there is no moiety bounded as the plaintiff had declared, for the whole acre is only bounded by the plaintiff containing his trespass within those bounds, and the defendant ought to be found a trespasser within those bounds, for otherwise it is not good; and it is impossible for the moiety of one acre to be within

[54] Part of the opinion is omitted.

"The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment." Per Willes, J., in Austin v. Dowling (1870) L. R. 5 C. P. 534, 540.

"If an individual prefers a complaint to a magistrate, and procures a warrant to be granted, upon which the accused is taken into custody, the complainant, in such a case, is not liable in trespass for the imprisonment; and that, even although the magistrate had no jurisdiction. According to the case of West v. Smallwood ([1838] 3 M. & W. 418, 49 R. R. 666), a party who shall make a direct application to a magistrate for a warrant, that another may be taken into custody, is deemed thereby only to make an appeal to the magistrate to exercise his jurisdiction: and the imprisonment is referred to the magistrate's authority, so as to exempt the complainant from all liability in trespass: and what takes place in the presence of the magistrate, ought to be referred to the exercise of his authority, as in Barber v. Rollinson ([1833] 1 Cr. & M. 330). In that case, the plaintiff having been discharged from criminal custody by a magistrate, was leaving the post-office, when the defendant said, "I have another charge against him, for forgery;" upon which the plaintiff was again taken and placed at the Bar, and upon the trial before Lord Lyndhurst, in an action of trespass in respect of this second imprisonment, the plaintiff was nonsuited; and, upon motion to set aside the nonsuit, it was held that the acts of the defendant were part of the proceedings before the magistrate, for which the defendant could not be held liable in trespass; that the taking could not be considered as the act of the defendant, who had only put the law in motion, for which he might be liable in case." Per Coltman, J., in Brown v. Chapman (1848) 6 C. B. 365, 376, 77 R. R. 347, 355.

those bounds: but the whole Court except Fenner, were of opinion that the plaintiff should have his judgment: for if the plaintiff layeth his action for a trespass committed in one acre, and the jury find that only to be in one foot of it, it is good; and here they have found the trespass in the moiety of the acre bounded, which is sufficient in this action, where damages only are to be recovered, but if it had been in ejectment, the verdict had been naught, for it is uncertain in what part he should have his writ of habere facias possessionem.

GRAHAM v. PEAT.

(Court of King's Bench, 1801. 1 East, 244, 102 Reprint, 95.)

Trespass quare clausum fregit. Plea the general issue, and certain special pleas not material to the question. At the trial before Graham, B., the trespass was proved in fact; but it also appeared that the locus in quo was part of the glebe of the rector of the parish of Workington in Cumberland, which had been demised by the rector to the plaintiff, and that the rector had not been resident within the parish for five years last past, and no sufficient excuse was shewn for his absence. Whereupon it was objected that the action could not be maintained, the lease being absolutely void by the Act of 13 Eliz. c. 20, which enacts, "That no lease of any benefice or ecclesiastical promotion with cure or any part thereof shall endure any longer than while the lessor shall be ordinarily resident and serving the cure of such benefice without absence above fourscore days in any one year; but that every lease immediately upon such absence shall cease and be void." And thereupon the plaintiff was nonsuited.

A rule was obtained in Michaelmas term last to shew cause why the nonsuit should not be set aside, upon the ground that the action was maintainable against a wrong-doer upon the plaintiff's possession alone, without shewing any title.

Cockell Serjt., Park, and Wood, now shewed cause, and insisted that possession was no further sufficient to ground the action even against strangers than as it was prima facie evidence to title, and sufficient to warrant a verdict for the plaintiff, if nothing appeared to the contrary. But here it did expressly appear by the plaintiff's own case that his possession was wrongful, for it was a possession in fact against the positive provisions of an act of Parliament, without any colour of title even against strangers. [Carter & Claycoles Case] 1 Leon. 307. He was not even so much as tenant at sufferance; though it is not certain that this latter can maintain a trespass. It is settled that the plaintiff could not have maintained an ejectment against a stranger who had evicted him.

Lord Kenyon, C. J. There is no doubt that the plaintiff's possession in this case was sufficient to maintain trespass against a

wrong-doer; and if he could not have maintained an ejectment upon such a demise, it is because that is a fictitious remedy founded upon title. Any possession is a legal possession against a wrong-doer. Suppose a burglary committed in the dwelling house of such a one, must it not be laid to be his dwelling house notwithstanding the defect of his title under that statute.

PER CURIAM. Rule absolute.[55]

LANE v. DIXON.

(Court of Common Pleas, 1847. 3 C. B. 776, 71 R. R. 484, 136 Reprint, 311.)

Trespass. The declaration stated that the defendant with force and arms broke and entered certain rooms of the plaintiff, in a parcel of a certain dwelling house, and then ejected the plaintiff and his family from the possession of the said rooms and kept them so ejected and expelled. Pleas, not guilty and five special pleas. The facts shewn upon the trial were as follows: In August, 1845, the plaintiff, a medical practitioner, hired from one Johnson certain rooms in Bury Street, St. James's, at a rent of £50. a year, with the privilege of putting a brass plate with his name engraved thereon, upon the front door, there to remain so long as he should continue to occupy the apartments. In September, Johnson demised the whole house to the defendant, for twenty-one years. On the 15th of January, 1846, the rent being unpaid, the defendant removed the plaintiff's brass plate from the door, and refused to allow the plaintiff to have access to his apartments. It appeared that the defendant let the whole of the house in separate apartments: but there was no direct evidence that the defendant had actually entered the plaintiff's rooms.

This action was commenced early in February, 1846. On the part of the defendant, it was insisted that the charge of breaking and entering the plaintiff's rooms was not proved. * * * Verdict for the plaintiff, leave being reserved to the defendant to move to enter a verdict for him, or a nonsuit, if the Court should be of opinion that there was no evidence of a breaking and entering.

Byles, Serjt., in Trinity Term, obtained a rule nisi accordingly, and also for a new trial, on the ground there was no evidence to justify the verdict.

[55] Compare:

Cary v. Holt (1746) 2 Str. 1238: P. declared in trespass upon his possession. D. made title and gave colour to P., who, in a replication de injuria, denied the title set out by D. Held, a good replication "for it lays the defendant's title out of the case, and then it stands upon the plaintiff's possession, which is good enough against a wrongdoer."

Harker v. Birbeck (1764) 3 Burr. 1556: P. has a liberty of digging in a lead mine but has no property in the soil above the mine. For an encroachment on the mine P. sues in trespass on the case. Lord Mansfield: "We are all clear that the action ought to have been trespass."

WILDE, C. J. One ground upon which this rule was moved, is, that there was no evidence to go to the jury, in support of so much of the declaration as alleges a trespass to the plaintiff's rooms, and ejecting him therefrom, and seizing his goods. The evidence offered was that the plaintiff had taken apartments in the house in question, for a certain term; and that, before that term had expired, the defendant refused to permit the plaintiff to have access to them. It appears to me that that was competent evidence to submit to the jury, and that it afforded a reasonable foundation for a verdict for the plaintiff. The period of time during which the plaintiff was excluded, the nature of the property and other surrounding circumstances, were all proper to be taken into account in determining whether or not it was to be presumed that the defendant broke and entered the rooms. It appeared that the apartments in question were open, and that the defendant took advantage of the temporary absence of the plaintiff, to fasten the outer door and so exclude the plaintiff from his lodgings. Considering that the whole house was let out in separate suits of apartments, and that the defendant refused to permit the plaintiff to return to the rooms, what is the reasonable intendment of the use to which the plaintiff would put them? Out of Court, no one would for a moment doubt that he would at once enter them for his own occupation or for the purpose of letting. All the circumstances were proper to be submitted to the jury, and could not properly be withheld from them: and I see no ground for saying that the inference they have drawn was incorrect. The first ground of the motion, therefore, fails. * * *

Rule discharged.[56]

WELLS v. HOWELL.

(Supreme Court of Judicature, New York, 1822. 19 Johns. 385.)

Howell sued Wells before a justice, because the defendant's horse had entered the plaintiff's field and destroyed the grass. Wells pleaded that there was no fence around the field when the damage was done, and admitted the trespass and the damage. Howell demurred to the plea. It was admitted that there was no fence, as stated, and that there was no town by-law about fences, or cattle running at large. The justice gave judgment for the plaintiff below for $10 and costs.

PER CURIAM. Every unwarrantable entry on another's land is a trespass, whether the land be inclosed or not. 3 Bl. Com. 209; 3 Selw. N. P. 1101. A person is equally answerable for the trespass of his cattle, as of himself. 3 Bl. Com. 211. The defendant below

[56] Only so much of the case is given as relates to the one point. The concurring opinions of Maule, Cresswell, and V. Williams, JJ., are omitted.

was bound to show a right to permit his cattle to go at large; and it is conceded that there was no town regulation on the subject. The judgment must be affirmed.

Judgment affirmed.[57]

PATRICK v. GREENWAY.

(Court of Common Pleas, 1796. 1 Wms. Saund. 343, 344 note, 85 Reprint, 495, 498.)

This was an action of trespass for fishing in the plaintiff's several fishery. It appeared in evidence that the defendant fished there but did not take any fish; neither was it alleged in the declaration that the defendant caught any fish. The plaintiff obtained a verdict, which, in the following term, the defendant moved to set aside. But the Court of Common Pleas refused even a rule to shew cause, upon the ground that the act of fishing was not only an infringement of the plaintiff's right, but would hereafter be evidence of an using and exercising of the right of the defendant if such an act were overlooked.[58]

[57] Accord: Y. B. 20 Edw. IV. (1481) f. 11, pl. 10: Trespass with cattle. Plea, that the plaintiff's land adjoined a place where defendant had common, that the cattle strayed from the common and defendant drove them back as soon as he could. Brian, C. J.: "If the land in which he has common be not inclosed, it behooves him to keep the beasts in the common and out of the land of any other."

Star v. Rookesby (1711) 1 Salk. 336, 91 Reprint, 295 ("for the law bounds every man's property and is his fence").

Compare Ellis v. Loftus Iron Co. (1874) L. R. 10 C. P. 10: P. sued to recover damages because his mare had been kicked and bitten by D.'s horse. It appeared that D. was accustomed to graze his horse in a plot of ground which was separated from the plaintiff's pasture by a wire fence, and that the horse, without going into P.'s ground, had caused the injury complained of by biting and kicking the mare through the fence. No negligence on the part of D. was established. Brett, J.: "* * * I had no doubt that if there was evidence of negligence and as a result of such negligence an animal of the defendant's passed wholly or in part onto the plaintiff's land, such a circumstance would constitute a trespass; but what I did doubt for some time was whether, when there was no negligence at all on the part of the defendant, the same consequence would follow. Having looked into the authorities, it appears to me that the result of them is that in the case of animals trespassing on land the mere act of the animal belonging to a man, which he could not foresee, or which he took all reasonable means of preventing, may be a trespass, inasmuch as the same act, if done by himself, would have been a trespass. Blackstone (16th Ed.) vol. iii, c. 12, p. 211; Chitty on Pleading (7th Ed.) vol. i, p. 98; and Comyns' Digest, title 'Trespass C,' are all authorities to this effect."

Compare Salmond, Jurisprudence (1910) 378.

[58] The case is reported from a note to Mellor v. Spateman (1670) 1 Wms. Saund. 343.

PFEIFFER v. GROSSMAN.

(Supreme Court of Illinois, 1853. 15 Ill. 53.)

This was an action of trespass quare clausum fregit. The plea was, not guilty. On the trial the court refused to give these instructions:

"That the putting of a fence or letting it stay on the land of another is a trespass in the eye of the law, for which the aggrieved person is entitled to at least nominal damages; that the plowing up of another man's land and cultivating it, although the land may thereby be improved, is still a trespass in the law, for which the person aggrieved is entitled to at least nominal damages."

The jury found for the defendant, and the court rendered judgment on the verdict. The plaintiff went up on error.

TREAT, C. J. The instructions not only asserted correct legal principles, but they were strictly applicable to the case. If a party puts a fence on another's land or plows up the soil, he is liable as a trespasser. Such acts are a violation of the owner's right of possession, to redress which the law gives him an action. And the action is maintainable, although the owner is not substantially injured. He is entitled to nominal damages for the intrusion upon his possession. The defendant cannot defeat the action by showing that the plaintiff is not materially prejudiced, or even that he is actually benefited. A right is invaded and a wrong committed, and that is a sufficient basis for an action. Every unauthorized entrance on the land of another is a trespass, for which an action will lie. The law implies damage to the owner, and in the absence of proof as to the extent of the injury, he is entitled to recover nominal damages. Especially is this the case where the suit is brought for the purpose of settling a question of right. Dixon v. Clow, 24 Wend. (N. Y.) 188; Pastorius v. Fisher, 1 Rawle (Pa.) 27; Bagby v. Harris, 9 Ala. 173; Plumleigh v. Dawson, 1 Gilman, 544, 41 Am. Dec. 199; Bolivar Manuf. Co. v. Neponset Manuf. Co., 16 Pick. (Mass.) 241; Whipple v. The Cumberland Manuf. Co., 2 Story's R. 561.

The judgment is reversed and the cause remanded.[59]

[59] "And although a thing appear for the profit of a man, and not to his damage, yet it is not lawful for a man to commit a tort. As if a man saw the beasts of his neighbour in another land damage feasants, it is not lawful for him to drive them off, and if he do, the owner shall have trespass; and yet he did a good act, and saved the owner from damages for the depasturing of his beasts. Also it is ruled in 21 H. 7. (27. b.) that a person brings trespass for corn carried away, the defendant pleads that the corn was severed from the nine parts and was in danger of being destroyed by cattle, wherefore the defendant carried it to the plaintiff's own barn, and laid it there, and judgment, etc. And this was adjudged no plea, and yet he received no damage. So here, although the termor has repaired the house of the lessor with the trees, which sounds to his advantage; yet, inasmuch as he hath exceeded his duty, and taken upon him the authority of the lessor, without any request, it is a reason why he should be punished. As if the commoner make

PICKERING v. RUDD.

(At Nisi Prius, 1815. 4 Camp. 219, 16 R. R. 777.)

Trespass for breaking and entering the plaintiff's close, and placing a board over it, and cutting a tree, etc. Plea, not guilty as to the clausum fregit; and as to cutting the tree, a justification that it was wrongfully growing against the wall of the defendant, and that he therefore removed it, as he lawfully might. New assignment of excess, and issue thereupon.

The defendant's house adjoins to the plaintiff's garden, the locus in quo; and to prove the breaking and entering of this the evidence was, that the defendant had nailed upon his house a board, which projected several inches from the wall, and so far overhung the garden.

Garrow, A. G. and Richardson for the plaintiff contended that this was a trespass for which he had a right to maintain the present action. Cujus est solum, ejus est usque ad coelum. The space over the soil of the garden is the plaintiffs, like the minerals below, and an invasion of either is, in contemplation of law, a breaking of his close. A mere temporary projection of a body through the air across the garden may not be actionable; but where a board is caused permanently to overhang the garden, this is a clear invasion of the plaintiff's possession. If this be not a trespass, it is easy to conceive that the whole garden may be overshadowed and excluded from the sun and air without a trespass being committed.

LORD ELLENBOROUGH, Ch. J. I do not think it is a trespass to interfere with the column of air superincumbent on the close. I once had occasion to rule upon the circuit, that a man who, from the outside of a field, discharged a gun into it, so that the shot must have struck the soil, was guilty of breaking and entering it. A very learned Judge, who went the circuit with me, at first doubted the decision, but I believe he afterwards approved of it, and that it met with the general concurrence of those to whom it was mentioned. I am by no means prepared to say, that firing across a field in vacuo, no part of the contents touching it, amounts to a clausum fregit. Nay, if this board overhanging the plaintiff's garden be a trespass, it would follow that an aeronaut is liable to an action of trespass quare clausum fregit at the suit of the occupier of every field over which his balloon passes in the course of his voyage. Whether the action may be maintained cannot depend upon the length of time for which the superincumbent air is invaded. If any damage arises from the object which overhangs the close, the remedy is by an action on the case. Here the verdict depends upon the new assignment of excess in cutting down the tree.

The jury found for the defendant.

a trench in the soil, whereby the soil is made better, yet he shall be punishable, because he has transgressed." Maleverer v. Spinke (1538) 1 Dyer, 35b, 36b, 73 Reprint, 79, 81.

SMITH v. SMITH.

(Supreme Judicial Court of Massachusetts, 1872. 110 Mass. 302.)

Tort. The declaration alleged that the defendant built a part of a barn upon the plaintiff's close, and thereby expelled and put out the plaintiff from possession and occupation of a part of the close, and kept and continued him so kept out and expelled from said part of the close. Verdict for the defendant. The following bill of exceptions was allowed: The plaintiff offered to prove that the eaves of the barn, alleged to have been built and erected upon the plaintiff's close by the defendant, extended over on to the close from fifteen to eighteen inches, but the judge excluded the evidence.

MORTON, J. * * * We think it was competent for the plaintiff to prove that the eaves of the defendant's barn projected over the plaintiff's close. Projecting his eaves over the plaintiff's land is a wrongful act on the part of the defendant which, if continued for twenty years, might give him a title to the land by adverse occupation. It is a wrongful occupation of the plaintiff's land, for which he may maintain an action of trespass. Codman v. Evans, 7 Allen, 431. Carbrey v. Willis, 7 Allen, 364, 83 Am. Dec. 688.

Exceptions sustained.[60]

[60] Only so much of the case is given as relates to the one point.

As to trespass on superjacent space, see Butler v. Frontier Telephone Co. (1906) 186 N. Y. 486, 491, 79 N. E. 716, 116 Am. St. Rep. 563, 11 L. R. A. (N. S.) 920, 9 Ann. Cas. 858: D. had strung a telephone wire across P.'s lot, about 30 feet above the surface. The wire reaches the entire width of the lot, but does not touch the soil or any building on the lot. P. brings ejectment. In this case Vann, J., remarks: "What is 'real property'? What does the term include so far as the action of ejectment is concerned? The answer to these questions is found in the ancient principle of law: Cujus est solum, ejus est usque ad cœlum et ad inferos. The surface of the ground is a guide, but not the full measure, for within reasonable limitations land includes not only the surface but also the space above and the part beneath. Co. Litt. 4a; 2 Blackstone's Comm. 18; 3 Kent's Com. (14th Ed.) 401. 'Usque ad coelum' is the upper boundary, and while this may not be taken too literally, there is no limitation within the bounds of any structure yet erected by man. So far as the case before us is concerned, the plaintiff as the owner of the soil owned upward to an indefinite extent. He owned the space occupied by the wire and had the right to the exclusive possession of that space which was not personal property, but a part of his land. According to fundamental principles and within the limitation mentioned space above land is real estate the same as the land itself. The law regards the empty space as if it were a solid, inseparable from the soil, and protects it from hostile occupation accordingly."

Compare:

Hannabalson v. Sessions (1902) 116 Iowa, 457, 90 N. W. 93, 93 Am. St. Rep. 250: H. and S. lived upon adjoining lots. Upon the boundary between the lots there was a tight board fence. Between the families there was a frequent war of words. H. was leaning against the fence, on her own side, with her arm extended over the top, on the other side. S. claims that this is a trespass upon his real estate. See infra, under "Defenses."

Whittaker v. Stangvick (1907) 100 Minn. 386, 111 N. W. 295, 117 Am. St. Rep. 703, 10 L. R. A. (N. S.) 921, 10 Ann. Cas. 528: P. owned a narrow duck pass between two navigable lakes; D. was about to erect blinds in front of

COSTIGAN v. PENNSYLVANIA R. CO.

(Supreme Court of New Jersey, 1892. 54 N. J. Law, 233, 23 Atl. 810.)

Action by Costigan against the Pennsylvania Railroad Company to recover damages for an injury to the plaintiff's premises. Case certified to the Supreme Court for advice.

DEPUE, J. The plaintiffs are owners of a lot of land on which were erected two dwelling-houses. The premises are situated near to a strip of land on which the defendants are engaged in constructing a railroad. The declaration charges that:

"The defendants, wrongfully and injuriously intending, etc., on divers days and times, etc., dumped and filled into and upon the natural surface of certain lands near to plaintiff's said lot and dwelling-houses a vast quantity, to wit, two hundred thousand tons of earth, gravel, stones and other filling, and raised and banked upon said lands embankments of great height, to wit, of the height of thirty feet, and thereby forced and pressed large quantities of the said earth, gravel, stones and other filling into and upon the said lot of plaintiffs' beneath the surface of the same, and thereby upheaved and greatly disturbed the surface and soil of said lot, and forced and carried the said dwelling-houses to the northward and eastward of their proper position upon said lot, and to and upon the lands of others, and thereby caused the foundation of said dwelling-houses to fall away, crack and crumble, and the walls of said houses to become broken, shattered and defaced, and to topple and lean over," etc.

The defendants, by a special plea, justify as lessees of the New Jersey Junction Railroad Company, a corporation of this state organized under the General Railroad law, and authorized to lay out, construct, maintain and operate a railroad between certain designated points. * * *

The cause of action set out in the declaration is a trespass upon the plaintiffs' lands. The allegation that the acts of the defendants were wrongfully and injuriously done is a sufficient averment to sustain

the pass, and about 300 feet away, with the intention of shooting ducks flying over the pass. In so doing D. would shoot across P.'s land.

See, also, the provision of the German Civil Code (taking effect in 1900) § 905: "The right of the owner of a piece of land extends to the space above the surface and to the substance of the earth beneath the surface. The owner may not, however, forbid interference which takes place at such a height or depth that he has no interest in its prevention." (Wang's trans.)

And compare 25 Harv. Law Rev. 486 (1912): "The landowner cannot safely rely on the old maxim, 'Cujus est solum, ejus est usque ad coelum,' as furnishing a satisfactory ratio decidendi. That maxim, taken in its literal and unqualified sense, is not likely to be recognized at the present time as a complete statement of the law. Two theories are prominent: One, that the air space above the earth belongs to the public; the other, that it belongs to the landowner. But each theory is subject to provisos and limitations which, in the great majority of cases, would bring the same result, whichever theory is adopted. The public right, under the first theory, is subject to be exercised with due regard to the interests of the landowner. On the other hand, the ownership of the landowner under the second theory, is burdened by a right of passage for the public." And see 38 Cyc. 498, note 83.

the declaration. The merits of this controversy arise upon the consideration of the pleas filed by way of justification. * * *

On both pleas the plaintiffs are entitled to judgment. The Circuit Court is advised accordingly.[61]

(B) *In Trespass to Personal Property*

MARENTILLE v. OLIVER.

(Supreme Court of New Jersey, 1808. 1 Penn. [2 N. J. Law] 379.)

Trespass. The charge was that the defendant unlawfully, forcibly, and with great violence, with a large stick, struck the horse of the plaintiff, on a public highway, which said horse was then before a carriage, in which the plaintiff was riding, on the said public highway, to the damage of the plaintiff, $50. Verdict and judgment for the plaintiff with $15 damages.

PENNINGTON, J. * * * To attack and strike with a club, with violence, the horse before a carriage, in which a person is riding, strikes me as an assault on the person; and if so, the justice had no jurisdiction of the action. But if this is to be considered as trespass on property, unconnected with an assault on the person, I think it was incumbent on the plaintiff below, to state an injury done to the horse, whereby the plaintiff suffered damage; that he was, in consequence of the blow, bruised or wounded, and unable to perform service; or that the plaintiff had been put to expense in curing him, or the like. All the precedents of declarations for injuries done to domestic animals, as far as my recollection goes, are in that way; and I think with good reason. Suppose a man, seeing a stranger's horse in the street, was to strike him with a whip, or large stick, if you

[61] Only so much of the case is given as relates to the one point.

For instances of trespass on subjacent space, see Comyn v. Kyneto (1604) Cro. Jac. 150, 79 Reprint, 131, where it was objected in vain that "an ejectment lies not of a coal mine because it is quoadam proficuum subtus solum, and an habere facias possessionem cannot be thereof."

See, also, Golden Reward Mining Co. v. Buxton Mining Co. (1899) 97 Fed. 413, 38 C. C. A. 228 (P. and D. were owners of adjoining mining claims in South Dakota. D. ran tunnels from his property into P.'s property, and extracted a large amount of ore. This was discovered four years later, when D.'s excavations caused the superimposed earth to settle, making depressions on the surface. P. thereupon sued for trespass upon his real property); Chartiers Block Coal Co. v. Mellon (1893) 152 Pa. 286, 25 Atl. 597, 598, 18 L. R. A. 702, 34 Am. St. Rep. 645; and the remarks of Paxson, C. J., ibid.

As to the time when the cause of action for such hidden trespasses accrues, see Lewey v. Frick Coke Co. (1895) 166 Pa. 536, 31 Atl. 261, 28 L. R. A. 283, 45 Am. St. Rep. 684 (the statute of limitations against the owner in favor of taking coal from beneath the surface begins to run from the time of the actual discovery of the trespass, or the time when the discovery was reasonably possible); and 9 Harv. Law Rev. 147.

please, and no injury was to ensue, could the owner of the horse maintain an action for this act? I apprehend not. For these reasons, I incline to think that this judgment ought to be reversed.[62]

KIRKPATRICK, C. J., concurred in the reversal.

Judgment reversed.

[62] Part of the opinion is omitted.

Compare Slater v. Swann (1729) Stra. 872: Action upon the case, for that the plaintiff was possessed of a horse and cart, and the defendant so violently beat the horse, that the plaintiff was deprived of the use of his horse and cart for several days. The Chief Justice (Lord Raymond) said: "This differed from trespass vi et armis for assaulting a man, where the assault is a cause of action; but here the assault on the horse is no cause of action, unless accompanied with a special damage."

In Marlow v. Weekes (1744) Barnes' Notes, 452, which was an action of trespass for beating the plaintiff's mare, the court remarked: "Assault upon a ship (a dead thing) bad; but for an injury to a beast a writ in trespass vi et armis appears in the Register." But see Professor Ames' comment on this: "There seems to be no such writ in the Register. Trespass for the asportation or the destruction of a chattel are the only writs for trespass affecting personal property. Other injuries to chattels were doubtless deemed of too trivial a nature to warrant a proceeding in the King's Court, and were redressed in the inferior Courts." Ames' Cases on Torts, vol. 1, p. 61, 3d Ed. And see Pollock on Torts (7th Ed.) 342: "Authority, so far as known to the present writer, does not clearly show whether it is in strictness a trespass merely to lay hands on another's chattel without either dispossession or actual damage. By the analogy of trespass to land it seems that it must be so. There is no doubt that the least actual damage would be enough."

Salmond, Law of Torts (2d Ed.) 340: "It is probable that a trespass to chattels is actionable per se without any proof of actionable damage. This, indeed, seems never to have been decided, but it is clearly so in the case of trespass to land and to the person, and there is no reason why it should be otherwise in the case of goods. If this is so, any unauthorized touching or moving of a chattel is actionable at the suit of the possessor of it, even though no harm ensues. It may be necessary for the protection of certain kinds of property that this should be the law."

In Paul v. Slason (1850) 22 Vt. 231, 54 Am. Dec. 75, D., a sheriff, who had attached hay belonging to P., used P.'s pitchfork, without his consent, in removing the hay. P. sued in trespass. The court charged the jury that if they believed from the evidence that the defendant took and carried away the pitchfork, they should give the plaintiff its value; that if it was used and left on the premises, so that the defendant received it again, and it was damaged by this use, the plaintiff would be entitled to recover the amount of such damage; but that if the pitchfork was merely used in removing the plaintiff's property there attached, and was left where it was found, so that the plaintiff had it again, and the pitchfork was not damaged by this use, they were not bound to give the plaintiff damages. A judgment on a verdict for the defendant was sustained by the Supreme Court, but on the principle of de minimis non curat lex. But see Fullam v. Stearns (1897) 30 Vt. 443, 456.

See the remarks of Wilson, J., in Graves v. Severens (1868) 40 Vt. 636, 640: "It is true that for an unlawful entry upon the real property, or disturbance of incorporeal rights, when the unlawful act might have an effect upon the rights of the party and be evidence in favor of the wrong doer, if his right ever came in question, an action may be supported, though there be no actual damage done. And where anyone wantonly invades another's rights for the purpose of injury, an action will lie, though no actual damage be done. But it would seem to be settled that an action for a trespass to personal property will not lie, when no unlawful intent, or disturbance of a right or possession, is shown, and when no actual damage has been done, but all damage is expressly disproved, unless there be some right in question, which it is important to the plaintiff to establish. Paul v. Slason (1850) 22 Vt. 231, 54 Am. Dec. 75; Fairbanks v. Kittredge, 24 Vt. 9; Sedgwick on Dam. 62."

WINTRINGHAM v. LAFOY.

(Supreme Court of New York, 1827. 7 Cow. 735.)

On error from the C. P. of the City and County of N. Y. The action in the court below was trespass de bonis asportatis by Lafoy against Wintringham. It appeared on the trial that Wintringham was a constable, who held a fi. fa. issued by the Marine Court of the city, against the goods and chattels of one Gallis; and that, Jan. 19, 1826, he levied on the articles in question, consisting of jewelry in the store occupied by Gallis, who was present at the levy. That Gallis informed the defendant below that the goods had been assigned by him (Gallis), and the defendant below said he was indemnified. That Gallis placed the articles on the glass case, so that the defendant below might look at them to ascertain their value. That the defendant below made an inventory, and said he would remove the goods, unless security was given that they would be forthcoming, to answer the execution. That security was, therefore, given, and the articles were left in the store. It further appeared that, Dec. 21, 1825, Gallis had executed an assignment of all his property to the plaintiff below, Lafoy, for the purpose, first, of paying law expenses, then the debt of the plaintiff below, then certain other creditors named, and then the rest of his creditors. * * *

SAVAGE, C. J. It is not denied that a debtor in failing circumstances may prefer one of his creditors, or one set of creditors to another; nor is it pretended that any fraud in fact was proved in the court below. Indeed this was negatived by the proof and verdict of the jury. * * *

Was there any evidence of a trespass? If a sheriff takes the goods of a stranger, he is liable in this action. It is contended, however, that admitting the goods to belong to the plaintiff, the defendant did no tortious act. Every unlawful interference, by one person with the property or person of another, is a trespass. The defendant in the court below undertook to control the property levied on. He took it into his possession, though there was no manual seizing of it. He was about to take it away, and would have done so, but for the security given him that it should be forthcoming upon the execution. He exercised dominion over it. This was enough to constitute him a trespasser, he having no authority. Trover lies against a defendant who undertakes to control property in defiance or exclusion of the owner. Reynolds v. Shuler, 5 Cow. 325, 326, and cases cited. The same doctrine is applicable in trespass, as in trover, where the conversion is the tortious intermeddling with the goods of another.[63]

The judgment must be affirmed.

[63] The statement of facts is abridged and part of the opinion is omitted. See remarks of Dewey, J., in Miller v. Baker (1840) 1 Mete. (Mass.) 27, 30: "A forcible taking of goods is not necessary to enable the owner to maintain

HARTLEY v. MOXHAM.

(Court of Queen's Bench, 1842. 3 Q. B. 701, 114 Reprint, 675, 61 R. R. 359.)

Trespass for seizing, taking, carrying away and converting articles, goods and chattels of the plaintiff. Plea, not guilty. On the trial, before Cresswell, J., the following facts appeared: The plaintiff had lodged in the house of the defendant. In September, 1841, plaintiff was packing up some goods for the purpose of taking them to Gloucester for sale, when defendant said that nothing should be removed till plaintiff had paid defendant his bill. A dispute arose; and the bill was not paid. Plaintiff put the goods under the charge of his own servant, in his bedroom: and defendant then locked them up in that room, kept the key, and detained the goods till plaintiff was prevented from going on his intended journey. It was objected that trespass would not lie, inasmuch as no act of taking appeared, but, at most, only a wrongful detention, the defendant never having touched the goods; and Cresswell, J., being of opinion that no taking was proved which would support an action of trespass, directed a nonsuit.

Erle now moved for a new trial, contending, that if the goods were not in a literal sense taken away, they were separated from the owner by locking the door upon them.[64]

LORD DENMAN, C. J. There is no ground for this motion. Cases like the present must often have occurred; yet there is no authority for an action of trespass under the circumstances. The case differs from that of a distress, where the landlord asserts that he takes the goods, and thereby acquires an authority and power and control over them. And, even in such a case of taking, it has never been held that trespass would lie if the act was wrongful.

Rule refused.

trespass. On a similar question, in Gibbs v. Chase, 10 Mass. 128, Sewall, J., says: 'No actual force is necessary to be proved. He who interferes with my goods, and without delivery by me, and without my consent, undertakes to dispose of them as having the property, general or special, does it at his peril to answer me the value in trespass or trover.' It is sufficient to maintain trespass, if the party exercises an authority over the goods against the will and to the exclusion of the owner by an unlawful intermeddling, though there be no manual taking or removal. Wintringham v. Lafoy, 7 Cow. (N. Y.) 735; Phillips v. Hall, 8 Wend. (N. Y.) 610, 24 Am. Dec. 108. In the present case there was not only an attachment of the property, but the placing of a keeper over it with directions to permit no one to remove the same, and an entry and exclusive possession by the keeper. It seems, therefore, that as to so much of the property in controversy as is conceded to be personal chattels, the case is clearly with the plaintiff."

[64] The statement of the case is slightly abridged, and a plea in justification, on which, as it turned out, nothing depended, that the defendant was an innkeeper, is omitted. Williams, Coleridge, and Wright, JJ., concurred with the Chief Justice.

BROOKS v. OLMSTEAD.

(Supreme Court of Pennsylvania, 1851. 17 Pa. 24.)

This was an action of trespass brought by Henry Olmstead against Brooks and Tozer, before a justice of the peace, and brought into court by an appeal from the judgment of the justice. The plaintiff filed a special declaration in the court below for taking and driving away a heifer, the property of the plaintiff, to which the defendants pleaded not guilty. On the trial, the defendants admitted that the heifer was found in their possession, but denied their liability as trespassers, alleging that the heifer was put into their possession without their knowledge or assent, and so continued in their possession, without their knowledge, till found by the defendants in error, when they purchased the heifer and paid for her, which was the material question in the cause.

COULTER, J. It is, no doubt, true that one who comes to the possession of goods by delivery, and who has been guilty of no fault on his part, although it may turn out that the person who made the delivery to him had no title himself and was a wrongdoer, yet the receiver, guilty of no fault, cannot be treated as a trespasser. For, in such case, he has done no act which aided in depriving the true owner of his property. He, nevertheless, holds the property for the true owner, who may recover in trover, if the recipient of the property has converted it to his own use; or he is liable in replevin. So it may be stated, safely, that he who buys property from a trespasser, without any knowledge whatever of the original trespass, cannot be treated as a trespasser himself; because he has been guilty of no fault, or assisted in any way in depriving the true owner of his property. And this is the general import of the cases cited from the New York books of reports. The law is correctly enough expounded in these books, and accurately stated. Indeed, the court below, in this case, seems fully to acknowledge this principle.

But, before testing the accuracy of the opinion of the court below, we must look at the exact case which was before them. Two drovers, Brooks and Tozer, purchased a drove in Bradford county, and had them collected, as is customary, by their agents, at the field of one Watkins. Among the cattle driven into that field was the heifer or cow about which this dispute originated, which heifer the defendants never did purchase, nor had they paid anything for it, either by themselves or their agents. Before they drove off the cattle from Watkins' field, it appears distinctly from the testimony of one of their agents, that they knew there was one beast more than their number, or than they had purchased. One of the witnesses, however, Benjamin Sawyer, testifies, that four days before the cattle were driven off, Brooks and Tozer called on him, and he stated to them that he

knew Olmstead's heifer, and pointed her out; they then asked him if he thought Olmstead would sell her.

The counsel for the defendant requested the court to charge the jury, that "if the heifer in question came into possession of the defendants by the act of their servant, without their knowledge or assent, and continued in their drove without their knowing that the heifer was among their cattle, trespass would not lie." The court answers that:

"Although the taking of the heifer by Charles Brooks, their agent, and his driving her to Watkins', and there putting her into their drove of cattle, if without their knowledge, would not make them trespassers; yet if they took possession of the heifer with their other cattle, and drove her away from Watkins' in Athens, to Sullivan county, where they were overtaken by plaintiff, they might be treated as trespassers, and their want of knowledge that the heifer was brought into their drove would not bar the plaintiff's right to recover in this case."

This answer is a little indistinct; but substantially, it answers the point of the defendants quite as favorably as the law allowed. For it was the duty of the defendants, before they became the actors in depriving the plaintiff of his property, by driving it far away, to take the usual and proper precautions to ascertain whether they had more than their own. I believe it is the universal custom of drovers before they start off with the drove, to count their cattle—a custom dictated by their own interest, in order that they may know whether they have all they purchased; as well as by a due regard to the interest of others, in order that they may know that they do not take away the property of other people.

Were the defendants then not in fault? Surely they were. For it will not do to allow any person the privilege of alleging his own recklessness, carelessness, or negligence, as an excuse for depriving another man of his property or rights. A man may be guilty of a high crime, if he rashly and recklessly, without proper precaution, does an act which injures another, although he does not intend to commit the crime or actually knows that he is doing so. Com. v. Cornish, 6 Bin. 249. A fortiori he may be guilty of a trespass. If the law were held otherwise, farmers and people in villages where cattle are allowed to run at large, would be exposed to great trouble and expense in regaining their cattle, driven off by the agents or servants of drovers. Because in the action of trover, if they were driven to that, the measure of damages would be the value of the goods and chattels at the time of the demand with interest, which would be no compensation for the loss of time, the expense and trouble in pursuing cattle to a great distance. When the plaintiff followed the defendants, in pursuit of his property, into Sullivan county, the defendants, when overtaken, admitted the right of property in the heifer to be in plaintiff, and offered to buy her. The plaintiff finally agreed to take $15 for the heifer, but they could not agree as to the amount of damages for expenses and trouble in following after the

heifer, and at last it was agreed that that sum should be settled when the drovers returned from the sale of their drove. It does not appear that the defendants, after their return, made any attempt to settle or pay the damages, and the plaintiff brought this action of trespass.

The counsel for the defendants submitted a second point to the court as follows: "That Olmstead, having sold the heifer to the defendants, and assented to settle the damages with the defendants after their return home, could not maintain this action of trespass." The counsel for plaintiffs in error contends that the court did not answer this point. It is true they did not answer it separately and distinctly; but it was substantially answered by the instruction to the jury, that the defendants below might be treated as trespassers, and that the action would lie. The point, however, wants substance, and if answered directly against the plaintiff there would not have been error. Taking pay for the heifer and expressly reserving the question of damages, left the matter open, and did not purge or wipe away the action of trespass. The wrong was not atoned for or satisfied; and the original action remained as well by the understanding of the parties, as by operation of law.

I do not well see what other action would lie for the enforcement of these damages under the circumstances.

We are of the opinion that the action of trespass was maintainable.

Judgment affirmed.

WEBBE v. LEEK.

(Court of Common Pleas, 1388. Y. B. 12 Rich. II., Trinity Term.)

Trespass brought by one man against another, and counted by Rikhill that by force and arms he broke the house of the plaintiff in a certain vill and took and carried away a servant of his found there ready, etc.

Wadham. As to all but the servant, not guilty; and as to the servant we say that on the same day of the trespass that he has complained of, we came to the said vill and we say that this which he has said was his servant was only an infant of the age of four years and we found the infant wandering in the same vill, wherefore we took the said infant for charity and to satisfy his needs and we demand judgment if wrong (were done). * * *

THIRNING, J. This action is not taken upon the statute of laborers, "Quod potens in corpore, etc.," but it is an action which was at the common law, for at the common law a man shall have an action for his infant or his servant taken out of his keeping, and it can be understood that although he was only of such an age, still he could confer ease and advantage on his master, as by taking care of a house and

other things, and it is reason that he have his action which is given to him at the common law.

Markham. A man shall have a good writ of trespass "quare quondam puerum suum in custodia sua existente" whether it be his servant or his infant of whatever age he may be, but not "quare servientem" and particularly in this case, because it cannot be understood that an infant of four years could render service to any one, etc.

And by the opinion of CHARLTON and THIRNING his action might be maintained at the common law, whatever his age.[65]

HYDE v. SCYSSOR.

(In the Exchequer Chamber, 1620. Cro. Jac. 538, 79 Reprint, 462.)

Trespass; for that the defendant, 21 May, 6 Jac. 1, made an assault upon Elizabeth the plaintiff's wife,

et illam verberavit, et malè tractavit, necnon the said Elizabeth simul cum one gown, one petticoat, etc., of the goods of the plaintiff, simul cum the said Elizabeth, at D. tunc et ibidem cepit, abduxit, et abcariavit, necnon eandem Elizabetham per 5 annos ab eodem le plaintiff detinuit et custodivit, per quod le plaintiff solamen et consortium, necnon consilium et auxilium in rebus domesticis quæ idem le plaintiff habere debuisset et potuisset cum uxore suâ per totam tempus præd. perdidit et amisit, et alia enormia, etc.

The defendant pleaded not guilty; and it was found against him, and damages assessed to £300., and judgment found for the plaintiff: and now a writ of error thereof was brought in the Exchequer Chamber.

The first error assigned was, because the action was by the husband solely for the battery of his wife, which ought not to be; for the tort and damages are properly done to the wife, and therefore the husband sole without the wife could not maintain the action; and then the damages being entirely given, the judgment is erroneous. Vide 9 Edw. 4, pl. 52; 46 Edw. 3, pl. 3; 22 Ass. pl. 16.

But all the Justices and Barons held, that true it is the husband, for the battery of his wife, ought to join his wife with him in the action, if this had been brought for that cause: but here the action is not brought for the battery of his wife, but for the loss and damage of

[65] Part of the case is omitted.

The translation is from Mr. George F. Deiser's edition of the Year Book of 12 Richard II., for the Ames Foundation.

Compare Seidmore v. Smith (1816) 13 Johns. (N. Y.) 322: "Smith brought an action of trespass to recover damages for seducing and harboring his manservant. It was objected that the action should have been debt, under the 15th section of the 'Act Concerning Slaves and Servants' (2 Rev. Laws 1813, p. 206); but the exception was overruled, and judgment was given for the plaintiff. Per Curiam: The statute penalty for harboring slaves or servants is cumulative, and does not destroy the common law remedy." See also Fores v. Wilson (1791) 1 Peake, 77, 3 R. R. 652: P. sues for debauching his maidservant. Erskine, for the defendant, objected, in vain, that the plaintiff was "no relation to the person seduced."

the husband, for want of her company and aid; and all is concluded with the per quod consortium amisit, which extends to all that was before; as where an action brought by the master for the battery of his servant, per quod servitium amisit, etc.

Judgment affirmed.

SECTION 3.—JUSTIFICATION OR EXCUSE OF A PRIMA FACIE TRESPASS

I. Showing the Justification

[Note on the Prima Facie Cause and the Absolute Cause. The question, What are the essentials of a cause in trespass?—or of any cause in tort or contract—is apt to arise, in a given case, not as a question of the essentials of an absolute cause, but as a question of the prima facie cause. To a great extent, the real difficulty in the law of torts is "to define the substantial principles of justification and excuse." But of the defendant's justification or excuse, although resting on facts which are cotemporaneous with the facts set up by the plaintiff in his first pleading, and well within his knowledge, the plaintiff's first pleading makes no mention. He pleads only the facts of a prima facie cause. And unless the defendant pleads his justification or excuse, the court, answering the question whether the facts in the case make a valid cause, will, as a rule, pay no heed to this outlying fact; yet its possible existence often colors the general notion of this tort.

The defendant can meet the prima facie cause presented in the plaintiff's first pleading—his declaration at common law, his complaint or petition under the code, in one or the other of three ways: (1) The defendant may demur, and thus raise the question whether the facts which appear in the plaintiff's pleading are sufficient in law to constitute a good prima facie cause existing in his right against the defendant. (2) The defendant may traverse, or deny, one or more of the facts alleged in the plaintiff's pleading, and thus put the plaintiff to the proof of the material facts denied. The facts not denied are admitted. (3) The defendant may plead, or answer, by confession and avoidance.

The effect of a confession and avoidance is to admit the plaintiff's case as pleaded, but to offer to avoid its prima facie effect through the proof by the defendant of the "new matter" which he has pleaded. If the defendant does not succeed in this, and the burden of proof as to the new facts is on him, the plaintiff succeeds once more on his prima facie case.

It is to be remembered that the office of a traverse, or denial, is not to excuse but to contradict, and thus define what the plaintiff must prove. It cannot "be made to do the work of a plea in confession and avoidance." Regularly "all matters in confession and avoidance shall be pleaded specially." (Rules of Hilary Term, 1853, rr. 12, 17.) It should be remembered also that matter in confession and avoidance is of two kinds. Admitting that the facts alleged by the plaintiff make a good prima facie case, the defendant may destroy their effect by showing that the plaintiff never, at any time, had an absolute cause of action, because the defendant's act, when committed, was justifiable or excusable. Or the defendant may admit that the plaintiff had for a time an absolute cause of action against him, but may show that it has been discharged or released by something occurring subsequently. In the cases given in the text, only the defence of justification or excuse is considered.—*Ed.*]

BADKIN v. POWELL et al.

(Court of King's Bench, 1776. Cowp. 476, 98 Reprint, 1195.)

Upon shewing cause why a verdict should not be entered in this case for the defendant Chancellor; the case upon the report of Lord Mansfield, before whom the cause was tried, appeared to be as follows:

The plaintiff was a running dustman, and the defendant Powell, a publick scavenger. Powell and King detained the plaintiff's cart and horses as they were standing in the street, under pretence of their being an estray, and within the City of London; and carried them to the Green Yard, of which the defendant Chancellor was the pound-keeper; who afterwards insisted upon being paid the following sums before he would deliver them up. For bringing them in, 2s., for crying them, 2s., for keeping the horses, £2, 6s. 8d., and for the care of the cart £1. 3s., which the plaintiff accordingly was obliged to pay: upon not guilty pleaded, the jury found a verdict for the plaintiff against all the three defendants.

The only question at the trial was, whether this action of trespass could be maintained against the defendant Chancellor the pound-keeper, who did no other act than barely receiving the horses and cart into the pound when they were brought there and keeping them several days till redeemed. I thought he ought to be found not guilty; but it was contended he was a trespasser by continuing them in the pound, being wrongfully impounded, and the jury found him, as well as the other defendants, guilty.

Mr. Wallace and Mr. Buller shewed cause, and argued, 1st. That in trespass all are principals: and here the original taking being tortious, the pound-keeper, by refusing to release the cattle, till the plaintiff had discharged the fees and all expences, had adopted the original taking.[66]

Lord Mansfield. This is an action of trespass against three defendants for seizing and detaining the plaintiff's cart and horses; and they have all pleaded not guilty. The question reserved is, whether the defendant Chancellor ought to be found guilty or not?

[66] The arguments and Aston, J.'s, concurring opinion are omitted.

It has been argued two ways; 1st, whether on the merits of the case he was a trespasser? 2dly, supposing on the merits of the case he was no trespasser, whether by pleading the general issue he has not mispleaded, and ought to have justified?

1st, upon the merits of the case: it was necessary for the plaintiff to prove him guilty of the trespass; otherwise the case stands, that two persons seized the cart and horses and brought them to the pound, of which Chancellor was the keeper. Chancellor has no concern in the taking or bringing them there. How then is he guilty of trespass? The pound is the custody of the law: and the pound-keeper is bound to take and keep whatever is brought to him, at the peril of the person who brings it. There is no judgment, no direction, no written warrant or examination to be had by him. When is the trespass committed by him? He does nothing to ratify it: but only takes the cattle as he is obliged to do, at the peril of the person who brings them. If wrongfully taken, they are answerable, not he. It would be terrible if a pound-keeper were liable to an action for refusing to take cattle in, and were also liable in another action for not letting them go. If he goes one jot beyond the duty and assents to the trespass, that may be a different case. But here he has done nothing beyond his duty: when the cattle are once impounded, he cannot let them go without a replevin, or without the consent of the party. Upon their being released he is entitled to legal fees. If he is guilty of extortion there is another remedy.

What I have said is a clear answer to the 2d objection, that he has not pleaded specially, as it has been contended he ought to have done. No man is bound to justify who is not prima facie a trespasser. A gaoler if he has a prisoner in custody is prima facie guilty of an imprisonment, and therefore must justify. But here it comes out on the plaintiff's own shewing, that the pound-keeper had nothing to do with the taking. The law thinks him so indifferent a person, that if the pound is broken, the pound-keeper cannot bring an action, but it must be brought by the party interested. It would be attended with terrible inconveniences, if he were answerable for a wrongful taking by the persons who bring the cattle to him; and, therefore, I am clearly of opinion there ought to be judgment for the defendant Chancellor in this case.

BENNETT v. ALLCOTT.

(Court of King's Bench, 1787. 2 Term R. 166, 100 Reprint, 90, 31 R. R. 667, note.)

Trespass for breaking and entering the plaintiff's house, debauching his daughter (describing her as a menial servant), and getting her with child, per quod servitium amisit. Plea, not guilty. At the trial it appeared, that the defendant, who was a collector of the land-tax, visited the plaintiff's daughter in the character of a suitor, but at

the time when his entering the house was proved in order to support the trespass, he went to demand payment of the land-tax, when, the plaintiff being from home, his wife invited the defendant to go into the daughter's bed-chamber, where she was lying upon the bed, and left them together for several hours. The jury gave a verdict for the plaintiff with £200. damages; which the learned judge thought were not excessive. A motion was made to set aside the verdict.

Lane. This is not an action on the case for the consequential damages, where the per quod is the gist of the action, but trespass for the immediate injury. Now if the trespass for breaking and entering the plaintiff's house fall to the ground, that which is a consequence must necessarily fall with it. It was proved that the defendant entered the plaintiff's house as a collector of the land-tax, therefore his entry was lawful, and his continuing there was at the request of the plaintiff's wife; this would have supported a plea of licence, and evidence of it is good under the general issue.

BULLER, J. An action merely for debauching a man's daughter, by which he loses her service, is an action on the case. But according to Lord Holt's opinion, [Russell v. Corne] 2 Lord Raymond, 1032, where the offence is accompanied with an illegal entry of the father's house, he has his election either to bring trespass for the breaking and entering, and lay the debauching of the daughter and loss of her service as consequential; or he may bring the action on the case merely for debauching his daughter, per quod servitium amisit. In the present case the plaintiff has made his election, and has brought an action of trespass for breaking and entering his house, and all the rest is merely consequential. And therefore it is true, as was said, that if the trespass had not been proved, the defendant would have been entitled to a verdict. But it is now perfectly clear that a licence to enter cannot be given in evidence under the general issue. The plea of "not guilty" only goes to deny the fact of the trespass: now as that was proved in fact, the plaintiff was entitled to a verdict; and the only consideration for the jury was as to the quantum of damages. * * *

Rule discharged.[67]

[67] Part of the opinion is omitted. Ashhurst and Butler, JJ., concurred in the result.

On license as a defense, when pleaded, see infra, page 132, "The Different Kinds of Justification or Excuse in Trespass: Consent."

WATSON v. CHRISTIE.

(Court of Common Pleas. 1800. 2 Bos. & P. 224, 126 Reprint. 1248, 5 R. R. 579.)

Trespass for assaulting and beating the plaintiff. Plea not guilty. At the trial it appeared that the defendant was the captain of a ship, and the plaintiff one of his crew; that the plaintiff while under the defendant's command had been so severely beaten by order of the defendant, that he had ever since that time been in a state of extreme ill health, and was likely to continue so during the rest of his life, which he was in some danger of ultimately losing in consequence of the assault. On the other hand, it was offered to be shewn that the beating in question was given by way of punishment for misbehaviour on board the ship, and it was insisted that the conduct of the defendant at the time of the assault being necessarily in evidence proved that misbehaviour.

Lord Eldon, Ch. J., before whom the cause was tried, directed the jury that the only questions for their consideration were, Whether the defendant was guilty of the beating? and what damages the plaintiff had sustained in consequence of it? that although the beating in question, however severe, might possibly be justified on the ground of the necessity of maintaining dicipline on board the ship, yet that such a defence could not be resorted to unless put upon the record, in the shape of a special justification; that the defendant had not said on the record that this was discipline, or justified it on any ground; that much evil beyond the mere act of wrong had been actually suffered; which evil had been occasioned by a cause which the defendant admitted he could not justify; that in his Lordship's judgment therefore the evil actually suffered in consequence of what was not justified ought to be compensated for in damages; that the jury should give damages to the extent of the evil suffered, without lessening them on account of the circumstances under which it was inflicted; that if they gave damages beyond a compensation for the injury actually sustained they would give too much, but that if they gave less they would not give enough.

The jury found a verdict for £500, being all the damages laid in the declaration.

Shepherd, Serjt., now moved for a rule calling on the plaintiff to shew cause why this verdict should not be set aside and a new trial be had, on the ground of the damages being excessive, and because the jury ought not to have been directed to exclude from their consideration those circumstances which tended to shew the necessity of that punishment being inflicted which was the cause of the action; for that although the plaintiff might perhaps be entitled to some damages, since the circumstances alluded to did not amount to a legal defence, yet the defendant had a right to the benefit of those circumstances by way of mitigation.

But the Court were of opinion that his Lordship's direction was perfectly right in point of law, and that it did not appear from the report that the damages given by the jury were excessive.

Shepherd took nothing by his motion.[68]

MILMAN v. DOLWELL.

(At Nisi Prius, 1810. 2 Campb. 378.)

Trespass for cutting the plaintiff's barges from their moorings in the river Thames; whereby they had been set adrift and been injured. It appeared at a time when there was a great quantity of ice in the Thames, the defendant took two barges of the plaintiff from the middle of the river, where they were moored, to the opposite shore, and that one of them was immediately after discovered to have a hole in its bottom, but there was no evidence to show how this had been occasioned.

Garrow, for the defendant, offered to prove, that at the time of the supposed trespass these barges were in the greatest danger of being carried away by ice; that if he had not interfered, they most probably would have been destroyed; that he did what was prudent and most for the plaintiff's advantage to be done under the circumstances; and that he had been employed by the plaintiff generally to take charge of the barges, and must be presumed to have had his authority to remove them from a place of danger to a place of safety.

LORD ELLENBOROUGH. These facts should have been specially pleaded. I cannot admit evidence of them under the plea of not guilty;—the issue joined upon which is, whether the defendant removed the barges belonging to the plaintiff from their moorings, not whether he was justified in doing so.

Garrow argued that the plea of not guilty merely denied the committing of any trespass, and it was impossible to say that any trespass was committed, if the barges were removed by the plaintiff's own orders either express or implied. The case was the same as if the plaintiff had stood by and directed how the thing was to be done, and the unmooring of the barges must be considered the act of the plaintiff rather than of the defendant.

LORD ELLENBOROUGH. The defendant allows that he intermeddled with goods which were the property and in the possession of the plaintiff. By so doing he is presumed to be a trespasser; and if he has any matter of justification, he must put it upon the record. The plea of not guilty only denies the act done, and the plaintiff's title

[68] "Even in mitigation of damages it is well settled that you cannot go into evidence which, if proved, would constitute a justification." The Earl of Halsbury, L. C., in Watt v. Watt (1905) A. C. 115, 118.

See, also, Pujolas v. Holland (1841) 3 Ir. L. R. 533.

On discipline as a defense, when pleaded, see infra, "The Different Kinds of Justification or Excuse in Trespass: Discipline."

to the subject of the trespass. If the defendant has any authority, general or particular, express or implied from the plaintiff, this must be specially pleaded, by way of excuse.

Garrow then offered to prove that these barges were frozen to some others belonging to J. S., by whom the defendant was employed to get the latter ashore, and that it was utterly impossible to do this without bringing the former along with them.

LORD ELLENBOROUGH. If the necessity was inevitable, and the barges of the third person by whose express orders the defendant acted, must otherwise have been destroyed, this might have amounted to a justification; but like the first set up, it must have been put upon the record.

The jury found a verdict for the plaintiff with one farthing damages.

Garrow afterwards moved for a new trial, on the ground that the evidence had been improperly rejected; and further contended, that the action should have been case and not trespass; but the court were against him on both points, and refused a rule to show cause.[69]

BRIDGETT v. COYNEY.

(Court of King's Bench, 1827. 1 Man. & R. 211, 31 R. R. 316.)

Trespass against a magistrate for an assault and false imprisonment. Verdict for the plaintiff. Motion for a new trial.

LORD TENTERDEN, C. J. * * * What are the circumstances of the case? The plaintiff appears before the defendant, who is a magistrate, to answer the complaint of Dawson, of having unlawfully killed his dog. The defendant proposes to the parties to arrange the matter upon amicable terms. The plaintiff rejects the proposal, upon which the defendant tells him, that unless he pays a certain sum of money, he shall convict him in a penalty of that amount, under an act of parliament, in which case he will be committed to prison. The plaintiff still rejects the proposal and declares that he will carry the case elsewhere; that is, that he will appeal from the defendant's jurisdiction to a higher tribunal. Upon that the defendant calls in a constable, whom he orders to take the plaintiff out, and if the parties cannot settle the matter, to bring him in again, as he must proceed to commit him under the act. The plaintiff accordingly goes out with the constable, and while they are absent the affair is settled, by the plaintiff's paying a sum of money. It seems to me impossible to doubt that the plaintiff went out on that occasion in custody, having been ordered into that custody by the defendant; and if so, there is, in the eye of the law, an assault and false imprisonment by the defendant upon the person of the plaintiff. Then what is the justification? It

[69] On the preservation of property as a defense, when pleaded, see infra, "The Different Kinds of Justification or Excuse in Trespass: Defense of Personal Property."

is said that the plaintiff was convicted, and therefore that his detention was legal. What evidence is there of his conviction? No conviction was produced at the trial, or is laid before us now; indeed, it is admitted that none has ever been drawn up: then how can we possibly say that the party was convicted? The final arrangement of the matter by the parties in an amicable way, might properly prevent the defendant from acting upon the conviction, if there had been one; but it did not prevent his drawing it up as a justification for his own conduct in the transaction; and not having done so, he is without justification, and must abide the consequences.

The other judges concurred.

Rule refused.[70]

CARSON v. WILSON.

(Supreme Court of New Jersey, 1829. 11 N. J. Law [6 Halst.] 43, 19 Am. Dec. 368.)

EWING, C. J. The declaration is in trespass for breaking and entering the house of the plaintiff and taking and carrying away his goods and chattels. The plea is, Not guilty. On the trial the defendants offered evidence to justify the breaking and entry and the taking of the property, under an execution from a court for the trial of small causes, in debt, at the suit of one of them, placed in the hands of another of them who was a constable; and to shew that the goods and chattels mentioned in the declaration were the property of one Buckalew the defendant in the execution, and fraudulently secreted in the house of the plaintiff, and as such were levied on and taken by virtue of the execution. The Court of Common Pleas rejected the evidence and a verdict and judgment were rendered for the plaintiff.

Under the plea of not guilty the evidence offered by the defendants was inadmissible. The charge set forth in the declaration and proved on the trial by the witness of the plaintiff appeared prima facie to be at common law a trespass. In such case the rule of pleading requires matter of justification or excuse, to be specially pleaded; and this rule has been expressly applied to an entry by virtue of process of fieri facias, Co. Lit. 282, b; 283, a; Com. Dig. tit. "Pleader," E. 15, 17; 3 Bos. & Puller, 223; 1 Saund. 298, n. 1; 1 Chit. Plead. 492, 495; 2 Chit. Pl. 587, and note g.

The evidence offered by the defendants was therefore properly overruled and the judgment shall be affirmed.

Judgment affirmed.[71]

[70] The statement of facts is abridged and part of the opinion is omitted.

On lawful detention as a defense, when pleaded, see infra, "The Different Kinds of Justification or Excuse in Trespass: Judicial Process, Lawful Arrest."

[71] On judicial process as a defense, when pleaded, see infra, "The Different Kinds of Justification or Excuse in Trespass: Judicial Process."

ANTHONY v. HANEYS et al.

(Court of Common Pleas, 1832. 8 Bing. 186, 131 Reprint, 372, 34 R. R. 670.)

Trespass for breaking and entering the plaintiff's close. Pleas, the general issue and a special plea that the defendant was the owner of certain goods and chattels, to wit, 10,000 bricks, etc., then in and upon the close of the plaintiff, and that defendant entered to remove them, doing no unnecessary damage. Demurrer and joinder.

BOSANQUET, J. I am of opinion that this plea is no answer to the trespass with which the defendant is charged. It is put broadly and nakedly that the defendant has a right to enter the soil of another to take his own property without shewing the circumstances under which it came there. The case has been argued on the ground of necessity: but on that ground at least the necessity should be shewn. There are, no doubt, various cases in which it has been held that the party is entitled to enter, but in all of them the peculiar circumstances have been stated on which the party rested his claim to enter. It would be too much to infer that the party may enter in all cases where his goods are on the soil of another, because he may enter in some where he shows sufficient grounds for so doing.

Judgment for plaintiff.[72]

HALL v. FEARNLEY.

(Court of Queen's Bench, 1842. 3 Q. B. 919, 114 Reprint, 761.)

Trespass for driving defendant's cart and horse against plaintiff, and thereby knocking him down, bruising and wounding him. Plea, not guilty.

On the trial, it was proved that the plaintiff was walking on a narrow part of the pavement in a public street, where there was a considerable curvature in it. The defendant was driving a cart in the road near the pavement at the edge of which the plaintiff was walking. The case for the plaintiff was that there was want of due care on the part of the defendant, who had driven so close to the pavement as to knock the plaintiff down, and run over and break his leg. The defendant endeavoured to shew that the plaintiff had slipped from the curb-stone at the moment when the cart was passing, and had so got his leg under the wheel. The defendant called no witnesses. WIGHTMAN, J., told the jury that the question for them was, whether the injury was occasioned by unavoidable accident or by the defendant's default; and that, if they thought the plaintiff had accidentally

[72] The statement of the pleadings has been abridged. The argument and the concurring opinions of Tindal, C. J., and Park and Alderson, JJ., are omitted. On necessity as a defense, if pleaded, see infra, "The Different Kinds of Justification or Excuse in Trespass: Necessity."

slipped off the pavement as the defendant's cart was passing, and had been run over in consequence of such accident, they ought to find for the defendant. Verdict for the defendant.

In the same term Crowder obtained a rule nisi for a new trial on the ground that the judge had misdirected the jury, by telling them that, on the issue, if the injury was accidental, the defendant was entitled to a verdict.

LORD DENMAN, C. J. The authorities shew that if the accident had resulted entirely from a superior agency, that would have been a defence, and might have been proved under the general issue; but a defence admitting that the accident resulted from an act of the defendant would not have been so proveable.

COLERIDGE, J. Any defence, which admits the trespass complained of to be the act of the defendant, must be pleaded specially.

WIGHTMAN, J. The act of the defendant was prima facie unjustifiable, and required an excuse to be shown. When the motion in this case was first made, I had in my recollection the case of Wakeman v. Robinson, 1 Bing. 213. It was there agreed that an involuntary act might be a defence on the general issue. The decision indeed turned on a different point; but the general proposition is laid down. I think the omission to plead the defence here deprived the defendant of the benefit of it, and entitled the plaintiff to recover.

Rule absolute for a new trial.[73]

YASKA v. SWENDRZYNSKI et al.

(Supreme Court of Wisconsin, 1907. 133 Wis. 475, 113 N. W. 959.)

Action for an assault and battery alleged to have been committed by the three defendants jointly. They answered separately by mere general denial. The evidence disclosed, substantially without dispute, a severe beating of plaintiff by defendant Swendrzynski, and there was some evidence of an attack by each of the other defendants. There was also some attempt to prove a previous agreement amongst the three defendants to assault plaintiff. Evidence was admitted tending to show a first assault by plaintiff, and the court submitted the case upon the theory that such first assault might constitute a defence, and the jury might consider whether the defendants acted in self-defence. A general verdict for the defendants was found, and judgment in their favor rendered, from which the plaintiff appealed.

DODGE, J. Obvious error was committed in charging the jury that the assault conceded to have been made by one of the defendants,

[73] On accident as a defense, if pleaded, see infra, "The Different Kinds of Justification or Excuse in Trespass: Accident."

and of which there was some evidence as to the others, might be justified, and a verdict for the defendants found, in case the plaintiff committed the first assault and the defendants acted in self-defence. Respondents' counsel substantially concede that such justification and defence was not admissible under mere general denial, and such is the law as settled by authorities. Levi v. Brooks, 121 Mass. 501; Cooper v. McKenna, 124 Mass. 284, 26 Am. Rep. 667; Barr v. Post, 56 Neb. 698, 77 N. W. 123; Atkinson v. Harran, 68 Wis. 405, 407, 32 N. W. 756; 3 Cyc. p. 1084; 2 Ency. Pl. & Pr. p. 862. We cannot doubt that the verdict in favor of all of the defendants may well have been due to this error. Hence no course is open to us but to reverse the judgment and order a new trial. * * *

Judgment reversed and cause remanded for a new trial.[74]

II. The Different Forms of Justification or Excuse

(A) Consent

(a) Leave and License

Harm suffered by consent is, within limits to be mentioned, not a cause of civil action. The same is true where it is met with under conditions manifesting acceptance, on the part of the person suffering it, of the risk of that kind of harm. The maxim by which the rule is commonly brought to mind is "Volenti non fit injuria." "Leave and licence" is the current English phrase for the defence raised in this class of cases. On the one hand, however, "volenti non fit injuria" is not universally true. On the other hand, neither the Latin nor the English formula provides in terms for the state of things in which there is not specific will or assent to suffer something which, if inflicted against the party's will, would be a wrong, but only conduct showing that, for one reason or another, he is content to abide the chance of it.[75]

Pollock, Law of Torts (8th Ed.) 159.

[74] A part of the opinion, on other points, is omitted.

So, in Common Law States, see Lutlopp v. Heckmann (1904) 70 N. J. Law, 272, 57 Atl. 1046: "In order to set up in such a case [assault and battery] the defense of son assault demesne, it must be pleaded specially."

On son assault demesne as a sufficient defense, see infra, "The Different Kinds of Justification or Excuse in Trespass: Defense of the Person."

[75] The standard common law form of the plea of leave and license had this as its cardinal averment: "Because he says that he, the said defendant, at the said several times when, etc., by the leave and license of the said plaintiff, to him for that purpose first given and granted, to wit, at, etc., aforesaid, committed the said several supposed trespasses in the said declaration mentioned:

PATRICK v. COLERICK.

(Court of Exchequer, 1838. 3 Mees. & W. 483, 49 R. R. 696.)

Trespass for breaking and entering the plaintiff's close with horses and waggons. Third plea, that the defendant being possessed of ten cart loads of straw, the plaintiff without the defendant's leave and against his will, took the said straw and wrongfully carried it away and placed it on plaintiff's said close, and that defendant made fresh pursuit after his said straw, and then quietly and peaceably entered the said close,

"and with said horses, mares, geldings and waggons in the introductory part of this plea mentioned (the same then being necessary and proper for that purpose) in order to retake his said straw and did then and there quietly and peaceably retake his said straw, and load the same upon the last mentioned waggons, and carry the same away from and out of the said close in the said first count mentioned, in which, etc., as he lawfully might for the cause aforesaid, doing no unnecessary damage to the plaintiff."

Demurrer, and joinder in demurrer.[76]

PARKE, B. The passage in Blackstone, as to the right of reception, applies to the case where the goods are placed on the ground of a third party. All the old authorities say, that where a party places the goods upon his own close, he gives to the owner of them an implied license to enter for the purpose of reception. There are many authorities to that effect in Viner's Abridgement. Thus, in title "Trespass," (1)a, it is said, "If a man takes my goods and carries them into his own land, I may justify my entry into the said land to take my goods again; for they came there by his own act." The reason of the judgment of the Court of Common Pleas[77] is, that it was not shewn who placed the goods there; and that the mere fact of the defendant's goods being on the plaintiff's land is no justification of the entry, unless it be shewn that they came there by the plaintiff's act.

LORD ABINGER, C. B., BOLLAND, B., and ALDERSON, B., concurred.

Judgment for the defendant.

as he lawfully might for the cause aforesaid." 2 Chitty, Pl. (2d Ed. 1811) 608, 609.

By the common law procedure act of 1852, the averment was reduced to this: "That he did what is complained of by the plaintiff's leave." 2 Chitty, Pl. (16th Am. Ed.) p. 658. See Common Law Procedure Act, 15 & 16 Vict. c. 76, Sch. B., 44.

[76] The statement of facts is abridged; the argument is omitted.

[77] The allusion is to Anthony v. Haneys (1832) 8 Bing. 186, 34 R. R. 670, given ante, page 130.

MOSES v. DUBOIS.

(Court of Appeals of South Carolina, 1838. Dud. 209.)

[This case is reported ante, p. 84, "False Imprisonment."]

ARROWSMITH v. LE MESURIER.

(Court of Common Pleas, 1806. 2 B. & P. N. R. 211, 127 Reprint, 605, 9 R. R. 642.)

Trespass for assault and false imprisonment. At the trial it appeared that a warrant having been granted by a magistrate, for apprehending the plaintiff upon a charge of conspiracy to sue out a fraudulent commission of bankrupt, a constable went with the warrant to the plaintiff's house, and shewed it to him; that after conversing some time with the constable, the plaintiff desired to have a copy of the warrant, which the constable permitted him to take; after which the plaintiff attended the constable to the magistrate, and after being examined upon the subject of the charge, was dismissed, about six hours after the time when the warrant was first shewn to him; that the constable never touched the plaintiff, and that due notice of the action had been given. Verdict for the defendant.

A rule having been obtained, calling on defendant to shew cause why this verdict should not be set aside, and a new trial be had, Sellon, Serjt., in support of the rule, contended, that it was not necessary that the plaintiff should be touched in order to constitute an arrest; that the plaintiff having gone before the magistrate in obedience to the warrant, must be considered to have been arrested, and consequently the plaintiff was entitled to a verdict.

Sir James Mansfield, Ch. J. I can suppose that an arrest may take place without an actual touch, as if a man be locked in a room: but here the plaintiff went voluntarily before a magistrate. The warrant was made no other use of than as a summons. The constable brought a warrant, but did not arrest the plaintiff. How can a man's walking freely to a magistrate prove him to be arrested? I think that the jury have done justice.

The other judges concurring, rule discharged.[78]

[78] Compare Wood v. Lane (1834) 6 C. & P. 774, at Nisi Prius before Tindal, C. J.:

The action was against Lane and Cleaton for false imprisonment, with pleas of not guilty and leave and license. It appeared that the plaintiff was at the house of one Saunders, bargaining with him for the sale of some goods, and had just made out an invoice, when the defendant Cleaton came in alone, and asked the plaintiff to pay him the amount he owed him, or some money on account. The plaintiff said he would not; upon which Cleaton went just outside the door, and returned immediately, followed by the defendant Lane, and pointing to the plaintiff, said, "This is the gentleman." The plaintiff tore up the

CADWELL v. FARRELL.

(Supreme Court of Illinois, 1862. 28 Ill. 438.)

This is an action entitled, "of a plea of trespass on the case," wherein Julia Farrell is plaintiff, and Frederick A. Cadwell is defendant, commenced and tried in the Superior Court of Chicago. Plea, general issue. There was a verdict for the plaintiff for $10,000. The defendant moved in arrest of judgment, assigning a misjoinder of causes of action. This motion was denied, and the court rendered judgment on the verdict. The defendant went up on error.[79]

WALKER, J. It is insisted that there is a misjoinder of counts in this declaration; that the sixth count is in trespass, whilst the others are in case. This is the only question raised upon this record. If this objection is well taken, the court below erred in refusing to arrest the judgment.

The sixth count avers that appellee had a spot on her left eye, which injured her personal appearance, and that appellant falsely, fraudulently and deceitfully represented and pretended to appellee, that by

invoice and threw it on the fire and said, "I suppose I am to go with you." The answer was, "Yes." The plaintiff and the two defendants went away together, to the plaintiff's house. There was no bailable process against the plaintiff. The defendant Lane was merely a clerk to Cleaton's attorney, but had represented himself as having authority to arrest.

Talfourd, Serjt., for the defendant. No arrest has been proved. Saunders, who was present, says nothing of the laying hold of the plaintiff.

(Tindal, C. J. The question is whether the plaintiff went voluntarily from Mr. Saunders' to his own house, or whether he went in consequence of the act of the defendants. If you put your hand upon a man, or tell him he must go with you, and he goes, supposing you to have the power to enforce him, is not that an arrest? May you not arrest without touching a man?)

White referred to the case of Arrowsmith v. Le Mesurier (1806) 2 B. & P. N. R. 211.

(Tindal, C. J. That is a case which has often been spoken of as going to the very extreme point; but in that case the jury found that the plaintiff went voluntarily with the officer. And in this case, if you can persuade the jury that the plaintiff went voluntarily, you may succeed.)

Talfourd, Serjt., then addressed the jury for the defendants. There was no real compulsion. No writ was produced. It was only an endeavour by a manoeuver to make the plaintiff do what he ought, but would not, viz., pay the money which he owed. It was a sudden thought which struck the attorney's clerk, and it is not a case for damages.

Tindal, C. J., in summing up, told the jury, that, if the plaintiff acted as an unwilling agent at the time and against his own will, when he went to his house from that of Saunders, it was just as much an arrest as if the defendants had forced him along.

The jury found for the plaintiff. Damage, £10.

Compare Shinglemeyer v. Wright (1900) 124 Mich. 230, 82 N. W. 887, 50 L. R. A. 129 (P., charged with stealing D.'s bicycle and checking it from a certain railway station, went with a policeman to the police station and thence with two detectives to the railway station, to see if she could be identified as the woman who checked the wheel); Kirk v. Garrett (1896) 84 Md. 383, 35 Atl. 1089 (P., a prosecuting witness, consents to remain in custody until he can appear before the grand jury).

And see 19 Cyc. 323, and cases cited in note 37.

[79] The arguments and a part of the opinion are omitted.

means of his skill and knowledge as an oculist, he could remove the blemish from her eye, and render its appearance equal to that of her right eye, without any injury to the right eye; and that he would not take out or destroy her left eye, and that she would be well and free from the effects of the treatment in six or seven days; that appellee, confiding in the truth of the representations thus made by appellant, and believing them to be true, was deceived, and thereby induced, at his special instance and request, to treat her left eye, to make it look as well as the right eye, for the sum of thirty dollars, which she paid to him. But that appellant, well knowing as aforesaid, falsely and maliciously pretended to operate on appellee's left eye, for the pretended purpose of causing it to look as well as her right eye, and to remove the spot therefrom, and did cut and lacerate the left eye, by means of which cutting and lacerating and tearing of the left eye, she suffered great pain; and that in consequence thereof, her right eye became greatly inflamed, and she suffered great pain, and was obliged to lay out and expend large sums of money for medical attendance for her cure, and was unable to perform labor for a long space of time.

It is urged that this count charges the operation to have been performed with malice, and that a direct injury to the person, prompted by malice, constitutes a trespass, for which case cannot be sustained. Direct and immediate force employed by one person against another, without his consent, with malice, constitutes trespass, however slight the injury produced; but it is otherwise when the force used is with the consent or at the request of the person against whom employed. If a dentist extract a tooth for a person at his request, whether necessary or not, it is no wrong; but if unskillfully performed, he would become liable in case for the injury resulting from a want of proper skill. If the same act were performed with malice, and without consent, it would be an aggravated trespass, if not a crime. In this case, the operation was performed at the request of appellee. This prevents her from recovering in trespass, and had the operation been skillfully performed, she could have no right of recovery in any form of action; but if the representations which induced the retainer were false and fraudulent, or if the proper skill was not employed, then case is properly the remedy. * * *[80]

[80] The court saved the case upon the theory that the sixth count was not for the direct and immediate force, but for falsely pretending to perform the operation for the purpose of improving the appearance of the eye.

MARKLEY v. WHITMAN.

(Supreme Court of Michigan, 1893. 95 Mich. 236, 54 N. W. 763, 20 L. R. A. 55, 35 Am. St. Rep. 558.)

Action for assault and battery. There was a judgment for the plaintiff, and the defendant brings error.

LONG, J. Plaintiff and defendant were both students at the Buchanan high school. On February 7, 1890, while the plaintiff was on his way home from school, the defendant and others of the scholars were engaged in what is called a "rush" or "horse game." The practice of the game is to find some one in advance, when the others form in a line, each one in the rear pushing the one in advance of him, and so on through the line until the one to be "rushed," who knows nothing of what is coming, is rushed upon by the one in his rear, and pushed or rushed. On the day in question the plaintiff, while going towards home on the sidewalk, was to be rushed. The defendant was in his immediate rear, and engaged in the game. When pushed, he rushed upon the plaintiff, striking him with his hands between the shoulders with such violence that the plaintiff was thrown nearly to the ground. Immediately thereafter he lost his voice above a whisper, and has never recovered its use. His neck was nearly fractured, and for several months he was compelled to take medical treatment in Chicago. It is claimed that he suffered great pain, and has not fully recovered. This action was brought to recover for the injuries thus occasioned. On the trial in the court below, the plaintiff had verdict and judgment for $2,500. Defendant brings error.

The errors relied upon relate principally to the charge of the court. It was claimed on the trial in the court below (1) that the push against the plaintiff was not an assault, and therefore not actionable; (2) that it was a pure accident; (3) that it was not a dangerous game, and the results which followed from the push could not have been anticipated; (4) that the defendant only put himself in a position ready to be pushed if the spirit of frolic should be entered into by those behind him, and his rush upon the plaintiff was neither invited nor approved; (5) that there was no unlawful intent to injure the plaintiff. It is insisted that the court below, in its charge, entirely ignored the claim of the defendant made on the trial; and also that the plaintiff was one of the school fellows, and stood in a different position to the defendant than would a stranger. The court instructed the jury substantially that, if the plaintiff was participating in the play, or in any way contributed to the injury, he could not recover; that, to entitle the plaintiff to recover, he must show by a preponderance of evidence that the game was a dangerous one, and that the injury was occasioned by the push given by the defendant; and that the defendant willfully pushed the plaintiff, or was voluntarily engaged in the game, which must be found to be dangerous, and one

reasonably calculated to be dangerous to innocent persons lawfully traveling along the sidewalk upon which the play was conducted. The court below further instructed the jury as follows:

"If the game in question was a dangerous one to indulge in on the street and at the time in question, and if the defendant was voluntarily engaged in such play at the time of the accident, and if the plaintiff was not participating in such sport, and was not guilty of conduct which in any way contributed to the injury, but, on the contrary, was lawfully traveling on the sidewalk, and in the exercise of reasonable care, and if the defendant, while so playing, pushed the plaintiff and injured him, he is liable; and in such case it is no excuse for him to say that he himself was pushed against the plaintiff by some other boy."

This charge fully protected the rights of the defendant, and was as favorable to him as the facts of the case warranted. In fact, on the trial it was little in dispute that the injury occurred exactly as the plaintiff claimed. He was peaceably walking along the street, and had no intimation that he was to be "rushed." He was not participating in the game, and, if his testimony is true, never had taken part in it, and on that occasion was not anticipating that he was the victim selected to be rushed. It was an assault upon him, and the court correctly stated the rules of law applicable to the case; at least the defendant had no reason to complain. It is evident that the defendant was one of those engaged in the game, which, upon a bare statement of the manner in which it is to be played, must be regarded as dangerous. He voluntarily engaged in it, and his conduct occasioned the injury. It was unlawful to "rush" the plaintiff under the circumstances shown, and the defendant must be held responsible for the consequences which followed. It may be, and probably is, true that those taking part in it did not anticipate the injurious effects upon the plaintiff; but that does not lessen the plaintiff's pain and suffering, or make the act less unlawful. The plaintiff, while passing along the street, and not engaged in the sport, had the same right to be protected from such an assault as a stranger would have had, and the assault upon him was as unlawful as it would have been upon a stranger.

We find no error in the case, and the judgment must be affirmed, with costs.

MOHR v. WILLIAMS.

(Supreme Court of Minnesota, 1905. 95 Minn. 261, 104 N. W. 12, 1 L. R. A. [N. S.] 439, 111 Am. St. Rep. 462, 5 Ann. Cas. 303.)

BROWN, J. We come then to a consideration of the questions presented by defendant's appeal from the order denying his motion for judgment notwithstanding the verdict.

It is contended that final judgment should be ordered in his favor for the following reasons: (a) That it appears from the evidence received on the trial that plaintiff consented to the operation on her left ear. (b) If the court shall find that no such consent was given,

that, under the circumstances disclosed by the record, no consent was necessary. * * *

We shall consider first the question whether, under the circumstances shown in the record, the consent of plaintiff to the operation was necessary. If, under the particular facts of this case, such consent was unnecessary, no recovery can be had, for the evidence fairly shows that the operation complained of was skillfully performed and of a generally beneficial nature. But if the consent of plaintiff was necessary, then the further questions presented become important. This particular question is new in this state. At least, no case has been called to our attention wherein it has been discussed or decided, and very few cases are cited from other courts. We have given it very deliberate consideration, and are unable to concur with counsel for defendant in their contention that the consent of plaintiff was unnecessary.

The evidence tends to show that, upon the first examination of plaintiff, defendant pronounced the left ear in good condition, and that, at the time plaintiff repaired to the hospital to submit to the operation on her right ear, she was under the impression that no difficulty existed as to the left. In fact, she testified that she had not previously experienced any trouble with that organ. It cannot be doubted that ordinarily the patient must be consulted, and his consent given, before a physician may operate upon him. * * *

Kinkead on Torts, vol. 1, § 375, states the general rule on this subject as follows:

"The patient must be the final arbiter as to whether he will take his chances with the operation, or take his chances of living without it. Such is the natural right of the individual, which the law recognizes as a legal one. Consent, therefore, of an individual, must be either expressly or impliedly given before a surgeon may have the right to operate."

There is logic in the principle thus stated, for, in all other trades, professions, or occupations, contracts are entered into by the mutual agreement of the interested parties, and are required to be performed in accordance with their letter and spirit. No reason occurs to us why the same rule should not apply between physician and patient. If the physician advises his patient to submit to a particular operation, and the patient weighs the dangers and risks incident to its performance, and finally consents, he thereby, in effect, enters into a contract authorizing his physician to operate to the extent of the consent given, but no further.

It is not, however, contended by defendant that under ordinary circumstances consent is unnecessary, but that, under the particular circumstances of this case, consent was implied; that it was an emergency case, such as to authorize the operation without express consent or permission. The medical profession has made signal progress in solving the problems of health and disease, and they may justly point with pride to the advancements made in supplementing nature and cor-

recting deformities, and relieving pain and suffering. The physician impliedly contracts that he possesses, and will exercise in the treatment of patients, skill and learning, and that he will exercise reasonable care and exert his best judgment to bring about favorable results. The methods of treatment are committed almost exclusively to his judgment, but we are aware of no rule or principle of law which would extend to him free license respecting surgical operations. Reasonable latitude must, however, be allowed the physician in a particular case; and we would not lay down any rule which would unreasonably interfere with the exercise of his discretion, or prevent him from taking such measures as his judgment dictated for the welfare of the patient in a case of emergency. If a person should be injured to the extent of rendering him unconscious, and his injuries were of such a nature as to require prompt surgical attention, a physician called to attend him would be justified in applying such medical or surgical treatment as might reasonably be necessary for the preservation of his life or limb, and consent on the part of the injured person would be implied. And again, if, in the course of an operation to which the patient consented, the physician should discover conditions not anticipated before the operation was commenced, and which, if not removed, would endanger the life or health of the patient, he would, though no express consent was obtained or given, be justified in extending the operation to remove and overcome them.

But such is not the case at bar. The diseased condition of plaintiff's left ear was not discovered in the course of an operation on the right, which was authorized, but upon an independent examination of that organ, made after the authorized operation was found unnecessary. Nor is the evidence such as to justify the court in holding, as a matter of law, that it was such an affection as would result immediately in the serious injury of plaintiff, or such an emergency as to justify proceeding without her consent. She had experienced no particular difficulty with that ear, and the questions as to when its diseased condition would become alarming or fatal, and whether there was an immediate necessity for an operation, were, under the evidence, questions of fact for the jury.

The contention of defendant that the operation was consented to by plaintiff is not sustained by the evidence. At least, the evidence was such as to take the question to the jury. This contention is based upon the fact that she was represented on the occasion in question by her family physician; that the condition of her left ear was made known to him, and the propriety of an operation thereon suggested, to which he made no objection. It is urged that by his conduct he assented to it, and that plaintiff was bound thereby. It is not claimed that he gave his express consent. It is not disputed but that the family physician of plaintiff was present on the occasion of the operation, and at her request. But the purpose of his presence was not that he

might participate in the operation, nor does it appear that he was authorized to consent to any change in the one originally proposed to be made. Plaintiff was naturally nervous and fearful of the consequences of being placed under the influence of anæsthetics, and the presence of her family physician was requested under the impression that it would allay and calm her fears. The evidence made the question one of fact for the jury to determine. * * *

Order affirmed.[81]

[81] Part of the opinion is omitted. See ante, p. 78.

Compare Bennan v. Parsonnet (1912) 83 N. J. Law, 20, 83 Atl. 948: P. applied to D., a surgeon, to operate upon a rupture in P.'s left groin. After P. had been placed under the anæsthetic, D. discovered in P.'s right groin a rupture of more serious menace, and likely to cause P.'s death if strangulation occurred. This danger was not to be apprehended from the other rupture, which had been operated upon before, although without entire success. D. operated upon the more serious rupture without waiting for P. to regain consciousness. In an action by P. for assault and battery, the jury, under the charge of the court, found that D. had performed an operation upon P. without his consent, and rendered a verdict of $1,000. The Supreme Court set aside the verdict, upon the theory of an implied assent. "The conclusion to which we are led," said Garrison, J., delivering the opinion, "is that when a person has selected a surgeon to operate upon him, and has appointed no other person to represent him during the period of unconsciousness that constitutes a part of such operation, the law will by implication constitute such surgeon the representative pro hac vice of his patient, and will, within the scope to which such implication applies, cast upon him the responsibility of so acting in the interest of his patient that the latter shall receive the full benefit of that professional judgment and skill to which he is legally entitled. Such implication affords no license to the surgeon to operate upon a patient against his will or by subterfuge, or to perform upon him any operation of a sort different from that to which he had consented or that involved risks and results of a kind not contemplated. As to such matters, the rule in question submits nothing to the judgment of the surgeon, who as the implied representative of his patient can under such implication truly represent him only in so far as he gives to him the benefit of his professional wisdom within the general lines of the curative treatment agreed upon between them, unless, of course, a wider discretion has been accorded to him. Within such general lines, however, much is necessarily left to the good judgment of the operating surgeon, just how much will depend upon the circumstances of the individual case. If the surgeon transcends his implied authority as thus defined, the question of his skill and wisdom is irrelevant, since no amount of professional skill can justify the substitution of the will of the surgeon for that of his patient."

Compare, further, Rishworth v. Moss (1913, Tex. Civ. App.) 159 S. W. 122: A child 11 years of age was taken by her adult sister to a surgeon, who, without the knowledge of the child's parents, but at the instance and request of the adult sister, placed the child under an anæsthetic with a view to an operation for the removal of adenoids. The child died in the operation. The life of the child was not dependent upon an operation, nor was there any emergency. The parents could have been communicated with before the operation. Held, that the child had no authority to consent to the operation, and that, in the absence of evidence of delegated authority in the sister, the surgeon was liable although using due skill.

See, also, Pratt v. Davis (1906) 224 Ill. 300, 79 N. E. 562, 7 L. R. A. (N. S.) 609, 8 Ann. Cas. 197: H. placed his wife, P., in a sanitarium for treatment. The physician in charge, D., told H. that a proposed operation would be a trifling one, but said also that two operations might be necessary. Thereafter D. performed one operation, and P. returned home. There being no improvement, H. brought P. back to the sanitarium, and D. the next day performed a second operation, but without asking the consent of either H. or P. There was no lack of skill in performing the second operation. Held, that D. was

STOUT v. WREN.

(Supreme Court of North Carolina, 1821. 8 N. C. 420, 9 Am. Dec. 653.)

Action for damages for a battery. The facts were that the plaintiff and defendant quarreled and agreed to fight, and that after they had gone out for that purpose the defendant asked the plaintiff if he would "clear him of the law," and the latter said, "Yes," whereupon the defendant beat him, he making no resistance. There was some evidence, contradicted however by other witnesses, that the plaintiff was so drunk as not to know what he was doing. The court instructed the jury that if the plaintiff was so intoxicated as not to know what he was about, he should have a verdict, otherwise not, for his assent to the injury barred his right of recovery. There was a verdict for the defendant and judgment thereon, a new trial having been refused, and the plaintiff appealed to this court.

TAYLOR, C. J. It is equally reasonable and correct, that a man shall not recover a recompense for an injury received by his own consent, but the rule must necessarily be received with this qualification, that the act from whence the injury proceeded be lawful. Hence in those manly sports and exercises which are thought to qualify men for the use of arms, and to give them strength and activity, if two played by consent at cudgels, and one hurt the other, no action would lie. But where in an action for assault and battery, the defendant offered to give in evidence that the plaintiff and he boxed by consent, from whence the injury proceeded, it was held to be no bar to the action, for as the act of boxing is unlawful, the consent of the parties to fight could not excuse the injury: Boulter v. Clark, Buil. N. P. 16. The consequence of this distinction is apparent also in the law of homicide; for if death ensue from innocent and allowable recreations, the case will fall within the rule of excusable homicide, but if the sport be unlawful and endanger the peace, and death ensue, the party killing is guilty of manslaughter: Fost. 259. It is laid down in Matthew v. Ollerton, Comb. 218,[82] that if one license another to beat him, such license is void, because it is against the peace, and the plaintiff recovered a verdict and judgment.

liable. Scott, C. J., delivering the opinion, remarks: "Where the narr. shows the act to have been a trespass to the person, or avers it to have been without the consent of the patient, it would seem to be unnecessary to go farther and negative the fact that some other person lawfully authorized to act for the patient consented. The question of the consent of such other person, if in the case, might well be left to be presented by a plea in bar."

[82] This case, Matthew v. Ollerton (1693), was in debt upon an award; the remark quoted was a dictum. It is apparently, however, the beginning of the doctrine upon this point. See Bell v. Hansley (1855) 48 N. C. 131; Adams v. Waggoner (1870) 33 Ind. 531, 5 Am. Rep. 230; Shay v. Thompson (1884) 59 Wis. 540, 18 N. W. 473, 18 Am. Rep. 538; Willey v. Carpenter (1892) 64 Vt. 212, 23 Atl. 630, 15 L. R. A. 855; Lund v. Tyler (1901) 115 Iowa, 236, 88 N. W. 333; Morris v. Miller (1909) 83 Neb. 218, 119 N. W. 458, 20 L. R. A. (N. S.) 907, 131 Am. St. Rep. 636, 17 Ann. Cas. 1047.

The case was very fairly put to the jury, as to the evidence of the plaintiff's intoxication, but I think the law was misconceived in stating to them, that if the plaintiff was sober and assented, he was not entitled to recover. There must be a new trial.[83]

EVANS v. WAITE.

(Supreme Court of Wisconsin, 1892. 83 Wis. 286, 53 N. W. 445.)

This is an action to recover damages for personal injuries alleged to have been inflicted by defendant upon plaintiff. It is charged in the complaint that:

"On July 4, 1891, while the plaintiff was lawfully riding on horseback on the public highway, in company with defendant, the defendant, being then and there armed with a revolver loaded with powder and leaden ball, negligently and carelessly discharged the said revolver so that the ball therefrom struck the plaintiff in the hip, and passed on through the flesh into his thigh, where it became lodged and imbedded so that it was impracticable to remove the same; and that the said ball so fired from the revolver in the hands of the defendant caused a deep, painful, and dangerous wound."

It is further alleged that the defendant is a minor of about the age of eighteen years.

The defendant answered by his guardian: (1) A general denial; and (2) that the plaintiff was guilty of contributory negligence, in that he enticed the defendant to go with him for the purpose of shooting, and that while the parties were shooting the plaintiff was accidentally injured, and not through any negligence of the defendant.

[83] In Morris v. Miller (1909) 83 Neb. 218, 119 N. W. 460, 20 L. R. A. (N. S.) 907, 131 Am. St. Rep. 636, 17 Ann. Cas. 1047, the following instruction had been given: "You are instructed that if you believe from the evidence that plaintiff and defendant voluntarily and by agreement entered into a fight, still I charge you that such agreement, if made, was unlawful, for the reason that such agreement, if made, would be in violation of the laws of the state and void, and such agreement, if made, would not be any defense to this action." Referring to it, Reese, C. J., remarked: "This instruction was given as applicable to the contention that the fight or combat was entered into voluntarily and by mutual agreement, and that the unsuccessful party to the strife could not transfer his cause from the street to the courts and recover damages for whatever injury he might sustain by reason of the prowess or activity of his adversary. At the time of the argument of the case at the bar of this court, the writer was of the opinion that the giving of the instruction might have been erroneous, but more mature reflection and an examination of the authorities have led to a different conclusion. It is true that an instruction of this kind would be condemned by some reputable authorities, among which are Galbraith v. Fleming (1886) 60 Mich. 403, 27 N. W. 581, and Smith v. Simon (1888) 69 Mich. 481, 37 N. W. 548; but it is quite clear that the great weight of authority is the other way, and that the recognized rule is that where two parties fight voluntarily, either party may recover from the other the actual damages suffered, and the consent of the plaintiff to engage in the combat will not bar his suit to recover."

Compare Barholt v. Wright (1887) 45 Ohio St. 177, 12 N. E. 185, 4 Am. St. Rep. 535, where, under a general denial, the agreement to fight was shown in mitigation of damages, but was no bar to the action.

On the trial it was proved that the defendant was a minor; that on the occasion mentioned in the pleadings he was armed with a revolver; and that the plaintiff was wounded, as charged in the complaint, by a bullet discharged from the revolver by accident, when in the hands of the defendant. The circuit judge held that, because the defendant was a minor and was armed with a revolver in violation of chapter 329, Laws of 1883 (S. & B. Ann. St. § 4397b), he was liable to the plaintiff for the injury, without regard to the question of negligence. Thereupon the jury were instructed to find for the plaintiff and to assess damages for the injury. The court confined the recovery to compensatory damages. The jury assessed plaintiff's damages at $375, nearly $150 of which was for actual necessary expenses incurred by the plaintiff, and for loss of time by reason of the injury. A motion for a new trial was denied, and judgment entered for the plaintiff pursuant to the verdict. The defendant appeals from the judgment.

LYON, C. J. In Shay v. Thompson, 59 Wis. 540, 18 N. W. 473, 48 Am. Rep. 538, it was held that if two persons, by mutual consent, in anger fight together, each is liable to the other for actual damages. The fighting being unlawful, the consent of either party is no bar to the action. The authorities upon which the decision is based are cited in the opinion. The rule of that case applies here. It was unlawful for the defendant to be armed with a revolver when the plaintiff was injured, and hence he is liable for any injury inflicted by him with such weapon. It is immaterial that the plaintiff was consenting to the defendant being so armed and to his use of the revolver. Such is the rule of Shay v. Thompson, 59 Wis. 540, 18 N. W. 473, 48 Am. Rep. 538. The only effect of such consent was to confine the recovery to compensatory damages, and it was so restricted.

The question of negligence is also immaterial. True, the complaint charges that the defendant was negligent, but it also contains a sufficient statement of a cause of action based upon the fact that the defendant was unlawfully armed with the revolver with which he wounded the plaintiff. Were there any defect in the complaint in that view of the case, it was amendable, for the whole transaction was fully proved on the trial without objection. This brings the case within the rule which allows the pleading to be amended to correspond with the proofs, or permits a variance between the pleadings and proofs to be disregarded. We fail to find any error disclosed in the record.

BY THE COURT. The judgment of the circuit court is affirmed.[84]

[84] Accord: Horton v. Wylie (1902) 115 Wis. 505, 92 N. W. 245, 95 Am. St. Rep. 953: P. and D., two boys about 13 years of age, were playing "cowboy" in a pasture. D. had a loaded revolver. Both boys had been alternately pointing it at each other. D. pointed it at P., at close range, and at full cock. P. struck up the revolver with his hand, and it went off, wounding P. The pos-

WELSUND v. SCHUELLER

(Supreme Court of Minnesota, 1906. 98 Minn. 475, 108 N. W. 483.)

This was an action to recover damages for seduction. The plaintiff was an uneducated and inexperienced girl of 16, without relatives in this country. She could not speak English, and was dependent upon her own labor for support. While employed as a servant in the family of defendant's father, she was seduced by defendant, who obtained her consent by assurances of love and caressing, and by inducing her to believe she would lose her place of employment if she did not submit. The relation continued about two months, when the defendant absconded, and did not return to the state until five years after her child was born. A demurrer was sustained by the trial court, upon the ground that the complaint did not state facts sufficient to constitute a cause of action.

LEWIS, J. (after stating the facts). No right of action existed at common law in favor of a woman against her seducer. The right to recover damages for seduction is at common law limited to the father or any one standing in loco parentis. Although damages were not limited to the loss of services, yet the action was based upon the relation of master and servant. Some states, including our own, have modified the common law permitting the action to be maintained by the parent or guardian, even though the daughter or ward is not living with or in the service of the plaintiff, and although there is no loss of service. And in a few states the right of action is conferred upon the female seduced, notably Indiana, Iowa, and Oregon. Even in those states the courts have sharply drawn the distinction between real seduction and acquiescence, holding that no cause of action existed if it was shown to be a voluntary act. Consent must be procured by some trick or artifice other than mere solicitation. Brown v. Kingsley, 38 Iowa, 220. The statute only applies where the defendant has been mainly instrumental in occasioning the wrong. Breon v. Henkle, 14 Or. 494, 13 Pac. 289. However, in the absence of any modification of the common law, the action will lie where the defendant fraudulently acquired possession of his victim by taking her into his family as a ward. Smith v. Richards, 29 Conn. 232.

The people of this state have seen fit to acquiesce in the common law, except as stated. It would be debatable whether the facts alleged in the complaint now before us are sufficient, even with the statutory modification above noted, and certainly they do not constitute such ex-

session of a revolver by a minor and the pointing of it were both forbidden by statute.

Compare Gilmore v. Fuller (1902) 198 Ill. 130, 65 N. E. 84, 60 L. R. A. 286: P., a member of a charivari party serenading a bridal couple with firearms, was accidentally shot by D., another member of the party. Held, that there could be no recovery.

ceptional circumstances as to bring the case within Smith v. Richards. As the law is, no cause of action is stated, and whether it is wise to change it calls for no opinion on our part. That is a question concerning which there is a diversity of opinion and can only be determined by the legislative power.

Order affirmed.[85]

(b) Assumption of Risk in Trespass[86]

MIDDLETON v. BRIDELYNGTON.

(De Banco Roll, Hilary 12 Rich. II. [1388] rot. 124, York.)

William the son of Richard of Middleton, of Beverly, draper, was attached to reply to Gregory of Bridelyngton, of a plea that with force and arms he assaulted the said Gregory at Beverly, and beat, and wounded and ill treated him, to the great damage of the said Gregory, and contra pacem. And further that the said Gregory complains by

[85] Accord, on the common-law rule: Oberlin v. Upson (1911) 84 Ohio St. 111, 95 N. E. 511, Ann. Cas. 1912B, 1061 note; Robinson v. Musser (1883) 78 Mo. 153 (In a civil action for an alleged rape, the plaintiff's testimony showed consent. A judgment for plaintiff was reversed, the Supreme Court remarking, "We feel constrained to say, 'Volenti non fit injuria' ").

On the statutory change, permitting the woman to sue her seducer, see Bradshaw v. Jones (1899) 103 Tenn. 331, 52 S. W. 1072, with an elaborate note in 76 Am. St. Rep. 655, 659; Wilson v. Mangold (1912) 154 Iowa, 352, 134 N. W. 1072 ("If without being deceived, and without any false promises, deceit, or artifice, the plaintiff voluntarily submitted, the defendant would not be liable").

See, also, for a summary of the varied character of this statutory modification of the common-law principle, 35 Cyc. 1294, 1295, and cases cited in note 3; and the cases under Dec. Dig., Key-No., "Seduction," § 11.

[86] The doctrine of assumption of risk appears more often in negligence cases, and especially in cases which involve the relation of master and servant. It is sometimes treated as resting on an implied contract. See Dowd v. New York, etc., Ry. (1902) 170 N. Y. 459, 471, 63 N. E. 541, and cases there cited. One of its earliest appearances in prominent form is in Ilott v. Wilkes (1820) 3 B. & Ald. 304, 22 R. R. 400. The facts here were as follows: The defendant was the owner of Chrishall Wood, consisting of fifty or sixty acres; and by his order, nine or ten spring-guns were set there. Several boards were affixed, containing notice to the public that such instruments were so placed. There formerly had been a path on the outside of the wood, but it had not been used for some years. The plaintiff, on the occasion in question, accompanied by another person, went out in the day time for the purpose of gathering nuts, and proposed to his companion to enter Chrishall Wood. The latter, however, refused, unless the plaintiff would go first; and he then told plaintiff that spring-guns were set there. They both, however, entered the wood, and the plaintiff received the injury which was the subject of the action, in consequence of treading on the wire communicating with the spring-gun. Upon these facts, the learned judge considering that this involved the same question which was under the consideration of the Common Pleas, in Deane v. Clayton (1816) 2 Marsh. 577, directed the jury to find a verdict for the plaintiff, and reserved to the defendant liberty to move to enter a nonsuit. The jury assessed the damages at £50.; and found, that at the time of the injury, there was not any footpath near the place in question; that the plain-

John of Wilton, his attorney, that the said William, on the Monday next after the feast of the Assumption of the Virgin Mary, 8 Richard II., vi et armis, to wit, with swords, bows and arrows, assaulted, wounded etc. the said Gregory at Beverly, contra pacem etc., and he claimed damages of twenty pounds.

The defendant by Thomas of Lynton, his attorney, defended the force and arms and pleaded not guilty, and placed himself upon the country, upon which issue was joined.

And as to the beating and wounding of the said Gregory, he said that he and the said Gregory, being between the ages of nine and ten years, were playing together at Beverly at a place called the Feegang, and there of their common accord sported and played together, and the harm suffered by the said Gregory was done in play, unintentionally and without malice on the part of the said William.

In his replication Gregory asserts that the injury was done intentionally and prays that this may be inquired of by the country, and William joins issue.

A venire facias is awarded, and the defendant finds bail.*

tiff was not in the exercise of any right of path, but was gathering nuts; and that he had knowledge and notice that spring-guns were placed in the wood. On the question whether a nonsuit should be entered, all the judges concurred that the action could not be maintained. Said Bayley, J.: "This is a case in which the plaintiff had notice that there were spring-guns in the wood. The declaration states that the plaintiff had no notice of the places or of the direction in which the guns themselves were placed, or where the wires communicating with the guns were placed; but it is not necessary to give notice to the public that guns are placed in such particular spots in such particular fields; for that would deprive the property of the intended protection. It is sufficient for a party generally to say, 'There are spring-guns in this wood'; and if another then takes upon himself to go into the wood, knowing that he is in the hazard of meeting with the injury which the guns are calculated to produce, it seems to me that he does it at his own peril, and must take the consequences of his own act. The maxim of law, 'Volenti non fit injuria,' applies; for he voluntarily exposes himself to the mischief which has happened. He is told that if he goes into the wood he will run a particular risk, for that in those grounds there are spring-guns. Notwithstanding that caution, he says, 'I will go into the wood, and I will run the risk of all consequences.'"

Compare the remark of Blackburn, J., delivering the judgment of the Exchequer Chamber in Fletcher v. Rylands (1866) L. R. 1 Ex. 265, 286: "Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who by the license of the owner pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident; and it is believed that all the cases in which inevitable accident has been held an excuse for what prima facie was a trespass, can be explained on the same principle, viz., that the circumstances were such as to show that the plaintiff had taken that risk upon himself."

* Note from the Record. See Deiser's edition of Y. B. 12 Rich. II., for the Ames Foundation, pp. 125, 126.

Compare Briese v. Maechtle (1911) 146 Wis. 89, 130 N. W. 893, 35 L. R. A. (N. S.) 574, Ann. Cas. 1912C, 176. P., a boy ten years old, and D., a boy

COLE v. TURNER.

(At Nisi Prius, 1704. Holt, K. B. 108, 90 Reprint, 958.)

At Nisi Pruis, upon evidence in trespass for assault and battery, Holt, C. J., declared, 1. That the least touching of another in anger is a battery.[87] 2. If two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it is no battery.[88] 3. If any of them use violence against the other, to force his way in a rude inordinate manner, it is a battery; or any struggle about the passage, to that degree as may do hurt, is a battery. Vid. Bro. Tresp. 236. 7 E. 4, 26. 22 Ass. 60. 3 H. 4, 9.

NOTE: It was in action of battery by husband and wife, for a battery upon the husband and wife, ad dampnum ipsorum; and though the plaintiff had a verdict, yet the Chief Justice said he should never have judgment. And judgment was after arrested above upon that exception.

RUTER v. FOY.

(Supreme Court of Iowa, 1877. 46 Iowa, 132.)

The plaintiff avers in her petition that the defendant assaulted and beat her with a pitchfork, whereby she sustained great injuries. Trial by jury. Verdict for plaintiff for $200. Defendant appeals.

ADAMS, J. * * * I. The defendant asked an instruction which is in the following words: "If you find from the evidence that plaintiff was injured, or contributed to her injury, by her own act or negligence, defendant would not be liable for assault and battery upon her, and plaintiff cannot recover." The court refused to give the instruction and the refusal is assigned as error.

of about the same age, attended the same school and at recess were both playing in the school yard. As P. was kneeling to shoot a marble, D. came running around the school house, being chased by another boy, and accidentally ran into P., knocking him over and so injuring his eye that P.'s sight was destroyed. A judgment for the defendant was affirmed.

[87] Accord: Kerriford's Case (1630) Clayton 22, pl. 38: "Kerifford, an attorny, was plaintiffe in battery, and the case was thus: He was walking in the market (as attornies do too much), and the defendant and he had some angry words there, upon which the defendant did presse to go by him, and in going, by reason of the throng of people there, he justled the plaintiffe, and for this he brought this action, in which if an assault onely be proved, it is sufficient, and holden it was no assault, for the touching him or justle was to another end, namely, to get by him in the throng and not to beat him, etc."

[88] Compare Reynolds v. Pierson (1902) 29 Ind. App. 273, 64 N. E. 484: P., a man 68 years old, was standing in a public place talking to S., when D., a man of 35 years, weighing 225 pounds, came walking briskly towards S. As he passed, D. seized and jerked the arm of S. The force of D.'s act was such that P., whose arm S. was then holding, was thrown to the ground. D.'s act was friendly and a customary form of greeting between him and S. D. passed on, without knowledge that P. was thrown down or hurt.

The doctrine of contributory negligence has no application in an action for assault and battery. There can be no contributory negligence except where the defendant has been guilty of negligence to which the plaintiff's negligence could contribute. An assault and battery is not negligence. The former is intentional; the latter is unintentional.[89]

SCANLON v. WEDGER.

(Supreme Judicial Court of Massachusetts, 1892. 156 Mass. 462, 31 N. E. 642, 16 L. R. A. 393.)

Tort, for personal injuries. Verdict for the defendant, and Hammond, J., reported the case for the determination of this court.

ALLEN, J. The several plaintiffs were injured by the explosion of a bomb or shell during a display of fireworks in Broadway Square, which was a public highway in Chelsea. This display was made by the defendant Wedger, who acted under a license from the mayor and aldermen of Chelsea for a display of fireworks in Broadway Square on that evening, under Pub. St. 1882, c. 102, § 55. A verdict was returned for the defendant, and the jury made a special finding that the defendant in firing the bomb exercised reasonable care. The

[89] Only so much of the case is given as relates to this one point.

Accord: Steinmetz v. Kelly (1880) 72 Ind. 442, 445 (37 Am. Rep. 170): "The doctrine, that contributory negligence on the part of the plaintiff will defeat his action, has been generally applied in actions based on the negligence of the defendant; in short, in cases involving mutual negligence. But it has also been applied in some cases where the matter complained of was not negligence merely, but the commission of some act in itself unlawful, without reference to the manner of committing it, as the willful and unauthorized obstruction of a highway, whereby a person is injured. Butterfield v. Forrester (1809) 11 East, 60; Dygert v. Schenck (1840) 23 Wend. (N. Y.) 446, 35 Am. Dec. 575. The doctrine, however, can have no application to the case of an intentional and unlawful assault and battery, for the reason that the person thus assaulted is under no obligation to exercise any care to avoid the same by retreating or otherwise, and for the further reason that his want of care can, in no just sense, be said to contribute to the injury inflicted upon him by such assault and battery. An intentional and unlawful assault and battery, inflicted upon a person, is an invasion of his right of personal security, for which the law gives him redress, and of this redress he cannot be deprived on the ground that he was negligent and took no care to avoid such invasion of his right." Per Worden, J.

And see Kain v. Larkin (1890) 56 Hun, 79, 9 N. Y. Supp. 89: Action to recover for the death of Kain, caused by the wrongful act of the defendant. "In this case the defendant, who was acting as an officer, told Kain, the deceased, to go about his business, and shoved him off the sidewalk. Kain came back, and defendant again told him to go home. He said defendant could not make him. Then defendant shot him." In his charge to the jury, the trial judge applied to the case the principle of contributory negligence, and instructed that there could be no recovery if the decedent in any degree contributed to the injury. On this there was a verdict with judgment for the defendant. The plaintiff appealed.

case comes to us on a report which states that if, on the facts contained therein, and on said finding, the plaintiffs are entitled to recover, the case is to be remitted to the Superior Court for the assessment of damages; otherwise, judgments are to be entered for the defendant. It is therefore to be considered whether it appears affirmatively that the plaintiffs were entitled to recover.

The plaintiffs apparently were present at the display of fireworks as voluntary spectators, and were of ordinary intelligence. No fact is stated in the report to show the contrary, nor has any suggestion to that effect been made in the argument. The plaintiffs have not rested their claims at all upon the ground that they were merely travellers upon the highway, or that they were unaware of the nature and risk of the display. The report says: "A considerable number of persons were attracted to said square by said meeting, and said bombs and other fireworks which were being exploded there. A portion of the center of said square, about forty by sixty feet, was roped off by the police of said Chelsea, and said bombs or shells were fired off within the space so enclosed and no spectators were allowed to be within said enclosure. * * * The plaintiffs were lawfully in said highway at the time of the explosion of said mortar, and near said ropes, and were in the exercise of due care."

The bombs or shells are described in the report, and they were to be thrown from mortars into the air, it being intended that they should explode in the air and display colored lights. They were apparently a common form of fireworks, such as has long been in use.

The ground on which the plaintiffs place their several cases is, that the Pub. St. 1882, c. 102, § 55, did not authorize the mayor and aldermen of Chelsea to license the firing of anything but rockets, crackers, squibs, or serpents, and that therefore the act of the defendant in firing bombs or shells was unauthorized and unlawful. It is not contended that it was at the time supposed, either by the defendant or by anybody else, that the license was insufficient to warrant the display which was actually made. The licensee was the chairman of a committee which had a political meeting in charge, and the defendant acted at the request of the committee, and was directed by them as to when and where to fire off the fireworks.

Under this state of things it must be considered that the plaintiffs were content to abide the chance of personal injury not caused by negligence, and that it is immaterial whether there was or was not a valid license for the display. If an ordinary traveller upon the highway had been injured, different reasons would be applicable. Vosburgh v. Moak, 1 Cush. 453, 48 Am. Dec. 613; Jenne v. Sutton, 43 N. J. Law, 257, 39 Am. Rep. 578; Conradt v. Clauve, 93 Ind. 476, 47 Am. Rep. 388. But a voluntary spectator, who is present merely for the purpose of witnessing the display, must be held to consent to it, and he suffers no legal wrong if accidentally injured without negligence

on the part of any one, although the show was unauthorized. He takes the risk. See Pollock on Torts, 138–144.[90]

In the opinion of a majority of the court, the entry must be, judgment for the defendant.[91]

[90] The reference is to the first edition of Pollock on Torts. But see the remark of the same author, in his seventh edition, page 505: "Liability under the rule in Indermaur v. Dames may be avoided not only by showing contributory negligence in the plaintiff, but by showing that the risk was as well known to him as to the defendant, and that with such knowledge he voluntarily exposed himself to it; but this will not excuse the breach of a positive statutory duty."

[91] Morton and Knowlton, JJ., dissented. In his dissenting opinion Morton, J., remarks: "It is carrying the doctrine of assumption of the risk further than I think it has ever been carried, to say that one who, being lawfully on the highway and in the exercise of due care, observes as a spectator an unlawful and dangerous exhibition in it, assumes the risk of injury from it. The exhibitor is bound at his peril to see that he has a valid license. If he selects the highway for an unlawful and dangerous display designed or calculated to attract the public, he, and not the spectators, assumes the risk of injury. * * * Further, the question of assumption of the risk is ordinarily one of fact for the jury. The plaintiffs are not bound to show that they did not assume the risk. Unless it appears that they did, they are entitled to recover. This court cannot say, as matter of law, upon the facts stated, that the plaintiffs assumed the risk. Nothing is disclosed as to the circumstances under which the plaintiffs were present. For aught that appears, they might have been travellers, stopping for a moment on their way through the square, or detained by the crowd."

That it is no part of the plaintiff's case to show that he did not assume the risk, see Dowd v. New York, etc., Ry. (1902) 170 N. Y. 459, 472, 63 N. E. 541.

The majority opinion in Scanlon v. Wedger was followed in Frost v. Josselyn (1902) 180 Mass. 392, 62 N. E. 469. Its doctrine was approved in Johnson v. City of New York (1906) 186 N. Y. 139, 149, 78 N. E. 715, 116 Am. St. Rep. 545, 9 Ann. Cas. 824: P. sought to recover for personal injuries caused by being struck by a speeding automobile in an unlawful speed test on a public highway. The plaintiff was present not as a casual spectator traveling on the highway, but for the express purpose of seeing a test in which automobiles would be driven at the greatest possible speed. So, in Bogart v. City of New York (1911) 200 N. Y. 379, 93 N. E. 937, 21 Ann. Cas. 466.

But see Moore v. City of Bloomington (1912) 51 Ind. App. 145, 95 N. E. 374: A city, without authority to do so, granted the free use of certain streets for a fireworks display. P., a child of tender years, standing in the street near the platform from which the fireworks were being discharged, was struck in the face by a skyrocket. Said Lairy, C. J., delivering the opinion: "It appears from the evidence in this case that appellant [P.] was not using the street for travel at the time of her injury, but that she had come to the place solely for the purpose of watching the fireworks. Under such circumstances it is insisted that she assumed the risk of injury and cannot recover for that reason. * * * It appears that she was a girl of tender years, and she may not have known or fully appreciated the danger she was encountering. She may have had no knowledge of the dangerous character of the fireworks which were being used or of the inexperience of the person in charge." A judgment for the defendant was accordingly reversed.

SULLIVAN v. DUNHAM.

(Supreme Court of New York, Appellate Division, 1896. 10 App. Div. 438, 41 N. Y. Supp. 1083.)

Action by Mary Sullivan, as administratrix of the estate of Annie E. Harten, deceased, to recover for the death of her intestate. From a judgment entered on a verdict in favor of plaintiff, and from an order denying a motion for a new trial, defendants appeal.

WILLARD BARTLETT, J. * * * The complaint charged that the defendants "wrongfully and unlawfully, and in reckless disregard of human life, did carelessly, negligently, and unskillfully blast and blow out" the tree; but the learned judge who presided at the trial held that the action was based, not at all upon negligence, but upon a wrong consisting of the improper use of real estate. The jury were told, in substance, that the plaintiff was entitled to a verdict if they were satisfied that the young girl was struck and killed in the highway by a portion of the tree blasted out on Dr. Dunham's land by Messrs. Dinkel & Jewell, employed by him to do the work under the direction of his foreman, Ward. The court also instructed the jury that the caution which the young lady exercised in respect to taking care of herself was not to be considered having previously, in the course of the trial, excluded evidence offered by the defendant for the purpose of showing that, after she was warned of the danger, she voluntarily remained in the vicinity.

In the instruction and ruling upon the degree of care required of the injured person in such a case, it is clear that an error was committed. Even where the cause of action is not founded upon negligence, but rests upon the commission of a trespass by the defendant, the party suffering injury therefrom is not wholly relieved of the obligation to exercise some degree of caution. If he is on his own land, or in the public highway, he has a right to assume, in the absence of knowledge or fair warning to the contrary, that others will not endanger his safety by trespass or other wrong. St. Peter v. Denison, 58 N. Y. 416, 17 Am. Rep. 258; Ochsenbein v. Shapley, 85 N. Y. 214. But, where there is personal notice of the existence of danger, or fair warning, the law imposes upon the person whose safety is imperiled the duty of using such reasonable means as are at hand to protect himself, and he cannot voluntarily and knowingly remain in a place of risk without losing his right of action for the injury which it was thus in his power to avoid. While I am far from saying that, upon the proof actually before the court in the case before us, the young woman who lost her life neglected any precaution which the law demanded, I think there was error in the exclusion of evidence which was offered on that subject. * * *

I think the judgment should be reversed, and a new trial granted.[92]

[92] Only so much of the case is given as relates to the one point. See ante, p. 68.

For the subsequent history of this case, see (1898) 35 App. Div. 633, 54 N.

WELLS v. KNIGHT.

(Supreme Court of Rhode Island, 1911. 32 R. I. 432, 80 Atl. 16.)

Action by the widow and minor children of Llewellyn Wells, for damages, under a Rhode Island statute, on account of his death by the alleged wrongful act of the defendant. There was a verdict for defendant, and plaintiffs bring exceptions.[93]

PARKHURST, J. * * * In the writ and declaration in the case at bar the action is styled "an action of the case." The amended declaration says that it was the duty of the defendant "to exercise due, proper, and reasonable care in the control, management, and operation" of his premises, and in the blasting or quarrying of rock or stone as aforesaid, and to give to travelers due, proper, and sufficient notice of such blasting, so that they would not be injured. The declaration alleges, as to the wrongful act complained of:

"And said plaintiffs aver that said Llewellyn Wells, on, to wit, said 21st day of May, A. D. 1907, at said Cranston, was in the exercise of due care, and was driving in, to wit, a southerly direction, a horse and wagon or vehicle over, across, and upon said Scituate avenue, in said town of Cranston, and while driving or traveling as aforesaid, and while in the exercise of due care, said Llewellyn Wells was struck in the right side, chest, arm, and body with a certain stone or rock, which was thrown or blown by blasting or quarrying as aforesaid, from said ledge or quarry over, across, and upon said highway, which said blasting or quarrying was done by said defendant, his agents and servants."

This, then, is the statement of the case upon which the plaintiffs must recover. The declaration states just how the accident happened. It does not state whether or not it was due to negligence.

It is plainly a declaration in trespass, alleging a direct and forcible trespass to the person, without any allegation of negligence on the part of the defendant. Such a declaration in trespass, founded on a writ, sounding in case, is permitted by statute (section 246, Court and Practice Act 1905), as construed in Adams v. Lorraine Mfg. Co., 29 R. I. 333, 71 Atl. 180; and we regard the action in form as an action of trespass, and not as an action of trespass on the case for negligence. It follows, therefore, that as there is no allegation of negligence, and the action is founded on a direct trespass to the person, the evidence offered in regard to the negligence of the defendant in the matter of the use of explosives and of the covering of the blast was, under strict rules, inadmissible. Furthermore, this court has recently approved the rule set forth in Hickey v. McCabe & Bihler, 30 R. I. 346, 348, 75 Atl. 404, 405, 27 L. R. A. (N. S.) 425, 19 Ann. Cas. 783, that "it is well settled that negligence need not be shown in order to recover for damage done by matter thrown by blasting upon the adjoining land.

Y. Supp. 962, and (1900) 161 N. Y. 290, 55 N. E. 923, 47 L. R. A. 715, 76 Am. St. Rep. 274, given ante, p. 68.

[93] The statement of facts is abridged, and only so much of the opinion is given as relates to the one point.

The rule is stated in 19 Cyc. 7, as follows: 'It may be said to be the rule that one who, in blasting upon his premises, casts rocks or other débris upon the land of another, is liable for such invasion, regardless of the degree of care or skill used in doing the work' "—citing numerous cases. The case proceeds to discuss the application of the same rule to cases where the damage was caused by concussions and vibrations due to blasting, noting the conflict of authority, and concludes that the same rule should apply in both classes of cases, and that proof of negligence on the part of the defendant is not necessary in cases where the damage caused by blasting results from concussions and vibrations, any more than in cases where damage results from rocks or other débris cast upon the land. * * *

And the rule of law is the same in cases of injury to the person as in case of damage to property. Hoffman v. Walsh, 117 Mo. App. 278, 93 S. W. 853; St. Peter v. Denison, 58 N. Y. 416, 17 Am. Rep. 258; Munro v. Dredging, etc., Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248, and cases infra. So the same rules are applied in case of injury or death caused to a person traveling in a highway. 2 Shearm. & Red. on Neg. § 688a; Sullivan v. Dunham, 161 N. Y. 290, 294, 295, 299, 55 N. E. 923, 47 L. R. A. 715, 76 Am. St. Rep. 274; Wright v. Compton, 53 Ind. 337, 341. * * *[94]

We come, then, to the question of contributory negligence. A careful consideration of the testimony convinces us that upon this ground the jury was justified in finding a verdict for the defendant. It is undisputed that the defendant sent his employé, Mr. Gardner, expressly for the purpose of warning travelers upon the highway to a point sufficiently far from the blast to be a safe place to wait till after the blasting was over, and that Gardner did warn the deceased and his companion, Ryan, at that point, to stop because of the danger. And although there is some conflict as to whether Mr. Gardner told the deceased and Ryan that there was to be more than one blast, there was ample evidence to corroborate Mr. Gardner's statement that he expressly said to them that three blasts were to be fired, and there is ample evidence that there were warnings given by the men on the ledge and others in the hearing of the deceased and Ryan, and heard by others much farther away than the deceased, that there were other blasts to follow the one already fired, while the deceased was waiting in his buggy at the place where he was first stopped by Gardner. A number of witnesses, eight or more, testify in various ways and to various facts and circumstances regarding the warnings—some directly corroborating Gardner's statement as to his direct warning of three blasts to be fired, others, as to the warnings given by the men at the ledge.

[94] On the question of an assault and battery, the opinion quotes from and follows Sullivan v. Dunham (1900) 161 N. Y. 290, 55 N. E. 923, 47 L. R. A. 715, 76 Am. St. Rep. 274, given ante, p. 68.

As there was ample evidence to warrant the jury in believing that full and explicit warning of the danger was given to the deceased, and it is undisputed that he was in a safe place when the warning was given, and voluntarily disregarded the warning and moved forward into a place of danger, when he met his death, and as the judge who has tried the case has approved the verdict of the jury, we find no ground for setting the verdict aside. Wilcox v. R. I. Co., 29 R. I. 292, 70 Atl. 913. It is not disputed, in this case, as we understand, that contributory negligence, if proved, is as much a bar to recovery in cases of this character, as in other cases of personal injury or death. Wright v. Compton, 53 Ind. 337; Sullivan v. Dunham, 10 App. Div. 438, 41 N. Y. Supp. 1083; 19 Cyc. p. 10; Shearm. & Red. vol. 2, pp. 1188–1190; Am. & Eng. Ency. Law (2d Ed.) vol. 12, p. 510; Smith v. Day (C. C.) 86 Fed. 62; Wadsworth v. Marshall, 88 Me. 263, 34 Atl. 30, 32 L. R. A. 588; Cary Bros. & Hannon v. Morrison, 129 Fed. 177, 63 C. C. A. 267, 65 L. R. A. 659. * * *

The case is remitted to the superior court, with direction to enter its judgment for the defendant upon the verdict as rendered by the jury.

(B) Accident; Mistake; Necessity

(a) Accident

There is a case put in the Year Book 21 Hen. VII., 28, a (1506), that where one shot an arrow at a mark, which glanced from it and struck another, it was holden to be trespass.[95]

Grose, J., in Leame v. Bray (1803) 3 East, 593, 596.

[95] So it was argued, forty years earlier, in the Thorn-Cutting Case (1466) Y. B. 6 Edw. IV., f. 7, pl. 18: "Sir, if one is shooting at butts, and his bow shakes in his hands, and kills a man, ipso invito, it is no felony, as has been said, etc.; but if he wounds one by shooting, he shall have a good action of trespass against him, and yet the shooting was lawful, etc., and the wrong which the other received was against his will."

Referring to the case in the Year Book of 1506, Denman, J., remarks, in Stanley v. Powell (1891) 1 Q. B. 86, 89: "It appears that the passage in question was a mere dictum of Rede, who (see 5 Foss' Lives of the Judges, p. 230) was at the time (1506) either a judge of the King's Bench or C. J. of the Common Pleas, which he became in October in that year, in a case of a very different kind from that in question, and it only amounts to a statement that an action of trespass may lie even where the act done by the defendant is *unintentional*. The words relied on are, 'Mes ou on tire a les buts et blesse un home, coment que est incontre sa volonte, il sera dit un trespassor incontre son entent.' But in that passage Rede makes observations which shew that he has in his mind cases in which that which would be prima facie a trespass may be excused."

And see Pollock on Torts (8th Ed.) 137, 142: "If we go far back enough, indeed, we shall find a time and an order of ideas in which the thing itself that does damage is primarily liable, so to speak, and through the thing its owner is made answerable. That order of ideas was preserved in the noxal actions of Roman law, and in our own criminal law by the forfeiture of the

WEAVER v. WARD.

(Court of King's Bench, 1616. Hobart, 134, 80 Reprint, 284.)

Weaver brought an action of trespass of assault and battery against Ward. The defendant pleaded, that he was among others by the commandment of the Lords of the Council a trained soldier in London, of the band of one Andrews, captain, and so was the plaintiff; and that they were skirmishing with their muskets charged with powder for their exercise in re militari, against another captain and his band; and as they were so skirmishing, the defendant casualiter et per infortunium et contra voluntatem suam, in discharging of his piece, did hurt and wound the plaintiff, which is the same, etc., absque hoc, that he was guilty aliter sive alio modo. And upon demurrer by the plaintiff, judgment was given for him; for though it were agreed that if men tilt or turney in the presence of the king, or if two masters of defence playing their prizes kill one another, that this shall be no felony; or if a lunatick kill a man or the like, because felony must be done animo felonico: yet in trespass, which tends only to give damages according to hurt or loss, it is not so; and therefore if a lunatick hurt

offending object which had moved, as it was said, to a man's death, under the name of deodand. But this is a matter of history, not of modern legal policy. So much we may concede, that when a man's act is the apparent cause of mischief, the burden of proof is on him to show that the consequence was not one which by due diligence he could have prevented. But so does (and must) the burden of proving matter of justification or excuse fall in every case on the person taking advantage of it. If he were not, on the first impression of the facts, a wrong-doer, the justification or excuse would not be needed. * * * There is a good deal of appearance of authority in the older books for the contrary proposition that a man must answer for all direct consequences of his voluntary acts at any rate, or as Justice O. W. Holmes has put it 'acts at his peril.' Such seems to have been the early Germanic law, and such was the current opinion of English lawyers till about the end of the eighteenth century. * * * They [the English authorities] have certainly been supposed to show that inevitable accident is no excuse when the immediate result of an act is complained of. Erskine said more than a century ago in his argument in the celebrated Case of the Dean of St. Asaph (1783) 21 St. Tr. 1022 (and he said it by way of a familiar illustration of the difference between criminal and civil liability), that 'if a man rising in his sleep walks into a china shop and breaks everything about him, his being asleep is a complete answer to an indictment for trespass, but he must answer in an action for everything he has broken.' And Bacon had said earlier to the same purpose, that 'if a man be killed by misadventure, as by an arrow at butts, this hath a pardon of course; but if a man be hurt or maimed only, an action of trespass lieth, though it be done against the party's mind and will.' Maxims of the Law, Reg. 7 [1596]. Stronger examples could not well be propounded. For walking in one's sleep is not a voluntary act at all, though possibly an act that might have been prevented; and the practice of archery was, when Bacon wrote, a positive legal duty under statutes as recent as Henry VIII.'s time, though on the other hand shooting is an extra hazardous act."

See, also, the chapter on "Trespass and Negligence" in Holmes' Common Law; Professor Wigmore's articles in 7 Harv. Law Rev. 315, 383, 441, reprinted in 3 Anglo-American Legal Essays, 474; and "Negligence in the Field of Trespass," Street's Foundations of Legal Liability, vol. 1, pp. 73–85.

a man, he shall be answerable in trespass: and therefore no man shall be excused of a trespass (for this is the nature of an excuse, and not of a justification, prout ei bene licuit) except it may be judged utterly without his fault.[96]

As if a man by force take my hand and strike you, or if here the defendant had said that the plaintiff ran across his piece when it was discharging, or had set forth the case with the circumstances so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt.[97]

[96] "It has been generally supposed that until the present century (earlier in this country, later in England) the old notion continued, i. e., that the rationalization never proceeded any further than to posit a voluntary act by the defendant: that if from a voluntary act a trespass—that is, a direct and immediate injury—followed, nothing could save the defendant from civil responsibility. And no doubt this came to be at least the preliminary test, the sine qua non, showing itself most prominently in the rule of pleading that if there had been no such voluntary act, then there was not even a prima facie trespass. But more than this the whole course of precedents and of contemporary legal opinion does not allow us to believe. The evidence seems plain that the rationalization towards the present standards began at a much earlier period than has been supposed. In other words, there has never been a time, in English law, since (say) the early 1500's, when the defendant in an action for trespass was not allowed to appeal to some test or standard of moral blame or fault in addition to and beyond the mere question of his act having been voluntary: i. e., conceding a voluntary act, he might still exonerate himself (apart from excuses of self-defence, consent, and the like). At first this test, naturally, was vague enough. 'Inevitable necessity,' 'unavoidable accident,' 'could not do otherwise,' served indiscriminately to express, in judicial language, the reasons of fairness on which they equally exempted him who had intentionally struck in self-defense, and him who unintentionally injured without what we now call 'negligence,' and him who intentionally trespassed on the plaintiff's land to avoid a highway attack. The phrases, 'non potuit aliter facere' and 'inevitable necessity,' served as leading catchwords for many centuries; and even up to the 1800's we find court and counsel constantly interchanging 'inevitable accident' and 'absence of negligence or blame.' The precedents show us, then, that somewhere about 1500 a decided sloughing-off of the last stage of the primitive notion took place, and a defendant could exempt himself in this sort of an action if his act, though voluntary, had been without blame: the standard being more indefinite, and perhaps not as liberal, as to-day, but not different in kind. But it would seem that towards the latter half of the 1800's the opinion at the bar in England misconceived the language of some of the earlier cases, and it became necessary to review them in two cases (Holmes v. Mather, 1875; Stanley v. Powell, 1891), in which the doctrine was finally settled, for England, that the defendant's attention to the requirements of due care may be (not necessarily always is) a defence, even where a trespass has been done. The same doctrine ('there must be some blame or want of care and prudence to make a man answerable in trespass') had long been laid down in this country, and that, too, purely as a matter of the right reading of the precedents." John H. Wigmore, "Responsibility for Tortious Acts," 7 Harv. Law Rev. 315, 383, 442; 3 Legal Essays, 474, 504, citing authorities.

[97] Compare:

Dickenson v. Watson (1682) T. Jones, 205, 84 Reprint, 1218: Trespass for assault and battery, in that D. had wounded P. in the eye by discharging a gun loaded with "hail-shot." D. pleaded that he was an officer appointed to collect hearth-money, and carried firearms for the more sure custody of the money collected and to be collected, and that having one of his pistols in his hands, and intending to discharge it ne aliquod damnum eveniret, he discharged it (nemine in opposito vis. existente), and while he discharged it the

omit all

UNDERWOOD v. HEWSON.

(At Nisi Prius. Coram Fortescue et Raymond, Justices, 1724. 1 Strange, 596.[98])

[This case is given ante, see page 31.]

JAMES v. CAMPBELL.

(At Nisi Prius, 1832. 5 Car. & P. 372, 24 E. C. L. 611.)

Assault and battery. In a quarrel between the defendant, Campbell, and a Mr. Paxton, the plaintiff, James, was struck by the defendant. It was claimed that the blow was intended for Mr. Paxton, not for the plaintiff, although the plaintiff and the defendant had not been on good terms.[99]

Bodkin, for the defendant, in his address to the jury, contended, that if the defendant did not intentionally strike the plaintiff, they ought to find their verdict for him.

plaintiff casualiter viam illam præterivit, et si aliquod malum ei inde accideret hoc fuit contra voluntat. of the defendant; quæ est eadem transgressio. To this plea the plaintiff demurred.

Bullock v. Babcock (1829) 3 Wend. (N. Y.) 391: In 1816, P., then a schoolboy 10 years of age, was hit in the eye with an arrow shot by D., a schoolmate about 12 years old. P. and D. had been shooting at a mark, when D. said to P., "I will shoot you." P. ran into the schoolroom and hid behind a fire board. D. followed to the door of the schoolroom and saying "See me shoot that basket," discharged the arrow. At that moment P. raised his head above the fire board, and the arrow struck him. In 1827, P. sued D. in trespass for the assault and battery.

Castle v. Duryea (1860) 32 Barb. 480; Id., 2 Keyes (*41 N. Y.) 169: D., commanding a regiment in public military exercises, ordered his men to fire. It was intended that only blank cartridges should be used, and elaborate precautions had been taken to secure this. In the belief that there was no ball cartridge in any of the guns, the regiment fired towards the spectators. P., one of the spectators, was hit by a ball which had accidentally been left in a gun used.

[98] Compare Cole v. Fisher (1814) 11 Mass. 137: Trespass vi et armis for firing a gun, by which the plaintiff's horse was frightened and ran away with his chaise and broke it. Sewall, C. J., remarked: "The well-known distinction of immediate injury and consequential injury is the rule upon which our doubts have arisen: in all other respects, the action is clearly maintained for the plaintiff upon the facts agreed. It is immaterial, as respects the right of action, or the form, whether the act of the defendant was by his intention and purpose injurious to the plaintiff, or the mischief which ensued was accidental, and besides his intention, or contrary to it. The decision in the case of Underwood v. Hewson has never been questioned. There the defendant was uncocking his gun, when it went off and accidentally wounded a bystander. The defendant was charged, and holden liable in trespass. Other cases before and since, might be cited, in which the same doctrine, which governed in that decision, has been recognized as the law."

And see 1 Beven on Negligence (3d Ed.) 565: "If, then, blame is at the root of liability, the doer of an unlawful act [i. e., not an act done without justification but an act which, apart from the question of justification, is primarily against law] is a fortiori liable for the consequences of it." Compare: 38 Cyc. 424, note 22.

[99] The statement of facts is abridged.

Mr. Justice BOSANQUET (to the jury): If you think, as I apprehend there can be no doubt, that the defendant struck the plaintiff, the plaintiff is entitled to your verdict, whether it was done intentionally or not. But the intention is material in considering the amount of damages.[100]

Verdict for the plaintiff. Damages £10.

WELLS v. HOWELL.

(Supreme Court of Judicature of New York, 1822. 19 Johns. 385.[1])

[This case is given ante, p. 108; see "Trespass to Real Property."]

NEWSOM v. ANDERSON.

(Supreme Court of North Carolina, 1841. 2 Ired. [24 N. C.] 42, 37 Am. Dec. 406.)

Trespass quare clausum fregit. The defendant was cutting trees on his own land, when one of them accidentally fell on the land of the plaintiff. The defendant did not act designedly or negligently, and it did not appear that there was any actual injury to the land. The plaintiff's counsel moved the court to instruct the jury that this constituted a trespass on the part of the defendant. The court refused. The instruction given sufficiently appears from the opinion. Verdict and judgment for defendant. Plaintiff appealed.

DANIEL, J. To sustain trespass, the injury must in general be immediate, and committed with force, either actual or implied. If the injurious act be the immediate result of the force originally applied

[100] Accord: Davis v. Collins (1904) 69 S. C. 460, 48 S. E. 469 (D. learned that S., with whom he had quarreled, was coming to town on a certain train. D. accordingly armed himself with brass knuckles and went to the railway station, intending to attack S. immediately upon his arrival. When S. got off the train, he stopped to speak to P., a young lady. D., attempting to strike S., accidentally hit P.); Peterson v. Haffner (1877) 59 Ind. 130, 26 Am. Rep. 81. (The plaintiff, Fred Haffner, 5 years old, and his brother William, 7 years old, were sitting on a sand pile, beside a box of mortar, in the public street before their home, when the defendant, 14 years old, with four other boys, came down the street. Some of the boys began throwing pebbles and mortar, in sport. The defendant picking up a piece of mortar, said to William Haffner, "Run or I will hit you." William started to run, and the plaintiff with him. The defendant threw the mortar at William and hit him on the back of the head. At that instant the plaintiff looked back, and a piece of the mortar which had struck William flew off and hit the plaintiff in the eye. The result was the loss of sight in this eye).

[1] For an historical explanation of the absolute liability for accident in such cases, see Salmond, Jurisprudence (3d Ed. 1910) 378; Wigmore, Responsibility for Tortious Acts, 7 Harv. Law Review (1894) 450. And see 2 Cyc. 376, note 38.

by the defendant, and the plaintiff be injured thereby, it is the subject of an action of trespass vi et armis, by all the cases, both ancient and modern, and it is immaterial whether the injury be willful or not: Leame v. Bray, 3 East, 599; 2 Leigh's N. P. 1402. We think that the charge of the judge was incorrect, when he said, "that the plaintiff could not recover, unless the tree was designedly or carelessly felled by the defendant, so as to fall on the plaintiff's land, or that, by falling on the plaintiff's land, it had fallen on his grass or vegetable growth of some kind." The ground of the action, quare clausum fregit, is the injury to the possession: 3 Bl. Com. 210; [Smith v. Milles] 1 T. R. 480; and that whether the injury extends to the plaintiff's land in the mineral or vegetable kingdom. Is not the felling of trees on a person's land, and incumbering it with rubbish, an injury to the possession? We think it is. * * *[2]

By COURT. New trial awarded.

HALL v. FEARNLEY.

(Court of Queen's Bench, 1842. 3 Q. B. 919, 114 Reprint, 761.)

[This case is given ante, see page 130.]

BROWN v. KENDALL.

(Supreme Judicial Court of Massachusetts, 1850. 6 Cush. 292.)

This was an action of trespass for assault and battery. It appeared in the evidence that two dogs, belonging to the plaintiff and the defendant, respectively, were fighting in the presence of their masters; that the defendant took a stick about four feet long, and commenced beating the dogs in order to separate them; that the plaintiff was looking on, at a distance of about a rod, and that he advanced a step or two towards the dogs. In their struggle, the dogs approached the place where the plaintiff was standing. The defendant retreated backwards from before the dogs, striking them as he retreated; and as

[2] Part of the opinion is omitted.

Accord: Gates v. Miles (1819) 3 Conn. 61: The plaintiffs were the owners of the sloop Mary; the defendant was the owner of the sloop Susan. The defendant was proceeding with the Susan, under his personal direction and management, through Long Island Sound, to New Haven. One of the plaintiffs was navigating the Mary, in the opposite direction, to New York. When the two sloops were distant from each other about 30 rods, the defendant commanded the person at the helm of the Susan to luff; "in obedience to which, the helmsman suddenly luffed, and turned said sloop Susan to windward, and in pursuance of the direction thus given, she directly struck the larboard quarter of the Mary, with great violence."

he approached the plaintiff, with his back towards him, in raising his stick over his shoulder, in order to strike the dogs, he accidentally hit the plaintiff in the eye, inflicting upon him a severe injury. * * * The judge declined to give certain instructions requested by the defendant but left the case to the jury under the following instructions:

"If the defendant, in beating the dogs, was doing a necessary act, or one which it was his duty under the circumstances of the case to do, and was doing it in a proper way; then he was not responsible in this action, provided he was using ordinary care at the time of the blow. If it was not a necessary act; if he was not in duty bound to attempt to part the dogs, but might with propriety interfere or not as he chose; the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable, using the word inevitable not in a strict but a popular sense.

"If, however, the plaintiff, when he met with the injury, was not in the exercise of ordinary care, he cannot recover, and this rule applies, whether the interference of the defendant in the fight of the dogs was necessary or not. If the jury believe, that it was the duty of the defendant to interfere, then the burden of proving negligence on the part of the defendant, and ordinary care on the part of the plaintiff, is on the plaintiff. If the jury believe, that the act of interference in the fight was unnecessary, then the burden of proving extraordinary care on the part of the defendant, or want of ordinary care on the part of the plaintiff, is on the defendant."

The jury under these instructions returned a verdict for the plaintiff; whereupon the defendant alleged exceptions.

SHAW, C. J. * * * The facts set forth in the bill of exceptions preclude the supposition, that the blow, inflicted by the hand of the defendant upon the person of the plaintiff, was intentional. The whole case proceeds on the assumption, that the damage sustained by the plaintiff, from the stick held by the defendant, was inadvertent and unintentional; and the case involves the question how far, and under what qualifications, the party by whose unconscious act the damage was done is responsible for it. We use the term "unintentional" rather than involuntary, because in some of the cases, it is stated, that the act of holding and using a weapon or instrument, the movement of which is the immediate cause of hurt to another, is a voluntary act, although its particular effect in hitting and hurting another is not within the purpose or intention of the party doing the act.

It appears to us, that some of the confusion in the cases on this subject has grown out of the long-vexed question, under the rule of the common law, whether a party's remedy, where he has one, should be sought in an action of the case, or of trespass. This is very distinguishable from the question, whether in a given case, any action will lie. The result of these cases is, that if the damage complained of is the immediate effect of the act of the defendant, trespass vi et armis lies; if consequential only, and not immediate, case is the proper remedy. Leame v. Bray, 3 East, 593; Hugget v. Montgomery, 2 N. R. 446, Day's Ed. and notes.

In these discussions, it is frequently stated by judges, that when 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 a result of all the authorities, the rule is correctly stated by Mr. Greenleaf, that the plaintiff must come prepared with evidence to show either 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 liable. 2 Greenl. Ev. §§ 85 to 92; Wakeman v. Robinson, 1 Bing. 213. If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom. Davis v. Saunders, 2 Chit. R. 639; Com. Dig. Battery, A. (Day's Ed.) and notes; Vincent v. Stinehour, 7 Vt. 69, 29 Am. Dec. 145.

In applying these rules to the present case, we can perceive no reason why the instructions asked for by the defendant ought not to have been given; to this effect, that if both plaintiff and defendant at the time of the blow were using ordinary care, or if at the time the defendant was using ordinary care, and the plaintiff was not, or if at that time both plaintiff and defendant were not using ordinary care, then the plaintiff could not recover.

In using this term, ordinary care, it may be proper to state, that what constitutes ordinary care will vary with the circumstances of the cases. In general, it means that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger. A man, who should have occasion to discharge a gun, on an open and extensive marsh, or in a forest, would be required to use less circumspection and care, than if he were to do the same thing in an inhabited town, village, or city. To make an accident, or casualty, or as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed.

We are not aware of any circumstances in this case, requiring a distinction between acts which it was lawful and proper to do, and acts of legal duty. There are cases, undoubtedly, in which officers are bound to act under process, for the legality of which they are not responsible, and perhaps some others in which this distinction would be important. We can have no doubt that the act of the defendant in attempting to part the fighting dogs, one of which was his own, and for the injurious acts of which he might be responsible, was a

lawful and proper act, which he might do by proper and safe means. If, then, in doing this act, using due care and all proper precautions necessary to the exigency of the case, to avoid hurt to others, in raising his stick for that purpose, he accidentally hit the plaintiff in his eye and wounded him, this was the result of pure accident, or was involuntary and unavoidable, and therefore the action would not lie. * * *

The court instructed the jury, that if it was not a necessary act, and the defendant was not in duty bound to part the dogs, but might with propriety interfere or not as he chose, the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable, using the word not in a strict but a popular sense. This is to be taken in connection with the charge afterwards given, that if the jury believed, that the act of interference in the fight was unnecessary (that is, as before explained, not a duty incumbent on the defendant), then the burden of proving extraordinary care on the part of the defendant, or want of ordinary care on the part of the plaintiff, was on the defendant.

The court are of opinion that these directions were not conformable to law. If the act of hitting the plaintiff was unintentional, on the part of the defendant, and done in the doing of a lawful act, then the defendant was not liable, unless it was done in the want of exercise of due care, adapted to the exigency of the case, and therefore such want of due care became part of the plaintiff's case, and the burden of proof was on the plaintiff to establish it. 2 Greenl. Ev. § 85; Powers v. Russell, 13 Pick. (Mass.) 69, 76; Tourtellot v. Rosebrook, 11 Metc. (Mass.) 460.

Perhaps the learned judge, by the use of the term "extraordinary care," in the above charge, explained as it is by the context, may have intended nothing more than that increased degree of care and diligence, which the exigency of particular circumstances might require, and which men of ordinary care and prudence would use under like circumstances, to guard against danger. If such was the meaning of this part of the charge, then it does not differ from our views, as above explained. But we are of opinion, that the other part of the charge, that the burden of proof was on the defendant, was incorrect. Those facts which are essential to enable the plaintiff to recover, he takes the burden of proving. The evidence may be offered by the plaintiff or by the defendant; the question of due care, or want of care, may be essentially connected with the main facts, and arise from the same proof; but the effect of the rule, as to the burden of proof, is this, that when the proof is all in, and before the jury, from whatever side it comes, and whether directly proved or inferred from circumstances, if it appears that the defendant was doing a lawful act, and unintentionally hit and hurt the plaintiff, then unless it also appears to the

satisfaction of the jury, that the defendant is chargeable with some fault, negligence, carelessness, or want of prudence, the plaintiff fails to sustain the burden of proof and is not entitled to recover.[3]

New trial ordered.

[3] The statement of facts is abbreviated and part of the opinion is omitted.

"If the accident had happened while chastising the dog, would the injured person be precluded from recovery because the act out of which the injury arose was a lawful one? If he could recover, the test of whether beating a dog in the street is a lawful act or not is not the correct test. If he could not, the maxim of law, 'Sic uti tuo ut alienum non lædas,' is reversed or limited, with some reference, perhaps, to real rights alone. The quiet citizen must keep out of the way of the exuberantly active one. The duty is to avoid being injured, not to avoid injuring. Test the matter by pleading. A trespass is only actionable when it results from other than a lawful act; consequently, a declaration setting out the facts would often be insufficient as being consistent with a lawful as well as an unlawful act; for illegality is never to be presumed." 1 Beven on Negligence (3d Ed.) 565.

Accord: Stanley v. Powell [1891] 1 Q. B. 86: The defendant and several others were pheasant shooting in a party, some being inside and some outside of a wood which the beaters were beating. The right of shooting was in one Greenwood, who was of the party. The plaintiff was employed by Greenwood to carry cartridges and the game which might be shot. Several beaters were driving the game along a plantation of saplings toward an open drive. The plaintiff stood just outside a gate which led into a field outside the plantation, at the end of the drive. The defendant was walking along in that field a few yards from the hedge which bounded the plantation. As he was walking along a pheasant rose inside the plantation; the defendant fired one barrel at this bird, and struck it with his first shot. The bird, when struck by the first shot, began to lower and turn back toward the beaters, whereupon the defendant fired his second barrel and killed the bird, but a shot, glancing from the bough of an oak which was in or close to the hedge and striking the plaintiff in the eye, caused the injury complained of. The oak was partly between the defendant and the bird when the second barrel was fired, but it was not in a line with the plaintiff, but, on the contrary, so much out of that line, that the shot must have been diverted to a considerable extent from the direction in which the gun must have been pointed in order to hit the plaintiff. The distance between the plaintiff and the defendant, in a direct line, when the second barrel was fired was about thirty yards. The plaintiff sued to recover his damages arising from the loss of his eye. The jury found that the plaintiff's hurt had been caused by a shot from the defendant's gun but that the shot had been fired by the defendant without any negligence. It was contended for the plaintiff that there could be a recovery on the ground of trespass, on the doctrine that even in the absence of negligence, an action of trespass might lie. Held that "if the case is regarded as an action on the case for an injury by negligence the plaintiff has failed to establish that which is the very gist of such an action, if on the other hand it is turned into an action for trespass, and the defendant is (as he must be) supposed to have pleaded a plea denying negligence and establishing that the injury was accidental in the sense above explained, the verdict of the jury is equally fatal to the action." Judgment was accordingly given for the defendant.

Compare Osborne v. Van Dyke (1901) 113 Iowa, 557, 85 N. W. 784, 54 L. R. A. 367: P. was holding a horse while D. applied medicine to its neck. The horse jumped, and D. began beating it with a heavy stick, with a nail in the end. While he was thus engaged, D.'s foot slipped, and in consequence he unintentionally hit P. in the face, breaking the bones of his nose. The trial judge charged the jury that D. would not be liable if in beating the horse he exercised reasonable care to avoid striking P., and the blow which inflicted P.'s injury was caused by an accidental slip, for which D. was not to blame; and that this was the law even if D. in beating the horse was guilty of an unlawful act. Held, erroneous.

As bearing on the principle of Stanley v. Powell, see the discussion in 1 Beven on Negligence (1908) 565–570.

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SULLIVAN v. DUNHAM.

(Court of Appeals of New York, 1900. 161 N. Y. 290, 55 N. E. 923, 47 L. R. A. 715, 76 Am. St. Rep. 274.)

[This case is given ante, p. 68; see "Battery."]

BRADLEY v. LAKE SHORE & M. S. RY. CO.

(Supreme Court of Pennsylvania, 1913. 238 Pa. 315, 86 Atl. 200, 44 L. R. A. [N. S.] 1148.)

Action of trespass by Bradley against the railway company for a personal injury. From a judgment for the defendant, on a directed verdict, the plaintiff appeals.

POTTER, J. The facts in this case are substantially as follows: On the evening of August 11, 1909, the plaintiff went to the passenger station of the defendant company, at Polk, Pa., at about 7 o'clock. He concluded to go to Franklin upon a train leaving about 9 o'clock, and with that purpose in view remained at or near the station. Shortly after 8 o'clock, while the plaintiff was seated upon a baggage truck, which stood upon the station platform, a freight train passed rapidly upon the second track from the platform. While the train was passing, an iron brake bar, which formed part of the brake equipment, broke, or became loosened at one end, fell down, and was dragged for some distance, and then broke away entirely, and was hurled violently from the train, striking the station platform, and, rebounding therefrom, struck and crushed plaintiff's hand, which rested upon the truck at his side. The plaintiff brought this action to recover damages for the resulting injury. At the trial a verdict for the defendant was directed upon the ground that the evidence did not warrant a finding by the jury of negligence upon the part of the defendant company. Afterwards, in an opinion refusing a new trial, the learned judge of the court below considered the legal questions raised most elaborately, and concluded that, under the evidence, the plaintiff could not, at the time and place of the accident, be properly regarded as having assumed the relation of passenger to the defendant company, and further that the defendant company had in no way failed in the discharge of any duty which it owed to the plaintiff, and that there was no proof of negligence, on the part of the defendant, which caused the accident, and no basis upon which to found an inference of it. It seems that the brake bar which inflicted the injury was of considerable size and weight, being from two to three feet in length, and, when in its proper position, its place was under the trucks of the car, about on a level with the axle, and at right angles thereto. At either end of the bar were inserted fulcrum pins fastening it to brake levers,

and through these pins ran cotter pins to hold them in place. If the cotter pins came out, through jolting or vibration, the fulcrum pins in turn might be misplaced, thus permitting the larger connecting bar to fall to the ground, which is just what seems to have happened in this case.

The facts bring the case within the principle of the decision in Bauman v. Manufacturing Co., 234 Pa. 416, 83 Atl. 293, where injury was caused by the loss of a cotter pin. This, without more, was held insufficient proof of negligence on the part of defendant. To the same effect were the decisions in Bradbury v. Kingston Coal Co., 157 Pa. 231, 27 Atl. 400, and East End Oil Co. v. Torpedo Co., 190 Pa. 350, 42 Atl. 707. In the present case it was shown that the cars on the train in question were inspected on the afternoon of the accident, and prior thereto, and were found to be in order with the exception that a brake bar was missing on one car, but that was not regarded as affecting in any way the safe operation of the train. The evidence shows that the matter may very properly be regarded as an accident pure and simple, and as such it falls within the rule that one engaged in a lawful act is not responsible for damage arising from a pure accident in the doing of it. It was not shown that the inspection made shortly before the accident was faulty or ineffective in any way, or that it was made by incompetent persons. As the trial judge says, it may be assumed that the accident was due to the cotter pin coming out of place, and that it would not have occurred had the pin been kept in place. Yet, as he points out, this affords no basis for inferring any lack of ordinary care upon the part of the defendant. The bolts and pins may have been in place when inspected, and yet have been jarred out of place or broken shortly afterward. There is no evidence upon this point, and nothing tending to show that the dropping of the brake bar was due to faulty inspection or any want of repair by the defendant company. That the bar should have fallen down, broken off, and been hurled from the train just at the spot where the plaintiff was sitting was of course a result which the defendant could not have foreseen. As the trial judge suggests, even if there had been any competent proof (and there was none) that the brake rod had become loosened, and, through oversight on the part of the employés, it was permitted to remain on the car, "only an extreme visionary would have imagined the consequences which followed, or that injury could result to person or property therefrom." We agree with the court below in the final conclusion that nothing in the evidence justified an inference that the defendant company failed in the discharge of any duty owed by it to the plaintiff.*

The assignments of error are overruled, and the judgment is affirmed.

* Compare Kirk v. West Virginia Colliery Co. (1914) 215 Fed. 77: The coal from D.'s mine was run by D. down an incline from the pit's mouth to a tipple above a side track, and thence into cars. The center of the side track was 18

THE MERCHANT PRINCE.

(Court of Appeal, [1892] P. 179.)

Appeal by plaintiffs, the owners of the Catalonia, from a decision of the President, dismissing, with costs, their action of damage by collision against the defendants, the owners of the Merchant Prince, on the ground that the collision was the result of inevitable accident. In substance the plaintiff's case was as follows: The Catalonia, a screw steamer, was lying at anchor in the Mersey, when the Merchant Prince, a screw steamer, coming down the river in broad day light struck the Catalonia a heavy blow on the port quarter, doing very considerable damage. The defendants pleaded that the collision and damage were caused by inevitable accident, and the evidence shewed that at the time the Merchant Prince was proceeding down the Mersey, there was a moderate gale blowing from the westward, and, it being slack water, the Catalonia was lying wind-rode partly athwart the river. She was observed to be about half a point on the port bow at about a mile distant. Owing to the force of the wind the Merchant Prince griped a little as she approached the Catalonia, so that her head came over somewhat to port. The pilot thereupon gave the order "port," and then "hard a port," but the third officer, who was steering, on trying to get the wheel over to port, found that the steering gear would not act, and on calling out that the wheel was jammed, the engines were put astern, but the vessels were too close for the collision to be avoided. * * *

FRY, L. J. * * * It is a case in which a ship in motion has run into a ship at anchor. The law appertaining to that class of case appears to be clear. In the case of The Annot Lyle, 11 P. D. 114, it was laid down by Lord Herschell that in such a case the cause of the collision might be an inevitable accident, but unless the defendants proved this they are liable for damages. The burden rests on the defendants to shew inevitable accident. To sustain that the defendants must do one or other of two things. They must either shew what was the cause of the accident, and shew that the result of that cause was inevitable; or they must shew all the possible causes, one or other of which produced the effect, and must further shew with regard to every one of these possible causes that the result could not have been avoided. Unless they do one or other of these two things, it does not appear to me that they have shewn inevitable accident.

feet distant from the center of the main track. P., walking down the main track to take a train, asked D.'s foreman whether it was safe to pass the tipple. He said, "There is no danger, go on." P. accordingly started by, walking on the outer edge of the main track, when a lump of coal coming through the tipple bounded over from the car then being loaded by D. and struck P. The court was of opinion that "the case resolves itself into one of pure accident for which the coal company could not, upon any principle of law, be held liable."

In the present case the defendants have not shewn what was the cause. They have left that entirely undecided. In fact, their evidence has been largely given to shew that the event never did happen; but, unfortunately for them, it did happen. * * *[4]

Lopes, L. J. In this case the moving vessel runs into and comes into collision with a vessel at anchor. As I understand it, the law is perfectly clear that in the circumstances such as I have described the defendants are bound to shew that what happened was inevitable. In this case it is beyond dispute that the defendants are unable to tell what the cause of the accident was, or how or why it happened. It occurs to me that that being so, it cannot be said that they have discharged the burden fastened upon them by shewing that what happened was inevitable. Can they say that they could not avoid a thing when they did not know what the thing to be avoided was? I think not. In this case the steerage gear absolutely failed. How is that to be accounted for? It appears to me it can only be accounted for in two ways. It must have arisen from a defect in the machinery, or from bad management of the machinery. The defendants have not satisfied me that what happened did not proceed from the kinking of the chain. I rather think it did proceed from that cause. If that is so, how does the matter stand with regard to the defendants? They knew they had a new chain, and they ought to have known a new chain was liable to stretch. They ought to have known that a chain that stretched was liable to kink. Knowing these matters, they ought to have provided against that which happened by being prepared to use one or other of the modes of steerage with which they were supplied. In these circumstances, I am unable to see that what happened was inevitable; I am unable to agree with the learned judge below, and I think the appeal ought to be allowed and judgment given in favour of the plaintiffs.

Appeal allowed, judgment reversed and entered for the plaintiffs.

(b) Mistake

If I drive over a man in the dark because I do not know that he is in the road, I injure him accidentally; but if I procure his arrest, because I mistake him for some one who is liable to arrest, I injure him not accidentally but by mistake. In the former case I did not intend the harm at all, while in the latter case I fully intended it, but falsely believed in the existence of a circumstance which would have served to justify it. So if by insufficient care I allow my cattle to

[4] The statement of facts is abridged. The opinion of Lord Esher, M. R., and portions of the concurring opinions, are omitted.

escape into my neighbor's field, their presence there is due to accident, but if I put them there because I wrongly believe that the field is mine, their presence is due to mistake. In neither case did I intend to wrong my neighbor, but in the one case my intention failed as to the consequence, and in the other as to the circumstance.

Salmond, Jurisprudence (3d Ed.) 377.

BASELY v. CLARKSON. omit

(Court of Common Pleas, 1681. 3 Lev. 37, 83 Reprint, 565.)

Trespass for breaking his close called the balk and the hade, and cutting his grass, and carrying it away. The defendant disclaims any title in the lands of the plaintiff, but says that he hath a balk and hade adjoining to the balk and hade of the plaintiff, and in mowing his own land he involuntarily and by mistake mowed down some grass growing upon the balk and hade of the plaintiff, intending only to mow the grass upon his own balk and hade, and carried the grass, etc., quæ est eadem, etc. Et quod ante emanationem brevis he tendered to the plaintiff 2s. in satisfaction, and that 2s. was a sufficient amends. Upon this the plaintiff demurred, and had judgment; for it appears the fact was voluntary, and his intention and knowledge are not traversable; they cannot be known.[5]

[5] See Holmes, Common Law (1881) 99 et seq.: Whittier's "Mistake in the Law of Torts" (1902) 15 Harv. Law Rev. 335–352: Salmond, Law of Torts (1910) 15: "The plea of inevitable accident is that the consequences complained of as a wrong were not intended by the defendant and could not have been foreseen and avoided by the exercise of reasonable care. The plea of inevitable mistake, on the other hand, is that although the act and its consequences were intended, the defendant acted under an erroneous belief, formed on reasonable grounds, that some circumstance existed which justified him. Such a mistaken belief in justification, however reasonable, is not itself a justification. This is probably the most important of all the exceptions recognized by law to the requirement of mens rea as a ground of civil liability."

"A word may be said as to the historical origin of this failure of English law to recognise inevitable mistake as a ground of exemption from civil liability. Ancient modes of procedure and proof were not adapted for inquiries into mental conditions. By the practical difficulties of proof early law was driven to attach exclusive importance to overt acts. The subjective elements of wrongdoing were largely beyond proof or knowledge, and were therefore disregarded as far as possible. It was a rule of our law that intent and knowledge were not matters that could be proved or put in issue. 'It is common learning,' said one of the judges of King Edward IV., 'that the intent of a man will not be tried, for the devil himself knoweth not the intent of a man.' Y. B. 17 Edw. IV. The sole question which the courts would entertain was whether the defendant did the act complained of. Whether he did it ignorantly or with guilty knowledge was entirely immaterial. This rule, however, was restricted to civil liability. It was early recognised that criminal responsibility was too serious a thing to be imposed upon an innocent man simply for the sake of avoiding a difficult inquiry into his knowledge and intention. In the case of civil liability, on the other hand, the rule was general. The success with which it has maintained itself in modern law is due in part to its undeniable utility in obviating inconvenient or even impracticable inquiries, and in part to the influence of the conception of redress in minimizing the importance of the formal condition of penal liability." Salmond, Jurisprudence (3d Ed.) 376.

omit

STONEHOUSE v. ELLIOTT.

(Court of King's Bench, 1795. 6 T. R. 315, 101 Reprint, 571.)

This action of trespass, assault and false imprisonment was tried before Lord Kenyon at the sittings at Westminister after last Hilary term, when these facts were given in evidence. The defendant, whose pocket had been picked at the play-house, suspected the plaintiff, and having laid hold of him gave him in charge to a constable who was present, and to whom she had before communicated her suspicions. The plaintiff was taken to the office in Bow Street, where the defendant still persisted in her charge against the plaintiff, but after some examination it appeared that the defendaant was mistaken in her suspicions of the plaintiff, and he was released. It was objected that the plaintiff had misconceived his action, that he should have brought an action on the case for making the malicious charge, and that trespass would not lie in such a case as the present. The cause however proceeded, and the plaintiff obtained a verdict subject to the opinion of this Court, whether the action in its present form could be maintained. Accordingly,

Gibbs moved in the last term to set aside the verdict, and to enter a nonsuit.

Lord Kenyon, C. J. The doubt whether this was the proper form of action originated with me. I thought at the trial that as the constable's power to arrest flagrante delicto, for the purpose of putting the supposed offender into a course of justice, was allowed by the law, the person making the charge could only be liable in an action on the case for making such a charge maliciously. But I am now satisfied that trespass will lie in this case, this having been the constant course of proceeding.[6]

Per Curiam. Rule discharged.

HIGGINSON et al. v. YORK.

(Supreme Judicial Court of Massachusetts, 1809. 5 Mass. 341.)

Trespass for breaking and entering the close of the plaintiffs, called Burnt Coat island, and taking and carrying away three hundred cords of the plaintiffs' wood. Upon the general issue, pleaded and joined, the action was tried at the sittings after the last June term in this county, and a verdict found for the plaintiffs, subject to the opinion of the Court upon the following facts contained in the judge's report.

[6] Compare Samuel v. Payne (1780) 1 Dougl. 359: Thinking, on reasonable grounds, that P. had stolen laces from him, D. caused an officer to take P. into custody. The officer acted without a warrant. It turned out that D. was mistaken. P. sued both D. and the officer in trespass for false imprisonment. Held, that D. was liable, but that the charge made by D. to the officer was a sufficient justification as to him.

In the year 1805, the defendant, being master of a vessel regularly employed in the coasting trade, was applied to by one Kenniston, who was then a trader in the town of Sedgwick, to take a cargo of wood from the said island to Boston. He accordingly went to this island with Kenniston, took on board his vessel thirty or forty cords of wood and carried the same to Boston, where it was sold and the proceeds thereof accounted for by the defendant to Kenniston.

It was also in evidence that one Phinney, without right or authority, had cut the wood in question, and sold it to Kenniston, previously to his agreement with the defendant to carry it to Boston. There was no evidence that the defendant had any knowledge of the trespass committed by Phinney, or that he was in any manner concerned, or aiding or assisting therein, other than by going to the island, and taking the wood upon freight as aforesaid. The title of the plaintiffs to the island was not questioned.

The cause was submitted without argument. The Court did not hesitate in giving their opinion in favor of the action, observing that the defendant was clearly a trespasser in going, without the license of the owner, upon the island of the plaintiffs; and supposing his taking the wood there to be a mistake as to the rights of Kenniston, and that under this mistake K. had been paid the full value of the wood taken by York, neither the mistake nor the accommodation, as being between joint trespassers, were any answer to the lawful owner, sustaining the injury to the soil, or the loss of his chattels. For when taken, the wood, being cut and separated from the soil, was the personal property of the plaintiffs.

The doubt in this case, which probably occasioned it to be reserved, was a mistaken apprehension that K. & Y. were to be constructively connected with Phinney in his original trespass in cutting the wood. But the causes of the action are entirely distinct. P. acquired no property in the wood by cutting it, as against the owners of the soil; K. could acquire none from him, and could transfer none to the present defendant; and these last broke the close of the plaintiffs in going upon their island, and were trespassers, and as such are chargeable in damages, at least to the value of the wood taken and carried away. Judgment according to the verdict.

HOBART v. HAGGET.

(Supreme Judicial Court of Maine, 1835. 12 Me. 67, 28 Am. Dec. 159.)

In an action of trespass, in which the general issue had been pleaded and joined, the following facts appeared: The defendant had bought an ox of the plaintiff, and having paid plaintiff the agreed price was directed by him to go and take the ox. The defendant went to the plaintiff's enclosure and took out an ox which he supposed was the

one he had purchased; but in fact it was not the ox which the plaintiff had intended to sell. The jury were instructed that if they were satisfied that there had been an innocent mistake between the parties, and that the defendant had supposed that he had purchased the ox in question when in fact the plaintiff supposed he was not selling that ox but another, then they should find for the plaintiff. Under these instructions there was a verdict for the plaintiff. The defendant excepted.[7]

PARRIS, J. * * * The jury having found for the plaintiff have virtually found that he did not sell the ox in controversy, and the question is raised whether the defendant is liable in trespass for having taken it by mistake. It is contended that where the act complained of is involuntary and without fault, trespass will not lie, and sundry authorities have been referred to in support of that position. But the act complained of in this case was not involuntary. The taking of the plaintiff's ox was the deliberate and voluntary act of the defendant. He might not have intended to commit a trespass in so doing. Neither does the officer, when on a precept against A. he takes by mistake the property of B., intend to commit a trespass; nor does he intend to become a trespasser, who, believing that he is cutting timber on his own land, by mistaking the line of division cuts on his neighbor's land; and yet, in both cases, the law would hold them as trespassers. * * *[8]

The exceptions are overruled, and there must be judgment on the verdict.

✓ PAXTON v. BOYER.

(Supreme Court of Illinois, 1873. 67 Ill. 132, 16 Am. Rep. 615.)

Action of trespass by Boyer against Paxton for an assault and battery. The declaration was in the usual form. The defendant pleaded the general issue, with which was filed a stipulation that all matters might be given in evidence that could be specially pleaded. A trial was had, and the jury returned the following verdict:

"We, the jury, find the defendant guilty, and assess the plaintiff's damages at $150. We, the jury, find from the evidence, that the blow complained of was struck by the defendant without malice, and under circumstances which would have led a reasonable man to believe it was necessary to his proper self-defense."

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[7] This statement of the case is substituted for that by the reporter. A part of the opinion is omitted.

[8] Accord: Dexter v. Cole (1858) 6 Wis. 320, 70 Am. Dec. 465: D., a butcher, was driving sheep, which he had purchased, towards his slaughterhouse. As they were passing along a highway, they became mixed with 22 sheep belonging to P., which were running at large upon the highway. D. undertook to separate them and did throw out, as he thought, all of P.'s sheep. In fact, however, four of P.'s sheep remained in the flock, and were driven with it by D. to his slaughterhouse. P. sues in trespass.

BREESE, J. * * * The testimony shows the trespass was committed by the defendant against an unoffending party—against one who had given no cause or provocation of any kind. The defendant asked this instruction, which was refused:

"The defendant can not be found guilty, in an action of this kind, unless, in inflicting the injury complained of, he has been guilty of some wrong, evil intent or want of care; and if you find, from the evidence, he struck the blow without any fault, you will find for the defendant."

On coming in of the verdict, the defendant moved for judgment on the special verdict, which the court denied. This is the first point made by appellant. He insists judgment should have been rendered for the defendant upon the special verdict, as that ignores malice and unlawful intent, and finds that the act was done under circumstances which would have led a reasonable man to believe it was necessary to his proper self-defense. Appellant's theory is, that he mistook plaintiff for his brother, with whom he was in conflict, and who had felled him to the floor by violence.

The court, for the plaintiff, instructed the jury that it was no defense, so far as actual damages are concerned, that the defendant had been violently assaulted by persons other than the plaintiff, or was then being assaulted by such other persons, or that he may have honestly believed he was striking Peter Boyer when he struck the plaintiff, or that he may have honestly believed it was necessary for his self-defense to assault the plaintiff, if the jury find, from the evidence, that the plaintiff was not a party to such assault upon the defendant; such evidence of mistake of facts, or good intentions on the part of the defendant, can only be considered in this case by the jury as a defense against the infliction by the jury of vindictive damages, and not as a defense against such actual damages as the evidence may show the plaintiff has suffered from such assault, or as naturally resulted from such assault. These instructions involve the merits of this controversy.

Appellant relies, in support of his theory, upon Morris v. Platt, 32 Conn. 75, and Brown v. Kendall, 6 Cush. (Mass.) 292. These cases are fully discussed, and sustain appellant. The facts in both cases are similar to those in this case, and were actions of assault and battery. The principle is announced in those cases, that a person is not liable for an unintentional injury resulting from a lawful act, where neither negligence nor folly is imputable to him who does the act, and that the burden of proving the negligence or folly, where the act is lawful, is upon the plaintiff.

This cause was tried on the general issue, with leave to give all matters in evidence which could be specially pleaded. That the plea of self-defense could have been pleaded is not questioned; in fact, the plaintiff in his second instruction, so put it to the jury, and they, by their special finding, have said the act was done in necessary self-defense, or under circumstances which would have led a reasonable man to

believe it was necessary to his proper self-defense. This finding was not excepted to by the plaintiff, nor did he object that the jury should be instructed on that point. It, therefore, stands as the verdict of the jury, that there was no malice in the act, and that it was done in necessary self-defense. This brings the case within those relied on by appellant, supra.

Can it be a question that, for an act done under such circumstances, the party doing the act is liable either civiliter or criminaliter? The rule is well established that, in an action of assault and battery, the plaintiff must be prepared with evidence to show, either that the intention was unlawful, or that the defendant was in fault. 2 Greenleaf on Ev. § 85.

The jury, by their special finding, have ignored the unlawful intention, and have said the defendant was not in fault. On what principle, then, can he be made chargeable? If a person, doing a lawful act in a lawful manner, with all due care and circumspection, happens to kill another, without any intention of doing so, he is not liable criminally. How, then, can it be said he shall be responsible in a civil case, when, in doing a lawful act with due care, and an injury happens, he shall be deemed in fault, and mulcted in damages?

It is said by appellee the rule is different in civil cases; that the motive (quoting from Chitty), intent or design of the wrongdoer towards the plaintiff is not the criterion as to the form of the remedy, for when the act occasioning the injury is unlawful, the intent of the wrongdoer is immaterial; but appellant here is no wrongdoer, as the jury have said by the special verdict.

We do not deny the principle contended for by appellee, that, where a tort is done, intention is no element to be considered. The special verdict out of the way, we should not have much difficulty in coming to the conclusion appellee's counsel have reached, but, with that at the threshold of the case, we are unable to see the force of them.

The authority cited from 2 Greenleaf Ev. § 94, by appellee, keeping the special verdict all the time in view, is decisive of the question. It finds, substantially, appellant "free from fault," and therefore not responsible.

The special finding must override the general verdict, because both can not stand, there being such an irreconcilable antagonism, and this is the provision of section 51, supra. It may be answered to the argument of appellee, that he was assaulted while in the enjoyment of a legal right which he had not forfeited by any act of his; that the jury have found the act done by appellant was done in the exercise of his legal right, without any design to injure appellee.

We have thought much on this case, and are constrained to hold, on the authority of Morris v. Platt, and Brown v. Kendall, supra, and on principle, that judgment should have been pronounced for the de-

fendant on the special verdict, for that justified him. This renders it unnecessary to consider any other question made on the record.

The judgment must be reversed, and the cause remanded, with directions to enter judgment for the defendant on the special verdict.

Judgment reversed.

SEIGEL v. LONG.

(Supreme Court of Alabama, 1910. 169 Ala. 79, 53 South. 753, 33 L. R. A. [N. S.] 1070.)

Seigel sued Long for assault and battery. It appeared from the defendant's evidence that he had walked from his wagon down to an automobile in which the plaintiff was sitting, and had placed his hand on the plaintiff's forehead, and pushed his hat back, in order to see his face, remarking "Some scoundrel came along here yesterday and scared my horses and caused them to run away and break my rake, and I am looking for him." The plaintiff asked for a general affirmative charge for nominal damages. This was refused. There was a judgment for the defendant, and plaintiff appeals.[9]

MAYFIELD, J. * * * It is true that defendant's testimony tended to show that defendant made a mistake as to the identity of the party whom he assaulted, and he told the plaintiff that, if he was not the person who frightened his team, he owed him an apology; but this did not prevent what he did from being an assault and battery It was an assault and battery, with or without mistaken identity. Carter v. State, 87 Ala. 113, 6 South. 356. It was likewise no defence that defendant offered to apologize after the assault, if he made a mistake as to the identity of the person assaulted.[10]

Reversed and remanded.

(c) NECESSITY

MOUSE'S CASE.

(Court of King's Bench, 1608. 12 Co. Rep. 63, 77 Reprint, 1341.)

In an action of trespass brought by Mouse, for a casket, and a hundred and thirteen pounds, taken and carried away, the case was, the ferryman of Gravesend, took forty-seven passengers into his barge, to pass to London, and Mouse was one of them, and the barge being upon the water, a great tempest happened, and a strong wind, so that

[9] This statement of facts is substituted for the statement given in the reporter.

[10] Only so much of the opinion is given as relates to the one point.

the barge and all the passengers were in danger to be drowned, if a hogshead of wine and other ponderous things were not cast out, for the safeguard of the lives of the men: it was resolved per totam Curiam, that in case of necessity for the saving of the lives of the passengers, it was lawful to the defendant, being a passenger, to cast the casket of the plaintiff out of the barge, with the other things in it; for quod quis ob tutelam corporis sui fecerit, jure id fecisse videtur,[11] to which the defendant pleads all this special matter, and the plaintiff replies, de injuria sua propria absque tali causa: and the first day of this term, this issue was tried, and it was proved directly, that if the things had not been cast out of the barge, the passengers had been drowned; and that levandi causa they were ejected, some by one passenger, and some by another; and upon this the plaintiff was nonsuit.

It was also resolved, that although the ferryman surcharge the barge, yet for safety of the lives of the passengers in such a time and accident and necessity, it is lawful for any passenger to cast the things out of the barge: and the owners shall have their remedy upon the surcharge against the ferryman, for the fault was in him upon the surcharge; but if no surcharge was, but the danger accrued only by the act of God, as by tempest, no default being in the ferryman, everyone ought to bear his loss for the safeguard and life of a man: for interest reipublicæ quod homines conserventur, 8 Ed. 4. 23, etc. 12 H. 8. 15. 28 H. 8. Dyer, 36. plucking down of a house, in time of fire, etc.,[12] and this pro bono publico; et conservatio vitæ hominis est

[11] "There are, I conceive, two different and distinct principles upon which private property may be justly taken, used or destroyed for the benefit of others. Both of these are commonly comprehended and confounded in the phrase of 'taking or destroying private property for public benefit.' One of these principles is applied when the property of an individual is taken by the authority of the state for the common use or benefit of the public. * * * But there is also another ground upon which the property or rights of individuals may be justly sacrificed to the necessities of others, where neither the state, as a whole, nor the public, in the general sense of that term, have any interest in such a sacrifice. This may be seen in cases of imminent peril, where the right of self-defence, or the protection of life or of property, authorizes the sacrifice of other and less valuable property. The throwing overboard of goods in a storm, the pulling down of a house to prevent the spreading of a conflagration, are common examples of the exercise of this right. This is a natural right arising from inevitable and pressing necessity, when of two immediate evils, one must be chosen, and the less is voluntarily inflicted in order to avoid the greater. Under such circumstances, the general and natural law of all civilized nations, recognized and ratified by the express decisions of our own common law, authorizes the destruction of property by any citizen, without his being subject to any right of recovery against him by the owner. The agent in such destruction, whether in protection of his own rights or the rights of others which may be accidentally under his safeguard, acts from good motives and for a justifiable end: so that against him the sufferer has no rightful claim. But the loser may have an equitable right of compensation against those who have benefited by his loss in the preservation of their property." Verplanck, Senator, in Stone v. Mayor of New York (1840) 25 Wend. 157, 173.

[12] Compare: Surocco v. Geary (1853) 3 Cal. 70, 58 Am. Dec. 385: Action to recover damages for blowing up and destroying the plaintiff's house. Answer that the defendant had destroyed the house to stop the progress of a

bonum publicum. So if a tempest arise in the sea, levandi navis causa, and for the salvation of the lives of men, it may be lawful for the passengers to cast over the merchandizes, etc.

conflagration then raging. Said Murray, C. J., delivering the opinion: "The only question for our consideration is, whether the person who tears down or destroys the house of another, in good faith, and under apparent necessity, during the time of a conflagration, for the purpose of saving the buildings adjacent, and stopping its progress, can be held personally liable in an action by the owner of the property destroyed. * * * The right to destroy property, to prevent the spread of a conflagration, has been traced to the highest law of necessity, and the natural rights of man, independent of society or civil government. It is referred by moralists and jurists to the same great principle which justifies the exclusive appropriation of a plank in a shipwreck, though the life of another be sacrificed; with the throwing overboard of goods in a tempest, for the safety of a vessel; with the trespassing upon the lands of another, to escape death by an enemy. It rests upon the maxim, 'Necessitas inducit privilegium quoad jura privata.' The common law adopts the principles of the natural law, and places the justification of an act otherwise tortious precisely on the same ground of necessity. (See American Print Works v. Lawrence, 21 N. J. Law, 258, 264, and the cases there cited.) This principle has been familiarly recognized by the books from the time of the Saltpetre Case [12 Co. Rep. 13 (1607)], and the instances of tearing down a house to prevent a conflagration, or to raise bulwarks for the defence of a city, are made use of as illustrations, rather than as abstract cases, in which its exercise is permitted. At such times the individual rights of property give way to the higher laws of impending necessity."

The Queen v. Dudley and Stephens (1884) 14 Q. B. D. 273: Two seamen and a 17 year old boy, cast away in a storm on the high seas, were compelled to put into an open boat. After eighteen days in the boat, when they had been seven days without food and five days without water, and the boat was drifting more than 1000 miles from land, D. and S. decided that, as the boy was extremely weak and likely to die, they would kill him, in order that their lives might be saved. On the twentieth day D. with the assent of S. killed the boy. The two lived on his flesh for four days, when they were picked up by a passing vessel. At the time of D.'s act there was no sail in sight nor any reasonable prospect of relief; and there appeared to D. and S. to be every probability that unless they fed upon the boy all must die of starvation. When found, it appeared that if D. and S. had not fed upon the body of the boy, they would not have survived to be rescued. Lord Coleridge, C. J.:

"* * * It is said that it follows from the various definitions of murder in books of authority, which definitions imply, if they do not state, the doctrine, that in order to save your own life you may lawfully take away the life of another, when that other is neither attempting nor threatening yours, nor is guilty of any illegal act whatever towards you or any one else. But if these definitions be looked at they will not be found to sustain this contention. * * *

"The only real authority of former times is Lord Bacon, who, in his commentary on the maxim, 'necessitas inducit privilegium quoad jura privata,' lays down the law as follows: 'Necessity carrieth a privilege in itself. Necessity is of three sorts—necessity of conservation of life, necessity of obedience, and necessity of the act of God or of a stranger. First of the conservation of life; if a man steal viands to satisfy his present hunger, this is no felony or larceny. So if divers be in danger of drowning by the casting away of some boat or barge, and one of them get to some plank, or on the boat's side to keep himself above water, and another to save his life thrust him from it, whereby he is drowned, this is neither se defendendo nor by misadventure, but justifiable.' On this it is to be observed that Lord Bacon's proposition that stealing to satisfy hunger is no larceny is hardly supported by Staundforde, whom he cites for it, and is expressly contradicted by Lord Hale in the passage already cited. And for the proposition as to the plank or boat, it is said to be derived from the canonists. At any rate he cites no authority for it, and

GILBERT v. STONE.

(Court of King's Bench, 1648. Style, 72.)

[This case is reported ante, page 29; see "Characteristics of a Cause in Trespass."]

HENN'S CASE.

(At a Justice's Seat for the Forest of Windsor, 1633. Coram the Earl of Holland, Lord Richardson, C. J., of K. B., and Baron Denham; Wm. Jones, 296, 82 Reprint, 157.)

The Judges agreed, that it hath been adjudged, that if a man do inclose, where he may by law, that he is bound to leave a good way, and also to keep it in continual repair at his own charge, and the countrey out not to be contributory thereto.

Mr. Attorney said, it was a Norfolke case, that in an action of trespass for debrusing his close, the defendant pleaded, that time out of mind, there was a common footpath, through that close, etc. The plaintiff replyed, that the defendant went into other places out of the

it must stand upon his own. Lord Bacon was great even as a lawyer; but it is permissible to much smaller men, relying upon the principle and on the authority of others, the equals and even the superior of Lord Bacon as lawyers, to question the soundness of his dictum. There are many conceivable states of things in which it might possibly be true, but if Lord Bacon meant to lay down the broad proposition that a man may save his life by killing, if necessary, an innocent and unoffending neighbour, it certainly is not law at the present day. * * *

"Now, except for the purpose of testing how far the conservation of a man's own life is in all cases and under all circumstances, an absolute, unqualified, and paramount duty, we exclude from our consideration all incidents of war. We are dealing with a case of private homicide, not one imposed upon men in the service of their Sovereign and in the defence of their country. Now it is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognised excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called 'necessity.' But the temptation to the act which existed here was not what the law had ever called a necessity. Nor is this to be regretted. Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence; and such divorce would follow if the temptation to murder in this case were to be held by the law an absolute defence of it. It is not so. To preserve one's life is generally speaking a duty, but it may be the plainest and highest duty to sacrifice it. * * * It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. * * *

"It is therefore our duty to declare that the prisoners' act in this case was wilful murder, that the facts as stated in the verdict are no legal justification of the homicide; and to say that in our unanimous opinion the prisoners are on this special verdict guilty of murder."

way (which was a kind of new assignment); the defendant rejoyned, that the footpath was adeo lutosa et funderosa, in default of the plaintiff, who ought to amend it, that he could not pass along that, and therefore he went as near the path as he could, in good and passable way, and this was resolved a good plea and justification; out of which Mr. Attorney inferred, that in case where a man incloseth, and doth not make a good way, it is lawful for passengers to make gaps in his hedges, to avoid the ill way, so that they do not ride further into his inclosed grounds then is needful for avoiding the bad way.[13]

[13] "Where a highway passes through open and uninclosed land, the public have a right to deviate onto the adjoining land (even though cultivated) when the usual track is foundrous and impassable; but it is uncertain whether this right exists as a matter of law independently of evidence of user, or not. It is, however, submitted that unless some evidence of the exercise of a prescriptive right to deviate can be adduced, the existence of such a right will not now be assumed as a matter of law. There is authority for saying that, if an owner of land adjoining a highway actively obstructs it, or being under obligation to repair it, fails to do so, the public may then deviate onto his adjoining land, even through his fences." Halsbury's Laws of England, vol. 16, p. 50, citing and commenting on the English authorities.

For the American doctrine, see "Streets and Highways," 37 Cyc. 206, and cases cited in notes 90 and 91; Cent. Dig., "Highways," § 291; and Key No., Dec. Dig., "Highways," § 82.

Compare Campbell v. Race (1851) 7 Cush. (Mass.) 408, 54 Am. Dec. 728: D. was travelling with his team on a highway running east and west, which led to a highway running north and south. The latter led to another highway, on which the defendant had occasion to go and which could be reached, by highway, only by passing over the two highways first named. At the time of the alleged trespass, they were both impassable with snow-drifts. Because of this, D. turned out of the first highway, at a place where it was impassable, and passed over the adjoining fields of the plaintiff, doing no unnecessary damage, and turned into the second highway, as soon as he had passed the obstructions which rendered both impassable. And he contended, that the highways being thus rendered impassable, he had a way of necessity over the plaintiff's adjoining fields. The trial judge ruled, that these facts constituted no defense. But said Bigelow, J., giving the opinion of the reviewing court: "It is not controverted, by the counsel for the plaintiff, that the rule of law is well settled in England, that where a highway becomes obstructed and impassable from temporary causes, a traveller has a right to go extra viam upon adjoining lands, without being guilty of trespass. The rule is so laid down in the elementary books, and it is fully supported by the adjudged cases. Such being the admitted rule of law, as settled by English authorities, it was urged in behalf of the plaintiff, that it had never been recognised or sustained by American authors or cases. But we do not find such to be the fact. * * * The rule itself is founded on the established principles of the common law, and is in accordance with the fixed and uniform usage of the community. The plaintiff's counsel is under a misapprehension in supposing that the authorities in support of the rule rest upon any peculiar or exceptional principle of law. They are based upon the familiar and well settled doctrine, that to justify or excuse an alleged trespass, inevitable necessity or accident must be shown. If a traveller in a highway, by unexpected and unforeseen occurrences, such as a sudden flood, heavy drifts of snow, or the falling of a tree, is shut out from the travelled paths, so that he cannot reach his destination, without passing upon adjacent lands, he is certainly under a necessity to do so. It is essential to the act to be done, without which it cannot be accomplished. * * * To hold a party guilty of a wrongful invasion of another's rights, for passing over land adjacent to the highway, under the pressure of such a necessity, would be pushing individual rights of property to an unreasonable extent, and giving them a protection beyond that which finds a sanction in the rules of law. Such a temporary and unavoidable use of private property, must be regarded

BULLARD v. HARRISON.

(Court of King's Bench, 1815. 4 M. & S. 387, 105 Reprint, 877, 16 R. R. 493.)

Trespass for breaking and entering two closes of the plaintiff. The defendant in two special pleas, claimed a private right of way, and alleged that this way had become impassable; that the defendant thereupon gave notice to the plaintiff to repair the same, which he refused to do; and that the defendant having occasion to use the said way, did of necessity turn out of it, and pass over the adjoining closes, keeping as near as he possibly could to the private way. The plaintiff demurred.

LORD ELLENBOROUGH, C. J. * * * [14] The question intended to be agitated upon this record is, whether in the case of a private way the grantee may break out, and go extra viam, if it be impassable, as in the case of a public way. As to that, I consider Taylor v. Whitehead, Doug. 749, has settled the distinction, that the right of going on adjoining lands extends not to private as well as public ways. And there may be many reasons in the case of highways, why the public should have an outlet, because it is for the public good that a passage should be afforded to the subjects at all times. But the same necessity does not exist in the case of a private right. Whoever will look to Serjt. Williams's note to the case of Pomfret v. Rycroft, 1 Saund. 323, note 6, will find both the law upon the subject, and the manner of pleading a way of necessity, very accurately detailed. It is a thing founded in grant, and the granter of a private way does not grant a liberty to break out of it at random over the whole surface of his close. It is established law, that the grantee of a private way cannot break out of it, and I hope that we shall not be carried to Nisi Prius upon such an unlimited right as claimed by these pleas. It seems to me that both pleas are ill.[15]

PER CURIAM. Judgment for the plaintiff.

as one of those incidental burdens to which all property in a civilized community is subject. In fact, the rule is sometimes justified upon the ground of public convenience and necessity. Highways being established for public service, and for the use and benefit of the whole community, a due regard for the welfare of all requires, that when temporarily obstructed, the right of travel should not be interrupted."

[14] The statement of facts is abridged, and a part of the opinion is omitted.

[15] Compare Arnold v. Holbrook (1873) L. R. 8 Q. B. 96: P. was an occupier of an arable field across which was a public footpath, but the plaintiff had the right to plow up the footpath when ploughing the field. After a ploughing, the public way would become muddy, and those using it would walk out on either side of it, for a better way. To prevent this P. placed hurdles on the sides of the way. D. threw down three of these hurdles. P. sued for a trespass. The trial judge gave judgment in favor of the defendant, on the ground that it was the duty of the plaintiff, after he had ploughed up the path, to set out again a proper path for the use of the public, instead of leaving them to tread out a path the best way they could; and that the path so trodden out having become in a muddy and founderous state, the public were justified in deviating on the plaintiff's land to find a firmer and better path. Held, that this judgment must be reversed and judgment entered for the plaintiff.

PROCTOR v. ADAMS.

(Supreme Judicial Court of Massachusetts, 1873. 113 Mass. 376, 18 Am. Rep. 500.)

Tort, in the nature of a trespass quare clausum, for entering the plaintiff's close and carrying away a boat. At the trial it appeared that the premises described in the declaration were a sandy beach on the sea side of Plum Island, and that the defendants went there, between high and low water mark, January 19, 1873, and against the objection and remonstrances of the plaintiff's tenant, carried away a boat worth $50, which they found lying there. The defendants offered evidence that upon the night of January 18, 1873, there was a severe storm; that the next morning they went upon the beach to see if any vessels or property had been cast ashore; that they found a boat lying upon the beach twenty-five feet below high water mark, which had apparently been driven ashore in the storm; that in order to save it, they endeavored to haul it upon the beach, and succeeded in putting it near the line of high water mark; that not thinking it secure, they, the next day, pushed it into the water, and carried it around into Plum Island River, on the inside of the Island; that they at once advertised it in the Ipswich and Newburyport papers; that they shortly afterwards delivered it to one Jackman, who claimed it as agent for the underwriters of the wrecked steamer Sir Francis, and who paid them twelve dollars for their services and expenses.

The court ruled that these facts, if proved, would not constitute a defence, and proposed to instruct the jury as follows:

"If the land upon which the boat was found and taken possession of by the defendants was in possession or occupation of the plaintiff, the defendants' entry upon it without permission of the plaintiff was an unlawful entry.

"If the defendants, having made an unlawful entry upon the plaintiff's land, there took and therefrom carried a boat, for any purpose affecting the boat as derelict or wrecked property, they are liable to the plaintiff for their unlawful entry upon the land in nominal damage, and also, the boat not being their property, but a wreck, in damages for the unlawful taking and carrying away of the boat, to the value of the boat."

The defendants requested the court to rule that, upon the case presented, the law would imply a license, but the court declined so to rule. The defendants then declined to go to the jury, and the court instructed the jury to return a verdict for the plaintiff for $51, and reported the case to this court.

GRAY, C. J. The boat, having been cast ashore by the sea, was a wreck, in the strictest legal sense. 3 Bl. Com. 106. Chase v. Corcoran, 106 Mass. 286, 288. Neither the finders of the boat, nor the owner of the beach, nor the Commonwealth, had any title to the boat as against its former owner. Body of Liberties, art. 90. Anc. Chart. 211. 2 Mass. Col. Rec. 143. St. 1814, c. 170. Rev. Sts. c. 57. Gen. Sts. c. 81. 3 Dane Ab. 134, 136, 138, 144. 2 Kent Com. 322, 359. But the

owner of the land on which the boat was cast was under no duty to save it for him. Sutton v. Buck, 2 Taunt. 302, 312.

If the boat, being upon land between high and low water mark, owned or occupied by the plaintiff, was taken by the defendants, claiming it as their own, when it was not, the plaintiff had a sufficient right of possession to maintain an action against them. Barker v. Bates, 13 Pick. 255, 23 Am. Dec. 678. Dunwick v. Sterry, 1 B. & Ad. 831. But if, as the evidence offered by them tended to show, the boat was in danger of being carried off by the sea, and they, before the plaintiff had taken possession of it, removed it for the purpose of saving it and restoring it to its lawful owner, they were not trespassers. In such a case, though they had no permission from the plaintiff or any other person, they had an implied license by law to enter on the beach to save the property. It is a very ancient rule of common law, that an entry upon land to save goods which are in jeopardy of being lost or destroyed by water, fire, or any like danger, is not a trespass. 21 H. VII. 27, 28, pl. 5. Bro. Ab. Trespass, 213. Vin. Ab. Trespass (H. a. 4), pl. 24 ad fin.; (K. a.) pl. 3. In Dunwick v. Sterry, 1 B. & Ad. 831, a case very like this, Mr. Justice Parke (afterwards Baron Parke and Lord Wensleydale) left it to the jury to say whether the defendant took the property for the benefit of the owners, or under a claim of his own and to put the plaintiffs to proof of their title. In Barker v. Bates, 13 Pick. 255, 23 Am. Dec. 678, upon which the plaintiff mainly relies, the only right claimed by the defendants was as finders of the property and for their own benefit.

The defendants are therefore entitled to a new trial. As the answer was not objected to, and the declaration may be amended in the court below, we have not considered the form of the pleadings.

New trial ordered.

NEWKIRK v. SABLER.

(Supreme Court of New York, 1850. 9 Barb. 652.)

This was an action for an assault and battery. It appeared that the plaintiff had sent his servant, with a team and wagon, across the farm of the defendant, upon which he entered by taking down the bars, after the defendant had forbidden the plaintiff's crossing his lands. On the return of the team to the place where it had entered, the bars were found fastened by boards nailed over them. The servant, after an ineffectual attempt to get through, left the team and wagon on the defendant's land, and went and informed the plaintiff, who came and commenced tearing down the fence for the purpose of taking away his property. The defendant forbade the plaintiff's taking down the fence, but the latter persisting in his attempt, the defendant struck the plaintiff, or struck at him, with a stick. A fight

ensued between the parties, in which the plaintiff received the injuries complained of; and both parties were more or less injured. The result was, that the plaintiff got the fence down, and brought away his team.

The judge charged the jury, among other things, that although the team and wagon of the plaintiff were wrongfully on the land of the defendant, it was the duty and right of the plaintiff to get them off, with the least possible injury to the premises; and that the defendant was not justified in using personal violence to prevent him from removing his team from the premises. That the real question for them to determine was, whether the plaintiff was, at the time of the assault, engaged in wanton and unnecessary destruction of the defendant's fences; or whether he was endeavoring in the most direct way, to remove his team from the premises; that if the jury should be satisfied from the evidence, that the force employed by the defendant was exerted for the purpose of preventing the plaintiff from removing his team from the premises, and not to preserve his fence from unnecessary injury, then they ought to find for the plaintiff. But on the contrary, if they should find that the injury the plaintiff was doing to the fence was unnecessary, and that the defendant committed the acts complained of for the purpose of preventing such unnecessary injury to the fence, then the verdict should be for the defendant. The counsel for the defendant excepted to so much of the charge, as charged that it was the duty of the plaintiff, and that he had a right, though his horses and wagons were upon the lands of the defendant, to remove them therefrom; and that the plaintiff was justifiable in breaking down the fence to remove them, if it was necessary to do so for that purpose; and that the defendant would not be justifiable in committing a battery to prevent him from so doing; and to so much of the charge as submitted to the jury the question which in the opinion of the judge, was the real question for them to try.

The jury found a verdict for $50 in favor of the plaintiff. From the judgment entered on this verdict the defendant appealed.

PARKER, J. I think that the learned justice erred in holding that the plaintiff had a right to enter upon the lands of the defendant for the purpose of regaining possession of his property.

The right to land is exclusive; and every entry thereon, without the owner's leave, or the licence or authority of law, is a trespass. (3 Bl. Com. 209. Percival v. Hickey, 18 John. 285, 9 Am. Dec. 210.) There is a variety of cases where an authority to enter is given by law; as to execute legal process; to distrain for rent; to a landlord or reversioner, to see that his tenant does no waste, and keeps the premises in repair according to his covenant or promise; to a creditor, to demand money payable there; or to a person entering an inn for the purpose of getting refreshment there. (3 Bl. Com. 212.

1 Cowen's Tr. 411.) In some cases, a license will be implied; as if a man make a lease, reserving the trees, he has a right to enter and show them to a purchaser. * * *

In some cases entry will be excused by necessity. As if a public highway is impassable, a traveler may go over the adjoining land. (Absor v. French, 2 Show. 28. Asser v. Finch, 2 Lev. 234. Young v. ———, 1 Ld. Raym. 725.) But this would not extend to a private way; for it is the owner's fault if he do not keep it in repair. (Taylor v. Whitehead, Doug. 747. Promfret v. Ricroft, 1 Saund. 321.) So if a man who is assaulted, and in danger of his life, run through the close of another, trespass will not lie, because it is necessary for the preservation of his life. (Year-Book, 37 H. 6, 37, pl. 26.) If my tree be blown down and fall on the land of my neighbor, I may go on and take it away. (Bro. Tres. pl. 213.) And the same rule prevails where fruit falls on the land of another. (Miller v. Fawdry, Latch, 120.) But if the owner of a tree cut the loppings so that they fall on another's land, he can not be excused for entering to take them away on the ground of necessity, because he might have prevented it. (Bac. Abr. Trespass F.)

Some times the right of action depends on the question which is the first wrongdoer. If J. S. have driven the beast of J. N. into the close of J. S., or if it have been driven therein by a stranger, with the consent of J. S., and J. N. go therein and take it away, trespass will not lie, because J. S. was himself the first wrongdoer. (3 Roll. Abr. 566, pl. 9. Chapman v. Thumbethorp, Cro. Eliz. 329). Tested by that rule, the plaintiff in this suit certainly has no right of action; for he was the first wrongdoer. But it is well settled that where there is neither an express nor an implied license, nor any such legal excuse as is above stated, a man has no right to enter upon the land of another for the purpose of taking away a chattel being there, which belongs to the former. The mere fact that the plaintiff owns the chattel, gives him no authority to go upon the land of another to get it. In Heermance v. Vernoy, 6 John. 5, where A. had entered upon the land of B. without his permission to take a chattel belonging to A.; it was held to be a trespass. So in Blake v. Jerome, 14 John. 406, a mare and a colt were taken out of the plaintiff's field, by a person who acted under the orders and direction of the defendant, after they had been demanded by the defendant and refused to be delivered to him; and after he had been expressly forbidden to take them, and the defendant was held to be guilty of a trespass.

In this case, the plaintiff's horses and wagon were on lands of the defendant, where they had been left by the servant of the plaintiff. They were not there by the defendant's permission. On the contrary the plaintiff had been guilty of a trespass in sending his team across the lands of the defendant, after he had been forbidden to do so. And I think the defendant had the right to detain them before they left the premises, and to distrain them damage feasant. 2 Rev. St. pt. 3,

c. 8, p. 427. But it is not necessary to decide, whether the defendant detained the property rightfully or wrongfully.

The plaintiff attempted to enter upon the lands of the defendant and against his will, for the purpose of taking away his property. This he had no right to do, even though his property were unlawfully detained there. If the plaintiff could not regain the possession of his property peaceably, he should have resorted to his legal remedy, by which he could, after demand and refusal, have recovered either the property itself or its value. He had no right to redress himself by force. (1 Bl. Com. 4.) In pursuing his object, the plaintiff tore down the defendant's fence after he had been forbidden to enter, and after he had been ordered by the defendant to desist. The defendant had a right to protect himself in the enjoyment of his possession and his property, by defending them against such aggression. Weaver v. Bush, 8 T. R. 78, Gregory v. Hill, Id., 299; Greene v. Jones, 1 Saund. 296, note 1. Green v. Goddard, 1 Salk. 641. Turner v. Meymott, 1 Bing. 158. 3 Bl. Com. 5.

The defendant can not be held liable for the injuries inflicted upon the plaintiff, on the occasion in question, unless he used more force than was necessary for the defense of his possession; and it seems that he did not use enough to prevent the plaintiff's effecting his forcible entry and taking away the property. But that was a question proper to be submitted to the jury.

The judgment of the circuit court must be reversed, and a new trial awarded; costs to abide the event.[16]

KIRK, Executor, v. GREGORY et ux.

(Exchequer Division, 1876. 1 Ex. Div. 55.)

The second count alleged a trespass by the female defendant in taking away certain jewelry claimed by the plaintiff as executor. Under a plea of not guilty the following facts were proved: The plaintiff's testator died in his own house, while in a state of delirium tremens. His attendants and others were feasting and drinking in the house. The female defendant, who was the wife of the testator's brother, immediately after the death, took out of an unlocked drawer in the room where the testator died some jewelry belonging to the testator, and (as she said) placed it with a watch of the testator's in a box, and put the box in a cupboard in another room for safety. The box and the cupboard were unlocked. The plaintiff on being informed found the watch, but the jewelry was missing and had never been found.

The judge left to the jury the question, whether the female defendant had put the things away bona fide for the purpose of preserving

[16] Part of the opinion is omitted.

them. The jury answered in the affirmative, and the judge thereupon directed a verdict for the defendants, giving the plaintiff leave to move to enter the verdict for him for 1s. damages on the count of trespass; the defendants to have liberty to add any plea of justification which the facts would support.[17]

Anstie, for the defendants. To constitute a trespass, there must be a wrongful taking; here there was none such.

Cave, Q. C., for the plaintiff. Removing the goods from the drawer was an asportation, and it would be no answer to say that the things would otherwise have been lost, even if the defendants had saved them instead of losing them as they did. In Bac. Abr. Trespass, E. (7th Ed.) by Gwillim & Dodd, p. 671, it is said: "If J. S. take the goods of J. N. to prevent them from being stolen or spoiled, an action of trespass lies; because the loss to J. N. would not, if either of these things had happened, have been irremediable. But if the goods of J. N. are in danger of being destroyed by fire, and J. S., in order to prevent this, take them, this action does not lie; because the loss if this had happened would have been irremediable." For this Bro. Abr. Tresp. pl. 213, is cited. See, also, Isaac v. Clark, 2 Bulst. 306, 312, 1 Roll. Rep. 1216, 130, and Reg. v. Thurborn, 1 Den. Cr. C. 387.

Bramwell, B. * * * There has clearly been an asportation which the defendants have to justify. Mr. Anstie, on their behalf, had leave to add any plea he thought fit, provided it was a good plea. Suppose there was a plea to the effect that the owner of the goods was recently dead, the executor was unknown, no one was in charge of the house, that the defendants were near relations to the deceased who had visited him, and that the trespass in question was a necessary removal of the goods for their preservation and protection, and a reasonable step. I am inclined to think this would be a good plea. The law cannot be so unreasonable as to lay down that a person cannot interfere for the protection of such things as rings and jewelry in the house of a man just dead. But the whole of the supposed plea was not proved. The jury found that the defendant acted bona fide, that is to say, that the articles were removed for their preservation; but it was not proved that the interference was reasonably necessary, that is to say, that the things were in a position to require the interference, and that the interference was reasonably carried out. Mr. Anstie ingeniously argued that the responsibility of a person under circumstances of this kind is really a question of negligence and not of trespass. I do not think it is. But even if it were, it was not shewn that the goods were in jeopardy. The supposed plea has not been proved. As the point now raised by the plaintiff never went to

[17] The statement is abridged. There were concurring opinions from Cleasby and Amphlett, BB. Only so much of Bramwell, B.'s, opinion is given as relates to the one point.

the jury, the defendants would be entitled to a new trial; but as they do not ask for it, the verdict must be entered for the plaintiff for 1s. damages.[18]

PLOOF v. PUTNAM.

(Supreme Court of Vermont, 1908. 81 Vt. 471, 71 Atl. 188, 20 L. R. A. [N. S.] 152, 130 Am. St. Rep. 1072, 15 Ann. Cas. 1151.)

The case was heard on demurrer to the declaration. The declaration was held sufficient and the demurrer was overruled, to which the defendant excepted.

MUNSON, J. It is alleged as the ground of recovery that on the 13th day of November, 1904, the defendant was the owner of a certain island in Lake Champlain, and of a certain dock attached thereto, which island and dock were then in charge of the defendant's servant; that the plaintiff was then possessed of and sailing upon said lake a certain loaded sloop, on which were the plaintiff and his wife and two minor children; that there then arose a sudden and violent tempest, whereby the sloop and the property and persons therein were placed in great danger of destruction; that, to save these from destruction or injury, the plaintiff was compelled to, and did, moor the sloop to defendant's dock; that the defendant, by his servant, unmoored the sloop, whereupon it was driven upon the shore by the tempest, without the plaintiff's fault; and that the sloop and its contents were thereby destroyed, and the plaintiff and his wife and children cast into the lake and upon the shore, receiving injuries.

This claim is set forth in two counts—one in trespass, charging that the defendant by his servant with force and arms willfully and designedly unmoored the sloop; the other in case, alleging that it was the duty of the defendant by his servant to permit the plaintiff to moor his sloop to the dock, and to permit it to remain so moored during the continuance of the tempest, but that the defendant by his

[18] Compare the remarks of Bigelow, J., in Campbell v. Race (1851) 7 Cush. (Mass.) 408, 413 (54 Am. Dec. 728), the facts of which are given ante: "The limitations and restrictions of the right to go upon adjacent lands in case of obstructions in the highway can be readily inferred. Having its origin in necessity, it must be limited by that necessity; cessante ratione, cessat ipsa lex. Such a right is not to be exercised from convenience merely, nor when, by the exercise of due care, after notice of obstructions, other ways may be selected and the obstructions avoided. But it is to be confined to those cases of inevitable necessity, or unavoidable accident, arising from sudden and recent causes which have occasioned temporary and impassable obstructions in the highway. What shall constitute such inevitable necessity or unavoidable accident must depend upon the various circumstances attending each particular case. The nature of the obstruction in the road, the length of time during which it has existed, the vicinity or distance of other public ways, the exigencies of the traveller, are some of the many considerations which would enter into the inquiry and upon which it is the exclusive province of the jury to pass, in order to determine whether any necessity really existed which would justify or excuse the traveller."

servant, in disregard of this duty, negligently, carelessly, and wrongfully unmoored the sloop. Both counts are demurred to generally.

There are many cases in the books which hold that necessity, and an inability to control movements inaugurated in the proper exercise of a strict right, will justify entries upon land and interferences with personal property that would otherwise have been trespasses. A reference to a few of these will be sufficient to illustrate the doctrine. In Miller v. Fandrye, Poph. 161, trespass was brought for chasing sheep, and the defendant pleaded that the sheep were trespassing upon his land, and that he with a little dog chased them out, and that, as soon as the sheep were off his land, he called in the dog. It was argued that, although the defendant might lawfully drive the sheep from his own ground with a dog, he had no right to pursue them into the next ground; but the court considered that the defendant might drive the sheep from his land with a dog, and that the nature of a dog is such that he cannot be withdrawn in an instant, and that, as the defendant had done his best to recall the dog, trespass would not lie. In trespass of cattle taken in A., defendant pleaded that he was seised of C. and found the cattle there damage feasant, and chased them towards the pound, and they escaped from him and went into A., and he presently retook them; and this was held a good plea. 21 Edw. IV, 64; Vin. Ab. Trespass, H. a, 4, pl. 19. If one have a way over the land of another for his beasts to pass, and the beasts, being properly driven, feed the grass by morsels in passing, or run out of the way and are promptly pursued and brought back, trespass will not lie. See Vin. Ab. Trespass, K. a, pl. 1. A traveler on a highway who finds it obstructed from a sudden and temporary cause may pass upon the adjoining land without becoming a trespasser because of the necessity. Henn's Case, W. Jones, 296; Campbell v. Race, 7 Cush. (Mass.) 408, 54 Am. Dec. 728; Hyde v. Jamaica, 27 Vt. 443 (459); Morey v. Fitzgerald, 56 Vt. 487, 48 Am. Rep. 811. An entry upon land to save goods which are in danger of being lost or destroyed by water or fire is not a trespass. 21 Hen. VII, 27; Vin. Ab. Trespass, H. a, 4, pl. 24, K. a, pl. 3. * * *

This doctrine of necessity applies with special force to the preservation of human life. One assaulted and in peril of his life may run through the close of another to escape from his assailant. 37 Hen. VII, pl. 26. One may sacrifice the personal property of another to save his life or the lives of his fellows. In Mouse's Case, 12 Co. 63, the defendant was sued for taking and carrying away the plaintiff's casket and its contents. It appeared that the ferryman of Gravesend took 47 passengers into his barge to pass to London, among whom were the plaintiff and defendant; and the barge being upon the water a great tempest happened, and a strong wind, so that the barge and all the passengers were in danger of being lost if certain ponderous things were not cast out, and the defendant thereupon cast out the plaintiff's casket. It was resolved that in case of necessity, to save

the lives of the passengers, it was lawful for the defendant, being a passenger, to cast the plaintiff's casket out of the barge; that, if the ferryman surcharge the barge, the owner shall have his remedy upon the surcharge against the ferryman, but that if there be no surcharge, and the danger accrue only by the act of God, as by tempest, without fault of the ferryman, every one ought to bear his loss to safeguard the life of a man.

It is clear that an entry upon the land of another may be justified by necessity, and that the declaration before us discloses a necessity for mooring the sloop. But the defendant questions the sufficiency of the counts because they do not negative the existence of natural objects to which the plaintiff could have moored with equal safety. The allegations are, in substance, that the stress of a sudden and violent tempest compelled the plaintiff to moor to defendant's dock to save his sloop and the people in it. The averment of necessity is complete, for it covers not only the necessity of mooring, but the necessity of mooring to the dock; and the details of the situation which created this necessity, whatever the legal requirements regarding them, are matters of proof, and need not be alleged. It is certain that the rule suggested cannot be held applicable irrespective of circumstance, and the question must be left for adjudication upon proceedings had with reference to the evidence or the charge.

The defendant insists that the counts are defective, in that they fail to show that the servant in casting off the rope was acting within the scope of his employment. It is said that the allegation that the island and dock were in charge of the servant does not imply authority to do an unlawful act, and that the allegations as a whole fairly indicate that the servant unmoored the sloop for a wrongful purpose of his own, and not by virtue of any general authority or special instruction received from the defendant. But we think the counts are sufficient in this respect. The allegation is that the defendant did this by his servant. The words "willfully, and designedly" in one count, and "negligently, carelessly, and wrongfully" in the other, are not applied to the servant, but to the defendant acting through the servant. The necessary implication is that the servant was acting within the scope of his employment. 13 Ency. P. & Pr. 922; Voegeli v. Pickel Marble, etc., Co., 49 Mo. App. 643; Wabash Ry. Co. v. Savage, 110 Ind. 156, 9 N. E. 85. See, also, Palmer v. St. Albans, 60 Vt. 427, 13 Atl. 569, 6 Am. St. Rep. 125.

Judgment affirmed and cause remanded.[1]

[1] Part of the opinion is omitted.

(C) Defense of the Person

The man who commits homicide by misadventure or in self-defence deserves but needs a pardon. Bracton cannot conceal this from us, and it is plain from multitudinous records of Henry III.'s reign. If the justices have before them a man who, as a verdict declares, has done a deed of this kind, they do not acquit him, nor can they pardon him, they bid him hope for the king's mercy. In a precedent book of Edward I.'s time a justice is supposed to address the following speech to one whose plea of self-defence has been endorsed by the verdict of a jury: "Thomas, these good folk testify upon their oath to all that you have said. Therefore by way of judgment we say that what you did was done in self-defence; but we cannot deliver you from your imprisonment without the special command of our lord the king: therefore we will report your condition to the king's court and will procure for you his special grace."

2 Pollock and Maitland, Hist. Eng. Law (2d Ed.) 479.[20]

ANON.

(Court of Common Bench, 1388. Y. B. 12 Rich. II. Michaelmas Term, 10.)

A man and his wife brought a writ of trespass against a man for a battery done to his wife and the defendant came by the cape in custody, wherefore

Rikhill for the defendant said that the day and place on which they suppose the battery to have been done to the wife, the husband and the wife made an assault on the defendant, so that the injury that the wife had suffered was due to her own assault, and we demand judgment if we have done any wrong.

Bryncheley. Of his own wrong, without any such reason, ready. And issue was joined.[21]

[20] "The statute of Gloucester (1278) provided that in Crown Cases, the slayer in self-defence (though forfeiting his goods) should receive a pardon by the king's favor if he pleased. * * * In civil actions of trespass, however, the mitigation was longer in coming. In 1294 and in 1319 the defendant was obliged to respond; but in 1400 and ever since the plea is accepted as a complete defence." John H. Wigmore, "Tortious Responsibility," 7 Harv. Law Rev. 315; 3 Anglo-American Legal Essays, 474, 508. And see the following note.

[21] The translation is from Mr. George F. Deiser's edition, for the Ames Foundation, p. 59.

Compare:

Y. B. 12 Ed. II., 381 (1319): In trespass for a battery the defendant pleaded not guilty. The jury found that the plaintiff was beaten, but this was because of his own assault, since the defendant could not otherwise escape; so that he brought this action out of malice; and the defendant prayed the discretion

JONES v. TRESILIAN.

(Court of King's Bench, 1670. 1 Mod. 36, 86 Reprint, 713.)

An action of trespass of assault and battery. The defendant pleads, son assault demesne. The plaintiff replies, that the defendant would have forced his horse from him, whereby he did molliter insultum facere upon the defendant in defence of his possession. To this the defendant demurred.

MORETON, Justice. Molliter insultum facere is a contradiction. Suppose you had said, that molliter you struck him down.

TWISDEN, Justice. You cannot justify the beating of a man in defence of your possession, but you may say that you did molliter manus imponere, etc.

KELYNGE, Chief Justice. You ought to have replied, that you did molliter manus imponere, quæ est eadem transgressio.

THE COURT. Querens nil capiat per billam, unless better cause be shown this term.[22]

of the justices. It was nevertheless adjudged that the plaintiff should recover his damages according to the verdict, and the defendant go to prison. See Ames, Cases on Torts (3d Ed.) 105.

Chapleyn of Greye's Inne (1400) Y. B. 2 Hen. IV., 8: In an action for a battery the defendants justified that the wrong which the plaintiff had was from his own assault. Markham. Although a man make an assault upon another, if he upon whom the assault is made can escape with his life, it is not lawful for him to beat the other, who made the assault, quod tota curia concessit. Cockayn, C. B. But I am not bound to wait until the other has given a blow, for perhaps it will come too late afterwards, quod conceditur. Ames, Cases on Torts (3d Ed.) 106.

[22] On the general principle, see the remark of Pollock, C. B., in Ibbotson v. Peat (1865) 3 H. & C. 644, 649, 140 R. R. 655, 658: "The defendant, by his plea, says, 'You have done me some wrong and I have been trying to redress that wrong by doing some wrong to you.' As a general proposition it may be laid down, that cannot be done. If a person is attacked by force he may defend himself by force; but in general a person cannot, because a wrong has been done to him, commit some other wrong for the purpose of repairing the injury; but he must endeavor to obtain redress in a lawful manner. As my brother Bramwell suggests, if a person libels another the latter is not justified in horsewhipping him; and if a person horsewhips another the latter is not justified in libeling him. On these grounds it appears to me that the plea is bad, and that the plaintiff is entitled to judgment."

The standard form of the common-law plea of self-defence (the plea of son assault demesne), with its modifications under the Rules of Hilary Term of 1834, was as follows: "And for a further plea [i. e., after a general issue] in this behalf, the defendant says, that the plaintiff, just before the said time, when, etc., to wit, on the day and year aforesaid, with force and arms, made an assault upon him, the defendant, and would then have beaten and ill-treated him, the defendant, if he had not immediately defended himself against the plaintiff, wherefore the defendant did then defend himself against the plaintiff, as he lawfully might, for the cause aforesaid; and in so doing did necessarily and unavoidably a little beat, wound, and ill-treat the plaintiff: doing no unnecessary damage to the plaintiff on the occasion aforesaid. And so the defendant saith, that if any hurt or damage then happened to the plaintiff, the same was occasioned by the said assault so made by the plaintiff on him the defendant, and in the necessary defence of himself the defendant against the plaintiff; which are the supposed trespasses in the introductory part of this

BARFOOT v. REYNOLDS et al.

(Court of King's Bench, 1729. 2 Strange, 953, 93 Reprint, 963.)

Trespass, assault and battery against Reynolds and Westwood. Reynolds pleaded son assault: and Westwood pleaded that he was a servant to Reynolds the other defendant, and that the plaintiff having assaulted his master in his presence, he in defence of his master struck the plaintiff. And on demurrer the plea was held ill, for the assault on the master might be over, and the servant cannot strike by way of revenge, but in order to prevent an injury; and the right way of pleading is, that the plaintiff would have beat the master, if the servant had not interposed, prout ei bene licuit. The plaintiff had judgment.

YASKA v. SWENDRZYNSKI.

(Supreme Court of Wisconsin, 1907. 133 Wis. 475, 113 N. W. 959.[23])

[This case is reported ante, page 131; see "Showing the Justification."]

COCKCROFT v. SMITH.

(Court of King's Bench, 1705. 2 Salk. 642, 91 Reprint, 541.)

In an action of mayhem brought by Cockcroft Attorney against Smith, the defendant pleaded son assault demesne and issue being joined thereupon, HOLT, Chief Justice, directed a verdict for the defendant, the first assault being tilting the form upon which the defendant sat, whereby he fell; the maim was that the defendant bit off the plaintiff's finger.

But the question was, what assault was sufficient to maintain such a plea in mayhem? HOLT, C. J., said that WADHAM WYNDHAM, J.,

plea mentioned, and whereof the plaintiff hath above complained. And this the defendant is ready to verify." See Stephen on Pleading (Williston's Ed.) 190. The historic form, down to the Rules of Hilary Term, was not substantially different. See Stephen on Pleading (Tyler's Ed.) 180; 2 Chitty on Pleading (3d Am. Ed.) 429.

Under the Common Law Procedure Act of 1852, schedule B, 45, the following short allegation was permissible: "That the plaintiff first assaulted and beat the defendant, who thereupon necessarily committed the alleged assault [*or* trespass, *or* did what is complained of] in his own defence." 2 Chitty on Pleading (16th Am. Ed.) 697.

[23] Accord: Lutlopp v. Heckmann (1901) 70 N. J. Law, 272, 57 Atl. 1046: Action for assault and battery. Plea of not guilty. Said Hendrickson, J.: "The evidence for the plaintiff was not returned with the writ, but, taking the evidence for the defendant, it plainly appeared prima facie that the assault complained of was established. Upon this point there was no question for the jury. The only defense suggested or that could be raised in avoidance of liability was that of self-defense. But no plea setting up such a defense had been filed, the defendant having gone to trial upon the general issue.

would not allow it if it was an unequal return; but the practice had been otherwise, and was fit to be settled: That for every assault he did not think it reasonable that a man should be banged with a cudgel; that the meaning of the plea was that he struck in his own defence: That if A. strike B. and B. strikes again, and they close immediately and in the scuffle B. mayhems A. that is son assault, but if upon a little blow given by A. to B., B. gives him a blow that mayhems him, that is not son assault demesne. POWELL, J., agreed: for the reason why son assault is a good plea in mayhem, is, because it might be such an assault as endangered the defendant's life.[24]

IRELAND v. ELLIOT.

(Supreme Court of Iowa, 1857. 5 Iowa, 478, 68 Am. Dec. 715.)

This action was brought to recover damages for an assault and battery upon the plaintiff by the defendant. The jury rendered a verdict in favor of the defendant, from which the plaintiff appeals. The questions made in the case arise upon the instructions of the court below, which will be found in the opinion of the court.

WOODWARD, J. * * * The plaintiff requested the court to instruct the jury that: "No amount of words, will justify an assault, or an assault and battery," which the court gave, with the following qualification: "This is so in criminal cases, but if the jury find in this action that Ireland, by abusive words and threatening conduct, brought the battery on himself, it is a defence." The plaintiff further requested the court to instruct the jury, that: "Words alone, do not constitute such wrongful acts, as to justify an assault and battery," which the court gave, but with this modification: "Unless the words were such as to (and were so intended and designed), cause a prudent man to lose his reason for the time, and if the battery was not more excessive than the provocation. In such case, it is a defence in a civil action for damages, provided the plaintiff was the wrongdoer."

The time permits but a brief attention to the question here presented, and in truth, it requires but a word. Provoking and insulting language, constitutes a defence to acts of violence, in a civil action, no more than in a criminal prosecution. The farthest that the law has gone, and the farthest it can go, whilst attempting to maintain a rule, is to permit the high provocation of language, to be shown as a palliation for the acts and results of anger; that is, in legal phrase,

[24] The statement of facts is from 1 Ld. Raym. 177. The same case, Cockcroft v. Smith, appears in (1704) 6 Mod. 230, 87 Reprint, 981, with this statement: "The defendant in a scuffle bit off the forefinger of an attorney's right hand." The case appears again in 11 Mod. 43, 88 Reprint, 872 (1705) Cockcroft v. Smith, with this statement of the facts: "Cockcroft in a scuffle ran his finger towards Smith's eyes, who bit off a joint from the plaintiff's finger."

to be shown in mitigation of damages. Thus far the law has gone and no farther. Language which, in its nature, tends generally to excite the angry passions of men, is admitted in evidence, as an extenuation, but never as a justification or defence, either in a criminal, or civil cause. * * *

Judgment reversed, and cause remanded.[25]

TUBERVILLE v. SAVAGE.

(Court of King's Bench, 1669. 1 Mod. 3, 86 Reprint, 684.)

[This case is reported ante, page 49; see "Assault."]

KEEP v. QUALLMAN.

(Supreme Court of Wisconsin, 1887. 68 Wis. 451, 32 N. W. 233.)

This action was brought to recover damages for an assault and battery alleged to have been committed by the defendant upon the person of the plaintiff.

The parties are neighbors, but not friends. On a certain Sunday afternoon they met in a public highway. Several other persons were present. The testimony tends to show that the defendant accosted the plaintiff by asking him, "What is the reason you are slandering me around all the time?" that immediately the plaintiff put his hand in his pocket, and was about taking it out again when the defendent struck him on the head with a cane twice, knocking him down. He got up, and, as the defendant testifies, attacked the latter, whereupon they fought with their fists until the plaintiff was vanquished and retreated. The defendant also testifies that he had just then heard that the plaintiff had told their neighbors to watch him; that previously he had been told that, at different times, the plaintiff had threatened to inflict personal violence upon him, and that plaintiff was in the habit of shooting people, and was a dangerous man; and when he put his hand in his pocket, the movement indicated to his (the defendant's) mind an intention to draw a revolver.

The court excluded other testimony offered by the defendant to show that the plaintiff was of a quarrelsome disposition and in the habit of using dangerous weapons. The jury were instructed that the defendant had shown no legal justification for the assault, and hence the defendant was liable to respond in damages therefor, and the case was submitted to the jury only for an assessment of damages. The damages were assessed at $175. A motion for a new trial

[25] A part of the opinion, on other points, is omitted.

was denied, and judgment was entered for the plaintiff pursuant to the verdict. The defendant appeals from the judgment.

LYON, J. It was not unlawful for the defendant to address the plaintiff as he did when they met on the highway, and if the plaintiff by his former threats of personal violence (if he made any), and by putting his hand in his pocket as testified to by the defendant (if he did so), gave the defendant reason to believe that he was about to draw a revolver or other weapon upon him, it was an assault, and the defendant had the right to act upon appearances and at once repel or prevent the supposed contemplated attack. See 1 Whart. Crim. Law, §§ 603–606. We think the testimony sufficient to send to the jury the question whether the acts of the plaintiff were sufficient to give the defendant reason to believe that he was in imminent danger of being attacked by the plaintiff when he knocked the latter down. That is to say, we think the testimony tends to prove a state of facts from which the jury might properly find the defendant was legally justified in striking the blows to prevent the plaintiff from attacking him. Hence the instruction that the defendant was absolutely liable in the action was erroneous. The instruction should have been that, if the defendant had no reasonable grounds to fear an immediate attack by the plaintiff, or, having such grounds, if he used more force than was necessary to prevent such attack, the plaintiff could recover; otherwise not.

We are also inclined to think that on the authority of State v. Nett, 50 Wis. 524, 7 N. W. 344, proof of the quarrelsome and violent disposition of the plaintiff should have been received, as elements in the correct solution of the questions above suggested.

BY THE COURT. The judgment of the circuit court is reversed, and the cause will be remanded for a new trial.

TICKELL v. READ.

(At Nisi Prius, 1772. Lofft 215, 98 Reprint, 617.)

Action of assault and battery, defendant pleads the general issue, not guilty; and also a special plea in justification, that he assisted his servant, whom the plaintiff was beating.

Contended, that the law will not justify a master interposing on an assault against his servant, by assaulting the person who beats the servant, as it does a servant in like case interposing for his master; because it was the duty of the servant, who was hired to serve and be assistant to his master's person, but not so the master to the servant. On the other hand it was contended to this effect nearly; the duty of master and servant was reciprocal, and if the servant owed to his master fidelity and obedience, the master owed to the servant

protection and defence; and might, therefore, well justify by this plea.

LORD MANSFIELD. I cannot tell them a master interposing when his servant is assailed, is not justifiable, under the circumstances of the case, as well as a servant interposing for his master: it rests on the relation.

(D) Defense of Property

(a) DEFENSE OF PERSONAL PROPERTY; RECAPTION

If a man will take my horse from me, or anything which belongs to me, and I will not suffer him to do it, although he is hurt, in this case I shall be excused in law. And suppose that a man is about to beat my servant, and I aid my servant in his defence, although the other is hurt by me, all this matter shall be adjudged in defence of my servant, and of my goods. For, since he was about to injure me, this malfeasance shall be said to be an assault upon me begun by him, and all this shall be said to be in defence of the goods and chattels of the defendant.[26]

Newton, C. J., Anon. (1440) Y. B. 19 Hen. VI, fol. 31, pl. 59.

Recaption or reprisal is another species of remedy by the mere act of the party injured. This happens when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant: in which case the owner of the goods, and the husband, parent, or master, may lawfully claim and retake them wherever he happens to find them, so it be not in a riotous manner, or attended with a breach of the peace. The reason for this is obvious; since it may frequently happen that the owner may have this only opportunity of doing himself justice: his goods may be afterwards conveyed away or destroyed; and his wife, children, or servants concealed or carried out of his reach; if he had no speedier remedy than the ordinary process of law. If therefore he can so contrive it as to gain possession of his property again without force or terror, the law favors and will justify his proceeding. But as the public peace is a superior consideration to any one man's private property; and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided that this natural right of recaption shall never be exerted where such exercise must

[26] "And so was the opinion of Ayscoghe, Fulthorpe, JJ., and all the Court." See Ames, Cases on Torts (3d Ed.) 121.

occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen; but must have recourse to an action at law.

Blackstone, 3 Com. 4. (1765).

JONES v. TRESILIAN.

(Court of King's Bench, 1670. 1 Mod. 36.)

[This case is given ante, page 191; see "Defense of the Person."]

WADHURST v. DAMME.

(Court of King's Bench, 1604. Cro. Jac. 45, 79 Reprint, 37.)

Trespass; for that he killed his dog, being a mastiff dog. The defendant pleads, that Sir Francis Willoughby was seised in fee of a warren in D. within the same county, whereof he is and then was warrener, and that his dog was divers times killing conies there; and therefore he finding him there, tempore quo, etc., running at conies, he there killed him, absque hoc that he is guilty at Etonbridge prout, etc. And it was thereupon demurred * * * for the matter of the justification.

But all the court held that the matter of justification is good; because it being alleged that the dog used to be there killing conies, it is good cause for the killing him, in salvation of his conies; for, having used to haunt the warren, he cannot otherwise be restrained.

YELVERTON doubted thereof, because it is not alleged that the master was sciens of that quality, or had warning given to him thereof.

POPHAM. The common use of England is, to kill dogs and cats in all warrens as well as any vermin; which shews that the law hath been always taken to be, that they may well kill them: so the justification is good.[27] * * * Wherefore it accordingly was adjudged for the defendant.

[27] A question as to the venue is omitted.

Accord: Leonard v. Wilkins (1812) 9 Johns. (N. Y.) 233 (D. had shot P.'s dog when it was in D.'s field. "The dog was running with a fowl in his mouth, and the defendant called after the dog before he fired, but he had the fowl in his mouth at the time he was shot." The property in the fowl was not shown); Harrington v. Hall (1906) 6 Pennewill (Del.) 72, 63 Atl. 875, where the court charged the jury thus: "The defendant justifies the killing of a dog, whosesoever it was, on the day in question, because, as he claims, the dog was, at the time of the shooting, in the act of killing one of a flock of his turkeys then upon his premises. We say to you that if you find under the evidence that the defendant himself, or his son under the father's directions, did kill the plain-

WRIGHT v. RAMSCOT.

(Court of King's Bench, 1667. 1 Wms. Saund. 84, 85 Reprint, 93.)

Trespass. The plaintiff declared that the defendant did beat, strike, and stab a mastiff of the plaintiff, so that the mastiff died. The defendant pleaded in bar, that the plaintiff suffered his mastiff to go unmuzzled in the street, by reason whereof the mastiff run violently upon a dog of one Ellen Bagshaw, and did then and there bite the said dog (which dog the said Ellen kept in her house for the preservation thereof); wherefore the defendant, being the servant of the said Ellen, then and there killed the mastiff, that he might not do any further mischief. Upon which plea the plaintiff demurred in law.

And Saunders of counsel for the plaintiff argued that * * * here the defendant has not said that he could not otherwise part or take off the mastiff from worrying the other dog; and if he had said so, it would have altered the case: and he might have justified the *beating* of the mastiff to preserve his dog, but not the *killing* of him, unless it could not otherwise be prevented. But in this case he said nothing more than that he killed the mastiff to prevent the other dog from being killed; whereas, for anything that appears to the contrary, he might have saved the other dog without killing the mastiff: and so he has killed the mastiff without any necessity or cause, which is not justifiable; and he has not in any way excused that injury. And therefore he concluded that the plea was bad.

And of that opinion was the whole Court; and judgment was given for the plaintiff.[28]

JANSON v. BROWN.

(At Nisi Prius, Adjourned Sittings in London, 1807. 1 Camp. 41.)

Trespass for shooting the plaintiff's dog. Pleas, 1, not guilty; and 2, a justification, that the dog was worrying and attempting to kill a fowl of the defendant's, and could not otherwise be prevented from so doing. Replication to the last plea, de injuria sua propria absque tali causa.

The case being made out on the part of the plaintiff, Garrow for the defendant said, he should prove that just before the dog was shot, being accustomed to chase the defendant's poultry, he was worrying the fowl in question, and that he had not dropped it from his mouth above an instant when the piece was fired. But,

tiff's dog under such circumstances, it was justifiable, and the plaintiff would not be entitled to recover. For, if the dog was upon the land of the defendant in the act of destroying his turkeys, the defendant was justified in killing him."

[28] The statement of the pleadings is abridged. The pleadings are set out at length in (1665) 1 Wms. Saund. 82, 85 Reprint, 92.

LORD ELLENBOROUGH said, this would not make out the justification; to which it was necessary that when the dog was shot, he should have been in the very act of killing the fowl, and could not be prevented from effecting his purpose by any other means.[29]

Verdict for plaintiff, with 1s. damages.

LIVERMORE v. BATCHELDER.

(Supreme Judicial Court of Massachusetts, 1886. 141 Mass. 179, 5 N. E. 275.)

Tort for killing the plaintiff's dog. Trial without a jury; the trial judge found the following facts:

The plaintiff, on February 20, 1884, was the owner of a dog, which was duly licensed by the town of Reading, and wore a collar, duly marked as required by the Pub. St. 1882, c. 102, § 80. On said February 20, the plaintiff's dog, with another dog, came upon the defendant's premises and there killed and maimed hens of the defendant, which were in his hen-house or shed. The dogs were driven away, and, in about fifteen minutes afterwards, came again upon the defendant's premises, and were running toward the same shed and hen-house of the defendant, when the defendant, having reasonable cause to believe that the dogs were proceeding to maim and kill others of his hens in said shed and hen-house, shot and killed the plaintiff's dog.

Upon these facts, the judge ruled that the defendant's killing of the plaintiff's dog under the circumstances stated, was not in law justifiable; and thereupon found and ordered judgment for the plaintiff. The defendant alleged exceptions.

HOLMES, J. The ruling of the court, as we understand it, meant that the facts found, without more, did not disclose a justification for killing the plaintiff's dog. It was found that the defendant had reasonable cause to believe that the dog was proceeding to maim and kill his hens, but not that he had reasonable cause to believe that it was necessary to kill the dog in order to prevent him from killing the hens. The justification, therefore, was not made out. Wright v. Ramscot, 1 Saund. 84. Janson v. Brown, 1 Camp. 41. See Commonwealth v. Woodward, 102 Mass. 155, 161.

It is unnecessary to consider whether the common law remedy is taken away by the Pub. Sts. c. 102, §§ 80–110.

Exceptions overruled.[30]

[29] Compare Reed v. Goldneck (1905) 112 Mo. App. 310, 86 S. W. 1104: "Under the rule of the common law which obtained prior to the statute as announced in the cases supra, one was not justified in killing a dog, even though it was on his premises, unless the dog was actually doing or attempting to do injury to his domestic animals; and in the latter case the danger from the dog must have been so apparent as to threaten imminent peril. * * * [But under the statute of 1899] if the dog be found either killing or chasing the animals, or under such circumstances as would make it appear satisfactorily to the jury that the dog had been engaged either in killing or chasing the animals, then the killing of the dog is justifiable."

[30] Compare Aldrich v. Wright (1873) 53 N. H. 398, 16 Am. Rep. 339: Four minks were swimming towards D.'s geese, at a distance of from one to three rods, when D. came out with a gun. The minks stopped pursuing the geese

McCHESNEY v. WILSON.

(Supreme Court of Michigan, 1903. 132 Mich. 252, 93 N. W. 627, 1 Ann. Cas. 191.)

The defendant shot and killed the plaintiff's dog when it was trespassing upon the defendant's premises. The dog had killed three chickens belonging to the defendant and was in the habit of urinating through the defendant's screen door onto his carpet. But at the time when he was shot the dog was not in the act of killing or pursuing a chicken. In the circuit court the plaintiff had a verdict and judgment for $20, the value of the dog. The defendant brings error.

GRANT, J. The court instructed the jury that the defendant was

and ran upon a little island, and there stopped. D. fired at the minks on the island and killed them all at one shot. The trial court ruled that D. was not justified in killing the minks if the geese were not in imminent danger, and could have been protected either by driving away the geese, or frightening or driving off the minks. Verdict for plaintiff. Said Doe, J., delivering the opinion: "The plaintiff's claim that the defendant is liable if the geese were not in imminent danger, taken in the sense for which the plaintiff contends, and the sense in which both parties, at the trial, probably understood it, cannot be sustained. * * * It is probable that the parties understood that by the doctrine of imminent danger, the defendant was liable unless the geese would, in a few moments, have been killed by the minks but for the defendant's shot. The doctrine, asserted in that form, would be erroneous. It was for the jury to say, considering the defendant's valuable property in the geese, the absence of absolute property in the minks, their character, whether harmless or dangerous, the probability of their renewing their pursuit if he had gone about his usual business and left the geese to their fate, the sufficiency and practicability of other kinds of defense, considering all the material elements of the question,—it was for the jury to say whether the danger was so imminent as to make the defendant's shot reasonably necessary in point of time. If, but for the shot, some of the geese, continuing to resort as usual to the pond, apparently would have been killed by these minks within a period quite indefinite, and if other precautionary measures of a reasonable kind, as measured by consequences, would have been ineffectual, the danger was imminent enough to justify the destruction of the minks for the protection of property. The right of defense is the right to do whatever apparently is reasonably necessary to be done in defense under the circumstances of the case. * * * The claim that the defendant was liable if the geese could have been protected by driving them away from the minks, cannot be sustained. Requiring the defendant to drive away the minks if he could, is an admission that he had a right to drive them away, and that they had no right to remain on his premises without his consent. But, requiring him, if he could not drive them away from the geese, to drive the geese away from them, is a practical denial of his right to keep geese in his own pond or on his own land, if he could only keep them there by killing minks. It amounts to this: it being impracticable to permanently eject the assailants, he must banish the assailed; and the raising of geese being impossible, the raising of minks is compulsory. A freeholder, permitted to fire blank cartridges only to cover the endless retreat of his poultry before these maranders, and obliged to suffer such an enemy to ravage his lands and waters with boldness generated by impunity, is a result of turning the fact of the reasonable necessity of retreating to the wall before a human assailant into a universal rule of law. This rule practically compels the defendant to bring his poultry to the block prematurely, and to abandon an important branch of agricultural industry. His right of protecting his fowls is merely his right of exterminating them." The opinion in this case reviews at length the authorities and the principles involved.

not justified in killing the dog, unless he was in the act of chasing, killing, or annoying his sheep or other domestic animals. The following facts are conclusively established: (1) That the dog was a killer of domestic fowls; (2) that he was a frequent trespasser upon the premises of the defendant, and frequently committed the disgusting nuisance above mentioned; (3) that plaintiff was notified by the defendant and others of the disposition of his dog; (4) that he took no steps to restrain him. Evidently the attention of the learned circuit judge had not been called to the cases of Hubbard v. Preston, 90 Mich. 221, 51 N. W. 209, 15 L. R. A. 249, 30 Am. St. Rep. 426, and Throne v. Mead, 122 Mich. 273, 80 N. W. 1080, 80 Am. St. Rep. 568, otherwise I think he would have directed a verdict for the defendant. Under the principle laid down in these decisions the defendant was justified in killing the dog.

That there is property in dogs, for which the owner may recover in a proper case, is conceded; but this does not authorize a party to keep a dog of the character of the one in this case, who almost daily commits a nuisance at his neighbor's house, and kills and destroys his neighbor's domestic fowls. No statute is needed to justify the injured party in killing a dog of this character when he appears upon the premises, after notifying the owner of his depredations, and giving him ample time to take care of him. Whether the statute (Comp. Laws 1897, § 5592) is broad enough to include domestic fowls is unnecessary to decide. See Marshall v. Blackshire, 44 Iowa, 475. This is not a case where a dog is found for the first time committing a nuisance in trespassing, or in killing fowls or animals. This is not the case of Bowers v. Horen, 93 Mich. 420, 53 N. W. 535, 17 L. R. A. 773, 32 Am. St. Rep. 513, where the offense with which the dog was charged was in walking over a freshly painted porch, and once being found in a henhouse without doing any damage, and in going around the defendant's house at night, chasing cats into trees, and barking. In that case stress was laid upon the fact that the defendant, knowing who the owner was, failed to notify him that the dog gave him any annoyance. Had the defendant in that case done so, a different result might have been reached, under the decision of Hubbard v. Preston, supra. * * *[31]

Judgment reversed.

[31] A part of the opinion is omitted. Hooker, C. J., and Montgomery and Moore, JJ., concurred in the reversal.

Compare Brill v. Flagler (1840) 23 Wend. (N. Y.) 354: D. shot P.'s dog, although it was not threatening either D. or his property. A demurrer to the plea admitted that the dog was in the constant habit of coming on D.'s premises, and about his dwelling, day and night, barking and howling, to the great annoyance of the family, that P. knew of this mischievous propensity of his dog and would not confine him, and that D. was unable to prevent the annoyance otherwise than by shooting. Held that the plea was a good bar. See generally under "Nuisance," infra.

BLADES v. HIGGS et al.

(Court of Common Pleas, 1861. 10 C. B. [N. S.] 713, 142 Reprint, 634, 128 R. R. 890.)

The declaration charged that the defendants assaulted and beat and pushed about the plaintiff, and took from him his goods, that is to say, dead rabbits. The defendants pleaded, amongst other pleas,

Thirdly, as to the assaulting, beating, and pushing about the plaintiff, that the plaintiff, at the said time when, etc., had wrongfully in his possession certain dead rabbits of and belonging to the Marquis of Exter; that the said rabbits were then in the possession of the plaintiff without the leave and license and against the will of the said Marquis; and that the plaintiff was about wrongfully and unlawfully to take and carry away the said rabbits and convert the same to his own use; whereupon the defendants, as the servants of the Marquis, and by his command, requested the plaintiff to refrain from carrying away and converting the same rabbits, and to quit the possession thereof to the defendants as such servants, which the plaintiff refused to do; and that thereupon the defendants, as the servants of the said Marquis, and by his command, gently laid their hands upon the plaintiff, and took the said rabbits from him, using no more force than necessary; which were the alleged trespasses in the declaration mentioned, etc. Demurrer and joinder.

Beasley, in support of the demurrer: The plea is clearly bad. In order to sustain it, it must be made out, that, wherever A.'s goods are wrongfully in the hands of B., A. or his servants may forcibly take them, without showing that a felony has been committed, or the way in which the goods came to B.'s possession, or that the defendant was attempting to retake them on fresh pursuit. To permit this, would be manifestly against one of the first principles of law. It is not alleged that the defendant had wrongfully taken the rabbits. He might have been an innocent bailee, or a purchaser in market overt.[32]

ERLE, Ch. J. The declaration in this case was for an assault and battery. The substance of the justification was, that, the plaintiff having wrongfully in his possession rabbits belonging to the defendants (we consider the servants here the same as the master), and being about to carry them away, the defendants requested him to refrain, and, on his refusal, molliter manus imposuerunt, and used no more force than was necessary to take the rabbits from him. To this the plaintiff has demurred, and thereby admits that he was doing the wrong, and that the defendants were maintaining the right, as alleged: and he contends that the defendants are not justified in using necessary force, on account of the danger to the public peace: but he adduces no authority to support his contention. The defendants likewise have failed to adduce any case where the justification was supported without an allegation to explain how the plaintiff took the property of the defendant and became the holder thereof. But the principles of law are in our judgment decisive to show that the plea is good, although that allegation is not made.

[32] A large part of the argument is omitted.

If the defendants had actual possession of the chattels, and the plaintiff took them from them against their will, it is not disputed that the defendants might justify using force sufficient to defend their right and retake the chattels; and we think there is no substantial distinction between that case and the present; for, if the defendants were the owners of the chattels, and entitled to the possession of them, and the plaintiff wrongfully detained them from them after request, the defendants in law would have the possession, and the plaintiff's wrongful detention against the request of the defendants would be the same violation of the right of property as the taking of the chattels out of the actual possession of the owner.

It has been decided that the owner of land entitled to the possession may enter thereon and use force sufficient to remove a wrong-doer therefrom. In respect of land, as well as chattels, the wrong-doers have argued that they ought to be allowed to keep what they are wrongfully holding, and that the owner cannot use force to defend his property, but must bring his action, lest the peace should be endangered if force was justified: see Newton v. Harland, 1 Man. & G. 644. But in respect of land, that argument has been overruled in Harvey v. Brydges, 14 M. & W. 442. Parke, B., says: "Where a breach of the peace is committed by a freeholder, who, in order to get possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly; even though in so doing a breach of the peace was committed."

In our opinion, all that is so said of the right of property in land, applies in principle to a right of property in a chattel, and supports the present justification. If the owner was compellable by law to seek redress by action for a violation of his right of property, the remedy would be often worse than the mischief, and the law would aggravate the injury instead of redressing it.

For these reasons, our judgment is for the defendants.[33]

[33] For the subsequent history of this case, see (1862) 12 C. B. N. S. 501; (1863) 13 C. B. N. S. (Exch.) 844; and (1865) 11 H. L. C. 621, to the effect that title to property created merely by the act of reducing a thing into possession, necessarily implies a reduction into possession effected by an act which is not in any way of a wrongful nature. Such an act, therefore, effected by one who is at the moment a trespasser, cannot create a title to property.

See the remark in Pollock on Torts (7th Ed.) p. 380, note c: "The reasons given at page 720 [of 10 C. B. N. S., i. e., Erle's opinion] seem wrong, and the decision itself is contrary to the common law as understood in the thirteenth century. One who retook his own goods by force (save, perhaps, on fresh pursuit) was a trespasser and lost the goods."

See, also, Sir Frederick Pollock's later comment on the case in 128 Rev. Rep. vi: "There seems to be no doubt that in Blades v. Higgs, the court allowed an

MONSON v. LEWIS.

(Supreme Court of Wisconsin, 1905. 123 Wis. 583, 101 N. W. 1094.)

This was an action to recover damages for an assault and battery by which the plaintiff's arm was broken. The defendant pleaded a justification. The evidence showed that the parties were working on the highway (the defendant being superintendent of highways, and the plaintiff working under him), and that the plaintiff was handling an ordinary scraper, the horses attached to the scraper being driven by a third person; that the defendant was not satisfied with the manner in which the plaintiff handled the scraper, and an altercation arose between them, which resulted in a personal encounter. The plaintiff's testimony tended to show that he retained possession of the scraper, and the defendant attempted to take the scraper away from him, and struck his arm in the attempt, by which the arm was broken. The defendant's testimony tended to show that during the altercation the scraper came to a standstill, and that he then discharged the plaintiff from the work, and the plaintiff stood up and let go of the scraper; that thereupon the defendant took hold of both handles of the scraper, and the plaintiff then tried to take it away from him, and he (defendant) struck the plaintiff's arm in defending his possession of the scraper. There was a verdict and judgment for the defendant, and the plaintiff appeals.

WINSLOW, J. There was no doubt, under the evidence, of the fact that the defendant struck the plaintiff and fractured his arm; but the principal disputed question seemed to be whether the defendant struck the blow while trying to take the scraper from plaintiff's possession, or whether the plaintiff had entirely let go of the scraper, and the defendant had, without violence, taken it and struck the blow while the plaintiff was endeavoring to retake it. In the one case the act of defendant was an attempt to take the property by force from plaintiff's possession, and in the other case it was an attempt to defend his own possession. In this situation of the evidence, the following instruction was given:

"If the defendant in this case ordered and directed the plaintiff to let go of the scraper and quit work, and discharged him, and the plaintiff refused to let go of the scraper and refused to quit work, then, after such order and refusal, the defendant had a right to use proper and reasonable force to enable him to control the scraper in question, and the jury must determine from all the evidence how much and what kind of force the defendant did in fact use."

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amount of self help which their predecessors in the Middle Ages would have disapproved as too dangerous to the public peace. Obviously the danger would be greater when most men went armed, and men of high rank with armed retinues."

But compare 27 Halsbury's Laws of England (1913) 868: "'If the goods are wrongfully removed or are in the wrongful possession of some one else, the owner may retake them and may use force if necessary."

For American cases, see 3 Cyc. 1078, note 15; 4 Cent. Dig., "Assault," §§ 13–15; Dec. Dig., Key No., "Assault," § 15.

This instruction admits at least of the construction that, if the defendant had discharged the plaintiff, the defendant was entitled to take the scraper from plaintiff's possession by force, if the force used was reasonable and proper to accomplish the purpose. We do not understand this to be the law. It was held in Barnes v. Martin, 15 Wis. 240, 82 Am. Dec. 670, that the owner of property which is in the peaceable possession of another has no right to retake the property by force. This principle is based upon public policy. It is in the interest of peace and public order. Any other rule would substitute the strong arm for the court of justice, and promote lawbreaking and violence. The right of the owner to recapture personal property is to be exercised only when he may peaceably do so, with the possible exception (not necessary to be discussed here) that, when the property has been momentarily taken from the owner by force or fraud, it may be lawfully retaken, if only reasonable and proper force be used. 2 Am. & Eng. Enc. of Law (2d Ed.) 983; 3 Cyc. 1078. In the present case, plaintiff's original possession of the scraper was lawful, and, if he retained the possession continuously, the defendant was not justified in using force to take it away; but if the plaintiff let go of it, and the defendant peaceably took possession, he might defend such possession with reasonable and proper force.

The court further charged the jury that "in this case, as in all other civil cases, the burden is upon the plaintiff to establish the facts essential to his recovery by a preponderance of the evidence." This might well be understood as meaning that the plaintiff, after proving the blow, was obliged to prove that there was no justification for it. This is not the law. The blow and consequent damage being admitted by the defendant, a prima facie case was made, and the burden lay upon him to prove facts constituting a justification therefor. Timm v. Bear, 29 Wis. 254; Blake v. Damon, 103 Mass. 199; 2 Greenleaf, Ev. (15th Ed.) §§ 95–98.

Judgment reversed, and action remanded for a new trial.[34]

[34] Accord: Bobb v. Bosworth (1808) Litt. Sel. Cas. (Ky.) 81, 12 Am. Dec. 273: In an action by Bosworth for an assault and battery by Bobb, it appeared that at the time of the assault and battery, Bosworth was in possession of the slave which was the subject of dispute between the parties; that Bobb came to retake him out of Bosworth's possession in a violent and forcible manner, which was resisted by Bosworth; and that in the scuffle Bobb broke Bosworth's arm. Said the Court, per Trimble, J.: "It is not material, whether Bobb or Bosworth had the better right to the negro. Bosworth was in actual possession; Bobb could not lawfully use violence and force in regaining possession. Having broken the peace, and used force, where he was forbidden by law to do so, he must be answerable for the consequences."

Kirby v. Foster (1891) 17 R. I. 437, 22 Atl. 1111, 14 L. R. A. 317: P. was in the employ of a corporation as bookkeeper. The sum of $50 belonging to the corporation had been lost. P. was held responsible for this by the officers of the corporation, and the amount was deducted from his pay. On a subsequent pay day, D., an officer of the corporation, handed P. some money to pay the help. P., acting under the advice of counsel, took from this money the amount due him at the time, including what had been deducted from his pay, put it into his pocket, and returned the balance to D., saying that he had received

his pay and was going to leave and that he did this under advice of counsel. D. thereupon attempted by force to take the money from him. In the struggle which ensued, P. received injuries, for which he brought suit. D. claimed a justification. There was a verdict for P., with a petition by D. for a new trial. Said Stiness, J., delivering the opinion: "Unquestionably if one takes another's property from his possession without right and against his will, the owner or person in charge may protect his possession, or retake the property, by the use of necessary force. He is not bound to stand by and submit to wrongful dispossession or larceny when he can stop it, and he is not guilty of assault in thus defending his right, by using force to prevent his property from being carried away. But this right of defence and recapture involves two things: first, possession by the owner, and, second, a purely wrongful taking or conversion, without a claim of right. If one has intrusted his property to another, who, afterwards, honestly though erroneously, claims it as his own, the owner has no right to retake it by personal force. If he has, the actions of replevin and trover in many cases are of little use. The law does not permit parties to take the settlement of conflicting claims into their own hands. It gives the right of defence, but not of redress. The circumstances may be exasperating; the remedy at law may seem to be inadequate; but still the injured party cannot be arbiter of his own claim. Public order and the public peace are of greater consequence than a private right or an occasional hardship. Inadequacy of remedy is of frequent occurrence, but it cannot find its complement in personal violence. Upon these grounds the doctrine contended for by the defendants is limited to the defence of one's possession and the right of recapture as against a mere wrong-doer. It is therefore to be noted in this case that the money was in the actual possession of the plaintiff, to whom it had been intrusted for the purpose of paying help, who thereupon claimed the right to appropriate it to his own payment, supposing he might lawfully do so. Conceding that the advice was bad, nevertheless, upon such appropriation the plaintiff held the money adversely, as his own, and not as the servant or agent of the company. If his possession was the company's possession, then the company was not deprived of its property, and there could be neither occasion nor justification for violence. Possession by the company would be constructive merely, which would cease when the plaintiff exercised dominion and control on his own behalf under an honest claim of right. It is only in this way, in many cases, that conversion is established. Having thus appropriated the money to himself, it is urged that the act amounted to embezzlement, which justified the intervention of the defendants to prevent the consummation of the crime. We do not think this is so. The plaintiff stated what he had done, and the grounds upon which he claimed the right to do it, handing back the balance above what was due him. A controversy followed; he started to go out, but was stopped by the defendants, and then the assault took place. The sincerity of the plaintiff's belief that he had a right to retain the money is unquestionable. Hence, as stated in Cluff v. Mutual Benefit Life Insurance Co., 13 Allen (Mass.) 308, cited by the defendants, even a forcible taking of property, 'if done under an honest claim of right, however ill founded, would not constitute the crime of robbery or larceny; because, where a party sincerely, though erroneously, believes that he is legally justified in taking property, he is not guilty of the felonious intent which is an essential ingredient of these crimes.' * * * The defendants object to the charge of the court, that where a person has come into the peaceable possession of a chattel from another, the latter has no right to retake it by violence, whether the possession is lawful or unlawful, upon the ground that this rule would prevent the recapture of property obtained by trickery or fraud. The instruction must be considered not as an abstract proposition, but with reference to the case before the jury. Nothing appeared to show that the money had been procured by misrepresentation, trickery, or fraud. It was delivered to the plaintiff voluntarily, in the usual course of business. True, under the advice of a lawyer whom he had consulted, the plaintiff had previously determined to apply the money to his own payment when he should receive it; but this did not make the delivery itself fraudulent, nor did his intent to assert what he believed to be his right make that intent criminal. We think, therefore, with reference to the case as it stood, there was no error in the charge as given, nor in the refusals to charge as requested."

(b) DEFENSE OF REAL PROPERTY; FORCIBLE RE-ENTRY

The first and principal remedy is of this kind, namely, that he who has been disseised may reject the spoiler of his own strength if he can, or by strength which he has called in or recalled, provided no interval has elapsed, the disseisin or misdeed being flagrant.

Bracton (circa 1250) 162 b.[35]

And also the King defendeth, That none from henceforth make any entry into any lands and tenements but in case where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner. And if any man from henceforth do to the contrary, and thereof be duly convict, he shall be punished by imprisonment of his body, and thereof ransomed at the King's will.

Statute, 5 Rich. II., c. 7 (1381).[36]

SKEVILL v. AVERY.

(Court of King's Bench, 1629. Cro. Car. 138, 79 Reprint, 722.)

Trespass of assault, battery, and wounding. The defendant pleaded to the wounding, not guilty. To the assault and battery he pleaded, that he was possessed of a house in such a parish for years, and that the plaintiff entered his house, and would have thrust him out of possession thereof; whereupon he molliter manus imposuit to put him out, and the harm, if any done, was in defence of his own possession. The plaintiff hereupon demurred.

[35] As quoted by Barker, J., in Page v. Dwight (1897) 170 Mass. 29, 48 N. E. 850, 39 L. R. A. 418, and by Swayze, J., in Schwinn v. Perkins (1910) 79 N. J. Law, 515, 78 Atl. 19, 32 L. R. A. (N. S.) 51, 21 Ann. Cas. 1223.

"Bracton's expression as translated, 'provided no interval has elapsed,' hardly differs from Lord Denman's expression six centuries later [in Browne v. Dawson (1840) 12 Ad. & El. 624, 629: 'A mere trespasser cannot, by the very act of trespass, immediately and without acquiescence give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title, if he can, without delay, reinstate himself in his former possession']. In such a case, as Mr. Justice Barker suggests in Page v. Dwight, the forcible entry and the recapture are but one transaction and the recapture is not a forcible entry but a successful and proper resistance of a forcible entry: all that has been done is to resist successfully a wrongful act." Mr. Justice Swayze in Schwinn v. Perkins (1910) 79 N. J. Law, 515, 78 Atl. 19, 32 L. R. A. (N. S.) 51, 21 Ann. Cas. 1223.

[36] A confirming statute in 1429 (8 Hen. VI., c. 9) provided that if it appeared that one had been forcibly put out of possession contrary to the statute, the justices "shall put the party so put out in full possession of the same lands and tenements so entered or holden as before."

Goldsmith, for the plaintiff, shewed for cause, that the defendant had pleaded a lease for years, not shewing who made the lease, nor when it was made, nor for how many years; whereas they ought to have been pleaded specially, and shewn particulatim, for if it be traversed, there cannot be any issue thereupon: and he relied upon Crogat's case, 8 Co. 66, that de injuria sua propria is no plea.

But all the Court held, that the defendant had well pleaded; for saying that he was possessed for years is but an inducement and conveyance to his justification and not the substance thereof, which is, that he offered to thrust him out of the possession of his house; and whatsoever title he hath, it is not material, for if he were in possession by virtue of a lease at will, or any other title, "de injuria sua propria" is a good plea; for the title or interest not coming in question (and what was pleaded or alledged being but an inducement to the plea), it needs not be so certain as where it is pleaded by way of title to make a claim in the defendant. Whereupon it was adjudged for the defendant.

WEAVER v. BUSH.

(Court of King's Bench, 1798. 8 Term R. 78, 101 Reprint, 1276.)

To trespass for assaulting and beating the plaintiff with a stick, the defendant pleaded (besides the general issue and son assault, which were found for the plaintiff) that:

"As to the assaulting of the plaintiff and beating, bruising, and ill-treating him, and with the said stick, giving and striking him the said blows, etc., he (the defendant) at the time when, etc., was lawfully possessed of and in a certain close called, etc., at, etc.; and being so possessed, the plaintiff at the said time when, etc., with force and arms and with a strong hand as much as in him lay did attempt and endeavour forcibly to break into and enter the said close of the defendant, and would have broken into and entered the said close without the defendant's licence and against his will, whereupon the defendant being then in his said close, and seeing the said attempt and endeavour of the plaintiff, did then and there resist and oppose such entrance into the said close; and upon that occasion did then and there defend his possession, as it was lawful for him to do; and that if any damage or injury then and there happened to the plaintiff, it was in the defence of the possession of the said close."

To this plea the plaintiff replied de injuria sua propria absque tali causa; the issue on this plea was found for the defendant.

Lens having moved to enter up judgment for the plaintiff, notwithstanding the justification in the third plea, which was found for the defendant, on the ground that that plea could not be supported on the authority of Jones v. Tresilian, 1 Mod. 36, where Twisden, J., said "You cannot justify the beating of a man in defence of your possession; but you may say that you did molliter manus imponere," etc.

Bond, Gibbs, and Dampier, now shewed cause against that rule.

LAWRENCE, J. The general form of pleading, certainly has been as the plaintiff's counsel contends; and on this ground, that the defendant ought not in the first instance to begin with striking the

plaintiff; but the law allows him, either in defence of his person or possessions, to lay his hand on the plaintiff, and then he may say, if any further mischief ensued, it was in consequence of the plaintiff's own act; so that the battery follows from the resistance. But it does not necessarily follow from any thing stated in this plea, that the defendant did more than gently lay his hands on plaintiff in the first instance; and if not, this plea may stand consistently with all the authorities. * * *[37]

PER CURIAM. Rule discharged.

POLKINHORN v. WRIGHT.

(Court of Queen's Bench, 1845. 8 Q. B. 197, 115 Reprint, 849.)

LORD DENMAN, C. J. This was an action of trespass for assault and battery; and the plaintiff in his declaration, complained that the defendant, on the 1st day of January 1844, assaulted the plaintiff, and then seized him, and dragged him about, and struck him many blows; by means whereof the plaintiff was greatly hurt, etc.

To this the defendant pleaded two pleas of justification: one in defence of the possession of a close and a gate, which the plaintiff endeavoured forcibly and with a strong hand to break and enter; and the other stating that the defendant was possessed of a cow, then being in a certain close, and that the plaintiff, against the will of the defendant, endeavoured to drive the cow away from the close and to dispossess the defendant of her, and would, forcibly and in breach of the peace, have driven away and dispossessed the defendant of the cow: wherefore the defendant resisted the attempt, and justifies the trespasses. The plaintiff replied de injuria. * * *

But the plaintiff contended that the defendant's pleas were bad for not alleging a request to desist before resisting with force. We do not think there is any weight in this objection. There is a manifest distinction between endeavouring to turn a man out of a house or close, into which he has previously entered quietly, and resisting a forcible attempt to enter. In the first case, a request is necessary: in the latter not. This distinction is expressly taken in Green v. Goddard (2 Salk. 641), and Weaver v. Bush (8 T. R. 78). In the present case the pleas justify the trespasses on the ground of resisting a forcible attempt, in the one case to enter the defendant's close, and in the other to dispossess him of his cow; in neither of which cases was a request to desist necessary.[38]

Judgment for defendant.

[37] The arguments of counsel, and the opinion of Lord Kenyon, C. J., with whom Lawrence, J., concurred, are omitted.

[38] The statement of the case, the arguments of counsel, and a part of the opinion, on another point, are omitted.

HOLMES v. BAGGE et al.

(Court of Queen's Bench, 1853. 1 El. & Bl. 782, 118 Reprint, 629.)

Trespass. The declaration contained counts for two assaults. There were seven pleas. The first was not guilty, with issue thereon. The sixth plea, to the first count, was that the defendant Bagge and ten others named, being eleven members of a cricket club called the Lynn Cricket Club, and eleven others named, being eleven members of a cricket club called the Lytcham Cricket Club, "were lawfully possessed of a certain close," and were lawfully playing a certain lawful game or match at cricket in the said close; and plaintiff was "unlawfully in and upon the said close," and "vexatiously and unlawfully interrupted, hindered and prevented" Bagge and the other twenty one persons "in and from any longer playing the said lawful game:" whereupon Bagge, in his own right and by the authority of the other twenty one persons, and Fletcher, as Bagge's servant, requested plaintiff "to depart from and out of the said close, and to desist from interrupting" the playing: which plaintiff refused to do: whereupon Bagge and Fletcher gently laid their hands upon plaintiff "in order to remove and did remove, him from and out of the said close in this plea mentioned." The seventh plea was similar to the sixth, but directed to the second count. To the sixth and seventh pleas, the plaintiff replied de injuria.

At the trial before Lord Campbell, C. J., at the last Norwich assizes, it appeared that the plaintiff and the defendant Bagge were both members of the committee of the Lynn Cricket Club. The owner of the close mentioned in the pleas was W. S. Rolin; and he had signed an agreement with the committee, of which the material parts were as follows:

"The said W. S. R. agrees to let unto the said committee, who accordingly hereby agree to hire, all that," etc., "now in the occupation of the said W. S. R., to be used as a cricket field by the members of the above named club, and for that purpose only, at the annual rent of £10." "The committee to do all that may be necessary for keeping the ground in proper playing condition, at their own expense. The tenancy under this agreement to be determinable at the end of any current season, on notice in writing to that effect being given by either party on or before the 29th September."

On the day of the alleged assault, there was a match between the eleven of the Lynn Cricket Club, of which eleven defendant Bagge was one, and plaintiff was not one, and the eleven of the Lytcham Cricket Club. The match was played on the close in question; and the spectators left a clear space round the players, which was, as the jury found, "tabooed" to all but the players. During the innings of the Lytcham Cricket Club, one of the Lynn eleven retired for a temporary purpose; and the plaintiff, who was among the spectators, was requested to take his place. He complied, but did not take off his coat. Bagge, who was captain of the Lynn eleven, told him to do so: offence was taken at the tone in which the command was given; and the plaintiff would neither take off his coat nor leave the "tabooed"

spot. He was then, by the direction of the defendant, forcibly removed from the "tabooed" ground; and the assaults were committed in so removing him.

The Lord Chief Justice, on proof of these facts, was of opinion that, the assaults in fact being clearly made out, the issue upon Not guilty must be found for the plaintiff, and that none of the other pleas were made out. He took the opinion of the jury as to whether the twenty two were lawfully playing at cricket, and whether the plaintiff disturbed them. The jury said they were lawfully playing, and plaintiff disturbed them by remaining on the tabooed ground. The Lord Chief Justice thereupon directed a verdict for the plaintiff, but reserved leave to enter a verdict on the 6th and 7th issues for the defendant, if the Court should be of opinion that the part of those pleas proved constituted a defence.

Byles Serjeant moved for a rule nisi to enter the verdict on the 6th and 7th issues, pursuant to the leave reserved.

LORD CAMPBELL, C. J. * * * As to the sixth and seventh pleas, they set up that the twenty two persons named were lawfully possessed of a close, and lawfully playing cricket there, that plaintiff wrongfully remained on the close, and interrupted the playing, and, though requested to depart from the close and to desist from the interruption, would not do so; whereupon the defendants gently laid their hands on him "in order to remove, and did remove, him from and out of said close." Now, no doubt a plea might have been framed to meet the facts, so as to have entitled the defendant to a verdict; for according to the evidence the two elevens were lawfully playing; and, as the jury found, the space round the wickets was tabooed, and the plaintiff came into that tabooed space, and persisted in remaining there though requested to go. And it may be that it would be a good justification that they removed him for disturbing persons lawfully playing at a lawful game; and, if such had been the justification here the plea would have been proved. But such is not the language of this plea, it avers that the twenty two persons named were possessed of the close, and that the plaintiff was removed from the close, because he would not leave it. Therefore the plea justifies the trespasses on the ground that the twenty two were possessed of the close, and committed the trespasses in defence of their possession. Now, in fact, the twenty two were not possessed. It was the cricket field of the Lynn Cricket Club; and eleven out of the twenty two were strangers, invited by the Lynn Cricket Club to come there as guests to play. They were in no sense possessed of the field. Therefore the justification, as pleaded, fails; and those issues were rightly found for the plaintiff.[39]

Rule refused.

[39] The statement is abridged; part of the opinion, on another point, is omitted.

Compare Dean v. Hogg (1834) 10 Bing. 345, 38 R. R. 443: The defendant Lewis hired a steamboat for a party of pleasure to Richmond, upon the terms

BRUCH v. CARTER.

(Court of Errors and Appeals of New Jersey, 1867. 32 N. J. Law, 554.)

A writ of error brought up for review a judgment against the defendants below, after verdict in an action of trespass. The declaration, framed in four counts, had alleged, in the second count, that the defendants,

"with force and arms, seized and broke loose, from a certain post of the said plaintiff, where he stood tied, a certain other horse of the said plaintiff of great value, etc., and removed the said horse a great distance, to wit, a distance of ten yards, and fastened the said other horse to a certain other post, by means whereof the said horse of the said plaintiff became entangled in his halter, was thrown with great violence upon the ground, and was instantly killed."

The court having overruled an objection to the declaration, the defendants, after the plaintiff had rested his cause, moved that he be non-suited, on the ground that he had not established his right to recover in the action. This motion was refused, and the defendants excepted.

WOODHULL, J. * * *[40] No extended examination of the testimony is required to show that the motion to non-suit was properly refused. The fact that Jacob Cowell, one of the defendants, untied the plaintiff's horse, and removed him from the hitching post, to which his owner had fastened him, is so clearly established by the testimony of John Carter, the plaintiff below, and of Jacob Cowell

disclosed in the following letter from the owner: "I note the Adelaide is engaged to you for Richmond or Twickenham for Tuesday the 28th of May, at the hire for the day of £5. 10 s., your party not exceeding fifty persons." The vessel was navigated by a captain and crew, employed and paid by the owner. Just as she was about to start from a quay in London, the plaintiff, an attorney, a stranger to the defendant, stepped on board, not being aware that the vessel had been hired for the day by Lewis, and his embarkation being countenanced by the captain. The plaintiff was not long in discovering that he had intruded into a private party, and expressed to some one near him his readiness to quit the vessel when an opportunity should present itself; but the person so addressed rather counselled him to stay. However, by the time the Adelaide had reached Battersea, it was generally bruited about that a stranger was on board. The ladies became alarmed; and Hogg, as the plaintiff alleged, in an imperious tone, ordered him to quit the vessel. The plaintiff, irritated by what appeared to him a harsh manner of making a lawful request, refused to go; whereupon the defendants, after calling on the captain to remove the plaintiff, with considerable violence shoved him into a boat alongside, and, in so doing, tore off the skirts of his coat. For this assault the plaintiff sued them in trespass; and having obtained a verdict for £10. damages, the question, upon a motion to set aside the verdict and enter a nonsuit instead, was, whether, under the above contract with the owner, Lewis had such possession of the steam vessel as to support the defendant's second plea, which alleged that Lewis was lawfully possessed of the steam vessel mentioned in the declaration; that the plaintiff was unlawfully in the steam vessel, from which he would not depart when requested; and then justified the committing of the trespasses by the defendants in defence of the possession of Lewis, and in order to remove the plaintiff from the vessel.

[40] A considerable portion of the opinion, touching on other points, has been omitted. The statement of facts has been abridged.

himself, that it does not appear to have been at all controverted in the cause. It is equally clear that the post in question stood in the highway, and that the plaintiff's right to use it, if not exclusive, was, at least, as good as that of either of the defendants. Here, then, we find, without looking further, acts done by one of the defendants, which must be held to amount to at least a technical trespass, for which the plaintiff below would be entitled, under the declaration in the cause, to recover nominal damages against this defendant, if nothing more. The plaintiff had, therefore, established his right to recover in the action, and there was no error in overruling the motion for a non-suit. * * *

It appears by one of the bills of exception that, towards the close of the testimony on the part of the defendants, the counsel for Bruch, asked the witness, Jacob Cowell, the following question: "Who put the post in the ground there from which you removed Carter's horse that day?" Which question was overruled by the court as proving an immaterial fact. The counsel then offered to prove, by the same witness, that the post from which he removed the horse, was his father's post; that the witness helped to put it there; and that he had a right to tie to it. Which offer was overruled by the court. The fourth and fifth assignments of error are founded upon the rejection by the court of the evidence thus offered on the part of the plaintiff in error. This evidence appears to me to be wholly immaterial to the issue in the cause, and to have been, for that reason, properly overruled. Admitting all these alleged facts to be true, they neither establish, nor tend to establish, in the defendants, or either of them, any such exclusive right to use the post in question as would enable them to justify the acts complained of in the declaration. It may well be doubted whether even Jacob Cowell's father, upon the facts as offered to be proved, could have legally untied and removed the plaintiff's horse, as the defendants, or one of them, did in this case. He may have owned the post, and may have placed it where it stood, in the highway near the church, for his own convenience: he may have had a perfect right to remove it at his pleasure, but while it remained there, should it not be regarded as so far dedicated to the use of persons having occasion to attend that church, that anyone finding it unoccupied, might lawfully tie his horse to it? However this may be, and whatever exclusive right Jacob Cowell's father may be supposed to have had to use the post in question, it is very certain that Jacob Cowell could not justify under that right, without showing that he acted by the direction, or, at least, the permission of his father. This he did not offer to do; but merely offered to prove that he helped his father put the post where it stood.

But the evidence in question, even if material, could not have been received under the general issue. * * *

Judgment affirmed.

GILMAN v. EMERY.

(Supreme Judicial Court of Maine, 1867. 54 Me. 460.)

Trespass to recover damages to plaintiff's horse and wagon. It appeared that the plaintiff started with his brother to drive two heifers from his stable, in Waterville, to another town. As they were passing the defendant's premises, leading plaintiff's horse attached to his wagon, and driving the heifers, one of the latter turned and ran back. Thereupon the plaintiff hitched his horse to a shade tree, twenty-two inches in diameter, standing upon the defendant's premises but within the limits of the highway, and went back for his heifer. The defendant seeing plaintiff's horse so hitched, removed him and hitched him to a post a few feet from the tree. When the plaintiff was returning for his horse, some twenty minutes afterwards, he saw his horse running through the streets, with halter dragging, and the wagon broken. There was no evidence as to the precise manner in which the defendant hitched the horse, or as to how he was freed from the post.

Plaintiff moved to amend by adding a count alleging a wrongful taking by the defendant, a negligent use and control of said horse and wagon, whereby they became injured and unfit for use. The presiding Judge overruled the motion, and ordered a nonsuit, and the plaintiff alleged exceptions.

WALTON, J. Travellers have no right to hitch horses to shade trees. It is well known that most horses have a propensity to gnaw whatever they are hitched to. Hitching posts of the hardest wood have to be capped with iron or they are soon so badly gnawed as to be ruined. Too many beautiful shade trees, planted at great expense and watched for years with anxious care, have been destroyed by having horses hitched to them, not to know that the practice is exceedingly dangerous. When, therefore, the owner of a shade tree finds a horse hitched to it, he may immediately remove him to a place of safety, and such removal will not be a trespass.

In this case, the defendant found a horse hitched to one of his shade trees. He unhitched him and led him a few feet and hitched him to a post set in the ground on purpose to hitch horses to. This was not an act of trespass, and probably the plaintiff would not have complained of it, but for the fact that his horse afterwards broke loose from the post and ran away and broke his wagon. But there is no evidence that the defendant did not use ordinary care in hitching the horse, and the plaintiff's writ does not charge him with negligence; it simply charges him with trespass vi et armis, in taking and carrying away the horse, buggy, etc.

The presiding Judge, being of opinion that the action could not be maintained, ordered a nonsuit, to which the plaintiff excepted. We cannot doubt that the nonsuit was rightly ordered.

BRENDLIN v. BEERS.

(Supreme Court of New York, Appellate Division, 1911. 144 App. Div. 403, 129 N. Y. Supp. 222.)

The plaintiff, who was engaged in the retail tea and coffee business, employed salesmen to take orders and make deliveries, but collected the bills personally. For the purpose of collecting a bill from a customer, the plaintiff went to an apartment house owned by the defendant, entered the vestibule, and rang the customer's bell. Thereupon the janitor appeared and asked what he wanted. The plaintiff informed him that he came to collect a bill from one of the tenants, whom he named. The janitor then told him to go down stairs and make the collection by means of the dumb-waiter, at the same time saying that this was in accordance with the orders given him by the owner of the premises. The plaintiff refused to do this, and attempted to forcibly pass the janitor for the purpose of going to his customer's apartment. The janitor thereupon seized him, and they both fell to the floor, where they remained until separated. The plaintiff then left the premises and instituted this action in the City Court of the City of New York against the owner of the apartment house to recover damages for alleged assault and battery by the janitor. The complaint was dismissed at the close of plaintiff's case, and the plaintiff appealed to the Appellate Term, which reversed the judgment and ordered a new trial, and from such determination the defendant appeals to this court. The janitor was acting within the scope of his authority.[41]

McLAUGHLIN, J. I am of the opinion the complaint was properly dismissed. There is no evidence that the janitor used any more force than was necessary to prevent the plaintiff from entering the house after he had been told he could not do so. The alleged cause of action is predicated upon the proposition that the plaintiff had a legal right to enter the apartment house, notwithstanding the fact that the owner forbade his doing so. He had no such right, and, if he had, he could not resort to force to accomplish that purpose. When the owner of a house rents it to another, he thereby confers upon the tenant the right to use the building or such part of it as is rented, and this includes an easement of ingress and egress by the usual way. This easement, however, is for the tenant (Totten v. Phipps, 52 N. Y. 354; Doyle v. Lord, 64 N. Y. 432, 21 Am. Rep. 629), and third parties, except upon the invitation, either express or implied, of the

[41] The statement of facts has been abridged, and a part of the opinion, on another point, is omitted.

For the earlier history of the case, see Brendlin v. Beers (1910) 68 Misc. Rep. 310, 123 N. Y. Supp. 1062: "The complaint alleges that the plaintiff entered the premises on the invitation of one of the tenants for the purpose of collecting a bill due him." See, also, (1910) 140 App. Div. 914, 125 N. Y. Supp. 1114.

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landlord or tenant, have no more right to enter the building than they would if it were vacant. Here the record is absolutely barren of any evidence that the tenant had, either expressly or impliedly, invited the plaintiff to enter the building, contrary to the rules established by the landlord. The plaintiff, before the alleged assault was committed, had been informed, that he could not deliver goods or collect bills, except by means of the dumb-waiter, which was located in the basement. This was a rule which had been established by the landlord, and so far as appears was a reasonable one, and entirely satisfactory to the tenant. It certainly was one which, so far as this plaintiff was concerned, the defendant had a right to make, and when he was so informed, and told he could not enter for the purpose of collecting the bill, he should have left the building. When he thereafter attempted to force his way into the building, defendant had a right to prevent his doing so, by using force sufficient for that purpose. Foye v. Sewell, 21 Abb. N. C. 15; Breitenbach v. Trowbridge, 64 Mich. 293, 31 N. W. 402, 8 Am. St. Rep. 829; Parsons v. Brown, 15 Barb. 590. * * *

Reversed and judgment of City Court affirmed.

HANNABALSON v. SESSIONS.

(Supreme Court of Iowa, 1902. 116 Iowa, 457, 90 N. W. 93, 93 Am. St. Rep. 520.)

Action at law to recover damages for an alleged assault and battery. It appeared that in a war of words the defendant had pushed the plaintiff's arm back from the defendant's side of a partition fence. There was a verdict and judgment for defendant, and plaintiff appeals.

WEAVER, J. * * * It is also said that the court erred in instructing the jury that, if plaintiff leaned over the partition fence and attempted to interfere with the ladder, defendant had the right to use such force upon her as was reasonably necessary to cause her to desist, and to expel her from his premises. It is claimed that this instruction is wrong. * * * The general doctrine announced in the instruction is, in our judgment, correct. The mere fact that the plaintiff did not step across the boundary line does not make her any less a trespasser if she reached her arm across the line, as she admits she did. It is one of the oldest rules of property known to the law that the title of the owner of the soil extends, not only downward to the center of the earth, but upward usque ad cœlum, although it is, perhaps, doubtful whether owners as quarrelsome as the parties in this case will ever enjoy the usufruct of their property in the latter direction. The maxim, "Ubi pars est ibi est totum,"—that where the greater part is, there is the whole,—does not apply to the person of the trespasser, and the court and jury could therefore not be

expected to enter into any inquiry as to the side of the boundary line upon which plaintiff preponderated, as she reached over the fence top. It was enough that she thrust her hand or arm across the boundary to technically authorize the defendant to demand that she cease the intrusion, and to justify him in using reasonable and necessary force required for the expulsion of so much of her person as he found upon his side of the line, being careful to keep within the limits of the rule, "Molliter manus imposuit," so far as was consistent with his own safety. Under the instructions of the court, the jury must have found that defendant kept within the scope of his legal rights in this respect, and that the alleged assault was not established by the evidence.

The judgment of the district court is affirmed.[42]

GREGORY and Honour, his Wife, v. HILL.

(Court of King's Bench, 1799. 8 Term R. 299, 101 Reprint, 1400.)

The declaration stated, that the defendant, on, etc., at, etc., with force and arms, made an assault on the plaintiff's wife; and then and there beat, bruised, and wounded and ill-treated her; and then and there gave and struck her divers and repeated blows and strokes on divers parts of her body; and then and there, with great force and violence, several and repeated times, knocked her down upon the ground, whereby, etc.

To this the defendant pleaded, that before and at the time when, etc., he was possessed of a certain dwelling house, situate, etc., which he then inhabited with his family; and that the said Honour, before the said time when, etc., entered into the said house, and continued therein, without the licence and against the will of him the defendant; and then and there made a great noise and disturbance therein, and disturbed the defendant and his family in the said house; whereupon the defendant requested she would cease her said disturbance, and quietly depart out of the said house, which she refused to do; whereupon the defendant gently laid his hands upon her, to turn her out of the said house, as it was lawful for him to do, which is the same assaulting, beating, bruising, wounding, ill-treating, and striking the said Honour divers and repeated blows and strokes, and knocking her down upon the ground, whereof the plaintiffs have above complained against him; without this, that the defendant is guilty of the premises aforesaid, at the place aforesaid, or elsewhere, out of the said house at, etc., and this he is ready to verify; wherefore, etc.

To this plea the plaintiff demurred; and assigned for causes, that it alleges no sufficient justification or excuse, nor any denial of the

[42] Part of the opinion is omitted. The statement of the case is abridged.

battery, bruising, wounding and ill-treating of the said Honour, and striking the said blows and strokes, and knocking down of the said Honour upon the ground, in the introductory part of the said plea mentioned.

Marryat was to have argued in support of the demurrer, and Espinasse against it; but

THE COURT said the case was too plain for argument: that though a plea of molliter manus imposuit would justify what the law considers as an assault, such as might be necessary to have put the party out of the house, without outrage and violence, yet it never was considered as any answer to a charge, such as is contained in the declaration, of beating, wounding and knocking the party down; and they adverted to the case of Collins v. Renison, Sayer, 138, where, to an action of trespass, alleging that the defendant overturned a ladder on which the plaintiff was standing, and threw him from it on the ground, the defendant pleaded, that he was possessed of a garden; and that the plaintiff, against his will, set up a ladder there, and went up the ladder, in order to nail a board to the plaintiff's house: that the defendant forbade him, and requested him to come down; and that the plaintiff persisting in nailing the board, the defendant gently shook the ladder, and gently overturned it and gently threw the plaintiff from it on the ground, doing him as little damage as possible; which was holden bad on demurrer.

The defendant had leave to amend.

JOHNSON v. PATTERSON.

(Supreme Court of Errors of Connecticut, 1840. 14 Conn. 1, 35 Am. Dec. 96.)

The original action was trespass for killing and destroying ten hens and chickens, the property of the plaintiff. There was also a special count in case, for the same injury.

On the trial before the county court, the plaintiff offered evidence to prove, and claimed to have proved, the allegations in his declaration. The defendant claimed to have proved, by proper evidence introduced for that purpose, that he had been, for a long time, trespassed upon, by the plaintiff's fowls coming upon his land and destroying the seeds therein planted, and the vegetation thereon growing; and that to prevent a repetition and continuation of these trespasses, he prepared Indian meal mixed with arsenic, and scattered it upon his land, having first informed the plaintiff, that such a preparation would be placed there, and that the plaintiff must confine his fowls, or in some other way prevent them from trespassing upon his land again, otherwise they certainly would be poisoned; that after such notice, the meal so prepared was immediately scattered on the defendant's land; and the plaintiff still neglecting to confine his fowls, or to prevent their coming upon the defendant's premises, they trespassed

thereon, and while so trespassing ate the Indian meal so prepared, and some of them thereafter died in consequence of it; which, the defendant claimed, was the same injury for which the plaintiff sought to recover damages. And the defendant claimed, that if these facts were satisfactorily proved, he was justified; and that the court should so charge the jury. The defendant further claimed, that he might lawfully scatter poisoned meal upon his own premises, without any notice to the plaintiff.

The court charged the jury, that unless the defendant had given full and ample notice to the plaintiff, after the poisoned meal had been laid, the defendant could not be justified; and that no previous notice of his intention so to prepare and leave the poisoned meal, could be sufficient; and refused to charge the jury, that the defendant had a right to scatter it, without notice.

The jury returned a verdict for the plaintiff. The defendant filed a bill of exceptions to the charge, and thereupon brought a writ of error in the superior court; which was reserved for the consideration and advice of this court.

SHERMAN, J. This is not a case in which the destruction of the plaintiff's property resulted from acts done by the defendant, in the ordinary use of his own, without any intention to do the injury complained; as in Blythe v. Topham, Cro. Jac. 158, where a stray horse fell into a pit made by the defendant in the common; or as in Bush v. Brainard, 1 Cow. (N. Y.) 78, 13 Am. Dec. 513, where the cow of the plaintiff, trespassing on the defendant's land, was killed, by drinking maple syrup in the defendant's sugar works. In this case, the defendant scattered the poison in his enclosure with intent to kill the plaintiff's fowls, if they should again trespass on the place. Being of opinion that the notice given by the defendant immediately before the poisonous article was put on the land, was sufficient, the only important question is, whether the defendant, having given such notice, offered in evidence a sufficient justification. If the jury have found the verdict, which they ought ultimately to give, the final judgment must be affirmed, although the court erred in regard to the sufficiency of the notice.

By the settled principles of the English law, the degree of force, which may be employed in defending one's person or property, when present, is well defined, and admits of no controversy. It is entirely and exclusively defensive. If a man makes an assault on the person of another; or enters his house and refuses to go out, when ordered; or enters on his land; or in any way attempts a mere trespass on his property real or personal, by force; so much force as is necessary to repel or prevent injury, or remove the trespasser, may be employed. There is no doubt, that if A. is trespassing on the land of B., the latter, when present, by himself or his servants, may, after notice to depart, use such reasonable force as is necessary for his removal. He may use like force to expel another's beast from his land,

or he may seize and impound it. But he has no right, by the English law or our own, when present, in such a case, to destroy life, or inflict permanent injury, or use greater force than is necessary for removal or prevention. This is admitted. The right to kill a bull or other furious beast from which one's person is in present danger; or a dog chasing sheep or other animals of property, so that they are exposed to harm; or a dog seen at large, which is accustomed to bite mankind; is an exception to this rule. * * *

We cannot justify the defendant in committing the comparatively small trespass for which the plaintiff complains, upon any principles which have been admitted in this state, or which we can reconcile with those just provisions of the English common law, which we have already incorporated into our own, in regard to the means which may be used to prevent a simple trespass. The case does not involve the inquiry, what may lawfully be done to prevent a burglary or other felony. Cases of that character are governed by other and well settled rules.

We advise that the judgment of the county court be affirmed.[43]

McCHESNEY v. WILSON.

(Supreme Court of Michigan, 1903. 132 Mich. 252, 93 N. W. 627, 1 Ann. Cas. 191.)

[This case is given, ante, page 200.]

SKINNER v. WILDER.

(Supreme Court of Vermont, 1865. 38 Vt. 115, 88 Am. Dec. 645.)

Trespass quare clausum fregit, with a count in trover. Plea, the general issue. Upon the plaintiff's offer to prove the facts set forth in the opinion the court held pro forma that if these facts were proved the plaintiff would not be entitled to recover, and directed a verdict for the defendant, to which the plaintiff excepted.

PECK, J. In this case, it appears, that the plaintiff planted or set apple trees on his own land six feet from the division line between his land and the defendant's land; the trees grew until the roots extended into and the branches overhung the defendant's land. The

[43] Part of the opinion is omitted.

Accord: James v. Tindall (1913, Del. Super.) 88 Atl. 1003: D. shot and killed sixteen turkeys belonging to P., which at the time were in D.'s field. D. claimed that the killing of the turkeys was justified, because they were on his property destroying grain. But, said Rice, J., delivering the opinion: "We think it was neither necessary nor justifiable to kill the turkeys in the protection of grain. The defendant might have impounded the turkeys or brought an action for damages to his property, if any, caused by the fowls."

question is, whether the defendant is liable either in trespass on the freehold or in trover for picking, carrying away, and converting to his own use the apples growing on the branches overhanging his own land. Each party claims to be the sole owner of the fruit in question; the plaintiff upon the ground that he is the owner of the tree; the defendant upon the ground that the branches and the fruit thereon overhung his land, and that in virtue of his ownership of his land he owns everything above it.

It is true that whoever owns land owns above it to an indefinite height,—that is, he owns the space above, or rather has the right to appropriate it to his use, so that no one can lawfully obstruct it to his prejudice. But it is not true in all cases that the owner of land owns everything upon or above it, though placed there wrongfully by another. Certainly, in case one's personal property is wrongfully placed upon the land of another, the property in the thing is not thereby changed. The owner of the soil has his remedy by action for damages, and he may remove it; but he does not become the owner. If a man build a house on his own land, with the eaves and windows above the surface of the ground projecting over the land of the adjoining proprietor, he is liable to an action for damages, and generally, at least under some circumstances, the adjoining proprietor may remove the obstruction as a nuisance; but the material removed does not become his property. In order to justify the act of removal in such a case, he must allege that the obstruction was wrongfully encumbering his premises, and that he therefore removed it, doing no unnecessary damage. If it appear that he unnecessarily destroyed it, or appropriated it to his own use, the justification fails. This shows that the right of removal does not depend on ownership, but on his right to protect his own premises from invasion. The defendant therefore cannot be regarded as the owner of the apples merely because the branches on which they grew were wrongfully encumbering his ground. * * *

Judgment reversed, and new trial granted.[44]

TURNER v. MEYMOTT.

(Court of Common Pleas, 1823. 1 Bing. 158, 130 Reprint 64, 25 R. R. 612.)

Trespass for breaking and entering plaintiff's house. At the trial before the Lord Chief Baron, it appeared that the plaintiff had been tenant of the house to the defendant, from week to week; that he had received a regular notice to quit, but omitted to deliver up pos-

[44] Only so much of the case is given as relates to the one point.

Compare Dubois v. Beaver (1862) 25 N. Y. 123, 82 Am. Dec. 326 (action in trespass for cutting down a tree which stood in the line of the division fence between the plaintiff's and the defendant's land).

session, whereupon the defendant, at a time when nobody was in the house, broke open the door with a crow-bar, and other forcible applications, and resumed possession. Some little furniture was still in the house. The Chief Baron having said that the law would not allow the defendant thus forcibly to reinstate himself, the jury found a verdict for the plaintiff, whereupon,

Taddy, Serjt., obtained a rule nisi for a new trial, and

Pell, Serjt., now shewed cause against the rule: The question is, whether when a tenant refuses to deliver possession after a regular notice to quit, the landlord may make a forcible re-entry: but it cannot be permitted he should take the law into his own hands, and do that by violence which is usually accomplished by an action of ejectment. It is contrary to the first principles of law, that he should become judge in his own cause, and substitute his own strength for the ordinary civil process. If there had been resistance, and death had ensued, the crime of murder would have been committed; and it makes no difference that nobody was in the house, for the defendant could not ascertain that till he entered, and the plaintiff might have come up while the violence was in progress. Some furniture being in the house, this was not a case of vacant possession. The statute of 11 Geo. II., which gives the landlord double value where the tenant holds over, shews what is the appropriate remedy in such cases; but that statute would be useless if the landlord might thus take the law into his own hands. It might be urged that if the landlord had proceeded irregularly he would be liable in an indictment for a forcible entry, but his subsequent liability would not justify the previous wrong. In Taunton v. Costar [45] the entry made by the landlord's putting his cattle on the ground was entirely peaceable, and to that there could be no objection; so that Lord Kenyon's observation, "that if he dispossessed the tenant with a strong hand, he would be liable for a forcible entry, but there could be no doubt of his right to enter on the land at the expiration of the term," was uncalled for by the case before him, and leads to the absurdity that, in certain cases, a landlord may enter, and yet he shall be punished for the entry.

Dallas, Ch. J. The high respect which I entertain for my Lord Chief Baron has alone made me hesitate a single moment, and even now, perhaps, as the cause is to go down to be tried again, I ought not to express an opinion. The question is, whether a landlord has a right to enter in the manner the defendant did under the circumstances of this case, in which the tenant held over after his right to possession had ceased, and the landlord's right to enter had accrued. It must be admitted he had a right to take possession in some way; the case of Taunton v. Costar [45] is in point to shew that he might

[45] In Taunton v. Costar (1797) 7 T. R. 431, 4 R. R. 481, it appeared that a tenant from year to year, who was holding over after proper notice to quit, had distrained as damage feasant certain cattle which his landlord, after the expiration of the term, had peaceably put upon the premises.

enter peaceably, and that no ejectment was necessary. If he has used force, that is an offence of itself; but an offence against the public for which, if he has done wrong, he may be indicted.[46]

BURROUGH, J. I was once concerned at the Cockpit in a case similar to the present, where I used the same arguments as have now been urged by my brother Pell, but Lord Kenyon and Lord Alvanley, who were there, entertained no doubt, and said the landlord might enter. The rule for a new trial in this case must be made absolute.[47]

[46] The allusion is to the statute of 5 Rich. II, c. 7 (1381), the terms of which are given ante.

[47] In Beddall v. Maitland (1881) 17 Ch. Div. 174, 188, Fry, J., remarks as follows of this act of 1381 (5 Rich. II., c. 7), and its effect in England: "This statute creates one of the great differences which exist in our law between the being in possession and the being out of possession of land, and which gave rise to the old saying that possession is nine points of the law. The effect of the statute is this, that when a man is in possession he may use force to keep out a trespasser; but, if a trespasser has gained possession, the rightful owner cannot use force to put him out, but must appeal to the law for assistance. And the result of the cases appears to me to be this, that, inasmuch as the possession of the defendant was unlawful, he can recover no damages for the forcible entry of the plaintiff. He can recover no damages for the entry, because the possession was not legally his, and he can recover none for force used in the entry because, though the statute of Rich. II. creates a crime, it gives no civil remedy. But, in respect of independent wrongful acts which are done in the course of or after the forcible entry, a right of action does arise, because the person doing them cannot allege that the acts were lawful, unless justified by a lawful entry; and he cannot plead that he has a lawful possession. This, as it appears to me, is the result of the cases. The leading authority on the subject is Newton v. Harland (1840) 1 Scott, N. R. 474, a case in which a great difference of opinion was evinced between the learned Judges before whom it came. It was tried three times, first before Baron Parke, secondly before Baron Alderson, and thirdly before Mr. Justice Coltman, and came three times before the Court of Common Pleas in Banc, and it must, in my judgment, be taken as having settled the law on the subject. The action was brought to recover damages for an assault committed on the plaintiff's wife in the course of a forcible entry by the defendant into some apartments which had been occupied by the plaintiff as tenant to the defendant. The plaintiff remained in the apartments after the expiration of his term, and the defendant entered by force and turned out the plaintiff's wife and family, and in so doing assaulted the wife. The defendant pleaded that the acts were done in defence of his possession of the house, and the Court of Common Pleas held, contrary to the opinions of Baron Parke and Baron Alderson, that the defence failed, because the defendant's entry was unlawful. On the other hand, when the cause of action alleged is simply the eviction, no damages can be recovered. That is the result of Pollen v. Brewer (1859) 7 C. B. (N. S.) 371, and it is also clear from other cases. No doubt, in Harvey v. Brydges (1845) 14 M. & W. 437, Baron Parke and Baron Alderson expressed their disapproval of Newton v. Harland (1840) 1 Scott, N. R. 474, but they were the Judges who had tried that case, and whose opinions had been overruled by the Court in Banc. * * * I think that none of those cases in any way countervail Newton v. Harland (1840) 1 Scott, N. R. 474, which I take to have established this, that there is a good cause of action whenever in the course of a forcible entry there has been committed by the person who has entered forcibly an independent wrong, some act which can be justified only if he was in lawful possession. I come, therefore, to the conclusion that, in respect of his claim for damages for the forcible entry and eviction, the defendant cannot succeed, but that, in respect of his claim for damages for the injury done to his furniture, which the plaintiff could only justify by a lawful possession, the defendant is entitled to succeed."

The facts in Beddall v. Maitland which are material to the question may be

ALLEN v. KEILY.

(Supreme Court of Rhode Island, 1892. 17 R. I. 731, 24 Atl. 776, 33 Am. St. Rep. 905, 16 L. R. A. 798.)

Defendant's petition for a new trial.

TILLINGHAST, J. The only question raised by the exceptions taken to the rulings of the court in this case is, whether a landlord can forcibly eject a tenant from his premises, after the expiration of the tenancy, if the tenant holds possession, in good faith, under a color and reasonable claim of right. The defendant requested the court to charge the jury as follows, viz.:

First. "If the landlord enter and expel the occupant who wrongly holds a tenement, but uses no more force than is reasonably necessary to accomplish this, he will not be liable to an action of assault and battery, although, in order to effect such expulsion and removal, it becomes necessary to use so much force and violence as to subject him to an indictment at common law for a breach of the peace, or under the statute for making forcible entry."

Second. "If the plaintiff was in possession, but the rent was due more than fifteen days after demand, the plaintiff was a mere trespasser and could be expelled by the defendant."

These requests were refused by the court, and the following was charged in lieu thereof, viz.: "One in possession under a reasonable claim and color of right, honestly believing it, has a right to maintain his possession, and no personal violence can be used to expel him. * * * If Mrs. Baldwin was in possession under a claim of right, the defendant had no right to use any degree of personal force to expel plaintiff."

In explanation of its charge, and refusal to charge as requested, the court stated the law applicable to the case on trial to be as follows, viz.: "That an owner has the right to put an undoubted trespasser off his premises. But if one is out of possession of property held by

summarized thus: P.'s lease of D.'s house had expired. D. had demanded possession, but P. still continued to occupy the house. In this state of things, D., accompanied by several men, came to the house to demand immediate possession. He was admitted without resistance at the front door and told P. what he had come for. After some conversation they went out of the house together to look at the stock in the nursery. When they were outside, P. suddenly ran back into the house, and locked the door, and refused to allow D. to re-enter. D., with the assistance of his men, forcibly broke down the back door. No further resistance was offered. D. and his men turned P. and his family out, and also put his furniture out of the house. P. claimed a right to recover damages for the forcible entry and eviction and also a right to recover for the damage done to the furniture.

See also, as to the English doctrine, 18 Halsbury's Laws of England, 557–558 (1911): "Where the tenant fails to deliver up possession, the landlord is entitled to re-enter and take possession, subject only to certain statutory restrictions. Thus he can re-enter where the tenant has abandoned possession, or where he can effect the entry peaceably; and even if he enters forcibly, and is thus liable to criminal proceedings under the statutes, yet the tenant has no civil remedy against him in respect of the entry, though the tenant can recover damages for injury to himself, or his family, or his property in the course of the entry. If, however, the entry is peaceable, the landlord is not liable for damage to goods which are unlawfully on the premises."

another under a color and reasonable claim of right, he has no right to use personal violence to regain possession. Hence, if Mrs. Baldwin was in possession under a fair claim of right to remain a tenant, or under her husband's tenancy, on the ground that the defendant had money belonging to one of them in his possession, more than the amount of rent due, on account of which her occupation had been recognized, he had no right to use personal violence to eject her."

We think this was error. The question at issue, in so far as the tenancy in question was concerned, was, whether or not it had been terminated. If it had, the plaintiff was a mere trespasser, and the defendant had the right to use so much force as was reasonably necessary to expel her. If the tenancy had not been terminated, she was not a trespasser, and the defendant had no right to interfere with her. But the question as to whether Mrs. Baldwin was entitled to possession was a mere question of right, depending upon the fact as to whether the tenancy had been legally terminated, and not upon the belief of the tenant as to her right to remain. That is to say, the mere fact that a person honestly believes that he is lawfully in possession of a tenement or messuage does not prevent him from being a trespasser, and liable to be dealt with as such. Possession of real estate is either rightful or wrongful. And the right to the possession thereof, like the right of ownership, is to be determined solely by the evidence submitted, and the law applicable thereto, and is not dependent upon, or in any degree affected by, the belief of the claimant as to such right. If this were not so, it would be in the power of any one in the wrongful possession of real estate, who believes his possession to be rightful, to compel the person who is legally entitled to the possession thereof to resort to an action at law to recover the same, thus practically nullifying the right which the law confers upon the owner to take forcible possession by expelling the trespasser.

Nor do we see that the distinction made by the court, between "an undoubted trespasser" and one who holds possession "under a color and reasonable claim of right," changes the legal aspect of the case. Mrs. Baldwin was either a trespasser or she was not. If she was, neither her belief that she was not, nor the fact that she held "under a color and reasonable claim of right," was of any importance. The only question of importance concerning this branch of the case was, whether she was in fact a trespasser. And this was a question to be determined by the jury upon all the proof bearing upon that point.

The doctrine laid down by this court in Souter v. Codman, 14 R. I. 119, 51 Am. Rep. 364, and subsequently followed in Freeman v. Wilson, 16 R. I. 524, 17 Atl. 921, is in harmony with the current of both the American and English decisions as to the right of a landlord to use physical force in expelling a tenant whose term has ex-

pired; and we see no reason to overrule or modify the opinions therein expressed. See, also, 2 Taylor's Landlord and Tenant (8th Ed.) §§ 531, 532, and cases cited.

We are therefore of the opinion that the court erred in refusing the defendant's requests to charge, and in charging to the contrary, as above set forth.

Petition granted.

BLISS v. BANGE.

(Supreme Court of Errors of Connecticut, 1826. 6 Conn. 78.)

This was an action of trespass quare clausum fregit, brought on the statute directing proceedings against forcible entry and detainer, demanding treble damages.

The declaration stated, that on the 9th of December, 1823, the plaintiff was in the actual and peaceable possession of the locus in quo, when the defendant, with force and strong hand, entered upon the same, and broke open divers doors of the plaintiff's barn thereon standing, and broke to pieces divers locks, staples and hinges of said doors, and ejected the plaintiff, and kept him from the possession, use and occupation of the premises, with other enormities; and that the plaintiff, on the same day, pursuant to the statute, prayed out a writ of forcible entry and detainer against the defendant, to recover possession of the premises; and that such writ being legally served and returned, a jury, legally empannelled, found, by their verdict, that the defendant did, by force and strong hand, enter upon the premises, and detain the same, which verdict was accepted by the court, who thereupon rendered judgment of restitution of the premises. The defendant in his plea, admitting that he had entered upon the premises, and done the acts complained of, attempted to justify such entry and the commission of such acts, by command, and as the servant of Alice Lawrence, in whom the freehold of the premises then was. This plea was traversed by the plaintiff; and the jury found the facts alleged in it to be true. The plaintiff then filed his motion, that judgment might be rendered in his favor veredicto non obstante; and the question arising on such motion, was reserved for the advice of this court.

DAGGETT, J. There can be no doubt but that this motion ought to prevail, if an action of trespass can be maintained, under the statute, where the plaintiff, being in possession, has been forcibly ejected from lands or tenements, by the true owner: because enough is admitted, on that supposition by this plea, to shew a clear cause of action. Does, then, the statute "directing proceedings against forcible entry and detainer," by the fifth section, give the plaintiff an action of trespass?

It is urged, by the counsel for the defendant, that the English statute, and that of the state of New York, are similar to that of Con-

necticut; and that their courts and commentators have established the contrary doctrine, declaring, that when it appears on trial, that the plaintiff had no title, an action of trespass cannot be sustained. I decline an examination of these positions, because in my judgment, our statute is perfectly unequivocal. It gives the action of trespass, in so many words, to the party aggrieved; and the party aggrieved is, by irresistible implication, the person forcibly ejected. The statute designedly excludes the examination and decision of the question of title, and, on principles of public policy, prohibits forcible entries and detainers, authorizes the process of restitution, and the action of trespass.

I am not at liberty to disobey a plain legislative enactment of ancient date, and carefully revised, as late as 1821, to which there is no constitutional objection. I would, therefore, advise the superior court, that judgment be entered up for the plaintiff; and that damages be assessed by that court.

The other Judges were of the same opinion.

Judgment for the plaintiff.[48]

[48] The arguments of counsel are omitted. On the owner's invasion of a possession without right, see 19 Cyc. 1132.

See, also, 24 Cyc. 1394 et seq., and Dec. Dig. Key-No. "Landlord and Tenant," § 277(3). Compare Domhoff v. Paul Stier, Inc. (1913) 157 App. Div. 204, 141 N. Y. Supp. 825: "Trespass is an injury to possession, and action therefor may be maintained by any one in actual possession of land (Holmes v. Seely [1838] 19 Wend. [N. Y.] 509; Van Brunt v. Schenck [1814] 11 Johns. [N. Y.] 377), and title is unnecessary (38 Cyc. 1004; Oglesby v. Stodghill [1857] 23 Ga. 590; Price v. Brown [1886] 101 N. Y. 669, 670, 5 N. E. 434). Whether plaintiff was a tenant or a subtenant, whether he was liable to be dispossessed for holding over after expiration of his term, or for failure to pay rent, he was in actual possession of at least a portion of the farm, and defendant had no right to regain possession of such premises by force and violence. Bristor v. Burr (1890) 120 N. Y. 427, 24 N. E. 937, 8 L. R. A. 710; Michaels v. Fishel (1902) 169 N. Y. 381, 389, 62 N. E. 425; Norton v. Arvernam Co. (1897) 14 App. Div. 581, 43 N. Y. Supp. 1099." Per Burr, J.

And see Judy v. Citizen (1884) 101 Ind. 18, 20: "The statute providing a remedy for a forcible entry was designed to protect persons in the actual peaceable possession of premises, under a claim of right, from forcible eviction or unlawful invasion, whether such claim might in the end turn out to be well founded or not. Cooley, Torts, 323. Where a person is thus in actual peaceable possession, and such possession is forcibly and violently invaded, even though it be by the owner, who in the end has the right of possession, such person is entitled to the remedy provided by this statute. In such case, proof of actual, exclusive, peaceable possession under a claim of right will support the 'right to possession,' and entitle the person evicted to restitution. 'Presumptively, a peaceable possession is always rightful.' Cooley, Torts, 326. If this is not the proper construction of the statute, then every tenant holding over, and every other person in actual possession, whose claim turns out not to be well founded, would be at the mercy of the landlord or other person having the better legal right, and might be expelled with whatever violence the owner might reasonably think fit to employ, thus substituting force and violence in the place of the orderly methods of the law. To prevent this was, as we have seen, the very purpose for which the forcible entry and detainer act was first enacted. Under this statute, the possession cannot be changed against the person who actually has it, under claim of right, without the intervention of legal procedure." Per Mitchell, J.

GREELEY v. SPRATT.

(Supreme Court of Florida, 1883. 19 Fla. 645.)

This was a proceeding by Spratt, under the statute relating to forcible entry and unlawful detainer. The plaintiff, praying for restitution and damages, alleged "that Jonathan C. Greeley hath forcibly turned him out of and unlawfully and against his consent withholds from him the possession of a certain room, to wit, the room in the three-story brick building situate in the city of Jacksonville in the said county in the southwest corner of Pine and Forsyth streets immediately to the right of the staircase leading to the third story of said building."

Spratt testified that he took possession of the room in question about the first day of July, 1880, as his own property, to be used as a law office, and put in his office furniture, and was there several weeks; that he left one evening, having locked the door; that he returned, the next morning, as usual, and found his office furniture out, and a colored man there, and a white man, Warriner, taking the lock from the door; that witness was denied permission to enter; that when he offered to open the door something was said by persons inside; that witness then said, "What does this mean?" and that from the words in reply, he understood that he could not come in without using force. The rental value of the room was about $15 a month. On cross-examination defendant's counsel, to show that Spratt was simply an intruder or trespasser, asked him, "By what means did you originally get possession of this room?" The question was objected to as immaterial, and the objection was sustained, to which ruling the defendant excepted. The judge charged the jury thus:

"The peaceable possession and the forcible entry are the questions at issue. The law forbids forcible entry, whether the party has title or not, and there can be no inquiry into the title of the property. If the party entering has right to the possession he must resort to the authority of law to obtain such possession. * * * If the jury find from the evidence that the plaintiff, on or about the first day of July, 1880, was in the possession of the room described in the complaint, using the same for his office, and that while so possessed the defendant Greeley, by himself or his agent, instructed for that purpose, and whether said Greeley was present or not, by the use of a skeleton key opened the door and entered said room in the night time, and in the absence of the plaintiff, and turned out of said room the office furniture of said room so belonging to the plaintiff, and resisted the said plaintiff the next morning by closing the door upon him, and kept possession of said room until and at the exhibition of this complaint, then the jury must find for the plaintiff."

Both these charges were excepted to by the defendant. There was a verdict for plaintiff in statutory form and damages assessed at $224. From a judgment upon this verdict the defendant appeals.

RANDALL, Ch. J.[49] * * * The third ground of error is the ruling of the court in excluding the question by what means the plain-

[49] The statement of facts is abridged. A part of the opinion is omitted.

tiff obtained possession of the room, which question was asked for the purpose of showing that the plaintiff was an intruder or trespasser. The statute provides that no person shall enter into lands or tenements but in case where entry is given by law, nor shall any person, where entry is given by law, enter with a strong hand, but only in a peaceable, easy and open manner. If any person shall enter in case where entry is not given by law, or shall enter any lands or tenements with strong hand, even in case where entry is given by law, the person turned out or deprived of possession by such unlawful or forcible entry, by whatever right or estate he held or claimed such possession, shall at any time within three years be entitled to the summary remedy provided. Chap. 1630, Act of 1868. The complaint was made under the provisions of this act.

It is not pretended that the plaintiff was a loafer or a vagabond, intruding upon the house or premises of another in an unseemly or offensive manner, for the testimony shows that the plaintiff was peaceably occupying the room in question as a law office with his books and furniture when he was dispossessed by putting his property out in the night and forbidden to enter, and by force prevented from entering. The statute contemplates that a party so having peaceable possession shall not be thus forcibly ejected even where entry is given by law; that is, where the right to enter and possess has been determined by law, but only in a "peaceable and open manner." The right to enter, based upon a paramount title or interest, cannot be tried in this proceeding. * * *[50]

[50] Compare Schwinn v. Perkins (1910) 79 N. J. Law, 515, 78 Atl. 19, 32 L. R. A. (N. S.) 51, 21 Ann. Cas. 1223 ("There may be possession without occupancy, as where a man's servant is in the actual occupancy of the property, holding possession for him, or where a man has temporarily gone out of his house, leaving no one in charge, but still having legal possession; and there may be a case of occupancy without possession, as where, in a man's absence, a mere stranger, visitor, or trespasser goes into his house without claim of right." Per Swayze, J.); Hodgkins v. Price (1882) 132 Mass. 196, 198 ("The process is for the purpose of restoring one to a possession which has been kept from him by force. It is not a process against a party who resists the right of possession by force, but it is for an interference with an actual possession. The claim that this plaintiff was ever in possession of this estate is simply preposterous. He had no more possession of it than he would have had of one of the rooms of the building if he had gone into such room and said to the occupant of it: 'I have come to take possession of this room. Here I am, in possession; you will please to go out. I propose to hold this by force, and if you attempt to remove me by force, then the weaker of us on being ejected will bring an action of forcible entry and detainer against the other.' But to make this illustration precisely analogous, we will say that this party, instead of calling in at the place of business when the tenant was there, took the opportunity while he had gone to dinner to clamber through the transom-window over his door, and in the mode before suggested salute him upon his return. It would be a disgrace to the law, and to all concerned in the administration of it, to say that a possession thus forcibly obtained, before the business hours of the day, from one who is in the actual, peaceable occupation of the premises, is to be protected and restored by the law when the actual occupant shall resume his occupation." Per Lord, J.).

Compare, also, Page v. Dwight (1897) 170 Mass. 29, 48 N. E. 850, 39 L. R. A. 418: D. was entitled to possession of premises occupied by P. under pos-

That portion of the charge excepted to, viz.: "If the party entering has the right to the possession he must resort to the authority of law to obtain such possession," is alleged to be erroneous and misleading, because it would call upon the jury to find for the plaintiff although defendant did not enter by force. But the judge in the same paragraph charged the jury that "the peaceable possession and the forcible entry are the questions at issue." The proposition of the charge was that if the plaintiff was in peaceable possession the defendant could not resort to force to oust him except by process of law; that force without process tended to a breach of the peace. The statute itself says that no person shall invade the possession of another except where entry is given by law, and that in a peaceable, easy and open manner and without a strong hand.

We find no substantial objection to the charge of the court. It submitted the whole issue of fact to the jury upon the testimony and assumed nothing as to the facts.

There was testimony given by defendant which, by itself, would go to show that he had not directed Warriner to remove plaintiff or his goods from the premises. Yet Warriner was in defendant's service at the time, and he swears that every thing he did was by defendant's direction. The jury have decided as to the facts and the liability of the defendant for the acts of Warriner.

session lawfully obtained but unlawfully withheld; D. puts P. out by force. Held, that under the Massachusetts statute (Pub. St. c. 175) P. cannot recover possession. "Upon the whole," said Barker, J., "we think that the better view is that the legislature, after making a fresh trial of the ancient system under which a possession ended by force might be restored without regard to title or right of possession, thought it better to provide that those only who had a right of possession should be put in by the courts, and to leave to the criminal law the acts of one who, being entitled to possession, takes it by prohibited force."

The statute of 1381 (5 Rich. II., c. 7) and its supplementary acts have had a substantial survival in many states of the Union, either as part of their inheritance from the mother country or by statutory adoption. See 19 Cyc. 1114, and notes 26–30. On the effect of the enactment, however, the states are not at one. See 24 Cyc. 1394–1395, and notes 90–99, and the notes to Wilson v. Campbell (1907) in 8 L. R. A. (N. S.) 426, and to Schwinn v. Perkins (1910) 32 L. R. A. (N. S.) 51. "In this country," says Professor Burdick, "neither the statutes nor the decisions are uniform upon these points. Some states punish forcible entry and detainer as crimes, but do not give a civil action against one guilty of these offenses, if he was entitled to possession, either for trespass quare clausum fregit, or for damages to the wrongful occupant. But, in most jurisdictions, even the owner of land who is entitled to immediate possession is not allowed to take the law into his own hands, and gain possession by the exercise of force which amounts to a breach of the peace. If he acquires possession in that way, he may be compelled to restore it and pay damages for trespass upon the property, as well as for injuries inflicted upon the persons of the wrongful occupants who resist the wrongful entry. If, however, he can gain possession peaceably, he may resort to force to retain it, without being chargeable with wrongful detainer, and he may resort to force to eject a mere trespasser." Burdick on Torts, 222 (3d Ed., 1913).

(E) Lawful Arrest

(a) Under Judicial Process

And a difference was taken when a Court has jurisdiction of the cause, and proceeds inverso ordine or erroneously, there the party who sues, or the officer or minister of the Court who executes the precept or process of the Court, no action lies against them. But when the Court has not jurisdiction of the cause, there the whole proceeding is coram non judice, and actions will lie against them without any regard of the precept or process, and therefore the said rule cited by the other side, sc. "Qui jussu judicii aliquod fecerit (but when he has no jurisdiction, non est judex) non videtur dolo malo fecisse, quia parere necesse est," was well allowed, but it is not of necessity to obey him who is not Judge of the cause, no more than it is a mere stranger, for the rule is, "judicium a non suo judice datum nullius est momenti." And that fully appears in our books; and therefore in the case betwixt Bowser and Collins in 22 E. 4, 33, b. there Pigot says, if the Court has not power and authority, then their proceeding is coram non judice: as if the Court of Common Pleas holds plea in an appeal of death, robbery, or any other appeal, and the defendant is attainted, it is coram non judice quod omnes concesserunt. But if the Court of Common Pleas in a plea of debt awards a capias against a duke, earl, etc., which by the law doth not lie against them, and that appears in the writ itself; and if the sheriff arrests them by force of the capias, although the writ be against law, notwithstanding, inasmuch as the Court has jurisdiction of the cause, the sheriff is excused: and therewith agrees 38 H. 8, Dy. 60, b.

The Case of the Marshalsea (1613) 10 Co. Rep. 68b, 76b.

O'SHAUGNESSY v. BAXTER.

(Supreme Judicial Court of Massachusetts, 1876. 121 Mass. 515.)

Gray, C. J. This is an action of tort against a constable of Boston for an assault and false imprisonment. The material facts of the case, as they appear from the statements in the report and the findings of the jury, are as follows: This plaintiff, whose real name is John O'Shaugnessy, was sued by the name of John Shaugnessy, a name by which he was commonly known, upon a promissory note signed by another person of that name, and not by himself. The person who made the writ knew that the plaintiff was not the person who signed the note, but intended to have the writ served upon him, and it was served upon him by another constable, and entered in the court hav-

ing jurisdiction thereof, which rendered judgment, upon his default, for the plaintiff in that action, and issued execution accordingly, in due form of law. The execution, with the proper certificates, was delivered to this defendant, with instructions to take this plaintiff and commit him to jail. The defendant did so, in obedience to such instructions, and in good faith, after ascertaining that the original writ had been served upon the plaintiff, but knowing that he was not the person who signed the note upon which the action was brought.

On this state of facts, the plaintiff, being the party against whom the writ was intended to be made, and on whom it was actually served, was the party defendant therein, and the person against whom the judgment was rendered and the execution issued. Whatever remedies he might have to relieve him from the judgment and execution as obtained by fraud, or to recover damages against the person who fraudulently abused the process of the court, the officer, acting in good faith, had the right to rely for his protection upon the process put into his hands, and was not bound to go behind that process, and to assume the risk of determining the question whether the plaintiff really signed the note upon which the action was brought, or the truth of any extrinsic fact which would exempt him from being arrested or imprisoned upon the execution. Laroche v. Wasbrough, 2 T. R. 737, 739; Magnay v. Burt, 5 Q. B. 381; s. c. Dav. & Meriv. 652; Wilmarth v. Burt, 7 Metc. 257; Twitchell v. Shaw, 10 Cush. 46, 57 Am. Dec. 80; Underwood v. Robinson, 106 Mass. 296, and other cases there cited. In the words of Chief Justice Parker, "The difficulty in such cases is, to ascertain whether the judgment was or was not, in fact, rendered against the person who is taken in execution; for if it was, although the person was mistaken, yet the officer would be justified." Hallowell & Augusta Bank v. Howard, 14 Mass. 181, 183.

The fact that this plaintiff was commonly known by the name by which he was sued and arrested, distinguishes the case from those in which one man has been arrested upon a writ against another of a different name. See Cole v. Hindson, 6 T. R. 234; Finch v. Cocken, 5 Tyrwh. 774, 785; s. c. 3 Dowl. 678, 686; Griswold v. Sedgwick, 1 Wend. (N. Y.) 126, 132; Langmaid v. Puffer, 7 Gray, 378.

Judgment on the verdict for the defendant.[51]

[51] Compare Whitten v. Bennett (1896 C. C.) 77 Fed. 271 (B., while state's attorney, drew an indictment charging P., together with S., with murder in the second degree. By mistake and clerical error, the indictment against P. was marked by the grand jury as "a true bill," although the grand jury knew that there was no case against P. and did not intend to indict him. B. knew of all this, and that there was no evidence against P., but nevertheless used the indictment to obtain a requisition against P., who was in another state, and sent D. to arrest him under the requisition. D. was instructed to bring P. with all speed, so as to prevent his obtaining a habeas corpus. The process under which D. acted in arresting P. was regular in form, and the record showed a proper indictment).

PIPER v. PEARSON.

(Supreme Judicial Court of Massachusetts, 1854. 2 Gray, 120, 61 Am. Dec. 438).

Action of tort against a justice of the peace, residing in Dracut, for assault, battery and false imprisonment. Answer, that the plaintiff was imprisoned in the county jail, in due process of law, for a contempt of court.

At the trial, the plaintiff gave in evidence copies, certified by the defendant, of the following papers: A complaint made to the defendant, charging John Russ with an unlawful sale of intoxicating liquors in Lowell, and a warrant issued thereon for the arrest of Russ; a mittimus issued by the defendant for the commitment of the plaintiff to prison for refusing to testify on the trial of said complaint before the defendant at Lowell, concerning sales of intoxicating liquors, made by Russ, and known to the witness; and a subsequent judgment of acquittal of Russ by the defendant. By St. 1848, c. 331, § 4, the exclusive jurisdiction of all crimes and offences committed within the district of Lowell is vested in the police court of Lowell.

The defendant relied, for his justification, on the record of the judgment; and contended that no sufficient proof had been adduced to show that his acts were without jurisdiction and void. But Metcalf, J., ruled that the record and mittimus constituted no defence. And to this ruling the defendant, being found guilty, alleged exceptions.

BIGELOW, J. The decision of this case depends on the familiar and well settled rule concerning the liability of courts and magistrates exercising an inferior and limited jurisdiction, for acts done by them, or by their authority, under color of legal proceedings.

One of the leading purposes of every wise system of law is to secure a fearless and impartial administration of justice, and at the same time to guard individuals against a wanton and oppressive abuse of legal authority. To attain this end, the common law affords to all inferior tribunals and magistrates complete protection in the discharge of their official functions, so long as they act within the scope of their jurisdiction, however false and erroneous may be the conclusions and judgments at which they arrive. But on the other hand, if they act without any jurisdiction over the subject matter; or if, having cognizance of a cause, they are guilty of an excess of jurisdiction; they are liable in damages to the party injured by such unauthorized acts. In all cases therefore where the cause of action against a judicial officer, exercising only a special and limited authority, is founded on his acts done colore officii, the single inquiry is whether he has acted without any jurisdiction over the subject matter,

or has been guilty of an excess of jurisdiction. By this simple test, his legal liability will at once be determined. 1 Chit. Pl. (6th Am. Ed.) 90, 209–213; Beaurain v. Scott, 3 Campb. 388; Ackerley v. Parkinson, 3 M. & S. 425, 428; Borden v. Fitch, 15 Johns. (N. Y.) 121, 8 Am. Dec. 225; Bigelow v. Stearns, 19 Johns. (N. Y.) 39, 10 Am. Dec. 189; Allen v. Gray, 11 Conn. 95. If a magistrate acts beyond the limits of his jurisdiction, his proceedings are deemed to be coram non judice and void; and if he attempts to enforce any process founded on any judgment, sentence or conviction in such case, he thereby becomes a trespasser. 1 Chit. Pl. 210; Bigelow v. Stearns, 19 Johns. (N. Y.) 39, 10 Am. Dec. 189. (See Clarke v. May, 2 Gray, 410, 61 Am. Dec. 470.)

These well settled principles leave no room for question as to the liability of the defendant in this action. As a justice of the peace for the county of Middlesex, he had no jurisdiction whatever to try the complaint against Russ. It was for an offence committed "within the district of Lowell," of which the police court of the city of Lowell had exclusive jurisdiction by St. 1848, c. 331, § 4, and which the justice of said court was legally competent to try and determine. Commonwealth v. Emery, 11 Cush. 406, 412. The defendant therefore acted wholly without legal authority, and can show no legal justification under any judicial record.

It was urged on the part of the defendant, that he had authority to punish the plaintiff for contempt, although he had no jurisdiction to try the principal case before him. But the answer to this suggestion is obvious. The power to punish for contempt is only incidental to the more general and comprehensive authority conferred on a magistrate, by which he is empowered to exercise important judicial functions. It is to enable him to try and determine causes without molestation, and protect himself from indignity and insult, that the law gives him authority to punish such disorderly conduct as may interrupt judicial proceedings before him or be a contempt of his authority or person. Rev. St. 1836, c. 85, § 33. But it is only when he is in the proper exercise of his judicial functions, that this power can be exercised. If he has no jurisdiction of a cause, he cannot sit as a magistrate to try it, and is entitled to no protection while acting beyond the sphere of his judicial power. His action is then extra-judicial and void. His power and authority are commensurate only with his jurisdiction. If he cannot try the case, he cannot exercise a power which is only auxiliary and incidental. There can be no contempt, technically speaking, where there is no authority. In the case at bar, the defendant had no more power to entertain jurisdiction of the complaint against Russ than any other individual in the community. Although he acted through mistake, it was nevertheless a usurpation. The plaintiff therefore could not have been guilty of contempt toward the defendant in his capacity as a magistrate, while

trying a cause of which he had no jurisdiction; and the commitment therefor was unauthorized and void.

It was suggested by the counsel for the defendant, that there was nothing in the case from which it could be properly inferred that the offence with which Russ was charged was actually committed in the city of Lowell; and that as the defendant, by virtue of his authority as a justice of the peace, had cognizance of offences committed elsewhere in the county of Middlesex, which he might well hear and determine in the city of Lowell, the presumption was that he was acting rightfully, till the contrary was shown. But there are two decisive answers to this argument. In the first place, the record on its face sets out an offence committed in the city of Lowell. That being a district set apart by statute, in which the police court has exclusive jurisdiction of criminal offences usually cognizable by magistrates, and the offence being charged as having been committed in Lowell, the record legally imports that it was committed there. 1 Stark. Crim. Pl. (2d Ed.) 62; Bac. Ab. Indictment, G, 4.

But in the next place, it was for the defendant to show a complete justification for the alleged trespass; if the record left it doubtful whether he had jurisdiction of the offence, it would not avail as a defence to the action. There is a marked distinction in this respect between courts of general jurisdiction and inferior tribunals having only a special or limited jurisdiction. In the former case, the presumption of law is that they had jurisdiction, until the contrary is shown; but with regard to inferior courts and magistrates, it is for them, when claiming any right or exemption under their proceedings, to show affirmatively that they acted within the limits of their jurisdiction. Peacock v. Bell, 1 Saund. 74, and notes; Mills v. Martin, 19 Johns. (N. Y.) 33, 34. The record in the present case prima facie shows a want of jurisdiction in the defendant.

Exceptions overruled.

SUMNER v. BEELER.

(Supreme Court of Indiana, 1875. 50 Ind. 341, 19 Am. Rep. 718.)

Action to recover damages for an illegal arrest, on charge of being found drunk, under the ninth section of the Baxter bill of 1873. The defendants answered in justification under the ninth section of this law. A demurrer for want of facts was sustained, and this ruling is assigned for error.

PETTIT, C. J. This section has been held to be unconstitutional, or, in other words, that it is not law. State v. Young, 47 Ind. 150. No question in law is better settled, and this is admitted by the counsel for the appellants in their brief, than that ministerial officers and other persons are liable for acts done under an act of the legislature which is unconstitutional and void. All persons are presumed to know the

law, and if they act under an unconstitutional enactment of the legislature, they do so at their peril, and must take the consequences.

There was no error in sustaining the demurrer to this paragraph of the answer.[52]

GIFFORD v. WIGGINS.

(Supreme Court of Minnesota, 1892. 50 Minn. 401, 52 N. W. 904, 18 L. R. A. 356.)

Action for false imprisonment. Judgment for defendant. Plaintiff appeals.

MITCHELL, J. The material allegations of the complaint may be summarized as follows:

The defendant made a complaint under oath to a justice of the peace in the village of Wilmar that plaintiff had violated the provisions of an ordinance of that village prohibiting peddling any goods, wares, merchandise, or other articles not manufactured or grown within the county of Kandiyohi without first having obtained a license therefor, and praying that the plaintiff might be arrested and dealt with according to law; that upon this complaint the justice issued a warrant, upon which the plaintiff was arrested and tried, and, upon the testimony of the defendant, adjudged guilty of a violation of the ordinance; that plaintiff was thereupon committed to jail, and there imprisoned until discharged on a writ of habeas corpus, on the ground that the ordinance in question was unconstitutional and void. There is no allegation that the complaint was made maliciously and without probable cause; hence the facts stated do not constitute a cause of action for malicious prosecution.

If the complaint states a cause of action at all, it must be for false imprisonment. It is not alleged that defendant participated or took part in plaintiff's arrest, or officiously interfered therewith by giving orders or directions to the officers or otherwise. It is true that in the complaint to the justice he prayed that the plaintiff might be arrested and dealt with according to law, but this is what is done, impliedly at least, in every case where a complaint is made to a magistrate or court charging any person with a violation of public law. The allegation that the plaintiff was convicted on the testimony of the defendant adds nothing to the complaint. By testifying as witness, certainly defendant did nothing that rendered him liable unless he testified false-

[52] Accord: Barling v. West (1871) 29 Wis. 307, 9 Am. Rep. 576; Campbell v. Sherman (1874) 35 Wis. 103, 110: "How can it be expected, it is asked, that a mere ministerial officer could decide such a question, and then find out that his process was void for want of jurisdiction in the court which issued it? The maxim ignorantia juris non excusat—ignorance of the law, which every man is presumed to know, does not afford excuse—in its application to human affairs frequently operates harshly; and yet it is manifest that if ignorance of the law were a ground of exemption, the administration of justice would be arrested, and society could not exist." Per Cole, J.

For modifications and limitations of this principle, see Brooks v. Mangan (1891) 86 Mich. 576, 49 N. W. 633, 24 Am. St. Rep. 137; Trammell v. Russellville (1879) 34 Ark. 105, 36 Am. Rep. 1; Tillman v. Beard (1899) 121 Mich. 475, 80 N. W. 218, 46 L. R. A. 215; Bohri v. Barnett (1906) 144 Fed. 389, 75 C. C. A. 327.

ly, which is not charged. It is alleged that the confinement of plaintiff was "on account and by reason of the procurement and direction of the defendant," but, in the absence of any allegations of specific facts, this must be construed as having reference to the act of making the complaint upon which the warrant was issued. It is also alleged that this confinement was wrongfully, maliciously, and unlawfully procured by defendant, and that said confinement was without probable cause; but this has reference to and is qualified by what immediately follows, to wit: "In this, that said ordinance was and is wholly void and unconstitutional." Hence, after stripping the complaint of all mere verbiage, we have a case where all that it is alleged that defendant did was to lay before the justice the complaint upon which the justice issued the warrant on which the plaintiff was arrested; and the sole ground upon which defendant is claimed to be liable is that the ordinance under which the proceedings were instituted was void. There is no doubt of the invalidity of the ordinance as "class legislation," for we have not yet arrived at the point where it is permissible to protect "home industries" under the guise of an exercise of the police power. It is to be observed that the object of this prosecution was not the enforcement of any private right of the defendant. He did not make the complaint on his own account, or for his own private benefit. The complaint was for an alleged violation of public law, in which he represented, not himself, but the public,—an important distinction, which courts have sometimes overlooked, and which counsel for plaintiff seems to have failed to notice in the citation of cases. It seems to be settled by an almost unbroken line of authorities that if a person merely lays a criminal complaint before a magistrate in a matter over which the magistrate has a general jurisdiction, and the magistrate issues a warrant upon which the person charged is arrested, the party laying the complaint is not liable for an assault and false imprisonment, although the particular case may be one in which the magistrate had no jurisdiction. The law on this subject was as well stated as anywhere by Lord Abinger in West v. Smallwood, 3 Mees. & W. 417, as follows: "Where a magistrate has a general jurisdiction over the subject-matter, and a party comes before him and prefers a complaint, upon which the magistrate makes a mistake in thinking it a case within his authority, and grants a warrant which is not justifiable in point of law, the party complaining is not liable as a trespasser, but the only remedy against him is by an action upon the case if he has acted maliciously." See, also, Leigh v. Webb, 3 Esp. 165; Carratt v. Morley, 1 Q. B. 18; Murphy v. Walters, 34 Mich. 180; Von Latham v. Libby, 38 Barb. (N. Y.) 339; Barker v. Stetson, 7 Gray (Mass.) 53, 66 Am. Dec. 457; Langford v. Railway Co., 144 Mass. 431, 11 N. E. 697; Teal v. Fissel (C. C.) 28 Fed. 351. This rule has been frequently applied where the facts stated in the complaint did not constitute a public offense, and it can make no difference in principle whether this is because the facts stated

do not bring the case within a valid statute, or because the statute under which the proceedings were instituted is invalid. In either case, the acts charged constitute no offense, because there is no law making them such. Barker v. Stetson, supra, was a case of the latter class.

The present case comes fully within the rule. The justice had a general jurisdiction over the subject-matter, to wit, prosecutions for the violations of village ordinances. The defendant merely stated the case to the magistrate in a complaint, without, so far as appears, bad faith or malice. The magistrate erred in thinking that the ordinance was valid, and that it was therefore a case within his authority, and issued a warrant which was not justifiable in point of law, and the plaintiff was arrested. Under such a state of facts the complainant is not liable. Under any other doctrine a person would never feel safe in making complaint of the commission of a public offense until the validity of the statute creating the offense had been passed upon by the court of last resort. Order affirmed.

PEOPLE v. McLEAN.

(Supreme Court of Michigan, 1888. 68 Mich. 480, 36 N. W. 231.)

McLean was convicted in the circuit court of the county of Mackinac of resisting an officer, and sentenced to state prison for two years. He prosecuted error.

CHAMPLIN, J. * * * It appears from the testimony returned in the bill of exceptions that on the night of the twenty-third of August, 1887, L. J. Monteith was sheriff of Mackinac county, and Peter A. Paquin was under-sheriff; that about 10 o'clock in the evening of that day, Justice Rutherford handed the sheriff a warrant for assault and battery against McLean in front of Rutherford's office; that Peter A. Paquin was then present, and the sheriff told him to get into a hack, and go up to what was known as "Red Annie's," a house of ill fame, by the road, and arrest McLean if he found him there; that he would take another direction by the railroad track, and go to another house of ill fame, and search for McLean there; that the sheriff had the warrant with him, and that Paquin had no warrant; that these houses of ill fame were about 80 rods apart; that he and the under-sheriff separated, the sheriff going up the railroad track, and the under-sheriff going in a hack in another direction.

Paquin arrived at "Red Annie's," found the door open, and a number of persons in the room. He saw McLean in there and went in, and laid his hand on McLean's shoulder and said: "McLean, I want you. I have got a warrant for you; you are my prisoner." McLean then pulled a revolver from his right-hand coat pocket, and pointed it at Paquin's head, and said: "Get out, you ——— ——— ———, or I will blow your brains out."

Paquin did not know whether the revolver was cocked or loaded, but he backed out of the door, McLean following him with the revolver, pointed at him, saying: "Get out; get out; get out of the house, or I will kill you."

About five minutes after he got out he heard the report of a revolver, but who fired it he did not know. He started to find the sheriff, and met him coming a short distance from the house. He did not tell McLean that he was an officer, and had no uniform or badge of office on. He had no personal acquaintance with McLean, and had never talked with him before that night. He did not know at the time he attempted to make the arrest where the sheriff was, only the sheriff had told him where he was going. * * *

The question whether an arrest can be made without warrant has been decided from time to time according to the various circumstances of each particular case, many of which may be found in 2 Hale, P. C. 72–105. The principles recognized in the cases are:

1. Any person may arrest another who is actually committing, or has actually committed, a felony.

2. He may arrest any person whom he suspects on reasonable grounds to have committed a felony, if one has actually been committed.

3. Any constable or sheriff may arrest any person whom he suspects, on reasonable grounds, of having committed a felony, whether in fact a felony has been actually committed or not.

The common law never allowed the arrest of persons, who were either guilty of or suspected of having committed misdemeanors, without a warrant issued by lawful authority, except in cases of actual breach of the peace committed in the presence of the officer, while the person was taken in the act, or immediately after its commission. This exception was made, not to bring the offender to justice, but in order to preserve the peace, which by the common law was regarded as of utmost consequence.

McLean was charged simply with a misdemeanor, and he could not be arrested for the crime after the commission of the act, without a proper warrant. The warrant was issued and delivered to the sheriff. The sheriff is authorized to take such assistance with him in making an arrest as he may deem necessary, and the warrant in his possession while present and pursuing his object will be a justification to his assistants in making the arrest. But he has no authority to send an under-sheriff or deputy to one place to make an arrest without a warrant, while he goes to another for the same purpose with the warrant. He cannot send his deputy into one town or county while he gives pursuit in another. Under the ancient practice of hue and cry, before warrants were issued, this might be done in the pursuit of felons, but no hue and cry could be raised for a misdemeanor.

We think it clear that in cases of misdemeanors the sheriff must be present either in sight or hearing, directing the arrest, to justify a

person not armed with the warrant to make the arrest. Such was not the case here. The under-sheriff had no warrant in his possession when he attempted to arrest McLean, and although acting under the orders of the sheriff, given before they separated, to search different places, the sheriff was not in such proximity nor did he have such immediate control of the action of the under-sheriff, as justified the court or jury in saying that the warrant was in the possession or control of the under-sheriff, or that it conferred upon him any authority to make the arrest. A warrant for a misdemeanor cannot lawfully be held by two officers at once, when they are not together. The case is fully covered in the opinion of Mr. Justice Campbell in Drennan v. People, 10 Mich. 184 et seq. Upon this point there was no disagreement between the members of the court, although they were divided upon the question whether the offense charged was felony, and therefore authorized an arrest without warrant.

We think the judgment should be reversed, and prisoner discharged.[53]

HOLROYD v. DONCASTER.

(Court of Common Pleas, 1826. 3 Bing. 492, 130 Reprint, 603, 28 R. R. 672.)

This was an action of trespass for false imprisonment, tried before Bayley, J., last York Assizes. The declaration was in the usual form. A constable, who had made the arrest of which the plaintiff complained, stated that he had arrested the plaintiff under a warrant which he had received from another person, and that when about to execute it, the defendant desired him to make haste. It was also proved, that the defendant had admitted in conversation that he had sent the plaintiff to prison. But no warrant was produced in evidence. The plaintiff's counsel, however, having opened the case as an arrest upon an illegal warrant, it was objected on the part of the defendant that the plaintiff ought to produce the warrant. A verdict was taken for the plaintiff, with liberty for the defendant to move to enter a nonsuit, if the Court should be of opinion that the plaintiff ought to have produced the warrant.

Wilde, Serjt., accordingly moved for a rule to this effect, on the ground that the plaintiff ought to have produced the warrant which was the cause of his action; also, that it sufficiently appeared from the defendant's admission, that the plaintiff had been apprehended under a warrant, and that, therefore, the action ought to have been conceived in case and not in trespass. Morgan v. Hughes, 2 T. R. 225; Stonehouse v. Elliot, 6 T. R. 315, 3 R. R. 183.

A rule nisi was granted and Wilde was this day heard in support of it. But

[53] Part of the opinion is omitted.

THE COURT were clearly of opinion that the warrant not having been produced, there was no legitimate evidence on which it could be presumed that it had ever issued, or that the action ought, in consequence, to have been case; and that, with respect to the production of the warrant, it was equally clear that a party who took upon himself to imprison another was prima facie guilty of a trespass, the onus of justifying which rested entirely with himself.

Rule discharged.

WILLIAMS v. JONES et al.

(Court of King's Bench, 1736. Cas. t. Hard. 298, 95 Reprint, 193.)

Trespass for an assault, battery and imprisonment of the plaintiff. The defendants justify for that the defendant Jones sued out a capias ad respondendum against the plaintiff, out of the Court of Common Pleas, directed to and delivered to the Sheriffs of London; whereupon the sheriff issued a warrant to the defendant Chamberlain, one of the serjeants of mace, who by virtue thereof arrested the plaintiff, and detained him in custody for six hours, at the request of defendant Jones, who was plaintiff in the said writ, which is the same trespass and assault, etc. to which plea the plaintiff demurred generally. * * *

LORD HARDWICKE, C. J. The question is, whether a battery of the plaintiff can be justified by shewing an arrest by lawful process; and upon consideration of the cases, we are of opinion that a battery cannot be justified by shewing an arrest barely; but that in order to make it good, something further should be shewn: as, that defendant gently laid his hands in order to arrest; and did arrest him; as in the case of Patrick and Johnson, 3 Lev. 403; though that way of pleading has been doubted of: or else that the plaintiff made resistance, and was going to rescue himself, and by reason of that he beat him to take him. There is no case in all the books, that says, that a battery may be justified, barely by shewing an arrest. * * *

As to what has been said, that every arrest admits a battery, because it cannot be without laying on of hands, and every laying on of hands is so; that is a mistake in the case of Genner and Sparkes, which was cited to warrant that distinction, which it does not do; for the question there was, whether there had been a rescue, and the Court held that there had not, because there had been no arrest, for the officer had not touched the defendant; and to be sure in that case there was no arrest, for the party was neither touched nor confined. But it does not follow that an arrest cannot be made without touching the person: for if a bailiff comes into a room and tells the defendant he arrests him, and locks the door, that is an arrest, for he is in custody of the officer. But, supposing there was a laying on of

hands in the present case, every laying on of hands is not a battery; for the party's intention must be considered: for people will sometimes by way of joke, or in friendship, clap a man on the back; and it would be ridiculous to say, that in every such case, a man must justify, and may not plead not guilty. The case of Wilson and Dodd, 2 Roll. Abr. 543, is directly in point, that a molliter manus is not a battery. That case indeed favours Lutwyche's opinion, that a molliter manus is not a justification, because it does not admit a battery: therefore as the arrest is not a battery, this is not a sufficient justification.

PER CURIAM. Judgment for plaintiff.[54]

(b) ARREST WITHOUT WARRANT

HENNESSY v. CONNOLLY.

(Supreme Court of New York, 1878. 13 Hun, 173.)

TALCOTT, J. This is an appeal from a judgment for the defendant, rendered on a verdict at the Oswego Circuit, and from an order of the Special Term denying a new trial. The action was for assault and battery and false imprisonment. The defendant was a policeman of the city of Oswego, and arrested the plaintiff on view and without warrant, on the charge of violating an ordinance of the city, which is as follows, viz.:

"Section 8. The bridge across the Oswego river in this city, on the line of Bridge street, shall be kept and reserved free from all obstructions, and all groups and assemblages of persons thereon at any time are strictly prohibited. No person or persons shall sit or stand on said bridge or any railing thereof or occupy the same so as in any manner to obstruct the free passage thereof, or to hinder, molest or annoy any person in passing along the same; and no person shall peddle any fruits, nuts or other articles or things thereon. Whoever shall violate any provision of this section shall forfeit a penalty of five dollars for each and every offense."

By the charter of the city of Oswego, title 3, section 8 (Sess. Laws of 1860, ch. 463), the penalty for a violation of such an ordinance is to be collected before a justice of the peace, or other court, and the first process may be by civil warrant or summons. The justice at the circuit instructed the jury that the plaintiff was violating a city ordinance in regard to the bridge, and if he did not desist at the command of the officer then the officer had a right to arrest him without any process.

We find nothing, and are referred to no section in the charter of the city of Oswego, providing that a policeman may arrest without warrant and simply on view, for the violation of a city ordinance. It is not like the charter of Syracuse, which was examined by this

[54] Part of the opinion is omitted.

court in this respect in Butolph v. Blust, 5 Lans. 84; and it was found in that charter the power was expressly conferred on a policeman of the city to arrest, detain and take before the police justice, any person whom he shall find committing a violation of any ordinance of the city.

Admitting the obstruction of the bridge to have been a misdemeanor, the policeman had no authority to arrest the defendant unless such misdemeanor was accompanied by a breach of the peace at common law. Butolph v. Blust, supra. There was some evidence tending to show a breach of the peace by the plaintiff, preliminary to the arrest, and that the conduct of the plaintiff was reprehensible in the extreme, but the difficulty with the charge excepted to is, that it was not in any manner qualified; and the jury was instructed generally that if the plaintiff was violating a city ordinance and did not desist on demand, the policeman had a right to arrest him without warrant.

It may be that a policeman should have authority to arrest without warrant, and on view, any person engaged in the violation of a city ordinance, and we presume this authority is conferred by most city charters, but it is a matter which rests with the legislature, and until the power is conferred, an arrest by a constable without warrant, in case of a misdemeanor, can only take place where it is accompanied by a breach of the peace. 1 Chitty's Crim. Law, 13; Carpenter v. Mills, 29 How. Prac. 473.

For the reason that the jury, under the instruction given them, cannot be deemed to have found a breach of the peace, the judgment and order denying a new trial must be reversed.

STATE v. HUNTER.

(Supreme Court of North Carolina, 1890. 106 N. C. 796, 11 S. E. 366, 8 L. R. A. 529.)

This was an indictment for false imprisonment. The defendant, a policeman of the city of Asheville, had arrested one Bennett for alleged violation of a city ordinance in the following words:

"Whenever three or more persons obstruct the sidewalk, it shall be the duty of the officer to courteously request them to move on, and, if such persons unreasonably persist in remaining, so as to incommode others passing, he shall take them to the station house."

The defendant testified that Bennett and four or five others were standing on the sidewalk when other people were passing, that the latter had to step on the curbing to get around them, that when defendant requested Bennett and his companions to move on, all left except Bennett, who refused, a third time, to go, and that the defendant then arrested Bennett, and took him to the station house. From a verdict of guilty, the defendant appealed.

AVERY, J. In the case of State v. Freeman, 86 N. C. 683, the court distinctly recognized the right of a police officer to arrest without warrant, not only for felonies, riots, and breaches of the peace, but for violation of a city or town by-law prohibiting nuisances, and which the municipality has the power to make, when the offense is committed in his presence. The Code (section 3820) makes it a misdemeanor to violate any valid city or town ordinance. * * *

The second ordinance relied upon for the protection of the officer, rule 15, is clearly in violation of the Constitution (article 1, §§ 12, 13, 17), in providing that a person may be arrested because he refuses to "move on," and, in the opinion of the officer, who is left to judge of his conduct, "unreasonably persists in remaining, so as to incommode others passing," and can be taken, without warrant or hearing, to the station house. Under this law, he may be deprived of his liberty, and sent to a dungeon, not only without trial, but without even a preliminary examination, or an opportunity to give bail for his appearance at an investigation to be had in future, because, in the opinion of a policeman, he consumes an unreasonable time in exchanging greetings with two friends whom he meets upon the sidewalk of the city. * * *

The charter of the city (chapter 111, §§ 25, 27, 59 Priv. Laws 1883) gave the city marshal the powers, as a peace officer, of the sheriff or constables of the county of Buncombe, and to both the marshal and a policeman the authority to make arrests "(1) whenever he shall have in his hands a warrant duly issued by the mayor of the city of Asheville or a justice of the peace of the county of Buncombe; * * * (3) whenever a misdemeanor or violation of any ordinance has been committed, and he has reasonable cause to believe that the suspected party may make his escape before a warrant can be obtained." The power to arrest without warrant is, in express terms, confined to two classes of cases,—where he sees an offense committed; or where he knows it has been committed and has reasonable ground to apprehend an escape. The latter provision enlarges his authority beyond that of a sheriff or constable, but upon condition that the ordinance has certainly been violated. Judge Dillon, in his work on Municipal Corporations (volume 1, § 211), says: "Charters authorizing municipal officers to make arrests upon view, and without process, are to be viewed in connection with the general statutes of the state, and, being in derogation of liberty, are strictly construed." Pesterfield v. Vickers, 3 Cold. (Tenn.) 205; White v. Kent, 11 Ohio St. 550. In the exercise of the extraordinary power given him by the charter, it was the duty of the defendant, before he touched the person of the prosecutor and demanded a surrender of his liberty, to know that the misdemeanor had been committed, either from seeing, or from such information as made him willing to incur the risk of

indictment, or of being mulcted in damages, if no ordinance had been violated. The question of good faith on the part of the policeman comes to his aid when he is resisted in making an arrest that he has an undoubted right to make, if there be resistance, and the question arise whether excessive force was used to overcome it; but policemen of Asheville must determine at their peril, preliminary to proceeding without warrant, whether a valid ordinance has been violated within or out of their view. The principle recognized in the cases of State v. McNinch, 90 N. C. 695, and State v. Pugh, 101 N. C. 737, 7 S. E. 757, 9 Am. St. Rep. 44, was never intended to apply in any case except where an officer is making a lawful arrest. * * *

We conclude that, according to the defendant's own evidence, he was guilty; and, therefore, though the judge may have failed to state the law correctly in submitting to the jury the whole case, still the defendant is not entitled to a new trial if he was guilty in the aspect of the testimony most favorable to himself, and founded upon the conception that his own statement was true. The judgment must be affirmed.[55]

DAVIS, J., dissenting.

COOK v. HASTINGS.

(Supreme Court of Michigan, 1907. 150 Mich. 289, 114 N. W. 71, 14 L. R. A. [N. S.] 1123, 13 Ann. Cas. 194.)

The action was by Cook against Hastings and two others. The judgment below was in favor of the defendants; the plaintiff brings error.

CARPENTER, J. The three defendants are each members of the police force of the city of Detroit. December 6, 1904, between 8 and 9 p. m., defendant Hastings arrested plaintiff on Columbia street, in said city of Detroit. Hastings was looking for a man who had been exposing his person to women and children, and—stating the facts most favorably to defendants—he believed and had reason to believe plaintiff to be that man. The arrest was made because of that belief, and because plaintiff refused to state his name or his business, and gave a false explanation (perhaps it was a false explanation) for waiting on the street behind a tree where Hastings discovered him. After the arrest, Hastings placed plaintiff in a patrol wagon of which defendants Stock and McDermott were in charge, and carried him to the Central Police Station, and the undisputed evidence compels the inference that while in the wagon plaintiff was in the joint custody of the three defendants. Soon after the patrol wagon reached the Central Station, plaintiff was given his liberty. He brought this suit

[55] The statement of facts is abridged and part of the opinion is omitted.

to recover damages for false imprisonment. It was tried in the circuit court before a jury. The trial judge directed a verdict in favor of defendants Stock and McDermott, and submitted to them the question of defendant Hastings' liability, and they returned a verdict in his favor.

The law governing this case is elementary. Except for a breach of the peace committed in his presence, or when he has a reasonable ground to believe that the person arrested is a felon or is about to commit a felony, a police officer has no authority to arrest without a warrant. In this case there was not only no reasonable ground to believe, but there was not even a suspicion, that plaintiff was a felon or was about to commit a felony. (For the offense of which he was suspected was not a felony.) It is equally clear that refusal to make any explanation to the police officer was not a breach of the peace. Klein v. Pollard, 149 Mich 200, 112 N. W. 717, 10 L. R. A. (N. S.) 1008, 119 Am. St. Rep. 670. The arrest was therefore illegal, and the trial court should have directed a verdict against defendant Hastings. The liability of the other defendants, legally speaking, is equally clear. During his conveyance in the patrol wagon, plaintiff was just as much in their custody as he was in Hastings'. It is then quite correct to say that they assisted defendant Hastings in depriving plaintiff of his liberty. It is true they rendered this assistance, not by actually laying their hands on plaintiff, but by a voluntary display of force which was intended to and did deprive him of his liberty. The law governing this question is correctly stated in a note, 12 A. & E. Enc. Law (2d Ed.) p. 777 (citing Griffin v. Coleman, 4 H. & N. 265), as follows: "If an arrest by a constable is in its inception wrongful, all other constables who act and assist in the continuance of the wrongful imprisonment are responsible for the entire damage thereby caused to the plaintiff, although they had no knowledge of the unlawfulness of the imprisonment and intended to act in the strict discharge of their official duties." The trial court should have directed a verdict for plaintiff against all the defendants.

Defendants' counsel urge that under the law declared in this opinion police officers will sometimes be compelled either to neglect their duty of preserving order—a duty they owe to the public—or to make unlawful arrests, and it is also urged that that alternative was presented in this case. If so, they must either neglect that duty or accept the risk of being held liable for the consequences, for if they are sued, the court will pass judgment on their conduct in accordance, not with the judge's notion of justice, but in accordance with a law which condemns. It is not for the judge presiding over the court to determine whether or not he will apply that law. He has no choice. He did not make the law, and he cannot change it. That law is as obligatory on him as it is on the humblest suitor who ever appeared in his court. He is bound to apply it in determining controversies.

The argument under consideration is in reality an appeal for a change of the law. It should have been addressed, not to a court, but to some other tribunal—a tribunal having authority to change the law.[56]

Judgment reversed, and a new trial ordered.

TIMOTHY v. SIMPSON.

(Court of Exchequer, 1835. 1 Cr., M. & R. 757, 40 R. R. 722.)

PARKE, B. This was an action of trespass and false imprisonment, tried before me at the sittings after Trinity Term last, at Guildhall. The declaration was for an assault and false imprisonment; to which there was a plea of not guilty, and a special plea of justification, on the ground that the plaintiff was guilty of a breach of the peace in the defendant's dwelling-house, and that he thereupon gave him in charge to a policeman, who was not averred to have had view of the breach of the peace. To this special plea there was a replication of de injuria sua propria absque tali causa. On the trial, the jury found a verdict for the plaintiff on the general issue, and for the defendant on the special plea, as I was of opinion that the material parts of it were proved; but, as it appeared to me that the plea was bad in law, I directed the jury to assess the damages on the general issue, and I also gave the plaintiff permission to move to enter a verdict for him on the special plea, if the Court should be of opinion that it was not substantially proved. A rule nisi having been obtained to enter a verdict for the plaintiff, or judgment non obstante veredicto, the case was fully argued before my Brothers Bolland, Alderson, Gurney, and myself, last Term. We have since considered the case, and are of opinion that the rule ought not to be made absolute, but that there should be a new trial, unless the parties will consent to enter a stet processus.

The facts of the case, as to which there was little or rather no contradictory evidence, may be very shortly stated. The defendant was a linen-draper; the plaintiff was passing his shop, and, seeing an

[56] Accord: Hardy v. Murphy (1795) 1 Esp. 294 (P. and S. were talking loudly in the street, and refused to be quiet when so ordered by D., a watchman, who thereupon took them to the station house); Booth v. Hanley (1826) 2 C. & P. 288 (D., a policeman, arrests P., who, in a public street, was "turning to the wall for a particular purpose"); Wooding v. Oxley (1839) 9 C. & P. 1 (P. arrested for disturbing a public meeting); Palmer v. Maine Cent. R. Co. (1899) 92 Me. 125, 42 Atl. 800, 44 L. R. A. 673, 69 Am. St. Rep. 513 (the conductor of the defendant railway company caused the plaintiff to be arrested by a constable without a warrant, on the ground that plaintiff had fraudulently evaded the payment of his fare); Kurtz v. Moffitt (1885), 115 U. S. 487, 6 Sup. Ct. 148, 29 L. Ed. 458 (a deserter from the Federal army was arrested by a state police officer without a warrant).

And see "Arrest," 3 Cyc. 880, note 65. For statutory modifications of the common-law rule, see 3 Cyc. 880–881, notes 67–70.

article in the window, with a ticket apparently attached to it, denoting a low price, sent his companion in to buy it; the shopman refused, and demanded a larger price; the plaintiff went in himself and required the article at the lower rate. The shopman still insisted on a greater price; the plaintiff called it "an imposition." Some of the shopmen desired him to go out of the shop in a somewhat offensive manner; he refused to go without the article at the price he bid for it; the shopmen pushed him out. Before they did so, he declared he would strike any one who laid hands on him. One of the shopmen, really supposing, or pretending to suppose, this to be a challenge to fight, stepped out and struck the plaintiff in the face, near the shop door; the plaintiff went back into the shop and returned the blow, and a contest commenced, in which the other shopmen took a part, and fell on the plaintiff. There was a great noise in the shop, so that the business could not go on—many persons were there, and others about the street door. The noise brought down the defendant, who was sitting in the room above. When he came down he found the shop in disorder, and the plaintiff on the ground struggling and scuffling with the shopmen; and this scuffle continued in the defendant's presence for two or three minutes. The defendant sent for a policeman, who soon afterwards came; in the meantime the plaintiff was taken hold of by two of the shopmen, who, however, relinquished their hold before the policeman came; and, on his arrival, the plaintiff was requested by the defendant to go from the shop quietly; but he refused, unless he first obtained his hat, which he had lost in the scuffle. He was standing still in the shop insisting on his right to remain there, and a mob gathering round the door; when the defendant gave him in charge to the policeman, who took him to the police station. The defendant followed; but, on the recommendation of the constable at the station, the charge was dropped.

Upon these facts the plaintiff appears to have been, in the first instance, a trespasser, by refusing to quit the shop when requested, and so to have been the cause of the affray which subsequently took place; but the first act of unlawful violence and breach of the peace was committed by the shopman; that led to a conflict, in which there were mutual acts of violence clearly amounting to an affray, the latter part of which took place in the defendant's presence; and the plaintiff was on the spot on which the breach of the peace occurred, persisting in remaining there under such circumstances as to make it probable that the breach of the peace would be renewed, when he was delivered by the defendant to the police officer in the very place where the affray had happened.

The first question which arises upon these facts is, whether the defendant had a right to arrest and deliver the plaintiff to a constable, the police officer having, by the stat. 10 Geo. IV. c. 44, § 4, the

same powers as a constable has at common law. It is not necessary for us to decide in the present case whether a private individual, who has seen an affray committed, may give in charge to a constable who has not, and such constable may thereupon take into his custody the affrayers, or either of them, in order to be carried before a justice, after the affray has entirely ceased, after the offenders have quitted the place where it was committed, and there is no danger of its renewal. * * * Here the defendant, who had immediately before witnessed an affray, gave one of the affrayers in charge to the constable on the very spot where it was committed, and whilst there was a reasonable apprehension of its continuance; and we are of opinion that he was justified in so doing, though the constable had seen no part of the affray. It is unquestionable that any bystander may and ought to interfere to part those who make an affray, and to stay those who are going to join in it till the affray be ended. It is also clearly laid down that he may arrest the affrayers, and detain them until the heat be over, and then deliver them to a constable. Lambard, in his Eirenarcha, chap. 3, p. 130, says: "Any man also may stay the affrayers until the storm of their heat be calmed, and then may he deliver them over to a constable to imprison them till they find surety for the peace; but he himself may not commit them to prison, unless the one of them be in peril of death by some hurt, for then may any man carry the other to the goal till it be known, whether he, so hurt, will live or die, as appeareth by the stat. 3 Hen. VII. c. 1." In Hawk. P. C. book 1, c. 63, § 11, it is said, that it seems agreed that any one who sees others fighting may lawfully part them, and also stay them until the heat be over, and then deliver them to the constable, who may carry them before a justice of the peace, in order to their finding sureties for the peace; and pleas founded upon this rule, and signed by Mr. Justice Buller, are to be found in 9 Went. Plead. 344, 345; and De Grey, Ch. J., on the trial, held the justification to be good. It is clear, therefore, that any person present may arrest the affrayer at the moment of the affray, and detain him till his passion has cooled, and his desire to break the peace has ceased, and then deliver him to a peace officer. And, if that be so, what reason can there be why he may not arrest an affrayer after the actual violence is over, but whilst he shews a disposition to renew it, by persisting in remaining on the spot where he has committed it? Both cases fall within the same principle, which is that, for the sake of the preservation of the peace, any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shews that the public peace is likely to be endangered by his acts. * * * For these reasons we are of opinion that the defendant was, upon the facts in evidence, justified in delivering the plaintiff to the police officer.

This brings me to the second question, whether the plea upon the record was substantially proved. I thought upon the trial that it

was, but, upon further consideration, I concur with the rest of the Court in thinking that it was not. The plea was as follows:

"And the defendant says, that before and at the said time when, etc., the said defendant was lawfully possessed of a certain dwelling-house in the city of London, and the said defendant being so possessed thereof, the said plaintiff just before the said time when &c. entered and came into the said dwelling-house, and then and there, with force and arms, made a great noise, disturbance, and affray therein, and then and there insulted, abused, and ill-treated the defendant and his servants in the said dwelling-house, and greatly disturbed and disquieted them in the peaceable and quiet possession of the said dwelling-house, in breach of the peace of our said lord the King; whereupon the defendant then and there requested the plaintiff to cease his noise and disturbance, and to depart from and out of the said house, which the plaintiff then and there wholly refused to do, and continued in the said house, making the said noise, disturbance, and affray therein; whereupon the defendant, in order to preserve the peace and restore good order and tranquility in the said house, then and there gave charge of the plaintiff to a certain policeman of the city of London, and then and there requested the said policeman to take the plaintiff into his custody, to be dealt with according to law; and the said policeman, so being such policeman as aforesaid, at such request of the defendant, then and there gently laid his hands on the plaintiff for the cause aforesaid, and did then and there take the plaintiff into his custody."

The replication puts in issue all the allegations constituting the ground of the arrest, and of these it is not necessary to prove all. It is enough to establish so many of them as would justify the arrest. It is not enough to prove facts which justify the imprisonment, it is necessary to prove such of the facts alleged as would do so. The allegations which were proved were the entry into the defendant's house, the assault on his servants, the disturbance of the defendant in his possession of the house, by an affray in it, in which the plaintiff bore a part, just before the time of the arrest, and that the defendant gave the plaintiff in charge in order to preserve the public peace; but the fact of an assault on the plaintiff himself was not proved, and that is the only breach of the peace which in the plea appears by necessary implication to have been committed in the defendant's presence; for in none of the other alleged facts is the defendant's presence inserted or necessarily implied before the moment of actual interference. The disturbance of the defendant in the possession of his dwelling-house might have occurred by an entry in his absence, and therefore that averment does not by necessary implication affect the defendant's presence. If so, the substance of this plea, that is, so many of the allegations in it as constituted a defence, was not proved, as the assault on the defendant himself was not proved. For this reason we think that the proof failed; but, as this is a case in which an amendment would have been allowed by virtue of the late statute, as it is clear upon the facts that there was a defence, on the ground of the defendant's right to arrest for a breach of the peace in his presence, and as the declaration of my opinion, that the plea was substantially proved, at the time, probably prevented an application to amend, we think that there should be

a new trial, when, or before which, the plea may be amended. And as ultimately there will be a verdict for the defendant, if the same evidence is adduced, the best course will be for the parties to agree to enter a sfet processus.[57]

Rule accordingly.

DERECOURT v. CORBISHLEY.

(Court of Queen's Bench, 1855. 5 El. & Bl. 188, 119 Reprint, 451.)

Declaration for assaulting and beating defendant, and giving him into custody to a policeman, and causing him to be imprisoned at a police station. There was a plea that

Before the committing, etc., one John Watkins was lawfully possessed of a messuage, situate within the city of London police district: and, being so possessed, the plaintiff, with force and arms, and with a strong hand, into the said messuage unlawfully, violently and forcibly did enter and, from the possession of the said messuage, with a strong hand, unlawfully, violently and forcibly did expel and amove the said J. W., against the peace, etc.; and the plaintiff committed the said breach of the peace in the presence of one of the officers of the city of London police, and a peace officer and constable of our lady the queen, and who then and there had view of the said breach of the peace which was committed within the city of London police district. And thereupon defendant gave plaintiff in charge of the said police officer for the said offence, and directed him to take him into custody and convey him before one of the city of London police magistrates to answer for the said offence; and the said police officer, accordingly, in pursuance of the said charge, gently laid his hands on the plaintiff, and took him into custody; and, for the purpose of conveying him before a city of London police magistrate, conveyed him in custody to, and imprisoned him for a short and reasonable time at, the said police station, doing no more than in duty he was bound to do; and which are the trespasses and acts complained of.

To the plea there was a demurrer.

ERLE, J. I also think that the plea is good. The action is for trespass and false imprisonment: I think there is a good confession and avoidance. The defendant says he did call upon the constable to arrest the plaintiff; so there is a good confession. Then the avoidance is, that the plaintiff committed a breach of the peace in the sight of the constable, and thereupon the defendant directed the constable to arrest him; that, I think, is a good avoidance. The argument for the plaintiff is, that the breach of the peace might have been over before the arrest took place; but the plea uses the word "thereupon," which I understand to mean the same as "then and there." Then was the defendant wrong in directing the constable to do his duty against the plaintiff? I think it very important to hold that he was right. On the plea, as we must understand it, the plaintiff has been shewn to be dealt with according to law. No right, therefore, has been violated. It has been pressed upon us that, although the constable might have a right to arrest, the defendant had no right to direct him to do

[57] Part of the opinion is omitted.

so. It may very often happen that bystanders may see a constable passing by a breach of the peace with perfect indifference, and may think it right to take up the matter and direct the constable to do his duty. I should be very unwilling to hold, and I never heard that it has been holden, that in such a case a bystander may not set the constable in motion.

Judgment for defendant.[58]

BAYNES v. BREWSTER.

(Court of Queen's Bench, 1841. 2 Q. B. 375, 114 Reprint, 149, 57 R. R. 707.)

Trespass for assault and false imprisonment. The defendant pleaded first, not guilty, and secondly, that the plaintiff on a certain night, notwithstanding the defendant's request that he cease and depart, knocked and rapped on the back door of defendant's dwelling house and was threatening the defendant to continue making the said noise and disturbance until defendant should deliver to plaintiff a certain book, then in the possession of the defendant; that the plaintiff having continued to make said noise and disturbance for two hours, the defendant then sent to one James Chatters, then being the constable of the parish,

for the purpose of arresting and taking plaintiff into custody, and thereby preventing him further disturbing and annoying defendant and his family as aforesaid; and plaintiff, having ascertained that he was about to be given into custody by defendant, ceased the said knocking and rapping at the back door of the said dwelling house, but which he had violently, wrongfully, and illegally continued up to that period, and then and there ran and escaped off and from the said premises of the defendant; when defendant, accompanied by certain persons who had been called to the aid and assistance of the said James Chatters, so being such constable as aforesaid, immediately followed and pursued plaintiff, and overtook him in a certain close near to the said dwelling house of the defendant; whereupon defendant, in order to preserve the peace and to prevent the said plaintiff from continuing to disturb the good order and tranquillity of the said dwelling house of the defendant, and to hinder and prevent plaintiff from continuing to make said noise and disturbance at the said dwelling house of defendant during the whole night, then gave charge of plaintiff to said James Chatters, then and there being such constable as aforesaid, and then requested the said James Chatters, so being such, etc., to take plaintiff into his custody, and carry him before some justice or justices of our said lady the queen, assigned, etc., to answer the premises, and to be dealt with according to law.

Issue was taken on this second plea, and at the trial a verdict was found for the plaintiff on the general issue and for the defendant on the second plea. Afterwards a rule nisi was obtained for judgment non obstante veredicto.[59]

[58] The concurring opinions of Lord Campbell, C. J., and Coleridge, J., are omitted.

[59] The statement of facts has been abridged. Part of the opinion of Coleridge, J., and the concurring opinions of Lord Denman, C. J., and Williams, J., are omitted.

COLERIDGE, J. * * * The plaintiff quitted the premises when he ascertained that the constable was coming. The plea does indeed allege that the defendant gave the plaintiff into custody in order to prevent a continuance of the breach of the peace: but it is not averred that the plaintiff, after quitting the premises, either threatened or intended to continue the breach of the peace. The plea, therefore, contains nothing equivalent to an allegation that another breach of the peace was about to be committed. The question is simply whether, after a breach of the peace is over, a constable who has not seen it may take up the party without warrant. Then it is contended that after verdict we must infer all the facts necessary to support the verdict. But the plea here contains nothing of which proof might not have been given without evidence of circumstances necessary to complete a good defence.

WIGHTMAN, J. The plaintiff is entitled to our judgment on the question, whether or not the defendant, when he caused the imprisonment, was justified in so doing. The point is perfectly clear. The authorities are collected in Timothy v. Simpson [1835] 1 Cr., M. & R. 757. * * *[60]

The defendant here fails to bring his case within that principle. On the contrary the plaintiff only threatened at first to continue the disturbance; but, when he heard the officer was coming, ran away. There is nothing to show that, after he ran away, he either insisted on remaining, or intended to do so. It would be going a very great length indeed to hold that the subsequent apprehension upon a pursuit under such circumstances, without warrant, was justifiable.

Rule absolute.

BALTIMORE & O. R. CO. v. CAIN.

(Court of Appeals of Maryland, 1895. 81 Md. 87, 31 Atl. 801, 28 L. R. A. 688.)

Action by Cain against the railway company for false imprisonment in having plaintiff arrested on a charge of disorderly conduct, on one of defendant's trains. From a verdict and judgment for the plaintiff, the defendant appealed.

It appeared in the evidence that on a Sunday morning the plaintiff and three companions drove to a camp meeting at Washington Grove and shortly thereafter took passage on the defendant's train for Washington City, entering the ladies' car. There was evidence also, that, after these men entered the ladies' car, they cursed and swore and drank liquor openly, and that one of them was smoking; that the conductor expostulated with them, and urged them to be quiet or to go into the smoking car, where they could drink and smoke as much as they pleased; that they said they had paid their fares, and would ride where it suited them.

[60] Wightman, J., here quoted at length from Timothy v. Simpson.

McSherry, J. * * * The conductor again appealed to them to be orderly, or he would be obliged to put them off the car; whereupon the plaintiff replied: "If you put him off (meaning Watkins, who was smoking), you will have to go too." It was further proved that numerous complaints were made by ladies and gentlemen about the conduct of these four men, and that one lady left the car, and went into the forward car. Afterwards other ladies who got on the train at other stations were put in the forward car, because it was not fit for them to enter the one where the men were. The conductor did not undertake to put them off, because he did not believe himself able to cope with these four intoxicated and lawless men. Just before the train arrived in Washington, the plaintiff was still behaving in a disorderly manner, and using profane language, in the hearing of the passengers on the same car. There were between 50 and 60 passengers on the train, most of whom were on their way to church in Washington. Finding himself unable to control these men or to suppress their disorder, and feeling powerless to eject them because of their threatened resistance, the conductor telegraphed from Forest Grove to Washington for an officer to arrest them, and, when the train drew up in the depot in that city, the policeman was there, and the conductor pointed out to him the plaintiff; and the officer then and there arrested the plaintiff, and took him to the station house.

With these facts before the jury, there were two prayers presented by the plaintiff, both of which were granted; and there were nine presented by the defendant, all of which, except the sixth, were rejected. The view we take of the case dispenses with a separate consideration of each of these prayers, inasmuch as the defendant's fifth prayer raises the crucial inquiry contained in the record; and what we shall say in discussing that prayer will, with a few brief additional observations, dispose of most, if not all, of the others. The fifth prayer maintains that, if the plaintiff was riotous and disorderly, the conductor had the right to eject him; that, if the conductor was unable to do this by reason of the threat of resistance, then the conductor was justified in requesting the first police officer whom he could find to arrest the plaintiff and it proceeds:

"If the jury further find that the police officer at the Washington depot was the first police officer the conductor saw, and that the conductor used due diligence in procuring a police officer, and that the conductor directed the police officer to arrest the plaintiff for said disorderly conduct, that the defendant is not liable for this arrest, and the verdict of the jury must be for the defendant."

From this prayer, considered in connection with the evidence to which allusion has been made, it is obvious at a glance that the predominant and controlling question before us involves the legality of the conceded arrest made in the city of Washington. Under the undisputed proof, that arrest was made without a warrant having been first procured. It was not made for an alleged felony, nor for a misdemeanor or breach of the peace, committed within view of the offi-

cer who took the plaintiff into custody, but, if the evidence of the defendant's witnesses be credited, it was made for a flagrant breach of the peace, which began at Washington Grove, and continued into Washington City, on the morning train of the defendant, and was made at the instance of the conductor, the very moment he reached a place where he could deliver these intoxicated offenders into the custody of a police officer. Was the arrest so made illegal?

It is settled that an officer has the right to arrest without a warrant for any crime committed within his view. It was his duty to do so at the common law, and this is still the law (Roddy v. Finnegan, 43 Md. 504; Phillips v. Trull, 11 Johns. [N. Y.] 486; Derecourt v. Corbishley, 5 El. & Bl. 188); and in cases of felony he may arrest upon information, without warrant, where he has reasonable cause (Rex v. Birnie, 1 Moody & R. 160; Rohan v. Sawin, 5 Cush. [Mass.] 281). And so any person, although not an officer, in whose view a felony is committed, may arrest the offender. Ruloff v. People, 45 N. Y. 213. But the right of a person not an officer to make an arrest is not confined to cases of felony for he may take into custody, without a warrant, one who in his presence is guilty of an affray or a breach of the peace. Knot v. Gay, 1 Root (Conn.) 66. "It seems agreed that any one who sees others fighting may lawfully part them, and also stay them till the heat be over, and then deliver them to the constable, who may carry them before a justice of the peace, in order to their finding sureties for the peace." 1 Russ. Crimes, 272; 1 Archb. Cr. Prac. & Pl. 82; 1 Hawk. P. C. c. 63, §§ 11, 17; 2 Hale, P. C. 90; East, P. C. 306; Timothy v. Simpson, 1 Cromp., M. & R. 757. * * *

Now, if it be true that the plaintiff was guilty of the reprehensible and disorderly conduct attributed to him by the witnesses, he was incontestably engaged in a flagrant and an outrageous breach of the peace, as pronounced as if there had been an actual affray during the whole time he was in the defendant's car; and it was clearly lawful, under these conditions, for the conductor to expel him and his drunken companions from the train if he had a sufficient force to overcome their threatened resistance, or else to arrest them all without warrant, and then deliver them to the first peace officer he could procure within a reasonable time. If this were not so, then, as said by Lord Chief Justice Denman in Webster v. Watts [11 Q. B. 311], "the peace of all the world would be in jeopardy." And it would be in jeopardy, because if, in such and similar instances, no arrest could be lawfully made without a warrant, the culprit, "if transient and unknown, would escape altogether," before a warrant could be obtained (Mitchell v. Lemon, 34 Md. 181), and there would soon cease to be any order or any security or protection afforded the public on swiftly-moving railroad trains, or even elsewhere, unless a peace officer were constantly present. The delay necessarily incident to obtaining a warrant would be in many, if not in most, cases of this and a kindred character equiv-

alent to an absolute immunity from arrest and punishment; and, should the name of the offender be unknown, he, most probably, would never be apprehended if once suffered to depart. The law is not so impotent and ineffective as that.

Being physically unable to expel these alleged riotous persons from the train, the conductor telegraphed for a peace officer, and without delay, and while the plaintiff was still drunk, caused his arrest the instant the officer thus summoned came in view of the plaintiff. If, then, any bystander could, in the language of Baron Parke, "for the sake of the preservation of the peace, * * * restrain the liberty of him whom he sees breaking" the peace, the act of the conductor in telegraphing for the policeman, and within a short space of time thereafter handing the plaintiff over to the officer, was in no respect different from a formal arrest of the plaintiff by the conductor, in the midst of the riot and disorder, and the prompt delivery of him afterwards to the officer. If the plaintiff was not in fact arrested by the conductor because of the presence of superior resisting force, that fact cannot make the subsequent act of the conductor in pointing out the plaintiff to the officer wrongful or illegal. The charge, according to the plaintiff's own testimony, was sustained. A fine was imposed, and he paid it. The accusation was therefore well founded, and what was done by the conductor, if the facts testified to by the defendant's witnesses be credited, was undeniably lawful, under all the circumstances. If this be so, then there is obviously no cause of action against the defendant, because no wrong has been done to the plaintiff. This is the theory of the defendant's fifth prayer. That prayer, being correct in principle and proper in form, ought to have been granted. For the same reasons, the second, third, fourth, and seventh prayers should have been granted.

The eighth was properly rejected. It makes the right to arrest depend on the fact that, while on the train, the plaintiff was charged by the conductor with being disorderly, whereas the right to arrest depended on the fact that the plaintiff was in reality disorderly. His having been charged by the conductor with being disorderly is quite a different thing from his having been in fact disorderly. The ninth prayer was properly rejected. It failed to submit to the jury that the arrest was made for the alleged breach of the peace. Though the arrest had been made without an assigned cause, the prayer exonerated the defendant.

The plaintiff's first prayer ought to have been rejected. Its fallacy lies in the postulate that an arrest for a breach of the peace, committed out of the view of a peace officer, necessarily could not be legally made without a warrant. * * *

Judgment reversed and new trial awarded.[61]

[61] The statement of facts is abridged and part of the opinion is omitted.

HANDCOCK v. BAKER et al.

(Court of Common Pleas, 1800. 2 Bos. & P. 260, 126 Reprint, 1270, 5 R. R. 587.)

Trespass for breaking the plaintiff's dwelling-house and assaulting him therein, and dragging him out of bed, and forcing him without clothes out of his house along the public street, and beating and imprisoning him without cause. Two of the defendants suffered judgment by default; and the other two pleaded, 1st, not guilty; 2ndly, as follows:

That the plaintiff, in the said dwelling-house, broke the peace and assaulted his wife, and purposed to have feloniously killed and slain her, and was on the point of so doing: and that her life being in great danger she cried murder and called for assistance; whereupon the defendants, for the preservation of the peace, and to prevent the plaintiff from so killing and slaying his wife, and committing the said felony, endeavoured to enter by the door, and knocked thereat; and because the same was fastened, and there was reason to presume that the wife's life could not have been otherwise preserved than by immediately breaking open the door and entering the said dwelling-house, and they could not otherwise obtain possession, they did for that purpose break and enter the said dwelling-house, and somewhat break, etc., doing as little damage as possible, and gently laid hands on the plaintiff, and prevented him from further assaulting and feloniously killing and slaying his said wife; and for the same purpose and also for that of taking and delivering the plaintiff to a constable, to be by him taken before a justice, and dealt with according to law, kept and detained him a short and reasonable time in that behalf, and because he had not then proper and reasonable clothes on him, took their hands off from him, and permitted him to enter a bed-chamber, and to remain there a reasonable time, that he might put on such clothes, which he might have done; and because he did not nor would so do, but wholly refused and went into bed there, and remained there at the end of such reasonable time, and would not quit the same, although thereto requested, the defendants for the same purposes as they so kept and detained the plaintiff as above mentioned, there being then no reasonable ground for presuming that he had changed his purpose of further assaulting and feloniously slaying his said wife, entered the bed-chamber in order for these purposes to take him therefrom, whereupon the plaintiff assaulted and would have beat the said defendants if they had not defended themselves, which they did, and if any damage happened to the plaintiff it was occasioned by his own assault, and the defendants for the purpose in that behalf aforesaid, gently laid hands upon the plaintiff and took him from the bed and out of the dwelling house along the public streets for a reasonable time, and kept and detained him for a short and reasonable time for those purposes, till they could find a constable, and as soon as they could find a constable delivered him to the constable for the purpose in that behalf aforesaid.

On the trial there was a verdict for the plaintiff on the general issue, and for the defendants on the special justification. At the following term a rule nisi was obtained calling on the defendants to show cause why judgment in their favor on the special justification should not be arrested and a verdict entered for the plaintiff on the general issue, with 1s. damages.

LORD ELDON, Ch. J. * * * In this case the plaintiff being about to commit a felony by killing and slaying his wife, the defendants interfered by breaking and entering the house in order to pre-

vent the execution of that intent; and "for the same purposes," that is, with a view to prevent the plaintiff from killing and slaying his wife, they afterwards committed the injury complained of in the bed-room, into which they had permitted him to enter in order to put on necessary clothes. It is stated that there was no reasonable ground for presuming that the plaintiff had changed his purpose; and it is argued that it ought to have been averred that his purpose actually continued: but if the preceding allegation be true, that the defendants entered the bed-room for the same purpose for which they had previously entered the house, the latter allegation was unnecessary; since the averment that it was for the same purposes sufficiently brought the question before the jury, Whether or not the defendants (entered) into the bed-chamber and detained the plaintiff for the purpose of preventing him from killing and slaying his wife? It is not difficult to conceive that under some circumstances it might be more especially the defendants' duty to interfere in that manner. Suppose A. endeavour to lay hold of B. who is in pursuit of C. with an intent to kill him, and B. thereupon ceases to pursue with a view of effecting his purpose with more cunning, the act of ceasing to run, so far from being evidence of an intention to desist from his purpose, might afford strong evidence of an intention to prosecute it with more effect; in which case the detention of B. would be justified. In this case the jury were competent to consider whether under all the circumstances of the case, including the presence or absence of the wife, the plaintiff got into bed with a view of more effectually executing his intent to kill his wife. In fact the jury have found that the defendants kept and detained the plaintiff after he had gone into the bed-room for the same purpose for which they kept and detained him before. With respect to the averment which has been supposed to be necessary, it is sufficient to answer, that after verdict it must be presumed that every thing is proved which is necessary to support the verdict; and the jury have found that it was necessary for the preservation of the woman's life that the defendants should do what they did.

HEATH, J. I am of the same opinion. It is a matter of the last consequence that it should be known upon what occasions by-standers may interfere to prevent felony. In the riots which took place in the year 1780, this matter was much misunderstood, and a general persuasion prevailed that no indifferent person could interpose without the authority of the magistrate; in consequence of which much mischief was done, which might otherwise have been prevented. In this case the defendants broke and entered the plaintiff's house in order to prevent the commission of murder, and that seems to have been admitted to be a good justification. The only dispute therefore turns on the propriety of their conduct towards the plaintiff after they had suffered him to go into the bed-room. Now I think that enough is stated in the justification to support the verdict, since the jury have

thought that the conduct of the defendants was right. After verdict we may suppose anything. We may suppose that the plaintiff's passion continued, and that he again declared that he would kill his wife.

Rule discharged.[62]

BECKWITH v. PHILBY et al.

(Court of King's Bench, 1827. 6 Barn. & C. 635, 108 Reprint, 585, 30 R. R. 484.)

This was an action for assaulting, beating, handcuffing, and imprisoning the plaintiff, and keeping and detaining him handcuffed and imprisoned, without any reasonable or probable cause for forty-eight hours, on a false and pretended charge of felony. At the trial the following appeared to be the facts of the case:

The plaintiff was a blacksmith residing at Waltham Cross, in the county of Hertford. The defendant Philby was high constable of Ongar in Essex, and resided at Loughton, in that county. The defendants Wilks and Spicer were constables of that parish. The plaintiff, on the 31st of January, 1826, with a bridle and saddle on his back, was returning from Romford market, where he had sold a pony for £7. 10 s., and about half past six in the evening sat down to rest himself near Loughton Bridge. While he was sitting there, one Gould, a farmer resident in the neighborhood, passed him. Gould told Philby the circumstance, and said he thought he ought to look after the man. Philby went out and asked the plaintiff several questions, to which he gave such answers as induced Philby to think he had been stealing a horse, or was about to do so. The plaintiff was searched, and was again asked by Philby where he came from; the plaintiff then said that he had come from Cheshunt, and had been to Romford to sell a horse, that his name was Beckwith, and he had got the horse of one Bartlett. He then referred Philby to one Noble, who lived in the neighbourhood. No inquiry was made by Philby of Noble that night. Philby then sent for the defendant Wilks, to take the plaintiff to the watch-house, and on Wilks' arrival desired him to handcuff the plaintiff, which was done. Wilks took him, at his own request, to a public-house at Loughton, and he remained there handcuffed during the night. On the following morning Wilks delivered the plaintiff to the custody of Spicer, who took him to a magistrate, who examined him, and said he thought it his duty to detain him, but that if there was anybody near who would be bound for his appearance, he might go home to his family. Noble became bound for the plaintiff's appearance, and he was then discharged. Philby was present at this examination. On inquiry at Cheshunt it appeared that the plaintiff had bought a horse of Bartlett, as he had stated, and nothing subsequently appeared against his character. No horse had been stolen in or

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[62] A part of the opinion of Lord Eldon and the concurring opinions of Chambre and Rooke, JJ., are omitted.

Shepherd and Williams, Serjts., arguing against the rule, cited 9 Edw. IV., 26 b, Bro. Ab. tit. Trespass, pl. 184, where to trespass for assault and imprisonment the defendant pleaded that the plaintiff was lying in wait in the highway to rob the king's subjects, that one Alice was riding on the same highway, against whom the plaintiff drew his sword and commanded her to deliver her purse, whereupon she levied hue and cry, that the defendant was riding there and heard the cry, and returned and took the plaintiff, and because there were no stocks in the vill he carried him to S. and there delivered him to the constable; and the plea was held good by the whole Court, and Moile said, If one say to me, "See this man, I will certainly kill him," in this case I may hold him so that he do not kill the man, and this holding is no imprisonment.

near Loughton on the day, or for some days before the plaintiff was apprehended, but within the preceding month many had been stolen.

For the plaintiff it was contended, that as there was no charge of felony made, nor any felony committed, the defendant Philby was not justified in making the arrest in the first instance, and still less were he and the other defendants justified in detaining the plaintiff during the night. The learned Judge was of opinion that the arrest and detention were lawful, provided the defendants had reasonable cause to suspect that the plaintiff had committed a felony, and he directed the jury to find a verdict for the defendants, if they thought upon the whole evidence that the defendants had reasonable cause for suspecting the plaintiff of felony. A verdict was found for the defendants, but liberty was reserved to the plaintiff to move to enter a verdict for nominal damages, if the Court should be of opinion that the arrest and detention were unlawful.

Gurney now moved to enter a verdict for the plaintiff for nominal damages, on the ground that a constable had no authority without a warrant to apprehend a person unless there was a charge of felony made by a third person, or unless a felony had been committed. A constable acting on his own suspicion, places himself in the situation of a private person. The latter cannot lawfully arrest another unless a felony has actually been committed, and then it must be on his own suspicion, and not on report or suspicion of another. When a felony has been committed by some one, a constable may, upon the information of others, lawfully apprehend a supposed offender, without any knowledge of the circumstances on which a suspicion is founded. But if he act without having information from others, and on his own suspicion, then he, in the same manner as a private individual, must be liable to an action if it afterwards appear that no felony has been committed.

Lord Tenterden, C. J. I am of opinion that there is no ground for disturbing the verdict. Whether there was any reasonable cause for suspecting that the plaintiff had committed a felony, or was about to commit one, or whether he had been detained in custody an unreasonable time, were questions of fact for the jury, which they have decided against the plaintiff, and in my judgment most correctly. The only question of law in the case is, whether a constable having reasonable cause to suspect that a person has committed a felony, may detain such person until he can be brought before a justice of the peace to have his conduct investigated. There is this distinction between a private individual and a constable; in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities. Now in this case it is quite clear upon the evidence, and

the jury have so found, that the conduct of the plaintiff had given the defendants just cause for suspecting that he either had committed, or was about to commit a felony, and the jury having so found, I am of opinion that the action was not maintainable.

Rule refused.[63]

WALTERS v. W. H. SMITH & SON.

(Court of King's Bench, [1914] 1 K. B. 595.)

Action by Walters to recover damages for false imprisonment and malicious prosecution.

The following statement of the facts is taken from the judgment of Sir Rufus Isaacs, C. J.:

"The plaintiff brought this action to recover damages for false imprisonment and malicious prosecution. It was tried by me with a special jury to whom I submitted certain questions to which they gave the following answers: (1) Did the defendants take reasonable care to inform themselves of the true facts of the case?—Yes. (2A) Did the defendants honestly believe that the plaintiff had stolen the book?—Yes. (2B) Did the defendants reasonably believe that the plaintiff had stolen moneys and stock (other than the book 'Traffic') from the bookstall?—Yes. (3) Were the defendants in instituting the criminal proceedings actuated by malice?—No. (4) What damages for false imprisonment?—£75.

"I ruled that there was not an absence of reasonable and probable cause for the prosecution. Thus the plaintiff failed and the defendant succeeded upon the claim for malicious prosecution, and the claim for false imprisonment remained to be dealt with.

"During the trial it was contended by the plaintiff that, inasmuch as the defendants admitted that no felony had in fact been committed in respect of the book 'Traffic' there was no defence to the claim based upon false imprisonment. The defendants contended that all that they need establish as legal justification for the imprisonment was (1) that an actual felony or felonies had been committed, and (2) that they had reasonable and probable cause for suspecting the plaintiff of having committed an actual felony or actual felonies; in other words, it was argued for the defendants that it was not essential to their defence to prove that the felony for which the plaintiff was arrested had in fact been committed. In order to give the defendants the opportunity of raising this point of law I left question (2B) to the jury, which was answered in favour of the defendants. Both parties claimed judgment upon the verdict of the jury. The matter was then argued before me, and I received great assistance from counsel on both sides, who argued the case with great ability. It was agreed by counsel for the parties that I should be at liberty to find any further facts which might become necessary. So far as they are material to the questions now raised the facts are that the plaintiff was, and had been for some nine years, in the employment of the defendants as assistant manager at a bookstall at the King's Cross Railway Station of the Great Northern Railway where some five other persons were also employed under a manager. Early in 1912 it was discovered at the usual half-yearly stocktaking that there was a deficiency of £126. which pointed to dishonesty and thefts by one or more of the defendants' servants. Stock was again taken in February, when the deficiency was £154., and again in April, 1912, when it was £148. Such a deficiency was inexplicable except upon the basis that money or stock, or both, had been stolen; probably only money was taken, but it might well be that stock also had been stolen. It is clear, and

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63 The statement of facts is abridged.

indeed it was not, and could not be, disputed by the plaintiff at the trial, that a felony, or more probably a series of felonies, had been committed which caused the deficiency, and it was unlikely that they could have been committed otherwise than by a person employed by the defendants at this bookstall. The defendants in order to detect the culprit, and acting upon advice, thereupon set what was called 'a trap.' Copies of a book called 'Traffic' were marked and delivered to the bookstall at King's Cross. An agent of the defendants went to a shop at Staines kept by the plaintiff and his wife, where magazines and newspapers were sold, to purchase a copy of 'Traffic.' On a later day he called, and one of the marked copies was sold to him in exchange for the price which he then paid. The book had been taken on June 15, 1912, by the plaintiff from the bookstall without payment having been made, and without the knowledge of the manager or other assistants at the bookstall. These facts when ascertained were duly reported, on June 19, to Mr. Kimpton, a manager of one of the defendants' departments, to whom the elucidation of the mystery had been entrusted. In addition, and as the result of inquiries, it was discovered that the plaintiff had acted in various respects in contravention of the practice regulating his employment by the defendants, which he knew he was bound to observe, and that in particular he, with his wife's assistance, had commenced, and was carrying on, a business where newspapers and magazines, and occasionally books, were sold. All these facts were thereupon reported to Mr. Hornby, one of the members of the defendant firm. The plaintiff was asked into a room, and in answer to questions put to him made statements which were of a very unsatisfactory character, and wholly failed to give an explanation of his possession of the book 'Traffic.' Mr. Hornby honestly believed that the plaintiff had stolen the book 'Traffic' and that the plaintiff had committed the thefts of money or books from the bookstall which had caused the deficiency, and at the end of the interview Mr. Hornby gave the plaintiff into the custody of Sergeant Budge, who had been employed in the matter as a detective officer. The plaintiff was taken to the police court and charged with stealing the book 'Traffic.' He was committed for trial and was eventually tried at the County of London Sessions held at Newington and acquitted; the defence was that in taking the book he had no felonious intent, which the jury accepted. At the hearing before me it was admitted by the defendants that the plaintiff had not stolen the book, but had taken it away with the intention of subsequently accounting or paying for it, and no imputation now rests upon him in connection with this transaction, and no suggestion is made against him of being party to the acts of theft or dishonesty which caused the deficiency.

"Having regard to the facts proved I have no doubt that the defendants had reasonable and probable cause for suspecting the plaintiff of having stolen the money or books other than the book 'Traffic' when they gave the plaintiff into custody. I further find as a fact that the plaintiff was given into custody for stealing the book 'Traffic,' and that although the defendants when they caused his arrest were convinced that the man who stole 'Traffic' was also guilty of the other thefts, they did not cause his arrest for those other thefts, but only for that theft of which they thought they had clear evidence. Doubtless they were influenced in taking this course by the suspicion, and indeed conviction, in their minds that the plaintiff had committed the other thefts. It induced them to give him into custody for stealing the book, whereas otherwise they might merely have summoned him or indeed might not have prosecuted him at all."

Sir Rufus Isaacs, C. J., after stating the facts above set out, continued: If as a matter of law the defendants must prove that the particular felony for which the plaintiff was imprisoned had in fact been committed they have failed in their defence, inasmuch as no felony with regard to "Traffic" had in fact been committed. If as a matter of law the defendants may justify the imprisonment by proof that at the time of the arrest of the plaintiff felonies had been committed other than that for which he had been arrested, and that they

had reasonable and probable cause for suspecting the plaintiff of having committed them, they would be entitled to succeed.

That is, in my view, the precise question for decision in this case, and one which, so far as I am aware, has never been expressly decided, and for that reason I have gone carefully into the facts and set them out in detail in order that, should it be desired to argue the case further, all the findings of fact will be found in my judgment.

It was strenuously argued before me by counsel for the defendants that in ordering the arrest of the plaintiff they had only caused such an interference with his liberty as was necessary to put matters in train for judicial inquiry, and that the charge subsequently formulated against the plaintiff in the legal proceedings should not be regarded in the claim for false imprisonment. I cannot accept that view inasmuch as it became quite clear during the course of the case, as I have found, that the plaintiff was arrested for stealing the book; and I must deal with the case upon that basis. Interference with the liberty of the subject, and especially interference by a private person, has ever been most jealously guarded by the common law of the land. At common law a police constable may arrest a person if he has reasonable cause to suspect that a felony has been committed, although it afterwards appears that no felony has been committed, but that is not so when a private person makes or causes the arrest, for to justify his action he must prove, among other things, that a felony has actually been committed. See per Lord Tenterden, C. J., in Beckwith v. Philby, 6 B. & C. 635. I have come to the conclusion that it is necessary for a private person to prove that the same felony had been committed for which the plaintiff had been given into custody. In Hawkins' Pleas of the Crown (7th Ed., 1795) bk. ii., ch. xii., p. 163, the law is thus stated: "As to the fourth particular, namely, in what manner an arrest for such suspicion is to be justified in pleading. Sect. 18. It seems to be certain, that * * * regularly he ought expressly to show that the very same crime for which he made the arrest, was actually committed." * * *

The case which is nearest to the one which we are at present considering is Anon., Y. B. 27 Hen. VIII, p. 23, where the plea was that divers cattle were stolen, and the defendant suspected the plaintiff of stealing six cattle. That plea was held bad on the ground that the defendant must prove that the thing which he suspected the plaintiff of stealing was in fact stolen. It is not the precise point, but it is at any rate the nearest to it that I have been able to find. * * *

My attention was also directed to a more modern authority, namely, Bullen and Leake's Precedents of Pleading (3d Ed., 1868) at page 797. This authority was produced by the defendants for another purpose to which I will refer in a moment, but in the note at page 795 I find the law thus stated: "A private individual is justified in himself arresting a person or ordering him to be arrested where a felony

has been committed and he has reasonable ground of suspicion that the person accused is guilty of it"—that means the felony for which he has been arrested. I doubt whether the two cases cited are in themselves a sufficient authority for the proposition there laid down, but I am satisfied that, as indeed one would expect to find in this very learned work, it is an accurate statement of the common law. I cannot find that any doubt has ever been expressed as to the accuracy of this proposition. On behalf of the defendants Mr. Clavell Salter attached some importance to Chitty on Pleadings, vol. iii., pp. 333 and 334, which contains a plea in bar in an action for trespass, and no doubt there the plea was in terms that the arrested person was given into custody (I am not using the exact language) for the purpose of setting on foot a judicial inquiry or legal proceeding, and that was very persistently and very ably relied upon before me. For the reason I have already given I do not think that in this case it assists the defendants, as I am quite convinced that the dominant intention in the minds of the defendants, as was shewn by the fact of the arrest, was to give the plaintiff into custody for having stolen the book and not merely for the purpose of setting on foot a judicial inquiry or formulating subsequently the charges upon which he was arrested. I think on examination of that plea it will be found that it does not support, or at least does not assist in, this case, because as a matter of law I think it is perfectly right to say (and it will be found in the pleas in all the old books on pleading) that there is a statement such as Mr. Salter argued must be pleaded, that it must be pleaded in substance that the plaintiff had been given into custody for the purpose of setting on foot a judicial inquiry, because were it otherwise there could be no justification for the arrest, and no private person would be justified in detaining a person in his own room or in his own house merely for the purpose of detention or punishment. His only justification, given the other circumstances which I have indicated, must be that he did it for the purpose of setting on foot a judicial inquiry. It is only by means of judicial process that the arrest can otherwise be justified. The mere fact of arrest for the purpose of detaining a person and not setting on foot a judicial inquiry could not be justified. It is in that connection that reference was made to the pleas in Bullen and Leake's Precedents of Pleading in the edition which I have quoted.

I have considered the authorities cited by Mr. St. John Hutchinson, but I do not think that they really assist. It is admitted on both sides that there is no authority precisely in point; one gets close to it, no doubt, in a number of cases, but I do not think that any real assistance is derived from the consideration of authorities which are not upon the precise point to be determined. It is by reference to the earlier works on the common law, which has never been altered, that one must ascertain what is the law of the land. I cannot find that any

doubt has ever been expressed upon the accuracy of the proposition of law which I have stated in the simplest language from the note in Bullen and Leake's Precedents of Pleading. I am bound to follow the law thus laid down, and, moreover, I am convinced on consideration that it is based on sound principle. I should be bound to follow it whether I was of that opinion or not, although it may well be that in some cases—as in this particular case—the law seems to operate somewhat harshly upon the defendants. But I have to bear in mind that the principle of law applicable to the facts in this case must be one of general application and cannot be modified, unless the law allows it, in order to meet the difficulties of a particular set of circumstances. The principle urged by the defendants' counsel would, in my judgment, be an encroachment upon the liberty of the subject as hitherto understood. It is true that very often there is a duty cast upon a person to put the law in motion in order to bring offenders to justice, and it is no doubt for reasons of public policy that some excuse, limited in character, is permissible in an action for damages at civil law for false imprisonment when a private person has wrongly caused the arrest of another. But be it observed that this concession is limited to felonies, and although a misdemeanour, which may be a more serious crime than some felonies, may have been committed, yet if a person causes a wrongful arrest, however serious the misdemeanour may be, it cannot be made the basis of any legal excuse if the party has been wrongfully arrested.

When a person, instead of having recourse to legal proceeding by applying for a judicial warrant for arrest or laying an information or issuing other process well known to the law, gives another into custody, he takes a risk upon himself by which he must abide, and if in the result it turns out that the person arrested was innocent, and that therefore the arrest was wrongful, he cannot plead any lawful excuse unless he can bring himself within the proposition of law which I have enunciated in this judgment.

In this case, although the defendants thought, and indeed it appeared that they were justified in thinking, that the plaintiff was the person who had committed the theft, it turned out in fact that they were wrong. The felony for which they gave the plaintiff into custody had not in fact been committed, and, therefore, the very basis upon which they must rest any defence of lawful excuse for the wrongful arrest of another fails them in this case. Although I am quite satisfied not only that they acted with perfect bona fides in the matter but were genuinely convinced after reasonable inquiry that they had in fact discovered the perpetrator of the crime, it now turns out that they were mistaken, and it cannot be established that the crime had been committed for which they gave the plaintiff into custody; they have failed to justify in law the arrest, and there must, therefore, be judgment for the plaintiff for the £75. damages which have been awarded, with the consequent results.

It follows from what I have said that, although there is judgment for the plaintiff for this amount, the defendants have succeeded on the issue as to malicious prosecution, and having succeeded, in my judgment they are entitled to all such costs as the Master thinks were properly attributable to that issue as distinguished from the general costs of the action, and I think the costs should follow the event; the Master will have to rule upon it, but so far as it may be necessary I make that order.

There will therefore be judgment for the plaintiff for £75. and costs.[64]

(F) Discipline

A master may justify the beating his apprentice, servant, scholar, etc., if the beating is in nature of correction only, and with a proper instrument, otherwise immoderate castigavit is a good reply; and so it was adjudged in Keits's Case, per Holt, Chief Justice.

Assault and battery; the defendant justified, for that the plaintiff was his apprentice, and that he tempore quo, etc., gave him gentle correction, and traversed that he was guilty at any time before or after he was his apprentice; and upon a demurrer to this plea it was adjudged ill, because the defendant ought to shew some cause specially, or the fault for which he beat his apprentice, and then conclude absque hoc, that he beat him before or after that time.

3 Salk. 47 (1695).[65]

LORD LEIGHS CASE.

(Court of King's Bench, 1675. 3 Keble, 433, 84 Reprint, 807.)

On difference between him and his lady about settlement of £200. per annum, pin money in case of separation, she upon affidavit of hard usage, and that she went in fear of her life, prayed security of the peace against him, which was granted. And by HALE, Chief Justice, the salva moderata castigatione in the register is not meant of

[64] Parts of the opinion are omitted. Compare Dec. Dig., "Arrest," § 64.

[65] "There are also several kinds of authority in the way of summary force or restraint which the necessities of society require to be exercised by private persons. And such persons are protected in exercise thereof, if they act with good faith and in a reasonable and moderate manner. Parental authority is the most obvious and universal instance. * * * The master of a merchant ship has by reason of necessity the right of using force to preserve order and discipline for the safety of the vessel and the persons and property on board. * * * There are conceivable circumstances in which the leader of a party on land, such as an Alpine expedition, might be justified on the same principle in exercising compulsion to assure the common safety of the party." Pollock on Torts (8th Ed.) 127, 128, 129.

beating, but only of admonition and confinement to the house, in case of her extravagance; which the Court agreed, she being not as an apprentice, etc., but after the parties were reconciled, and all discharged.[66]

SHEEHAN v. STURGES.

(Supreme Court of Errors of Connecticut, 1885. 53 Conn. 481, 2 Atl. 841.)

Action for assault and battery, tried to the court. Finding of facts, with judgment for the defendant. The plaintiff appeals.

GRANGER, J. This is a complaint for an assault and battery. The defense is that the plaintiff was at the time a pupil in a school kept by the defendant, that he willfully violated the reasonable rules of the school and disobeyed the reasonable commands of the defendant as his teacher, and that for this misconduct the defendant as such teacher whipped him in a reasonable manner. The sole controversy upon the trial was as to the reasonableness of the punishment inflicted. The court found that "such whipping was not unreasonable or excessive and was fully justified by the plaintiff's misconduct at that time."

The extent and reasonableness of the punishment administered by a teacher to his pupil is purely a question of fact. This is too well settled to make the citation of authorities necessary. The finding of the court therefore settles the question as to this, unless the court acted upon improper evidence.

The plaintiff testified as a witness in his own behalf, and on his cross-examination the defendant, against the objection of the plaintiff's counsel, was allowed to ask him whether on two former occasions,

[66] "The husband also, by the old law, might give his wife moderate correction. For, as he is to answer for her misbehavior, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children; for whom the master or parent is also liable in some cases to answer. * * * But with us in the politer reign of Charles the Second this power of correction began to be doubted and a wife may now have security of the peace against her husband; or, in return, a husband against his wife. Yet the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege; and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehavior." 1 Bl. Com. 444 (1765).

Compare State v. Rhodes (1868), 61 N. C. 453, 98 Am. Dec. 78: A husband struck his wife three blows "with a switch about the size of one of his fingers." Said the court: "The violence complained of would, without question, have constituted a battery, if the subject of it had not been the defendant's wife." Held, that the husband should not be convicted.

But see State v. Oliver (1874) 70 N. C. 60, Fulgham v. State (1871) 46 Ala. 143, Kales, Cas. on Persons, 609, and Lawson v. State (1902) 115 Ga. 578, 41 S. E. 993: While a husband may use such force as is necessary to repel a felonious assault by his wife upon him, he is not justified under any circumstances in striking his wife, either by way of chastisement or in resentment of a past injury.

Compare The Queen v. Jackson, [1891] 1 Q. B. 671, Kales, Cases on Persons, 612.

both of them more than a week before the whipping in question, he had not assaulted the teacher while he was chastising him. And the defendant afterwards, in his testimony in his own behalf, was allowed, against the objection of the plaintiff, to state that the plaintiff's conduct in school was habitually bad, and that on two former occasions, one of them about two weeks and the other seven or eight days before the whipping in question, the plaintiff had assaulted him while he was chastising him. The defendant was also allowed, on the plaintiff's cross-examination, against objection, to inquire of him whether he had not, seven or eight days before the whipping in question, put stones in his pocket and declared that he was going to attack the teacher with them. The plaintiff, in answer to the inquiry, denied that he had done so, and the defendant, against the plaintiff's objection, was allowed to show by a witness that the plaintiff had so done. The defendant did not inform the plaintiff at the time of the whipping that he was punishing him for his past and habitual misconduct.

We think the court committed no error in admitting the inquiries and evidence. The right of the schoolmaster to require obedience to reasonable rules and a proper submission to his authority, and to inflict corporal punishment for disobedience, is well settled. * * *

No precise rule can be laid down as to what shall be considered excessive or unreasonable punishment. Reeve's Dom. Rel. 288. Each case must depend upon its own circumstances. In Commonwealth v. Randall, 4 Gray (Mass.) 36, it is held that, "in inflicting corporal punishment, a teacher must exercise reasonable judgment and discretion, and be governed as to the mode and severity of the punishment by the nature of the offense, and the age, size, and apparent powers of endurance of the pupil." And we think it equally clear that he should also take into consideration the mental and moral qualities of the pupil, and, as indicative of these, his general behavior in school and his attitude towards his teacher become proper subjects of consideration.

We think therefore that the court acted properly in admitting evidence of the prior and habitual misconduct of the plaintiff, and that it was perfectly proper for the defendant, in chastising him, to consider not merely the immediate offense which had called for the punishment, but the past offenses that aggravated the present one, and showed the plaintiff to have been habitually refractory and disobedient. Nor was it necessary that the teacher should, at the time of inflicting the punishment, remind the pupil of his past and accumulating offenses. The pupil knew them well enough, without having them brought freshly to his notice.

There is no error. In this opinion the other judges concurred.[68]

[68] Part of the opinion is omitted.

STATE v. VANDERBILT.

(Supreme Court of Indiana, 1888. 116 Ind. 11, 18 N. E. 266, 9 Am. St. Rep. 820.)

The teacher of a public school, having made a rule that pupils must pay for the wanton and careless destruction of school property, enforced it by chastising a pupil. A charge of assault and battery was thereupon brought against the teacher, who was acquitted in the trial court. The State appealed the case.

ZOLLARS, J. * * * Looking to the record before us as a whole, we think that it sufficiently presents the question as to whether or not a teacher of a public school may establish, and enforce by chastisement, a rule requiring pupils to "pay for the wanton and careless destruction of school property."

The bill of exceptions shows that the State, by the prosecuting attorney, asked the court to charge the jury "that a teacher in a public district school has no right to inflict a money penalty upon a pupil for the accidental destruction or breakage of school property, and enforce the same." That instruction the court refused, and over the exception of the State gave the following instruction:

"A rule of the teacher, requiring that the pupil shall pay for the wanton and careless destruction of school property, is a reasonable rule, and one that the teacher has the right to enforce."

It is not necessary that the evidence should be in the record to enable us to pass upon these instructions, if in any case on appeal by the State the evidence can be examined, a question which we leave where it is left by our cases. Without speaking of the instruction refused, which is the opposite of that given, the latter, if erroneous, would be erroneous under any supposable state of the evidence.

Under our cases, a school teacher has the right to exact from pupils obedience to his lawful and reasonable demands and rules, and to punish for disobedience, "with kindness, prudence and propriety." And where, in such case, the punishment is not administered with unreasonable severity, a proceeding for an assault and battery can not be maintained against the teacher. Danenhoffer v. State, 69 Ind. 295, 35 Am. Rep. 216. The rule or rules to which the teacher may thus enforce obedience must, however, be reasonable, and whether or not such rules are reasonable is ultimately a question for the courts. Fertich v. Michener, 111 Ind. 472, 11 N. E. 605, 14 N. E. 68, 60 Am. Rep. 709.

We think that a rule requiring pupils to pay for school property which they may wantonly and carelessly break or destroy, is not a reasonable rule, and, therefore, that teachers have no right to make and enforce such a rule by chastisement of the pupils. The "wanton and careless destruction," etc., amounts to nothing more than carelessness. Lafayette, etc., R. R. Co. v. Huffman, 28 Ind. 287, 92 Am.

Dec. 318; Terre Haute, etc., R. R. Co. v. Graham, 95 Ind. 286, 296, 48 Am. Rep. 719. Carelessness on the part of children is one of the most common, and yet one of the least blameworthy, of their faults. In simple carelessness there is no purpose to do wrong. To punish a child for carelessness in any case is to punish it where it has no purpose or intent to do wrong or violate rules.

But beyond this, no rule is reasonable which requires of the pupils what they can not do. The vast majority of pupils, whether small or large, have no money at their command with which to pay for school property which they injure or destroy by carelessness or otherwise. If required to pay for such property, they would have to look to their parents or guardians for the money. If the parent or guardian should not have the money, or if they should refuse to give it to the child, the child would be left subject to punishment for not having done what it had no power to do.

Without giving other reasons for our conclusion that the rule in question was an unreasonable rule, our judgment is that the court below erred in giving the instruction above set out, and that this appeal must be sustained, and the appellee taxed with the costs on appeal.[69]

KING v. FRANKLIN.

(At Nisi Prius, 1858. 1 Fost. & F. 360, 115 R. R. 924.)

Action for false imprisonment and placing the plaintiff in irons.

The defendant was captain of, and the plaintiff a passenger in, the Undaunted. The placing in irons having been proved, the defence set up was, that a mutiny was imminent, and a justification of the imprisonment for the prevention of the mutiny. It appeared that a quarrel had arisen between the captain and some of the passengers respecting the playing of cards in a particular part of the vessel, and some confusion arose therefrom. In the course of the dispute the plaintiff had said that the ship was a floating hotel and the captain only the landlord of her. The captain thereupon ordered the plaintiff to be slightly ironed, stating, in his evidence, that there was no cabin in which to confine him.

Watson, B. (in summing up). The captain has the absolute control over the passengers and crew. The contract with the passenger is to carry, board and lodge him, and the passenger is to obey all the captain's reasonable orders, in an emergency even to work the ship when necessary. If a passenger misconduct himself at table, the captain may remove him, or may even imprison him for a short period, if imprisonment be necessary for the enforcement of his lawful commands. The rule of law is simple; the power of the captain is lim-

[69] Part of the opinion is omitted.

ited to the necessity of the case. In the present case the defendant justifies, for "that he had reasonable and probable cause to believe, and did believe, that a mutiny was imminent." To succeed in his defence he must prove the whole of this allegation. It would not be sufficient that he did believe unless he had also reasonable cause for apprehending a mutiny. The defendant appears to have taken great offence at the term "landlord of hotel" being applied to him; but the term is not altogether incorrect, except that in case of misconduct the landlord may remove the guest from the house, but as the captain cannot remove the passenger from the ship, he may, if necessary, and in moderation, imprison him. He certainly would not be justified in imprisoning a person for having called him "the landlord of an hotel."

Verdict for the plaintiff.

BROWN, HUSSEY & ERITH v. HOWARD.

(Supreme Court of Judicature of New York, 1817. 14 Johns. 119.)

Howard sued Brown, Hussey and Erith, for assault and battery and false imprisonment on the high seas, on board the ship Teaplant. Brown, the master of the ship, pleaded not guilty, and son assault demesne; the other defendants, who were mates on the ship, pleaded not guilty, and justified that they acted by the orders of Brown, the master. There was testimony that Hussey and Erith interfered in no other way than by tying Howard, at the master's order. The counsel for the defendants then moved that the two mates should be acquitted, and struck out of the record, which the court refused; and judgment was given for the plaintiff for $125.

THOMPSON, C. J. * * * The return states that all the facts relative to the transaction took place in presence of the two defendants who were offered as witnesses, and of course, fully known to them at the time they obeyed the order of the captain in binding the plaintiff's hands and feet with ropes. If this was an illegal act in the captain, the mates were not bound to obey him, and cannot excuse themselves under such order. A master has no right to command his servant to commit a trespass, or do a wrongful or unlawful act. From the facts stated in the return, it appears to me that the conduct of the captain, to say the least of it, was harsh and rigorous and altogether unjustifiable; and unless we are warranted in presuming the statement to be, in some degree, colored by the witnesses who were fellow seamen with the plaintiff below, the conduct of the captain merits severe animadversion.

Although a captain may have a right to inflict corporal punishment upon a seaman under his command, yet it is not an arbitrary and uncontrolled right; he is amenable to the law for the due exercise of

it. He ought to be able to show, not only that there was a sufficient cause for chastisement, but that the chastisement itself was reasonable and moderate. 2 Bos. & P. 224; Michaelson v. Denison, 3 Day (Conn.) 294, Fed. Cas. No. 9,523. The rule on this subject is well laid down by Abbott. Abb. on Shipping, 125. By the common law, says he, the master has authority over all the mariners on board the ship, and it is their duty to obey his commands in all lawful matters relative to the navigation of the ship, and the preservation of good order; and in case of disobedience or disorderly conduct, he may lawfully correct them in a reasonable manner; his authority, in this respect, being analogous to that of a parent over a child, or a master over his apprentice or scholar. Such an authority is absolutely necessary to the safety of the ship and of the lives of the persons on board; but it behooves the master to be very careful in the exercise of it, and not to make his parental power a pretext for cruelty and oppression.

Not being able to discover, from the return, the least justification for the captain's treatment of the plaintiff below, and the mates having been acquainted with the whole transaction, I can perceive no ground upon which they can be exonerated as parties, nor, of course, admissible as witnesses. The judgment below must, accordingly, be affirmed.[70]

HANNEN v. EDES.

(Supreme Judicial Court of Massachusetts, 1819. 15 Mass. 347.)

This was an action of trespass for an assault and battery. The defendant pleads, in bar, that at the time when, etc., he was master of the ship Cicero, then in a distant port; that the plaintiff was a seaman, or mariner, on board the same ship; that he, the defendant, issued a reasonable and proper order to the plaintiff, relative to his duty on board the vessel, which the plaintiff wilfully disobeyed; and that he, the defendant, moderately chastised him for such disobedience—which is averred to be the same beating complained of in the declaration. The plaintiff replied de injuria sua propria absque tali causa, etc., on which issue was joined.

On the trial the defendant having proved his justification, so far as respected his authority, the duty of the plaintiff, and his disobedience of a reasonable and proper command, the plaintiff was permitted to show, in evidence, (the defendant objecting), and to insist to the jury, that the beating complained of was excessive, and out of all proportion to the offence committed; and having proved this, a verdict

[70] The statement of the case is abridged, and a portion of the opinion is omitted. The question before the reviewing court, in error on certiorari from a justice's court, was whether Hussey and Erith could be taken out of the case as parties and thus be admitted as witnesses.

was returned in his favor. The defendant moved for a new trial, on the ground that this evidence was improperly admitted; contending that, if the plaintiff relied upon any excess or unreasonableness in the beating, he ought to have set it forth specially in his replication, in the nature of a new assignment.

PARKER, C. J. * * * The general doctrine upon which the whole matter rests is that, whenever the defendant's plea, in an action of trespass, confesses and avoids, by justifying the whole trespass set forth in the declaration, and the plaintiff would set up some new matter as the foundation of his action, he shall show that new matter specially, as in the case of Scot v. Dixon, 2 Wils. 3, cited in the argument. Where, in trespass, the defendant justifies under a license, for putting his cattle into the plaintiff's close, the plaintiff may reply that he put them in at another time without leave, and he shall not shew this in evidence under the general traverse; for, not having specified the time in his declaration, and there being but one trespass complained of, the justification shall be held to apply to that, unless the plaintiff shows another and distinct trespass, in such manner as to give the defendant an opportunity to deny or justify it.

So, in the case of Dye v. Leatherdale, 3 Wils. 20, also referred to in the argument for the defendant, which was trespass for taking and carrying away a hog, and converting him, etc., the justification was that the hog was taken damage feasant; to which the plaintiff replied specially, acknowledging the justification, and averring that the defendant afterwards converted the hog to his own use. This was held to be good pleading; because it alleged a new fact, different from that which was justified in the bar. And in the case of Oystead v. Shed, 12 Mass. 506, the doctrine relied upon by the counsel for the defendant rests upon the same principle, viz., that the breaking of the outer door was a new fact, not relied upon in the declaration, except by way of aggravation; and therefore, as the trespass, as alleged in the declaration, was justified, the plaintiff, in order to take advantage of this, ought to have replied it specially. And to this effect are all the other authorities cited for the defendant.

Now if the case before us cannot be distinguished from those which have been cited, the pleading in this case was wrong for the plaintiff's purpose, and the whole practice of the state has been wrong. But we think it is clearly distinguishable. In the plea of moderate castigavit, the defendant must not only make out his authority, and the cause of the beating, but must also show that the beating was, in fact, moderate; so that if, by his own evidence, it should appear that he had abused his authority, and inflicted blows unnecessary for the purpose, or cruel in the degree, the issue would fail him entirely; and it would be of his own wrong, and without the cause set forth in his plea; and this not upon the ground of his being a trespasser ab initio, so much as because he shows no right at all to inflict any beat-

ing, in the manner and to the degree which the evidence would prove; and he therefore falsifies his own plea.

If the plaintiff intended to rely upon another beating, different in point of time from that which was justified in the plea, he should have replied specially, and set forth such different beating; but if there were but one, as in the present case, and the answer to the justification was intended to be, that the very beating was immoderate, and therefore not justified, the general traverse is right. And so are the authorities, as will be found in Franks v. Morris, 10 East, 81, note (a), and more at large in 1 Saund. 299, note (6), by Sergeant Williams, which were referred to in the argument of the counsel for the plaintiff.

The truth is, the plaintiff had no new cause to assign. The beating which he complained of was the same with that attempted to be justified; and by his replication de injuria sua, etc., he denies the justification. He does not show that afterwards, viz., after the moderate chastisement averred in the plea, there was a further excessive beating, but that the beating itself, alleged to be moderate, was excessive, and so defeated the justification; and thus, we think, the uninterrupted practice is reconcilable with the authorities.

There is an old case reported in Siderfin, 246, and Keble, 884, which was an action for an assault and battery; and wounding and mayhem, by breaking the arm, were alleged. Upon a plea of son assault demesne the plaintiff demurred, stating, as the ground of his demurrer, that as a heinous battery and a mayhem were alleged, the plea ought to have shown an assault sufficient to justify such a battery. But it was holden that the plea was good; because the degree and proportion of the beating to the assault was matter of evidence. If it was not proportionable, the issue would be for the plaintiff, notwithstanding he made the first assault; otherwise, for the defendant. The same principle is applicable to the case before us. The degree and proportion between the offence and the punishment was matter of evidence; and being found disproportioned, the issue was rightly found for the plaintiff, notwithstanding the matter set forth in the plea.

Judgment on the verdict.[71]

[71] The argument of Stearns, and part of the opinion of Parker, C. J., are omitted.

Compare the remark in 2 Phillips on Evidence, 204 (7th London Ed.): "It seems to be the better opinion that, when the trespass is alleged in the declaration in general terms, and it is justified in the like terms, if the defendant has inflicted a greater injury on the plaintiff than he ought to have done, the excess is properly the subject of a special replication." 2 Phill. 204, 7th Lond. Ed.; Dale v. Wood (1822) 7 Moore, 33, Bowen v. Parry (1824) 1 Car. & Payne, 394, Franks v. Morris (1808) 10 East, 81, note, Skinner, 387. See Phillips v. Howgate (1821) 5 B. & A. 220, Cockroft v. Smith (1704) 2 Salk. 642, Bull. N. P. 15; 1 Chitty, Pl. 625.

But see 3 Cyc. 1086, notes 7 and 8, and Abney v. Mize (1908) 155 Ala. 391, 46 South. 230.

(G) Safety of Plaintiff

A private person may, without an express warrant, confine a person disordered in his mind, who seems disposed to do mischief to himself, or to any other person.

Bacon's Abridg. Trespass, (D).

LOOK v. DEAN.

(Supreme Judicial Court of Massachusetts, 1871. 108 Mass. 116, 11 Am. Rep. 323.)

Tort for unlawfully arresting and imprisoning the plaintiff. In justification of an admitted restraint, the defendant pleaded:

That the plaintiff at the time and place aforesaid was insane, and incapable of taking care of himself, and was conducting himself in a wild and irrational manner, and the defendant prevailed upon him to cease from such disorderly conduct and to retire to a place of quiet; and if in so doing he in any manner restrained the plaintiff of his liberty, he did so without malice towards the plaintiff, and because the plaintiff, by reason of his insanity, was incapable of taking care of himself; and the defendant did only what was, as he believed, for the welfare and safety of the plaintiff.

On the trial there was a verdict for the plaintiff. The defendant brings exceptions.

CHAPMAN, C. J. The question which this case presents arises upon the defendant's request for instructions, and the instructions that were actually given. The defendant asked the court to rule that if the plaintiff was insane, and the defendant, honestly believing that the welfare of the plaintiff demanded that he should go from the crowd, to which he was talking, to a place of quiet near by, took him forcibly to such place, using no more force than was necessary for the purpose, and acting from no other motive than a desire to assist and protect the plaintiff, such act would not be an assault nor an unlawful arrest or imprisonment. The court declined to give this instruction, but instructed the jury that, if the plaintiff was insane, the officer had a right to arrest him, but it would in such case be his duty immediately to take proper steps to have him committed to a lunatic hospital, and if he failed to do so he would be liable from the beginning for the arrest.

Both the request and the instructions assume that he was neither dangerously insane, nor disturbing the peace, but was merely insane. The defendant was a deputy of the state constable, but his office gave him no authority over the plaintiff. He had only such authority as any private person would have. The right which every citizen has to enjoy personal liberty is necessarily subject to some exceptions. Most of these exceptions are enumerated in Colby v. Jackson, 12 N. H. 526, and the authorities there cited. Among them, are the right to restrain

a person who is fighting, or doing mischief, or disturbing a congregation, or has fallen in a fit, or is so sick as to be helpless, or is unconsciously going into great danger, or is drunk, or has delirium tremens, or is so insane as to be dangerous to himself or others. In such cases, the right to restrain persons has its foundation in a reasonable necessity, and ceases with the necessity. As to insane persons who are not dangerous, they are not liable to be thus arrested or restrained by strangers. Bac. Ab. Trespass, D; Anderdon v. Burrows, 4 C. & P. 210; Scott v. Wakem, 3 Fost. & Finl. 328; Fletcher v. Fletcher, 28 L. J. N. S. (Q. B.) 134; In re Oakes, 8 Law Reporter, 122. There is no reason why they should be thus liable; for it is well known that many persons who are insane, and especially monomaniacs, are as harmless as any other persons, and are not deemed proper subjects for treatment in a hospital. The request for instructions was properly refused.

We need not in this case discuss the question whether the defendant would have had the right, as stated in the instructions given, to take up the plaintiff, he not being a dangerous person, provided he had taken the proper steps to have him committed to a lunatic hospital; for he took no such steps. There was no legal justification for the acts of the defendant.

It is elementary law that one who would justify himself under a statute must pursue the statute. The question put to the defendant as a witness, by his counsel, whether he was acting under the direction of any superior officer, was properly ruled to be inadmissible, because he did not proceed under the statutes, but merely held the plaintiff for a while, and then released him. A superior officer could not authorize this course.

The question whether in his opinion the mind of the plaintiff, at the time of the arrest, was in a normal or abnormal condition, and whether the plaintiff was sane or insane, was also inadmissible, because the fact itself was immaterial, it not being pretended that the defendant was acting under the statutes.

The subsequent commitment of the plaintiff to the hospital by another constable was a separate matter, and could not have justified the defendant, even if it had been legal.

Exceptions overruled.[72]

[72] The statement of the case is abridged.

"In Fletcher v. Fletcher (1859) 1 E. & E. 420, [28 L. J. Q. B. 134], the Court used general language which might seem to convey the notion that the mere fact of lunacy justified the confinement of the sufferer. The judges did not, it is conceived, mean this. The distinction between harmless and dangerous lunatics was not material for them to consider." Clerk & Lindsell on Torts, 211, note e. Accord: Keleher v. Putnam (1880) 60 N. H. 30, 49 Am. Rep. 304: "The plaintiff was mildly insane, and the defendant without process arrested and detained her."

On the limits of the excuse, see Colby v. Jackson (1842) 12 N. H. 526 (no one has a right to confine an insane person for an indefinite time, until he shall be restored to reason, but upon compliance with the formalities of the law); Paetz v. Dain (1872) Wils. (Ind.) 148.

HOFFMAN v. EPPERS.

(Supreme Court of Wisconsin, 1876. 41 Wis. 251.)

The action was to recover damages for an assault and battery alleged to have been committed by the defendant upon the plaintiff. The evidence, admitted under a general denial, tended to show that the parties came from a neighboring town to the city of Kenosha to attend a lawsuit as witnesses; that they were together there, and drank with each other several times, and both became intoxicated; that the friends of the plaintiff took him to a hotel and put him to bed; that when the time for the suit to be called had nearly arrived, the defendant went to the room where the plaintiff was, aroused him, took him down stairs and into the street, and started with him in the direction of the court. After the defendant got the plaintiff into the street, the latter was arrested and locked up in jail until the next morning, when he was taken before a magistrate and fined for being drunk and disorderly in the streets of the city.

The jury found for the defendant; a new trial was denied; and from a judgment entered pursuant to the verdict, the plaintiff appealed.

Wiesmann and Quarles, for the appellant: * * * The statute does not punish the act of intoxication, but the act of being found in a public place in such a state of intoxication as to disturb others. To speak of the plaintiff, therefore, as having been arrested for being intoxicated, was to misstate the law and mislead the jury. The arrest, imprisonment and fine of the plaintiff were the direct and immediate result of the defendant's unlawful acts. Plaintiff was sleeping soundly when defendant intruded upon him, and would not of his own accord have violated the law. He was punished for being where the defendant carried him against his will. * * *

LYON, J. * * * It was certainly lawful for the defendant to arouse the plaintiff from his drunken stupor, and to endeavor to assist him to the court where he was required as a witness; and if the defendant did this as a friendly act, in a gentle and friendly manner, with an honest purpose to do the plaintiff no injury, but only to aid him to reach the court, he is not liable to respond in damages for such acts. As we understand the charge of the learned circuit judge, he substantially so stated the law to the jury; and there is sufficient testimony tending to show that such was the motive and purpose of the defendant's conduct, to render the instructions applicable to the case. * * *

Judgment affirmed.[73]

[73] The statement of the case is abridged, and only so much of the opinion is given as relates to the one point.

On the principle involved, compare Richmond v. Fisk (1893) 160 Mass. 34, 35 N. E. 103, given ante, p. 77; and see in general, ante, Section 2—Elements of a Prima Facie Cause in Trespass.

LUKA v. LOWRIE.

(Supreme Court of Michigan, 1912. 171 Mich. 122, 136 N. W. 1106, 41 L. R. A. [N. S.] 290.)

Action by Charles Luka, by next friend, against Lowrie and others. Judgment for defendants. Plaintiff brings error.

The plaintiff, a boy 15 years of age, while crossing the Michigan Central Railroad track, was knocked down by an engine and in some manner, not clearly shown, was thrown under the wheels of a car. His left foot was mangled and crushed. Shortly after his injury, plaintiff was removed to Harper Hospital in an ambulance. He was partially conscious upon his arrival and was able to communicate his name and the name of the street upon which he lived to the attending surgeons. Within 10 or 15 minutes after his arrival, he lapsed into a comatose condition, and later into complete unconsciousness. Efforts to revive him by injections of strychnine and infusion of a saline solution were made, but he remained unconscious until after the operation. Soon after his arrival at the hospital, at 10:15 a. m., plaintiff's foot was examined by four house physicians connected with the hospital. They concluded that prompt surgical treatment was necessary and telephoned to defendant, who is assistant surgeon of the Michigan Central Railroad. Defendant arrived at the hospital at 10:45 a. m. Upon examining the plaintiff, he found him unconscious, with a weak pulse and dilated pupils. The foot was found to be cold and dead, the circulation having been interrupted. Defendant testified that he learned from the house surgeon the boy's name and residence street. With reference to the residence, he knew the distance from Harper Hospital and the time it would take to get from there to the hospital; that he inquired of the house surgeon if any one, any relatives, were present, and was informed that no person was present whatever. After a consultation with the four house physicians, it was agreed by all that an immediate amputation was necessary to save the plaintiff's life. The foot was amputated, and the plaintiff recovered. It is the plaintiff's claim that his foot should not have been amputated at all, and particularly that it should not have been amputated without first obtaining his consent or the consent of his parents, who went to the hospital as soon as possible after learning of the accident. A verdict having been directed in favor of defendant, the case is brought here for review upon writ of error.

BROOKE, J. * * * There is nothing in this record to indicate that, had the parents of plaintiff been present at the operating table, they would have refused their consent to the operation. Indeed, it is inconceivable that such consent would have been withheld in the face of the determination of five duly qualified physicians and surgeons that it was necessary to save the plaintiff's life. But defendant testifies, and in this he is not contradicted, that he made inquiry for

relatives of the plaintiff and was told that none were in the hospital. Suppose that his informant was in error (which is not certain), the defendant had a right to rely upon the information and to act in the emergency upon the theory that to obtain consent was impracticable. In Pratt v. Davis, 224 Ill. 309, 79 N. E. 565, 7 L. R. A. (N. S.) 609, 8 Ann. Cas. 197, it was said: "In such event a surgeon may lawfully, and it is his duty to, perform such operation as good surgery demands without such consent." Upon the question involved in this case a valuable collection of authorities will be found in Gillette v. Tucker, 93 Am. St. Rep. 657, note. See, also, 6 Cyc. 675; 30 Cyc. 1587.

The fact that surgeons are called upon daily, in all our large cities, to operate instantly in emergency cases in order that life may be preserved, should be considered. Many small children are injured upon the streets in large cities. To hold that a surgeon must wait until perhaps he may be able to secure the consent of the parents before giving to the injured one the benefit of his skill and learning, to the end that life may be preserved, would, we believe, result in the loss of many lives which might otherwise be saved. It is not to be presumed that competent surgeons will wantonly operate, nor that they will fail to obtain the consent of parents to operations where such consent may be reasonably obtained in view of the exigency. Their work, however, is highly humane and very largely charitable in character, and no rule should be announced which would tend in the slightest degree to deprive sufferers of the benefit of their services.

The judgment is affirmed.[74]

[74] Compare Rolater v. Strain (1913) 39 Okl. 572, 137 Pac. 96, 50 L. R. A. (N. S.) 880: P. stepped on a nail which penetrated the great toe of her right foot. The wound did not heal, and D., a surgeon, was consulted. He advised an operation, to drain the wound. P. consented, but on condition that no bone should be removed. P. was placed under an anæsthetic, but in performing the operation D. removed a sesamoid bone. Contending that she did not consent to the removal of this bone, P. sued for assault and battery. It was not claimed that the operation was unskillfully performed. D. contended that even if the contract was made, still the removal of the bone, under the circumstances, was not a violation of it, since the facts show this to be an emergency case, as this bone was found in an unusual place, and was unexpected, and when it was discovered, the patient being under the influence of the anæsthetic, it was unsafe to stop the operation at the time and allow her come out from under the influence of the anæsthetic so as to have obtained her consent to its removal, and that he was justified under the circumstances in removing the bone. Held, P. may recover.

For the principle, see ante, Mohr v. Williams (1905) 95 Minn. 261, 104 N. W. 12, 1 L. R. A. (N. S.) 439, 111 Am. St. Rep. 462, 5 Ann. Cas. 303.

SECTION 4.—TRESPASS AB INITIO

THE SIX CARPENTERS' CASE.

(Court of King's Bench, 1610. 8 Co. Rep. 146 a, 77 Reprint, 695.)

In trespass brought by John Vaux against Thomas Newman, carpenter, and five other carpenters, for breaking his house, and for an assault and battery, 1 Sept. 7 Jac. in London, in the parish of St. Giles extra Cripplegate, in the ward of Cripplegate, etc., and upon the new assignment, the plaintiff assigned the trespass in a house called the Queen's Head. The defendants to all the trespass præter fractionem domus pleaded not guilty; and as to the breaking of the house said, that the house præd' tempore quo, etc., et diu antea et postea, was a common wine tavern, of the said John Vaux, with a common sign at the door of the said house fixed, etc., by force whereof the defendants, præd' tempore quo, etc., viz. hora quarta post meridiem into the said house, the door thereof being open, did enter, and did there buy and drink a quart of wine, and there paid for the same, etc. The plaintiff, by way of replication, did confess, that the said house was a common tavern, and that they entered into it, and bought and drank a quart of wine, and paid for it: but further said, that one John Ridding, servant of the said John Vaux, at the request of the said defendants, did there then deliver them another quart of wine, and a pennyworth of bread, amounting to 8d. and then they there did drink the said wine, and eat the bread, and upon request did refuse to pay for the same: upon which the defendants did demur in law: and the only point in this case was, if the denying to pay for the wine, or the nonpayment, which is all one (for every nonpayment upon request, is a denying in law) makes the entry into the tavern tortious.

And first it was resolved when an entry, authority, or license, is given to any one by the law, and he doth abuse it, he shall be a trespasser ab initio:[75] but where an entry, authority, or license is given by

[75] On this distinction between nonfeasance and misfeasance in the law of trespass ab initio, see the remarks of Coke, C. J., in Isaack v. Clark (1615) 2 Bulstrode, 306, 312: "If a man findes goods, an action upon the case lieth, for his ill and negligent keeping of them, but no trover and conversion, because it is but a non feasans, and so in the Six Carpenters Case, he shall not be punished in trespass, for not paying for his wine, being but non feasans; but if a distress taken be abused, he shall then be punished in trespass, and so the difference is, that mis-fesans but not non-fesans, shall make one a trespasser."

See, also, the remark of Mr. Justice Holmes in Commonwealth v. Rubin (1896) 165 Mass. 453, 43 N. E. 200: "The rule that if a man abuse an authority given him by the law, he becomes a trespasser ab initio, although now it looks like a rule of substantive law and is limited to a certain class of cases, in its origin was only a rule of evidence by which, when such rules were few and rude, the original intent was presumed conclusively from the subsequent conduct."

Compare the remarks of Professor Ames on "the origin of the familiar distinction in the law of trespass ab initio between the abuse of an authority given

the party, and he abuses it, there he must be punished for his abuse, but shall not be a trespasser ab initio. And the reason of this difference is, that in the case of a general authority or license of law, the law adjudges by the subsequent act, quo animo, or to what intent, he entered; for acta exteriora indicant interiora secreta. Vide 11 H. 4, 75 b. But when the party gives an authority or license himself to do anything, he cannot, for any subsequent cause, punish that which is done by his own authority or license, and therefore the law gives authority to enter into a common inn, or tavern, so to the lord to distrain; to the owner of the ground to distrain damage-feasant; to him in reversion to see if waste be done; to the commoner to enter upon the land to see his cattle, and such like. Vide 12 E. 4, 8 b. 21 E. 4, 19 b. 5 H. 7, 11 a. 9 H. 6, 29 b. 11 H. 4, 75 b. 3 H. 7, 15 b. 28 H. 6, 5 b. But if he who enters into the inn or tavern doth a trespass, as if he carries away any thing; or if the lord who distrains for rent, or the owner for damage-feasant, works or kills the distress; or if he who enters to see waste breaks the house, or stays there all night; or if the commoner cuts down a tree, in these and the like cases, the law adjudges that he entered for that purpose; and because the act which demonstrates it is a trespass, he shall be trespasser ab initio as it appears in the said books. So if a purveyor takes my cattle by force of a commission, for the King's house, it is lawful; but if he sells them in the market, now the first taking is wrongful; and therewith agrees 18 H. 6, 19 b. Et sic de similibus.

It was resolved per totam Curiam, that not doing cannot make the party who has authority or license by the law a trespasser ab initio, because not doing is no trespass, and, therefore, if the lessor distrains for his rent, and thereupon the lessee tenders him the rent and arrears, etc., and requires his beasts again, and he will not deliver them, this not doing cannot make him a trespasser ab initio; and therewith agrees 33 H. 6, 47 a. So if a man takes cattle damage-feasant, and the other offers sufficient amends and he refuses to redeliver them, now if he sues a replevin, he shall recover damages only for the detaining of them, and not for the taking, for that was lawful; and therewith agrees F. N. B. 69, g. temp. E. 1. Replevin 27. 27 E. 3. 88. 45 E. 3, 9. So in the case at Bar, for not paying for the wine, the defendants shall not be trespassers, for the denying to pay for it is no trespass, and therefore they cannot be trespassers ab initio; and therewith agrees directly in the point 12 Edw. 4, 9 b. For there Pigot, Serjeant, puts this very case, if one comes into a tavern to drink, and when he has drunk he goes away, and will not pay the taverner, the taverner shall have an action of trespass against him

by the law and the abuse of an authority given by the party, the abuse making one a trespasser ab initio in the one case, but not in the other." 11 Harv. Law Review 276, 287–289; 3 Legal Essays 418, 428–430; Lectures on Legal History, 61.

See, further, Professor Beale's article on "Trespass" in 38 Cyc. 1000, notes, and cases there given, and Key No., Dec. Dig., "Trespass," § 13.

for his entry. To which BRIAN, Chief Justice, said, the said case which Pigot has put, is not law, for it is no trespass, but the taverner shall have an action of debt. * * *[76]

GARGRAVE v. SMITH.

(Court of Common Pleas, 1691. Salk. 221, 91 Reprint, 196.)

Trespass for breaking his house, and taking and carrying away his goods; the defendant justified the taking and carrying away nomine districtionis for damage-feasant; plaintiff replied quod post districtionem præd. viz. eodem die, etc., he converted them to his own use. On demurrer it was urged, that the replication was a departure, for it does not make good the plaintiff's declaration in trespass, but shews rather that the plaintiff's should have brought trover and conversion: Sed non allocatur; he that abuses a distress, is a trespasser ab initio, and therefore if in trespass the defendant justifies nomine districtionis, the plaintiff may shew an abuse, and it is no departure, but makes good his declaration; and so it does in this case, for the converting is a trespass or trover at election, and the matter disclosed in the replication makes good his election, for it proves it a trespass as well as a trover.

ALLEN v. CROFOOT.

(Supreme Court of Judicature of New York, 1830. 5 Wend. 506.)

Crofoot sued Allen in a justice's court, and declared against him in trespass for entering his house in his absence and obtaining copies of papers for the purpose of commencing a suit against him. The defendant pleaded the general issue and license to enter the house. The cause was tried by a jury, who found a verdict for the plaintiff for $50, for which sum the justice gave judgment. The defendant appealed to the Cortland Common Pleas, where the court charged the jury that if they should be of the opinion that the defendant had acted unfairly or improperly in obtaining copies of the papers, and had gone to the plaintiff's house with the intention of fraudulently obtaining such copies, though he had leave to enter the house, they should find for the plaintiff; but if he acted correctly and openly, and had leave to enter the house, they should find for the defendant. The defendant excepted to this charge, and the jury found a verdict for

[76] A portion of the opinion, dealing with analogous cases, is omitted. After reviewing many authorities, Lord Coke is clear that in the doctrines of the Six Carpenters' Case "all the books which prima facie seem to disagree are upon full and pregnant reason well reconciled and agreed."

the plaintiff, with $75 damages. The defendant sued out a writ of error.[77]

SAVAGE, C. J. * * * It is also urged by the plaintiff in error that the court below erred in charging the jury that the action was sustainable, if they should find the defendant entered the plaintiff's house fraudulently, to obtain improperly copies of papers in the absence of the plaintiff. It was decided in the Six Carpenters' Case that where an authority to enter upon the premises of another is given by law, and it is subsequently abused, the party becomes a trespasser ab initio; but where such authority or license is given by the party, and it is subsequently abused, the party guilty of the abuse may be punished, but he is not a trespasser;[78] and the reason of the difference is said to be that in case of a license by law the subsequent tortious act shows quo animo he entered; and having entered with an intent to abuse the authority given by law, the entry is unlawful; but where the authority or license is given by the party, he cannot punish for that which was done by his own authority.

Whether this is not a distinction without a difference of principle, is not necessary to inquire. A better reason is given for it in Bac. Abr. tit. "Trespass," B. Where the law has given an authority, it is reasonable that it should make void everything done by the abuse of that authority, and leave the abuser as if he had done everything without authority. But where a man who was under no necessity to give an authority does so, and the person receiving the authority abuses it, there is no reason why the law should interpose to make void everything done by such abuse, because it was the man's folly to trust another with an authority who was not fit to be trusted therewith. It is contended that the license, being obtained by fraud, was void. The defendant knocked on the door and was told to walk in;[79] he was found copying certain papers; but how he obtained them, on what representation, or from whom, the evidence does not disclose. One witness does indeed testify that he said he would not have got

[77] The statement is abridged. A part of the opinion on another point is omitted.

[78] On the origin of this distinction in the law of trespass ab initio, see Professor Ames' Article on "The History of Trover," 11 Harv. Law Rev. 276, 287–289; 3 Legal Essays, 418, 428–430.

[79] Compare: Moore v. Duke (1911) 84 Vt. 401, 80 Atl. 194: Duke, a constable with a writ of replevin for a chattel in the possession of Moore, entered Moore's lot and knocked at the door of his dwelling. Moore opened the door and invited Duke to enter. "This," said Powers, J., delivering the opinion, "is said to have amounted to a license in fact. But the breaking of the close described in the second count preceded this. It was complete when the officer stepped across the imaginary line which divided the lot from the street. * * * As evidence that Duke did not come upon the premises under a license from the plaintiff, either express or implied, it was permissible to show that he came there for the sole purpose of serving this writ." In this case, Moore's declaration against Duke was framed in two counts, one charging a trespass to the plaintiff's dwelling house, the other a trespass to the lot on which the dwelling stood.

the copies, if he had not practiced a deception on the wife and brother-in-law of the plaintiff. If this declaration should be considered evidence of his having made improper representations to obtain the papers, then the question arises: Does he thereby become a trespasser ab initio?

It has been decided that to enter a dwelling-house without license is in law a trespass, Adams v. Freeman, 12 Johns. 408, 7 Am. Dec. 327, and that possession of property obtained fraudulently confers no title. Under such circumstances no change of property takes place, Woodworth v. Kissam, 15 Johns. 186; and it is argued that, as fraud vitiates everything into which it enters, a license to enter the house fraudulently obtained is void, and is no license. The principle of relation has never been applied to such a case, nor is it necessary for the purposes of justice to extend it further than to cases where the person enters under a license given him by law. In such cases, as the party injured had not the power to prevent the injury, it seems reasonable that he should be restored to all his remedies.

The judgment must be reversed without costs, and a venire de novo awarded by Cortland, C. P.

ADAMS v. RIVERS.

(Supreme Court of New York, 1851. 11 Barb. 390.)

This action was brought in a justice's court. The plaintiff declared, for that he was in possession of premises bounded by streets on two sides, and also in constructive possession to the center of each street, subject only to a public easement; that the defendant wrongfully came upon the sidewalk of the plaintiff, and there remained, using offensive, vulgar and vile language towards the plaintiff and refusing to depart. The answer pleaded a license to be upon the sidewalk. There was a verdict for the plaintiff for $20 damages, and judgment thereon. The defendant appealed to the county court, which reversed the judgment, upon the ground that evidence was admitted of the language of the defendant while on the sidewalk of a public street, and that no action for such a cause could be maintained. The plaintiff appealed to the Supreme Court.[80]

WILLARD, P. J. * * * This brings us to the main question in the case, whether the defendant, by using abusive and insulting language to the plaintiff, became a trespasser from the beginning. The testimony authorized the jury to find that the defendant came on to the premises of the plaintiff, covered by the street, not in the legitimate use of the highway as a place of travel, but for the express purpose of abusing him. The opprobrious language used by the defendant was not actionable as slanderous. It was highly provoking and tended directly to a breach of the peace. It was received in evidence merely

[80] The statement of the case has been abridged. Only so much of the opinion is given as relates to the one point.

to show that the defendant was a trespasser, having forfeited his privilege by a gross abuse of it; and not indirectly to recover damages before the justice, for actionable words. It is conceded that the justice had no jurisdiction of an action of slander.

The general doctrine as laid down in the Six Carpenters' Case, 8 Co. 146, a, is that when an entry, authority or license is given to any one by the law, and he doth abuse it, he shall be a trespasser ab initio; but when an entry, authority or license is given by the party, and he abuses it, then he must be punished for the abuse, but shall not be a trespasser ab initio. * * * In all the cases put by Coke, the acts complained of as abuses of the power were distinct acts of trespass. And it seems to be the better opinion that a man cannot become a trespasser ab initio, by any act of omission, which would not itself, if not protected by a license, be the subject of trespass. * * * No case has been cited showing that a man will forfeit a license granted by law, by the use of vituperative language; and none such has fallen under my notice. In all the cases, except Adams v. Adams, and Bond v. Wilder,[81] some positive act, such as if done without authority would be a trespass, has been held essential to make the party a trespasser ab initio. These cases may have been decided upon local statutes. It is quite clear that uttering abusive language was not an act for which the plaintiff could maintain trespass against the defendant. * * *

"A highway," says Swift, Justice, in Peck v. Smith, 1 Conn. 132, 6 Am. Dec. 216, "is nothing but an easement, comprehending merely the right of all the individuals in the community to pass and repass, with the incidental right in the public to do all the acts necessary to keep it in repair. This easement does not comprehend any interest in the soil, nor give the public the legal possession of it." In this state, since the adoption of the Revised Statutes, the public under certain circumstances, may have a qualified right of pasturage, by certain animals at certain seasons. Griffin v. Martin, 7 Barb. 297. The use of the highway, by any person for any purpose other than to pass and repass, is a trespass upon the person who owns the fee of the road. Makepeace v. Worden, 1 N. H. 16; Babcock v. Lamb, 1 Cow. 238; Jackson v. Hathaway, 15 Johns. 447, 8 Am. Dec. 263. But no act will amount to a trespass unless the same act would be a trespass if committed on any other land of the plaintiff. Language, however licentious and abusive, is not a trespass, within the appropriate meaning of that term. Nor can a party be made a trespasser upon the freehold of the adjoining owners of the soil, by the uttering of abusive language as he passes along the road. A person who disturbs the

[81] Adams v. Adams (1832) 13 Pick. (Mass.) 384, was to the effect that the *omission* of a distrainor to afford proper food and water to distrained cattle made the distrainor a trespasser from the beginning. In Bond v. Wilder (1844), 16 Vt. 394, it was held that if an officer levy upon property by virtue of an execution, and advertise the same for sale, and neglect to sell it upon execution, he becomes a trespasser ab initio.

public peace as he passes along the road, by singing obscene songs and using boisterous and obscene language, may be liable to be punished at the suit of the public, for a breach of the peace, but he is not liable in trespass at the suit of the adjoining owners. These acts, however censurable, are not acts of trespass.

The foregoing remarks show that if the action was sought to be maintained on the ground that the defendant became, while passing on the road, a trespasser from the beginning, by reason of his abusive language to the plaintiff, the action cannot be maintained. The county judge must have taken this view of the case; for one of the reasons for the reversal is that evidence was received by the justice, under objections, of the language and conversation of the defendant on the sidewalks of the public streets, and in his judgment no action could be maintained for that cause. It is presumed that the county judge supposed that the abusive language was proved, not as a substantive cause of action, but as showing that the defendant had forfeited his right to be in the highway on the plaintiff's premises; in short that he was a trespasser ab initio, by reason of his abusive conduct.

But there was another view of the case which seems to have been overlooked. * * * The defendant committed a trespass while standing on the sidewalk by the plaintiff's lot where he lived, and using towards him abusive language. While so engaged he was not using the highway for the purpose for which it was designed,[82] but was a trespasser. He stood there but about five minutes. It was not shewn that he stopped on the side walk for a justifiable cause; on the contrary it was rendered probable that it was for a base and wicked purpose. It was, therefore, a trespass. Suppose a strolling musician stops in front of a gentleman's house, and plays a tune or sings an obscene song under his window, can there be a doubt that he is liable in trespass? The tendency of the act is to disturb the peace, to draw together a crowd, and to obstruct the street. It would be no justification that the act was done in a public street. The public have no need of the highway but to pass and repass. If it is used for any other purpose not justified by law, the owners of the adjoining land are remitted to the same rights they possessed before the highway was made. They can protect themselves against such annoyances, by treating the intruders as trespassers.[83]

[82] Compare Moore v. Duke (1911) 84 Vt. 401, 80 Atl. 194: D. had entered P.'s dwelling to serve a writ of replevin. The question was whether D. had entered on P.'s implied invitation. It appeared that the dwelling was used in part as a village clerk's office. "But," said the court, "a public office like this is not public for all purposes or to all persons. It is only open to such as have legitimate business there, and this includes only such persons as have business to transact there of the kind for which the office is maintained and other matters reasonably incident thereto and in some circumstances persons whose business is merely social."

[83] Accord:

Harrison v. Duke of Rutland (1893) 1 Q. B. 142: D. owned a grouse moor crossed by a public highway. While D. was shooting on this moor, P. went

The action therefore was strictly supported by the evidence. The jury were not limited to mere compensatory damages, and the court could not have interfered, had the recovery been five times as much as it was. Merest v. Harvey, 5 Taunt. 442; Cook v. Ellis, 6 Hill, 466, 41 Am. Dec. 757; Whitney v. Hitchcock, 4 Denio, 461.

The judgment of the county court must be reversed, and that of the justice affirmed.

COLE v. DREW et ux.

(Supreme Court of Vermont, 1871. 44 Vt. 49, 8 Am. Rep. 363.)

Trespass, q. c. f. The defendant's wife, under the direction of the highway surveyor, cut the grass growing in the highway over the land of the plaintiff, that her children might go and come from school, without getting their clothes wet. She cut about fifteen or twenty pounds and carried it away and fed it to her husband's horse. The court ruled, at the trial, that the defendant was justified in cutting the grass in the highway, but that in carrying it away and feeding it to the horse, she became a trespasser ab initio; and that the rule "de minimis non curat lex" did not apply. Verdict for plaintiff for one cent damages. Defendants excepted.

Ross, J. * * * The owner of the soil over which a highway is located is entitled to the emblements growing thereon, and to the entire use of the land, except the right which the public have to use the land and the materials thereon for the purpose of building and maintaining a highway, suitable for the safe passage of travelers. This doctrine has been long established by numerous authorities. Goodtitle v. Alker, 1 Burr. 133; Holden v. Shattuck, 34 Vt. 336, 80 Am. Dec. 684; Perley v. Chandler, 6 Mass. 454, 4 Am. Dec. 159; Stackpole v. Healey, 16 Mass. 33, 8 Am. Dec. 121; Jackson v. Hathaway, 15 Johns. (N. Y.) 447, 8 Am. Dec. 263. These authorities fully establish that he may maintain trespass, or ejectment, for injuries to his rights as such owner of the soil. The public acquire only an easement in the land taken, consisting of the right to use the materials, in and upon the land taken, for building and maintaining a suitable way, and of using the way, when constructed, for passing and repass-

upon the highway solely for the purpose of interfering with D.'s shooting, and did there so interfere, by waving his handkerchief and opening and shutting his umbrella, and thus preventing grouse from flying toward D. On P.'s refusal to desist, D.'s servants held him down, using no more force than was necessary, until the shooting was over. P. sued for battery. D. pleaded that P. was a trespasser on his land.

Hickman v. Maisey (1900) 1 Q. B. 752: P. owned land crossed by a highway. S., a trainer of race horses, obtained from P. the right to use some of his land for the training and trial of race horses. D., the proprietor of a publication which gave accounts of the doings of race horses in training, spent an hour and a half walking backwards and forwards over a portion of the highway on P.'s land, observing with glasses and taking notes of the trials of the race horses. P. sued for a trespass on his land.

ing. The public and the highway surveyor, who is the agent of the public for certain purposes, have no right to appropriate any of the materials or emblements of the land taken to any other purpose. The defendant wife could exercise, under the authority of the highway surveyor, no greater right than those which the law has conferred on the surveyor.

The grass, though properly cut by Mrs. Drew, under the direction of the highway surveyor, because it interfered with the use of the land for the purposes of a highway, was, when cut, the property of the plaintiff. Mrs. Drew had no right to use it for feeding her husband's horse. By so doing she overstepped the license and authority which the law conferred upon the highway surveyor, and through him upon her, and made herself a trespasser ab initio. If a man abuse an authority or license given by the law he renders himself a trespasser ab initio, as it was resolved in the Six Carpenters' Case, 8 Coke, 146. She, under the authority and license given by the law to cut the grass, by feeding the grass to the horse clearly invaded a right still belonging to the plaintiff as owner of the soil. Such cutting and appropriation of the grass, under the claim of a right by the defendant for fifteen consecutive years, would furnish very strong, if not conclusive, evidence of the acquisition of the ownership of the soil, by the defendant, by adverse use. The right to take the herbage, or emblements, is about all that is left to the owner of soil burdened with the easement of a public highway. When one takes this right from him he appropriates generally the only remaining right of the owner of the soil. Such an invasion of a right, we think, always imports some damage, though no pecuniary loss results therefrom. We think Fullam v. Stearns, 30 Vt. 443, fully establishes that the maxim, "de minimis non curat lex," is never properly applied to an injury for the invasion of a right, and it does not apply to this case. The defendants insist that, under the pleadings, if the plaintiff would recover for the appropriation of the grass he should have new assigned. No such question appears to have been raised in the court below.

Judgment of the county court is affirmed.[84]

BOSTON & M. R. CO. v. SMALL.

(Supreme Judicial Court of Maine, 1893. 85 Me. 462, 27 Atl. 349, 35 Am. St. Rep. 379.)

The Boston & Maine Railroad Company brought an action of trespass against James W. Small, deputy sheriff, for breaking and entering one of the plaintiff's freight cars.

EMERY, J. The plaintiff corporation, as a common carrier, had in its possession, on one of its side tracks, in Biddeford, a box freight

[84] The statement of facts is abridged and part of the opinion is omitted.

car laden with merchandise for various parties, and locked and sealed. While the car was in this situation and condition, the defendant, a deputy sheriff for York county, armed with a search warrant from the Biddeford municipal court under Rev. St. c. 27, § 40, broke the lock and door, and entered the car, in the nighttime—soon after midnight. His warrant commanded him to "therein search for intoxicating liquors, and if there found, to seize and safely keep the same, with the vessels in which they are contained, until final action and decision be had thereon." He did find in the car one barrel of intoxicating liquor, viz. a barrel of alcohol, but did not seize it, being of the opinion that it was not intended for unlawful sale. He, however, made upon the warrant the erroneous return that he searched the car, and found no intoxicating liquor. The plaintiff thereupon brought this action of trespass for the breaking into its car through the lock and door. The defendant has pleaded a justification under the warrant above described.

Assuming the complaint and warrant, and the search under them, to have been in other respects legal and regular, the question arises whether the intentional omission "to seize and safely keep," etc., the intoxicating liquors found in the car by the officer, invalidates his authority under the warrant, and leaves him a trespasser.

Though often obscured in earlier and ruder times, it is a distinctive feature of our common-law system of jurisprudence that it so jealously guards the liberty and property of the citizen against the capricious, arbitrary, or extra-legal acts of government officers, and at the same time insists upon the full performance of their legal duty. English history abounds with instances of the assertion of this principle. Two conspicuous instances are the beheading of one king for overstepping the law, and the expulsion some 50 years later of another king, partly for refusing to execute certain laws. The principle is now imbedded in the fundamental law of our republic.

Imbued with this spirit, our law requires of every ministerial officer, assuming to execute a statute or legal process against the person or property of the citizen, a strict observance of every provision of the statute, and of every lawful command in the process. The law permits to such an officer no discretion in this respect. If he once begin, he must execute the process, the whole process, and nothing but the process. Many extracts from judicial opinions could be quoted, stating this rule as strongly and comprehensively. One distinguished jurist has used judicially the following language: "A man who seizes the property or arrests the person of another, by legal process, or other equivalent authority conferred upon him by law, can only justify himself by a strict compliance with the requirements of such process or authority. If he fails to execute or return the process as thereby required, he may not, perhaps, in the strictest sense, be said to become a trespasser ab initio; but he is often called such, for his

whole justification fails, and he stands as if he never had any authority to take the property, and therefore appears to have been a trespasser from the beginning." Gray, J., in Brock v. Stimson, 108 Mass. 521, 11 Am. Rep. 390. By substituting the word "injure" for the word "seize" in the above quotation, the language of Justice Gray would be literally applicable to this case.

There would seem to be no difference in principle between civil and criminal processes in this respect, and hence illustrations may properly be taken from either class of cases. In Blanchard v. Dow, 32 Me. 557, a tax collector regularly sold cattle of the plaintiff upon a tax warrant. He omitted afterwards to render "an account in writing of the sale and charges," as required by the statute and his warrant. It was held that this omission deprived him of the protection of his warrant. In Carter v. Allen, 59 Me. 296, 8 Am. Rep. 420, a tax collector, under the same circumstances, did render the account in writing, and tender the surplus, but the statement of account proved to be incorrect. It was held that this error vitiated the officer's immunity. In Ross v. Philbrick, 39 Me. 29; Brackett v. Vining, 49 Me. 356; and Smith v. Gates, 21 Pick. (Mass.) 55—it was held that an omission by an officer to execute a command in the precept, at the precise time named therein, invalidated his authority, and made him liable as a trespasser to those with whose property he had interfered under his precept. In the last-named case (Smith v. Gates) there was a variation of only 20 minutes. In Tubbs v. Tukey, 3 Cush. (Mass.) 438, 50 Am. Dec. 744, an officer arrested the plaintiff on a criminal process on Sunday, and committed him to jail. On the following Monday morning, instead of taking the plaintiff before the police court, as required by law to do, the officer assumed to discharge the plaintiff from arrest. It was held that the omission to take the plaintiff before the court took away from the officer all justification for the arrest. In Russell v. Hanscomb, 15 Gray (Mass.) 166, a fish warden, as authorized by statute, took a seine which was illegally set. He did not, however, as required by statute, begin a legal proceeding for the forfeiture. In the words of Shaw, C. J., the court held that the warden's "failure to prosecute was a departure from his authority, and, in legal effect, deprived him of his justification." In Brock v. Stimson, 108 Mass. 520, 11 Am. Rep. 390, a police officer, by authority of a statute, arrested the plaintiff for being drunk and disorderly in a public place; but instead of taking him before the court for trial, as further required by statute, he released the plaintiff from arrest as soon as he recovered from his intoxication. It was held that this disobedience of the statute took away all protection under the statute. In Phillips v. Fadden, 125 Mass. 198, upon a similar state of facts, the proposition was again asserted that, if an officer fails to do all that the law requires him to do, his whole justification fails. It has also been held, and is a familiar principle, that the omission by the officer to obey the final and formal command to make return of the precept

under which he assumes to act invalidates his authority under the precept, and renders him liable to an action for anything done under it. Williams v. Babbitt, 14 Gray (Mass.) 141, 74 Am. Dec. 670; Williams v. Ives, 25 Conn. 568; Dehm v. Hinman, 56 Conn. 320, 15 Atl. 741, 1 L. R. A. 374.

In the Six Carpenters' Case, 8 Coke, 146, in which the doctrine of trespass ab initio seems to have been first formally expounded, it was said that the reason for holding a person acting under authority of law to be a trespasser ab initio by any subsequent abuse of such authority, was that his subsequent illegality showed that he began with an unlawful intent. This dictum has been often repeated in various forms. It seems, however, to be artificial, and even fictitious. An officer may often, in fact, begin with the best and most lawful intent, and yet forfeit his protection by subsequent misconduct. The more solid and sure foundation for such a rule would seem to be public policy. It is inconsistent with both private security and public order that ministerial officers should assume to determine for themselves how far, and in what manner, they will enforce a statute, or execute a process. If the safety of the citizen requires that such officers shall do no act not authorized, the safety of the people equally requires that such officers shall omit no act that is commanded.

It was further resolved in the Six Carpenters' Case that "not doing cannot make the party who has authority or license by law a trespasser ab initio, because not doing is no trespass." This dictum, also, has been often repeated, and has at times influenced judicial decisions. The reasoning may seem plausible, but in reality it is a bit of sterile, verbal syllogization. It has borne no good fruit.

It is difficult to see any difference in principle between misfeasance and nonfeasance in a ministerial officer. In either case, he is forsworn; has disobeyed the statute or process he has sworn to execute faithfully. It is the disobedience, not the act, that deprives him of his authority. The disobedience is the fatal poison which paralyzes the protecting arm of the law, and this disobedience can come as well from acts of omission as commission.

The learned editor of the American Decisions, in the notes to Barrett v. White, 3 N. H. 210, 14 Am. Dec. 365, criticises this dictum of the Six Carpenters' Case. He says the distinction seems to be merely artificial, and should not be allowed to protect a disobedient officer. He cites many cases in which, he says, the distinction has been practically disregarded. Reference is made to those notes and citations, without further quotations from them here.

The courts of Maine and Massachusetts, while sometimes alluding to or quoting this dictum, have practically ignored it when dealing with cases like this one before us. Every case above cited from the decisions of those courts were cases of nonfeasance or omission. The tax collector simply omitted to do some particular thing, either entirely or at the specified time. The police officers simply omitted to

do some act required. The failure to make return of the process is a simple omission. The New Hampshire court seems to uphold the distinction drawn in the Six Carpenters' Case, for in Ordway v. Ferrin, 3 N. H. 69, it held precisely the contrary of our decision in Brackett v. Vining, 49 Me. 356. Our stricter rule is firmly established in our law, and we think, upon grounds of public policy, it is the better and more reasonable rule. While, of course, in a given case, an officer may have a sufficient, lawful excuse for his omission, the general, plain, reasonable, and necessary proposition is that a ministerial officer must faithfully obey every lawful command in the statute or process, or he will be left without its protection in any suit against him for any acts done by him under color of such statute or process. The case of Hinks v. Hinks, 46 Me. 423, in no way conflicts with this proposition, for there the defendant was not an officer, and was only exercising a private right.

Referring now to the case before us, it is evident that the principal purpose of the statute (Rev. St. 1883, c. 27, § 40), and of the process issued under it was the seizure of whatever intoxicating liquors were found, and the bringing them before the court for determination whether they were intended for unlawful sale. The authority to enter the car, and there search, was given for that express purpose. The defendant officer exercised the authority to search, but he willfully and deliberately refused to seize the intoxicating liquors he found, and made a false return that he found none. He assumed to nullify the main command of the statute and of his process. He willfully defeated the very purpose of the search he assumed to make. Such a flagrant disobedience should, and we think does, destroy the protection he might otherwise have justly enjoyed.

The good faith of the defendant—his strong belief that the intoxicating liquor he found was not intended for unlawful sale—is no excuse, and does not mitigate the penalty. As said in Guptill v. Richardson, 62 Me. 262, the fact "that it [the liquor] was not liable to forfeiture would not excuse the officer for disobedience to his precept." The command to seize the liquors was plain. His duty was plain. He was given no discretion, no power to determine what intoxicating liquors he would or would not seize. He should not have arrogated to himself any such power.

It is urged that it may at times work a great hardship upon an innocent owner, if an officer must in every case seize whatever intoxicating liquors he finds under a search warrant, however evident it is they are not intended for unlawful sale. The policy of the law is that every owner or keeper of intoxicating liquors shall be prepared to defend them before the courts, and not before the officer, against the accusation that they are intended for unlawful sale. The convenience of such owner or keeper must give way to the good of the people, and to their undoubted right to protect themselves in this way against

the consequences of the traffic in such articles. At any rate, the officer must obey the law and his lawful process.

It is urged that the omission to seize the liquors in this case caused this plaintiff no special injury, however much the public may have been harmed. The search, however, did the plaintiff an injury. The lock and door of its car were broken by the defendant. He might have made that breaking official and lawful by doing his whole official duty. He saw fit, however, to disregard his precept and abandon his duty. This abandonment of duty was also an abandonment of his authority, and left him amenable for all the damage done by him to the plaintiff corporation.

Defendant defaulted. Damages assessed at $10.[85]

[85] Compare Moore v. Duke (1911) 84 Vt. 401, 80 Atl. 194: The plaintiff was clerk of the incorporated village of Plainfield, and as such had the custody of its books of record, including one which contained, among other things, the record of building permits granted by the village. These records were kept by the plaintiff at his dwelling in a certain room which he used for an office. The defendant Duke was constable of the town of Plainfield. The other defendants, Ryan and Bruffee, were, respectively, bailiff and trustee of the village. Ryan was also street commissioner. Some controversy having arisen over the building operations of one Fortney, and it being claimed by the officials that he had violated the terms of his permit, it became necessary for Ryan and Bruffee to have the record of this permit or a copy of the same. On the morning of March 8, 1910, Bruffee called at the clerk's office, and asked the clerk to loan him the book containing this record. This the clerk refused to do. A little later, Bruffee and Ryan called at the office, and asked for and examined the book, but the clerk declined to allow them to take it away from the office. Thereupon, after some spirited discussion regarding the matter, Ryan went to Montpelier and arranged with an attorney to have the book replevied. Before leaving Plainfield, he notified the constable of his intentions, and asked him to be ready to serve the writ, which was to be sent him by mail. The writ came in due time, a bond was executed and taken, and the constable went to the plaintiff's house to serve the writ. He did serve the writ, took the book thereunder, and delivered it to the plaintiffs therein—Ryan and Bruffee. He indorsed his return on the back of the writ, and sent it by mail to the attorney who made it, but it was never entered in court. Said Powers, J., delivering the opinion: "Duke's entry, when made, was for a justifiable purpose, for his process was fair and his entry without actual force; nor did anything occur while he was upon the premises to change his situation. He proceeded according to the commands of the process in all respects but one. The one thing which remained for him to do—and which was absolutely essential to make all his previous acts regular and valid—he omitted."

CHAPTER II

ABSOLUTE TORTS OTHER THAN TRESPASSES

SECTION 1.—BEFORE THE STATUTE OF WESTMINSTER THE SECOND [1]

I. Historical

Meanwhile [2] the actions which came to be known as personal make their appearance. The oldest seems to be "Debt-Detinue," which appears already in Glanvill. I say "Debt-Detinue"—originally men see little distinction between the demand for a specific chattel and the demand for a certain sum of money. Gradually this action divides itself into two, Detinue for a specific chattel, Debt for a sum of money —this differentiation takes place early in the thirteenth century. As in Detinue the judgment given for the plaintiff awards him either the chattel itself, or its value; and, as the defendant thus has the option of giving back the chattel or paying its value, Bracton is led to make the important remark, that there is no real action for chattels—an important remark, for it is the foundation of all our talk about real and personal property. To Debt and Detinue we must now add Replevin, the action for goods unlawfully taken in distress. This action we are told was invented in John's reign—another tradition ascribed its invention to Glanvill. Covenant also has appeared, though during the first half of the thirteenth century it is seldom used except in cases of what we should call leases of land for terms of years. Gradually the judges came to the opinion that the only acceptable evidence of a covenant is a sealed writing, and one of the foundations of our law of contract is thus laid. Account appears in Henry III's reign; but it is very rare and seems only used against bailiffs of manors.

But the most important phenomenon is the appearance of Trespass —that fertile mother of actions. Instances of what we can not but call actions of trespass are found even in John's reign, but I think it clear that the writ of trespass did not become a writ of course until

[1] 13 Edw. I, ch. 24 (1285). Its translation, in part, is given infra.

[2] The reference is to the development of English law after the death of Henry the Second, in 1189, and before the accession of Edward the First, in 1272.

very late in Henry III's reign. Now trespass is to start with a semi-criminal action. It has its roots in criminal law, and criminal procedure.

F. W. Maitland, Equity and Forms of Actions, 342 (1909).

In the reign of Edward the First the scope of the law of tort as administered in the royal courts was narrow. * * * There were remedies against personal violence, there were remedies against forcible seizure of property, there were remedies against various frauds and other offences which might come under the notice of a court which was trying a case. It is not till these frauds and other offences have become generally actionable wherever committed that we shall see clearly the outlines of our modern law of tort.

Of other personal actions brought in the royal courts the most common were detinue, debt, covenant, and account. The writ of detinue lay for the wrongful detention of a chattel which belonged to the plaintiff. It was generally brought against a bailee. Possibly at this period it could not be brought against any other person. A person who had parted with his goods involuntarily (i. e. otherwise than by a bailment) must sue either by the appeal of larceny or, omitting the words of felony, by an action for a res adirata. It is probably not till later that the action of detinue was gradually extended to such a case. The writ of debt was originally almost one with the writ of detinue. To the end their wording was almost identical. The plaintiff seeks the restoration of money. "It was in fact a general form in which any money claim was collected, except unliquidated claims for damages by force, for which there was established the equally general remedy of trespass."

Holdsworth's Hist. Eng. Law (1909) vol. 2, p. 309.

II. Detinue—Replevin

(A) Nature of the Cause in General

The appeal, trespass, and replevin were actions ex delicto. Detinue, on the other hand, in its original form, was an action ex contractu, in the same sense that debt was a contractual action. It was founded on a bailment; that is, upon a delivery of a chattel to be redelivered.

[3] "Adirata" means gone from his hand against his will—adextratus. P. & M. ii, 160, n. 2; cp. Bracton's Note Book, case 281; Y. B. 21, 22 Edw. I (R. S.) 468; Holmes, Common Law, 168, 169; vol. iii, App. I, B (2).

[1] The cases which follow under Detinue and Replevin develop its doctrine only so far as its differentiation from Trespass and Conversion appears to be important.

The bailment might be at will or for a fixed term, or upon condition, as in the case of a pledge. The contractual nature of the action is shown in several ways. * * *

In all the cases of detinue thus far considered the action was brought by a bailor, either against the bailee or some subsequent possessor. We have now to consider the extension of detinue to cases where there was no bailment. Legal proceedings for the recovery of chattels lost were taken, in the earliest reported cases, in the popular courts. The common case was doubtless that of an animal taken as an estray by the lord of a franchise. If the lord made due proclamation of the estray, and no one claimed it for a year and a day, the lord was entitled to it. But within the year and day the loser might claim it, and if he produced a sufficient secta, or body of witnesses, to swear to his ownership or loss of the animal, it was customary for the lord to give it up, upon the owner's paying him for its keep, and giving pledges to restore it in case of any claim for the same animal being made within the year and day. There is an interesting case of the year 1234, in which after the estray had been delivered to the claimant upon his making proof and giving pledges, another claimant appeared. It is to be inferred from the report that the second claimant finally won, as he produced the better secta. If the lord, or other person in whose hands the estray or other lost chattel was found, refused to give it up to the claimant, the latter might count against the possessor for his res adirata, or chose adirree, that is, his chattel gone from his hand without his consent; or he might bring an appeal of larceny.

James Barr Ames, "The History of Trover." [5]

We must not be wise above what is written or more precise than the lawyers of the age. Here is an elementary question that was debated in the year 1292: I bail a charter for safe custody to a married woman; her husband dies; can I bring an action of detinue against her, it being clear law that a married woman can not bind herself by contract? This is the way in which that question is discussed:

Huntingdon. Sir, our plaint is of a tortious detinue of a charter which this lady is now detaining from us. We crave judgment that she ought to answer for her tort.

Lowther. The cause of your action is the bailment; and at that time she could not bind herself. We crave judgment if she must now answer for a thing about which she could not bind herself.

Spigurnel. If you had bailed to the lady thirty marks for safe custody while she was coverte for return to you when you should demand them, would she be now bound to answer? I trow not. And so in this case.

[5] First published in 11 Harv. Law Rev. 375, 379 (1898); reprinted in 3 Anglo-American Legal Essays, 432, 437.

Howard. The cases are not similar; for in a writ of debt you shall say debet, while here you shall say iniuste detinet. And again, in this case an action arises from a tortious detainer and not from the bailment. We crave judgment.

Pollock and Maitland, Hist. of Eng. Law, vol. 2, p. 180.[6]

[6] "The nature of the action of Detinue has often been the subject of discussion by the courts. And even Parliament has at different times taken different views on the subject. But the truth appears to be that Detinue was a variety of the ancient action of Debt, which was itself originally in the nature of a real action, to recover specific chattels, but, owing partly to historical, partly to economic, causes, came early to be treated as a personal action, generally founded on contract. As a natural consequence of this origin, various anomalies attached to it; one being that, until 1833, a claim in Detinue could generally be met by the primitive defence known as 'wager of law,' a defence not available against the action of Trespass, or the more modern actions founded on the Statute of Westminster the Second ('Case'). Hence Detinue tended at one time to be superseded by Trover (ante, title II), which, in many cases, is equally applicable to the facts. But after the defence of 'wager of law' had been abolished by section 13 of the Civil Procedure Act, 1833, there was a revival of Detinue, and, naturally, with some misunderstanding as to its nature. The action is, in fact, useful in cases in which the defendant sets up no claim of ownership, and has not been guilty of trespass; for, on the latter point especially, it is clear that it was never necessary in Detinue to allege that the defendant's original acquisition was unlawful. The typical case was that in which a bailor sued his bailee to recover the goods bailed (detinue sur bailment), there being then no action founded on simple contract; and this long remained the formal assumption in every action of Detinue; though at an early date the allegation of bailment became a mere matter of form, which could not be denied or 'traversed.' (See Gledstane v. Hewitt, ubi sup.) But allegations of finding, and even of trespass, were also admitted (detinue sur trover, etc.); and thus, as was natural, the plea of 'not guilty' was recognized, in addition to the more correct plea of 'non detinet.' * * * The action of Detinue is now apparently treated as an action of Tort. Trotter v. Windham & Co. (1907) 23 T. L. R. 676." J. C. Miles, in Jenks' Digest of Eng. Civ. Law, § 882.

See also 3 Holdsworth's Hist. of Eng. Law, 274:

"The action of Detinue, it is thought, lay originally only against a bailee, i. e. it was available only to an owner who had voluntarily parted with the possession of his goods to another. Some words of Littleton in 1455, describing a count in trover as a 'new found haliday,' are taken to mean that the action of detinue was practically confined before that date to actions against bailees.

"It is, however, difficult to believe that the rights of owners of goods were so curtailed during the fourteenth century. No doubt the action of detinue was an action which was used chiefly against bailees; and some dicta perhaps would seem to imply that the action lay only against a bailee. But such dicta, if spoken in course of an action of detinue sur bailment, would not negative a possibility of bringing such an action against some one other than a bailee. We want a precise statement to the effect that the action lies against a bailee and no one else. To borrow the precise language of the pleaders, we must have, not only an averment that an action of detinue lies only against a bailee, but also an averment that it lies only against a bailee 'sans ceo que' it lies against any one else. It is just this averment which it would probably be difficult to find."

And see especially Professor Ames' article on the History of Trover, 11 Harv. Law Rev. 375–383; 3 Anglo-American Legal Essays, 432–442. As late as 1861 detinue was classed as an action of contract. See Danby v. Lamb, 11 C. B. N. S. 423, and the opinion of Byles, J., p. 427: "According to all the authorities from Brooke's Abridgment, Joinder in Accion, pl. 97, down to the case of Walker v. Needham, 4 Scott, N. R. 222, 1 Dowl. N. S. 220 (1841), detinue has always been considered to an action ex contractu." But in 1878, and

KETTLE v. BROMSALL.

(Common Pleas, 1738. Willes, 118, 125 Reprint, 1087.)

WILLES, Lord Chief Justice, gave the opinion of the Court as follows:

Detinue. The plaintiff declares in the first count that he was possessed of a handle of a knife with an old English inscription purporting it to be a deed of gift to the monastery of St. Albans, a ring with an antique stone with one of the Cæsars' heads upon it in basso relievo, and of several other things of the like nature, particularly specified in the declaration, and laid together to be of the value of £500. as of his own proper goods; and that being so possessed he casually lost the same, and that afterwards by finding they came unto the hands and possession of the defendant, by reason whereof an action accrued to the plaintiff to demand the same of the defendant.

In the second count he declares that he delivered to the defendant the same things, specifying them again, of the value together of £500. to be safely kept and to be delivered to the plaintiff when required; that nevertheless the defendant, though often requested, has not delivered the same or any part thereof to the plaintiff, but refused and still doth refuse to deliver the same and unjustly detains them; to the plaintiff's damage of £1000. * * *[7]

Serjt. Comyns for the defendant took three objections, two to the declaration and one to the replication. * * * [The second was:] That the first count is in trover, and the second in detinue; and that trover and detinue cannot be joined. That if the first be taken to be in trover, there is no conversion; and if in detinue, there is no demand; and consequently that it cannot be good in either. To shew that trover and detinue cannot be joined he cited 8 Co. 87b, Buckmere's case; because they require different pleas.[8]

But we are all of opinion that this objection will not hold; for that both counts are in detinue. Detinue will lie for things lost and found as well as for things delivered; so it is expressly laid down in Fitz.

apparently since then, in England, detinue is recognized as a cause in tort. See Bryant v. Herbert (1878) 3 C. P. D. 389, C. A.; Du Pasquier v. Cadbury Jones & Co. (1903) 1 K. B. 104, C. A.; Keates v. Woodward (1902) 1 K. B. 332, 336.

For the American doctrine see 14 Cyc. 241, and note 4; 16 Cent. Dig. "Detinue," § 1; Key-No. "Detinue," § 1.

[7] The pleadings terminated in a demurrer to the replication, and joinder therein. Only so much of the case is given as relates to the objection to the declaration.

[8] "Not only the pleas, but the judgments also, are different; in trover only damages can be recovered, but in detinue the things themselves, or their value, may be recovered. And two counts cannot be joined in the same declaration unless the same judgment may be given on both. Brown v. Dixon, D. & E. 276. See also Gilb. Hist. C. B. 6, 7."

In the principal case, the court takes it as established law that trover and detinue cannot be joined.—[*Ed.*

N. B. tit. "Detinue" (E), a book of the greatest authority. * * * And it would be very absurd if it were otherwise; for if so, a person might be greatly injured, and have no adequate remedy. For in trover only damages can be recovered; but the things lost may be of that sort, as medals, pictures, or other pieces of antiquity, (and this seems to be the present case,) that no damages can be an adequate satisfaction, but the party may desire to recover the things themselves, which can only be done in detinue. * * * [9]

As therefore we are of opinion that the objections would not hold either to the declaration or the replication, judgment was given for the plaintiff.[10]

[9] "'Detinue,' this is a very old action. The defendant is charged with an unjust detainer (not, be it noted, an unjust taking)—injuste detinet. This action looks very like a real action. The writ originating it bears a close similarity with the writ of right (præcipe in capite), but in the first place the mesne process is not in rem, and in the second (and this is very important) the defendant when worsted is always allowed the option of surrendering the goods or paying assessed damages. The reason of this may perhaps be found partly in the perishable character of medieval movables, and the consequent feeling that the court could not accept the task of restoring them to their owners, and partly in the idea that all things had a 'legal price' which, if the plaintiff gets, is enough for him." F. W. Maitland, "Equity and Forms of Action," 355.

See also Phillips v. Jones (1850) 15 Q. B. 859, 867, and Somerset v. Cookson (1735) 3 P. Wms. 390: (P. brought an injunction to compel the delivery of an old altar-piece made of silver and remarkable for a Greek inscription and dedication to Hercules. The altar piece had been sold without right by S. to D., a goldsmith, who had notice of D.'s claim to it. D. insisted that P. could have adequate relief without detinue. P. insisted that "nothing can be more reasonable than that the man, who by wrong detains my property, shall be compelled to restore it to me again in specie: and the law being defective in this particular such defect is properly supplied in equity." Held, that an injunction might be granted.)

[10] "Detinue by a loser against a finder would probably have come into use much earlier but for the fact * * * that the loser might bring trespass against a finder who refused to restore the chattel on request. Indeed, in 1455, where a bailiff alleged simply his possession, and that the charters came to the defendant by finding, Prisot, C. J., while admitting that a bailor might have detinue against any possessor of goods lost by the bailee, expressed the opinion that where there was no bailment the loser should not bring detinue, but trespass, if, on demand, the finder refused to give up the goods. Littleton insisted that detinue would lie, and his view afterwards prevailed. It was in this case that Littleton, in an aside, said: 'This declaration per inventionem is a new-found Halliday; for the ancient declaration and entry has always been that the charters ad manus et possessionem devenerunt generally without showing how.' Littleton was quite right on this point. But the new fashion persisted, and detinue sur trover came to be the common mode of declaring wherever the plaintiff did not found the action upon a bailment to the defendant." Ames, History of Trover, 11 Harv. Law Rev. 375, 381; 3 Anglo-Am. Legal Essays, 439.

And see the note, 3 Anglo-Am. Leg. Essays, p. 440: "Littleton's remark seems to have been misapprehended in 2 Pollock & Maitland, 174. The innovation was not in allowing detinue where there was no bailment, but in describing the defendant as a finder."

MILLS v. GRAHAM.

(Common Pleas, 1804. 1 Bos. & Pul. [N. R.] 141, 127 Reprint, 413, 8 R. R. 767.)

The declaration was as follows:

The defendant was summoned to answer unto a plea, that he, the said defendant, render unto the said plaintiff certain goods and chattels, to the value of £300 of lawful money of Great Britain, which the defendant unjustly detains from the plaintiff; and thereupon the plaintiff, by R. H. his attorney, complains for that whereas the plaintiff, heretofore, to wit, on, etc., at, etc., delivered to the defendant the goods and chattels following, that is to say, 75 dozen of skins of the said plaintiff of a large value, to wit, of the value of £300, of lawful money of Great Britain, to be redelivered by the said defendant to the said plaintiff when he should be thereto requested; and nevertheless the said defendant, although thereto often requested, hath not yet delivered the said goods and chattels, or any of them, or any part thereof, to the said plaintiff, but hath hitherto refused and still doth refuse to deliver the same to the said plaintiff, to wit, at, etc. And whereas the said plaintiff heretofore, to wit, on, etc., at, etc., was lawfully possessed of divers other goods and chattels, to wit, 75 dozen of other skins of a large value, to wit, of the value of £300 of like lawful money, and being so thereof possessed, the said plaintiff afterwards, to wit, on, etc., at, etc., casually lost the said last-mentioned goods and chattels out of his hands and possession, and the same then and there came to the hands and possession of the said defendant, who found the same; nevertheless the said defendant, well knowing the said last-mentioned goods and chattels to be the goods and chattels of the said plaintiff, and to him of right to belong and appertain, had not as yet delivered the said last-mentioned goods and chattels, or any of them, or any part thereof, to the said plaintiff, although often requested so to do, but hath hitherto refused, and still doth refuse to deliver the same to the said plaintiff, and now unjustly detains the same from the said plaintiff, to wit, at, etc., whereupon the said plaintiff saith he is injured, and hath sustained damage to the amount of £300 and therefore he brings his suit, etc.

On the trial, before Sir James Mansfield, C. J., after a plea of non detinet, it appeared that the defendant, being desirous of purchasing some skins, applied to the plaintiff to sell him some, which the latter declined, but agreed to let him have skins to the amount of £275. to finish, for the finishing of which the plaintiff was to pay; that the skins having been delivered accordingly, the plaintiff afterwards applied to the defendant to return them, offering to pay anything that might be due; that the defendant refused to return them, and again wished to purchase them, offering to pay the price by instalments of £5. a month; that the plaintiff still refusing to sell them, the defendant declared that he would contest the matter at law, as he was under age, which was the case.

His Lordship was of opinion that the first count of the declaration, which stated a bailment of goods to be redelivered upon request, was not supported by evidence of a bailment for a special purpose, but held, that notwithstanding this infancy of the defendant, and an objection to the allegation on the second count, that the goods came to his hands by finding, the plaintiff was entitled to recover upon that count. Accordingly a verdict was found for the plaintiff, subject to the opinion of the Court. Afterwards a rule nisi for a nonsuit was obtained. * * *

CHAMBRE, J. The action of detinue is as old as any action known to the law, and yet it is rather extraordinary that the subject of objection in the present case has never been brought into question. Many cases might be put to which an action of detinue could not apply, unless this general mode of declaring were allowed. Only three modes of stating the inducement appear by the entries to have been used. One is on a bailment, another on finding, and a third on purchase. But the precedents do not comprehend half the cases which might arise. Suppose a bailment were made to A., and that the goods, after passing through several hands, come into the hands of B. Could it be necessary to trace the progress of the goods through all the hands into which they had passed? In this case, I believe that the practice has been to declare upon a finding, as has been done in the present case. I am not certain that the finding has not been literally proved in this case; for it is not clear that the word "finding" is to be confined to the sense of picking up a thing which has been casually lost. The form of proceeding in trover is very material on this point, and seems to warrant us in considering the finding merely as inducement. To the present day, no case has ever arisen in which it has been thought necessary, upon the plea of non detinet, to prove precisely the finding alleged. * * *[11] I entirely concur in thinking that sufficient proof has been given to entitle the plaintiff to recover.

Rule discharged.

REEVE v. PALMER.

(Court of Common Pleas, 1858. 5 C. B. [N. S.] 84, 141 Reprint, 33, 116 R. R. 573. Exchequer Chamber, 1859. 5 C. B. [N. S.] 91, 141 Reprint, 36, 116 R. R. 577.)

Detinue for title-deeds, with a count for money received. To the first count the defendant pleaded, amongst other pleas, non detinet, and that the deeds were not the plaintiff's; and to the second, never indebted and a set off. The facts appearing on the trial were as follows:

The defendant was an attorney at Cambridge. The deeds in respect of which the action was brought had been left in the defendant's custody as attorney for the plaintiff. At the trial, there was only one deed in contest

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[11] The argument of counsel, part of the opinion of Chambre, J., and the concurring opinions of Sir James Mansfield, C. J., and Heath and Rooke, JJ., are omitted. The statement is slightly abridged.

Compare Walker v. Jones (1834) 2 Cr. & M. 672: In an action of detinue "the defendant pleaded a plea traversing the delivery; to which there was a demurrer." On the argument Comyn, for the defendant, stated that the plea had been drawn from a precedent in Chitty (3 Chitty Pl. [4th Ed.] 1028), but that, after the case of Gledstone v. Hewitt (1831) 1 C. & J. 565, from which it appeared that the bailment in detinue was immaterial, he could not support the plea.

See also Jones v. Littlefield (1832) 3 Yerg. (Tenn.) 133; Rucker v. Hamilton (1835) 3 Dana (Ky.) 36.

between the parties, the rest having been delivered up to the plaintiff after the commencement of the action. There was no evidence as to what had become of the missing deed, or how it was lost, except that the defendant stated that he had not seen it since the date of its execution in 1853. When the demand was made in 1857, the defendant claimed a certain sum for costs, which the plaintiff paid under protest.

The jury returned a verdict for the plaintiff on the second count, with £85. damages, and for the defendant upon the first count, the jury leaving it in doubt whether the loss of the deed occurred before or after the demand.

David Keane, for the plaintiff, obtained a rule calling upon the defendant to show cause why a verdict should not be entered for the plaintiff on the issues on the first count, for £15. damages, pursuant to leave reserved to him at the trial, on the grounds,—first, that the defendant, as the immediate bailee of the deed, was answerable in detinue though he had lost the deed.

WILLIAMS, J. * * * All the authorities, from the most ancient time, show that it is no answer to an action of detinue, when a demand is made for the re-delivery of the chattel, to say that the defendant is unable to comply with the demand by reason of his own breach of duty.[12] In the present case, the deed which is the subject of the demand in the first count was delivered to the defendant under circumstances which made it his duty to use ordinary care that it should be forthcoming when wanted. By the defendant's omission to perform that duty, the deed was not forthcoming when demanded. It clearly is no answer for the defendant to say he has lost it. The rule must be made absolute to enter the verdict for the plaintiff.

The defendant appealed against this decision, and the case came on for argument in the Exchequer Chamber, before Pollock, C. B., Crompton, J., Martin, B., Bramwell, B., Watson, B., and Hill, J.[13]

[12] "Inability to redeliver was indeed urged in one case as an objection to the action, although the inability was due to the active misconduct of the defendant: 'Brown. If you bail to me a thing which is wastable, as a tun of wine, and I perchance drink it up with other good fellows, you cannot have detinue, inasmuch as the wine is no longer in rerum natura, but you may have account before auditors, and the value shall be found.' This, Newton, C. J., denied, saying detinue was the proper remedy. It may be urged that the detinue in this case was founded upon a tort. But in truth the gist of the action was the refusal to deliver on request." Ames, History of Trover, 11 Harv. Law Rev. 375; 3 Anglo-Am. Legal Essays, 433.

[13] The arguments of counsel and the opinion of Cockburn, C. J., with whom Williams and Willis, JJ., in the Common Pleas concurred, are omitted. In the Exchequer Chamber, the opinions of Pollock, C. B., Crompton, J., and Watson, B., are omitted.

Compare Williams v. Gesse (1837) 3 Bing. N. C. 849, 43 R. R. 822, given infra.

And see Wilkinson v. Verity (1871) L. R. 6 C. P. 206: P. delivered to D. certain goods for safe-keeping. D. wrongfully sold them. More than six years after the date of the sale, P., being still in ignorance of this sale, demanded the goods of D., who refused to return them. Held, in an action of detinue for the goods, that the statute of limitations ran from the date of the demand and refusal, and not from the date of the sale. For the historical explanation of this, see Ames' History of Trover, 11 Harv. Law Rev. 376; 3 Anglo-Am. Leg. Essays, 433.

BRAMWELL, B. If there had been anything more important in dispute here than a mere question of costs, I should have liked to look into it a little more before deciding it. If the defendant has by his own default become dispossessed of or lost the deed, it may be that he may be considered as having wrongfully detained it. I am not prepared to say that there was sufficient evidence of negligence on the part of the defendant. All that appears, is, that the deed was deposited with him by his client, and that it is lost. I must confess I have not information enough about the matter to say whether the judgment of the Court below was right or not.

HILL, J. It is conceded that detinue will lie against one who has parted with a deed which has been intrusted to him for safe custody. I am utterly at a loss to discover any difference between the case of an attorney who has lost a deed intrusted to him for safe custody, without any explanation as to the circumstances under which it was lost, and an attorney who has voluntarily parted with the deed to a third person. In Comyns's Digest, Pleader (2 X, 12), speaking of this form of action, where the deed has been lost, the Chief Baron says: "If detinue be for charters, the verdict must find some damages if the charters be lost," citing Fisher v. ———, Saville, 29. I think the judgment of the Court below should be affirmed.

Judgment affirmed.

NYBERG v. HANDELAAR.

(In the Court of Appeal [1892] 2 Q. B. 202.)

The action was brought to recover the value of a half-share in a gold enamel box jointly owned by the plaintiff and one Frankenheim, or a return of the box and damages for its detention. The plaintiff in the year 1889 purchased the box, and afterwards sold a half-share in it to Frankenheim, and it was agreed between them that the plaintiff should retain possession of the box until it should be sold. At a later period the box was entrusted by the plaintiff to Frankenheim for the purpose of being taken to Christie's Auction Rooms, where it was to be sold. Frankenheim owed the defendant money, and delivered the box to the defendant by way of security for the debt. On the trial, the jury found that Frankenheim pledged his half-share in the box with the defendant for value, and the learned judge on further consideration gave judgment for the defendant, on the ground that the plaintiff was not entitled to succeed in trover or detinue, and that the special agreement that the plaintiff and not Frankenheim was to have possession of the box did not do away with the right of property which the latter passed to the defendant. The plaintiff appealed.

LOPES, L. J. The law of detinue, in my opinion, is that a person entitled to possession of a personal chattel can maintain the action when he has a right to immediate possession arising out of an absolute or

special property in the chattel. I have great difficulty in seeing how a person can have a right to the immediate possession of a chattel without having some special property in it. A joint owner of goods cannot maintain an action for the conversion of the goods against his co-owner in respect of any act of the latter consistent with his ownership. It follows that the plaintiff could not, in the absence of any agreement as to possession of the box, have recovered it from the defendant. But there was an agreement that he should be entitled to the possession of the box until such time as it might be sold. What happened was that the plaintiff entrusted Frankenheim with the box to take it to Christie's, where it was to have been sold. This Frankenheim did not do, but handed the box to the defendant as security for a debt of his own. This transaction amounted to a bailment to Frankenheim for a special purpose, which he did not carry out, and on failure of the trust the plaintiff's right to immediate possession accrued at once. I dissent, therefore, from the judgment of the Court below, and think the appeal should be allowed.

Appeal allowed.[14]

ANDERSON v. GOULDBERG.

(Supreme Court of Minnesota, 1892. 51 Minn. 294, 53 N. W. 636.)

Replevin to recover certain logs. Verdict for plaintiff. The defendants appeal from an order denying a new trial.

MITCHELL, J. It is settled by the verdict of the jury that the logs in controversy were not cut upon the land of the defendants, and consequently that they were entire strangers to the property. For the purposes of this appeal, we must also assume the fact to be (as there was evidence from which the jury might have so found) that the plaintiffs obtained possession of the logs in the first instance by trespassing upon the land of some third party. Therefore the only question is whether bare possession of property, though wrongfully obtained, is sufficient title to enable the party enjoying it to maintain replevin against a mere stranger, who takes it from him. We had supposed that this was settled in the affirmative as long ago, at least, as the early case of Armory v. Delamirie,[15] so often cited on that point. When it is said that to maintain replevin the plaintiff's possession must have been lawful, it means merely that it must have been lawful as against the person who deprived him of it; and possession is good title against all the world except those having a better title. Counsel says that possession only raises a presumption of title, which, however, may be rebutted. Rightly understood, this is correct; but counsel misapplies it.

[14] The arguments of counsel are omitted. The concurring opinion of Fry, L. J., is omitted.

[15] 1 Strange, 504 (1722). As to the facts in this case, see infra, under Trover and Conversion.

One who takes property from the possession of another can only rebut this presumption by showing a superior title in himself, or in some way connecting himself with one who has. One who has acquired the possession of property, whether by finding, bailment, or by mere tort, has a right to retain that possession as against a mere wrongdoer who is a stranger to the property. Any other rule would lead to an endless series of unlawful seizures and reprisals in every case where property had once passed out of the possession of the rightful owner.

Order affirmed.

(B) Limits of Detinue and Replevin

COUPLEDIKE v. COUPLEDIKE.

(King's Bench, 1604. Cro. Jac. 39, 79 Reprint, 31.)

Error of a judgment in detinue in the Common Pleas. * * *

A second error assigned was, for that the writ supposeth deteiner de una domo vocat. a bee-house, which cannot be, that detinue should lie of a house.

Wherefore it was reversed.[16]

NIBLET v. SMITH.

(Court of King's Bench, 1792, 4 T. R. 504, 100 Reprint, 1144.)

This was a replevin for taking the goods and chattels, to wit, one lime-kiln, etc., of the plaintiff; to which there was an avowry for rent in arrear. The plaintiff, in his plea in bar, said, that the lime-kiln before and at the said time when, etc., was affixed to the freehold of the piece or parcel of ground on which, etc., and as such was by law exempt from any distress for the arrears of rent in the avowry mentioned, and ought not to have been distrained for the same, etc. To this plea the defendant demurred generally.

Holroyd in support of the demurrer. The lime-kiln being affixed to the freehold, no replevin will lie for it; for if the defendant should succeed, it could not be delivered to him under the writ of retorno habendo. In Co. Lit. 145b, it is said, that a replevin lies for goods and chattels only; and a lime-kiln is as much affixed to the freehold as doors, windows, or a furnace which are always considered as belonging to the freehold. Bro. Abr. "Chattels," pl. 7.

THE COURT were of opinion that the plea in bar could not be supported, because it was a departure from the declaration. That the declaration, treating the lime-kiln as a chattel, might possibly have been true, because lime may be burnt in a portable oven, and the kiln need

[16] The first error was not sustained. On the second objection, see Co. Lit. 286.

not therefore necessarily be affixed to the freehold: but that, as the plea in bar stated it to be affixed to the freehold, it was inconsistent with the declaration.

Judgment for the defendant.[17]

MENNIE v. BLAKE.

(Court of Queen's Bench, 1856. 6 El. & Bl. 842, 119 Reprint, 1078, 106 R. R. 822.)

Replevin. Plea: non cepit. Issue thereon.

The cause came on to be tried before Crowder, J., at the last Spring Assizes for Devon. The following account of the facts which then appeared in evidence is taken from the judgment of this Court.

"One Facey was indebted to the plaintiff. He brought him £15. towards payment of the debt, but requested and obtained permission to lay the money out in the purchase of a horse and cart, which were to be the property of the plaintiff, but of which Facey was to have the possession and the use, subject to such occasional use as plaintiff might require to have of them, and to their being given up to plaintiff when he should demand them. Accordingly Facey made the purchase: the possession and the use were substantially with him: he fed, stabled and took care of the horse: there was some evidence that his name was on the front of the cart; certainly plaintiff's was on the side; under what circumstances placed there the evidence was contradictory, the plaintiff alleging it to have been placed in the ordinary way as an evidence of property, the defendant insinuating that it was so placed in order to protect it from Facey's other creditors. It is not however material, because on the one hand the plaintiff's property we take to be indisputable, and on the other we do not think there is evidence enough to charge the defendant with fraud or collusion in the circumstances under which he obtained possession, and which we now proceed to state.

"Facey determined to emigrate; and the defendant knew of his intention; but the plaintiff did not. The horse and cart were used in transporting Facey's effects to the pier at which he was to embark; and the defendant, to whom he owed money for fodder supplied to the horse went with him to procure payment if he could: at parting Facey delivered the horse and cart to him, telling him to take them for the debt, but adding that he owed the plaintiff money also, and that, if he would discharge the debt due to the defendant, which was much less than their value, he was to give them up to him. In this manner the defendant acquired his possession. The plaintiff for some time remained in ignorance of what had passed; and afterwards, coming to the knowledge of it, demanded them; but the defendant refused to deliver them unless his debt were paid; whereupon the plaintiff proceeded to replevy the goods, and brought the present action."

Upon these facts the learned Judge directed a verdict for the plaintiff, with leave to move to enter a verdict for the defendant or a nonsuit, if under such circumstances replevin did not lie.

[17] Accord: Ricketts v. Dorrel (1876) 55 Ind. 470: (Replevin to recover fence rails which D. has unlawfully taken from the possession of P. and used in the construction of a fence on D.'s land.)

Compare Silsbury v. McCoon (1850) 3 N. Y. 379, 53 Am. Dec. 307: (A quantity of corn was taken from the owner by a willful trespasser and by him converted into whisky.)

Montague Smith, in the ensuing term, obtained a rule nisi accordingly.

COLERIDGE, J. * * * The question raised is, whether there was any taking of the horse and cart from the plaintiff by the defendant? And we are of opinion, looking to the nature and purpose of the action of replevin, that there was no taking in the sense in which that word must be understood in this issue. The whole proceeding of replevin, at common law, is distinguished from that in trespass in this, among other things: that, while the latter is intended to procure a compensation in damages for goods wrongfully taken out of the actual or constructive possession of the plaintiff, the object of the former is to procure the restitution of the goods themselves; and this it effects by preliminary ex parte interference by the officer of the law with the possession. This being done, the action of replevin, apart from the replevin itself, is again distinguished from trespass by this, that, at the time of declaring, the supposed wrongful possession has been put an end to, and the litigation proceeds for the purpose of deciding whether he, who by the supposition was originally possessed, and out of whose possession the goods were taken, and to whom they have been restored, ought to retain that possession, or whether it ought to be restored to the defendant. Blackstone (3 Comm. 146), after observing that the Mirror ascribes the invention of this proceeding to Glanvil, says that it "obtains only in one instance of an unlawful taking, that of a wrongful distress." If by this expression he only meant that in practice it was not usual to have recourse to replevin except in the case of a distress alleged to be wrongful, he was probably justified by the fact. But there are not wanting authorities to shew that the remedy by replevin was not so confined; and in the case of Shannon v. Shannon, 1 Sch. & Lef. 324, 327, Lord Redesdale finds fault with this passage, saying that the definition is "too narrow," and that "many old authorities will be found in the books of replevin being brought where there was no distress." * * *

From a review of these and other authorities which might be added, it may appear not settled whether originally a replevy lay in case of other takings than by distress. Nor is it necessary to decide that question now; for, at all events, it seems clear that replevin is not maintainable unless in a case in which there has been first a taking out of the possession of the owner. This stands upon authority and the reason of the thing. We have referred already to a dictum of Lord Redesdale. Three cases are to be found—Ex parte Chamberlain, 1 Sch. & Lef. 320, In re Wilson's, 1 Sch. & Lef. 320, note (a), and Shannon v. Shannon, 1 Sch. & Lef. 324—in which the law is so laid down by Lord Redesdale. And these are cases of great authority; for that very learned Judge found the practice in Ireland the other way. He felt the inconvenience and injustice of it: he consulted with the Lord Chief Justice and obtained the opinion of the other Judges, and then

pronounced the true rule, which, in one of these cases, In re Wilson's, 1 Sch. & Lef. 320, note (a), he thus states: The writ of replevin "is merely meant to apply to this case, viz. where A. takes goods wrongfully from B. and B. applies to have them redelivered to him upon giving security until it shall appear whether A. has taken them rightfully. But if A. be in possession of goods, in which B. claims a property, this is not the writ to try that right." In the course of these cases his Lordship points out how replevin proceeds against the general presumption of law in favour of possession; how it casts upon him who was in possession the burthen of first proving his right; and he puts (Ex parte Chamberlain, 1 Sch. & Lef. 322), as a reductio ad absurdum, a case not unlike the present. "Suppose," says he, "the case of a person having a lien on goods in his possession, and who insists on being paid before he delivers them up: I do not see on the principles insisted on, why a writ of replevin may not issue in that case." The reason of the thing is equally decisive: as a general rule it is just that a party in the peaceable possession of land or goods should remain undisturbed, either by the party claiming adversely or by the officers of the law, until the right be determined and the possession shewn to be unlawful. But, where, either by distress or merely by a strong hand, the peaceable possession has been disturbed, an exceptional case arises; and it may be just that, even before any determination of the right, the law should interpose to replace the parties in the condition in which they were before the act done, security being taken that the right shall be tried, and the goods be forthcoming to abide the decision. Whatever may be thought of Lord Coke's etymology, what he says of replegiare, while it shews his understanding of the law, gives a true account of what replevin is, a redelivery to the former possessor on pledges found. But this is applicable clearly to exceptional cases only. If, wherever a party asserts a right to goods in the peaceable possession of another, he has an election to take them from him by a replevin, it is obvious that the most crying injustice might not infrequently result. Now, in the present case, Facey was not the servant of the plaintiff; nor was his possession merely the possession of the plaintiff; he was the bailee of the plaintiff, and had a lawful possession from the delivery of the owner, which conferred on him a special property. This did not authorize him to transfer his possession to the defendant; nor could he give him a lien for his debt against the paramount right of the true owner the bailor: after a demand and refusal, upon the admitted facts in this case, the plaintiff could clearly have maintained trover against the defendant; but yet there was nothing wrongful in his accepting the possession from Facey; he acquired that possession neither by fraud nor violence; at least none is found, and we cannot presume either; and he retained the possession on a ground which might justify the retainer until the alleged ownership was proved. This therefore, in our opinion, was a

case in which the plaintiff could not proceed by replevin, but should have proved his prior right in trover or detinue. * * *

The rule should be absolute, not to enter a verdict, but a nonsuit.[18]

MAXHAM v. DAY.

(Supreme Judicial Court of Massachusetts, 1860. 16 Gray, 213, 77 Am. Dec. 409.)

Action of tort against a deputy sheriff for refusing to serve a writ of replevin, sued out by the plaintiff against George Spring, to recover possession of a diamond pin with gold settings.

At the trial in the superior court, it appeared that, when the officer was asked to serve the writ of replevin, Spring was wearing the pin as a personal ornament in the bosom of his shirt, with his coat buttoned over it so as to conceal it from sight, and threatened resistance if the officer should attempt to take it from him. Lord, J., ruled that these facts did not excuse the officer, and he alleged exceptions.

BIGELOW, C. J. Replevin at common law is founded on the wrongful taking of personal property; and is a remedy, by which the person, from whom goods or chattels are taken, may be restored to the possession of them until the question of title can be judicially tried and determined. * * *

In our practice it is often resorted to, instead of an action of trespass or trover, as a simple and convenient method of trying the title to goods and chattels. It is a purely personal action, which any party may commence, as of right, by suing out a writ, without preliminary oath or other formality, in like manner as other civil suits are brought. Its peculiar and distinguishing characteristic is, that it takes the property in controversy from him who by his possession of it is prima facie its owner, and places it in the hands of the plaintiff, substituting in its stead a personal security in the form of a bond to the defendant for its return if such shall be the final judgment of the court.

But although replevin is at common law a general remedy to recover property wrongfully taken, it does not follow that it is of universal application, so that it can be effectively used in all cases, whatever may be the condition or situation of the property. Remedies are always to be used and applied in subordination to the great principles of right, which it is the object of the law primarily to secure and protect. Re-

[18] Part of the opinion is omitted. See Ames, The History of Trover, 11 Harv. Law Rev. 374; 3 Anglo-Am. Legal Essays, 431. See also 34 Cyc. 1352–1354, 1359, notes 14 and 16, to the general effect that in many states of the Union, either with or without the aid of a statute, replevin has become concurrent with detinue.

That replevin now lies where trespass or trover can be maintained, see 34 Cyc. 1355. And, in general, 42 Cent. Dig. § 1, and 17 Dec. Dig. § 1; Key-No. "Replevin," § 1.

dress is not to be obtained by doing a wrong. A person cannot use the process of law in vindication of his own rights in such way as to invade those of another. To illustrate: A creditor can in certain cases arrest the body of his debtor; this is a clear legal right; but it cannot be exercised by a forcible entry of the debtor's dwelling, because such an act would infringe on another right equally clear, by which a man's house is made a place of shelter and repose, which no one armed only with civil process can break into or disturb. So a criminal is liable to arrest and to have his person and premises searched; the good order and safety of the community require that this right should be enforced; but it cannot be done without warrant under oath, specially designating the person and object of search and arrest, because that would be contrary to the right of every person to be secure against unreasonable searches and seizures. The truth is, that in determining whether a particular remedy is applicable or appropriate in any case, it is not sufficient to consider whether it will be effectual to redress the grievance or vindicate the right of one party. An equally essential and necessary inquiry is to ascertain whether it can be employed without an infringement of the rights and privileges of the other party. If it cannot be, then it follows that the law will not sanction it. There are cases, no doubt, in which legal process, lawfully used, may cause inconvenience and hardship, and even operate oppressively on those against whom it is directed; but we know of no case in which it can be legitimately made the instrument of wrong, or the means by which private rights can be invaded or taken away.

It seems to us, on careful consideration, that this action cannot be maintained without coming in conflict with this plain and elementary principle. The proposition on which the plaintiff must rest his case amounts, when examined, to this: that on a process in its nature purely civil an officer is bound to seize and search the person of the defendant. The statement of such a proposition carries with it a sufficient refutation. Its practical recognition would lead to a palpable infraction of the cardinal principle by which, under our constitution and laws, the sanctity of the person is guarded from unfounded and groundless searches and arrests. There is nothing in the nature of a writ of replevin, which gives to it any efficiency or power over the person, superior to other civil process. It may be sued out at the will of any person who sees fit to assert a title to property in the possession of another; no oath or other sanction is required to prevent its misuse or abuse; even the right of property, which it seeks to establish, may on investigation prove to be wholly without foundation. How then can it be contended that it confers on an officer an authority, which cannot be exercised even under a criminal process, except when it is verified by oath and issued with the formalities required by the constitution and laws?

Certainly no precedent or authority has been cited, and none, we believe, can be found, that sustains the doctrine which the plaintiff

must establish in order to maintain this action. In England, as we have already said, the process of replevin is used only in cases where property has been distrained, for the purpose of trying the legality of the seizure, and is confined chiefly, if not entirely, to beasts of the field and of the plough, implements of husbandry, household goods, and other chattels, not found or used on the person; and in Ireland, where the writ of replevin at common law is still a common remedy to try the title of goods and chattels in any way wrongfully taken, no case is found in which it has been used for the purpose of taking articles of clothing, or of personal use or adornment, from the person of the defendant. In a matter of this sort, relating, as it does, to the extent of the power conferred on an officer in the service of a process known to the common law from the earliest period, we regard the entire absence of authority in support of the right claimed by the plaintiff to be a strong argument against its existence. * * *

The exercise of such a power is not only contrary to right and unsupported by authority, but it is also inconsistent with sound policy. Practical jurisprudence looks, in the application of remedies, to the peace, good order and decorum of society. The evils which would flow from the unrestricted use of a civil process to search the person and to seize from it articles of dress or use or ornament are obvious and manifold. It would bring the officer of law in direct contact with the citizen, under circumstances well calculated to excite irritation and anger, and lead directly to breaches of the peace. It would place in the hands of wicked and evil disposed persons the means of annoyance and injury, and the power to interfere wantonly and without just cause with the most sacred rights of the person. If the right exists at all, it cannot be limited to particular articles of use or adornment, but must extend to every article of apparel worn by persons of either sex, and might be lawfully exercised at the sacrifice of decency and the proprieties of life. The reasons on which the restraint upon the power of taking articles from the person by distress or by attachment and execution is founded apply with equal force to the right to take them by replevin. Sunbolf v. Alford, 3 M. & W. 248; Mack v. Parks, 8 Gray, 517, 69 Am. Dec. 267.

Nor is there any necessity for giving such a remedy to recover property of this nature. A bill in equity under Rev. Sts. c. 81, § 8 (Gen. Sts. c. 113, § 2), to compel the redelivery of goods or chattels taken or detained from the owner and withheld so that the same cannot be replevied, would afford ample redress in all cases where the property is so situated that it cannot be taken without an interference with the person.

Exceptions sustained.

At a second trial in the superior court, the plaintiff conceded that, when the defendant was asked to serve the replevin writ, the pin was affixed to the bosom of Spring's shirt, in the manner in which breast-

pins are usually worn; but offered to prove that Spring had placed it there, not as an article of wearing apparel or personal ornament, but for the sole purpose of keeping it out of the reach of legal process, knowing that he had no valid title to it; and that the defendant might have seized it. But Morton, J., excluded the evidence, and ruled that, under the circumstances conceded and offered to be proved, the defendant was excused from serving the writ of replevin. The plaintiff submitted to a verdict for the defendant, and alleged exceptions, which were argued at October term, 1861.

Hoar, for the plaintiff. The plaintiff refers to the authorities and suggestions at the first argument. The question now presented is whether any article small enough to be kept by a defendant on his person is irrepleviable. Can a landlord distrain his tenant's watch for rent, and by keeping it on his person prevent the legality of the distress from being tested? If a child, too young to be punished for larceny, seizes in a jeweller's shop a valuable diamond, is there no legal process by which the possession can be restored to the proper owner?

BIGELOW, C. J. The facts now offered to be proved in support of this action do not change the result at which we arrived in considering the case as presented at the former hearing. It was then determined that replevin did not lie at common law for articles of dress or personal adornment, alleged to have been unlawfully taken, and which were actually worn on the person at the time when the service of the writ of replevin was attempted. The necessity of securing immunity to the person from unreasonable searches and seizures, and the impolicy of allowing an unlimited power to an officer to take on civil process articles worn on the person, forbid the extension of the remedy by replevin to property so used and situated. A bill in equity for property unlawfully withheld affords an ample remedy to recover possession of property of such a nature.[19]

Exceptions overruled.

SAGER v. BLAIN.

(Court of Appeals of New York, 1871. 44 N. Y. 445.)

Appeal from an order of the General Term of the Supreme Court, in the second district, granting a new trial and reversing an order of the City Court of Brooklyn, denying a new trial.

The action was replevin, to recover possession of certain United States treasury notes, particularly described in the complaint, "and also the sum of $9,112.19, delivered by Charles Meigs & Son to the defendant, with damages for the withholding thereof."

The testimony being closed, the court charged the jury that the

[19] Part of the opinion is omitted. Compare Sibeck v. McTiernan (1910) 94 Ark. 1, 125 S. W. 136; and see 34 Cyc. 1362, notes 74, 75.

plaintiff was not entitled to recover in this action the $9,112.19 claimed in the complaint, and directed the jury to find a verdict for the defendant, Rhoda E. Blain, for that amount; to which charge and direction the plaintiff's counsel excepted.[20]

HUNT, C. The embarrassments of this case have arisen, chiefly, from the selection of an improper form of action. The plaintiff, claiming to have purchased from the defendant, Isaac W. Blain, several government bonds, and a balance of money theretofore paid by Messrs. Meigs & Co. to his wife, upon his order, commences an action of replevin, to obtain this property from Mrs. Blain. The government bonds are specific articles, distinguishable from all others of a like character by dates and numbers. As to these, an action of replevin for their recovery was well enough. The plaintiff desired to avail himself of the advantages which the law gives when the defendant improperly withholds property belonging to the plaintiff. One of these was the right of seizing the property in advance, and retaining it until the defendant shall give security for its return. The other is the right of imprisonment, in the event of not paying the judgment recovered. For the purpose of recovering the money, the remedy proposed and the advantages sought were entirely inapplicable. On the order of her husband, Meigs & Co. had given to Mrs. Blain their check for $9,000, on which she had drawn the money from the bank. Whether she obtained the bills of the bank, the notes of the government, or specie, does not appear. Whatever she obtained, she kept herself, and it was never under the control or in the possession of the plaintiff or his assignor, Mr. Blain.

The claim against Mrs. B., under such circumstances, was simply for money had and received. It was to be pursued in the ordinary manner for the collection of a debt. The extraordinary remedies given in prosecuting for a tort could not be invoked. If by attempting to use them the plaintiff has involved himself in difficulty, he must suffer the consequences.

When the proper action is brought, the rights of the parties will be determined without difficulty. If this money was given to Mrs. Blain by her husband, he being free from debt, I see no reason why she cannot hold it. If it was in her hands as the mere depositary of her husband, it was subject to his order and passed by the transfer to the plaintiff. This question has not been, and could not be, decided in this action. The action of replevin or trover is based upon an improper detention or conversion of the plaintiff's property. Proof of ownership will not of itself authorize a recovery. The plaintiff may prove undoubted ownership; but, unless he proves a conversion also, or a refusal to deliver, he cannot recover. There are many cases to this effect in the books. Packard v. Getman, 4 Wend. 613, 21 Am. Dec.

[20] The statement of facts is abridged. The concurring opinion of Leonard, C., is omitted.

166; Hallenbake v. Fish, 8 Wend. 547, 24 Am. Dec. 88. His action for the recovery of a specific $9,000, alleged to be detained from him, is no bar to an action for $9,000 of debt generally due to him from the defendant. As a debt merely it cannot be recovered in the present action. The record cannot, therefore, be a bar to an action for the recovery of the debts simply. Spalding v. Spalding, 3 How. Prac. 297; Seymour v. Van Curen, 18 How. Prac. 94.

The record does not show whether, in the present case, the plaintiff exercised the right of preliminary seizure, which the law authorizes in an action of replevin. It will illustrate the case if we assume that he did. Let us assume that Mrs. Blain drew this $9,000, upon the check of Meigs & Co., in legal tender notes. Assume, further, that she retained the notes in her possession, and that, by the aid of a friend within the garrison, the sheriff was able to take the notes into his possession upon the replevin papers in the suit. The defendant, Mrs. Blain, not being able to give security for their return, they remain in the plaintiff's possession at the time of the trial. Upon the trial it is held that, as to this money, an action of replevin will not lie; that, as to that portion of the demand, judgment must go against him. He has quite mistaken his remedy. Both parties must be restored to the statu quo ante bellum. The plaintiff must give back the money. Mrs. Blain is entitled to receive it. This is precisely what was done at the trial. In my judgment, the direction was right in form as well as in substance. It stated the rights of the parties in this suit and nothing more. If an ordinary action for money assigned to him shall hereafter be brought by the plaintiff against Mrs. Blain, there will be found nothing in this record to prevent its decision upon the merits. Should there be any doubt about the effect of this verdict, which I do not myself anticipate, the record is still open to amendment. No judgment has been entered upon the verdict, and it would be within the authority of the Special Term to direct the insertion of a statement of the ground of the judgment, viz., the improper form of action, or that the judgment be simply that the plaintiff cannot recover the $9,000.

Several questions of evidence were presented, but I see no error that requires our consideration.

The order of the General Term should be reversed, and judgment entered upon the verdict of the City Court.[21]

[21] Compare Graves v. Dudley (1859) 20 N. Y. 76, 79: "This action is brought to recover the possession of the bills, and it is insisted that such an action will not lie where the subject-matter is money. The authorities relied upon by the counsel, arose in the action of detinue, when that was the remedy provided by law for the recovery of personal property unlawfully detained. The cases are analogous to the action given by the Code to recover the possession of like property similarly detained, and the same principle should be applied to the latter action. Coke upon Littleton (286b), speaking of the writ of detinue, says: 'In this writ the plaintiff shall recover the thing detained, and therefore it must be so certain as it may be known, and for that cause it lyeth not for money out of a bag or chest: and so of corn out of a sack, and the like; these cannot be known from other.' This shows that money could be recov-

WARTEN v. STRANE.

(Supreme Court of Alabama, 1886. 82 Ala. 311, 8 South. 231.)

Detinue for "one lot of corn in the shuck, to wit, 76 bushels in defendant's crib nearest his dwelling, lately bought by plaintiff from defendant." On the trial the plaintiff testified that, the defendant being indebted to him, a settlement was made by his clerk, George Gray, by which the account "was paid by a credit for a gin, two mules, one horse, and 100 bushels of corn in the shuck at defendant's crib, at the rate of 60 cents per bushel, leaving a balance of $25 due the defendant, which he afterwards took out in plaintiff's store. * * * The corn at the crib was to be his property. He had never seen the corn. The trade was made by his clerk, who died last fall, but he and the defendant, in January, 1885, talked over the trade thus made with said Gray." The evidence as to the trade being made by said Gray was excluded. The plaintiff was then asked "whether the corn he bought of the defendant was 100 bushels to itself, or part of a large quantity." He replied that he did not personally know whether the corn was in a lot by itself; that the defendant told him, in January, 1885, that the corn was in his west crib, separated from his other corn, and that said Gray told him when he returned from making the trade that he bought the lot of corn in the west crib, and showed him the dimensions thereof. The court excluded what Gray said to the plaintiff. * * * There was a verdict for the defendant and the plaintiff appealed.

SOMERVILLE, J. 1. The principle is familiar that where there is a contract of sale of personal property, and anything remains to be done to individualize and identify the particular property intended to be sold, such as counting, weighing, measuring, or separating from a larger mass or bulk, no title passes to the purchaser, such as will maintain in his favor an action of detinue or trover. This is for the simple reason that the particular part of the property or chattels contracted to be sold and delivered cannot be ascertained by precise identification. Bank v. Fry, 69 Ala. 348, s. c., 75 Ala. 473; Shealy v. Edwards, 73 Ala. 175, 180, 49 Am. Rep. 43. The charge of the court, in reference to this phase of the case, was in harmony with this well-settled rule governing sales of personal property, and was free from error. * * *[22]

ered in the action of detinue, the same as corn; that is where it could be identified. The same rule applies to all personal property, and to maintain an action for its recovery it must be identified so that delivery of the specific goods to which the party is entitled may be made." Per Grover, J.

[22] Only so much of the case is given as relates to the one point. The case was reversed on another point, and remanded.

SECTION 2.—AFTER THE STATUTE OF WESTMINSTER THE SECOND

I. Historical

Apparently, the inventiveness of the Chancellor and judges in the matter of making new writs had come to an end in the latter half of the thirteenth century. At any rate, there were complaints in Parliament of suitors being turned away empty-handed because there was no writ to suit their cases. Accordingly, the great Statute of Westminster the Second sought to provide a remedy by enacting that "whensoever from henceforth it shall fortune in the Chancery, that in one case a writ is found, and in like case falling under like law, and requiring like remedy, is found none, the Clerks of the Chancery shall agree in making a writ" (and, if they do not there is to be an appeal to Parliament).[23]

This enactment, though it appears only at the end of a chapter on special cases, seems to have been taken as a general authority for the expansion of legal remedies; and under it were formed many new writs on the analogy of the older writs found in the Register. These new writs were all grouped together under the name of "Case"; apparently from the words used in the Statute of Westminster the Sec-

[23] The Statute of Westminster the Second, made Anno 13 Edw. I, Stat. 1, and Anno. Dom. 1285.

"Whereas of late our Lord the King, in the Quinzim of Saint John Baptist, the Sixth Year of his Reign, calling together the Prelates, Earls, Barons, and his Council at Gloucester, and considering that divers of this Realm were disherited, by Reason that in many Cases, where Remedy should have been had, there was none provided by him nor his Predecessors, ordained certain Statutes right necessary and profitable for his Realm, whereby the People of England and Ireland, being Subjects unto his Power, have obtained more speedy Justice in their Oppressions, than they had before; and certain Cases, wherein the Law failed, did remain undetermined, and some remained to be enacted, that were for the Reformation of the Oppressions of the People: Our Lord the King in his Parliament, after the Feast of Easter, holden the Thirteenth Year of his Reign at Westminster, caused many Oppressions of the People, and Defaults of the Laws, for the accomplishment of the said Statutes of Gloucester, to be rehearsed, and thereupon did provide certain Acts, as shall appear here following: * * *

"Chap. xxiv. * * * 2. And whensoever from henceforth it shall happen in the Chancery that in one case a writ is found and in a like case [in consimili casu] falling under the same right and requiring a similar remedy [simili remedio] a writ is lacking, the clerks of the Chancery shall agree in making a writ, or adjourn the complainants to the next parliament, and they shall write out the cases in which they cannot agree and refer them to the next parliament, and let a writ be made with the consent of the learned in the law, lest it happen thereafter that the King's Court [Curia] be long deficient in doing justice to the complainants."

Stats. at Large (Pickering's Ed.) 1762, vol. 1, pp. 163, 197, with a few variations from the translation in Pickering.

ond—"in consimili casu." Another feature common to them all was that each was framed on the model of a specific older writ; enlarging its scope by omitting one or more of the technical requirements of the older document.[24]

Jenks, Short Hist. Eng. Law, 136.

[24] The Statute of Westminster the Second contains, in its twenty-fourth chapter, a clause of which lawyers have long recognized the importance, but which lay historians are too apt to regard as mere technical jargon. Carefully concealed under the guise of an administrative regulation, the Statute lays it down, that the chancery officials, through whose hands must pass every royal writ, which was then, and still is, the normal beginning of every action in the royal courts, need no longer be guided by a strict adherence to precedent in the issue of these documents. It is sufficient if the remedy sought and the circumstances of the case are like those for which writs have previously been issued. In other words, principle, not precedent, is henceforth to guide the Chancellor and his officials in the issue of writs.

To a layman, impatient of the intricacies of legal history, such a direction may seem the most obvious piece of official platitude. In truth, it covered a daring attempt at completing, by a master stroke, a revolution which had been gradually proceeding during the twelfth and thirteenth centuries. Once more it is necessary to remind the reader, that the conception of the Crown, as the sole fountain of justice, is a very modern conception in legal history. The Crown in the later Middle Ages was but one of many competitors for the profitable business of judicature. The Church, the feudal nobles, the chartered boroughs, the merchant guilds, the shire and hundred moots, were all rivals, more or less formidable. And any premature attempt on the part of the Crown to claim universal and exclusive jurisdiction would assuredly have led to the fiercest opposition, even if it had not resulted in the dissolution of the State. Time was on the side of the Crown; but the King had to walk warily, and to be content for a long time with small things. Bit by bit, as chances offered, the royal officials filched the business of their rivals; and, as each claim was established, it was carefully enshrined as a precedent in that Register of Writs, which was one of the most precious possessions of the royal chancery. If an intending litigant could bring his case within the terms of a registered writ, well and good. If not, the King's courts could do nothing for him. He might have the best case in the world from a moral, or even from a legal point of view. But his remedy, if any, lay elsewhere. With sorrowful hearts, for they disliked "turning away business," the chancery officials regretted that they could not supply the desired article. The officials knew that their path was beset with dangers. The bold assertion of Henry II, that no lawsuit touching the title to freehold could be commenced without a royal writ, had played no mean part in stirring the baronial rising under John; and the claim had been solemnly renounced in the Great Charter. Now, perhaps, we are in a position to understand something of the audacity of the consimilis casus clause of the Statute of Westminster the Second, which, if acted upon to its full extent, would have left it open to ingenious chancery officials to discover analogies of existing precedents in the case of every intending litigant. But its comparative failure is another signal proof that sound legislation is little more than the official consecration of enlightened public opinion, and that "fancy" or premature reforms are mere waste of words. The opposition to the full use of the clause came, not merely from feudal and clerical tribunals, but from the King's own judges, who refused to recognise as valid writs which, in their view, departed too widely from precedent, no less than from the Parliaments of the fourteenth century, profoundly jealous of a power which, under the form of mere official documents, was really a power to declare the law of the land. The final victory of the royal jurisdiction was won, by the skilful use of fictions, by the rise of the Court of Chancery, and, finally, by the Reformation, which crushed the independence of the Church courts. It could not be achieved by a single clause in the Statute of Westminster the Second.

Jenks, "Edward I: The English Justinian," 1 Anglo-Am. Legal Essays, 151–152.

As is well known, the Action on the Case was stretched to cover a large number of offences. It thus, in common speech, became the parent of many special actions; though these differed from the older actions in this important point, that, as they were all commenced by the same writ, the plaintiff could not, even before the abolition of forms of action, be non-suited for confusing one with the other. Thus we get the so-called "actions" of Trover, Nuisance, Assumpsit, Malicious Prosecution, Seduction, Defamation, and Deceit; some of which (e. g. Nuisance, Malicious Prosecution, and Deceit) have to be rather carefully distinguished from older remedies for similar offences, which had, for one reason or another, become obsolete or inconvenient. * * *

But elasticity was of the essence of the Action on the Case; and, all through its history, that action has been made to serve, very usefully, as a general formula under which any grievance for which no special definition existed, but which it was deemed desirable by the Courts to recognize, could be smuggled in.

Jenks, Negligence and Deceit in the Law of Torts.[25]

II. NUISANCE [26]

(A) Nature of the Tort

all case 734

(a) THE DIFFERENT KINDS OF NUISANCE

FINEUX v. HOVENDEN.

(Court of Queen's Bench, 1599. Cro. Eliz. 664, 78 Reprint, 902.)

Action on the case. Whereas there had been a way within the City of Canterbury leading from St. Peter's street unto a street called Rushmarket; and that all the inhabitants of the city had used, time whereof, &c. to pass that way; and that the plaintiff was an inhabitant

[25] Published in 26 Law Quarterly Review (1910) 162, 164.

[26] "The explanation of this threefold meaning and application of the term nuisance [that is, nuisance as a species of criminal offense, nuisance as a disturbance of servitudes, and nuisance as the act of causing or allowing the escape of deleterious things into another's land] is that in its origin the term was merely a generic expression meaning wrongful harm, and that although it has now lost this wide signification it has failed to attain instead any single specific application. The term is derived, through the French, from the late Latin 'nocentia.' See Tertull. Apol. cap. 40: 'Deus innocentiæ magister nocentiæ judex.' Chaucer used it in this generic sense: 'Helpe me for to weye ageyne the feende. * * * Keepe us from his nusance.' (Mother of God, 1, 21.) Nuisance appears in the old Latin pleadings as 'nocumentum,' i. e., harm. The terms trespass and tort, though similarly generic in their original use, have been more successful in the process of specification." Salmond, Law of Torts (2d Ed.) 184.

On the common-law remedies for nuisance before the statute of Westminster II, see 3 Bl. Com. 221, and Jenks' Short Hist. Eng. Law, 144 (1912).

there; that the defendant had made a ditch and erected a pale cross that way, whereby he had lost his passage, &c. The defendant pleaded not guilty; and * * * it was found for the plaintiff; and now moved, in arrest of judgment,[27] by Coke, Attorney General, that this action lies not for a private person; because it is a common nuisance, and is punishable in a court leet only, unless he can shew some special prejudice, as 27 Hen. 8, pl. 27, is; and so it was adjudged in this Court, in Serjeant Bendlows v. Kemp, that he might maintain an action upon some special prejudice. And at St. Alban's Term, in William v. Johns, it was adjudged, that where a chapel was within a manor, and the parson of the adjoining church used to read divine service every Sunday, for the lord and his tenants in the said chapel: and for that the parson had failed therein, the lord brought an action upon the case; and adjudged that it lay not; for so every one of the tenants might bring the like action, which would be inconvenient, that he should be liable to all their actions; but he ought to be punished by the Ordinary in this case. But, peradventure, where there is not any other remedy to be had than by action, there every one may have his action who is grieved. And therefore, in Westbury v. Powel, where the inhabitants of Southwark had a common watering place, and the defendant had stopped it, and the plaintiff, being an inhabitant there, brought his action upon the case, it was adjudged maintainable. But it is here punishable in the leet. Wherefore, &c.—And of that opinion were POPHAM, GAWDY, and FENNER, that without a special grief shewn by the plaintiff, the action lies not.—But CLENCH è contra; for the stopping of itself is a special prejudice to the plaintiff, that he cannot go that way. Wherefore it is reason he should maintain the action.[28] Sed adjournatur.

[27] A part of the case, on a question of venue, is omitted. The statement is slightly abridged.

[28] On the reason for the rule, see Coke, First Institute, 56a: "For if the way be a common way, if any man be disturbed to goe that way, or if a ditch be made overthwart the way so as he cannot goe, yet shall he not have an action upon his case: and this the law provided for avoyding of multiplicity of suites, for if any one man might have an action, all men might have the like. But the law for this common nuisance hath provided an apt remedy, and that is by presentment in the leete or in the torne, unlesse any man hath a particular damage."

See also Professor Jeremiah Smith's remark in 15 Columbia Law Review, 2 (1915): "It is now generally admitted that no private action can be maintained at common law, unless the plaintiff has sustained actual damage; meaning damage which involves appreciable pecuniary loss to him individually. The controversy is whether this goes far enough; or whether the law ought to further insist upon certain particular kinds of actual damage (upon certain exceptional classes of actual damage). Those who advocate the more stringent rule contend that, in the absence of these requirements, there is great danger of such a multiplicity of suits as would constitute an intolerable evil. The apprehension of such a result has exerted much influence upon courts: sometimes inducing a denial of recovery to a plaintiff who has suffered very substantial damage, but whose damage does not fall within certain exceptional classes."

FOWLER v. SANDERS.

(Court of King's Bench, 1617. Cro. Jac. 446, 79 Reprint, 382.)

Action upon the case, for laying in the highway in Coggeshall, leading from Coggeshall to Braintree, divers loads of logs, whereby they much straitened the highway; so as the plaintiff, upon the evening of such a day, riding on the said way; his horse stumbled upon those blocks, and much hurt him; for which, &c.

The defendant confesses it to be a highway; but he saith, that the town of Coggeshall is an ancient vill, wherein all the inhabitants there, having ancient houses, used time whereof, &c., to lay logs in waste places of the said way before their doors for their fuel, leaving sufficient passage for chariots, horsemen, and footmen; and that he was seised in fee of an ancient house, and laid logs for his fuel in the waste places of the highway, leaving sufficient for passage of chariots, horsemen, and footmen, &c., and the plaintiff riding by the highway improvide turned his horse upon the blocks and fell, &c.

Whereupon the plaintiff demurred: and without much argument it was adjudged—

First, that the action well lay for the plaintiff; because he having special damage had cause to bring that action, although the nuisance be a public nuisance. 27 Hen. 8, pl. 27. 5 Co. 73, a. Williams' case.[29]

Secondly, that the prescription to make a nuisance is not good; for it is against law to prescribe in such manner.

Thirdly, this prescription for the inhabitants is not good. Wherefore it was adjudged accordingly.

[29] Y. B. 27 Hen. viii, 27, pl. 10. Action on the case for stopping a highway whereby the plaintiff was unable to reach his close. Fitz Herbert: "I fully agree that every nuisance done in the King's highway is punishable in the Leet, and not by action unless it be where a man has a greater hurt, or annoyance, than anyone has, and there he who has greater inconvenience or hurt, can have an action to recover his damages which he has by reason of his special hurt. For example, if one digs a ditch across the highway and I come riding along the way in the night and I and my horse are thrown into the ditch so that I am greatly damaged and inconvenienced therein, I shall have an action in this case against him who made this ditch across the way because I am more damaged thereby than anyone else."

The right to a private action when the plaintiff, without fault on his part, has suffered damage through physical contact with the unlawful obstruction, appears to have been unquestioned since the days of the Year Books, "although, if such questions were to arise now for the first time, they might perhaps, be disputed by some courts." See Professor Jeremiah Smith's article on "Private Action for Obstruction to Public Right of Passage," 15 Columbia Law Rev. 147 (1915).

HART v. BASSET.

(Court of King's Bench, 1682. T. Jones, 156, 84 Reprint, 1194.)

The plaintiff declared that whereas he had the tithes of the parish of B. for such a year, and was possessed of a barn into which intendebat portare & ponere the tithes, and that the alta via Regia in B. was the direct way for the carrying of the tithes to the barn. The defendant had obstructed and stopped up the said way by a ditch and gate erected ex transverso viæ, whereby he could not carry his tithes by the said way, but was forced to carry them by a longer and more difficult way. Upon non cul' verdict was given for the plaintiff, and £5. damages. In arrest of judgment it was moved, that this way being a high way (as was alledged by the plaintiff himself) the obstruction was a common nusance. And this damage is not such for which an action will lie, for then every one who had occasion to go this way might have his action, which the law will not suffer for the multiplicity. And Williams's case, 1 Inst. 59, was cited for it. But resolved by the whole Court that the action lay. And it was said that the common rule, that no one shall have an action for that which every one suffers, ought not to be taken too largely.[30] But in this case the plaintiff had particular damage, for the labour and pains he was forced to take with his cattle and servants, by reason of this obstruction, may well be of more value than the loss of a horse, or such damage as is allowed to maintain an action in such a case. Judgment was given for the plaintiff.[31]

[30] In support of the plaintiff's right to recover see also Maynell v. Saltmarsh (1665) 1 Keb. 847; Jeveson v. Moor (1697) 12 Mod. 262; Chicester v. Lethbridge (1738) Willes, 71; Rose v. Miles (1815) 4 M. & S. 101; Greasly v. Codling (1824) 2 Bing. 263.

[31] Compare Burrows v. Pixley (1792) 1 Root (Conn.) 362, 1 Am. Dec. 56: (P. declared that D. had erected a dam across a navigable river below P.'s house, by which the navigation of the river was effectually obstructed, "and showed that the river had been in use for a long time by him and others for the transportation of produce, and that the obstruction was particularly detrimental to him, because he had for many years owned a shipyard, where he carried on the business of shipbuilding, which was made profitable to him because of the navigableness of said river.")

Hughes v. Heiser (1808) 1 Bin. (Pa.) 463, 2 Am. Dec. 459: (P. declared that he had procured a large quantity of boards and timber and made them into rafts to bring down the Big Schuylkill river, which was a public highway for the passage of rafts, that he seized the opportunity of a flood and came down as far as a dam unlawfully erected by D., and was there stopped by this obstruction.)

And see 29 Cyc. 1213, notes 65 and 66; 37 Cent. Dig. "Nuisance," §§ 164–169; 15 Dec. Dig. "Nuisance," § 72; and Judge Smith's article on "Private Action for Obstruction of Public Right of Passage," 15 Columbia Law Rev. 1–23, 142–165 (1915).

WILLARD v. CITY OF CAMBRIDGE.

(Supreme Judicial Court of Massachusetts, 1862. 3 Allen, 574.)

Tort. The declaration alleged, in substance, that the city of Cambridge raised the draw and took up the planks of a drawbridge, which formed a part of a public highway which they were bound to keep in repair, and obstructed the travel over the same for sixteen days, whereby the plaintiff, who was a dealer in lumber, wood and coal at a wharf adjacent to the bridge, was injured in his business, and his customers were unable to come to his wharf, and he lost the sale of lumber, wood and coal, and was subjected to increased trouble and expense in delivering what he had already sold and promised to deliver, and in getting in his crops, and his houses occupied by tenants were rendered less desirable, and he was obliged to abate from his rents in order to keep his tenants. The defendants filed a demurrer, assigning for cause that no legal cause of action was set forth; and the case was reserved, by Dewey, J., for the determination of the whole court.

BIGELOW, C. J. We cannot distinguish this case from those in which it has been determined by this court that no action at law can be maintained to recover damages for the obstruction of a highway, unless a party can prove that he has sustained some special and peculiar damage thereby, different in kind, and not merely in degree, from that which is occasioned to other persons by the alleged nuisance.[32]

No doubt the annoyance and injury to the plaintiff by the acts alleged in the declaration were much greater in amount than those which were caused to any other person having occasion to use the same highway. But it was a similar sort or species of damage. His near proximity to the bridge and the nature of the business in which he was engaged did not change the kind of damage to which he was subjected,

[32] The Chief Justice here referred to Quincy Canal v. Newcomb (1843) 7 Metc. (Mass.) 276, 39 Am. Dec. 778; Brainard v. Connecticut River R. (1851) 7 Cush. (Mass.) 511; Blood v. Nashua & Lowell R. (1854) 2 Gray (Mass.) 140, 61 Am. Dec. 444; Brightman v. Fairhaven (1856) 7 Gray (Mass.) 271; Harvard College v. Stearns (1860) 15 Gray (Mass.) 1; Hartshorn v. Inhabitants of South Reading (1862) 3 Allen (Mass.) 504.

See also, as bearing on the same doctrine, Smith v. Boston (1851) 7 Cush. (Mass.) 254; Blackwell v. Old Colony R. (1877) 122 Mass. 1; Stanwood v. Malden (1892) 157 Mass. 17, 31 N. E. 702, 16 L. R. A. 591; Nichols v. Richmond (1894) 162 Mass. 170, 38 N. E. 501; Robinson v. Brown (1902) 182 Mass. 266, 65 N. E. 377; Crook v. Pitcher (1884) 61 Md. 510; Painter v. Gunderson (1913) 123 Minn. 323, 143 N. W. 910.

Compare the remark of Brown, D. J., in Piscataqua Nav. Co. v. New York, etc., R. Co. (D. C. 1898) 89 Fed. 362, 363: "In each of these cases, there was only detention, and not physical injury, to person or goods. In each of these cases, as in the present case, the plaintiffs were in the actual use of the way, and were subjected to actual obstruction, and to actual loss additional to that which, by presumption of law, attaches to each member of the public. This actual loss, proved as a matter of fact, is the gist of the private action."

but only increased the extent of the injury.[33] Every traveller having occasion to pass the bridge or to transport goods or merchandise across it incurred in some degree additional trouble and expense, as well as loss of time, by being compelled to seek another and more circuitous route. These elements of damage are the same as those claimed by the plaintiff, and are not special or peculiar to him so as to furnish a good cause of action. The same is true of the alleged loss of rents. Every person owning property on the highway leading to the bridge, near to or remote from the place of the alleged obstruction, sustained a similar injury. Smith v. Boston, 7 Cush. 257. The case of Stetson v. Faxon, 19 Pick. 147, 31 Am. Dec. 123, is distinguishable from the case at bar by the leading fact that there the nuisance causing the obstruction to the plaintiff's premises was erected directly against and abutting on the estate of the plaintiff, and diverted travel therefrom, and it did not appear that any other person sustained a similar injury.[34]

Demurrer sustained.

[33] Compare Chancellor Walworth's dictum in Lansing v. Smith (1829) 4 Wend. (N. Y.) 25, 21 Am. Dec. 89: "If the defendants had erected these temporary bridges, and were not authorized to do so, they might be indicted for a common nuisance. But the bridges might also be more injurious to some persons than to others. In such a case, if a person has sustained actual damage by the erection of the nuisance, whether direct or consequential, I am not prepared to say he cannot maintain an action against the wrongdoer. If he sustains no damage but that which the law presumes every citizen to sustain, because it is a common nuisance, no action will lie. But the opinion I have formed on this point is that every individual who receives actual damage from a nuisance may maintain a private suit for his own injury, although there may be many others in the same situation. The punishment of the wrong-doer by a criminal prosecution will not compensate for the individual injury; and a party who has done a criminal act cannot defend himself against a private suit by alleging that he has injured many others in the same way, and that he will be ruined if he is compelled to make compensation to all."

[34] Stetson v. Faxon (1837) 19 Pick. (Mass.) 147, 31 Am. Dec. 123: A warehouse erected by D. projected several feet into a public street, and beyond P.'s warehouse, standing on the street line; because of this P.'s warehouse was obscured from the view of passers-by, and travel was diverted so that P.'s warehouse became less eligible as a place of business, his tenants left, and he was obliged to reduce his rents. Walker v. Shepardson (1853) 2 Wis. 384, 60 Am. Dec. 423: D. drives piles into the bed of a navigable river in front of P.'s property on the river. Brayton v. City of Fall River (1873) 113 Mass. 218, 18 Am. Rep. 470: A city constructed a system of sewers which carried the dirt of unpaved streets into a tidal creek, and obstructed its navigation. "If the effect of the defendant's acts had been merely to create a bar across the mouth of the creek, so as to destroy or injure its navigability, the plaintiff could not maintain an action because it was thereby rendered more difficult and expensive to reach his wharf, or because his wharf was rendered less valuable. Those would be injuries of the same kind sustained by all other persons who have occasion to use the creek, or who owned land bordering upon it. But in this case the evidence tended to show that the effect of the sewers had been to fill up the creek directly in front of and adjoining the plaintiff's wharf, so that his vessels which he was accustomed to employ to bring grain to his wharf and elevator could not lie at the wharf on account of the diminished depth of water." Per Morton, J.

Compare the remarks of Winslow, J., in Tilly v. Mitchell & Lewis Co. (1904) 121 Wis. 1, 98 N. W. 969, 105 Am. St. Rep. 1007: "A person whose lot abuts upon the particular piece of street which is unlawfully closed or ob-

WILKES v. HUNGERFORD MARKET CO.

(Court of Common Pleas, 1835. 2 Bing. N. C. 281, 132 Reprint, 110.)

Action on the case for the obstruction of a right of way. The declaration alleged that at the time of the committing the grievance by the defendants there was a thoroughfare leading from the Adelphi along divers streets and courts into Craven Court, and thence along other streets and courts into Whitehall, and thence back again, for all persons at all times; that the plaintiff was possessed of a messuage adjoining the said thoroughfare, in which he carried on the business of a bookseller, and made great gains by the sale of books to persons passing along the thoroughfare; that the defendants wrongfully kept the thoroughfare closed an unreasonable length of time, and during that time thereby prevented the plaintiff from carrying on his business in as beneficial a manner as he otherwise would have done, whereby the plaintiff was deprived of divers gains which would otherwise have accrued to him. The jury have found that the defendants did continue the obstruction to the plaintiff's right of way an unnecessary length of time.[35]

TINDAL, C. J. * * * The next question is, whether this is such a peculiar and private damage to the plaintiff beyond that suffered by the rest of his Majesty's subjects, as to enable him to sustain an action against the defendants. And I think, in conformity with the greater number of decisions, that it was. The injury to the subjects in general, is, that they cannot walk in the same track as before; and for that cause alone an action on the case would not lie: but the injury to the plaintiff is, the loss of a trade, which but for this obstruction to the general right of way he would have enjoyed; and the law has

structed is universally held to be specially and peculiarly injured, though he may have other access to his lot: but many of the cases draw an arbitrary line at this point, and maintain that when the plaintiff's lot fronts upon another part of the street no such injury is shown. Certainly the distinction is illogical. The man whose lot fronts upon the next block may be fully as deeply injured in the decreased value, rentability, and desirability of his lot as the man whose lot fronts on the block which is closed. One may suffer as great damage in his estate as the other. True, there may be many such individual owners, but that cannot affect individual rights. There may be 20 or there may be 50 of them, but, if each has suffered great damage to his estate by the unlawful closing of a street, why shall not each have his action? Neither 20 men nor 50 men constitute the general public. The general public is composed of the great mass of individuals who own no property in the vicinity, and who may wish to pass over the street or not, and who, if they do, simply suffer the trifling inconvenience of being obliged to make a circuitous trip. The man who owns a lot in the next block, and whose lot has lost a great part of its value by reason of the closing of the street, manifestly suffers some injury different in its nature from the mere inconvenience suffered by the general public."

See also 15 Columbia Law Review, 154–157 (1915).

[35] This statement, slightly abridged from Chief Justice Tindal's opinion, is substituted for the reporter's statement. The arguments, a portion of the opinion by Tindal, C. J., and the opinions of Park, Gaselee, and Bosanquet, JJ., are omitted.

said, from the Year Books downwards, that if a party has sustained any peculiar injury, beyond that which affects the public at large, an action will lie for redress. Is the injury in the present case of that character or not? The plaintiff, in addition to a right of way which he enjoyed in common with others, had a shop on the roadside, the business of which was supported by those who passed: all who passed had the right of way; but all had not shops: that is the observation made in Baker v. Moore, cited in Ivison v. Moore, 1 Ld. Raymd. 486, which was an action for stopping a way and preventing the carriage of coals. In Baker v. Moore the refusal of the plaintiff's tenants to remain on the premises was considered a damage sufficiently peculiar and private to entitle the plaintiff to sue the defendant for having erected a wall across a common way used by the tenants. Indeed, for the most part the only question is, whether the injury to the individual is such as to be the direct, necessary, natural, and immediate consequence of the wrongful act. Hubert v. Groves, 1 Esp. 148, has been relied on on the part of the defendants: but the gravamen there was one which applied equally to all his Majesty's subjects, namely, that they were obliged to go in a more circuitous track, and not one which affected the plaintiff above others: unless that be a sufficient distinction between Hubert v. Groves and the present case,[36] I must yield to the greater authority of the other decisions.

Discharged as to entering a nonsuit.

[36] The case of Wilkes v. Hungerford Market Co. "is commonly considered as having been overruled by the House of Lords in Ricket v. Metropolitan Rly. Co. (1867) 2 H. L. 175. It is to be remarked, however, that there is nothing in the decision of the House of Lords in this case which is inconsistent with the Hungerford Market Case, and that the observations made upon the latter case are dicta unnecessary to the matter in hand. Ricket's Case decides merely that on the true interpretation of the Lands Clauses Act and the Railways Clauses Act claims to compensation under these acts are limited to damage done to the property affected and do not extend to damage done to the goodwill of a business. It is submitted, therefore, that the question still remains open, and that it is worthy of serious consideration whether damage done to the plaintiff in his trade by the illegal obstruction of a highway is not an actionable wrong." Salmond, Torts (2d Ed.) 280 (1910). And see Judge Smith's remarks on these cases in 15 Columbia Law Rev. 163, 164 (1915).

Compare Duy v. Alabama Western R. Co. (1911) 175 Ala. 162, 57 South. 724, Ann. Cas. 1914C, 1119, and note: (P. claims damages because D.'s freight depot, obstructing a public street in a block different from the block in which P.'s property was situated, has rendered P.'s property "less accessible to customers and intending customers, and the trade of the general public has been deflected or diminished.")

SOLTAU v. DE HELD.

(High Court of Chancery, 1851. 2 Sim. [N. S.] 133, 61 Reprint, 291.)

The plaintiff sought an injunction to restrain the ringing of the bells of a church near the plaintiff's house.

The bill alleged, among other things, that when a peal of the church bells was rung, the noise was so great that it was impossible for the plaintiff, or the members of his family, to read, write or converse in his house; that the ringing of the chapel bell and church bells was an intolerable nuisance to the plaintiff, and, if the said bell or bells was or were permitted to be rung in the manner in which the same were so rung as aforesaid, it would be impossible for the plaintiff to reside any longer in his house; that, in consequence of the before-mentioned grievance, the plaintiff applied to the defendant to desist from the ringing the said bells or any of them, so as to occasion any annoyance to the plaintiff, and, the defendant having refused to comply with that application, the plaintiff, in June 1851, commenced an action against the defendant to recover damages for the nuisance committed to him by means or in consequence of the before-mentioned ringing of the said bell or bells; that the action was tried on the 13th of August, 1851, when a verdict was found for the plaintiff, with forty shillings damages and costs; that, on the 10th November, 1851, judgment in the action was signed, and it remained unreversed.

The defendants put in a general demurrer to the bill.

THE VICE-CHANCELLOR (Sir R. T. KINDERSLEY). * * *[37] The demurrer is a general demurrer for want of equity; and, of course, by that demurrer, the defendant undertakes to shew that, upon the statements contained in the bill, the plaintiff would not be entitled to any relief at the hearing of the cause.

The first ground of demurrer to this bill is that the nuisance complained of is a public nuisance; and, therefore, the suit should have been instituted by the Attorney-General; and that it is not competent to the plaintiff to file a bill respecting it. * * *[38]

[37] The statement of the case is abridged; only so much of the opinion is given as relates to the one point.

[38] In an omitted portion of his opinion, the Vice Chancellor suggested this as the test of a public nuisance: "I conceive that, to constitute a public nuisance, the thing must be such as, in its nature or its consequences, is a nuisance—an injury or a damage, to all persons who come within the sphere of its operation, though it may be so in a greater degree to some than it is to others. For example, take the case of the operations of a manufactory, in the course of which operations volumes of noxious smoke, or of poisonous effluvia, are emitted. To all persons who are at all within the reach of those operations it is more or less objectionable, more or less a nuisance in the popular sense of the term. It is true that to those who are nearer to it it may be a greater nuisance, a greater inconvenience than it is to those who are more remote from it: but, still, to all who are at all within the reach of it, it is more or less a nuisance or an inconvenience. Take another ordinary case, perhaps the most ordinary case of a public

In my further observations on this ground of demurrer, I will proceed on the assumption that it is a public nuisance; that is to say, that the defendant is right in his contention that it is a public nuisance, and let us see what the consequence will be if it be so. Now, in the case of a public nuisance, the remedy at law is indictment; the remedy in equity is information at the suit of the Attorney-General. In the case of private nuisance the remedy at law is action; the remedy in equity is bill. And this is the distinction which is pointed out in those passages cited by Mr. Campbell from the third volume of Blackstone's Commentaries and from Mitford's Treatise on Pleading. But it is clear that that which is a public nuisance may be also a private nuisance to a particular individual, by inflicting on him some special or particular damage; and, if it be both, that is, if it be in its nature a public nuisance, and, at the same time, does inflict on a particular individual a special and particular damage, may not that individual have his private remedy at law by action, or in equity by bill? That is the question which is to be determined with respect to this ground of demurrer. The defendant's counsel insist that he cannot; and several cases were cited in support of that proposition. But, on referring to those cases, it appears to me that they do not support that proposition. * * *

Several cases have been referred to on the part of the plaintiff; such as Spencer v. The London and Birmingham Railway Company, 8 Sim. 193, Sampson v. Smith, 8 Sim. 272, Haines v. Taylor, 2 Beav. 75, and Walter v. Selfe, 15 Jurist, 416, in all of which it was held that,

nuisance, the stopping of the king's highway; that is a nuisance to all who may have occasion to travel that highway. It may be a much greater nuisance to a person who has to travel it every day of his life than it is to a person who has to travel it only once a year, or once in five years; but it is more or less a nuisance to everyone who has occasion to use it. If, however, the thing complained of is such that it is a great nuisance to those who are more immediately within the sphere of its operations, but is no nuisance or inconvenience whatever, or is even advantageous or pleasurable to those who are more removed from it, there, I conceive, it does not come within the meaning of the term public nuisance. The case before me is a case in point. A peal of bells may be, and no doubt is, an extreme nuisance, and, perhaps, an intolerable nuisance to a person who lives within a very few feet or yards of them; but, to a person who lives at a distance from them, although he is within the reach of their sound, so far from its being a nuisance or an inconvenience, it may be a positive pleasure; for I cannot assent to the proposition of the plaintiff's counsel that, in all circumstances and under all conditions, the sound of bells must be a nuisance. And it is rather curious that one of the witnesses who was examined on the trial on the part of the plaintiff, and who deposed strongly to the bells being an intolerable nuisance when he was in Mr. Soltau's house, says: "But where I live at Clapham, which is about a furlong from the bells and with the intervention of trees, so far from their being a nuisance to me, they are a positive gratification; and I confess I should be extremely sorry if they were done away with." I mention that only by way of illustrating that, in this case, to some persons who live within the sound of these bells they may be no nuisance at all; and, no doubt, are none; and, therefore, I very much doubt, indeed, my opinion is, that the nuisance complained of in this case could not be indicted as a public nuisance." 2 Sim. (N. S.) 142-144.

if an individual sustains a special and particular damage from an act, he may have the interference of the Court on a bill, although the act complained of be, in its nature, a public nuisance. Two other cases were cited: The Attorney-General v. Forbes, 2 Myl. & C. 123, and the Attorney-General v. Johnson, 2 Wills. C. C. 87. Those cases shew only that there may be both an information and bill; that is, that the Attorney-General may file an information to restrain the act complained of as a public nuisance, and that an individual who sustains a particular injury may join as plaintiff as well as relator, and have the remedy for himself also in the same suit. I am of opinion, therefore, that the first ground of demurrer is not tenable. * * *

WESSON v. WASHBURN IRON CO.

(Supreme Judicial Court of Massachusetts, 1866. 13 Allen, 95, 90 Am. Dec. 181.)

Tort. The first count of the declaration alleged that the plaintiff was owner of a freehold estate in a messuage and dwelling-house in Worcester, contiguous to the land and buildings of the defendants, and occupied as a dwelling-house for the plaintiff's tenants; and the defendants wrongfully kept and continued certain buildings, called and used for a rolling mill and foundry, next easterly from the land of the plaintiff, and occupied by the defendants for the manufacture of railroad iron, and other articles made from iron and steel, and kept and used large stationary steam engines, trip-hammers, rolling mills, and other machinery and furnaces for the melting of iron, etc., by night as well as by day, and made large quantities of railroad iron, and other articles made from iron and steel, and thereby, and by the action and motion of the said engines, mills and machinery, the ground and dwelling-house of the plaintiff were greatly shaken and jarred, so that the house was greatly shaken to pieces and rendered uncomfortable and unfit for habitation and of no value.

The second count contained similar allegations in regard to another messuage and dwelling-house, known as the Wesson Tavern House, with additional averments that the defendants consumed large quantities of coal, by means of which large quantities of coal-dust, smoke and ashes, noisome and offensive, rose and issued from the defendants' buildings and entered into and diffused themselves over and through the plaintiffs' premises, rendering the same uncomfortable and unfit for habitation, and depriving her of the gains which she otherwise would have made.

The answer denied all wrongful acts on the part of the defendants, and all injury to the plaintiff.

At the trial * * * the plaintiff requested the court to instruct the jury that if her dwelling-house was injured by jarring and shak-

ing, and rendered unfit for habitation by smoke, cinders, dust and gas from the defendants' works, it was no defence to the action that many other houses in the neighborhood were affected in a similar way. But the judge declined so to rule, and instructed the jury, in accordance with the request of the defendants, that the plaintiff could not maintain this action if it appeared that the damage which the plaintiff had sustained in her estate was common to all others in the vicinity; but it must appear that she had sustained some special damage, differing in kind and degree from that common to all others in the neighborhood.

The jury returned a verdict for the defendants, and the plaintiff alleged exceptions.

BIGELOW, C. J. * * * There can be no doubt of the truth of the general principle stated by the court, that a nuisance may exist which occasions an injury to an individual, for which an action cannot be maintained in his favor, unless he can show some special damage in his person or property, differing in kind and degree from that which is sustained by other persons who are subjected to inconvenience and injury from the same cause. The difficulty lies in the application of this principle. The true limit, as we understand it, within which its operation is allowed, is to be found in the nature of the nuisance which is the subject of complaint. If the right invaded or impaired is a common and public one, which every subject of the state may exercise and enjoy, such as the use of a highway, or canal, or public landing place, or a common watering place on a stream or pond of water, in all such cases a mere deprivation or obstruction of the use which excludes or hinders all persons alike from the enjoyment of the common right, and which does not cause any special or peculiar damage to any one, furnishes no valid cause of action in favor of an individual, although he may suffer inconvenience or delay greater in degree than others from the alleged obstruction or hinderance. The private injury, in this class of cases, is said to be merged in the common nuisance and injury to all citizens, and the right is to be vindicated and the wrong punished by a public prosecution, and not by a multiplicity of separate actions in favor of private individuals. Several instances of the application of this rule are to be found in our own reports. Stetson v. Faxon, 19 Pick. 147, 31 Am. Dec. 123; Thayer v. Boston, 19 Pick. 511, 514, 31 Am. Dec. 157; Quincy Canal v. Newcomb, 7 Metc. 276, 283, 39 Am. Dec. 778; Holman v. Townsend, 13 Metc. 297, 299; Smith v. Boston, 7 Cush. 254; Brainard v. Connecticut River Railroad, 7 Cush. 506; Blood v. Nashua & L. R. Corp., 2 Gray, 140, 61 Am. Dec. 444; Brightman v. Fairhaven, 7 Gray, 271; Harvard College v. Stearns, 15 Gray, 1; Willard v. Cambridge, 3 Allen, 574; Hartshorn v. South Reading, Id. 501; Fall River Iron Works Co. v. Old Colony & Fall River Railroad, 5 Allen, 224.

But it will be found that, in all these cases, and in others in which the same principle has been laid down, it has been applied to that class

of nuisances which have caused a hindrance or obstruction in the exercise of a right which is common to every person in the community, and that it has never been extended to cases where the alleged wrong is done to private property, or the health of individuals is injured, or their peace and comfort in their dwellings is impaired by the carrying on of offensive trades and occupations which create noisome smells or disturbing noises, or cause other annoyances and injuries to persons and property in the vicinity, however numerous or extensive may be the instances of discomfort, inconvenience and injury to persons and property thereby occasioned. Where a public right or privilege common to every person in the community is interrupted or interfered with, a nuisance is created by the very act of interruption or interference, which subjects the party through whose agency it is done to a public prosecution, although no actual injury or damage may be thereby caused to any one. If, for example, a public way is obstructed, the existence of the obstruction is a nuisance, and punishable as such, even if no inconvenience or delay to public travel actually takes place. It would not be necessary, in a prosecution for such a nuisance, to show that any one had been delayed or turned aside. The offence would be complete, although during the continuance of the obstruction no one had had occasion to pass over the way. The wrong consists in doing an act inconsistent with and in derogation of the public or common right. It is in cases of this character that the law does not permit private actions to be maintained on proof merely of a disturbance in the enjoyment of the common right, unless special damage is also shown, distinct not only in degree but in kind from that which is done to the whole public by the nuisance.

But there is another class of cases in which the essence of the wrong consists in an invasion of private right, and in which the public offence is committed, not merely by doing an act which causes injury, annoyance and discomfort to one or several persons who may come within the sphere of its operation or influence, but by doing it in such place and in such manner that the aggregation of private injuries becomes so great and extensive as to constitute a public annoyance and inconvenience, and a wrong against the community, which may be properly the subject of a public prosecution. But it has never been held, so far as we know, that in cases of this character the injury to private property, or to the health and comfort of individuals, becomes merged in the public wrong, so as to take away from the persons injured the right which they would otherwise have to maintain actions to recover damages which each may have sustained in his person or estate from the wrongful act.

Nor would such a doctrine be consistent with sound principle. Carried out practically, it would deprive persons of all redress for injury to property or health, or for personal annoyance and discomfort, in all cases where the nuisance was so general and extensive as to be a legitimate subject of a public prosecution; so that in effect a wrong-

doer would escape all liability to make indemnity for private injuries by carrying on an offensive trade or occupation in such place and manner as to cause injury and annoyance to a sufficient number of persons to create a common nuisance.

The real distinction would seem to be this: that when the wrongful act is of itself a disturbance or obstruction only to the exercise of a common and public right, the sole remedy is by public prosecution, unless special damage is caused to individuals. In such case the act of itself does no wrong to individuals distinct from that done to the whole community. But when the alleged nuisance would constitute a private wrong by injuring property or health, or creating personal inconvenience and annoyance, for which an action might be maintained in favor of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance. This we think is substantially the conclusion to be derived from a careful examination of the adjudged cases. The apparent conflict between them can be reconciled on the ground that an injury to private property, or to the health and comfort of an individual, is in its nature special and peculiar, and does not cause a damage which can properly be said to be common or public, however numerous may be the cases of similar damage arising from the same cause. Certainly multiplicity of actions affords no good reason for denying a person all remedy for actual loss and injury which he may sustain in his person or property by the unlawful acts of another, although it may be a valid ground for refusing redress to individuals for a mere invasion of a common and public right.

The rule of law is well settled and familiar, that every man is bound to use his own property in such manner as not to injure the property of another, or the reasonable and proper enjoyment of it; and that the carrying on of an offensive trade or business, which creates noisome smells and noxious vapors, or causes great and disturbing noises, or which otherwise renders the occupation of property in the vicinity inconvenient and uncomfortable, is a nuisance for which any person whose property is damaged or whose health is injured or whose reasonable enjoyment of his estate as a place of residence is impaired or destroyed thereby may well maintain an action to recover compensation for the injury. The limitations proper to be made in the application of this rule are accurately stated in Bamford v. Turnley, 3 Best & Smith, 66, and in Tipping v. St. Helen's Smelting Co., 6 Best & Smith, 608–616, s. c. 11 H. L. Cas. 642, and cases there cited. See, also, in addition to cases cited by the counsel for the plaintiff, Spencer v. London & Birmingham Railway, 8 Sim. 193; Soltau v. De Held, 9 Sim. (N. S.) 133.

The instructions given to the jury were stated in such form as to lead them to infer that this action could not be maintained, if it ap-

peared that other owners of property in the neighborhood suffered injury and damage similar to that which was sustained by the plaintiff in her estate by the acts of the defendants. This, as applied to the facts in proof, was an error, and renders it necessary that the case should be tried anew.

Exceptions sustained.[39]

[39] A portion of the statement of facts, and of the opinion, on a point of evidence, is omitted.

See King v. Morris & Essex Railroad (1867) 18 N. J. Eq. 397. The defendant had placed upon its road sixteen new coal-burning engines, which threw out burning coals. The increase of fires along the line had been so great, since the use of the coal-burning locomotives, that some insurance companies had refused to take risks along the road at the usual rates, and some had refused altogether. The complainant, a manufacturer, sought to enjoin the use of such locomotives. Said the Chancellor: "The case is a proper one for the interference of this court by injunction. The defendants must be restrained from running any coal engines on their road, if the consequences are necessarily such as are shown by the proof in this case. * * * Nor is it necessary that the injunction or relief in this case should be applied for in the name of the state, or the Attorney General. This is not a public nuisance, although it may injure a great many persons. The injury is to the individual property of each. The nuisance is public when it affects the rights enjoyed by citizens as part of the public; as the right of navigating a river, or traveling on a public highway; rights to which every citizen is entitled."

See also the remarks of Brett, J., in Benjamin v. Storr (1874) L. R. 9 C. P. 400, 406: "There are three things which the plaintiff must substantiate, beyond the existence of the mere public nuisance, before he can be entitled to recover. In the first place, he must shew a particular injury to himself beyond that which is suffered by the rest of the public. It is not enough for him to shew that he suffers the same inconvenience in the use of the highway as other people do, if the alleged nuisance be the obstruction of a highway. The case of Hubert v. Groves, 1 Esp. 148, seems to me to prove that proposition. There the plaintiff's business was injured by the obstruction of a highway, but no greater injury resulted to him therefrom than to any one else, and therefore it was held that the action would not lie. Winterbottom v. Lord Derby, Law Rep. 2 Ex. 316, was decided upon the same ground: the plaintiff failed because he was unable to shew that he had sustained any injury other and different from that which was common to all the rest of the public. Other cases shew that the injury to the individual must be direct, and not a mere consequential injury, as, where one is obstructed, but another (though possibly a less convenient one) is left open; in such a case the private and particular injury has been held not to be sufficiently direct to give a cause of action. Further, the injury must be shewn to be of a substantial character, not fleeting or evanescent. If these propositions be correct, in order to entitle a person to maintain an action for damage caused by that which is a public nuisance, the damage must be particular, direct, and substantial. The question then is, whether the plaintiff here has brought himself within the rule so laid down. The evidence on the part of the plaintiff shewed that from the too long standing of horses and wagons of the defendants in the highway opposite his house, the free passage of light and air to his premises was obstructed, and the plaintiff was in consequence obliged to burn gas nearly all day, and so to incur expense. I think that brings the case within all the requirements I have pointed out; it was a particular, a direct, and a substantial damage. As to the bad smell, that also was a particular injury to the plaintiff, and a direct and substantial one. So, if by reason of the access to his premises being obstructed for an unreasonable time and in an unreasonable manner, the plaintiff's customers were prevented from coming to his coffee-shop, and he suffered a material

COOK v. MAYOR AND CORPORATION OF BATH.

(Equity Cases before the Vice-Chancellors, 1868. L. R. 6 Eq. 177.)

This was a motion for an injunction to restrain the defendants from building in such a way as to obstruct a lane called Cross Back Lane, and later, White Hart Lane, in the city of Bath.

The plaintiff was the owner in fee of a messuage, No. 14, Bath Street, which was bounded at the back by Cross Back Lane, leading into Stall Street, and it appeared that from 1793, when this house was erected, there had been a back-door leading into Cross Back Lane, through which the plaintiff had access through Cross Back Lane to Stall Street. About forty years ago the then occupier of the house closed and bricked up this back-door, leaving the jambs in the wall, and keeping the old door in his cellar, but in the spring of 1864 the present plaintiff re-opened the door, and restored it as much as possible to its former position.

In 1867 the defendants, having purchased the house at the corner of the lane and Stall Street, were proceeding to erect buildings in such a way as, it was admitted, would permanently block up all access from White Hart Lane into Stall Street, and thereupon the plaintiff filed his bill for an injunction to restrain them from so doing. * * *

SIR R. MALINS, V. C. * * * Thus far I have dealt with the case on the assumption of the lane being subject to a private right of way; but, in truth, the evidence goes far to shew that White Hart Lane was a public way. On this view the defendants have contended that the Attorney-General must sue. But the cases cited are conclusive as to the plaintiff's remedy. In Spencer v. London and Birmingham Railway Company, 8 Sim. 193, s. c. 1 Railw. Cas. 159, a very similar case to the present, Vice-Chancellor Shadwell laid down the rule to be, that where there was a public nuisance by obstructing a highway which caused a particular private injury, a bill would lie for

diminution of trade, that might be a particular, a direct, and a substantial damage."

Compare Baltzeger v. Carolina Midland Ry. Co. (1899) 54 S. C. 242, 32 S. E. 358, 71 Am. St. Rep. 789: A railway company had created a public nuisance by obstructing the flow of surface water and causing its accumulation. This nuisance rendered the plaintiff's dwelling unhealthy and dangerous to live in, and caused sickness and suffering in his family. A demurrer to the complaint showing these facts was sustained by the trial court. "The injury," said the Supreme Court, "must be particular—as some of the cases express it, special or peculiar; must result directly from the obstruction, and not as a secondary consequence thereof; and must differ in kind, and not merely in extent or degree, from that which the general public sustains. The plaintiff relies upon the allegations contained in the fourth paragraph of his complaint to show that his injury was special or peculiar. One of the requirements of the rule is that the damages must differ in kind as well as degree from those which, it may reasonably be expected, will be sustained by the public generally. The allegations of the complaint show that the causes which led to the plaintiff's injury might reasonably be expected to affect others in the neighborhood, and therefore his injury was not special."

the private injury, and granted an injunction; and on the appeal Lord Cottenham did not dissent from this view.

In this case I am of opinion that there has been a wholly unjustifiable stopping up of a public or private way, it matters not which; if it is a public way the Attorney-General might have sued in respect of the public nuisance, and the plaintiff may also sue in respect of his individual injury; and therefore, on any view of the evidence, the plaintiff is entitled to an injunction. * * * [40]

(b) Nuisance Distinguished from Other Torts

WESHBOURN AND MORDANT'S CASE.

(Court of King's Bench, 1589. 2 Leon. 103, 74 Reprint, 394.)

In an action upon the case, the plaintiff declared, that whereas he was possessed of a parcel of land called the Parsonage, lying adjoyning to a certain river, from the 29 of May, 29 Eliz. untill the day of the bringing of this writ, the defendant had the said twentieth day of May stopt the said river with certain loads of earth, and so it continued untill the fourteenth day of February, by which his land was drowned, and so he had lost the profit of it by that time.

And it was moved in arrest of judgment, that upon the declaration there doth not appear any cause of action, for the plaintiff hath made title to the land drowned from the twentieth of May, so as that day is excluded, and the nusance is said to be made the twentieth day, and so it appeareth the nusance was before the possession of the plaintiff; and if it were so, then cannot he complain of any wrong done before his time: to which it was answered, that although the stopping was made before his possession, yet the continuance of the same is after, and a new wrong, for which an action lieth: as 5 H. 7, 4. It was presented, that an abbat had not cleansed his ditch, &c. by reason of which the highway is stopt: the successor shall be put to answer the said indictment, by reason of the continuance of it: and see, that continuation of a nusance is as it were a new nusance, 14 and 15 Eliz. 320. And it may be that the plaintiff was not dammified untill long time after the twentieth day of May (scil.) after the stopping: and the words of the writ here are satisfied and true: and afterwards judgment was given for the plaintiff.[41]

[40] Part of the statement of facts and part of the opinion are omitted.

[41] Compare the Case of the Farmers of Hampstead-Water (1701) 12 Mod. 519: Trespass for digging a hole in the plaintiff's soil, whereby his land was overflown, continuando transgressionem for nine months: "And it was insisted, that they might give evidence of a consequential damage after the nine months, as well as in a nusance which continues for nine months." But Holt, C. J., said "he was not satisfied that the parity would hold, for the git of the action in a nusance is the damage; and therefore as long as there are damages there is ground for an action; but trespass is one entire act, and the very tort is the git of the action."

CODMAN v. EVANS.

(Supreme Judicial Court of Massachusetts, 1863. 7 Allen, 431.)

Tort. The declaration was as follows:

"And the plaintiffs say that whereas they before and at the time of the committing of the grievance hereinafter mentioned, were and from thence hitherto have been and still are lawfully possessed of a certain close, abutting on Tremont Street, so called, in said Boston, situate between the messuages now numbered 175 and 176 on said street, and bounded westerly by said street; northerly by land of the defendant, to him conveyed by one Rice; easterly by a passage way running northerly, and leading to Mason Street, so called; and southerly by the northerly wall of the said messuage now numbered 176, on said Tremont Street, yet the said defendant, well knowing the premises, wrongfully and injuriously kept and continued, from and upon the southerly wall of his messuage numbered 175 as aforesaid, a certain building projecting and overhanging the plaintiff's said close, and before then wrongfully erected and built, projecting as aforesaid, for a long space of time, to wit, from the first of May last past hitherto."

After it had been determined that the plaintiffs should prevail in this action, 5 Allen, 308, 81 Am. Dec. 748, they moved in the superior court for judgment that the building mentioned in the declaration be abated and removed, in so far as it overhangs their land described therein, and that a warrant be issued to the proper officer requiring him to abate and remove the same at the expense of the defendant, in like manner as public and common nuisances are removed; and it was thereupon considered and adjudged by the court that the building or bay-windows, overhanging the plaintiff's close, be abated and removed.[42] The defendant appealed.

Bigelow, C. J. The only question open on this appeal is, whether there is anything on the record from which it appears that the judgment for an abatement of the nuisance rendered by the court below is erroneous in law. * * *

On reference to the declaration in the present case, it is clear that it may properly be regarded as in the nature of an action on the case for consequential injuries to the plaintiff's estate. It has not the peculiar characteristics of an action of trespass to real property, either at common law or under the forms appended to the practice act. Gen. St. c. 129. There is no allegation that the wrong or injury was com-

[42] Part of the opinion is omitted.

Compare Pollock's remark, Indian Civil Wrongs Bill, § 55, note (g): "It will not escape observation that to some extent the definition of nuisance overlaps that of trespass (e. g. the overhanging eaves in Illustration 2 seem to constitute a continuing trespass). This is so in England and all common-law jurisdictions, and it does not produce any difficulty or inconvenience that I know of." Illustration 2 is as follows: "If Z. has a house whose eaves overhang A.'s land, or if the branches of a tree growing on Z.'s land project over A.'s land, this is a nuisance to A., inasmuch as it interferes with his powers of control and enjoyment on his own property, and also tends to discharge rain-water on A.'s land."

mitted "with force and arms" or "forcibly." 1 Chit. Pl. (6th Amer. Ed.) 144. It may be that an action of trespass might have been brought for the erection and continuance of the structure described in the declaration, and that, on proof of the plaintiffs' title, and of the facts and circumstances connected with the alleged wrongful act of the defendant, such action would be the only appropriate and proper remedy. But that is not the question before us on this record. We are not called on to decide a question of variance between allegations and proofs, but only to determine the nature of the action in which the judgment appealed from was rendered. It seems to us that on this point there can be no doubt. According to the strictness of the ancient forms of pleading, the declaration in this action would have been a good count in an action on the case. This clearly appears by reference to Baten's Case, 9 Co. 53b, in which it will be found that the declaration, mutatis mutandis, is almost identical with that in the case at bar. The same is true of the declaration in the recent case of Fay v. Prentice, 1 C. B. 828. It is true that in this last case there was an allegation of special damage in its nature consequential, but it was expressly held that the action might be maintained for other damage which was not alleged. And in Baten's Case, ubi supra, it was adjudged that the plaintiff need not assign in a count in case for a nuisance any special nuisance. It is sufficient if it appears from the declaration that the nature of the structure is such that consequential damage would be occasioned by the flow or dropping of water therefrom, and that other similar injuries might ensue to the plaintiffs' property.

The error of the defendant consists in supposing that we can travel out of the record, and that, by reference to the proceedings in the former action between these parties, and to the questions heretofore determined in this suit, we can judicially ascertain that this action can be supported by the plaintiffs only as an action of trespass.[43] But this we cannot do. The objection that the facts did not support the

[43] On the distinction between trespass and nuisance see also 21 Halsbury's Laws of England, 506, note "k": "The following acts have been held to be trespass: The actual pouring of water on to a neighbor's land (Preston v. Mercer [1656] Hard. 60, as explained in Reynolds v. Clarke, supra); injuring a person on the highway by throwing logs at him (Reynolds v. Clarke, supra). On the other hand the following acts were held or considered to be nuisance and not trespass: Overburdening a floor, whereby it fell and did damage to the goods of another in his cellar beneath (Edwards v. Halinder [1594] Poph. 46); diverting the water of a river by digging trenches in the defendant's own ground (Levridge v. Hoskins [1709] 11 Mod. Rep. 257); fixing a spout to defendant's house whereby water was poured on to the plaintiff's land (Reynolds v. Clarke [1725] 1 Stra. 634); so working a mine as to cause water to flow through other mines into those of the plaintiff (Haward v. Bankes [1760] 2 Burr. 1113); logs left by one party to lie in the highway to the personal injury of another (Reynolds v. Clarke, supra, per Fortescue, J., at p. 635)."

And see Frazier v. Pennypack Trap Rock Co. (1901) 17 Montg. Co. (Pa.) 105, where the throwing of rocks upon adjoining premises by the discharge of a blast, being an actual physical invasion, was declared to be a trespass, while concussions, produced at the same time, were declared to be a nuisance.

declaration should have been taken at an earlier stage of the case. It is now too late to raise it. It is sufficient to warrant the judgment for abatement, that the declaration is in form an action of tort for a nuisance.

Judgment affirmed.

WILLIAMS v. POMEROY COAL CO.

(Supreme Court of Ohio, 1882. 37 Ohio St. 583.)

Prior to January 30, 1868, one Nahum Ward owned in fee lot 1223, on the Ohio river, in Meigs county, and at the same time one Philip Hondesheldt was the owner in fee of lot 1222, and V. B. Horton was the owner in fee of lot 301, and the latter had a lease from Hondesheldt granting the right to mine all the coal under the south half of lot 1222. On August 10, 1858, Mr. Horton conveyed to the Pomeroy Coal Company, by his lease of that date duly executed, his right to mine and take away the coal under said two tracts of land. By the terms of said lease the Pomeroy Coal Company bound itself to "quit and surrender the premises" at the end of ten years, to wit, by August 10, 1868. The defendant entered upon the premises, and as early as 1862 had mined all the available coal thereon, and did, in that year, abandon the said lease, with the consent of said Horton, and turned over to him the abandoned mines on said premises. The defendants, while excavating the coal on lot 1222, mined over on the adjoining lot 1223, from thirty-six to thirty-nine feet. In 1864 the plaintiff bought lot 1223 of said Nahum Ward, and began operating the mines thereon. In June, 1868, the workmen engaged in said plaintiff's mine tapped the water which had accumulated in the abandoned mine, and it flooded the mine of plaintiff. The working over on lot 1223 was done as early as 1861, but was not known to the plaintiff until the water flowed into his mine as above stated.

A judgment in the common pleas, on a verdict for the defendant, was affirmed, on error, by the district court. A petition in error is prosecuted to reverse these judgments.

WHITE, J. The decision of this case depends upon what constituted the cause of action against the defendant, and when it accrued. The claim of the plaintiff is that the cause of action consists of a private nuisance caused by the excavation made by the defendant on lot 1223 when removing the coal under his lease from the south half of lot 1222, and that the cause of action is a continuing one and first accrued when the water from the abandoned mine flowed over into the mine of the plaintiff. On the other hand, the claim of the defendant is that the cause of action consisted of the trespass committed in making the excavation, and was completed when the work was done and the mine abandoned. In the first place, it may be observed that this

is not a case where the defendant has wrongfully entered upon the lands of the plaintiff and erected and maintained structures thereon. Nor is it a case where structures have been erected and maintained on the lands of the defendant or of another, to the nuisance or injury of the plaintiff's premises. In these cases the wrong may, by the lapse of time, ripen into a right under the statute of limitations or by prescription. In speaking to this point in Clegg v. Dearden, 12 Ad. & Ellis (N. S.) 601, Lord Denman uses the following language: "The gist of the action, as stated in the declaration, is the keeping open and unfilled up an aperture and excavation made by the defendant into the plaintiff's mine. By the custom, the defendant was entitled to excavate up to the boundary of his mine, without leaving any barrier, and the cause of action, therefore, is the not filling up the excavation made by him on the plaintiff's side of the boundary and within their mine. It is not, as in the case of Holmes v. Wilson, 10 A. & E. 503, a continuing of something wrongfully placed by the defendant upon the premises of the plaintiff; nor is it a continuing of something placed upon the land of a third person to the nuisance of the plaintiff, as in the case of Thompson v. Gibson, 7 Mees. & W. 456. There is a legal obligation to discontinue a trespass or remove a nuisance; but no such obligation upon a trespasser to replace what he has pulled down or destroyed upon the land of another, though he is liable in an action of trespass to compensate in damage for the loss sustained. The defendant, having made an excavation and aperture in the plaintiff's land, was liable to an action of trespass; but no cause of action arises from his omitting to reenter the plaintiff's land and fill up the excavation. Such an omission is neither a continuation of a trespass, nor a nuisance; nor is it a breach of any legal duty."

The defendant in the present case had no estate or interest in lot 1222 further than the right to mine the coal therefrom. This he accomplished in 1862, and surrendered the premises. He had no authority from the owner of the fee, nor from Horton, his immediate lessor, to mine over into lot 1223; and at the time of the flowage of water from the abandoned mine into the mine of the plaintiff, he had for more than five years ceased to have any interest in lot 1222 or any right of entry thereon.

If the claim of the defendant as to what constituted the cause of action is correct, the action clearly cannot be maintained. 1. For the reason that at the time of the commission of the trespass, the plaintiff was not the owner of the land upon which the trespass was committed; and, 2, if he had been such owner, the action would be barred by the statute of limitations.

There is no distinction in the application of the statute of limitations between trespasses under ground and upon the surface; nor whether the cause of action is known or unknown to the plaintiff within the time limited by the statute. Hawk v. Minnich, 19 Ohio St. 466, 2 Am. Rep. 413; Hunter v. Gibbons, 1 Hurl. & Nor. 459.

The question therefore is, whether the defendant, in addition to the liability for the trespass, is also liable for creating and continuing a nuisance. If he is so liable a recovery for the trespass would be no bar to subsequent actions for continuing the nuisance.

In Stephen's Commentaries (vol. 3, 499), a private nuisance is defined to be "anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another, and not amounting to a trespass."

Here the only thing done by the defendant was the making of the excavation upon the plaintiff's land, which did amount to a trespass.

Plaintiff's counsel claim that the action is brought to recover consequential damages resulting from the wrongful acts of the defendant. Be it so. But with what wrongful acts is the defendant chargeable except those constituting the trespass? We see none. And a recovery for the trespass or the bar of an action brought for it, is a bar to a recovery for the consequences resulting from such trespass. True, this is not the ground upon which the jury were charged, but the error in the charge was in favor of the plaintiff, and is no ground for reversal.[44]

Judgment affirmed.

HAYES v. BROOKLYN HEIGHTS R. CO.

(Court of Appeals of New York, 1910. 200 N. Y. 183, 93 N. E. 469.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the second judicial department, which affirmed an interlocutory judgment of Special Term sustaining a demurrer to a separate defense set forth in the answer. The following questions were certified:

"1. Does the complaint herein state a cause of action for the maintenance of a nuisance?

"2. Does the complaint herein state a cause of action for negligence?

"3. Should the demurrer to that part of the defendant's answer setting up the three years' Statute of Limitations be sustained?"

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[44] Accord: National Copper Co. v. Minnesota Min. Co. (1885) 57 Mich. 83, 96, 23 N. W. 781, 787 (58 Am. Rep. 333): "Neither party was under obligation to keep its mine pumped out for the benefit of its neighbor. Either was at liberty to discontinue its operations and abandon its mine whenever its interest should seem to require it. And had the plaintiff brought an action within two years from the time of trespass, its recovery would necessarily have been had with this undoubted right of abandonment in view. But a jury could not have awarded damages for any exercise of a right, and they could not, therefore, have given damages for a possible injury to flow from such an abandonment. This is on the plain principle that the mere exercise of a right cannot be a legal wrong to another, and if damage shall happen, it is damnum absque injuria." Per Cooley, C. J.

Compare Lemmon v. Webb (1894) 3 Ch. 1: For more than twenty years the branches of a number of large old oaks and elms on D.'s land have overhung P.'s boundary. Smith v. Giddy (1904) 2 K. B. 448: P. claims damages because certain elm and ash trees on D.'s land overhang P.'s premises and interfere with the growth of his fruit trees.

HAIGHT, J. This action was brought by the plaintiff to recover damages for a personal injury alleged to have occurred on the 12th day of March, 1902, on Second avenue, in the borough of Brooklyn, by reason of his stepping into a hole or rut while crossing the avenue. The complaint alleges that the defendant was operating a street surface railroad upon the avenue in question and that it was its duty to keep in repair that portion thereof between the rails of its tracks and two feet in width outside of its tracks and that for a long time prior thereto the defendant suffered that portion of Second avenue to become and continue out of repair and a rut or hole to be formed therein and to become rough and uneven; and further that the suffering and loss of earning power and income of the plaintiff by reason of his injury "were due solely to the wrongful and unlawful conduct of the defendant, its agents and servants, in suffering said hole or rut to be and remain in the street near its tracks." The separate defense interposed by the defendant to which the plaintiff demurred is "that the cause of action upon which a recovery is herein sought did not accrue within three years next before the commencement thereof." The Special Term sustained the demurrer and from the interlocutory judgment entered thereon an appeal was taken to the Appellate Division, which affirmed the same by a divided court. This action was commenced on the 11th day of March, 1908.

The question presented is as to whether the action is based upon a nuisance or negligence. It will be observed that the complaint fails to allege that there existed a nuisance or that the defendant was negligent. Under the statute of limitations it is provided that an action to recover damages for a personal injury, "except in a case where a different period is expressly prescribed in this chapter," shall be brought within six years; and it is further provided that an action to recover damages for a personal injury resulting from negligence shall be brought within three years. Code Civ. Proc. §§ 382, 383. If, therefore, the action alleged in the complaint resulted from negligence, the separate defense set forth in the answer was good, and the demurrer should not have been sustained. If, however, it did not result from negligence, then the demurrer was properly sustained.

A public nuisance, in so far as it applies to the case under consideration, consists in unlawfully doing an act or omitting to perform a duty, which act or omission endangers the safety of any considerable number of persons, or unlawfully interferes with, or tends to render dangerous, a public park, square, street, or highway. Under the railroad law the duty is imposed upon street surface railroads of keeping the space between their tracks and two feet on either side thereof in good and safe condition. Consol. Laws, c. 49, § 178. The duty, therefore, of municipalities of keeping their streets and highways in good and safe condition, is, to the extent specified by the statute, also devolved upon the railroad corporations, whose duty with reference thereto becomes the same as that which rests upon the municipality.

It will be observed that, under section 382, above referred to, the six-year statute of limitations has no application in a case where a different period is expressly prescribed, and under section 383 a different period is prescribed where the injury results from negligence. The question, therefore, arises as to whether the alleged injury in this case was the result of negligence on the part of the defendant. If a municipality or a railroad company should dig a pit or place a dangerous obstruction in or upon a public street, which it was obligated to keep in repair, it would be the creation of a public nuisance, and unquestionably the party creating the nuisance would be liable to a person suffering injuries by reason thereof. So, also, an individual maintaining a coal hole in the sidewalk in front of his premises with an insufficient cover, or who constructs a water pipe which receives the water collected from the roof of his building, and discharges it on the surface of the sidewalk, from which ice forms as the water flows across it to the gutter, becomes liable therefor as the creator of the nuisance irrespective of any question of negligence. Clifford v. Dam, 81 N. Y. 52; Tremblay v. Harmony Mills, 171 N. Y. 598, 64 N. E. 501.

But where the obstruction to a public street has resulted from other causes, or from the acts of others than that of the municipality, a different rule obtains with reference to its liability. In such cases the municipality is not the creator of the nuisance; but it becomes its duty to abate and remove the same, to the end that the public may pass safely over the public street. It is not called upon to abate and remove until it has notice of the existence of the obstruction, or such time has elapsed after the existence of the obstruction as will raise a presumption that the municipality or its officers had notice, or in the exercise of due diligence should have had such notice. In such cases the failure to abate or remove the obstacle involves a question of negligence; for, if it proceeds with reasonable diligence to remove the same, no recovery can be had against the municipality. But if it unreasonably suffers the nuisance to exist, it does so by reason of its negligence, and such becomes the basis of its liability.*

*Accord: McCluskey v. Wile (1911) 144 App. Div. 470, 129 N. Y. Supp. 455: The complaint alleged that the defendant, the owner of an apartment house in which the plaintiff resided, "unlawfully, negligently, and carelessly permitted a certain dog, the property of one of the tenants in said premises, to lie and remain about the hallways, lobbies, and staircases of said premises, so as to be dangerous to the life and limb of persons traversing the said hallways, lobbies, and staircases, and to become a nuisance, as the defendant well knew," that the defendant omitted to light the hallway, and that the plaintiff, without fault on her part, tripped on the said dog, which she could not see because of the defendant's failure to light the stairway, and was thereby injured. If the cause asserted is for negligence, it is barred by the statute; if it is for nuisance it is not barred. "The plaintiff undertakes to distinguish the case from Hayes v. Brooklyn Heights R. Co., 200 N. Y. 183, 93 N. E. 469, by the distinction between the words 'suffer' and 'permit.'"

And see McNulty v. Ludwig & Co. (1912) 153 App. Div. 206, 138 N. Y. Supp. 84; Bailey v. Kelly (1915) 93 Kan. 723, 145 Pac. 556.

Accordingly, in the case of Dickinson v. Mayor, etc., of N. Y., 92 N. Y. 584, where ice or snow had been suffered to remain upon a crosswalk of a street, and that by reason thereof the plaintiff sustained injuries for which he sought damages, it was held that the action was one for negligence, and not for a positive wrong committed by the defendant, and, therefore, the three-year statute of limitations ran against it.

We do not understand the case of Robinson v. Chamberlain, 34 N. Y. 389, 90 Am. Dec. 713, to be in conflict with our views as above expressed. True, it was held that 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 in an action by a person who has sustained special damages by reason thereof; but that action was for negligence. It was prosecuted by the plaintiff against Chamberlain, a contractor who had undertaken to keep the state canal in repair. An injury was sustained by the plaintiff's canal boat in consequence of the defendant's neglect to perform his duties, and he was held liable for the injury by reason of his careless and negligent omission to perform his duties.

Our attention has been called to numerous other decisions bearing upon the question but we do not deem it necessary to specifically refer to them. We do not understand them to be in conflict with the distinction which we have made with reference to the two classes of cases discussed. We have referred to the liability of municipal corporations for the reason that such cases are more numerous and have been more generally under consideration in this court. In view of the fact, however, that the liability of a railroad company is the same as that of the municipality they become our guide in determining the questions involved in this case.

We entertain the view that the complaint alleges a cause of action based upon negligence, and consequently the demurrer to the separate defense set forth in the answer should be overruled. It follows that the interlocutory judgment of the Appellate Division and Special Term should be reversed and judgment ordered for defendant on demurrer, with costs in all courts, with leave to plaintiff to withdraw demurrer within twenty days on payment of such costs, and the second question certified answered in the affirmative, and the third question certified answered in the negative; the first question not answered. Judgment accordingly.

HALL et ux. v. GALLOWAY et al.

(Supreme Court of Washington, 1913. 76 Wash. 42, 135 Pac. 478.)

This was an action for damages, brought by Hall and his wife. The complaint set forth the following facts:

That the plaintiffs were husband and wife; that at the times mentioned in the complaint they were the owners and proprietors of a certain hotel which, at all the times mentioned, was a public house for the entertainment of travelers; that the plaintiffs were compelled to receive all travelers who properly apply for admission so long as there was room for them; that the plaintiffs conducted their house in an orderly manner and that they and their hotel bore a good reputation in the community; that about 9 o'clock p. m. on July 13, 1911, defendant Bannerman entered the hotel, placed upon the register the names of J. E. Henderson and wife and George H. Holmes and wife and asked for rooms, which were furnished to them; that the defendants and two females, unknown to the plaintiffs, entered the rooms, remained there for about two hours until expelled by the plaintiffs; that the defendants falsely represented themselves to be husbands of the females in question for the purpose of gaining admittance to the hotel and were unknown to the plaintiffs; that, soon after gaining admission to the hotel, the defendants and their consorts indulged in such lewd and disorderly conduct that the plaintiffs forcibly ejected them, the other guests being disturbed thereby; that by reason of this episode many guests of the hotel were led to believe it a place of ill repute; and that the plaintiffs were brought into public scorn and disgrace, whereby the patronage of their hotel was decreased, and as a consequence plaintiffs and each of them claimed to have been damaged in the sum of $5,000.

On motion the trial court ordered the plaintiffs to state as separate causes of action the alleged injury to Mr. Hall and the alleged injury to Mrs. Hall. The court also ordered, on a motion to make specific, that the plaintiffs set out the names of the guests and the names of others who were led to believe that the house was of ill repute, and also the amount of damages actually sustained by reason thereof. The court based this order on the ground that the alleged misconduct was not actionable per se, and that in order to be actionable it must result in actual loss to the plaintiffs, and that the rule in slander cases denying damages for repetitions of slander apply here, and that the guests at that time must be the ones who withdraw their patronage to the extent of causing loss, and that their names must be set forth. Attempting compliance with these orders, the plaintiffs filed their amended complaint, which was ordered stricken out for the reason that it did not set forth the names of the guests and others whose patronage was lost by reason of the alleged actions of the defendants. Thereupon the plaintiffs filed a second amended complaint to which a demurrer was sustained on the ground that it did not state facts sufficient to constitute a cause of action and that several causes of action were improperly united. The plaintiffs appeal from a judgment of dismissal.[45]

ELLIS, J. * * * The trial court, in sustaining the demurrer, held, in effect, that the law making certain words actionable per se is

[45] The statement of the case is abridged, and part of the opinion is omitted.

an exception to the general principles of the law of torts, and that such an exception should not prevail where the action is founded on slanderous conduct rather than slanderous words.

The trial court, in granting the several motions above referred to and in sustaining the demurrer to the complaint in its final form, dropped into a fundamental error which seems to have colored his view of the case throughout. This error consisted in a confusion of the law as to acts illegal in their nature, constituting a private nuisance injurious to the property of the plaintiffs as a community, with the rules of law relating to words spoken of individuals constituting slander, which is essentially a wrong personal to the individual slandered. While it is true that the two things in their nature partake somewhat of the same character, they are different in that the ultimate ground of recovery in the one case is for an injury to the property right alone, while in the other damages allowed are for an injury to personal character and the injury to the sensibilities resulting from the slanderous words. The one is, of course, an injury to all persons interested in the property affected by the illegal acts. The other is an injury only to the person of whom the slanderous words are spoken. As we view the original complaint, it stated every fact necessary to the allegation of the perpetration by the defendants of a private nuisance actionable per se in favor of the person whose property was injuriously affected. The statute (Rem. & Bal. Code, § 943), in defining actionable nuisances, included whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of life and property, and declares the same the subject of an action for damages and also for other and further relief. Section 944 specifically declares that any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance may maintain the action. While the original complaint was inartificial in form, it stated every fact essential to a cause of action for a private nuisance so defined. * * *

Judgment reversed.

(B) Elements of a Prima Facie Cause in Nuisance

(a) The Facts to be Pleaded, in an Action for Damages [46]

"Nuisance" is a good word to beg a question with. It is so comprehensive a term, and its content is so heterogeneous, that it scarcely does more than state a legal conclusion that for one or another of

[46] Until a comparatively recent day, the standard declaration in trespass on the case in nuisance, like the standard declaration in trespass on the case in trover, beclouded the doctrine with immaterial matter. The following precedent, from 3 Chitty on Pleading, 433 (1816), is of this class:

"For that whereas the said A. B. on, etc., and long before was and con-

widely varying reasons the thing stigmatized as a nuisance violates the rights of others.

Ezra Ripley Thayer, "Public Wrong and Private Action," 27 Harv. Law Rev. 326 (1914).

LAFLIN & RAND POWDER CO. v. TEARNEY.

(Supreme Court of Illinois, 1890. 131 Ill. 322, 23 N. E. 390, 7 L. R. A. 262, 19 Am. St. Rep. 34.)

This was an action on the case, brought against the powder company, to recover for damage to buildings on the premises of the plaintiff, caused by the explosion of a powder magazine on the premises of the defendant. The declaration was not demurred to. Motions by the defendant for a verdict in its favor, for a new trial, and in arrest of judgment were all denied; and verdict and judgment were entered for the plaintiff. This judgment being affirmed in the Appellate Court, the defendant appeals.

MAGRUDER, J. * * * It is claimed by the appellant that the declaration does not set out a cause of action.

The first objection made to the declaration is that it does not charge the defendant with negligence. The objection is not well taken. The powder magazine kept by the defendant upon its premises was so situated with reference to the dwelling house of the plaintiff, that it was liable to inflict serious injury upon her person or her property in case of an explosion. It was a private nuisance, and, therefore, the defendant was liable whether the powder was carefully kept or not. As a

tinually from thence hitherto hath been, and still is, lawfully possessed of and in a certain messuage or dwelling-house, with the appurtenances, situate and being at the parish of ———, in the county of ———, and by reason thereof, during all the time aforesaid, was and still is lawfully entitled to the use and enjoyment of a certain coach-walk or avenue, and of a certain footwalk or avenue there near adjoining and leading to the said messuage or dwelling-house, and to the shade, shelter, protection, and ornament of divers trees, to wit, ——— elm trees and ——— lime trees, during all the time aforesaid, growing and being in the said walks or avenues; yet the said C. D. well knowing the premises, but contriving and wrongfully intending to hurt, injure, and prejudice the said A. B. in this behalf, and to obstruct him in the use and enjoyment of the said walks and avenues, and to deprive him of the shade, shelter, protection, and ornament of the said trees there, whilst the said A. B. was so possessed and entitled as aforesaid, to wit, on the same day and year aforesaid, and on divers other days and times between that day and the day of exhibiting the bill of the said A. B. at, etc., aforesaid, wrongfully and injuriously cut, lopped, and topped the said trees, to wit, ——— of the said elm trees, and ——— of the said lime trees. By means whereof the said A. B. hath been greatly obstructed and prejudiced in the use and enjoyment of the said walks and avenues, and hath been and is greatly deprived of the shade, shelter, protection, and ornament of the said trees so lopped, topped, and cut as aforesaid, to wit, at, etc., aforesaid."

By the middle of the last century, however, the following form was recognized as a sufficient count in trespass on the case in nuisance:

"That the plaintiff was possessed of a dwelling-house in which he dwelt, and the defendant wrongfully built a brick kiln near thereto, and caused noxious and unwholesome smells, whereby the plaintiff's dwelling-house became unfit to live in." See 2 Chitty on Pleading (16th Am. Ed.) 584.

general rule, the question of care or want of care is not involved in an action for injuries resulting from a nuisance. If actual injury result from the keeping of gunpowder, the person keeping it will be liable therefor, even though the explosion is not chargeable to his personal negligence. Wood's Law of Nuisance (1st Ed.) §§ 73, 115, 130, 142; Heeg v. Licht, 80 N. Y. 579, 36 Am. Rep. 654; Cheatham v. Shearon, 1 Swan (Tenn.) 213, 55 Am. Dec. 734; Stout v. McAdams, 2 Scam. (Ill.) 67, 33 Am. Dec. 441; Ottawa Gas Co. v. Thompson, 39 Ill. 600; Nevins v. City of Peoria, 41 Ill. 502, 89 Am. Dec. 392; Cooper v. Randall, 53 Ill. 24; Myers v. Malcolm, 6 Hill (N. Y.) 292, 41 Am. Dec. 744; Hay v. Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279; Phinizy v. Augusta, 47 Ga. 263; Burton v. McClellan, 2 Scam. (Ill.) 434; Wier's Appeal, 74 Pa. 230.

The second objection to the declaration is that it does not specifically aver the powder magazine to be a nuisance. It was not necessary to use the word "nuisance," if the facts alleged constituted a nuisance. The declaration avers, that it was the duty of the defendant to so use its premises as not to jeopardize the buildings of the plaintiff, and not to store upon its premises any dangerous substance whereby plaintiff's property might be destroyed in case of an explosion;

that the defendant did keep upon its premises a magazine of gunpowder, dynamite, etc., and stored therein a large amount of gunpowder, dynamite, etc., that the gunpowder, dynamite, etc., so kept upon said premises, exploded, and that, by means of such explosion, "the material of which such magazine was constructed was then and there driven with great force and violence upon and against the property of the plaintiff hereinbefore described," and that "the following property of the plaintiff was, by means of such explosion, struck by flying missiles, rocks, and stones, and was wrecked and torn by means of the concussion of the air, then and there caused by said explosion, and was totally destroyed and lost, and was of great value—to wit: One two-story frame dwelling," etc.

"A private nuisance is defined to be anything done to the hurt or annoyance of the lands, tenements or hereditaments of another. 3 Bl. Com. 216. Any unwarrantable, unreasonable or unlawful use by a person of his own property, real or personal, to the injury of another, comes within the definition stated, and renders the owner or possessor liable for all damages arising from such use." Heeg v. Licht, 80 N. Y. 579. The averments of the declaration bring the present case within the definition thus quoted. The fact that the magazine exploded shows that it was dangerous. The fact, that the explosion destroyed plaintiff's buildings, shows, that the keeping of gunpowder in the magazine, considered with reference to "the locality, the quantity and the surrounding circumstances," constituted a nuisance per se. Heeg v. Licht, supra; Wood's Law of Nuisance, § 142, supra. * * *

The judgment of the Appellate Court is affirmed.[47]

[47] The statement of facts is abridged and part of the opinion is omitted. See also Sullivan v. Waterman (1898) 20 R. I. 372, 375, 39 Atl. 243, 39 L. R. A. 773 (the declaration did not in terms allege that the acts complained of constituted a nuisance).

Niagara Oil Co. v. Ogle (1912) 177 Ind. 292, 294, 98 N. E. 60, 62, 42 L.

HOLMES v. CORTHELL.

(Supreme Judicial Court of Maine, 1888. 80 Me. 31, 12 Atl. 730.)

The action was for obstructing a public way by building a stone wall across it, whereby the plaintiff claimed to have suffered special damage.

HASKELL, J. * * * It is settled in this state that one who suffers special injury, no matter how inconsiderable, from a common nuisance, may recover damages in an action at law from the person creating it, (Rev. St. 1883, c. 17, § 12; Brown v. Watson, 47 Me. 161, 74 Am. Dec. 482; Dudley v. Kennedy, 63 Me. 465;) and from the person maintaining it after request to abate it, (Pillsbury v. Moore, 44 Me. 154, 69 Am. Dec. 91.) Three demurrers to the declaration have been filed, and two amendments of it have been allowed. To the sustaining of the last demurrer to the declaration, as finally amended, the plaintiff has taken exception. The declaration avers the existence of a public way, and the obstruction of it by the defendant in erecting a stone wall across it, whereby, on a given day and on divers other days and times, etc., the plaintiff in attempting to travel upon such way, was "hindered, obstructed, and prevented from passing" along it, and "incurred great danger and suffered great pain and inconvenience, in attempting to climb and pass over said wall," and thereby was injured in his comfort, property, and the enjoyment of his estate. The plaintiff avers that he was "hindered," etc., from passing along the way. Be it so. No averment shows any specific damage from this hindrance. It does not appear that upon any special occasion he was thereby compelled to make a longer detour to reach a particular place where he had need to go; nor that he lost any time or was put to any expense thereby. He may have incurred danger and suffered pain in trying to climb the wall, both of which may have resulted from his own careless or rash conduct, for which the defendant is not responsible. The plaintiff avers that certain of the work-people in his sardine factory "were hindered and prevented from going to and attending to their work, whereby he lost and was deprived of their services." Suppose this to

R. A. (N. S.) 714, Ann. Cas. 1914D, 67: "It is insisted that the complaint is defective because it contains no averment that the plaintiff was free from contributory negligence, and no averment of facts showing that plaintiff could not have protected his property by exercising ordinary care. This theory is untenable. This is not an action for damages for negligence, but for damages for the maintenance of a nuisance, and to enjoin or abate it. Sections 291–293, Burns 1908; sections 289–291, R. S. 1881. In cases of this character, the rules governing the sufficiency of complaints for negligence have no application." Per Morris, C. J.

Hall v. Galloway (1913) 76 Wash. 42, 50, 135 Pac. 478, 481: "This case being an action for damages for the perpetration of a private nuisance injurious to the plaintiff's property, the complaint was not demurrable because of its failure to allege the specific items of damage claimed as would have been the case had the action been by a private person for special damages sustained by reason of the perpetration of a public nuisance."

be true, where is the injury to the plaintiff? He does not aver the loss of their service to be at his cost, nor that their services, if rendered, would have been of any value to him. Upon this score the plaintiff does not appear to have suffered any damage.

Exceptions overruled.[48]

(b) Nature of the Plaintiff's Interest

WARREN v. WEBB.

(Court of Common Pleas, 1808. 1 Taunt. 379, 127 Reprint, 880.)

The plaintiff declared that he was possessed of a dwelling house in the parish of St. George the Martyr, in the county of Surrey, and that the defendant possessed a shop contiguous, and a wooden spout affixed thereon, for carrying off the rain water from the roof, which spout it belonged to the defendant to keep in such repair, that no injury should happen to the plaintiff's dwelling house; and alleged that the defendant suffered the spout to be out of repair, to wit, at Westminster, in the county of Middlesex aforesaid, whereby the rain water soaked through the spout, and penetrated and injured the plaintiff's wall, to wit, at Westminster, in the said county. The premises were proved to be in Surrey. At the trial of this cause at the Westminster sittings after last Easter term, before Mansfield, Ch. J., a verdict was found for the plaintiff, with liberty for the defendant to move to enter a nonsuit, upon the ground that this was a local action, and that the venue ought to have been laid in Surrey, where the nuisance was committed, whereas it was alleged to have happened in Middlesex. Accordingly, Cockell, Serjt., in Trinity term last, obtained a rule nisi to enter a nonsuit.

Mansfield, C. J. The objection taken in this case was that the plaintiff did not at the trial support his declaration. The defendant's counsel supposed that in the declaration the defendant's house was

[48] The statement of facts is abridged and part of the opinion is omitted. Accord: Stone v. Wakeman (1608) Noy, 120: "Yet for another cause by the Court the plaintiff shall not have judgment (on a motion in arrest of judgment); because he hath not shewn how he hath suffered any particular damage or loss by that stopper." The action was in case "for stopping of a way." Sohn v. Cambern (1885) 106 Ind. 302, 6 N. E. 813: "The utmost that can be said of the facts stated in the special finding is, that they show that the appellee's route to her market town is interfered with by the obstruction placed in the highway, and this is not sufficient to entitle her to maintain this action. * * * It is true that the special finding states in general terms that the appellee has suffered special injury, but this is a mere statement of a legal conclusion, and is not the statement of a fact. Special findings, like special verdicts, must state facts, and not simply conclusions of law." Per Elliott, J. Van Buskirk v. Bond (1908) 52 Or. 234, 96 Pac. 1103: Suit by private parties to enjoin an alleged public nuisance. The statement of the plaintiff's damage was merely "that they are peculiarly and particularly injured by reason of the attempted closing of said roads by the defendant."

alleged to be in Middlesex, and the evidence was that the house was in Surrey. On reading the declaration it at first appeared to me that the videlicet in the county of Middlesex, as applied to a house or anything else in Surrey, in its nature local, is nonsense, and a contradiction in terms. And upon consideration the true sense appears to be this: It is a description of the house, a local object, which it states to be in Middlesex, and consequently the objection must prevail. If this is not a description of the place where the defendant's house is situated there is no description of it, and if no place is alleged in the declaration, it must be intended that the house lies in the county in which the nuisance is alleged to be committed, which is Middlesex. Therefore quacunque via data the declaration is not supported.[49]

Rule absolute.

MALONE v. LASKEY.

(In the Court of Appeal. [1907] 2 K. B. 141.)

Sir GORELL BARNES, President.[50] In this case the plaintiff sues the defendants for damages for injuries sustained by her under circumstances which I will state sufficiently fully to indicate the point that we have to decide. The premises on which the accident happened be-

[49] Compare Fitz. Ab. Accion sur le Cas, pl. 24, where it is said by Markham: "Si home leve un fosse ou molin a travers de mon chymin, j'avera assise de nusans et nul auter brief."

For the nature of the Assize of Nuisance, as a real action, see 3 Bl. Com. 221, Jenks' Short Hist. Eng. Law, 94; 2 Pollock and Maitland, Hist. Eng. Law, 53: "To meet that troubling of possession which is caused by nuisances as distinguished from trespasses, that is, by things that are erected, made, or done, not on the soil possessed by the complainant but on neighbouring soil, there has all along been an 'assize of nuisance' which is a supplement for the novel disseisin. Law endeavours to protect the person who is seised of land, not merely in the possession of the land, but in the enjoyment of those rights against his neighbours which he would be entitled to were he seised under a good title." The scope of the assize was slightly extended by the Statute of Westminster II. "Indeed, the narrow scope of the assize is given as an illustration of the kind of evil the statute was meant to remedy." And so popular did the action in the case become that the older remedy of the assize, even where it was available, soon tended to disappear." 3 Holdsworth's Hist. Eng. Law, 8; Jenks' Shorter Hist. 94.

On the continuance of the local character of the cause for a private nuisance notwithstanding its development into a possible cause for damages merely, compare 40 Cyc. 20, 21, "Actions with a Local Source," and Watts v. Kinney (1843) 6 Hill (N. Y.) 82, 91. An analogous limitation appears in the doctrine as to the character of the cause to recover damages merely for a trespass to land. See 40 Cyc. 31, 72; but see Little v. Chicago, etc., R. Co. (1896) 65 Minn. 48, 53, 67 N. W. 846, 33 L. R. A. 423, 60 Am. St. Rep. 421.

On both principle and authority an action to abate a nuisance should remain local. Compare 40 Cyc. 73; Northern Indiana R. Co. v. Michigan Cent. R. Co. (1853) 15 How. (U. S.) 233, 244, 14 L. Ed. 674. And see Simmons v. Lillystone (1853) 8 Exch. 441.

[50] The reporter's statement of the case, the arguments of counsel, the concurring opinions of Fletcher Moulton and Kennedy, L. JJ., and so much of Sir Gorell Barnes' opinion as relates to the question of negligence, are omitted. As respects negligence in such a case, see infra.

long to the Birkbeck Building Society, and the defendants are the trustees for that society. A house which belonged to them was let by the defendants in 1899 to Witherby & Co., who in 1901 sub-let a portion to the Script Shorthand Company. Malone, the plaintiff's husband, was in that company's employ and occupied a part of the premises, apparently as part of the consideration for his services to his employers. There was a lavatory in the house, of which Malone and his family had the use and apparently the exclusive use; and in the lavatory there was flush cistern, which was fixed against the wall. About the end of 1904 the cistern was said to be in an unsafe condition, and a communication was made by the plaintiff or her husband to Witherby & Co. on the subject. On December 26 Witherby & Co. wrote to Priest, who was one of the staff employed by the defendants, saying that the cistern required to be replaced and was then in a dangerous condition. On January 6, 1905, the plaintiff wrote another letter of complaint to the representative of Witherby & Co., in which vibration was alluded to as a cause of the dangerous state of the cistern. The vibration to which that letter referred arose from the working of an electric light engine which was worked by the defendants on their premises close to this building, and its constant working is said to have affected the security of the cistern or tank. Some time in the same month the defendants, to whom the complaints had been handed on by Witherby & Co. sent two plumbers, who were the servants of the defendants and part of their permanent staff, to rectify the defect in the condition of the cistern. The plumbers placed an iron bracket under the cistern to support it, and were then apparently satisfied that they had left it secure. This unfortunately turned out not to be the fact. In May, 1905, while the plaintiff was in the lavatory, she was injured by the bracket falling on her and inflicting injuries, to recover damages for which she brought the present action. At the trial Darling, J., left certain questions to the jury, in answer to which they found that the bracket fell by reason of the working of the engine; that the working of the engine amounted to a nuisance; that the plaintiff's injuries were the consequence thereof; that the defendants put up the bracket in an improper and negligent manner, and left the apparatus in a dangerous condition, and that the plaintiff was injured in consequence; and they assessed the damages at £400. We are now asked to set aside the judgment for the plaintiff and enter judgment for the defendants, or to send the case back for a new trial, but the substantial point argued has been whether judgment should be entered for the defendants. There is one further fact which I ought perhaps to mention. The plaintiff said in cross-examination that she remembered that when the new bracket was put up she did not think it was safe, and that she wrote again about it. There is also some evidence given by the husband and daughter that the tank shook after the bracket was put up. No question, indeed, was put to the jury as to the knowledge of the plaintiff that the cistern was still unsafe, possibly

because the plaintiff had been considerably injured by the accident, and her evidence was therefore kept as short as possible. Therefore any discussion of the question whether the plaintiff knew the risk, and accepted the position of acting as though the cistern were safe, must be conducted independently of any finding of the jury on the point.

The two main questions argued before us were (1) whether the plaintiff had a cause of action arising from the nuisance alleged, which question involves the consideration of the first three questions left to the jury; and (2) whether there was a cause of action based on the negligence of the defendants in undertaking to do the work and doing it in such an improper manner that injury resulted to the plaintiff. As to the first question, I must confess to feeling some doubt whether there was any substantial evidence that the fall of the bracket was due to the alleged vibration, but that would only affect the question of whether there should be a new trial. I doubt whether the findings of the jury can be correct; the plaintiff contended that the use of oil in the engine had made a change, but the defendants reverted from January to May to the use of coal; and further, as the engine had been working for years, it is not likely to have done this damage in three months. The main question, however, on this part of the case is whether the plaintiff can maintain this action on the ground of vibration causing the damage complained of, and in my opinion the plaintiff has no cause of action upon that ground. Many cases were cited in the course of the argument in which it had been held that actions for nuisance could be maintained where a person's rights of property had been affected by the nuisance, but no authority was cited, nor in my opinion can any principle of law be formulated, to the effect that a person who has no interest in property, no right of occupation in the proper sense of the term, can maintain an action for a nuisance arising from the vibration caused by the working of an engine in an adjoining house. On that point, therefore, I think that the plaintiff fails, and that she has no cause of action in respect of the alleged nuisance. * * * [51]

Judgment for defendants.

HOSMER v. REPUBLIC IRON & STEEL CO.

(Supreme Court of Alabama, 1913. 179 Ala. 415, 60 South. 801, 43 L. R. A. [N. S.] 871.)

Action against the Steel Company. Judgment for defendant on demurrer, and plaintiff appeals.

The facts made by the complaint are that, for a long time previous to the grievances herein complained of, plaintiff occupied and resided

[51] Compare Hogle v. Franklin Mfg. Co. (1910) 199 N. Y. 388, 92 N. E. 794, 32 L. R. A. (N. S.) 1038, where the successful plaintiff resided with her husband in a house the lease of which from the owner was "in the husband's name as lessee."

with his family, including intestate, who was his son, upon land near Greeley, Ala., and that, after plaintiff's residence and occupation upon said land had commenced, the defendant dammed up certain water, and thereby created a pond near plaintiff's residence; that defendant was engaged in the development of iron and other minerals, and had caused said pond to remain there for a long time, and had placed in said pond various substances, which caused said pond to give off foul and unwholesome and noxious air, and caused said premises on which plaintiff resided to become unhealthy, causing plaintiff's boy to become sick, so that he died. The demurrers were that the cause of action did not survive to the personal representative, and that the damages claimed did not survive; that there was nothing to show that plaintiff's intestate was the owner of the land, or had any possessory or leasehold interest therein; that the damages claimed are purely consequential; and that no right of action was shown.

SAYRE, J. The effect of the complaint is to aver that the death of plaintiff's intestate, on account of which he sues, was caused by an issue of foul, unwholesome, and noxious air from a pond which defendant corporation constructed in the neighborhood of his residence, where intestate, his minor child, lived with him. We are not required to know how plaintiff will prove the causation alleged; but, accepting the allegation as true and provable on demurrer, there will be no question but that it shows damage peculiar to intestate, not merely in degree but in kind. The only factor of the case presented which it is conceived may possibly be effective in denial of the cause of action asserted is that plaintiff's intestate owned no legal interest or estate in the land upon which he lived. To sustain his contention that the complaint is defective in this respect, appellee quotes Blackstone's definition of nuisance as "anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another." We have made approving use of that definition in several cases. On this occasion it is necessary to note that the hurt or annoyance of the definition is not necessarily a physical injury to the lands, tenements, or hereditaments, but may be an injury to the owner or possessor thereof in respect of his dealing with, possessing, or enjoying them. Cooley on Torts (3d Ed.) 1174.

At the old common law, a declaration in a suit brought for the physical abatement of a nuisance by the writ of nuisance was required to allege a freehold estate in the premises affected, but that was because the action was a real action. One modern way of abating a nuisance is by an action on the case for damages merely, in which case the declaration need only show that the plaintiff was rightfully in possession of the premises affected. 14 Ency. Pl. & Pr. 1113. This remedy, however, is not permitted to those who suffer only in common with the public; for otherwise, in the language of Chief Justice Shaw in Quincy Canal v. Newcomb, 7 Metc. (Mass.) 276, 39 Am. Dec. 778, where he was speaking of a public nuisance which had not become a

private nuisance by reason of special damage to the plaintiff, that "would lead to such a multiplication of suits as to be itself an intolerable evil." But that is as far as the best considered cases have gone in the policy of repressing litigation on account of wrongs done and suffered through nuisances, and we apprehend it is as far as the courts ought to go or will. This court, in common with all others, has held that the fact that a nuisance may have deleteriously affected the property or personal well-being of others in the neighborhood does not alleviate any material and special injury done to the plaintiff, nor merge it in the public wrong for which the public may have a remedy in one way or another. Richards v. Daugherty, 133 Ala. 569, 31 South. 934. It is obvious that to maintain an action for an injury affecting the value of the freehold the plaintiff must have a legal estate. But if noxious vapors and the like cause sickness and death to one who has a lawful habitation in the neighborhood, no sufficient reason is to be found in the accepted definitions of nuisance, nor in that policy of the courts which would discourage vexatious litigation, nor in the inherent justice of the situation, as we see it, why the person injured, or his personal representative in case of death, should not have reparation in damages for any special injury he may have suffered, although he has no legal estate in the soil.[52] Certainly a child has the right to live under his father's roof—is a lawful occupant of his father's home—and in our opinion he should be accorded the same measure of protection against the construction of nuisances in the neighborhood which are so noxious and long-continued as to materially affect his physical well-being. Ft. Worth & Rio Grande Ry. v. Glenn,

[52] On the widening theory of Nuisance compare the following:

(I) "Private nuisance is the using or authorizing the use of one's property, or of anything under one's control, so as to injuriously affect an owner or occupier of property (a) by diminishing the value of that property; (b) by continuously interfering with his power of control or enjoyment of that property; (c) by causing material disturbance or annoyance to him in his use or occupation of that property." Pollock's Draft of a Civil Wrongs Bill, for the Government of India (1886) § 55.

(II) "A nuisance consists in unlawfully doing an act or omitting to perform a duty, which act or omission either: (1) Annoys, injures or endangers the comfort, repose, health or safety of others; or (2) offends decency; or (3) unlawfully interferes with, or obstructs or tends to obstruct or renders dangerous for passage any lake or navigable river, bay, stream, canal or basin, or any public park, square, street, or highway; or (4) in any way renders other persons insecure in life or in the use of property." Civ. Code N. D. (1877) § 2047; Rev. Codes (1905) § 6641; Comp. Laws Okl. (1909) § 4751; Rev. Codes S. D. (1903) § 2393.

(III) "Whatever is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action." Rev. St. Ind. (1852) vol. 2, pt. 2, § 628; Burns' Ann. St. (1914) § 291.

The same or a similar enactment, sometimes with further clauses, appears in Civ. Code Cal. (1906) § 3479; Rev. Codes Idaho (1909) § 3656; Code Iowa (1897) § 4302; Rev. Laws Minn. (1905) § 4446; Rev. Codes Mont. (1907) § 6162; Comp. Laws Utah (1907) § 3506; Pierce's Code Wash. (1905) § 1265.

97 Tex. 586, 80 S. W. 992, 65 L. R. A. 818, 104 Am. St. Rep. 894, 1 Ann. Cas. 270. In that case may be found a discussion of most of the cases upon which appellee relies, and, while they have had due consideration by us, we have not felt obliged by duty or expediency to repeat what was there said. We have stated our concurring conclusion, and, in a general way, the reasons upon which we proceed. This must suffice.

The court erred in sustaining the demurrer as for any ground assigned, and the judgment will be reversed.[53]

(c) THE DEFENDANT'S ACT

ROBERTS et al. v. HARRISON.

(Supreme Court of Georgia, 1897. 101 Ga. 773, 28 S. E. 995, 65 Am. St. Rep. 342.)

SIMMONS, C. J. A petition was filed by Roberts and five others, under section 4760 of the Civil Code, for the removal of a pond of water, which had collected upon the lands of W. O. Harrison. The jury returned a verdict finding the pond a nuisance, and the justices

[53] Accord: Ft. Worth & Rio Grande Ry. Co. v. Glenn (1909) 97 Tex. 586, 80 S. W. 992, 65 L. R. A. 818, 104 Am. St. Rep. 894, 1 Ann. Cas. 270: (D., a railway company, permitted an old well upon its right of way, near land owned and occupied by P.'s father and his family, to become a nuisance. P., an infant three years old, was made sick by noxious gases from this nuisance. P. at the time was on the premises as a member of his father's family, but had no property right in the land.)

But see Ellis v. Kansas City, etc., R. R. (1876) 63 Mo. 131, 21 Am. Rep. 436; Kavanagh v. Barber (1892) 131 N. Y. 211, 30 N. E. 235, 15 L. R. A. 689; Hughes v. City of Auburn (1899) 161 N. Y. 96, 55 N. E. 389, 46 L. R. A. 636. Compare "Nuisance," 29 Cyc. 1257, 1258, notes 44, 45; 21 Harv. Law Rev. 633.

Compare the remark of Powell, J., delivering the opinion in Towaliga Falls Power Co. v. Sims (1909) 6 Ga. App. 749, 65 S. E. 844: "At common law a nuisance was regarded only as in injury to some interest in land. Blackstone's definition of a private nuisance is 'anything done to the hurt or annoyance of the lands, tenements or hereditaments of another.' The definition adopted in our Code is broader: 'A nuisance is anything that worketh hurt, inconvenience, or damage to another.' Civ. Code 1895, § 3861. An examination of the authorities will show that the modern tendency of the American courts is to break away from so much of the common-law rule as confined redress on account of nuisances to the damage done to some interest in real property, and as gave remedy only to persons having interests in lands. An interesting case on the subject is that of Ft. Worth & Rio Grande Ry. Co. v. Glenn, 97 Tex. 586, 80 S. W. 992, 65 L. R. A. 818, 104 Am. St. Rep. 894 [1 Ann. Cas. 270]. It is hardly consistent with the modern idea of legal rights, wrongs, and remedies that a husband living in a house, the title to which is in his wife, should not have a cause of action against one who erects near by a nuisance which sickens him, and causes him other great losses—and yet some courts go to this extent. Under our Code we think the rule is not so rigid; but that one who has been specially endamaged by a nuisance can recover from the wrongdoer, though his damage consists in an injury to his purse or person, irrespective of whether he has had an interest in real estate damaged or not."

of the peace directed the sheriff or his deputy to enter upon the lands, "and abate the nuisance complained of by removing said pond in the most feasible manner." The defendant carried the case by certiorari to the superior court. There the certiorari was sustained, and the judgment of the justices set aside, on the ground that while, in a sense, the pond complained of is a nuisance, it is not such a legal nuisance as the justices of the peace have jurisdiction to abate. The area of the pond in question varied from time to time, and the water, partially receding, would leave exposed to the sun portions of the land which had been submerged. In the processes of evaporation, and by the decay of large masses of vegetable matter, noxious and deleterious gases were emitted, which were injurious to the public health, and to the health of persons residing in the community. The accumulation of the water was due solely to natural causes, and the defendant did not, by his own act or negligence, contribute to bring about the alleged nuisance. At one time the land had been drained by a ditch which emptied into a creek, but in consequence of the filling in and choking up of either the ditch or the creek, or both, the water accumulated, and formed the pond. The defendant had done nothing to interfere with the natural drainage, and the pond was formed by the overflow of the creek, due entirely to causes over which the defendant had no control.

The presence of the pond and the attendant evils were doubtless annoying, and even injurious, to persons residing in the neighborhood, but we think that they do not constitute a nuisance for which the defendant can be held answerable, or which he can be compelled, under section 4760 of the Civil Code, to abate. This court has held that a person is not guilty of an actionable nuisance unless the injurious consequences complained of are the natural and proximate results of his own acts or failure of duty. Brimberry v. Railway Co., 78 Ga. 641, 3 S. E. 274, and the cases there cited and discussed. This doctrine, we think, is the true one, and it is recognized as such by all of the authorities on this point which we have examined. In 1 Wood, Nuis. 116, we find the rule thus stated: "Where water collects in low, marshy places, and, by reason of becoming stagnant, emits gases that are destructive to the health, and lives even, of the community, this is not a nuisance in the legal sense; and the owner of the land is not bound to drain it, nor can he be subjected to action or indictment therefor. The reason is that, in order to create a legal nuisance, the act of man must have contributed to its existence. Ill results, however extensive or serious, that flow from natural causes, cannot become a nuisance, even though the person upon whose premises the cause exists could remove it with little trouble and expense. * * * Thus it will be seen that a nuisance cannot arise from the neglect of one to remove that which exists or arises from purely natural causes." See, also, Giles v. Walker, 24 Q. B. Div. 656; Mohr v. Gault, 10 Wis. 513, 78 Am. Dec. 687; Hartwell v. Armstrong, 19 Barb. (N. Y.) 166; State v. Rankin, 3 S. C. 438, 16 Am. Rep. 737; Peck v. Herrington,

109 Ill. 611, 50 Am. Rep. 627; Woodruff v. Fisher, 17 Barb. (N. Y.) 224. The facts of the present case place it within the principles announced in the cases above cited, and the judgment of the justices of the peace was erroneous. The certiorari of the defendant was properly sustained, and the judgment of the justices set aside. Judgment affirmed.[54]

MYERS v. MALCOLM et al.

(Supreme Court of New York, 1844. 6 Hill, 292, 41 Am. Dec. 744.)

Case. The action was brought to recover damages for an injury occasioned to the plaintiff by the explosion of a quantity of gunpowder belonging to the defendants. On the trial it appeared, among other things, that the defendants received about 600 pounds of powder in kegs, and placed it in the loft of a store in the village of Syracuse; that they were soon afterwards notified to remove it by the trustees of the village, and did so by depositing it in the upper story of a carpenter's shop; that the shop was built of wood, and was situated on the canal, within the limits of the corporation; that there was a lumber yard near the shop, and several wooden buildings, some of which were inhabited dwellings, and others were used as stables, etc.; and that the lower part of the shop was occupied during the day by a carpenter, but no fire was allowed in it, and it was locked up each night. It further appeared that the shop took fire on the night of August 20, 1841, about five days after the powder had been deposited in it, and that during the progress of the fire the powder exploded, killing several persons, and seriously wounding and injuring others, among whom was the plaintiff. * * *

NELSON, C. J. The charge of the circuit judge, as detailed in the bill of exceptions, is not very explicit, but we may fairly assume, I think, that the case was put to the jury on the question whether the conduct of the defendants, in regard to the manner of depositing the powder, was such as to render them guilty of a public nuisance; and if that point has been properly determined in favor of the plaintiff, then I apprehend his right to private damages must follow as a corollary. In this view, the question of negligence on the part of the de-

[54] Accord: Mohr v. Gault (1860) 10 Wis. 513, 78 Am. Dec. 687; Barring v. Commonwealth (1865) 2 Duv. (Ky.) 95. Compare Giles v. Walker (1890) 24 Q. B. 656: (The seeds of thistles growing naturally on D.'s land are blown by the wind upon the land of P.)

See also Adams v. Popham (1879) 76 N. Y. 410: (D. erected on his own premises a dam across a small stream, a short distance from P.'s house; the water of the pond made by this dam was stagnant, and became filled with unwholesome matter, which poisoned the atmosphere, rendered the use of P.'s premises dangerous to life and health, and depreciated its value. Held, a nuisance which D. might be restrained from continuing.) Richards v. Daugherty (1902) 133 Ala. 569, 31 South. 934: (Action to abate a nuisance caused by D.'s building a dam across a stream.)

fendants, except so far as it may be necessarily involved in the question of nuisance, has very little, if anything, to do with the case. But, on the other hand, if the defendants' conduct was not sufficient to render them chargeable with the offense mentioned, then the whole gist of the action lies in negligence, and the inquiry might arise whether this was so connected with the injury as to render the defendants liable. Perhaps evidence enough was given at the trial to have justified the judge in putting the case to the jury in either aspect; though the most satisfactory position for the plaintiff, I am inclined to think, and the one most difficult to be answered by the defendants, is the ground that the depositing and keeping of the powder in the exposed situation described by the witnesses, amounted to a public nuisance, and that any individual sustaining a special injury from the act, was entitled to his private damages.

It was not doubted in the case of People v. Sands, 1 Johns. 78, 3 Am. Dec. 296, that the act of carelessly keeping fifty barrels of gunpowder in a house in the village of Brooklyn was a nuisance at common law. The allegation in the indictment there was, that the defendants kept the barrels in a certain house near the dwelling houses of divers good citizens, and near a certain public street, without otherwise characterizing the manner of keeping the article; and upon the principle that nothing will be intended or inferred to support an indictment, the court said, for aught they could see, the house might have been one built and secured for the very purpose of keeping powder in such a way as not to expose the neighborhood. Spencer, J., dissented, holding that enough appeared to make the question one for the jury to settle, who could inquire into the various circumstances of place, quantity, exposed situation of the neighborhood, etc. In a case before Lord Holt, Anonymous, 12 Mod. 342, the defendant was indicted and convicted for keeping several barrels of gunpowder in a house in Brentford Town, sometimes two days and sometimes a week, till he could conveniently send them to London. And it was there resolved, "that though gunpowder be a necessary thing, and for defense of the kingdom, yet if it be kept in such a place as it is dangerous to the inhabitants, or passengers, it will be a nuisance." In Rex v. Taylor, 2 Str. 1167, the King's Bench granted an information against the defendant, for a nuisance, upon "affidavits of his keeping great quantities of gunpowder, to the endangering of the church and houses where he lived," or, as it should have been expressed, according to Burns, "to the endangering of the lives of His Majesty's subjects." 2 Burns, Just. 667, 668; 1 Russ. Cr. 297, and note "o."

I think the jury would have been well warranted in finding the defendants guilty of the offense, upon the facts disclosed in this case, as it cannot be doubted that the gunpowder was deposited in a building insufficiently secured and protected, and altogether unfit for the safe-keeping of so large a quantity of the article. The situation of the building in other respects, moreover, was such as to render the

gunpowder dangerous to the lives of the citizens; for an explosion, either by accident or design, at any period of time after the deposit, would in all human probability have proved destructive to more or less of the inhabitants residing in the neighborhood.

Assuming that the jury were justified in coming to this conclusion, the authorities are abundant to show that the defendants were answerable to the plaintiff for the personal injury occasioned by the explosion. The principle is stated by Abbott, C. J., in Duncan v. Thwaites, 3 Barn. & C. 556. He there said: "I take it to be a general rule, that a party who sustains a special and particular injury by an act which is unlawful on the ground of public injury, may maintain an action for his own special injury." The following cases exemplify and apply the principle, viz.: Rose v. Miles, 4 Maule & S. 101; Henly v. Mayor, etc., of Lyme Regis, 5 Bing. 91; 3 Barn. & Ad. 77; s. c. in error, 1 Bing. N. C. 222; Pierce v. Dart, 7 Cow. 609; Lansing v. Smith, 8 Cow. 146; s. c. in error, 4 Wend. 25, 21 Am. Dec. 89, per Walworth, Chancellor; Mills v. Hall, 9 Wend. 315, 24 Am. Dec. 160. See, also, Mayor, etc., of N. Y. v. Furze, 3 Hill, 612. * * * [55]

HUBBARD v. PRESTON.

(Supreme Court of Michigan, 1892. 90 Mich. 221, 51 N. W. 209, 15 L. R. A. 249, 30 Am. St. Rep. 426.)

The defendant shot and killed the plaintiff's dog. In an action in a justice's court, the defendant had judgment. The only question submitted to the jury on the trial in the circuit court was as to the value of the dog, which the jury found to be $25, and verdict and judgment were entered for that amount. Defendant brings error.[56]

LONG, J. On the trial the defendant introduced testimony tending to show justification for the killing. The court permitted the testi-

[55] Only so much of the case is given as relates to the one point. A new trial was granted for error in the admission of evidence.

See Cheatham v. Shearon (1851) 1 Swan (Tenn.) 213, 55 Am. Dec. 734: (D. stored 500 kegs of powder in a powder house in a populous part of a city; the powder house was struck by lightning and the powder was thereby exploded, causing damage to P.)

Prussak v. Hutton (1898) 30 App. Div. 66, 51 N. Y. Supp. 761: (A powder house owned by A., leased by him as a powder house to B., and used as such by C., was exploded by lightning. Held, that if the powder house was a nuisance, A., B., and C. were all liable.)

Kleebauer v. Western Fuse & Explosives Co. (1902) 69 Pac. 246; Id. (1903) 138 Cal. 497, 71 Pac. 617, 60 L. R. A. 377, 94 Am. St. Rep. 62: (D. kept 5,000 pounds of gunpowder stored in a powder magazine within 250 yards of numerous dwellings; an employé whom the police were seeking to arrest for murder intentionally exploded the powder; P.'s house near by was damaged.)

See also Heeg v. Licht (1880) 80 N. Y. 579, 36 Am. Rep. 654, 8 Abb. N. C. 355; McAndrews v. Collerd (1880) 42 N. J. Law, 189, 36 Am. Rep. 508.

[56] The statement of the case is slightly abridged.

mony to be introduced, but held that it did not amount to a justification. The only question raised in this court is whether the court should have submitted that branch of the case for the determination of the jury.

We think the court was in error in not so doing. It appeared that the defendant did not keep a dog; that he lived on Bagg street, city of Detroit, and for eight days prior to the shooting he and his family had been greatly annoyed by the congregation of a large number of dogs about his premises, barking, quarreling, and fighting there; that they came every night upon his lawn, about his house, when it became dark (on two occasions he counted 12 dogs), and that they kept up their cries all night at intervals; that he complained to the police on three different days prior to the killing, but without any relief, and he had driven them away on several nights; that the noise made by them kept the members of his family awake, and seriously annoyed them; that he did not know the owners; that on the night he killed plaintiff's dog he drove them away twice, but they returned; that he could not get near them, but they would return; that they became an intolerable nuisance, and finally, about 8 o'clock in the evening, he went out with his revolver, and shot among them, while on his lawn. He did not know who owned any of them, and did not shoot at any particular dog.

The defendant had a right to protect his family from such nuisance; and it was a question for the jury whether he used such means as were reasonable and necessary, under the circumstances, to rid himself of it.[57]

The judgment must be reversed, with costs, and a new trial ordered.

MOORE v. DAME BROWNE.

(Court of Queen's Bench, 1573. 3 Dyer, 319b, 73 Reprint, 723.)

Trespass on the case for the malicious turning aside of part of a course of water of a conduit, which ran from a fountain in Clerkenwell to the house of the plaintiff, which was the site of the late house of the friars preachers s. the Black-fryars London. The defendant pleaded not guilty; and in evidence at Guildhall at nisi prius, it appeared that Sir Humphrey Browne in his life upon finding an old pipe near the main pipe lying in his yard, where he had built his new house in Cow Lane in the parish of Saint Sepulchre (which was a house be-

[57] Compare Bowers v. Horen (1892) 93 Mich. 420, 53 N. W. 535, 17 L. R. A. 773, 32 Am. St. Rep. 513, where the dog was killed while trespassing, but there was no nuisance shown.

See also Brill v. Flagler (1840) 23 Wend. (N. Y.) 357; Herring v. Wilton (1906) 106 Va. 171, 55 S. E. 546, 7 L. R. A. (N. S.) 349, 117 Am. St. Rep. 997, 10 Ann. Cas. 66, injunction against the maintenance of a kennel of barking dogs.

longing to the late monastery of Watton in the county of York) made a little pipe and a cock out of the main pipe, drawing thereby water to serve his house, and to stop it again at his pleasure; which the said Dame since the death of her husband, when she lived there had used and occupied:—and whether she by that shall be adjudged guilty, and a trespasser upon this diversion, because she was not the first who diverted, but her husband was, and the wife only a continuer of the diversion, was doubted. But because the portion of the water turned aside had not continual course or running, but was oftentimes stopped by the cock, and opened again at the pleasure of the wife toties quoties, that may be called in her a new diversion &c. And so she was found guilty, and damages £10. And so was the opinion of the justices in banc.

HUGHES et al. v. MUNG.

(General Court of Maryland, 1796. Court of Appeals, 1797. 3 Har. & McH. 441.)

This was an action on the case for diverting an ancient watercourse. By the bill of exceptions taken at the trial it appears

the plaintiffs made title to the land in the declaration mentioned, called Penny Pack Pond, under a patent granted to Peter Rench in March, 1753, and by him conveyed by deed of bargain and sale, duly executed and recorded, bearing date on the 13th November, 1781. And to support their action the plaintiffs offered evidence to prove that the water, for the diversion of which this action is brought, formerly ran through the land above mentioned. That about 27 or 28 years ago, George Nicholas Mung, the father of the defendant, diverted the said stream of water from its ancient course, as located by the plaintiffs upon the plats returned in the cause, and turned it into the course in which it now runs, as located upon the said plats. The plaintiffs also offered evidence to prove that the said stream of water has, ever since the said diversion by George Nicholas Mung, run where it now runs as located on the plats returned, and still runs there; that the land through which the said stream now runs, is held and claimed by the defendant, Jacob Mung, and has been so held and claimed by him ever since the 1st of January, 1792: that the defendant ever since that time has continued, and still does continue, to use the said stream of water in the channel in which it now runs, by watering his stock therein, by enclosing it within his fences, and by throwing the water thereout occasionally upon his meadow.

The defendant's counsel prayed the opinion of the court, that this evidence was not sufficient in law to enable the plaintiffs to sustain their action.

THE COURT (CHASE and DUVALL, JJ.) were of opinion, and so directed the jury, that an action will lie for the diversion of the watercourse against the person who diverted it, and against any person who keeps up the obstruction which changed the watercourse; but no adventitious accidental advantages, derived from the use of the water running in its present course, will amount to a continuance of the nuisance, without some act done by the defendant to keep up the obstructions occasioning the diverting of the course of the stream, and that

the present action cannot be supported without showing those acts were done since the title of the plaintiffs accrued to the lands called Penny Pack Pond.

To this opinion the plaintiffs excepted, and appealed to the Court of Appeals.

The Court of Appeals, at June term, 1797, affirmed the judgment.

LEAHAN v. COCHRAN.

(Supreme Judicial Court of Massachusetts, 1901. 178 Mass. 566, 60 N. E. 382, 53 L. R. A. 891, 86 Am. St. Rep. 506.)

The evidence tended to show the following facts:

Affixed to the house of the defendant was a conductor, constructed and used for the purpose of carrying water from the roof to the public sidewalk adjoining; there was a groove in the sidewalk, extending from the end of the conductor to the outer edge of the sidewalk; the water from the conductor had frozen in and about the groove upon the sidewalk; and the plaintiff while traveling, in the exercise of due care, over the ice, was injured. The evidence warranted a finding that in the winter the natural and probable result of the situation would be the formation of ice upon the sidewalk, which would be dangerous to public travel, and therefore a public nuisance. At the time of the accident the defendant had been the owner of the house for several years, and there was no evidence that the defendant constructed the building, the conductor, the groove, or the sidewalk; and it appeared that the condition of the conductor at the time of the purchase was, and ever since had been, the same as at the time of the accident. There was no evidence that the defendant ever had been requested by the plaintiff, or by any other person, to reform the nuisance, or that the plaintiff ever complained of it to the defendant.

There was a judgment for the plaintiff and the defendant brought exceptions.

HAMMOND, J. The action is at common law and the question whether the notice requisite to the maintenance of an action, under Pub. St. c. 52, § 19, was given, is immaterial. It is not argued that the evidence did not warrant a finding that this conductor in its natural operation did create a nuisance in the highway. The only question presented is whether the court erred in declining to give the second and third rulings requested by the defendant. These requests raise the question whether, the situation being the same as at the time of the purchase by the defendant, she can be held answerable to the plaintiff, in the absence of any request made to her to reform the nuisance. There can be no doubt that in the case of a private nuisance the general doctrine in this country, following Penruddock's Case, 5 Coke, 100, is that the grantee of land upon which, at the time of the grant, there exists a nuisance created by his predecessors in title, is not responsible merely because he has become the owner of the land. His liability arises from his knowingly continuing the nuisance in its original state unless he has had notice to abate, or, at least, until he has had knowledge that it is a nuisance, and injurious to the rights of

others; and, while there is some dissent from this doctrine (see opinion of Denio, J., in Brown v. Railroad Co., 12 N. Y. 486; of Strong, J., in Hubbard v. Russell, 24 Barb. [N. Y.] 404; and of Manning, J., in Caldwell v. Gale, 11 Mich. 77), still it must be regarded as the law of this commonwealth (McDonough v. Gilman, 3 Allen, 264, 80 Am. Dec. 72 and cases cited). The cases are numerous in which this doctrine has been applied to private nuisances, but with the exception of Woram v. Noble, 41 Hun (N. Y.) 398, we have seen no case where the doctrine has been directly applied to the case of a public nuisance, although in Wenzlick v. McCotter, 87 N. Y. 122, 41 Am. Rep. 358, and Dodge v. Stacy, 39 Vt. 558, the court seems to have failed to notice any difference in this respect between private and public nuisances.

We think the rule should not be extended to a public nuisance like that in this case. The reason generally given for the rule is that, in the absence of any notice to the contrary, the grantee has the right to assume that the structures upon the land are rightfully there, and that, even where they may seem to interfere with the usual rights appurtenant to other estates, he may properly assume that the right thus to interfere has been lawfully obtained, and it is said that it would be inequitable to subject him to damages until he has had notice that in maintaining the structure or work complained of he is infringing upon the rights of others. The reason of the rule is not applicable to a case like this. The conductor, in its natural and intended use, caused ice to form upon the sidewalk, which, being dangerous to public travel, was a public nuisance. No matter how often the ice was formed, the right thus to incumber the street could not be lawful. The right to create such a nuisance was not a matter of grant, nor could it have been acquired by prescription. City of Holyoke v. Hadley Water-Power Co., 174 Mass. 424, 426, 54 N. E. 889; Inhabitants of New Salem v. Eagle Mill Co., 138 Mass. 8. In so far as the conductor, by its natural operation, caused the formation of such ice, it created a nuisance. The defendant, as owner, must have known this, or must be presumed to have known it. In such a case, the reason for the requirement of notice does not exist, and we see no reason why the rule should be applied. See Matthews v. Railway Co., 26 Mo. App. 75. Exceptions overruled.

ROSEWELL v. PRIOR.

(Court of King's Bench, 1701. 2 Salk. 460, 91 Reprint, 397.) [58]

In an action upon the case, for that the plaintiff being seised of an ancient house and lights, the defendant had erected, etc., whereby they were stopped. There was a former recovery for this erection, and this action was for the continuance; and the case was, tenant for years

[58] S. C., elaborately reported, in 12 Mod. 635, 88 Reprint, 1570.

erected a nuisance, and afterwards made an under-lease to J. S. The question was, whether, after a recovery against the first tenant for years for the erection, an action would lie against him for the continuance after he had made an under-lease?

Et PER CUR. It lies; for he transferred it with the original wrong, and his demise affirms the continuance of it: he hath also rent as a consideration for the continuance, and therefore ought to answer the damage it occasions. Vide Jones, 272. Receipt of rent is upholding 2 Cro. 372, 555. The action lies against either at the plaintiff's election.[59]

LAMBTON v. MELLISH.

LAMBTON v. COX.

(Chancery Division. [1894] 3 Ch. 163.)

The plaintiff moved against the defendant in each action for an injunction restraining him from playing any organ so as to cause a nuisance or injury to the plaintiff or his family or other occupiers of the plaintiff's property. The following facts were shown:

The plaintiff was the lessee and occupier of a house adjoining Ashstead Common in Surrey. The premises of the defendant Mellish were about 60 yards from the plaintiff's premises; those of the defendant Cox were about 120 yards from the plaintiff's premises and about 100 yards from those of the defendant Mellish, and were separated from both by a line of railway. During the summer months a large number of school treats and assemblages of that description took place on Ashstead Common. The defendants Mellish and Cox were rival refreshment contractors who catered for visitors and excursionists to the common, and both the defendants had merry-go-rounds on their premises, and were in the habit of using organs as an

[59] See also Todd v. Flight (1860) 9 C. B. (N. S.) 377, 389.

In Plumer v. Harper (1824) 3 N. H. 88, 14 Am. Dec. 333, where the original creator of the nuisance had conveyed the property in fee, Richardson, C. J., remarks: "If the question which this case presents were now to be decided for the first time, it seems to us that it would be very difficult to find a good reason why the original wrongdoer should be discharged by conveying the land. The injury has no connection with the ownership of the land. If A. enter into the land of B., and there erect a dam, which causes the water to overflow B.'s land, there can be no doubt that he will be liable for any damage resulting from such overflowing. So if A. enters B.'s land and there erects a nuisance to the prejudice of C., it is clear that A. will be liable to C. When he who erects the nuisance conveys the land, he does not transfer the liability to his grantee. For it is agreed in all the books that the grantee is not liable until, upon request, he refuses to remove the nuisance. It does not make the original act less injurious because the grantee adopts it; and we are not aware that in any action against an individual for a tort it can be a good defense to show that a third person has assented to the wrong, and thus become liable."

Compare Mansfield v Tenney (1909) 202 Mass. 312, 88 N. E. 892, 25 L. R. A. (N. S.) 731, and note.

accompaniment to the amusements. These organs for three months or more in the summer were played continuously together from about 10 a. m. till 6 p. m. and the noise caused by the two organs was "maddening."

The organ used by Mellish had been changed and it was alleged by him that the organ in use when the motion was made was a small portable hand-organ making comparatively little noise. That used by Cox was a much larger one provided with trumpet stops and emitting sounds which could be heard at the distance of one mile.

Whitehorne, Q. C., and Butcher, for the defendant Mellish: What Mellish is doing is in itself lawful, and no injunction will be granted to restrain a man from doing that which is lawful, and which if taken by itself is no nuisance. To obtain an injunction the plaintiff must shew that Mellish is acting in concert with Cox. It does not follow that if an injunction will lie against Cox it will necessarily lie against Mellish. Thorpe v. Brumfitt, Law Rep. 8 Ch. 650, has no application, as there the acts complained of were in themselves unlawful.

CHITTY, J. * * * [60] A man may tolerate a nuisance for a short period. A passer-by or a by-stander would not find any nuisance in these organs; but the case is very different when the noise has to be continuously endured: under such circumstances it is scarcely an exaggeration to term it "maddening," going on, as it does, hour after hour, day after day, and month after month. I consider that the noise made by each defendant, taken separately, amounts to a nuisance. But I go further. It was said for the defendant Mellish that two rights cannot make a wrong—by that it was meant that if one man makes a noise not of a kind, duration, or degree sufficient to constitute a nuisance, and another man, not acting in concert with the first, makes a similar noise at the same time, each is responsible only for the noise made by himself, and not also for that made by the other. If the two agreed and acted in combination each would be a wrongdoer. If a man shouts outside a house for most of the day, and another man, who is his rival (for it is to be remembered that these defendants are rivals), does the same, has the inhabitant of the house no remedy? It is said that that is only so much the worse for the inhabitant. On the ground of common sense it must be the other way. Each of the men is making a noise and each is adding his quantum until the whole constitutes a nuisance. Each hears the other, and is adding to the sum which makes up the nuisance. In my opinion each is separately liable, and I think it would be contrary to good sense, and, indeed, contrary to law, to hold otherwise. It would be contrary to common sense that the inhabitants of the house should be left without remedy at law. I think the point falls within the principle laid down by Lord Justice James in Thorpe v. Brumfitt, Law Rep. 8 Ch. 650. That was a case of obstructing a right of way,

[60] The statement of the case is abridged, and a part of the opinion is omitted.

but such obstruction was a nuisance in the old phraseology of the law. * * *[61] There is in my opinion no distinction in these respects between the case of a right of way and the case, such as this is, of a nuisance by noise. If the acts of two persons, each being aware of what the other is doing, amount in the aggregate to what is an actionable wrong, each is amenable to the remedy against the aggregate cause of complaint. The defendants here are both responsible for the noise as a whole so far as it constitutes a nuisance affecting the plaintiff, and each must be restrained in respect of his own share in making the noise. I therefore grant an interim injunction in both the actions in the terms of the notices of motion.

RICH v. BASTERFIELD.

(Court of Common Pleas, 1847. 4 C. B. 783, 136 Reprint, 715, 72 R. R. 716.)

CRESSWELL, J.[62] This was an action on the case, in which the declaration alleged that the plaintiff had been and was possessed of a messuage, etc., which he and his family occupied; that the defendant was possessed of two messuages and yards near to the plaintiff's messuage; and that the defendant, contriving to injure the plaintiff and his family in their occupation etc., on, etc., erected certain shops and chimneys on the defendant's said yards, near to the plaintiff's house, and continued the same there, and lighted fires in the said shop, and caused smoke, etc., to issue from the said chimneys; whereby the plaintiff's messuage was rendered unhealthy, and he was compelled to keep his windows closed, to exclude the smoke, and was prevented obtaining fresh air, and the plaintiff and his family were annoyed and prejudiced in the occupation of his messuage, etc. The defendant pleaded—first, not guilty—secondly, that he, the defendant, was not possessed of the said yards and shops.

At the trial before my Brother Erle, at the sittings in Middlesex after Hilary term, 1846, it appeared in evidence that the plaintiff was possessed of a house, No. 10, and the defendant of two other houses, being Nos. 12 and 13, in the New Road, east of Tottenham Court Road; that the houses stand a considerable distance back from the road; that, in front of the defendant's houses, the defendant some time since erected two low buildings, which were let as shops; that he afterwards put a stove into one of the shops, from which the smoke was at first carried under ground into one of the chimneys of the

[61] Mr. Justice Chitty here quoted the remark of Lord Justice James in Thorpe v. Brumfitt (1873) L. R. 8 Ch. 650, 656, which is given infra, p. 406, in note to Delaware & Hudson Canal Co. v. Torrey.

[62] The reporter's statement, the arguments of counsel, and a portion of the opinion are omitted.

house behind it; but, that plan not answering, that he afterwards erected a chimney; and that the shop, with the stove and chimney, was subsequently let to a tenant from week to week, who occupied it at the time when the nuisance to the plaintiff's house was said to have been committed, and by whom the fires complained of were made.

A former occupier stated that he used to make fires in the stove, principally of coke, and that no smoke which could be at all injurious then issued from the chimney. The fires made by the present occupier caused a good deal of smoke to issue, which, when the wind blew towards the plaintiff's house, was driven to it, and compelled him to keep his windows shut.

Upon this evidence, it was contended, for the defendant, that he was entitled to a verdict on both issues; for, that the act of his tenant in making fires, could not be considered as his act, and therefore he was not guilty; and that, the tenant being in possession at the time when the nuisance was said to have been committed, the defendant was entitled to a verdict on the issue of not possessed, also,

The learned judge reserved to the defendant leave to move to enter a verdict in his favour, and left to the jury the question whether the defendant made a reasonable use of his rights in respect of the property in question in a reasonable place; and they found for the plaintiff. * * *

It was not contended, either at nisi prius, or on the argument, that the chimney erected by the defendant was itself a nuisance; and, unless used in a manner which caused smoke to issue, so as to prejudice the plaintiff in the occupation of his own premises, no complaint could have been made against it. The landlord, therefore, did not let the premises with any existing nuisance upon them; if he had, by letting and receiving rent for them in that condition, he would have been liable for continuing and upholding the nuisance, as in Rosewell v. Prior. Nor had he entered into any contract, express or implied, with the tenant, to make fires of any kind. The latter might have wholly abstained from making fires, without being subjected to any complaint by the landlord; or he might have made fires so that no inconvenience to the plaintiff would have ensued, by using coke, which was the course adopted by the former occupier, Shearman; or he might have abstained from making fires at all, when the wind was in such a direction as to carry the smoke to the plaintiff's house.

It being, therefore, quite possible for the tenant to occupy the shop without making fires, and quite optional on his part to make them or not, or to make them with certain times excepted, so as not to annoy the plaintiff, or in such a manner as not to create any quantity of smoke that could be deemed a nuisance,—it seems impossible to say that the tenant was, in any sense, the servant or agent of the defendant, in doing the acts complained of. The utmost that can be imputed to the defendant, is, that he enabled the tenant to make fires, if he pleased.

The case, then, resting, not upon the erection of the chimney, but upon the subsequent use of it by tenant, can the defendant, his landlord, be held to be guilty of the nuisance?

Several cases have occurred in which the owners of fixed property have been held liable for the consequences of acts done upon it by persons not strictly their servants or agents. But the principle on which those cases proceeded, and the limits within which they should be restrained, are clearly laid down by Littledale, J., in Laugher v. Pointer, 5 B. & C. 547, 8 D. & R. 556; which judgment is cited with much just approbation, and adopted by the Court of Exchequer, in Quarman v. Burnett, 6 M. & W. 499. The principle stated by Mr. Justice Littledale is that, where a man is in possession of fixed property, he must take care that his property is so used and managed that other persons are not injured; and that, whether his property be managed by his own immediate servants, or by contractors or their servants. * * *

For the reasons already given, we think that the verdict must be entered for the defendant on the plea of not guilty, as well as on the issue of not possessed, which refers to the time when the nuisance was created.

Rule accorded.[63]

HOGLE v. H. H. FRANKLIN MFG. CO.

(Court of Appeals of New York, 1910. 199 N. Y. 388, 92 N. E. 794, 32 L. R. A. [N. S.] 1038.)

For several years prior to the 21st of August, 1906, the plaintiff resided with her husband in a house on West Marcellus street in the city of Syracuse, the lease from James Doheny, the owner, being in the husband's name as lessee. The lot upon which the house stands

[63] See Harris v. James (1876) 45 L. J. Q. B. 545, and Rex v. Pedley (1834) 1 Ad. & El. 822, for a different application of the principle when the occupation reasonably contemplated by a landlord is likely to produce a nuisance, or the landlord "lets a building which requires particular care to prevent the occupation from being a nuisance, and the nuisance occurs for want of such care on the part of the tenant."

Compare Barker v. Herbert, [1911] 2 K. B. 633, C. A.: (The defendant was the owner in possession of a vacant house in a street, with an area which adjoined the highway. One of the rails of the area railings had been broken away by boys playing football in the street, and, consequently, a gap had been created in the railings. The plaintiff, a child, got through this gap from the street, and was clambering along inside the railings, when he fell into the area, and sustained injuries through the fall. In an action brought on his behalf to recover damages from the defendant in respect of his injuries, the jury found, in answer to questions left to them, that the area was, when the accident happened, a nuisance, but that the defendant did not know, at the time of the accident, that the rail had been removed, that such a time had not elapsed after its removal that he would have known of it at the time of the accident, if he had used reasonable care, and that he had used reasonable care to prevent the premises from becoming dangerous to persons using the highway.)

is 34 by 100 feet, and the rear thereof adjoins the land of the defendant, upon which there is a large building several hundred feet long used for the manufacture of automobiles. Between the lot on which the defendant's factory stands and the lot occupied by the plaintiff and her husband, which for convenience will be called the plaintiff's lot, there is a vacant space ten feet wide which is not used for storage or dumping purposes, or for any purpose except the admission of light and air. At the rear of the plaintiff's lot is a tight board fence six feet high, and the space between the fence and her house, 20 by 34 feet, is used as a garden. Each floor of the factory has windows overlooking the plaintiff's premises, and on each of said floors are many mechanics and laborers in the employ of the defendant.

For eighteen months prior to the 21st of August, 1906, the employés of the defendant had habitually thrown small pieces of iron, such as nuts, the ends of bolts and the like, from the upper windows of its factory upon the rear of the plaintiff's lot. Mr. Hogle, who was not at home much in the daytime, saw such objects thrown from the third story of the factory at least a dozen times, some of which struck his house and others fell in the yard at the rear. This was after 6 o'clock in the evening, but when the men were still at work in the factory. He took a handful of the nuts and bolts collected from the garden to Mr. Franklin, the president of the defendant, stated the facts to him, and said he wanted the practice stopped, for he was afraid some one would get hurt. Mr. Franklin replied that he was glad to learn what had happened and would see that it was stopped. Mr. Doheny, the lessor of the plaintiff, complained on several occasions to the assistant manager of the defendant, who said he would do all he could to stop the annoyance.

The practice, however, continued and increased, although Mr. Franklin and his foreman forbade it and threatened to discharge any one who was seen to throw anything upon the plaintiff's lot. A little son of the plaintiff was hit by a nut when playing in the backyard. On another occasion a pail of dirty water was thrown upon him, and on still another tobacco spittle hit him on the head. Mrs. Hogle testified that she saw nuts, pieces of bolts, etc., thrown on her lot and at the children playing there on the average once a day from the spring of 1905 until in August, 1906. Once she saw a rattail file thrown from the window on the third floor and saw it pass over her little boy and strike the ground behind him. These objects, which for convenience counsel called missiles, came from the windows of defendant's factory and mainly from those on the third floor. She saw many of them when they were thrown by defendant's workmen from the windows of its factory.

On the 21st of August, 1906, she went out into her garden and looking up saw men at work and heard them talking by the windows of the third floor, which were open. As she was kneeling on one knee about ten feet from the rear of her lot to pull some radishes, she

caught a side glance of some object coming from the direction of the third floor and at once was hit by a piece of iron upon her arm just below the shoulder. She produced the iron in court and the injury inflicted by it was somewhat severe.

Upon the first trial, when the complaint was based wholly on negligence, she had a verdict, which was set aside by the trial justice upon the ground that, as the acts of the defendant's workmen were not done within the scope of their employment, an action for negligence would not lie, but it was pointedly suggested in the opinion that an action for nuisance was the proper remedy. The complaint was thereupon so amended as to rest both on negligence and nuisance. Upon the second trial also the plaintiff had a verdict and the judgment entered thereon was affirmed by the Appellate Division, one of the justices dissenting. The defendant now appeals to this court.

VANN, J. * * * As the Appellate Division held, and as we think, the evidence warranted the jury in finding that the piece of iron which injured the plaintiff was maliciously thrown from a window of the defendant's factory by one of its workmen, and that for more than a year it had been the practice of its workmen, maliciously, or in a spirit of mischief, to throw similar objects from the windows of its factory upon the premises adjoining where plaintiff lived, with the knowledge of the defendant, but without its consent and in violation of its orders.

The defendant contends—and its motion for a nonsuit was based on the ground—"that there can be no recovery in this case unless the jury should find that this piece of iron was thrown upon plaintiff's premises as a necessary consequence of the work being carried on there or as an incident to it." The refusal to so hold is the main assignment of error on this appeal.

While we all think that the recovery should be sustained we differ somewhat as to the exact theory upon which it should be based. No request that the plaintiff should elect between the theory of nuisance and that of negligence was made at the trial, and the complaint was adapted to either. The trial judge did not name the action, but treated it as an action on the case. If the evidence established a cause of action for negligence in failing to take reasonable precautions to suppress the evil practice, such as closing the windows or screening them with wire netting or setting a watch upon the men or some other of like character, the defendant cannot complain. Such negligence would rest, not on the throwing of the missiles, as they were not thrown in furtherance of the master's business, but on not using reasonable care to prevent them from being thrown. In other words, it would rest on a relative, and not on an absolute, duty. If, on the other hand, the evidence established an action for nuisance, the rulings of the court were more favorable to the defendant than it was entitled to, because the liability for injury from a nuisance is not relative, but absolute,

and proof of negligence on the one hand and the absence thereof on the other is not required.

The line between protracted and habitual negligence and nuisance is not easily drawn, and facts may exist which call for damages on either theory when the pleadings are appropriate, as in this case, to either kind of relief. High authority is not wanting to sustain the judgment below on the ground of negligence pure and simple. Thus, in an important case, the plaintiff was a workman employed by the defendant railroad at its workshop in the city of Washington. When returning from his day's labor, he stopped at the intersection of two streets to enable a repair train to pass him. For a long time prior it had been the custom of the defendant to allow its workmen, who went out on a repair train in the morning, to bring back with them on their return in the evening sticks of refuse timber for their individual use as firewood, and these men were in the habit of throwing the sticks off the train while in motion at the points nearest their own homes; but they had been cautioned by the company not to injure any one in doing so. As the defendant's train passed the plaintiff, such a piece of refuse wood was thrown from it by one of the men and, striking the ground, rebounded, struck the plaintiff, and injured him seriously. Upon the trial of an action to recover damages, after proving these facts, the plaintiff rested, and defendant moved for a verdict in its favor, and the motion was granted. Upon appeal to the Court of Appeals of the District of Columbia the judgment was affirmed; but upon further appeal to the Supreme Court of the United States it was reversed, on the ground that the jury could have found the defendant guilty of negligence. Fletcher v. Baltimore & Potomac R. R. Co., 168 U. S. 135, 18 Sup. Ct. 35, 42 L. Ed. 411. Mr. Justice Peckham, writing for all the judges, said: "Negligence on the part of the company is the basis of its liability, and the mere failure to prevent a single and dangerous act, as above stated, would not prove its existence. * * * If the act on the car were such as to permit the jury to find that it was one from which, as a result, injury to a person on the street might reasonably be feared, and if acts of a like nature had been and were habitually performed by those upon the car to the knowledge of the agents or servants of the defendant, who with such knowledge permitted their continuance, then in such case the jury might find the defendant guilty of negligence in having permitted the act and liable for the injury resulting therefrom, notwithstanding the act was that of an employé and beyond the scope of his employment and totally disconnected therewith. * * * It is not a question of scope of employment or that the act of the individual is performed by one who has ceased for the time being to be in the employment of the company. The question is: Does the company owe any duty whatever to the general public, or, in other words, to individuals who may be in the streets through which its railroad tracks are laid, to use reasonable diligence to see to it that those who are on its trains shall

not be guilty of any act which might reasonably be called dangerous and liable to result in injuries to persons on the street, where such act could by the exercise of reasonable diligence on the part of the company have been prevented? We think the company does owe such a duty and if through and in consequence of its neglect of that duty an act is performed by a passenger or employé which is one of a series of the same kind of acts and which the company had knowledge of and had acquiesced in, and if the act be in its nature a dangerous one, and a person lawfully on the street is injured as a result of such an act, the company is liable. Any other rule would in our opinion be most disastrous, and would be founded upon no sound principle." See, also, Swinarton v. Le Boutillier, 7 Misc. Rep. 639, 28 N. Y. Supp. 53, affirmed 148 N. Y. 752, 43 N. E. 990; Dwyer v. D. & H. Canal Co., 17 App. Div. 623, 47 N. Y. Supp. 1135.

The defendant had reason to believe that missiles would be thrown from its premises upon those of the plaintiff in the future, as they had been continuously in the past, and that they might hurt some one. It took some precautions to prevent the evil; but they were not effective, and the defendant knew they were not. It could not remain quiet and let the practice go on. The jury could properly say that in the exercise of reasonable care in the management of its own property, so as to prevent an injury reasonably to be expected to its neighbor's property and person, it should have taken further precautions, and that it was negligent in not having done so. This would lead to an affirmance on the ground of negligence, the real ground upon which the case was sent to the jury. I am personally of the opinion, however, that the practice complained of was a nuisance as matter of fact, if the jury so found. "Sic utere tuo ut alienum non lædas," is an old maxim of the law, which applies both to the use made and the use knowingly suffered to be made of one's own property while he is in full control thereof. It is a trespass for the owner of one lot to throw anything upon the adjoining lot of his neighbor. The defendant furnished the place from which and the means with which habitual trespasses, calculated to inflict personal injury, were committed on the adjoining premises of the plaintiff. The defendant knew of the practice and knew that it had existed a long time, and, while some efforts were made to prevent it, the evil continued and even grew worse. An occasional trespass of this kind committed by the defendant's workmen would not warrant a jury in finding it guilty of suffering or maintaining a nuisance; but, when the practice became habitual and the injury was direct, substantial, and well known, I think the duty of the defendant became absolute, and that it was guilty of suffering a nuisance to continue on its land if it did not prevent the evil.

In a recent case, without attempting a general definition of a nuisance, we said that: "If the natural tendency of the act complained of is to create danger and inflict injury upon person or property,

it may properly be found a nuisance as matter of fact; but, if the act in its inherent nature is so hazardous as to make the danger extreme and serious injury so probable as to be almost a certainty, it should be held a nuisance as matter of law." Melker v. City of New York, 190 N. Y. 481, 488, 83 N. E. 565, 567, 16 L. R. A. (N. S.) 621, 13 Ann. Cas. 544. See, also, Sullivan v. Dunham, 161 N. Y. 290, 55 N. E. 923, 47 L. R. A. 715, 76 Am. St. Rep. 274; McCarty v. Natural Carbonic Gas Co., 189 N. Y. 40, 81 N. E. 549, 13 L. R. A. (N. S.) 465, 12 Ann. Cas. 840. While that definition implies that the act is that of the defendant, I think the same rule should apply when a series of acts extending over many months is committed by men in the employment of the defendant, to its knowledge, with its personal property and while standing on its premises, even if the acts are without the line of its business. Although the defendant did not commit the injuries nor sanction them, it suffered them to continue for so long a period as to make them its own, or so at least the jury could find. It is a nuisance for one to permit a crowd to habitually gather on his land and by boisterous singing, obscene language, and other disorderly conduct to seriously annoy his next-door neighbor. It is immaterial whether the acts are committed by his own workmen or by strangers, so long as they are committed on his land, constantly and with his knowledge.

It is the duty of the owner of premises to prevent them from being made a constant source of injury to others, and it is upon this principle that suffering a foul water closet to exist in a crowded neighborhood is held a nuisance. The decaying carcasses of animals, whether placed on his land by the owner or not, hogpens, cesspools, dangerous structures, explosives and the like, while all are dependent on the surrounding circumstances and on the degree of danger or annoyance, may be found nuisances in fact. Although the mere ownership of land may impose no liability for a nuisance thereon, or committed therefrom, still if the owner suffers his premises to become the stand point for the habitual infliction of injuries upon his neighbor, and such injuries could not be inflicted without standing on such land, he may be held liable by the jury as a principal. He suffers the evil to exist on his land, if, while in the full possession and control thereof, he knows that it exists thereon and he does not abate it within a reasonable time and under reasonable circumstances, both time and circumstances ordinarily being for the jury.

I think that upon the facts as they are presumed to have been found by the jury the defendant was guilty of suffering a nuisance to exist and continue on its premises, and that it is liable for the injury resulting therefrom to the plaintiff without proof of negligence or its incidents.

The judgment should be affirmed, with costs.[64]

[64] Part of the opinion is omitted.

(d) Kinds and Degrees of the Annoyance [65]

WALTER v. SELFE.

(High Court of Chancery, 1851. 4 De Gex. & Sm. 315, 64 Reprint, 849.)

This was a motion for an injunction to restrain the defendant from so burning bricks on a strip of ground belonging to the defendant as to occasion annoyance to the plaintiffs or damage to the buildings or the trees and shrubbery on the plaintiffs' premises.[66]

The Vice-Chancellor (Sir J. L. Knight Bruce). * * * One of the plaintiffs sues as the owner, and the other as his tenant and the occupier, of a parcel of land at Surbiton, in Surrey, of which a dwelling-house, with outbuildings appurtenant to it, stands on part, and other part consists of a garden or pleasure-ground or both, also belonging to the house.

It is admitted that the house was built before the year 1829, and has been used and occupied as a dwelling-house from a time preceding that year. The land on its northwestern part adjoins a portion of a parcel of land, containing more than an acre, but less than two acres in the whole, which belongs to the defendant, and on which, in the spring or early in the summer of the year 1850, he began to manufacture bricks of the clay of the earth of the same land by burning, in what is, I believe, a common mode of manufacturing them,—by means of a clamp, that is to say, not a kiln. It does not appear that, before the year 1850, any manufacture or process of that sort, or of any offensive, objectionable or disagreeable kind, had been begun upon any portion of this parcel of land, or carried on there. * * *

The first point, disputed or not conceded, is the question whether, as between the defendant in his character of a person owning, using and occupying his parcel of land that has been mentioned on the one hand, and the plaintiffs in their characters of owner and occupier of the house, offices and garden occupied by the plaintiff, Mr. Pressly, on the other hand, Mr. Pressly is entitled to an untainted and unpolluted stream of air for the necessary supply and reasonable use of himself and his family there, or, in other words, to have there for the ordinary purposes of breath and life an unpolluted and untainted atmos-

[65] "It would be dangerous to attempt any exhaustive list of specific nuisances; for it is to be expected that, with changes in social and industrial habits, new examples will continually arise, and, possibly, old ones disappear from the list." Jenks' Digest of Eng. Civil Law, bk. II, pt. 3, p. 401 (1907), where 12 classes of well-known instances are mentioned. See also the 14 classes of "Nuisances in Respect of Particular Matters," in Halsbury's Laws of England, vol. 21, pp. 513–546, the 10 classes in Salmond, Torts 184, 185, note (1910), and the 125 heads of nuisance in 29 Cyc. 1165–1184. A valuable collection of specific nuisances, within the doctrine of one state, can be found in Pepper & Lewis' Pennsylvania Digest, cc. 23938–24026.

[66] The statement of the case is abridged, and portions of the opinion are omitted.

phere; and there can, I think, be no doubt upon the facts and law but that this question must be answered in the affirmative, meaning, by "untainted" and "unpolluted," not necessarily air as fresh, free and pure as at the time of building the plaintiffs' house the atmosphere there was, but air not rendered to an important degree less compatible, or at least not rendered incompatible, with the physical comfort of human existence, a phrase to be understood of course with reference to the climate and habits of England.

It is next to be considered whether the defendant has interfered or purposes to interfere materially with this right of the plaintiffs, or of the plaintiff, Mr. Pressly.

That the process of manufacturing bricks by burning them on the defendant's land, in the manner begun and now intended by him, must communicate smoke, vapours and floating substances of some kinds to the air is certain. I think it plain also, from the relative positions of the two properties, that this smoke and these vapours and floating substances, the burning being to the westward of the defendant's own house, must wholly or to a great extent enter and become mixed with the air supplying the plaintiffs' house, and part at least of the garden or pleasure-ground belonging to it, and this without being previously so dispersed or attenuated as to become imperceptible, or be materially impaired or diminished in force. I conceive that the plaintiffs' house, and at least part of its pleasure-ground or garden, must generally or often, if the manufacture shall proceed, be subjected substantially, as far as the quality of the atmosphere is concerned, to the original and full strength of the mixture and dose thus produced. I speak without forgetting the trees that stand along the line of the boundary, and without assuming their continuance, or the contrary.

The question then arises whether this is or will be an inconvenience to the occupier of the plaintiffs' house as occupier of it, a question which must, I think, be answered in the affirmative; though, whether to the extent of being noxious to human health, to animal health, in any sense, or to vegetable health, I do not say nor deem it necessary to intimate an opinion;[67] for it is with a private not a public nui-

[67] Compare Campbell v. Seaman (1876) 63 N. Y. 568, 20 Am. Rep. 567: D., a large manufacturer of bricks from clay upon his own land, used a process which caused each kiln to give out, for at least two days of its burning, a volume of sulphurous acid gas. While D. was thus making bricks, P. built a handsome residence on the adjoining property. The residence stood in some 40 acres of ornamental grounds. The gas from D.'s kilns destroys P.'s white and yellow pines and Norway spruces and damages his grape vines. P. seeks an injunction. Said Earl, J., delivering the opinion: "The plaintiffs had built a costly mansion and had laid out their grounds and planted them with ornamental and useful trees and vines, for their comfort and enjoyment. How can one be compensated in damages for the destruction of his ornamental trees, and the flowers and vines which surrounded his home? How can a jury estimate their value in dollars and cents? The fact that trees and vines are for ornament or luxury entitles them no less to the protection of the law. Every one has the right to surround himself with articles of luxury, and he will be no less protected than one who pro-

sance that the defendant is charged. And both on principle and authority the important point next for decision may properly, I conceive, be thus put: Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people?

And I am of opinion that this point is against the defendant. As far as the human frame in an average state of health at least is concerned, mere insalubrity, mere unwholesomeness, may possibly, as I have said, be out of the case, but the same may perhaps be asserted of stied hogs, melting tallow, and other such inventions less sweet than useful. That does not decide the dispute; a smell may be sickening though not in a medical sense. Ingredients may, I believe, be mixed with air of such a nature as to affect the palate disagreeably and offensively, though not unwholesomely. A man's body may be in a state of chronic discomfort, still retaining its health, and perhaps even suffer more annoyance from nauseous or fetid air for being in a hale condition. Nor, I repeat, do I think it incumbent on the plaintiffs to èstablish that vegetable life or vegetable health, either universally or in particular instances, is noxiously affected by the contact of vapours and floating substances proceeding from burning bricks; for, as I said, they have I think established that the defendant's intended proceedings will, if prosecuted, abridge and diminish seriously and materially the ordinary comfort of existence to the occupier and inmates of the plaintiffs' house (whatever their rank or station, whatever their age, whatever their state of health). * * *[68]

vides himself only with articles of necessity. The law will protect a flower or a vine as well as an oak. Cook v. Forbes [1867] L. R. 5 Eq. Ca. 166; Broadbent v. Imperial Gas Co. [1856] 7 De G., McN. & G. 436. These damages are irreparable, too, because the trees and vines cannot be replaced, and the law will not compel a person to take money rather than the objects of beauty and utility which he places around his dwelling to gratify his taste or to promote his comfort and his health.")

[68] Compare the remarks of the Chancellor (Zabriskie) in Cleveland v. Citizens' Gas Light Co. (1869) 20 N. J. Eq. 201, 205: "To live comfortably is the chief and most reasonable object of men in acquiring property as the means of attaining it; and any interference with our neighbor in the comfortable enjoyment of life, is a wrong which the law will redress. The only question is what amounts to that discomfort from which the law will protect. The discomforts must be physical, not such as depend upon taste or imagination. But whatever is offensive physically to the senses, and by such offensiveness makes life uncomfortable, is a nuisance; and it is not the less so, because there may be persons whose habits and occupations have brought them to endure the same annoyances without discomfort. Other persons or classes of persons whose senses have not been so hardened, and who, by their education and habits of life, retain the sensitiveness of their natural organization, are entitled to enjoy life in comfort as they are constituted. The law knows no distinction of classes, and will protect any citizen or class of citizens, from wrongs and grievances that might perhaps be borne by others without suffering or much inconvenience. The complainants have houses

It appears to me that in the present instance, the defendant as well as the plaintiffs declining to go before a jury and asking a court of chancery to decide between them without assistance in any shape from a court of law I ought to grant an injunction.*

EVERETT et ux. v. PASCHALL.

(Supreme Court of Washington, 1910. 61 Wash. 47, 111 Pac. 879, 31 L. R. A. [N. S.] 827, Ann. Cas. 1912B, 1128.)

This action was brought to enjoin the defendant from maintaining a tuberculosis sanitarium, with a capacity of ten patients, in a residential portion of the city of Seattle, on a lot separated from plaintiff's lot by an alleyway. The lower court denied an injunction, and the plaintiffs appealed.

CHADWICK, J. * * * The text of our decision has been aptly stated by counsel for appellant: "Can a tuberculosis hospital be maintained in a residential portion of a city where its maintenance depreciates the value of contiguous property from 33⅓ to 50 per cent., and where its existence detracts from the comfortable use of such residential property?"

In the evolution of the law of nuisance there has grown an element not clearly recognized at common law. Blackstone, 3 Com. 216, has defined a nuisance to be "anything that worketh hurt, inconvenience, or damage," reducing the nuisances which affect a man's dwelling to three: (1) Overhanging it; (2) stopping ancient lights; and (3) corrupting the air with smells. It will be seen that within these definitions the maintenance of a sanitarium conducted with due attention to sanitation is not a nuisance, for it creates no physical inconvenience whatever. But a new element in the law of nuisance has been developed, first, by judicial decisions, and, later, by declaratory statutes;

built and held for the purpose of residences, by families of means and respectability, and anything that by producing physical discomfort would render them unfit for such residence, or drive such families from them, is a nuisance which the law will restrain. This, then, is the question before me: Whether the proposed works of the defendants would produce such annoyance as would render such families, composed of women and children, as well as men, uncomfortable; not whether men accustomed to follow their occupations in places where they are surrounded, and unavoidably, by much that is offensive, may not be so accustomed to odors of like nature as not to be annoyed by these."

Compare Adams v. Ursell, [1913] 1 Ch. 269: (Action to restrain an alleged nuisance caused by a fried fish shop, in premises adjoining the plaintiff's residence. "The frying of fish went on daily between 11:30 a. m. and 1:30 p. m., and between 6:30 and 10:30 p. m. The plaintiff gave evidence that the odour caused by frying the fish pervaded every room of his house and affected the flavour of butter in his larder; and that the vapour from the defendant's cooking stove appeared in the plaintiff's house like a fog or mist." But it appeared that this was not injurious to health.)

*An appeal from that decision was heard by the Lord Chancellor (Lord St. Leonards) and was dismissed, with costs.

that is, the comfortable enjoyment of one's property. It is written in the statutes of this state: "Nuisance consists in unlawfully doing an act or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency * * * or in any way renders other persons insecure in life, or in the use of property." Rem. & Bal. Code, § 8309. Respondent contends, and the court has found, that the property of respondent is not a nuisance per se, and that it is so conducted that it is not, and cannot be, a nuisance by reason of its use; that there is no real danger; that the fear or dread of the disease is, in the light of scientific investigation, unfounded, imaginary, and fanciful; and that the injury, if any, is damnum absque injuria. On the other hand, the appellants insist that the location of a sanitarium for the treatment of a disease, of which there is a positive dread which science has so far failed to combat, so robs them of that pleasure in, and comfortable enjoyment of, their home as to make it an actionable nuisance under the statute; and, furthermore, under the findings of the court, that the presence of the sanitarium in a district given over to residences, and which has depreciated property from 33 to 50 per cent., is such a deprivation of property as will warrant a decree in their favor under the maxim, "Sic utere tuo ut alienum non lædas."

Waiving for the present the substantial pecuniary damage which the court found to exist, and addressing ourselves to the principle underlying the lower court's decree—that is, that the danger being only in the apprehension of it, a fear unfounded and unsustained by science, a demon of the imagination—the courts will take no account of it: If dread of the disease and fear induced by the proximity of the sanitarium, in fact, disturb the comfortable enjoyment of the property of the appellants, we question our right to say that the fear is unfounded or unreasonable, when it is shared by the whole public to such an extent that property values are diminished. The question is, not whether the fear is founded in science, but whether it exists; not whether it is imaginary, but whether it is real, in that it affects the movements and conduct of men. Such fears are actual, and must be recognized by the courts as other emotions of the human mind. That fear is real in the sense indicated, and is the most essentially human of all emotions, there can be no doubt. * * *

Nuisance is a question of degree, depending upon varying circumstances. There must be more than a tendency to injury. There must be something appreciable. The cases generally say, "tangible, actual, measurable, or subsisting." But in all cases, in determining whether the injury charged comes within these general terms, resort should be had to sound common sense. Each case must be judged by itself. Joyce on Nuisances, 19. Regard should be had for the notions of comfort and convenience entertained by persons generally of ordinary tastes and susceptibilities. Columbus Gaslight & Coke Co. v. Freeland, 12 Ohio St. 392; Barnes v. Hathorn, 54 Me. 124. The nuisance

and discomfort must affect the ordinary comfort of human existence as understood by the American people in their present state of enlightenment. Joyce on Nuisances, § 20. The theories and dogmas of scientific men, though provable by scientific reference, cannot be held to be controlling unless shared by the people generally. In Grover v. Zook, 44 Wash. 494, 87 Pac. 639, 7 L. R. A. (N. S.) 582, 120 Am. St. Rep. 1012, 12 Ann. Cas. 192, this court said: "That pulmonary tuberculosis is both contagious and hereditary, as these terms are understood (although not in a strictly technical and professional sense), as well as infectious, admits of little, if any, doubt." This principle applies with peculiar force in this case; for aside from the general dread of the disease, as found by the court, it is also shown that the security of the public depends upon proper precautions and sanitation, which may at any time be relaxed by incautious nurses or careless or ignorant patients.

Furthermore, the court found that the bacilla of the disease may be carried by house flies. Thus every house fly that might drone a summer afternoon in the drawing room or nursery is a constant reminder to plaintiffs of their neighbor, tending to disquiet the mind and render the enjoyment of their home uncomfortable. The only case we find holding that fear alone will not support a decree in this class of cases is Anonymous, 3 Atk. 750, where Lord Hardwicke said: "And the fears of mankind, though they may be reasonable ones, will not create a nuisance." Our statute modifies, if indeed it was not designed to change, this rule. Under the facts, we cannot say that the dread which is the disquieting element upon which plaintiffs' complaint is made to rest is unreal, imaginary, or fanciful. In so doing, we are not violating the settled principles of the law, but affirming them.

We conceive the case of Stotler v. Rochelle, 83 Kan. 86, 109 Pac. 788, 29 L. R. A. (N. S.) 49, to be directly in point. There we find the same contentions made as here. The question was whether the fear of cancer was sustained in the light of medical authority. The court said: "In the present state of accurate knowledge on the subject, it is quite within bounds to say that, whether or not there is actual danger of the transmission of the disease under the conditions stated, the fear of it is not entirely unreasonable." The unusual feature of that case, in that judicial notice is taken of the fact that fear may be urged as a ground for injunctive relief, challenged the interest of the Honorable John D. Lawson, the learned editor of the American Law Review. He takes no issue with the rule. He says: "A hospital, said the court, is not a nuisance per se, or even prima facie, but it may be so located and conducted as to be a nuisance to people living close to it. The question was not whether the establishment of the hospital would place the occupants of the adjacent dwellings in actual danger of infection, but whether they would have reasonable ground to fear such a result, and whether, in view of the general dread in-

spired by the disease, the reasonable enjoyment of their property would not be materially interfered with by the bringing together of a considerable number of cancer patients in this place. However carefully the hospital might be conducted, and however worthy the institution might be, its mere presence, which would necessarily be manifested in various ways, would make the neighborhood less desirable for residence purposes, not to the oversensitive alone, but to persons of normal sensibilities. The court concluded that upon these considerations the injunction was rightfully granted. The plaintiff, as the owner and occupant of adjacent property, had such a peculiar interest in the relief sought as to enable him to maintain the action." 40 Am. Law Review, No. 5, p. 759.

In the case of Baltimore v. Fairfield Imp. Co., 87 Md. 352, 39 Atl. 1081, 40 L. R. A. 494, 67 Am. St. Rep. 344, an injunction against placing a leper in a residence neighborhood for care and restraint was justified upon the ground that the disease produced a terror and dread in the minds of the ordinary individual. In that case, the court said: "Leprosy is, and always has been, universally regarded with horror and loathing. * * * The horror of its contagion is as deep-seated today as it was more than 2,000 years ago in Palestine. There are modern theories and opinions of medical experts that the contagion is remote and by no means dangerous; but the popular belief of its perils founded on the Biblical narrative, on the stringent provisions of the Mosaic law that show how dreadful were its ravages and how great the terror which it excited, and an almost universal sentiment, the result of a common concurrence of thought for centuries, cannot in this day be shaken or dispelled by mere scientific asservation or conjecture. It is not, in this case, so much a mere academic inquiry as to whether the disease is in fact highly or remotely contagious; but the question is whether, viewed as it is by the people generally, its introduction into a neighborhood is calculated to do a serious injury to the property of the plaintiff there located." In Cherry v. Williams, 147 N. C. 452, 61 S. E. 267, 125 Am. St. Rep. 566, 15 Ann. Cas. 715, a temporary restraining order was granted against the maintenance of a tuberculosis hospital, notwithstanding evidence was introduced, as in this case, tending to show that the establishment of such a hospital, if properly maintained and conducted, would not be a menace to the health of the community, but in fact a benefit. We have no cases in this state directly in point, yet a case not without bearing is that of Shepard v. City of Seattle, 59 Wash. 363, 109 Pac. 1067, 40 L. R. A. (N. S.) 647. Judge Rudkin, delivering the opinion of the court, said: "The presence of a private insane asylum, with its barred windows, and irresponsible inmates, would annoy, injure, and endanger the comfort, safety, and repose of any person of average sensibilities if located within 200 feet of his place of abode. In other words, it is a matter of common knowledge that the presence of such an institution

in a residential portion of a city would practically destroy the value of all property within its immediate vicinity for residence purposes."

We therefore conclude that the lower court erred in denying an injunction. The case is remanded with instructions to enter a decree upon the findings in favor of appellant.[69]

[69] The statement of facts is abridged and part of the opinion is omitted.

But see Board of Health v. North American Home (1910) 77 N. J. Eq. 464, 78 Atl. 677: ("Notwithstanding the great public good which will necessarily result from the work of an institution of this nature [a sanitarium devoted exclusively to the treatment of children afflicted with bone tuberculosis], it is manifest that if the health of the residents of Ventnor City is jeopardized by its maintenance, a court of equity may grant such relief as will afford adequate protection to the residents of that city from the threatened danger; but if no real danger of that nature exists, the mere fact that uninformed people who are unacquainted with the true conditions may or probably will assume such a danger to exist cannot be made the basis of equitable relief." Per Leaming, V. C.)

In Tod-Heatley v. Benham (1888) 40 Ch. D. 80, 98, Bowen, L. J., remarked: "I will assume as a matter of argument only that 'nuisance' in this covenant (in a building lease against doing any act which shall or may be or grow to the annoyance, nuisance, grievance or damage of the lessor, his heirs or assigns) means only a nuisance at common law; that is, in the language of Vice-Chancellor Knight Bruce in Walter v. Selfe (1851) 4 De G. & Sm. 322, 'an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people.' Any material interference with the ordinary comfort of existence: that would be a nuisance. The law, in thus defining 'nuisance' has stopped short, I will not say of protecting the fancies of people, because the mere fancies of people I do not think can in any view be an element in the definition, but has stopped short, according to what is said in Aldred's Case (1610) 9 Rep. 58b, of giving an action in respect of that which is a matter only of delight, and not of necessity. 'Annoyance' is a wider term than 'nuisance,' and if you find a thing which reasonably troubles the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth, but of the ordinary sensible English inhabitant of a house—if you find there is anything which disturbs his reasonable peace of mind, that seems to me to be an annoyance, although it may not appear to amount to physical detriment to comfort. You must take sensible people, you must not take fanciful people on the one side or skilled people on the other; that is the key as it seems to me of this case. Doctors may be able to say, and, for anything I know, to say with certainty, that there is no sort of danger from this hospital to the surrounding neighbourhood. But the fact that some doctors think there is makes it evident at all events that it is not a very unreasonable thing for persons of ordinary apprehension to be troubled in their minds about it. And if it is not an unreasonable thing for an ordinary person who lives in the neighbourhood to be troubled in his mind by the apprehension of such risk, it seems to me there is danger of annoyance, though there may not be a nuisance. * * *"

See further Kestner v. Homeopathic M. & S. Hospital (1914) 245 Pa. 326, 91 Atl. 659, 52 L. R. A. (N. S.) 1032.

DAVIS v. SAWYER.

(Supreme Judicial Court of Massachusetts, 1882. 133 Mass. 289, 43 Am. Rep. 519.)

W. ALLEN, J. This is a bill in equity praying for an injunction to restrain the defendants from ringing a bell. The case comes here on appeal by the defendants from a decree entered by a single judge, enjoining them from ringing the bell earlier than half after 6 o'clock in the morning. The plaintiffs for many years have owned and occupied dwelling-houses situated, one about one thousand feet, and the other about three hundred feet, from a woollen mill of the defendants. The defendants began to run their mill, which had been before that occupied by other persons, in December, 1879, and about January 1, 1880, placed the bell upon the mill, and caused it to be rung every working day at 5 o'clock, and twice between 6 and 6:30 o'clock, in the morning, and at other times during the day, except that the 5 o'clock bell was discontinued during the summer months.

The plaintiffs allege that the bell as rung is a private nuisance to them, and injures their property, and disturbs the quiet and comfort of their homes; that it is not necessary for any purpose of trade or manufacture; that it is unnecessarily large, and rung at unseasonable hours, and unreasonably long. The defendants in their answer deny that the bell is a nuisance to the plaintiffs, and say that it is used by the defendants to summon the operatives in their mill to work; that it is necessary and customary to adopt some method to summon operatives in such a manufactory to their work; that the bell is of suitable size, and rung at suitable hours, and in a proper manner, for that purpose.

Two questions are presented: whether the plaintiffs have proved that the ringing of the bell is a nuisance to them; and whether it is such a nuisance that this court will interfere to restrain it by injunction.[70]

Noise which constitutes an annoyance to a person of ordinary sensibility to sound, such as materially to interfere with the ordinary comfort of life, and impair the reasonable enjoyment of his habitation, is a nuisance to him. Crump v. Lambert, L. R. 3 Eq. 409; Wesson v. Washburn Iron Co., 13 Allen, 95, 90 Am. Dec. 181; Fay v. Whitman, 100 Mass. 76. Upon a careful examination of the evidence reported, it seems fully to sustain the finding of the judge who heard the case, that the ringing of the bell was a nuisance to the plaintiffs. The bell weighs about two thousand pounds, and is set in an open tower about forty feet from the ground, and was rung for a long time at 5 o'clock, as many as ninety strokes having been repeatedly counted. The resi-

[70] The second question, whether it was such a nuisance that the court will interfere to restrain it by injunction was answered in the affirmative.
See Sawyer v. Davis (1883) 136 Mass. 239, 49 Am. Rep. 27.

dences of the plaintiffs are so situated with respect to the bell, particularly that of the plaintiff Davis, being higher than the bell and upon a hill-side, with no obstruction between, that they receive the full force of the sound, and they are in a village in which, at that hour, there is no other ringing of bells, or other disturbing noise. Without referring to the evidence in detail, or reviewing the particular circumstances affecting the question, it is enough to say that the evidence sustains what must have been found by the judge, namely, that the plaintiffs were deprived of sleep during the hours usually devoted to repose, and were personally annoyed, and disturbed in their homes, and the quiet and comfort of their dwellings were impaired, as the natural consequence of the acts of the defendants which are complained of. Nor is the fact that a large majority of the persons living nearer to the bell than the plaintiffs were not annoyed by it, at all conclusive that it would not, and did not, awaken and annoy persons of ordinary sensibility to noise situated as the plaintiffs were. Besides the consideration that nearness to the bell would not alone determine the effect produced by its sound, it is obvious that the bell was sufficient and effective to awaken persons ordinarily sensitive to sound, who were no more exposed to its effects than the plaintiffs were. That was the effect it was intended to produce, and, if it had not in fact produced the effect, its use would not have been continued. The fact that some persons may have had such associations connected with the sound that it may have been to them a pleasure rather than an annoyance, or that the sensibility of others to the sound may have become so deadened that it ceased to disturb them, shows that the noise was not a nuisance to them, but does not change its character as to others. Many persons can, by habit, lose, to some extent, their sensibility to a disturbing noise, as they can to a disagreeable taste or odor or sight, or their susceptibility to a particular poison, but it is because they become less than ordinarily susceptible to the particular impression. In this case, the evidence shows that persons were awakened and disturbed by the bell until they had lost ordinary sensibility to its sound. * * *

Decree affirmed.

ROGERS v. ELLIOTT.

(Supreme Judicial Court of Massachusetts, 1888. 146 Mass. 349, 15 N. E. 768, 4 Am. St. Rep. 316.)

Tort for a nuisance, namely, the ringing of a church bell. At the trial there was evidence tending to prove

that the plaintiff, who lived with his father in a thickly settled portion of Provincetown, had received a sun-stroke, and was carried home and a physician called to attend him; that directly opposite his father's house across a street but twenty feet in width was a Roman Catholic Church of which the defendant was the clergyman in charge; that one of the incidents

of the plaintiff's illness was that loud noises might throw him into convulsions; that the defendant was informed by the physician and the plaintiff's father of the probable consequences to the plaintiff of the ringing of the bell upon his church, and was requested not to ring it; that the defendant refused to refrain from ringing the bell, but caused it to be rung eight times upon the next Sunday, as usual, twice before each of the four services held upon that day; that the plaintiff, the windows of whose room were shut, was thrown into violent and painful convulsions at each time that the bell on the church was rung, as well as when other bells in the town were rung, or a whistle on a steamboat in the harbor was blown, and once when the town clock struck; and that the convulsions increased the illness and retarded the recovery of the plaintiff.

The judge ruled that the plaintiff was not entitled to recover, and ordered a verdict for the defendant; and reported the case for the determination of this court. If the ruling was wrong, the verdict was to be set aside and a new trial granted; otherwise, judgment was to be rendered on the verdict.

KNOWLTON, J. The defendant was the custodian and authorized manager of property of the Roman Catholic Church used for religious worship. The acts for which the plaintiff seeks to hold him responsible were done in the use of this property, and the sole question before us is whether or not that use was unlawful. The plaintiff's case rests upon the proposition that the ringing of the bell was a nuisance. The consideration of this proposition involves an inquiry into what the defendant could properly do in the use of the real estate which he had in charge, and what was the standard by which his rights were to be measured.

It appears that the church was built upon a public street in a thickly settled part of the town, and if the ringing of the bell on Sundays had materially affected the health or comfort of all in the vicinity, whether residing or passing there, this use of the property would have been a public nuisance, for which there would have been a remedy by indictment. Individuals suffering from it in their persons or their property could have recovered damages for a private nuisance. Wesson v. Washburn Iron Co., 13 Allen, 95, 90 Am. Dec. 181.

In an action of this kind, a fundamental question is, by what standard, as against the interests of a neighbor, is one's right to use his real estate to be measured. In densely populated communities the use of property in many ways which are legitimate and proper necessarily affects in greater or less degree the property or persons of others in the vicinity. In such case the inquiry always is, when rights are called in question, what is reasonable under the circumstances. If a use of property is objectionable solely on account of the noise which it makes, it is a nuisance, if at all, by reason of its effect upon the health or comfort of those who are within hearing. The right to make a noise for a proper purpose must be measured in reference to the degree of annoyance which others may reasonably be required to submit to. In connection with the importance of the business from which it proceeds, that must be determined by the effect of noise upon people gen-

erally, and not upon those, on the one hand, who are peculiarly susceptible to it, or those, on the other, who by long experience have learned to endure it without inconvenience; not upon those whose strong nerves and robust health enable them to endure the greatest disturbances without suffering, nor upon those whose mental or physical condition makes them painfully sensitive to everything about them.

That this must be the rule in regard to public nuisances is obvious. It is the rule as well, and for reasons nearly, if not quite as satisfactory, in relation to private nuisances. Upon a question whether one can lawfully ring his factory bell, or run his noisy machinery, or whether the noise will be a private nuisance to the occupant of a house near by, it is necessary to ascertain the natural and probable effect of the sound upon ordinary persons in that house,—not how it will affect a particular person, who happens to be there to-day, or who may chance to come to-morrow. Fay v. Whitman, 100 Mass. 76; Davis v. Sawyer, 133 Mass. 289, 43 Am. Rep. 519; Walter v. Selfe, 4 De G. & Sm. 315, 323; Soltau v. De Held, 2 Sim. (N. S.) 133; St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642. * * *

If one's right to use his property were to depend upon the effect of the use upon a person of peculiar temperament or disposition, or upon one suffering from an uncommon disease, the standard for measuring it would be so uncertain and fluctuating as to paralyze industrial enterprises. The owner of a factory containing noisy machinery, with dwelling-houses all about it, might find his business lawful as to all but one of the tenants of the houses, and as to that one, who dwelt no nearer than the others, it might be a nuisance. The character of his business might change from legal to illegal, or illegal to legal, with every change of tenants of an adjacent estate; or with an arrival or departure of a guest or boarder at a house near by; or even with the wakefulness or the tranquil repose of an invalid neighbor on a particular night. Legal rights to the use of property cannot be left to such uncertainty. When an act is of such a nature as to extend its influence to those in the vicinity, and its legal quality depends upon the effect of that influence, it is as important that the rightfulness of it should be tried by the experience of ordinary people, as it is, in determining a question as to negligence, that the test should be the common care of persons of ordinary prudence, without regard to the peculiarities of him whose conduct is on trial.

In the case at bar it is not contended that the ringing of the bell for church services in the manner shown by the evidence materially affected the health or comfort of ordinary people in the vicinity, but the plaintiff's claim rests upon the injury done him on account of his peculiar condition. However his request should have been treated by the defendant upon considerations of humanity, we think he could not put himself in a place of exposure to noise, and demand as of legal right that the bell should not be used.

The plaintiff, in his brief, concedes that there was no evidence of

express malice on the part of the defendant, but contends that malice was implied in his acts. In the absence of evidence that he acted wantonly, or with express malice, this implication could not come from his exercise of his legal rights. How far and under what circumstances malice may be material in cases of this kind, it is unnecessary to consider.

Judgment on the verdict.[71]

(e) WHETHER ACTUAL DAMAGE IS ESSENTIAL

TAYLOR v. BENNETT.

(At Nisi Prius, Swansea Assizes, 1836. 7 Car. & P. 329.)

Case. The first count of the declaration was for disturbing the plaintiff in the use of a well which she claimed as appurtenant to "a certain dwelling-house called Caivatre," by filling up the well with rubbish, and rendering the water muddy.

It appeared that the rubbish had been thrown into the well, but that the well had not been filled up thereby.

[71] Part of the opinion is omitted.

Accord: Lord v. De Witt (1902 C. C.) 116 Fed. 713: (P. is suffering from disease and an operation which have left him so sensitive to jar, and with so weak a heart, that if D. goes on with certain blasting which D. has begun on his own lot, with a view to building a house, the necessary jar from the blast will probably cause P.'s death. P. seeks to enjoin the blasting.)

Compare the analogous principle adopted by the Judicial Committee of the Privy Council in Eastern & South African Telegraph Company v. Cape Town Tramways Companies, [1902] A. C. 381. The action was for damages because of disturbances in the working of the plaintiffs' submarine cable, caused by an escape of electricity stored by the defendants for the working of their tramway system. Said Lord Robertson, delivering the judgment of their Lordships: "If the instrument (the plaintiffs' telegraphic cable) be taken as it was when the injury occurred, its nature is such that to insure its immunity from disturbance is a somewhat serious liability to cast on neighbours. To describe this as a delicate instrument might be inaccurate, if the term were used in relation to other electrical instruments of extreme sensibility. But in the present discussion this is not the true comparison at all. The true comparison is with things used in the ordinary enjoyment of property, and this instrument differs from such things in its peculiar liability to be affected by even minute currents of electricity. Now, having regard to the assumptions of the appellants' argument, it seems necessary to point out that the appellants, as licensees to lay their cable in the sea and as owners of the premises in Cape Town where the signals are received, cannot claim higher privileges than other owners of land, and cannot create for themselves, by reason of the peculiarity of their trade apparatus, a higher right to limit the operations of their neighbours than belongs to ordinary owners of land who do not trade with telegraphic cables. If the apparatus of such concerns requires special protection against the operations of their neighbours, that must be found in legislation; the remedy at present invoked is an appeal to a common law principle which applies to much more usual and less special conditions. A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure."

COLERIDGE, J. (in summing up). If the effect of throwing in this rubbish was merely to make the water temporarily muddy, that would be too minute a damage to justify you in finding for the plaintiff; but if you think that the defendant has shallowed the water of the well, and has thereby rendered it less convenient to the plaintiff to obtain water, the plaintiff is entitled to a verdict.[72]

Verdict for the plaintiff on the first count of the declaration. Damages 1s.

FAY v. PRENTICE et al.

(Court of Common Pleas, 1845. 1 C. B. 828, 135 Reprint, 769, 68 R. R. 823.)

Case, for erecting a cornice at the side of the house of the defendant Prentice, projecting over the garden of the plaintiff.

On the trial, after a plea of not guilty, it appeared that the defendant Prentice was possessed of a messuage adjoining the messuage and garden of the plaintiff, and built up to the extreme boundary of his own land, and that, in May, 1844, he caused to be erected thereon (by the other defendant, a builder), an ornamental cornice, which projected about fourteen inches over the plaintiff's garden. The case attempted to be made out on the part of the plaintiff was, that the plants and gravel-walk in his garden were injured by the dripping of rain from this cornice; and some of his witnesses stated, that, in the event of the cornice being permitted to remain up so long as to give the owner of the house a right to keep it there, the value of the plaintiff's premises would be thereby diminished to the extent of £100., inasmuch as he would be prevented from building to the extremity of his land. Upon cross-examination, none of the witnesses would undertake to state that any rain had fallen upon the plaintiff's garden from the time of the erection of the cornice down to the commencement of the action, the 2d of July, 1844.

It was thereupon insisted, on the part of the defendants, that, as the grievance of which the plaintiff complained in his declaration was the causing the rain-water to flow from the cornice on to the plaintiff's garden, the evidence did not sustain it, no such inconvenience as that complained of having, in fact, been sustained by the plaintiff, down to the time of the commencement of the action.

[72] "But even should you think it proved that the defendants committed the act complained of, and that they have also not succeeded in making out their justification, before you can find for the plaintiff, you must be also satisfied that the plaintiff has sustained some substantial damage; it is not every unpleasantness or inconvenience that will be a good ground for an action like the present. There are many nuisances which the law will not recognize; as, by building so as slightly to obstruct another's light, or to shut out his view of a fine prospect, and the like. You must be satisfied that the plaintiff has sustained some substantial damage." Lord Denman, summing up in Evans v. Lisle (1836) 7 Car. & P. 563, 565.

His Lordship refused to nonsuit the plaintiff, but reserved the point; and he left it to the jury to say whether or not the plaintiff had been injured by the dripping of rain from the defendant's cornice, upon his garden, or by reason of the projection itself; which latter he inclined to think gave a cause of action, inasmuch as the plaintiff would be thereby prevented from building to the extremity of his own land, if so minded. The jury returned a verdict for the plaintiff, damages 40s.

A rule nisi having been obtained to enter a nonsuit,

Shee, Serjt., urged the doctrine of Holt, C. J., in Ashby v. White (1703) 2 Ld. Raym. 938, that "every injury to a right imports a damage, in the nature of it, though there be no pecuniary loss."

(MAULE, J. I think there is no doubt that trespass would lie here: but, can the plaintiff maintain case without showing some consequential damage?)

Talfourd, Serjt., in support of the rule: It is not disputed that case will lie for a permanent injury to the plaintiff's right, upon a declaration aptly framed. But the question here is, whether any such injury (apart from the falling of rain) is suggested upon this record as will entitle the plaintiff to maintain this action. Striking out the allegation as to the dripping of rain upon the plaintiff's garden, that which remains is a mere allegation of a trespass. You cannot disengage the damage resulting from the trespass, from the trespass itself, so as to make it the subject of another form of action. Suppose the defendants had put up a pipe over their own land, in such a manner that it would only in very wet weather incommode the plaintiff; the plaintiff, clearly, could not have brought an action until some actual damage had occurred.[73]

COLTMAN, J. * * * Let us strike out of the declaration the allegation as to the dripping of rain; and then there remains simply an allegation that the defendants wrongfully and injuriously built, and caused and procured to be built, a certain cornice and projection, near to, and projecting over, the plaintiff's garden-ground, and that, by reason of the premises, the plaintiff had been greatly annoyed and incommoded in the use, possession, and enjoyment of his messuage, garden-ground, etc., and the same thereby became and was greatly deteriorated and lessened in value. Now, my brother Talfourd contends that evidence as to damage resulting to the plaintiff from the projection of the cornice, apart from rain, was not admissible, there being no allegation in the declaration to warrant it; for, that the statement as to the erection of the cornice must be considered as a mere allegation of a trespass, for which the plaintiff could not recover any damages in this form of action. It was not contended at the trial that that amounted to a trespass; nor was it so put by Sir T. Wilde, on moving

[73] The statement of the case is abridged. A part of the opinion of Coltman, J., and the concurring opinions of Maule and Cresswell, JJ., are omitted.

for the rule. Supposing it, however, to be conceded that that would amount to an act of trespass—which is opposed to the opinion of Lord Ellenborough, Pickering v. Rudd, 1 Stark. N. P. C. 56, by reason of the presumption of law, cujus est solum, ejus est usque ad cœlum, there is nothing to show that the plaintiff had, or claimed, a right so extensive as that: and it is mere matter of fact. There is nothing, therefore, in this declaration that necessarily shows that the building of the cornice amounted to a trespass; and, consequently, I see no ground for saying that the evidence that was received was improperly admitted, or that the case was improperly left to the jury. Baten's Case, 9 Co. Rep. 53b, has considerable bearing on the present. It was there alleged that the defendant erected a house at the extremity of his land so as to project or jut over the house of the plaintiffs, ad nocumentum liberi tenementi ipsorum: and the court resolved that the plaintiffs need not assign any special nuisance; for, it appeared to the court that it was to their nuisance. So, here, the mere fact of the defendants' cornice overhanging the plaintiff's land, may be considered as a nuisance to him, importing a damage which the law can estimate. And, if so, it is quite unnecessary, as I apprehend, to lay special damage in the declaration. For these reasons, I am of opinion that there is no ground for disturbing the verdict.[74]

Rule discharged.

STURGES v. BRIDGMAN.

(Chancery Division, 1878. Court of Appeal, 1879. 11 Ch. Div. 852.)

The plaintiff was a physician. In the year 1865 he purchased the lease of a house in Wimpole Street, London, which he occupied as his professional residence. Wimpole Street runs north and south, and is crossed at right angles by Wigmore Street. The plaintiff's house was on the west side of Wimpole Street, and was the second house from the north side of Wigmore Street. Behind the house was

[74] See the remarks of Kelly, C. B., in Harrop v. Hirst (1868) L. R. 4 Ex. 43, 46: "The plaintiffs claim, with other persons, inhabitants of the same district as themselves, a right to a continuous flow of water for domestic purposes from a spout situated in the street of Tamewater, in the parish of Saddleworth, in the West Riding of Yorkshire. The defendant is the occupier and owner of certain land through which the stream on which the spout is dependent for its supply of water, flows; and he has from time to time abstracted water from the stream, to such an extent as to render the amount which reaches the spout to be sometimes insufficient for the supply of the whole district entitled to make use of it. It did not appear, however, at the trial that the plaintiffs themselves had ever suffered any actual personal inconvenience from the want of water, and the question is, whether, under these circumstances, an action is maintainable at their suit—in other words, does such an action lie without proof of any actual personal and particular damage? I think it is clear on the authorities, and especially on the case of Westbury v. Powel, cited in Fineux v. Hovenden (1599) Cro. Eliz. 661, that such an action is maintainable."

a garden, and in 1873 the plaintiff erected a consulting-room at the end of his garden.

The defendant was a confectioner in large business in Wigmore Street. His house was on the north side of Wigmore Street and his kitchen was at the back of his house, and stood on ground which was formerly a garden and abutted on the portion of the plaintiff's garden on which he built the consulting-room. So that there was nothing between the plaintiff's consulting-room and the defendant's kitchen but the party-wall. The defendant had in his kitchen two large marble mortars set in brickwork built up to and against the party-wall which separated his kitchen from the plaintiff's consulting-room, and worked by two large wooden pestles held in an upright position by horizontal bearers fixed into the party-wall. These mortars were used for breaking up and pounding loaf-sugar and other hard substances, and for pounding meat.

The plaintiff alleged that when the defendant's pestles and mortars were being used the noise and vibration thereby caused were very great, and were heard and felt in the plaintiff's consulting-room, and such noise and vibration seriously annoyed and disturbed the plaintiff, and materially interfered with him in the practice of his profession. In particular the plaintiff stated that the noise prevented him from examining his patients by auscultation for diseases of the chest. He also found it impossible to engage with effect in any occupation which required thought and attention. The use of the pestles and mortars varied with the pressure of the defendant's business, but they were generally used between the hours of 10 a. m. and 1 p. m.

The plaintiff made several complaints of the annoyance, and ultimately brought this action, in which he claimed an injunction to restrain the defendant from using the pestles and mortars in such manner as to cause him annoyance.

The defendant stated in his defence that he and his father had used one of the pestles and mortars in the same place and to the same extent as now for more than sixty years, and that he had used the second pestle and mortar in the same place and to the same extent as now for more than twenty-six years. He alleged that if the plaintiff had built his consulting-room with a separate wall, and not against the wall of the defendant's kitchen, he would not have experienced any noise or vibration; and he denied that the plaintiff suffered any serious annoyance, and pleaded a prescriptive right to use the pestles and mortars under the 2 & 3 Will. IV, c. 71.

Issue was joined, and both parties went into evidence. The result of the evidence was that the existence of the nuisance was, in the opinion of the court, sufficiently proved; and it also appeared that no material inconvenience had been felt by the plaintiff until he built his consulting-room.

The action came on for trial before the Master of the Rolls.

JESSEL, M. R.[75] I think this is a clear case for the plaintiff. There is really no dispute as to this being a nuisance; in fact, the evidence is all one way, and, as has been often said in these cases, the plaintiff is not bound to go on bringing actions for damages every day, when he is entitled to an injunction.

The only serious point which has been argued for the defendant is that by virtue of the statute, or by prescription, he was entitled as against the plaintiff to make this noise and commit a nuisance. Now the facts seem to be that until a very recent period it was not a nuisance at all. There was an open garden at the back of and attached to the plaintiff's house, and the noise, it seems, if it went anywhere, went over the garden, and, of course, was rapidly dispersed; as far as I can see upon the evidence before me, there was until a recent period no nuisance to anybody—no actionable nuisance at all. The actionable nuisance began when the plaintiff did what he had a right to do, namely, built a consulting-room in his garden, and when, on attempting to use the consulting room for a proper purpose, he found this noise too great for anything like comfort. That was the time to bring an action for nuisance.

Now, under those circumstances, it appears to me that neither the defence of the statute, nor the defence of the right by prescription, can possibly avail. * * *

It seems to me that, neither on the theory of lost grant nor on the statute, can the defendant claim to do what he has done, and therefore the plaintiff is entitled to an injunction; but as it would be somewhat hard upon a confectioner to alter his mode of business at the height of the London season, I will give him a reasonable time, say until the 1st of August, to alter the position of his mortars.[76]

[75] Part of the opinion is omitted.

Compare Dana v. Valentine (1842) 5 Metc. (Mass.) 8: P. sought an injunction to restrain D. from carrying on the business of slaughtering cattle on his land adjoining P.'s property. The defense was that D. had been carrying on this business at this place for more than twenty years without molestation. But to this it was objected that P.'s property had been vacant during this period, that he had suffered no annoyance until recently, and therefore that he could not interpose to prevent its continuance. "But," said Wilde, J., "it is very clear that where a party's right of property is invaded, he may maintain an action for the invasion of his right, without proof of actual damage."

[76] From this decision the defendant appealed. After argument the Court of Appeal (James, Baggallay, and Thesiger, L. JJ.) dismissed the appeal: "The Master of the Rolls in the Court below took substantially the same view of the matter as ourselves, and granted the relief which the plaintiff prayed for and we are of opinion that his order is right and should be affirmed." The opinion in the Court of Appeal, by Thesiger, L. J., is omitted.

ROBERTS v. GWYRFAI DISTRICT COUNCIL.

(Chancery Division. [1899] 1 Ch. 583.)

The plaintiff was the owner and occupier of an ancient water-mill, with lands belonging thereto, and he claimed, as riparian owner and occupier of the same, to be entitled to the natural flow of a stream that ran past his mill from a lake at the foot of a mountain some distance above the mill, the stream being utilized for driving the mill. The plaintiff also claimed that, whenever necessary for the purposes of his mill, he was entitled, in times of drought and scarcity of water in the stream, to dam up the water of the lake as a reservoir so as to ensure a sufficient supply of water to the mill. In 1893, the defendants, who had obtained a lease of the lake from the Crown and also a lease of adjoining land for the purpose of increasing the size of the lake, informed the plaintiff of their intention to take water from the lake for the purpose of supplying certain villages in their district with water, and applied to him for his written consent thereto under section 332 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), but he refused to give such consent. Thereupon the defendants, without any further notice, laid down pipes, and under, it was said, a license granted by the Crown in 1896, constructed a dam across the end of the lake, of which the stream in question formed the natural outlet, so as to increase the water storage, a sluice being placed in the dam to regulate the outflow from the lake. The area of the lake was considerably increased by the defendants' works.

The plaintiff, in 1898, issued the writ in this action for an injunction to restrain the defendants from taking any of the water from the lake, and from doing any act whereby the flow of water in the stream through and by the plaintiff's mill and lands would be diminished. The defendants, as lessees and occupiers of land adjoining the lake, claimed riparian and other rights in the lake, including the right to take water therefrom for supplying their district, so far as they could do so without causing damage to other riparian owners. They denied that they had done or were intending to do anything whereby the flow of water in the stream past the plaintiff's mill had been or would be diminished or so as to cause any damage to the plaintiff.

The action now came on for trial with witnesses. It was admitted at the trial that the plaintiff had not yet suffered any actual damage, and that the defendants' dam had been properly constructed for the purpose they had in view; also, that an arrangement had been made by means of the sluice for providing a regulated flow of water down the stream. This, the defendants' witnesses said, would give the plaintiff a constant supply instead of an intermittent one, which the plaintiff admitted sometimes occurred in dry seasons. The plaintiff, however, insisted that he was entitled, as of right, to the flow of water past his mill unimpeded and uncontrolled in any way by the defendants.

KEKEWICH, J. * * * The defendants, in the exercise of what they conceive to be their duty and within their powers, utilised the waters of this lake by constructing certain works which are admitted at present to be properly constructed with a view of supplying the district with water. It is not suggested that the plaintiff will be any worse off now than he was before; probably he will be better off in the future than he has been in the past. The supply may not be the same, but it will be sufficient, and will be apparently more constant than it has been before, since the evidence shews it to have been of an intermittent character and sometimes very much less than was required for the purposes of the mill. But the plaintiff says: "I am entitled to insist upon having what I had before. It is immaterial whether the supply of water I had before is better or worse than what is now proposed to be given to me. It is for me to consider whether I shall derive any benefit from the alteration. I protest against any alteration at all."

Several cases have been referred to, but I intend to refer only to one of them in which occurs a passage to which Mr. Renshaw called my attention. The law on this subject has been threshed out again and again, and I do not think any advantage would be gained by my going through the authorities. A riparian proprietor or owner is entitled to say that the water which flows by his property and which is used by him for ordinary, or it may be for extraordinary, purposes shall flow in the future as it has done in the past—debet currere ut currere solebat. That seems to me to be the common law right; and unless that common law right has been affected by statute he is entitled to insist upon it. But there is one passage in Lord Cairns's speech in the House of Lords in the case of Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co., L. R. 7 H. L. 697, which, Mr. Renshaw says, instead of being in the plaintiff's favour is against him. I do not so read it. What Lord Cairns says is this (L. R. 7 H. L. 705): "Therefore, my Lords, so far as regards the position of the respondents as riparian owners, it appears to me that they clearly have a right to complain of that which is done by the appellants, if what is so done by them is insisted upon as a thing which they have a right to do." That is the qualification. "I put this qualification because, if, when the attention of the appellants had been called to what they were doing, they had not insisted upon doing it as a matter of right, I can well understand that if the Court of Chancery found * * * that no sensible damage had occurred to them, it might not have thought it necessary to interfere with them by an injunction or declaration."

What I understand Lord Cairns to mean is that, there being no sensible damage, an injunction or declaration would not have been granted unless the appellants had insisted upon what they were doing as a thing they were entitled to do as a matter of right. From which I should conclude also that, as they did insist upon it as a matter of

right, whether damage was incurred or not, the respondents were entitled to an injunction or declaration. That, as I understand, is the meaning of his Lordship's observations, and what he means by the qualification, and what he deduces from it. Therefore it seems to me that, unless the defendants have some higher authority by statute (prescription being out of the question) to interfere with the flow of water, they have no right to alter the flow even although the alteration may cause no sensible damage to the plaintiff. He is entitled to have his water flowing as it did before, and so far I am entirely in his favour. * * *

The defendants are seeking to interfere with the plaintiff's common law right, and there is no statutory power enabling them to do that. The common law right seems to me to be unaffected by the statute.

The result is that, in my opinion, the plaintiff is entitled to an injunction. The injunction will be a perpetual injunction to restrain the defendants, their servants, agents, and workmen, from taking any water from the lake for the purpose of supplying their district with water, and from doing any other act for that purpose whereby the flow of water in the stream and through and by the plaintiff's mill and lands shall be diminished.[77]

DOWNING v. ELLIOTT.

(Supreme Judicial Court of Massachusetts, 1902. 182 Mass. 28, 64 N. E. 201.)

This case was reserved from the Supreme Judicial Court, Suffolk County, for the full court, on the pleadings, master's report, and complainant's exceptions.

MORTON, J. The plaintiff is engaged in the ice business, and is the owner of a pond in Brighton, from which he cuts ice for family and wholesale trade. The defendant is the owner of a greenhouse near the pond, and heated by steam. Prior to the bringing of the bill he had used soft coal; and the bill alleges that smoke, dust, soot, and cinders were thereby deposited in the plaintiff's pond, and the ice rendered unfit for use. The prayer of the bill is that the defendant may be restrained from using soft coal or other fuel that will interfere with or injure the property or business of the plaintiff, and for the assessment of damages. * * *

The defendant's business is a lawful business, and he has a right to use his premises in any manner that will not interfere with the legal rights of others or violate the law. It cannot be said, we think, that the use of soft coal for the purpose of generating steam of itself constitutes a nuisance, and there is nothing to show that the business is not a proper one to be carried on in that locality, or that it is not carried on in a proper manner. Indeed, there would seem to be few

[77] Only so much of the case is given as relates to the one point.

businesses less objectionable than that of growing plants and flowers for sale. But, though the locality is a suitable one, and the business is lawful, and carried on in a proper manner, the defendant has no right to materially contaminate the air that comes to the plaintiff's premises, and injure his business and property, by the presence and deposit of smoke, soot, dust, and cinders. Every one has a right to have the air that comes to his premises come as pure and uncontaminated as can reasonably be expected. In thickly-settled communities absolute purity is out of the question; and the more thickly-settled the community is, and the more varied are the kinds of business, the more will the atmosphere be unavoidably impregnated with impurities. This is one of the inconveniences, if it is an inconvenience, which every one who lives in a populous neighborhood must suffer. But the fact that the atmosphere is already impure does not justify or excuse a party in adding to the impurity, so as thereby to cause still further discomfort to others, or still further injury to their business or property; and conduct which leads to such a result will constitute an invasion of the rights of the parties injuriously affected thereby. But in these as in other cases an independent wrongdoer is responsible only for the consequences of his own wrongdoing, and not for the acts or conduct of others. The burden of proof is upon the party complaining, and each case must stand on its own facts. No general rules can be laid down that will furnish an infallible guide in all cases. The most that can be done is to indicate the lines along which the decision must proceed. To entitle the plaintiff to relief, the injury of which he complains must be certain and substantial, and not slight or theoretical. The right, as already observed, is not a right to absolute purity, any invasion of which would give a right of action, but it is a right to such a degree of purity as, taking all the circumstances into account, the plaintiff is reasonably entitled to. See Ferrule Co. v. Hills, 159 Mass. 147, 34 N. E. 85, 20 L. R. A. 844; Rogers v. Elliott, 146 Mass. 349, 15 N. E. 768, 4 Am. St. Rep. 316; Smelting Co. v. Tipping, 11 H. L. Cas. 642; Crump v. Lambert, L. R. 3 Eq. 409; Walter v. Selfe, 4 De Gex & S. 315; Fleming v. Hislop (1886) 11 App. Cas. 686; Wood, Nuis. (1st Ed.) 429 et seq.

In the present case the master finds that the ice was unfit and unsuitable for the plaintiff's family trade by reason of black spots resembling soot and cinders embedded in it, and that the black specks referred to had been deposited on the surface, and had sunk into the ice in the process of alternate freezing and thawing; and he says, what is obvious, that the main question in the case is to determine from what source these specks came. Upon that question he finds as follows: "I cannot find that no particles of soot or carbon from the defendant's chimney are deposited on the plaintiff's pond or upon his ice, but I find and report that soot and cinders from the defendant's chimney, caused by the burning of soft coal by him, are only one cause contributing to the specks resembling soot and cinders in the

plaintiff's ice, rendering it unfit and unsuitable to be used and disposed of in his family trade. I further find and report, if it is material, that the portion of soot and cinders coming from the defendant's chimney is of small importance in comparison with other causes contributing to injure the plaintiff's ice and render it unfit and unsuitable as aforesaid." These findings are warranted by other facts found by the master,—such, for instance, as the general considerations affecting the locality, the precautions taken by the defendant to prevent the escape of soot and cinders, the distance from the fire to the chimney and the distance from them to the pond, the fact that the prevailing wind was not in a direction from the greenhouse towards the pond, and the experiments and other circumstances tending to show that the atmosphere abounded in impurities from other causes. There is no finding that any unusual or extraordinary volumes of smoke issued at any time from the defendant's chimney; and the fair import of the master's findings is, it seems to us, that while he cannot say that no soot and cinders from the defendant's chimney were deposited on the plaintiff's ice, if any were deposited they contributed only slightly, if at all, to the injury to the ice, and the damage done by them was insignificant as compared with that resulting from other causes. He further finds that, while the use of soft coal is not a necessity in carrying out the defendant's business, it is more economical, and saves him between $400 and $500 a year. If, therefore, an injunction should issue as prayed for, it not only will not afford the plaintiff the relief which he seeks, but will inflict great and unnecessary injury on the defendant. As the case stands, we do not think that the plaintiff is entitled to an injunction. Neither do we think that he is entitled to damages. If the alleged injuries are too slight and uncertain to be ground for an injunction, we do not see how they can be made the basis for an assessment of damages.[78]

The result is that we think that the bill should be dismissed. So ordered.

[78] Part of the opinion is omitted.

"In all these cases of nuisance, one has to consider what must be proved by the plaintiff in order to support his action. It seems to me that the House of Lords went upon the principle that, whether the plaintiff was relying upon his common law rights, or upon his prescriptive rights, or his rights of property of any sort or kind, the conditions precedent to constitute a cause of action were really identical. The courts have always been unwilling in these cases of nuisance to hold that every nuisance, apart from the rule de minimis non curat lex, should be a cause of action. On the contrary, in all these cases of nuisance which involve a limitation of a man's right to use his own land, the courts will not enforce the alleged rights of the plaintiff, unless that which has occurred is a substantial interference with his comfortable or profitable occupation of his dwelling-house, or warehouse, or house of business, as the case may be." Vaughan Williams, L. J., in Kine v. Jolly, [1905] 1 Ch. 480, 488.

(C) The Remedies in Nuisance

There was an old Assise of Nuisance; but this, as a real action, could only be used by and against freeholders, while the action of Case framed upon the analogy of it was open to all persons having an interest in possession, against all persons causing a physical injury to their land. A curious and not altogether commendable survival of the right of self-help marks the transition. Under the old Assise of Nuisance, and the still older Writ of Quod Permittat, the successful plaintiff was entitled to have the nuisance "abated," or taken away by the sheriff and the power of the county. The judgment in the action of Case in the Nature of Nuisance was merely for damages; but the complainant was, apparently, permitted to abate the nuisance himself, and the right survives to the present day, though the exercise of it has been largely superseded by the issue of mandatory injunctions.

Jenks, Short History of Eng. Law, 144 (1912).

GATES v. BLINCOE.

(Court of Appeals of Kentucky, 1834. 2 Dana, 158, 26 Am. Dec. 440.)

ROBERTSON, C. J. The plaintiff sued the defendants, in case, for diverting the water from his mill, by cutting a ditch. They attempted to justify on the ground that the mill dam was a nuisance, which they had a legal right to abate.

On the trial, the court instructed the jury that

"if the water occasioned (by the dam) was a nuisance, or had been a nuisance, and was like to become so again, the defendants had a right to cut a ditch, and draw off the water,"

and thereupon the jury found a verdict for the defendants, on which the court rendered a judgment in bar of the action. * * *

In the opinion of this court, the instruction is erroneous in three particulars:

First. It is not strictly true, that "if the dam had been a nuisance, and was like to become so again," the defendants had a right to abate it. Unless it was a nuisance at the time when the ditch was cut, no person had a right to stop or obstruct the mill without the owner's consent. It is not now material whether the evidence tended to prove that the dam was a nuisance when the ditch was cut; for the instruction clearly implies that, though it may not have been then a nuisance, the defendants had a right to abate it, if it had been, and would probably again become a nuisance; and it is evident that, even though it may have been once a nuisance, and might again become so, it may not have been a nuisance when the ditch was cut by the defendants. A probability that a thing may become a nuisance, or, in other words,

an actual and substantial annoyance, public or private, does not make a nuisance which can be lawfully abated; and therefore, Lord Hardwicke, in an anonymous case in 3 Atk. said that "the fears of mankind, though they may be reasonable, will not create a nuisance."

In a proper case, when the danger is imminent, a nuisance may be prevented by injunction; and for that which had been a common nuisance, an indictment would be an effectual and appropriate remedy.

A nuisance must be actually subsisting, to the injury of the public, or of some individual, before any person should be suffered to resort to a remedy so critical, perilous and extraordinary, as that of his own will and power, which necessity alone indulges, in cases of extremity or of great emergency, in which no ordinary remedy will be altogether effectual. The public peace should not be jeoparded, by permitting individuals to redress their own wrongs, when they might obtain adequate security and indemnity by a resort to any of the ordinary remedies in courts of justice.

Prima facie, a mill dam which was once a nuisance will continue to be so as long as it exists; but it may not; and, therefore, as the dam may not in this case have been a nuisance when the ditch was cut, the instruction was erroneous.

Second. Even though the dam may have been a nuisance when the ditch was cut, the defendants had not, as the court instructed the jury that they had, a right, as a matter of course, to abate the nuisance; because it may have been, in the opinion of the jury, a private nuisance only, and, if so, no person who was not injured by it had a right to abate it; and therefore, as the jury, and not the court, had the right to decide whether the nuisance was public or private and whether, if private, it annoyed the defendants, or any of them, the court erred in instructing the jury, that if they believed that the dam was a nuisance, the defendants had a right to abate it.

Third. If the defendants had a right to cut a ditch for abating a nuisance, their right was limited to that which was a nuisance; they had no right to draw off more water than so much as would abate the nuisance. If they transcended that limit, they did an injury to the plaintiff for which he might have an action. Rex v. Rippineau, 1 Strange, 686, and Russell on Crimes, 306. The ditch may have been deeper than the end to be legitimately effected by it, required. There was no proof as to that point, and the instruction is, in that particular, unqualified, and, therefore, is erroneous; because it imports that the defendants were justifiable, even if, in abating a nuisance, they wantonly or recklessly destroyed, without necessity, the total value of the plaintiff's mill.

Wherefore, it is considered by this court that the judgment be reversed, and the cause remanded for a new trial.[79]

[79] Part of the opinion is omitted.

See Baten's Case (1611) 9 Co. Rep. 53 b, 54 b: ("Nota reader, there are two ways to address a nusance, one by action, and in that he shall recover

STATE v. MOFFETT et al.

(Supreme Court of Iowa, 1848. 1 G. Greene, 247.)

The defendants were indicted for damaging a mill-dam. It appears from the bill of exceptions

that Moffett built and possessed a mill and dam on Skunk River in 1834 or 1835; that at the time of the alleged injury he was in possession; that in 1840 Peter Brener, built a mill and dam on the same river, about a mile and half below Moffett's mill, the effect of which was to throw back-water to an injurious extent on the wheels of Moffett's Mills, but not so as to stop them entirely; that both mills are public mills; and on the 23d of March, 1848, Moffett and the other defendants tore down Brener's dam to a considerable degree—a space from fifty to eighty feet wide, and from one to three feet deep—with intent to remove the alleged nuisance; and justified in their defense on the ground that Brener's dam was a nuisance injurious to Moffett, and that he had a right to abate it by his own act.

The prosecution asked the court to instruct the jury, that, by the 15th section of the criminal law of Iowa, entitled an "Act Defining Crimes and Punishments," the right of Moffett to abate a mill-dam as a nuisance, by his own act, was taken away; which instruction was refused. The court also refused to instruct the jury, that the act of the legislative assembly authorizing Peter Brener to build a dam did not take away Moffett's right to abate the dam as a nuisance. The court then instructed the jury, that if Brener's dam caused water to flow back upon the wheel of Moffett's mill to his serious injury, it was a private nuisance, and Moffett might pull it down so as to remove the back-water. These instructions, refused and given, are assigned for error.

KINNEY, J. The only question in this case is, whether the statute making it a penal offense to "injure a mill-dam," took away Moffett's right to abate it for a nuisance. That a person at common law has a right to abate a nuisance cannot be denied. It is one of those rights which secure to him the uninterrupted enjoyment of his person and property. When properly exercised, it may be as essential to his happiness as the right of self defense. But like other summary rights of

damages, and have judgment that the nusance shall be removed, cast down, or abated, as the case requires; or the party grieved may enter and abate the nusance himself, as appears by 17 E. 3, 44, 9 E. 4, 35, and in Penruddock's Case, but then he shall not have an action, nor recover damages, for in an assize of nusance, or quod permittat prosternere, etc., it is a good plea, that the plaintiff himself either before the writ brought, or pending the writ, has abated the nusance: for in an assise or quod permittat, he shall have judgment of two things, sc. to have the nusance abated, and to recover damages, and he has disabled himself by his own act to have judgment for one of them, s. to have a nusance abated, and therefore the action doth not lie.") James v. Hayward (1631) Cro. Car. 184, 78 Reprint, 761. Raikes v. Townsend (1804) 2 Smith, 9, 7 R. R. 776, when Serjeant Williams urged unsuccessfully that the right of abatement by self help was confined to the cases mentioned in 2 Rolle's Abridgement, 144, pls. 2 and 3, nuisances to a house, to a mill, or to land.

See also 29 Cyc. 1214 et seq.; 37 Cent. Dig. "Nuisance," §§ 51–54; Key-No. "Nuisance," §§ 20, 74.

this nature, it is confined within certain limits. No more injury to the property of another must be inflicted than is absolutely necessary to accomplish the object. A salutary check is thrown around an improper exercise of this right, as the individual is always under the peril of being deemed a trespasser, unless the existence of the nuisance is established. Thus, while a person can be the judge, in the first instance, as to the existence of the nuisance, if it should turn out otherwise he is responsible, and can be made to answer to the party injured, and may subject himself to criminal prosecution. But at common law, his right to abate a nuisance, when it really is such, is uncontroverted. And we think our statute has not impaired this right by making it penal to injure a mill-dam, if the mill-dam becomes a nuisance. The injury to the dam, to come within the purview of the statute, must be "willful or malicious." The summary abatement of a dam as a nuisance, is not necessarily attended with malicious or willful motives. It may be an act necessary for the protection and enjoyment of property. * * * [80]

Judgment affirmed.

SMITH v. GIDDY.

(High Court of Justice, King's Bench Division. [1904] 2 K. B. 448.)

The plaintiff and the defendant were the occupiers of adjoining premises. The plaintiff alleged that he had sustained damage to the extent of £60. by reason of certain elm and ash trees growing on the defendant's premises overhanging the plaintiff's premises and interfering with the growth of his fruit trees. The plaintiff claimed damages and an injunction.

The county court judge held that the plaintiff's only remedy was to abate the nuisance by cutting back the overhanging trees himself, and he directed a nonsuit. The plaintiff appealed.[81]

WILLS, J. I am of opinion that the judgment of the county court judge in this case was erroneous, and that there must be a new trial. It is no doubt quite true that there is no case to be found in the books in which the action has been held to lie against an adjoining owner for allowing his trees to project over the boundary where the only damage resulting from the projection has been a damage to the plaintiff's crops. It was pointed out by Kelly, C. B., in Crowhurst v. Amersham Burial Board [1878] 4 Ex. D. 5, that there was no precedent for such an action, and it was there suggested that there was much to be said on the grounds of general convenience in favour of such an action not being maintainable. But I am of opinion that the principle upon which that case was decided is enough to enable us to decide

[80] Part of the opinion, discussing the scope of the statute, is omitted.

[81] See Lemmon v. Webb, [1894] 3 Ch. 1.

the present case in favour of the plaintiff. There the action was brought against the owners of a yew tree which they or their predecessors in title had planted on their land and which they allowed to overhang their boundary, whereby the plaintiff's horse in the adjoining meadow feeding on the projecting branches was poisoned; and it was held that the action lay. The court treated the case as an illustration of the rule in Rylands v. Fletcher [1868] L. R. 3 H. L. 330, that a person who brings on his land something that is likely to do damage if it escapes is responsible if that damage occurs.[82] It seems to me that there is no distinction in principle between the damage occasioned in that case and the damage in the present. The injury to the plaintiff's fruit trees was the natural consequence of the defendant's trees being allowed to overhang.

I have come to this conclusion with considerable reluctance, for I have a strong feeling that it is highly desirable not to establish new causes of action if it can possibly be avoided, but I do not see how we can refuse to hold that this action lies without departing from the principle of Crowhurst's Case. Moreover, we are fortified in this view by the dictum of Kay, L. J., in the case of Lemmon v. Webb [1894] 3 Ch. 1, where, although it was not necessary to the decision, he distinctly states it as his opinion that for any damage occasioned by overhanging boughs an action on the case would lie. It has been contended that the remedy which the plaintiff has of cutting the trees back himself is all sufficient, and that under those circumstances it is unnecessary to invent a new cause of action. But that, in my opinion, is no answer to the action.

KENNEDY, J. I am of the same opinion. The county court judge has nonsuited the plaintiff; therefore we must assume, for the purposes of the present argument, that the damage alleged in the particulars has actually been suffered. If that be so, the damage was substantial. And under those circumstances I fail to see any reason in principle why the action should not lie as for a nuisance. I cannot differentiate the present case in principle from Crowhurst v. Amersham Burial Board. If trees although projecting over the boundary are not in fact doing any damage, it may be that the plaintiff's only right is to cut back the overhanging portions; but where they are actually doing damage, I think there must be a right of action. In such a case I do not think that the owner of the offending trees can compel the plaintiff to seek his remedy in cutting them. He has no right to put the plaintiff to the trouble and expense which that remedy might involve. The case must go back for a new trial.

Judgment for the appellant.[83]

[82] See infra.

[83] As to the effect if it had appeared in this case that the trees were a natural growth, see Giles v. Walker (1890) 24 Q. B. D. 656.

COULSON v. WHITE.

(High Court of Chancery, 1743. 3 Atk. 21, 26 Reprint, 816.)

THE LORD CHANCELLOR. Every common trespass is not a foundation for an injunction in this court, where it is only contingent and temporary; but if it continues so long as to become a nuisance, in such a case the court will interfere and grant an injunction to restrain the person from committing it.[84]

CRUMP v. LAMBERT.

(In Chancery, 1867. L. R. 3 Eq. 409.)

LORD ROMILLY, M. R. The plaintiff in this cause is the occupier and owner of a house in Walsall, in Staffordshire, and complains that the defendants have recently erected an iron factory adjoining his grounds, the smoke, noise, and effluvia proceeding from which occasion a nuisance which he applies to this court to abate. The defence is, in substance, twofold; first, one of law, and secondly, one of fact. The defendants say that smoke alone does not entitle a person to come here for an injunction; that a disagreeable smell alone does not entitle a plaintiff to ask for an injunction; that noise alone does not entitle a plaintiff to ask for an injunction. * * *

With respect to the question of law, I consider it to be established by numerous decisions that smoke, unaccompanied with noise or noxious vapour, that noise alone, that offensive vapours alone, although not injurious to health, may severally constitute a nuisance to the owner of adjoining or neighbouring property; that if they do so, substantial damages may be recovered at law, and that this court, if applied to, will restrain the continuance of the nuisance by injunction in all

[84] As late as 1834, Lord Chancellor Brougham remarked, in Earl of Ripon v. Hobart, 3 My. & K. 169, 180: "It is always to be borne in mind that the jurisdiction of this court over nuisance by injunction at all is of recent growth, has not till very lately been much exercised, and has at various times found great reluctance on the part of the learned judges to use it, even in cases where the thing or the act complained of was admitted to be directly and immediately hurtful to the complainant. All that has been said in the cases where this unwillingness has appeared, may be referred to in support of the proposition which I have stated; as in The Attorney-General v. Nichol [1809] 16 Ves. 338, The Attorney-General v. Cleaver [1811] 18 Ves. 211, an Anonymous case [1790] 1 Ves. Jun. 140, before Lord Thurlow, and others. It is also very material to observe, what is indeed strong authority of a negative kind, that no instance can be produced of the interposition by injunction in the case of what we have been regarding as eventual or contingent nuisance."

On the present extent and variety of this equitable jurisdiction, see 29 Cyc. 1219 et seq., and 21 Halsbury's Laws of England, 560.

The principles followed in granting or refusing an injunction for a nuisance are in the main those which apply generally to this branch of equity.

cases where substantial damages could be recovered at law. Elliotson v. Feetham [1835] 2 Bing. N. C. 134, and Soltau v. De Held [1851] 2 Sim. N. S. 133, are instances relating to noise alone. In the former, damages were recovered in an action at law; and in the second, an injunction was granted on account of sound alone.

What constitutes a nuisance is thus defined by Lord Justice Knight Bruce, when Vice-Chancellor, in Walter v. Selfe, 4 De G. & Sm. 322: "Both on principle and authority the important point next for decision may properly, I conceive, be thus put: Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort, physically, of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people?" This definition is adopted in Soltau v. De Held by Vice-Chancellor Kindersley, and is, I apprehend, strictly correct; and it agrees with the principle of all the cases referred to at common law and approved of in the case of St. Helen's Smelting Company v. Tipping, 11 H. L. C. 642, which settled the law as regards another part of this case, to which I shall presently have occasion, when citing Hole v. Barlow, 4 C. B. N. S. 334 (E. C. L. R. vol. 93), to refer. The law on this subject is, I apprehend, the same, whether it be enforced by action at law or by bill in equity. In any case where a plaintiff could obtain substantial damages at law, he is entitled to an injunction to restrain the nuisance in this court.[85]

RIDER v. CLARKSON.

(Court of Chancery of New Jersey. 1910. 77 N. J. Eq. 469, 78 Atl. 676, 140 Am. St. Rep. 614.)

Suit for injunction by Susie B. Rider and others against Mary E. Clarkson and others.

LEAMING, V. C. * * * It is lawful for a person to keep a vicious dog. De Gray v. Murray, 69 N. J. Law, 458, 55 Atl. 237. But it is not lawful for a person to keep a vicious dog in such manner that neighbors are unnecessarily exposed to danger. It is no less a nuisance for a neighbor to keep a vicious dog without appropriate restraint and in such manner that the dog can and will escape and inflict bodily harm than it is for such neighbor to conduct a lawful business in such negligent manner as to endanger the health of residents in the vicinity. The undisputed facts are that the dog in question is vicious, and is only restrained by a fence over which he can jump at will; and that the owner of the dog refuses to adopt suitable

[85] Only so much of the case is given as relates to the one point.
On the limitations attaching to equity jurisdiction in such causes, see 29 Cyc. 1222 et seq.

measures to prevent the escape of the dog; and that complainants are in danger of being attacked by the dog at such times as they leave their homes. The dog has been ordered by the municipality to be killed, pursuant to the provisions of a local ordinance, but the execution of that order had been prevented by a writ of certiorari; in the meantime the unlawful conduct of defendants renders it unsafe for complainants to pass to and from their homes. I think it the undoubted duty of a court of equity to extend immediate relief against the continuance of such conditions.

I see no reason why complainants may not appropriately join in the bill. They suffer special injury by reason of the proximity of their properties to the property occupied by defendants, and the wrongful conduct of defendants affects them in a similar way and at the same time. See Rowbotham v. Jones, 47 N. J. Eq. 337, 20 Atl. 731, 19 L. R. A. 663.

I will advise a preliminary injunction restraining defendants from longer keeping the dog on the premises in question without the adoption of suitable measures to prevent the escape of the dog from the premises.[86]

COOMBS et al. v. LENOX REALTY CO.

(Supreme Judicial Court of Maine. 1913. 111 Me. 178, 88 Atl. 477, 47 L. R. A. [N. S.] 1085.)

SPEAR, J. This is a bill in equity in which the plaintiffs allege that the brick wall of the defendant's building, 18 feet from the ground, and between the second and third floor continuing to the roof, shows a maximum overhang upon the plaintiffs' premises of about 1½ inches, and prays that the encroachment upon the plaintiff's land occasioned thereby may be adjudged a nuisance and that the defendant may be ordered and required to remove it forthwith.

The case comes up on appeal from the decree of the sitting justice. In this decree the law and the facts are so fully stated that the court feels fully justified in adopting it as a proper declaration of the law. If we were to write an opinion, it would necessarily be but a restatement of the law found in the decree, as we fully indorse both the reasoning and the result therein announced. The decree is as follows:

"The case came on to be heard on bill, answer, and proof, and was argued by counsel. And now, after mature deliberation, I make the following findings of fact and rulings in law:

"The defendant in the winter of 1911–12 erected a four-story brick apartment building on Turner street, Auburn, on land adjoining the plaintiff's land. At the bottom, the wall next to the plaintiff's land

[86] Part of the opinion is omitted.

was built about one inch in from the division line, and was so continued up to the second story. At a point between the second and third stories, owing it is said to the freezing of the mortar nights in extreme cold weather, the wall gradually bulged out as it was built up, until it was in a place or places two inches over the line. The trouble was then noticed by the contractor, and the wall was gradually drawn in until at the top it projected over the line about a quarter of an inch. The result was that when the wall was completed there was an area on its side, towards the easterly end, 20 to 30 feet high and 30 to 40 feet long, which overhung the plaintiff's land, and the overhang was 2 inches at the most, and from that down to a point at the bottom, and a quarter of an inch at the top.

"It is not shown that any of the defendant's officers or agents knew of the bulging until after the building was completed. The contractor testified, and I find, that, although he knew of the bulging before the wall was completed, he did not think it was over the line. The plaintiffs have not been guilty of laches, and have in no sense acquiesced.

"It is not disputed that the plaintiffs, owning the soil in fee, owned also ad usque cœlum, and the overhang of the wall is an invasion of their rights. They have already brought two successive actions of trespass quare clausum fregit for the trespass, and have recovered judgment in each. The plaintiffs now bring this bill for a mandatory injunction to compel the defendant to remove the overhang of the wall which is over their line.

"The plaintiffs have a three-story wooden tenement building on their lot, standing so near the offending brick wall of the defendant that it will be impossible to remedy a very considerable portion of the overhang by working on the outside. The wall will have to be torn out from the inside and rebuilt, if abatement is ordered. The plaintiffs are sustaining no pecuniary damage at the present time, and will not so long as their present use of their property is unchanged.

"It is not disputed that equity has jurisdiction to order the invasion of the plaintiff's premises to be abated. The grounds of such jurisdiction, as usually stated, are the want of a complete remedy at law, since full compensation for the entire wrong cannot be obtained in an action at law for damages (see 4 Pomeroy's Eq. Juris. § 1357, and note) and to prevent a multiplicity of actions, since a plaintiff might be compelled to bring a succession of actions in order to obtain relief. See 1 Pomeroy's Eq. Juris. § 252, and 5 Pomeroy's Eq. Juris. §§ 496, 516.

"But it does not follow that a writ of mandatory injunction should be granted in all cases. It is a discretionary writ. The discretion, however, is not an arbitrary one, but is to be exercised in accordance with settled rules of law. The rules by which I think this case must be tested are stated in Lynch v. Union Institution for Savings, 159 Mass. at page 308, 34 N. E. at page 364, 20 L. R. A. 842, in these

words: 'In general, where a defendant has gone on without right and without excuse in an attempt to appropriate the plaintiff's property, or to interfere with his rights, and has changed the condition of his real estate, he is compelled to undo, so far as possible, what he had wrongfully done affecting the plaintiff, and to pay the damages. In such a case a plaintiff is not compelled to part with his property at a valuation, even though it would be much cheaper for the defendant to pay the damages in money than to restore the property. * * * On the other hand, where, by an innocent mistake, erections have been placed a little upon the plaintiff's land, and the damages caused to the defendant by removal of them would be greatly disproportionate to the injury of which the plaintiff complains, the court will not order their removal, but will leave the plaintiff to his remedy at law. * * * The doctrines applied by the court of equity in cases of this kind call for a consideration of all the facts and circumstances which help to show what is just and right between the parties.'

"I think the case at bar falls within the second class of cases mentioned in the Massachusetts case. Here there was no intention nor attempt to appropriate the plaintiff's property. The contractor made a mistake. The injury to the plaintiffs is now trivial, and at no time can it be so great that it would not be many times outweighed by the expense, damage, and loss which would necessarily be occasioned to the defendant if it should be compelled to remove the overhang of its wall. I do not think that equity requires or permits the court to use its strongest arm to produce a result so inequitable. I think the bill should be dismissed, but, under the circumstances, without costs. For further discussion, see Methodist Epis. Soc. v. Akers, 167 Mass. 560, 46 N. E. 381; Harrington v. McCarthy, 169 Mass. 492, 48 N. E. 278, 61 Am. St. Rep. 298; Levi v. Worcester Consolidated St. Ry., 193 Mass. 116, 78 N. E. 853; Kendall v. Hardy, 208 Mass. 20, 94 N. E. 254; Kershishian v. Johnson, 210 Mass. 135, 96 N. E. 56, 36 L. R. A. (N. S.) 402; Hunter v. Carroll, 64 N. H. 572, 15 Atl. 17.

"It is therefore ordered, adjudged, and decreed that the bill be dismissed."

Appeal denied.[87]

[87] See Pile v. Pedrick (1895) 167 Pa. 296, 31 Atl. 646, 647, 46 Am. St. Rep. 677; Huber v. Stark (1905) 124 Wis. 359, 102 N. W. 12, 109 Am. St. Rep. 937, 4 Ann. Cas. 340; Baugh v. Bergdoll (1910) 227 Pa. 420, 76 Atl. 207; Kershishian v. Johnson (1911) 210 Mass. 135, 96 N. E. 56, 36 L. R. A. (N. S.) 402.

And see "Adjoining Landowners," 1 Cyc. 773, 1 C. J. 1208; "Injunction," 22 Cyc. 834, note 42.

(D) Excusable Nuisances [88]

DELAWARE & HUDSON CANAL CO. v. TORREY.

(Supreme Court of Pennsylvania, 1859. 33 Pa. 143.)

This was an action on the case by the canal company for obstructing the navigation of its canal, by the discharge of saw-dust from the defendant's mill into the Lackawaxen river, a public highway, in such a manner as to allow the saw-dust to enter the feeder of the company's canal and basin.

It appeared that the defendant had built a saw-mill on the south side of the Lackawaxen, in such a way that the tail-race terminated at the head of the company's feeder, and the saw-dust from the mill entered the feeder, and passed down to the basin, where it settled and obstructed the navigation. The defendant offered evidence to prove that it was impossible for him to use and enjoy his saw-mill, without letting the saw-dust fall into, and pass off with the stream. The court admitted this evidence, notwithstanding an objection by the plaintiff, and sealed a bill of exceptions. Verdict and judgment for the defendant.[89]

STRONG, J. The court was requested to instruct the jury, "that if the whole or any part of the saw-dust made at the defendant's mill, came into the company's basin and there intermingled with other matter, obstructing the navigation, and making it necessary for the company to remove it, then the verdict should be for the plaintiffs."

[88] "In an action on the case, under the plea of not guilty, the defendant may not only put the plaintiff upon proof of the whole charge, contained in the declaration, but may give in evidence any justification or excuse of it, or shew a former recovery, release, or satisfaction. * * * So in case for obstructing ancient lights, a custom of London to build on an ancient foundation to any height, may be given in evidence by the defendant; and though a license must be pleaded in trespass, yet it is the practice to admit it in evidence in an action on the case." 1 Chitty, Pl. 488 (1828).

Rules in Hilary Term (1833): "Pleadings in Particular Actions: IV. In Case: 1. In actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea: all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration. In an action on the case for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house.

In an action on the case, for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way.

2. All matters in confession and avoidance shall be pleaded specially." See Chitty, Pl. (16th Am. Ed.) 755.

[89] The statement of the case is abridged and part of the opinion is omitted.

This proposition the court refused to affirm, but on the contrary charged the jury that, if they believed the saw-dust from the defendant's mill alone, unaccompanied and unmixed with saw-dust from other mills, would not inconvenience the plaintiffs, they could not recover. Thus the jury were led to believe that the deposit of saw-dust by the defendant in their basin was not sufficient to enable the plaintiffs to maintain an action, unless it alone caused a practical inconvenience and obstruction to the navigation. This we hold to have been erroneous, and the error was a radical one underlying the whole charge.[90] It was repeated in various forms, and covered nearly the whole ground of contest in the case. The facts, as developed by the evidence, seem to leave no doubt, that the dust from the defendant's mill, falling into the stream, was carried by the current through the feeder of the canal into the basin, and there deposited. The defence consisted mainly, not in a denial of this fact, but in the assertion, that if there had not been intermingled with it saw-dust, culm, and other substances from other mills, no obstruction of the navigation would have been caused. In the way in which the learned judge put the case to the jury, they must have understood that, if the facts were as contended by the defendant, there could be no recovery—that the dust from Mr. Torrey's mill alone must have been, of itself, an obstruction. If this be so, then the basin of the plaintiffs might have been filled without any legal injury to them, for the contributors to the deposit might have been so numerous that the share contributed by each would be inappreciable. Or suppose there had been no other saw-mill on the stream than that of the defendant. In a course of years that might have filled the basin with its dust, and yet the quantity deposited during any period of six years might not, of itself, have caused any obstruction. If the doctrine avowed by the learned judge be correct, the wrong would be remediless. The court confounded the degree with the existence of the injury, or perhaps failed to distinquish between a wrong to the present enjoyment and an injury to the right of enjoyment. The defendant cannot justify himself by showing that others were guilty of similar and concurrent wrongs. He had no right to cause any saw-dust to be deposited in the plaintiff's basin. His first deposit therefore was an actionable injury, though it caused no practical inconvenience, because it was a violation of the plaintiffs' right, and because continued deposition for twenty-one years would have given to him an easement, a right to continue it, as was ruled in Wright v. Williams, 1 M. & W. 77, and as we held in Jones v. Crow, 32 Pa. 398, a case decided at this term. The commencement of the acquisition of such an easement is with

[90] The charge on this point, notwithstanding the admission of this testimony, was as follows: "It is argued here, that a water saw-mill cannot be so constructed as to avoid the difficulty complained of. The only answer we need make to it is, that it must be so constructed as not to create a nuisance to the injury of others."

the first user, and of course the first user is an invasion of the rights of the owner of the servient tenement. * * * [91]

The evidence, the admission of which is the subject of the sixth assignment of error, was doubtless inadvertently received. The court subsequently charged the jury, that if the defendant could not enjoy a water-power on his own premises without depriving others above or below him of vested rights, he must cease to enjoy it, or answer in damages for injury done. This ruling, undoubtedly correct, if applied to the evidence, would have excluded it.

The judgment is reversed, and a venire de novo awarded.[92]

[91] "Then it was said that the plaintiff alleges an obstruction caused by several persons acting independently of each other, and does not shew what share each had in causing it. It is probably impossible for a person in the plaintiff's position to shew this. Nor do I think it necessary that he should shew it. The amount of obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, though the amount caused by them all may be a serious injury. Suppose one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent; and it is no defence to any one person among the hundred to say that what he does causes of itself no damage to the complainant." Per James, L. J., in Thorpe v. Brumfitt (1873) L. R. 8 Ch. 650, 656.

Compare the opinion of Chitty, J., in Lambton v. Mellish, [1894] 3 Ch. 163, where it was submitted by counsel that the independent act of one of the defendants, in using a gentle hand organ, was a lawful act, and therefore could not be enjoined.

[92] See also Richards v. Daugherty (1902) 133 Ala. 569, 31 South. 934; West Munice Strawboard Co. v. Slack (1909) 164 Ind. 21, 27, 72 N. E. 879; United States v. Luce (1905 C. C.) 141 Fed. 385, 411: (The factory of the defendants and the factory of Brown & Co. "are so situated with respect to each other that when the wind is in such direction as to carry the odors from one of them to the quarantine station it will carry the odors from the other there, and the odors from one cannot be distinguished from the odors from the other. There is no evidence of co-operation, privity or business relationship of any kind between the defendants and Brown & Co. in the erection and operation of their respective factories, or between the defendants and the succeeding owners or managers, if such there be, of the factory erected by Brown & Co.; nor is there any evidence to the point that the odors from either of the factories alone would or would not so contaminate the air at the quarantine station as to create a nuisance there within the definition of the authorities. But the combined odors from both factories unquestionably have that effect, and in producing it the two establishments in fact co-operate in and contribute to the creation of the nuisance. Under these circumstances, in the absence of a plain, adequate and complete remedy at law, the owners or managers of both or either of the factories can be enjoined from maintaining or contributing to the maintenance of the nuisance." Per Bradford, D. J.)

For other cases in point see "Nuisance," 37 Cent. Dig. § 8; 15 Dec. Dig. § 8.

Compare Chipman v. Palmer (1879) 77 N. Y. 51, 33 Am. Rep. 566: (D. and other persons polluted a stream by the discharge of sewage therein, each from his own premises, and each acting separately and independently of the others: Held, that D. was not liable for all the damage caused P. by the nuisance thus created, but was liable only to the extent of the damage created by D.) Simmons v. Everson (1891) 124 N. Y. 319, 26 N. E. 911, 21 Am. St. Rep. 676: (One action, to recover damages for the death of S., was brought against three defendants, E., P., and L. These three defendants owned in severalty three adjoining lots upon a city street. Upon these lots stood three brick stores, separated from each other by brick partition walls

RAPIER v. LONDON TRAMWAYS CO.

(High Court of Justice, Chancery Division, [1893] 2 Ch. 588.
In the Court of Appeal, [1893] 2 Ch. 597.)

The defendants, the London Tramways Company, were empowered by Act of Parliament to construct three lines of tramway according to certain plans, "with all proper rails, plates, works, and conveniences connected therewith." The act gave no compulsory power for taking land and made no special mention of building stables. The defendants constructed the lines, and built large blocks of stables near the plaintiff's house for the horses employed in drawing the cars. The plaintiff complained of the smell caused by the stables, and brought an action for an injunction to restrain the defendants from using the stables so as to cause a nuisance.

The action came on for hearing before Mr. Justice Kekewich, who granted the injunction asked as regards the smell. The defendants appealed.[93]

LINDLEY, L. J. I think it is impossible to disturb the judgment or order which is appealed from. The case is one of very considerable importance both to the plaintiff and to the defendants, and it is also of importance from a public point of view.

The first point which we have to consider is the Act of Parliament under which, if at all, the defendants can justify what they have done. Now, what they have done is this. Being a company formed for making tramways, they have bought a piece of land near the plaintiff's house, about five acres in extent. They have erected, at very considerable expense, very excellent stables upon this land, capable of holding more than 400 horses, but used apparently up to the present time for 200, more or less. All that is perfectly lawful. There is no reason why people should not have stables, and large stables too, provided only they carry on their stable business in such a way as not to occasion a nuisance to their neighbours. The Act of Parliament to which Mr. Willis has referred does not appear to me

extending from the foundations to the roofs. The fronts of the stores made a continuous brick wall of uniform height and thickness. The partition walls and the front wall were interlocked or built together. On October 17, 1887, the three stores were destroyed by fire. Nothing was left standing except the front wall and parts of the partition walls. Soon after the fire the front wall began to incline towards the street, and continued to incline more and more in that direction until November 17, 1887, when it gave way, near the partition wall between the buildings of L. and P., and the whole front fell into the street. Material from a part of the front wall standing on the lots of E. and P., and from their partition wall, fell upon and killed S., who was lawfully upon the sidewalk near the boundary between their lots. No part of L.'s wall touched him. It was contended that, if E., P., and L. were liable at all, they were not liable jointly, within the rule of Chipman v. Palmer (1879) 77 N. Y. 51, 33 Am. Rep. 566. Held, that they were jointly liable.)

[93] Only so much of the case is given as relates to the one point.

to do more than authorize them to create and make a certain tramway; it proceeds on the assumption that they may use animal power; I do not think it otherwise authorizes such use. Animal power for such a purpose in this country means horse-power, and as a matter of course the defendants must have horses. That involves, as a natural consequence, stables to put them in. To that extent the Act of Parliament authorizes the defendants to have stables and horses. I agree with Mr. Willis that it is for the directors to say, within the limits which I will discuss presently, where they shall have stables, how many horses they will have, and where they will locate them. What are the limits of that discretion? Mr. Willis says this Act of Parliament, which does not say anything expressly about stables or horses, gives the directors power to do whatever in the exercise of their discretion they may think reasonable and proper in their own interests, provided they take all reasonable care not to commit a nuisance.

Is that the true construction of the Act of Parliament? or is it that they may do what they may think right in the exercise of their own discretion provided they do not commit a nuisance? Which is it? The whole case up to a certain point turns on that. An Act of Parliament might be so worded as to cast upon them no greater duty than the duty to take reasonable care. Unless the Act of Parliament is so worded as to limit their duty to that extent, I think the common law must prevail, that they must exercise their power so as not to commit a nuisance. At common law, if I am sued for a nuisance, and the nuisance is proved, it is no defence on my part to say, and to prove, that I have taken all reasonable care to prevent it.[94] The

[94] Compare Bohan v. Port Jervis Gas Light Co. (1890) 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711: (P. sued to recover damages for an alleged nuisance caused by D. in making gas from naphtha. There was no evidence of negligence on the part of D. The trial court was asked to charge: "That unless the jury should find that the works of the defendant were defective, or that they were out of repair, or that the persons in charge of manufacturing gas at these works were unskillful and incapable, their verdict should be for the defendant;" and "that if the odors which affect the plaintiff are those that are inseparable from the manufacture of gas with the most approved apparatus and with the utmost skill and care, and do not result from any defects in the works, or from want of care in their management, the defendant is not liable." This charge the court refused to give.)

Whittemore v. Baxter Laundry Co. (1914 Mich.) 148 N. W. 437, 52 L. R. A. (N. S.) 930, and note: (In his business of dry cleaning D. uses 15,000 gallons of gasoline annually. He is about to place on his property, and within 11 feet of P.'s dwelling, two steel tanks for the storage of gasoline. The tanks have a capacity of 10,000 gallons each. P. seeks to enjoin D. from storing gasoline in the tanks. Said Kuhn, J., delivering the opinion: "We may grant that the storage of gasoline on the premises adjacent to or adjoining the premises of another is not a private nuisance per se. It might, however, become such considering the locality, the quantity, and the surrounding circumstances, and would not necessarily depend upon the degree of care used in its storage. Heeg v. Licht, 80 N. Y. 579, 36 Am. Rep. 654, 29 Cyc. 1177. We may also concede that in the instant case every precaution that human ingenuity has conceived has been made use of in the construction of the tanks as testified to by the defendant's experts. Considering, however, the

Act of Parliament may be an answer. It was an answer in the case of London, Brighton and South Coast Railway Company v. Truman, 29 Ch. D. 89, 11 App. Cas. 45, and it might be an answer here if the Act of Parliament went further than it did. I cannot find that the Act of Parliament contains any clause which warrants us in saying that no limit is set to the exercise of the discretion of the directors except the duty to take reasonable care not to create a nuisance. The only limit I can find is the limit which is set by the general law of the country that they do not commit a nuisance. Within that limit they may have what stables they like, they may have what number of horses they like, and they may conduct them how they like. * * *

dangerous character of the substance and its power as an explosive, of which in this age of its wonderful development as a power to propel automobiles, traction engines, and airships, we can well take judicial notice, and also considering human fallibility, that accidents in the operation of the most perfect mechanism will occur, and all that it needs to change what is, when properly protected, a harmless agency to a most dangerous explosive is a careless person, can it be said that to have 20,000 gallons of such an agency stored within but a few feet of one's dwelling house is not sufficient to be an unreasonable interference with the comfortable enjoyment of that home?"

West v. Bristol Tramways Co., [1908] 2 K. B. 14: (D., a tramway company which was required, by a special Act of Parliament, to pave between and on either side of its rails with wood, used for that purpose wood blocks coated with creosote. The fumes given off by this creosoted wood pavement caused damage to plants and shrubs belonging to P., a market gardener whose premises abutted on a road thus paved by D. There was another kind of wood paving, in use for several years, which D. might have used, and which, if used, would have caused no damage to P.'s plants and shrubs. The jury found "that it was not absolutely necessary for the defendants to pave the road as they did, and at the time they did; and that it was reasonably necessary for them to pave the road as they did, and at the time they did, according to the knowledge of the defendants at the time, but that in the light of the evidence given at the hearing it was not reasonably necessary." Said Lord Alverstone, C. J.: "In my opinion the proposition of law applicable to this case is correctly stated in Garrett on Nuisances (2d Ed.) p. 129; and I will read that statement as part of my judgment, as, in my opinion, the law on the subject could not be more clearly expressed. It is as follows: 'Where the owner of land uses his land for any purpose for which it may in the ordinary course of enjoyment of land be used, he will not, in the absence of negligence on his part, be liable, though damage result to his neighbour in the ordinary enjoyment by the latter of his property; for it lies with the latter to protect himself from the operation of natural laws. But, if the owner of land uses it for any purpose which from its character may be called non-natural or extraordinary user, such as, for example, the introduction on to the land of something which in the natural condition of the land is not upon it, he does so at his peril, and is liable if sensible damage results to his neighbour's land from its escape, or if the latter's legitimate enjoyment of his land is thereby materially curtailed.' If the contention of the defendant's counsel in this case is correct, this last proposition is stated much too widely; for they contend that the owner of land who has so acted has not done so at his peril, and is not liable, unless the plaintiff shews that the thing introduced on the land was, to the knowledge of the defendant, likely to escape and cause damage. The authorities do not, in my opinion, support the suggestion that this onus is cast on the party injured."

And see the principle of Fletcher v. Rylands (1866) L. R. 1 Ex. 265; (1868) L. R. 3 H. L. 330, infra.

VILE v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, 1914. 246 Pa. 35, 91 Atl. 1049.)

The action was against the railroad company for damages to the plaintiff's land from the discharge of cinders, smoke, etc., from the defendant's locomotives. Verdict for the plaintiff with judgment for the defendant non obstante veredicto. The plaintiff appeals.

BROWN, J. In 1889 the plaintiff below leased several acres of land, in the city of Philadelphia, for the purpose of carrying on his business as a truck gardener. He raised all kinds of vegetables, some under sash for the early market. In 1904 the Pennsylvania Railroad Company established a place about 400 yards from his truck garden, for the purpose of cleaning its locomotives. These were cleaned by the use of compressed air driven through the boiler tubes. As a consequence of this process of cleaning, smoke, soot, ashes, cinders and greasy substances were blown out of the stacks of the locomotives and settled on appellant's premises, ruining his plants and vegetables and destroying his business. In this action he recovered a verdict of $5,500 for the injuries which he sustained, but defendant's motion for judgment non obstante veredicto was allowed on the ground that the testimony of the witness called by the plaintiff as an expert to show that the locomotives of the defendant could have been cleaned without any resultant injury to the plaintiff was insufficient to sustain his charge of negligence. On this appeal the narrow question is whether the court below correctly so held in denying plaintiff judgment on the verdict. * * *

In support of the judgment of the court below it is argued that the defendant cannot be held liable to the plaintiff, because it appeared that the means which it had adopted to clean the boiler tubes were those in general use by other railroad companies. In view of the testimony as to the practicability of adopting other means for cleaning the boilers by which such injuries as were sustained by the appellant may be avoided, the doctrine of general usage, contended for by counsel for appellee, is not to be applied. To apply it in the present case would mean that though the defendant could have adopted means for the prevention of injuries to others in cleaning its locomotives in its yard, it was not bound to adopt them until they had been adopted by other railroad companies. It is to be remembered that the complaint of the appellant does not grow out of the actual operation of the locomotives, but out of what resulted from preparing them for operation—on property owned by the defendant company. It had a right to use the property for that purpose, but, under the competent testimony in the case, believed by the jury, only in obedience to the rule, "Sic utere tuo ut alienum non lædas;" and not to have so used it was found by the

jury to have been negligence, for the consequences of which the defendant must answer to the plaintiff. * * *

The judgment entered for the defendant is therefore reversed, and the record remitted, that plaintiff may have judgment.*

PILE et al. v. PEDRICK et al.

(Supreme Court of Pennsylvania, 1895. 167 Pa. 296, 31 Atl. 646, 647, 46 Am. St. Rep. 677.)

Bill in equity against Pedrick and another to compel the removal of a wall. From this decree below both the plaintiffs and the defendants appeal.

WILLIAMS, J. The learned judge of the court below was right in holding that the wall in controversy was not a party wall. It was not intended to be. The defendants were building a factory and under the advice of their architect decided to build within their own lines in order to avoid the danger of injury to others from vibration which might result from the use of their machinery. They called upon the district surveyor to locate their line and built within it as so ascertained. Subsequent surveys by city surveyors have determined that the line was not accurately located at first but was about one and a half inches over on the plaintiffs. This leaves the ends of the stones used in the foundation wall projecting into the plaintiffs' land below the surface one and three-eighths inches. This unintentional intrusion into the plaintiffs' close is the narrow foundation on which this bill in equity rests.

The wall resting on the stone foundation is conceded to be within the defendants' line. The defendants offered nevertheless to make it a party wall by agreement and to give to plaintiffs free use of it, as such, on condition that the windows on the third and fourth floors should remain open until the plaintiff should desire to use the wall. This offer was declined. The trespass was then to be remedied in one of two ways. It could be treated with the plaintiffs' consent as a permanent trespass and compensated for in damages, or the defendants could be compelled to remove the offending ends of the stones to the other side of the line. The plaintiffs insisted upon the latter course, and the court below has by its decree ordered that this should be done. The defendants then sought permission to go on the plaintiffs' side of the line and chip off the projecting ends, offering to pay for all inconvenience or injury the plaintiffs or their tenants might suffer by their so doing. This they refused.[95] Nothing remained

*Only so much of the case is given as relates to the one point.

[95] Compare Thompson v. Gibson (1841) 7 M. & W. 456, 56 R. R. 762: (The defendants had erected a building, on the land of S., which excluded the public from a part of the space on which a market was lawfully held. They cannot now remove the nuisance without committing a trespass on S.'s land.

but to take down and rebuild the entire wall from the defendants' side and with their building resting on it. This the decree requires, but in view of the course of the litigation the learned judge divided the costs. * * *

It is not denied that the foundation wall on which the appellant (Pedrick) has built was located under a mistake made by the district surveyor, and does in fact project slightly into the plaintiffs' land. For one inch and three-eighths the ends of the stones in the wall are said to project beyond the division line. The defendants have no right at law or in equity to occupy land that does not belong to them and we do not see how the court below could have done otherwise than recognize and act upon this principle. They must remove their wall so that it shall be upon their land. This the court directed should be done within a reasonable time. To avoid further controversy over this subject we will so far modify the decree as to permit such removal to be made within one year from the date of filing hereof. In all other respects the decree is affirmed.[96]

BLISS v. HALL.

(Court of Common Pleas, 1838. 4 Bing. N. C. 183, 132 Reprint, 758, 44 R. R. 697.)

In an action of nuisance for carrying on the business of a tallow chandler in a messuage adjoining the messuage of the plaintiff, the defendant pleaded as follows:

That the defendant was possessed of his said messuages for a long space of time, to wit, for the space of three years next before the plaintiff became possessed of his said messuage in the declaration mentioned, and before the plaintiff occupied, inhabited, and dwelt in the same: and that before and at the time when the defendant first became and was possessed of his said messuages, the said furnaces and stoves in the introductory part of this plea mentioned had been and then were erected, set up, and placed in and upon the same: that the defendant always, to wit, from the time at which he became so possessed of his said messuages, until and at and after the plaintiff so became possessed of his said messuage as in the declaration mentioned, and thence hitherto, had used, exercised, and carried on the said trade and business of a candlemaker, and had occasioned—the phenomena described in the declaration (enumerating them as above)—in the same manner and form, and degree, and to the same extent, and at the same hours, and times, and seasons, as at the said time when, etc., in the declaration and in the introductory part of this plea mentioned; and the same during

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"But," said Baron Parke, "that is a consequence of their own original wrong, and they cannot be permitted to excuse themselves from paying damages for the injury it causes, by showing their inability to remove it, without exposing themselves to another action.") Smith v. Elliot (1848) 9 Pa. 345: (D. cut the bank of a stream and thus diverted water from P.'s mill. The break in the bank was on the land of a stranger, and D. cannot abate the nuisance without committing a trespass.)

[96] Part of the opinion of Pile's Appeal, as to dividing the costs, is omitted. Compare Coombs v. Lenox Realty Co. (1913) 111 Me. 178, 88 Atl. 477, 47 L. R. A. (N. S.) 1085.

all that time, and at the said time when, etc., were and still are requisite and necessary to enable the defendant to carry on his said trade and business, in and upon his said premises, in the same manner and form, and to the same extent, as the defendant carried on the same at the time when the plaintiff came to his said premises in the declaration mentioned, near and adjoining to the premises and business of the defendant, so carried on as aforesaid: that the defendant lawfully enjoyed his said premises, manufactory, and business, before the plaintiff came to, occupied, or was possessed of his said premises in the declaration mentioned, in the same condition, extent, manner, and form, as he enjoyed and possessed the same at the said time when, etc., in the declaration mentioned, and of right ought still lawfully to enjoy the same without interruption or suit of the plaintiff; and that, the defendant was ready to verify.

Demurrer and joinder.

Hoggins, against the demurrer. Even if it be a nuisance, a party who comes to it is not entitled to complain. It was his own election to approach so near.[97]

TINDAL, C. J. In this case the declaration alleges that the defendant injuriously carried on, in messuages contiguous to the messuage of the plaintiff, the trade and business of a candlemaker, by which noxious vapours and smells proceeded from the messuage of the defendant and diffused themselves over the messuage of the plaintiff; and all that the defendant says in answer, is, that he carried on the business for three years before the plaintiff became possessed of the messuage he inhabits. That is no answer to the complaint in the declaration; for the plaintiff came to the house he occupies with all the rights which the common law affords, and one of them is, a right to wholesome air. Unless the defendant shows a prescriptive right to carry on his business in the particular place, the plaintiff is entitled to judgment.

VAUGHAN, J. The smells and noises of which the plaintiff complains are not hallowed by prescription, and under this plea the defendant cannot justify their continuance.

BOSANQUET, J. I am of the same opinion. The defendant has, prima facie, a right to enjoy his property in a way not injurious to his neighbour; but here on his own showing the business he carries on is offensive, and he makes out no title to persist in the annoyance.

Judgment for the plaintiff.[98]

[97] Compare Blackstone's remark: "If my neighbor makes a tan-yard, so as to annoy and render less salubrius the air of my house or garden, the law will furnish me with a remedy; but if he is first in possession of the air, and I fix my habitation near him, the nuisance is of my own seeking, and may continue." 2 Bl. Com. 403 (1765).

[98] The concurring opinion of Park, J., is omitted.

BAMFORD v. TURNLEY.

(Court of Queen's Bench, 1860. In the Exchequer Chamber, 1862. 3 Best & S. 62, 66, 129 R. R. 235, 238, 122 Reprint, 25, 27.)

Action for a nuisance arising from the burning of bricks on the defendant's land near to the plaintiff's house. The declaration was in two counts; the only material plea to both counts was "Not Guilty." On the trial it appeared:

That some land, part of the Beulah Spa Estate, was offered for sale in lots by public auction, in accordance with certain printed particulars of sale. These were headed "Particulars of the first section of the Beulah Spa Estate, consisting of about fifty acres of Freehold Building Land, etc., in nineteen lots," and stated, among other things, that the property presented "splendid sites for the erection of first class villas;" and that "there is abundance of brick earth and gravel, which, combined with all the other advantages appertaining to this exceedingly beautiful property, present an unusually advantageous opportunity of carrying out safe and profitable building operations." The brother-in-law of the plaintiff, in the year 1857, purchased lot 11 of this property, containing about two acres, and built a residence on it. The house was finished in the year 1858, and shortly afterwards the plaintiff became the tenant of the house and property. The defendant was a solicitor in London, and in the year 1858, he bought some other lots of the same property under the same particulars and conditions, being respectively lots 1, 10, 14, and 16. It was proved that building was going on in the neighbourhood, the plaintiff's house being within ten minutes' walk of the new railway station; that, during the preceding year, bricks had been burnt at certain spots in lots 13 and 15, and at a spot adjoining to lot 15; that during the last seventeen years, bricks had from time to time been burnt at various parts of the field, of which the site of the clamp in question then formed part, such field having been divided at the time of the sale into various lots; and that bricks had previously been made on the spot where the plaintiff's house stood.

In June, 1860, the defendant, with the view of burning bricks made out of the brick earth found upon his land and thereby obtaining bricks to build upon it, erected a clamp of bricks on lot 16, at a distance of 180 yards from the plaintiff's house. It was proved that there was an annoyance to the plaintiff arising from the erection and use of the clamp as complained of in the first count sufficient prima facie to constitute a cause of action; but it was also proved that the erection and use of the clamp by the defendant as complained of was temporary only, and for the sole purpose of making bricks on his own land and from the clay found there, with a view to the erection of dwelling-houses on his own land; and that the clamp for burning the bricks was placed on that part of the defendant's land most distant from the plaintiff's house, and so as to create no further annoyance than necessarily resulted from the burning of bricks.

The question was whether, under the circumstances so proved, an action could be maintained in respect of such annoyance.

Lord Chief Justice COCKBURN, before whom the case was tried, intimated that the case came within the principle laid down in Hole v. Barlow [1858] 4 C. B. N. S. 334, and directed the jury, upon the authority of that case, that if they thought that the spot was convenient and proper, and the burning of the bricks was, under the circumstances, a reasonable use by the defendant of his own land, the defendant would be entitled to a verdict upon the first count, independent of the small matter of whether there was an interference with the

plaintiff's comfort thereby. Upon this ruling a verdict was by arrangement entered for the defendant on the first count, leave being reserved to the plaintiff to move to set it aside, if the Court should be of opinion that the above ruling of the Lord Chief Justice was erroneous.[1]

In the following Michaelmas Term, Petersdorff, Sergt., moved for a rule calling upon the defendant to show cause why a verdict should not be entered for the plaintiff on the first count for 40s. damages.

PER CURIAM (COCKBURN, C. J., and WIGHTMAN, HILL, and BLACKBURN, JJ.). Rule refused with leave to appeal.

In the Exchequer Chamber.

The plaintiff having appealed against the above decision, a case setting forth the facts was stated, and concluded as follows:

"If the court should be of opinion that, upon the facts as stated, the ruling of the Lord Chief Justice, founded upon the decision of Hole v. Barlow, was erroneous, the verdict found for the defendant on the first count is to be set aside, and a verdict entered for the plaintiff instead thereof with 40s. damages.

"If the court should be of a contrary opinion, the verdict entered for the defendant upon the first count is to stand."

The case was argued, in Easter Vacation, before Erle, C. J., Pollock, C. B., Williams and Keating, JJ., and Bramwell and Wilde, BB.

WILLIAMS, J., delivered the judgment of ERLE, C. J., KEATING, J., WILDE, B., and himself:

On the argument of this case, there was some contest as to what the true question was which the court had to consider. On the part of the plaintiff it was said to have been proved at the trial, beyond dispute, that the burning of the bricks in the kilns of the defendant was a nuisance, and that the point reserved was, whether it was legalized by the other facts which the jury must be taken to have found to exist. On the part of the defendant it was said that the true point was, whether, under all the circumstances of the case, the burning of the bricks amounted to an actionable nuisance.

It is not, perhaps, material which of these contentions is correct. For the Lord Chief Justice, at the trial, directed the jury, on the authority of Hole v. Barlow, 4 C. B. N. S. 334, to find for the defendant, notwithstanding his burning the bricks had interfered with the plaintiff's comfort, if they were of opinion that the spot where the bricks were burnt was a proper and convenient spot, and the burning of them was, under the circumstances, a reasonable use by the defendant of his own land. The jury, consequently, if they were of that opinion, would have been bound to find their verdict for the defendant, not-

[1] The statement of the case is abridged. Upon the second count, a verdict was by arrangement entered for the plaintiff, with 1s. damages, but no question arose on that count. Part of the opinion of Bramwell, B., and the dissenting opinion of Pollock, C. B., are omitted.

withstanding they were also of opinion that the brick-kilns of the defendant, by immitting corrupted air upon the plaintiff's house, had rendered it unfit for healthy or comfortable occupation.

It was therefore treated as a doctrine of law that, if the spot should be found by the jury to be proper or convenient, and the burning of the bricks a reasonable use of the land, these circumstances would constitute a bar to the action; and if there is, in truth, no such doctrine, there was a misdirection: it is the same thing as if there had been a plea averring the existence of these circumstances, and a demurrer to the plea. Such a plea, though it would admit all the allegations of the declaration, would be a good plea by way of avoidance, if the direction of the Chief Justice was right. And it is not material to inquire whether it would be good as averring facts which amount to a legalization of the nuisance stated in the declaration, or as superadding facts which, taken together with those stated in the declaration, show that the alleged annoyance was not an actionable nuisance. In either point of view the question for our consideration appears to be, whether the case of Hole v. Barlow, 4 C. B. N. S. 334, was well decided. And we are of opinion that it was not.

That decision was plainly founded on a passage in Comyns' Digest, Action upon the Case for a Nuisance (C), which is in the following words: "So an action does not lie for a reasonable use of my right, though it be to the annoyance of another; as, if a butcher, brewer, &c., use his trade in a convenient place, though it be to the annoyance of his neighbour." It may be observed that, in the language of this dictum (for which no authority is cited by Comyns), there is a want of precision, especially in the words "reasonable" and "convenient," which renders its meaning by no means clear. And it may be doubted whether the court, in Hole v. Barlow, did not misunderstand it. What is a "convenient place"? Does this expression mean, as the court understood it in that case, that the place is proper and convenient for the purpose of carrying on the trade, or does it mean that it is a place where a nuisance will not be caused to another? It has been pointed out by Mr. W. H. Willes, in his valuable edition of Gale on Easements, p. 410, note, that this latter sense of the word "convenient" is the one adopted by Hide, C. J., in Jones v. Powell, Palm. 536, 539, s. c. Hutt. 135, where he says, "A tan-house is necessary, for all men wear shoes, and nevertheless it may be pulled down if it be erected to the nuisance of another: in like manner of a glass-house; and they ought to be erected in places convenient for them." In the original Norman-French it is "Un tan house est necessary, car touts wear shoes; et uncore ceo poit estre pull down, etc., si est erect al nusance d'auter: et issint de glass house; Et pur ceux doient estre erect in places convenient pur eux." The term appears to be used in the same sense when applied to questions as to public nuisances. Thus it is said in Hawkins, P. C., book 1, c. 75 (2 Hawk. P. C., by Leach, p. 146, § 10), "It seems to be agreed, that a brew house, erected in such an in-

convenient place wherein the business cannot be carried on without greatly incommoding the neighbourhood, may be indicted as a common nuisance." It should seem, therefore, that just as the use of an offensive trade will be indictable as a public nuisance if it be carried on in an inconvenient place, i. e., a place where it greatly incommodes a multitude of persons, so it will be actionable as a private nuisance if it be carried on in an inconvenient place, i. e., a place where it greatly incommodes an individual.

If this be the true construction of the expression "convenient" in the passage from Comyns' Digest, the doctrine contained in it amounts to no more than what has long been settled law, viz., that a man may, without being liable to an action, exercise a lawful trade, as that of a butcher or brewer and the like, notwithstanding it be carried on so near the house of another as to be an annoyance to him, in rendering his residence there less delectable or agreeable, provided the trade be so conducted that it does not cause what amounts, in point of law, to a nuisance to the neighbouring house.

In Hole v. Barlow, 4 C. B. N. S. 334, however, the court appear to have read the passage as containing a doctrine that a place may be "proper and convenient" for the carrying on of a trade, notwithstanding it is a place where the trade cannot be carried on without causing a nuisance to a neighbour. This is a doctrine which has certainly never been judicially adopted in any case before that of Hole v. Barlow, and moreover the adoption of it would be inconsistent with the judgments pronounced in some of the cases cited at the bar during the argument, and more especially with the case of Walter v. Selfe, 4 De Gex & Sm. 315. And the introduction of such a doctrine into our law would we think lead to great inconvenience and hardship, because, as was forcibly urged by Mr. Mellish in arguing for the plaintiff, if the doctrine is to be maintained at all, it must be maintained to the extent that, however ruinous may be the amount of nuisance caused to a neighbour's property by carrying on an offensive trade, he is without redress if a jury shall deem it right to find that the place where the trade is carried on is a proper and convenient place for the purpose.

It should be observed that the direction of the judge to the jury in Hole v. Barlow, which was upheld by the Court of Common Pleas, was simply that the verdict ought to be for the defendant if the place where the bricks were burnt was a convenient and proper place for the purpose. But in the present case, the Lord Chief Justice's direction to the jury pointed at a further condition, viz., if the burning of the bricks was under the circumstances a reasonable use by the defendant of his own land. It remains, therefore, to consider whether the doctrine adopted in Hole v. Barlow, if accompanied with this addition, is maintainable.

If it be good law, that the fitness of the locality prevents the carrying on of an offensive trade from being an actionable nuisance, it ap-

pears necessary to follow that this must be a reasonable use of the land. But if it is not good law, and if the true doctrine is, that whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the acts complained of, the annoyance is sufficiently great to amount to a nuisance according to the ordinary rule of law, an action will lie, whatever the locality may be, then surely the jury cannot properly be asked whether the causing of the nuisance was a reasonable use of the land.

If such a question is proper for their consideration in an action such as the present, for a nuisance by inmitting corrupted air into the plaintiff's house, we can see no reason why a similar question should not be submitted to the jury in actions for other violations of the ordinary rights of property; e. g. the transmission by a neighbour of water in a polluted condition. But certainly it would be difficult to maintain, as the law now stands, that the jury, in such an action, ought to be told to find for the defendant if they thought that the manufactory which caused the impurity of the water was built on a proper and convenient spot, and that the working of it was a reasonable use by the defendant of his own land. Again, where an easement has been gained in addition to the ordinary rights of property, e. g. where a right has been gained to the lateral passage of light and air, no one has ever suggested that the jury might be told, in an action for obstructing the free passage of the light and air, to find for the defendant if they were of opinion that the building which caused the obstruction was erected in a proper and convenient place, and in the reasonable enjoyment by the defendant of his own land. And yet, on principle, it is difficult to see why such a question should not be left to the jury if Hole v. Barlow was well decided.

We are, however, of opinion that the decision in that case was wrong, and, consequently, that the direction of the Lord Chief Justice which was founded on it, was erroneous, that the verdict for the defendant ought to be set aside, and a verdict entered for the plaintiff.

Bramwell, B. * * * The question seems to me to be, Is this a justification in law,—and, in order not to make a verbal mistake, I will say,—a justification for what is done, or a matter which makes what is done no nuisance? It is to be borne in mind, however, that, in fact, the act of the defendant is a nuisance such that it would be actionable if done wantonly or maliciously. The plaintiff, then, has a prima facie case. The defendant has infringed the maxim, Sic utere tuo ut alienum non lædas. Then, what principle or rule of law can he rely on to defend himself? It is clear to my mind that there is some exception to the general application of the maxim mentioned. The instances put during the argument, of burning weeds, emptying cesspools, making noises during repairs, and other instances which would be nuisances if done wantonly or maliciously, nevertheless may be lawfully done. It cannot be said that such acts are not nuisances, because, by the hypothesis, they are; and it cannot be doubted that,

if a person maliciously and without cause made close to a dwelling-house the same offensive smells as may be made in emptying a cesspool, an action would lie. Nor can these cases be got rid of as extreme cases, because such cases properly test a principle. Nor can it be said that the jury settle such questions by finding there is no nuisance, though there is. For that is to suppose they violate their duty, and that, if they discharged their duty, such matters would be actionable, which I think they could not and ought not to be. There must be, then, some principle on which such cases must be excepted. It seems to me that that principle may be deduced from the character of these cases, and is this, viz., that those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action. This principle would comprehend all the cases I have mentioned, but would not comprehend the present, where what has been done was not the using of land in a common and ordinary way, but in an exceptional manner—not unnatural nor unusual, but not the common and ordinary use of land. There is an obvious necessity for such a principle as I have mentioned. It is as much for the advantage of one owner as of another; for the very nuisance the one complains of, as the result of the ordinary use of his neighbour's land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live.[2]

ST. HELEN'S SMELTING CO. v. TIPPING.

(House of Lords, 1865. 11 H. L. C. 642, 11 Reprint, 1483.)

This was an action to recover damages for injuries done to the plaintiff's trees and crops, by the defendants' works. The defendants are the directors and shareholders of the St. Helen's Copper Smelting Company (Limited). The plaintiff, in 1860, purchased a large portion of the Bold Hall estate, consisting of the manor house and about 1300 acres of land, within a short distance of which stood the works of the defendants. The declaration alleged that:

"The defendants erected, used, and continued to use, certain smelting works upon land near to the said dwelling house and lands of the plaintiff, and caused large quantities of noxious gases, vapours, and other noxious matter, to issue from the said works, and diffuse themselves over the land and premises of the plaintiff, whereby the hedges, trees, shrubs, fruit, and herbage, were greatly injured; the cattle were rendered unhealthy, and the

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2 "For instance, annoyance may be caused to my neighbor by what is done in repairing my house in one year, and he in turn will cause me similar annoyance in another year. But the same considerations do not apply to a non natural or extraordinary user of land." Per Farwell, L. J., in West v. Bristol Tramways Company [1908] 2 K. B. 14, 23.

plaintiff was prevented from having so beneficial a use of the said land and premises as he would otherwise have enjoyed, and also the reversionary lands and premises were depreciated in value."

THE LORD CHANCELLOR (LORD WESTBURY). * * * My Lords, I think your Lordships will be satisfied with the answer we have received from the learned judges to the questions put by this House.[3]

My Lords, in matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter,

[3] The history of the case to this point was as follows: The cause, under a plea of Not Guilty, was tried before Mr. Justice Mellor, at Liverpool in August, 1863. The defendants offered evidence to show that the whole neighborhood was studded with manufactories and tall chimneys, that there were some alkali works close by the defendants' works, that the smoke from one was quite as injurious as the smoke from the other, that the smoke of both sometimes united, and that it was impossible to say to which of the two any particular injury was attributable. The fact that the defendants' works existed before the plaintiff bought the property was also relied on.

The defendants' counsel submitted that the three questions which ought to be left to the jury were, "whether it was a necessary trade, whether the place was a suitable place for such a trade, and whether it was carried on in a reasonable manner." The learned judge did not put the questions in this form, but did ask the jury whether the enjoyment of the plaintiff's property was sensibly diminished, and the answer was in the affirmative. Whether the business there carried on was an ordinary business for smelting copper, and the answer was, "We consider it an ordinary business, and conducted in a proper manner, in as good a manner as possible." But to the question whether the jurors thought that it was carried on in a proper place, the answer was, "We do not." The verdict was therefore entered for the plaintiff. A motion was made for a new trial, on the ground of misdirection, but the rule was refused. 4 Best & S. 608. Leave was however given to appeal, and the case was carried to the Exchequer Chamber, where the judgment was affirmed; Lord Chief Baron Pollock there observing: "My opinion has not always been that which it is now. Acting upon what has been decided in this court, my Brother Mellor's direction is not open to a bill of exception." 4 Best & S. 616. This appeal was then brought.

The judges were summoned, and Mr. Baron Martin, Mr. Justice Willes, Mr. Justice Blackburn, Mr. Justice Keating, Mr. Baron Pigott, and Mr. Justice Shee, attended. For the appellants, who were the defendants in the court below, there was an argument by the Attorney General (Sir R. Palmer) and Mr. Webster, to the effect that the dissent in Bamford v. Turnley, in the Exchequer Chamber, from the doctrine of Hole v. Barlow, was not warranted by principle or authority. "Our material question," said the counsel for the appellants, "is the convenience or fitness of the place where the business is carried on."

These two questions were thereupon proposed by the Lord Chancellor to the judges: "Whether directions given by the learned judge at Nisi Prius to the jury were correct? or, Whether a new trial ought to be granted in this case?"

Mr. Baron Martin. My Lords, in answer to the questions proposed by your Lordships to the judges, I have to state their unanimous opinion that the directions given by the learned judge to the jury were correct, and that a new trial ought not to be granted. As far as the experience of all of us goes, the directions are such as we have given in these cases for the last twenty years.

namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think, my Lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of the property.

Now, in the present case, it appears that the plaintiff purchased a very valuable estate, which lies within a mile and a half from certain large smelting works. What the occupation of these copper smelting premises was anterior to the year 1860 does not clearly appear. The plaintiff became the proprietor of an estate of great value in the month of June 1860. In the month of September 1860 very extensive smelting operations began on the property of the present appellants, in their works at St. Helen's. Of the effect of the vapours exhaling from those works upon the plaintiff's property, and the injury done to his trees and shrubs, there is abundance of evidence in the case.

My Lords, the action has been brought upon that, and the jurors have found the existence of the injury; and the only ground upon which your Lordships are asked to set aside that verdict, and to direct a new trial, is this, that the whole neighbourhood where these copper smelting works were carried on, is a neighbourhood more or less devoted to manufacturing purposes of a similar kind, and therefore it is said, that inasmuch as this copper smelting is carried on in what the appellant contends is a fit place, it may be carried on with impunity, although the result may be the utter destruction, or the very considerable diminution, of the value of the plaintiff's property. My Lords, I apprehend that that is not the meaning of the word "suitable," or the meaning of the word "convenient," which has been used as applicable to the subject. The word "suitable" unquestionably cannot carry with it this consequence, that a trade may be carried on in

a particular locality, the consequence of which trade may be injury and destruction to the neighbouring property. Of course, my Lords, I except cases where any prescriptive right has been acquired by a lengthened user of the place.

On these grounds, therefore, shortly, without dilating farther upon them (and they are sufficiently unfolded by the judgment of the learned judges in the court below), I advise your Lordships to affirm the decision of the Court below, and to refuse the new trial, and to dismiss the appeal with costs.[4]

Judgment of the Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, affirmed; and appeal dismissed with costs.

RUSHMER v. POLSUE & ALFIERI, Limited.

(In the Court of Appeal. [1906] 1 Ch. 234.)

POLSUE & ALFIERI, Limited, v. RUSHMER.

(In the House of Lords. [1907] A. C. 121.)

Appeal from the judgment of Warrington, J., granting a perpetual injunction to restrain a nuisance arising from noise. The facts of the case, as shown by the evidence, were as follows:

For the last seventeen or eighteen years the plaintiff had been, and he still was, the occupier, and was also the present lessee, of a house, No. 8 Gough Square, Fleet Street, in the City of London, in which he was residing with his family. In a shop on the ground floor he carried on the business of a dairyman.

Gough Square was a small oblong space situate in a district bounded on the east by Shoe Lane, on the south by Fleet Street, on the west by Fetter Lane, and on the north by Holborn. It was a district specially devoted to the printing and allied trades. There was no thoroughfare for wheeled traffic in Gough Square, the only access for such traffic being under an archway in the north-west corner. The plaintiff's house, No. 8, was in the north-east corner. For a house in the heart of the City of London the plaintiff's was, it appeared, in a quiet situation, except for such noises as inevitably arose from neighbouring business establishments. No. 7, Gough Square, the house adjoining the plaintiff's house on the west side, had for some time been occupied by persons maintaining and working machinery, but it appeared from the evidence that although in the day time the plaintiff must have been subjected to noise from that source, yet no noisy machinery had been worked at night in that house. Nearly opposite to the plaintiff's house was a large printing establishment, Messrs. Pardon's, in which work on certain days of the week proceeded at night,

[4] The concurring opinions of Lord Cranworth and Lord Wensleydale are omitted.

and some distance further away were the printing works of the Daily Telegraph newspaper, which were run regularly at night. The evidence, however, shewed that no disturbance at night was caused by noise arising from either of those sources.

The defendants, Polsue & Alfieri, Limited, were a company carrying on business as printers and publishers at Nos. 4 and 5, Gough Square, and at No. 10, Wine Office Court, which latter house immediately adjoined the plaintiff's house, being separated therefrom only by a party-wall. No. 10, Wine Office Court, was taken by the defendants in 1904. A printing business had been previously carried on there, though without causing the plaintiff any nuisance from noise; but in September of that year the defendants set up in that house and began to work certain machinery, including a cutter on the ground floor and a printing machine in the basement. The noise of which the plaintiff complained mainly arose from this printing machine, the evidence shewing that no real nuisance arose from the cutter. The printing machine was of an improved type, quieter, it was said, than most machines of the kind, and was properly fixed upon a concrete bed. It was driven by an electric motor, and was usually run at a speed throwing off 1,440 impressions per hour; but under exceptional circumstances it might be, and in fact had been, run at a rate of 1,560 impressions. It had always been carefully and properly worked. When first set up it was driven through the medium of a shafting fixed to the ceiling of the room; but after a complaint by the plaintiff this was altered and the machine was driven by a belt passing directly to it from the motor. In October, 1904, the plaintiff again complained, and on October 21 caused a formal letter of complaint to be written by his solicitor. To this no reply was made, and on November 1 the plaintiff issued the writ in this action against the defendants for an injunction to restrain them from so working their machinery and carrying on their printing works at No. 10, Wine Office Court, as, by reason of noise or otherwise, to cause a nuisance or annoyance to the plaintiff as lessee and occupier of the house No. 8, Gough Square, or to his family, or to the persons inhabiting or resorting to that house. Notice of motion for an injunction was given, but the motion was never heard, the action being by arrangement at once set down for a speedy trial.

In their defence to the plaintiff's statement of claim, the defendants denied that their printing machine was being so worked as to cause a nuisance to the plaintiff, and they insisted that, as his premises were situated in the heart of a district almost entirely devoted to the printing and allied trades, he was not entitled to an injunction. At the trial oral evidence was given on both sides by several engineering experts as to the general nature and effect of the noises arising from printing and other machines in the neighbourhood. As to the noise caused by the defendants' machine and to the alleged nuisance arising therefrom to the plaintiff and his family, particularly at night, evidence was given by several persons, including, in addition to the plaintiff, his two daugh-

ters and his son. At the conclusion of the trial, before Warrington, J., which occupied five days of the Michaelmas Sittings, 1904, his Lordship reserved judgment. On January 12, 1905, he delivered his judgment, in which he commenced with the following statement of the legal principles which, in his opinion, were applicable to the case:

"The question I have to answer is whether the defendants, by working the machine in question, seriously interfere with the comfort, physically, of the plaintiff and his family in the occupation of his house according to the ordinary notions prevalent among reasonable English men and women: Walter v. Selfe (1851) 4 De G. & Sm. 315, 322; and for the purpose of answering this question I am not to look at the defendants' operations in the abstract and by themselves, but in connection with all the circumstances of the locality, and in particular in reference to the nature of the trades usually carried on there, and the noises and disturbance existing prior to the commencement of the defendants' operations: Sturges v. Bridgman, 11 Ch. D. 852, 865; St. Helen's Smelting Co. v. Tipping, 11 H. L. C. 642. But if, after taking these circumstances into consideration, I find a serious and not merely a slight additional interference with the plaintiff's comfort as above defined, I think it is the duty of the Court to interfere: Crump v. Lambert, L. R. 3 Eq. 409. This seems to me to be the true result of the authorities."

His Lordship then proceeded to deal with the evidence, and stated the three following definite findings of fact:

First, that although in the day time the plaintiff must have been subject to some noise from printing works in the immediate neighbourhood, no disturbance at night had been caused by noise arising from any of these sources. Secondly, that as regarded the ordinary working hours in the day time, the plaintiff had not proved such a substantial addition to pre-existing noises as would amount to a legal nuisance. And, thirdly, that the night working of the defendants' machine caused a serious disturbance to the plaintiff and his family such as had not previously been experienced by them.

His Lordship held this to be a legal nuisance entitling the plaintiff to an injunction. Accordingly he granted a perpetual injunction restraining the defendants, their workmen, servants and agents from so working their machinery, and so carrying on their printing works, at No. 10, Wine Office Court, as by reason of noise to cause a nuisance to the plaintiff as lessee and occupier of the adjoining house, No. 8, Gough Square, or to his family, or to the persons inhabiting or resorting to such house.

The defendants appealed.[5]

In the Court of Appeal.

Cozens-Hardy, L. J. This is an appeal from the judgment of Warrington, J., who has granted an injunction restraining the defendants from so working a printing machine as to occasion a nuisance to the plaintiff. The plaintiff has for seventeen years been residing with his family at No. 8, Gough Square, Fleet Street. In the lower part of the house he carries on a milk business. The defendants' machine is next door to the plaintiff's house. The plaintiff's house is situate in a district specially devoted to the printing and allied trades, most of

[5] The arguments of counsel and the opinions of Vaughan Williams and Stirling, L. JJ., both concurring in the dismissal of the appeal, are omitted.

which are noisy, though not all equally noisy. The district is one in which it is not reasonable to expect the same quiet and freedom from noise as might be looked for in more purely residential neighbourhoods. Warrington, J., has stated the legal principles which it was his duty to apply as follows. (His Lordship then read from the learned judge's judgment the passage above quoted and proceeded:) In my opinion that is a statement of the law which is not only accurate, but adequate. He then proceeds to deal with the evidence. He does not leave us to infer the conclusions at which he has arrived, for he states certain definite findings of fact. (His Lordship then read the three findings above stated, and proceeded:) In my opinion, it is not right for the Court of Appeal in a case like this to overrule the decision on issues of fact of a judge who has seen and heard the witnesses; and, this being so, I think the appeal must fail. I cannot doubt that the learned judge did apply the legal principles he himself enunciated, and I do not think we ought to embark upon the consideration of the question whether his mind may not have been influenced by some other legal view than that expressed by him. But some arguments were raised by counsel for the appellants and for the respondent to which I desire shortly to refer. It was strenuously contended by Mr. Duke that a person living in a district specially devoted to a particular trade cannot complain of any nuisance by noise caused by the carrying on of any branch of that trade without carelessness and in a reasonable manner.[6] I cannot assent to this argument. A resident in such a

[6] In his argument for the defendant, Duke, K. C., cited the following cases in support of his contention: St. Helen's Smelting Co. v. Tipping (1865) 11 H. L. C. 642; Gaunt v. Fynney (1872) L. R. 8 Ch. 8, 10, 13; Sturges v. Bridgman (1879) 11 Ch. D. 852, 865; Christie v. Davey, [1893] 1 Ch. 316; Saunders-Clark v. Grosvenor Mansions Co., [1900] 2 Ch. 373; Attorney General v. Cole & Son, [1901] 1 Ch. 205; Bamford v. Turnley (1860) 3 B. & S. 62. The following cases were distinguished from the case at bar: Crump v. Lambert (1867) L. R. 3 Eq. 409, 414; Heather v. Pardon (1877) 37 L. T. 393; Bartlett v. Marshall, [1895] 44 W. R. 251; Crossley & Sons v. Lightowler (1867) L. R. 2 Ch. 478, 481.

On the local standard of comfort as a test in Nuisance, see also 21 Halsbury's Laws of England, 531, 532 (1912); 29 Cyc. 1157, 1159, and especially notes 33, 47, 48, 49; and the annotations to Rushmer v. Polsue (1906) in 4 A. & E. Ann. Cas. 373, 377.

Compare Gilbert v. Showerman (1871) 23 Mich. 448: (P., the owner of a four-story business building in Detroit, in a part of that city which was chiefly given over to business, occupied the upper part of his building as his dwelling. D. used his adjoining four-story building as a steam-flouring mill. P. sought to enjoin D. from operating his mill, claiming a nuisance. Said Corley, J., in dismissing the bill: "The complainant, having taken up his residence in a portion of the city mainly appropriated to business purposes, cannot complain of any new business near him, provided such new business is not in itself objectionable as compared with those already established, and is carried on in a proper manner.")

Eller v. Koehler (1903) 68 Ohio St. 51, 67 N. E. 89: (P. sued to recover damages for alleged injuries to her health and her property resulting from the noise and vibrations occasioned by D.'s drop-hammers, in use on his adjoining lot. D. averred that his "said manufacturing plant is situate in a part of the city which is and has been devoted to like business purposes, and was so at the time said plant was constructed." This was not denied by P.

neighbourhood must put up with a certain amount of noise. The standard of comfort differs according to the situation of the property and the class of people who inhabit it. This idea is expressed by Thesiger, L. J., in Sturges v. Bridgman, 11 Ch. D. 852, when he said that what might be a nuisance in Belgrave Square would not be a nuisance in Bermondsey. But whatever the standard of comfort in a particular district may be, I think the addition of a fresh noise caused by the defendant's works may be so substantial as to create a legal nuisance. It does not follow that because I live, say, in the manufacturing part of Sheffield I cannot complain if a steam hammer is introduced next door, and so worked as to render sleep at night almost impossible, although previously to its introduction my house was a reasonably comfortable abode, having regard to the local standard; and it would be no answer to say that the steam hammer is of the most modern approved pattern and is reasonably worked. In short, if a substantial addition is found as a fact in any particular case, it is no answer to say that the neighbourhood is noisy, and that the defendant's machinery is of first-class character.[7]

It was, on the other hand, urged by Mr. Terrell that any kind of noise occasioning discomfort is actionable unless the defendant can prove a prescriptive right to create a noise. I do not think this argument can be supported, and I see no ground for supposing that Warrington, J., was influenced by it. The lower standard of comfort

The court was asked by D. to charge the jury thus: "In determining the question whether the plaintiff has suffered actual, substantial, and material injuries, you may consider the locality of her property and that of the defendant, the nature of the business that is being conducted by the defendant, the character of the machinery that he is using, the manner of using the property producing the alleged injuries; and you may also consider the kinds of business, if any, which are being conducted and carried on in the vicinity of these properties. * * * If you find from the evidence that the plaintiff's property is situated in a populous city, and in the vicinity of other shops of the same, or substantially the same, character and kind, then you may consider this fact in determining whether the plaintiff has suffered injuries of the kind named. A party dwelling in a populous city, and in the vicinity of shops and factories, cannot have the same quiet and freedom from annoyances that he would have in the country or in other districts. If these annoyances, should you find them to be such, are either trifling in their nature, or are such as under the particular circumstances of this case do not cause real, substantial, and material injuries, then, so finding, the plaintiff could not recover." The court refused to so instruct. There was a judgment for plaintiff. The refusal of this instruction was held reversible error.)

[7] Compare Ross v. Butler (1868) 4 C. E. Green (19 N. J. Eq.) 294, 307, 97 Am. Dec. 654: (P. sought to enjoin D. from operating a pottery on his city lot, in the same block with P.'s dwelling houses; D. answered that this part of the city "is inhabited principally by mechanics and laborers, many of whom use their houses and lots for business purposes, and that the complainants so use their premises." An injunction was granted, Chancellor Zabriskie remarking: "Here the question is whether a dense smoke laden with cinders, caused by the burning of pine wood, and continued for twelve hours, twice in each month falling upon and penetrating the houses and premises of the complainants, at distances varying from forty to two hundred feet, would cause such injury, annoyance, and discomfort, as would constitute a legal nuisance. I am of opinion that it would.")

existing, say, in Whitechapel would equally exist in one of the numerous districts which have sprung up in late years on the outskirts of the City, and which are occupied by persons of the same class as those who occupy the older houses in Whitechapel. In short, prescription has nothing to do with the case.

In the result I accept Warrington, J.'s findings of fact, and his enunciation of the legal principles applicable to the case, and I think that this appeal must be dismissed.

The Court of Appeal (Vaughan Williams, Stirling, and Cozens-Hardy, L. JJ.) having affirmed the decision of Warrington, J., the defendants appealed.

In the House of Lords.

LORD LOREBURN, L. C. My Lords, this appeal has been presented to your Lordships with great fairness and propriety; but to my mind it is a hopeless appeal. There is no question of law that I can see in the case. Warrington, J., laid down the law quite soundly; nor is it disputed that he did so.

The law of nuisance undoubtedly is elastic, as was stated by Lord Halsbury in the case of Colls v. Home and Colonial Stores, [1904] A. C. 179, at p. 185. He said: "What may be called the uncertainty of the test may also be described as its elasticity. A dweller in towns cannot expect to have as pure air, as free from smoke, smell, and noise as if he lived in the country, and distant from other dwellings, and yet an excess of smoke, smell, and noise may give a cause of action, but in each of such cases it becomes a question of degree, and the question is in each case whether it amounts to a nuisance which will give a right of action." This is a question of fact.

It is said, indeed, by the learned counsel for the appellants that Warrington, J., did not carry out his law in the way in which he approached the facts. I cannot see that it is so. There was evidence sufficient to shew that, taking into consideration the character of the locality and the noises there prevailing, yet a serious addition had been caused by the defendants. In my opinion that was quite sufficient to warrant the conclusion arrived at by the learned judge and the Court of Appeal.

I agree with Cozens-Hardy, L. J., when he says: "It does not follow that because I live, say, in the manufacturing part of Sheffield I cannot complain if a steam hammer is introduced next door, and so worked as to render sleep at night almost impossible, although previously to its introduction my house was a reasonably comfortable abode, having regard to the local standard; and it would be no answer to say that the steam hammer is of the most modern approved pattern and is reasonably worked."

My Lords, I think that this appeal wholly fails and that it ought to be dismissed with costs.

PIERSON v. GLEAN.

(Supreme Court of Judicature of New Jersey, 1833. 2 Green [14 N. J. Law] 36, 25 Am. Dec. 497.)

The declaration alleged that the plaintiff was lawfully seized and possessed, on the first day of April, 1831, of certain lands, through which a stream of water had always been accustomed to flow; that the defendant on the said first day of April, 1831, and from that time continually afterwards, maintained a mill dam across the said stream and thereby caused the waters of the said stream to overflow and drown the plaintiff's land.

To this declaration the defendant put in three pleas—1st, the general issue. 2dly, protesting that he never erected or unlawfully maintained the dam, the defendant says that prior to the 26th of July, 1830, he had no title or possession; that on that day he became seized and possessed of the said dam; since which neither the plaintiff or any other person, for him or in his behalf, ever requested the defendant to reform or remove the said dam; and concludes with a verification, 3dly, that the mill-dam was erected, kept up and maintained before the 26th July, 1830, previous to which day the defendant had no title, possession or interest in the said dam—that on that day the defendant became seized and possessed in fee, and has never since been requested, etc.

To the second and third pleas there is a general demurrer and joinder.

HORNBLOWER, C. J. * * * The only question presented to the court upon the pleadings in this case, is, whether an action for continuing a nuisance, will lie against him, who did not erect it, before any request made to him to remove or abate the injury.

The plaintiff's declaration is not for erecting, but for maintaining and keeping up the dam.

The defendant says, the dam was erected before he became seized or possessed of the premises, and that the plaintiff did not at any time before the commencement of the action, request him to reform or remove the injury complained of. This allegation is fully admitted by the general demurrer.

The law as settled in Penruddock's Case, 5 Co. 101, has never, I believe, been seriously questioned since. In that case it was resolved, that though the continuance of a nuisance by the feofee was a new wrong, yet a quod permittat would not lie against him, without a request made, etc. Ld. Ch. Just. Willes, in Winsmore v. Greenbank, Willes Rep. 583, speaking of the distinction between the beginning and the continuance of a nuisance, by building a house that hangs over or damages another, refers to Penruddock's case; says the law is certainly so, and the reason obvious. Mr. Chitty, in his treatise on Pleading, vol. 1, p. 376, says it is necessary to state a request in declaration,

for continuing a nuisance erected by another. See 2 Chit. on Pl. 334, note c. In the case of Salmon v. Bensley, Ryan and Moody, 195, 21 Engl. Com. L. R. 414, 2 Saund. on Evid. and Plead. 690, the same doctrine is admitted by Abbott, Ld. Ch. Just., though he held that a person who takes premises upon which a nuisance exists, and continues it, takes them subject to all the restrictions imposed upon his predecessors, by the receipt of such a notice, as had in that case been served upon the preceding occupant.

As well then upon the good sense and common justice of the case, as upon the ground of venerable and unquestioned authorities, I am of opinion, that the demurrer ought to be overruled.

Judgment for defendant on demurrer.[8]

BONNER v. WELBORN.

(Supreme Court of Georgia, 1849. 7 Ga. 296.)

In 1843 Alfred Welborn erected a mill-dam on his own land, adjoining the property known as the Meriwether Warm Springs, then the property of Seymour R. Bonner. In 1845, Seymour R. Bonner sold and conveyed this property to the plaintiff in error, Robert Bonner.

In 1847, Robert Bonner brought an action against Alfred Welborn, alleging that he had been damaged $20,000, because the defendant on November 1, 1843, and on divers other days and times between that date and the commencement of this suit had erected a mill-dam within 400 yards of certain medicinal springs and a hotel of which the plaintiff was possessed and thus had caused the water to stagnate and plaintiff's premises to become unhealthy, with the result that plaintiff's hotel business fell off. At the trial, no request by the plaintiff to the defendant to abate the nuisance was proven.

The court charged the jury, that the erection of the mill-pond by the defendant, on his own land, being a lawful act, it was necessary that the plaintiff should request the defendant to abate it, or give notice to that effect, before he could maintain this action; and the mill-dam, as shown by the proof, having been erected before the plaintiff purchased the land, or went into possession of the springs, he could not maintain this action for its erection or continuance, until he had requested the defendant to take it down.

NISBET, J. * * * The circuit judge ruled, that the defendant was not liable in this case, but upon request, or notice to abate the nuisance. That decision is also excepted to, and is the only other question made. The plaintiff is the grantee of the property, holding title of Seymour Bonner, who was the owner at the time the mill-dam was

[8] The statement of the case is abridged, and part of the opinion is omitted.

built. The defendant, Welborn, erected the mill-dam, and is still the owner. The mill-pond did not prove a nuisance, until after the plaintiff bought and went into possession of the springs. At this bar, it is insisted, that an action for damages does not lie in favor of him who is the feofee or assignee of the owner, at the time the nuisance was erected, against him who erected it, without request. This proposition, I do not think, is sustainable, either upon principle or authority.

A private nuisance, is anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. 3 Black. 170. If, for example a person keeps his hogs or other noisome animals so near the house of another, that the stench of them incommodes him, and makes the air unwholesome, this is an injurious nuisance, as it tends to deprive him of the use and benefit of his house. 9 Coke, 58; 1 Burrow, 337; 3 Black. Com. 217. If one does any other act, in itself lawful, which yet being done in that place, necessarily tends to the damage of another's property, it is also a nuisance. So closely, says Blackstone, does the law of England enforce that excellent rule of gospel morality, of "doing to others, as we would that they should do unto ourselves." Let this suffice to show what a nuisance is, and that the act complained of in this instance is a nuisance. The obligation of each citizen is, to use his own property in such a way as not to do hurt or damage to the property of another. If he does not, he creates a nuisance, and is liable to respond in damages; and this, although the use to which he applies his property is, in itself, lawful. The condition upon which he uses his property is, that no one shall be injured thereby. The rule is of universal application; no one is exempt from its operation; nor does the obligation depend upon the time when, or the manner in which, he becomes owner. Eo instanti in which the use of his property becomes injurious to another, it is a nuisance, and he is liable in damages. This liability depends upon no other fact or circumstance—if the nuisance exists, if the damage is proven, the law, without more, attaches to him the liability. The law devolves upon him the burden of seeing to it, that in the use of his property, he does no injury to his neighbor. There is, therefore, no condition precedent to the recovery of the person injured in his property, or the use of it. The conclusion from these principles, is irresistible, that he who does hurt or damage to another, in the use of his own property, is liable, without notice or request. * * * [9]

[9] The statement of facts is abridged, part of the opinion of Nisbet, J., and the concurring opinion of Lumpkin, J., and the dissenting opinion of Warner, J., are omitted.

MURTHA v. LOVEWELL.

(Supreme Judicial Court of Massachusetts, 1896. 166 Mass. 391, 44 N. E. 347, 55 Am. St. Rep. 410.)

Report from Supreme Judicial Court, Suffolk County; Oliver Wendell Holmes, Judge. The case was reported to the full court for decision.

LATHROP, J. The defendants do not now contend that their furnace for melting iron was not properly found by the justice of this court who heard the case to be a nuisance at common law, but they seek to justify their acts on the ground of certain so-called "licenses," issued by the mayor and aldermen of Chelsea, under Pub. St. c. 102, §§ 40–48. The first of these appears to be merely a street permit to use a portion of the street in front of the premises for the deposit of building materials. On March 5, 1895, a license to erect a furnace for melting iron was granted to the defendants, with the provision that they build a stack 25 feet in height above the roof of the building, with a suitable spark arrester placed upon the top thereof. Due notice was given of the application for such a license, in accordance with section 41 of chapter 102 of the Public Statutes. A copy of this order was served upon the defendants, but, through some mistake, the height of the stack above the roof was stated to be 20 feet, instead of 25 feet. Thereupon the defendants proceeded to erect their stack only 20 feet high above the roof. Subsequently, this mistake was discovered, and the defendants filed a petition that the board of aldermen should revise the order by striking out the word "five" after the word "twenty"; and on May 4, 1895, the former action of the board was rescinded, and a new license was issued, to maintain a steam engine and boiler, also to melt iron, etc., on condition that the chimney on said building be 20 feet high, and capped with a suitable spark arrester. No notice, however, was given to any one on this petition.

We are of opinion that the defendants show no ground of defense. They did not comply with the license of March 5, 1895, although perhaps through no fault of theirs; and the license of May 14, 1895, cannot avail them, because no notice was given, as provided in section 41, above referred to. If the case stopped here, the plaintiff would be entitled to an injunction to restrain the defendants from continuing the nuisance, and to the damages which had been assessed for the injury already done to the plaintiff's premises. But it was stated by counsel on both sides at the argument that, since the case was reported to this court, the defendants had obtained a license, in proper form, after due notice, to continue their business; and we have been requested to consider the question whether, under the sections above referred to, a license is any defense to this bill in equity for a private

nuisance. If it is a defense, it is obvious that an injunction should not be granted; and the plaintiff will be entitled only to the damages which he has sustained, and which, by agreement of parties made at the argument, is to be the sum found by the justice who heard the case. We are of opinion that it is well settled in this commonwealth that, under statutes similar to the one before us, where a license is granted by a local board, and the licensees are complying with the license, what they do cannot be considered as a nuisance or be restrained by this court.

In Com. v. Parks, 155 Mass. 531, 30 N. E. 174, it is said by Mr. Justice Holmes: "It is settled that, within constitutional limits not exactly determined, the legislature may change the common law as to nuisances, and may move the line either way, so as to make things nuisances which were not so, or to make things lawful which were nuisances, although, by so doing, it affects the use or value of property." Under St. 1845, c. 197, § 1, which is similar in its language to Pub. St. c. 102, § 40, it was said in Call v. Allen, 1 Allen, 137, 142, 143, that, the power being vested in the officers named in the statute to grant licenses, "it is an inevitable implication from its exercise in making and recording an order prescribing rules, restrictions, and alterations as to the building in which the furnace or engine is constructed, and other provisions for the safety of the neighborhood, that the owner may thereafter, by conforming to and observing all the terms and requirements of the order, lawfully continue to maintain, use, and work them." And again: "The further prosecution of his business by the defendant, by the use of his engine, was lawful; and his mills and works could afterwards be justly complained of only when he should fail in any respect to comply with the requirements of the order, or should act contrary to or in violation of its provisions."

This question was considered at length in Sawyer v. Davis, 136 Mass. 239, 241, 242, 245, 49 Am. Rep. 27. In that case, after this court had determined on a bill in equity that the ringing of a bell on a mill was a private nuisance to the plaintiff, and after a final injunction was issued restraining such ringing, the legislature passed a statute authorizing manufacturers, for the purpose of giving notice to employés, to ring bells and use whistles and gongs of such size and weight, and in such manner, and at such hours, as the board of aldermen of cities and selectmen of towns might designate. The selectmen of the town where the mill was situated granted a license to the owner to ring the bell on the mill at the hour at which he was prevented from ringing it by the injunction. It was held on a bill of review brought by the millowner, seeking to have the injunction dissolved, that the statute was constitutional, and that the bill could be maintained. It was said in the opinion: "And, when the legislature directs or allows that to be done which would otherwise be a nuisance,

it will be valid, upon the ground that the legislature is ordinarily the proper judge of what the public good requires, unless carried to such an extent that it can fairly be said to be an unwholesome and unreasonable law." See, also, Com. v. Rumford Chemical Works, 16 Gray, 231; Alter v. Dodge, 140 Mass. 594, 5 N. E. 504; White v. Kenney, 157 Mass. 13, 31 N. E. 654. The case of Quinn v. Light Co., 140 Mass. 106, 3 N. E. 200, upon which the plaintiff relies, was decided upon the ground that a license under Pub. St. c. 102, § 40, to run a steam engine, if it included authority to run any kind of machinery, was broader than the statute; that the machinery, therefore, might, by its noise, be a nuisance, for which an action for damages would lie.

In the case at bar, the nuisance appears to have been caused by the spark arrester not preventing sparks and small pieces of red-hot iron from falling upon the vacant lot of the plaintiff, but "the authority to do an act must be held to carry with it whatever is naturally incidental to the ordinary and reasonable performance of that act." Sawyer v. Davis, 136 Mass. 245, 49 Am. Rep. 27. The presiding justice has stated that he was satisfied that, on the evidence, this spark arrester was the best one known for the purpose, and so found it to be suitable, and that the furnace and chimney were managed with all the precaution practicable for the business. Under the statutes above referred to, which apply to this case, we are of opinion that there is enough to show that the legislature intended the license to cover the whole question, and to authorize the doing of the business with reasonable care. We are also of the opinion that the finding of the single justice shows that the business was conducted with such care. Assuming that there was a proper license, we are therefore of opinion that the plaintiff is not entitled to an injunction, but is only entitled to recover the damages which have been assessed. Decree accordingly.

BRANAHAN v. HOTEL CO.

(Supreme Court of Ohio, 1883. 39 Ohio St. 333, 48 Am. Rep. 457.)

The Cincinnati Hotel Company had obtained a judgment in the District Court against Branahan and others, owners and drivers of hackney coaches, perpetually enjoining them from using the street in front of the plaintiff's property as a hackney coach stand. It appeared that this use of the street was under the authority of a city ordinance. The defendants move to file a petition in error to the District Court.

JOHNSON, C. J. * * * The City is clothed with power over the streets, and is charged with the duty of keeping them open for public use and free from nuisance. It may enlarge these general public uses

without infringing the rights of the adjacent owner, but where additional burdens are imposed even for a public purpose, which materially impair the incidental property right of the lot owner, equity will enjoin, until compensation is made. Railway v. Lawrence, 38 Ohio St. 41, 43 Am. Rep. 419; Street Railway v. Cumminsville, 14 Ohio St. 524; Crawford v. Village of Delaware, 7 Ohio St. 459. This ordinance granted a permanent use of the street for mere private uses. As well might the city authorize permanent booths or structures for the use of dealers in various articles of trade. Having no rent to pay, the occupants could accommodate the public at better rates.

The supervision and control of the public highways of a city is a public trust, and while additional uses may be imposed, not subversive of, or impairing the original use, such as laying down gas and water mains; yet the rights of the public to use it as a street, and of the adjacent lot owner to enjoy it as the means of access to his property, cannot be materially impaired.

The city has the right to regulate hackney coaches (R. S. § 1692), and also the right to appropriate private property for the use of the corporation, but it has no power to appropriate the easement of an adjacent owner to a mere private use. This permanent occupancy of the streets cutting off access to the plaintiff's store rooms, for the convenience and benefit of a private business, cannot be justified on the plea that the public who use hacks are accommodated more readily and on better terms.

The same would, doubtless, be the case with other kinds of business located in the streets. The finding of the court is, that the use complained of deprives the owner of all access to his premises.

Even if, as is suggested, this is in the nature of a public use, like a market, the city could not appropriate it to such use without proceeding according to law as settled in the cases already cited.[10]

Motion overruled.

[10] A portion of the case is omitted.

Compare Bacon v. Boston (1891) 154 Mass. 100, 28 N. E. 9, and the remark of C. Allen, J.: "The general rule is that the legislature may authorize small nuisances without compensation, but not great ones. Sawyer v. Davis, 136 Mass. 239, 243 [49 Am. Rep. 27]. But it will not be assumed that the legislature intended to authorize a nuisance unless this is the necessary result of the powers granted."

And see 29 Cyc. 1196 et seq.

III. Trover and Conversion [11]

(A) Nature of the Tort

(a) Trover and Conversion Distinguished from Other Torts.

PUT and HARDY v. RAWSTERNE et al.

(Court of King's Bench, 1682. Sir T. Raym. 472, 83 Reprint, 246.)

Trover of divers goods. The defendant pleads an action of trespass vi & armis brought against them formerly, for taking and disposing of the same goods; and upon not guilty pleaded, a verdict for the defendants: judgment si actio. The plaintiff demurs; and adjudged for the plaintiff in this action of trover, because trover and trespass are actions sometimes of a different nature; for trover will sometimes lie where trespass vi & armis will not lie; as if a man hath my goods by my delivery to keep for me, and I afterwards demand them, and he refuses to deliver them, I may have an action of trover, but not trespass vi & armis because here was no tortious taking: and sometimes the case may be such, that either the one or the other will

[11] A Declaration in Trover and Conversion, in the Case of Bancks v. Jeans (1735), the Pleader's Assistant (1795) 509:

"To wit. Robert Bancks, Esq., complains of Thomas Jeans, in custody, &c, for this, that whereas the said Robert upon the first day of May in the year of our Lord one thousand seven hundred and thirty-five, at Basinstoke, in the county of Southampton, was possessed of divers goods and chattels, that is to say, of thirty ton weight of paving stones, thirty ton weight of other stone for building, three thousand bricks, and ten cart loads of timber, of the value of sixty pounds, as of his own proper goods and chattels, and being so possessed thereof, the said Robert afterwards, that is to say, on the same day and year abovesaid, at Basinstoke aforesaid, casually lost the said goods and chattels out of his hands and possession, which said goods and chattels afterwards, to wit, on the same day and year abovementioned, at Basinstoke aforesaid, came to the hands and possession of the said Thomas by finding the same, yet the said Thomas well knowing the said goods and chattels to be the proper goods of him the said Robert, and of right to belong and appertain to him, but devising and fraudulently intending, craftily and subtilly to deceive and defraud the said Robert of the said goods and chattels, hath not delivered the said goods and chattels, nor any of them to the said Robert (although often requested so to do) but afterwards, that is to say, upon the second day of May, in the year aforesaid, at Basingstoke aforesaid, converted and disposed of the said goods and chattels to his own use, to the damage of the said Robert sixty pounds, and thereupon he brings his suit."

See also the form of the declaration in Stephen on Pleading (Williston's Ed. 1895) 44, and in Whittier's Cases on Pleading, 195.

Under the Judicature Acts (1875), the following is a sufficient statement of claim in Trover and Conversion:

"The plaintiff has suffered damage by the defendant wrongfully depriving him of a gold watch belonging to the plaintiff, and converting the same to his own use after a demand from the plaintiff for its delivery. The plaintiff claims £40. damages." Cunningham and Mattinson, Precedents 569 (1884).

For the different uses of the term "Conversion" see Black's Dictionary, "Conversion in Law" and "Conversion in Equity," and 9 Cyc. 824.

lie; as where there is a tortious taking away of goods, and detaining them, the party may have either trover or trespass, and in such case judgment in one action is a bar in the other. And the rule for this purpose is, that wheresoever the same evidence will maintain both the actions, there the recovery or judgment in one may be pleaded in bar of the other; but otherwise not; and so this judgment will not clash with Ferrer's Case,[12] which is good in law; for here it is to be presumed that the plaintiffs in the first action had mistaken their action; for that they had brought a trespass vi & armis, whereas they had no evidence to prove a wrongful taking, but only a demand and denial, and therefore the verdict passed against them in that action, and so were forced to begin in this new action of trover. This judgment was given positively by PEMBERTON, JONES and myself, DOLBEN hæsitante.

LACON v. BARNARD, Attorney.

(Court of Common Pleas, 20 Jac. I. Cro. Car. 35, 79 Reprint, 635.)

Trover and conversion of one hundred sheep, shewing that the plaintiff upon the twenty-fifth day of March, 19 Jac. I, was possessed of those goods and lost them, and that upon the last day of April they came to the defendant's hands, who the same day sold and converted them to his proper use.

The defendant for eleven of them pleaded not guilty; and as to the eighty-nine, the residue, he pleaded, that the plaintiff at another time, viz. on the eighteenth day of September, 19 Jac. I, prosecuted an original writ out of the Chancery, returnable in this Court, against the defendant and one Brian Smith, quare ceperunt et abduxerunt 100 oves; and thereto they appeared, and the plaintiff counted against them of their taking of a hundred sheep upon the fourteenth day of April, 19 Jac. I; and thereto they pleaded not guilty for the eleven sheep, and for the eighty-nine residue they pleaded a recovery in debt by the defendant against Edward Hatcliff of a debt of sixty pounds; and that the said Edward Hatcliff was then possessed of the said eighty-nine sheep, and that by virtue of a fieri facias those goods were sold to him, whereupon he took them into his custody. The plaintiff thereto replied, and took issue, and found for him, and damages assessed to twopence: and thereupon the plaintiff had judgment of the said twopence damages, and had six pounds for costs; and avers, that the said taking and driving, for which the recovery in trespass was had, and the conversion of the said eighty-nine sheep in this action be all one, and that the said judgment is yet in force.

To this plea the plaintiff replies, that true it is he brought such an action, and recovered the twopence for the taking and driving of the

[12] Ferrer's Case (1599) 6 Co. 7a. And see Ferrers v. Arden (1598) Cro. Eliz. 668, 78 Reprint, 906.

said eighty-nine sheep, and six pounds for costs; but he farther saith, that the twopence damages was not assessed for the value of the said sheep and the conversion of them, and that the said defendant, at the day and year in the bill, sold the said eighty-nine sheep and converted them to his own use: the which conversion is the same conversion whereof he now complaineth; and traverseth, that the said taking and driving in the said action, whereupon the judgment was given, is the same trespass as to the conversion of those goods whereof the plaintiff now declareth.

Upon this replication the defendant demurred generally: and it was now argued at the Bar by Serjeant Crew, for the defendant, and by Serjeant Henden, for the plaintiff; and after the said arguments at the Bar, it was resolved

By HUTTON, HARVEY, and myself, that this replication is good, and that the plaintiff ought to recover; for the damages of twopence given for the eighty-nine sheep being so small, is in itself an implication (and the Court shall so intend it) that it was given only for the taking and driving of them, and that the plaintiff had them again, and not in lieu of the value of them; for if it should be given for the value of them, then the plaintiff should thereby lose the property in them and have nothing for his sheep but twopence, and the defendant should have the sheep: but the law will rather intend (and so it may be averred) that those damages were given only for the taking and driving, and that the plaintiff had them again, and afterwards lost them, and that the defendant found and after converted them, &c.: and this demurrer is a confession that he converted them after the said taking and driving; for the action of trespass is supposed to be upon the 14th April, 19 Jac. I, and the trover and conversion in this action is supposed to be upon the 30th April, 19 Jac. I, which well stands with the former action; for the defendant may take and chase them one day, and the plaintiff recover damages for the chasing, and after lose them, &c. And this first action is brought for the first taking and chasing, and the second for the conversion, so both may stand together, which is now confessed by the demurrer, and that the damages were given for the first taking and driving and not for the conversion; therefore they conceived the plaintiff should recover.

But YELVERTON held, because the action of trespass is cepit et abduxit, therefore it includes that the defendant had them, and ousted the plaintiff of the possession: and although the damages be small, it shall be intended to be given for the sheep; and if so, then he cannot have an action for converting them afterward.

But judgment was given for the plaintiff.

AMERICAN UNION TELEGRAPH CO. v. MIDDLETON.

(Court of Appeals of New York, 1880. 80 N. Y. 408.)

MILLER, J. This action was brought to recover damages for wrongfully and maliciously cutting down, and unlawfully carrying away and converting twenty-three telegraph poles, wires, and insulators attached thereto, located in the State of New Jersey, and forming a part of a continuous line of telegraph in operation in that State. An order of arrest was granted, the defendant held to bail, and a motion to vacate the order was denied. The defendant appealed to the General Term, where the order was affirmed and an appeal was taken to this court.

The question presented is whether an order of arrest can be lawfully granted in such a case. The telegraph poles, with the wires and attachments thereto, which, it is alleged, were cut down by the defendant, were affixed to the soil of a highway, and constituted a part of the freehold. The Electric Tel. Co. v. Overseers, 24 L. J. (N. S.) 146. As they could not be cut down without an entry on the realty, and this constitutes a material part of the damages, the only action which can properly be brought is an action of trespass quare clausum fregit. This is clearly manifest; and as such action is local in its character, by the statute as well as by the common-law, it will not lie in this State, where the land is located in another State. Watts' Adm'rs v. Kinney, 23 Wend. 484. In the case last cited it was held that although the courts will entertain actions which are in their nature transitory, notwithstanding they arise abroad, actions for trespass quare clausum fregit, ejectment, etc., where the land lies in a foreign country, cannot be tried here.

It is claimed that the damage to the real estate is not the cause of action; and as the tortious acts were committed upon the highway where the defendant had a right to be, there could be no trespass on the close. The answer to this position is that the plaintiff had affixed their poles to the realty, and the cutting away of the same was a trespass for which damages could only be recovered by an action quare clausum fregit.

It is also insisted that the gravamen of the complaint was for carrying away and converting the poles which were severed, and were personal property after the cutting, even if they were a part of the realty previously. It is quite obvious that the cutting of the poles and the removal of them was one continuous and uninterrupted transaction, inseparably connected together, which constituted a single cause of action which cannot be divided into two actions, one for the cutting and another for the conversion. The one was a part of the other, and the conversion so coupled with the cutting that they were the same, and both of them are thus made local. Howe v. Willson, 1 Denio, 181.

Conceding, however, that the poles and wires could have been made

the subject of a conversion after they had been severed from the soil, we think that the affidavits establish that no such separate conversion actually took place. The defendant only carried them from the place where they were cut and from the highway to the ditches and side fences of the road, and left them there or placed them on the side fences by the road-side. There was no assumption of possession, no attempt to exercise control, or to convert them to his own use. But even if there was, the only damages which could be recovered in such a case would be the actual value of the poles and wires, which would be merely nominal when compared with the amount of damages ($5,000) which the plaintiff claims to recover, and for which sum the defendant was held to bail in this action. It is very evident from the plaintiff's affidavits that there was no legal conversion, and that it could not take place without a removal of the poles and wires for the purpose of taking them away from the plaintiff, or by the exercise of some dominion over them by the defendant for the benefit of himself or of some other person. The mere act of removal, of itself, independent of any claim over them in favor of the defendant, or any one else, does not amount to the conversion of the poles, wires and insulators: Addison on Torts (3d Ed.), 309. * * *

It follows that the order of the Special and General Terms must be reversed. * * *[13]

WILLIAMS v. GESSE.

(Court of Common Pleas, 1837. 3 Bing. [N. C.] 849, 132 Reprint, 637, 43 R. R. 822.)[14]

Trover for a coat and pantaloons. Plea, not guilty. The defendant kept a public house at Oxford, frequented by farmers. The plaintiff's clothes, packed in a box, were deposited in the defendant's kitchen, behind the settle, by a person who said the box was to stay till called for. The box was never seen again by the plaintiff, but when he enquired for it, the defendant said, "I suppose it's behind the settle."

Verdict for the plaintiff, with leave for the defendant to move to enter a nonsuit instead, on the ground that there was no evidence of any conversion.

[13] Part of the opinion is omitted.

Compare: Radway v. Duffy (1903) 79 App. Div. 116, 80 N. Y. Supp. 334: (D. entered without right upon the land of P., and dug up and carried away 6,000 cubic yards of earth, and used it in grading a public street, for which D. had a contract.)

McGonigle v. Atchison (1885) 33 Kan. 726, 7 Pac. 550: (P. sued to recover for 200,000 bushels of sand dug out of his land in Missouri by D., and by him taken into Kansas and there converted to his own use.)

[14] For the report of this case at nisi prius, see Williams v. Gessey (1837) 7 Car. & P. 777.

Ludlow, Serjt., having obtained a rule nisi accordingly,

V. Lee appeared for the plaintiff; but upon reading the learned Judge's report, as above,

The rule was made absolute.

In a similar action by a sister of the plaintiff against the same defendant, it was proved that the defendant received parcels for carriers; that the parcels were accustomed to be placed behind the settle; and when application was made for the parcel in question, the defendant's wife said, "My husband has sent it, no doubt, by Croft, the carrier: he has a bad memory; it's a pity you did not speak to me." Verdict for the defendant.

V. Lee, in Easter Term, moved for a new trial, on the ground that the language of the wife showed that the defendant had interfered by giving directions, which would amount to a conversion.

Sed PER CURIAM: What was there to go to the jury? Was there anything but negligence? That will not support the action.[15]

Rule refused.

[15] Accord: Mulgrave v. Ogden (1591), Cro. Eliz. 219, 78 Reprint 475: (Action sur trover of twenty barrels of butter; and counts that he tam negligenter custodivit that they became of little value. Upon this it was demurred, and held by all the justices, that no action upon the case lieth in this case; "for no law compelleth him that finds a thing to keep it safely: as if a man finds a garment, and suffers it to be moth-eaten; or if one finds a horse, and giveth it no sustenance: but if a man finds a thing and useth it, he is answerable, for it is conversion: so if he of purpose misuseth it; as if one finds paper, and puts it into the water, &c. but for negligent keeping no law punisheth him.") Owen v. Lewyn (1672) 1 Ventr. 223, 86 Reprint, 150; Ross v. Johnson (1772) 5 Burr. 2825; Bowlin v. Nye (1852) 10 Cush. (Mass.) 416; Wamsley v. Atlas S. S. Co. (1901) 168 N. Y. 533, 61 N. E. 896, 85 Am. St. Rep. 699.

Compare Central Railroad & Banking Co. v. Lampley (1884) 76 Ala. 357, 52 Am. Rep. 334: (Action against a railroad company to recover damages for the alleged conversion of money which the plaintiff sent in a registered letter addressed to L., at a station on the defendant's line. The defendant was engaged in transporting the mail, and in this capacity received the letter in question. The letter never reached its address. The complaint contained only one count, in trover for conversion of the money, not stating any other facts. Plea, not guilty. The trial court charged that "it is no answer to this complaint that the money was lost through the defendant's want of proper care." Said Clopton, J., delivering the opinion of the reviewing court: "The essential element of a conversion is malfeasance. The action will lie against a common carrier, for a misdelivery, or an appropriation of the property to his own use, or for any act of dominion or ownership antagonistic to, and inconsistent with the plaintiff's claim or right. But trover will not lie against a carrier, for goods lost by accident or stolen, or for non-delivery, unless there be a refusal to deliver while having possession; nor for any act or omission, which amounts to negligence merely, and not to an actual wrong. Packard v. Getman, 4 Wend. [N. Y.] 613, 21 Am. Dec. 166; Magnin v. Dinsmore, 70 N. Y. 410, 26 Am. Rep. 608. So also a bailee is not liable for a conversion, who deals negligently with goods intrusted to him. Heald v. Carey (1852) 11 C. B. 977. On like principles, trover will not lie against a mail-contractor, for money lost by negligence, or stolen, unless the theft was authorized by him. We do not understand, as is insisted on, that the evidence shows, or tends to show, that the defendant is guilty of any wrongful disposition, or appropriation, or withholding of the letter containing the money, other than a failure to deliver on the com-

OLIVANT v. BERINO.

(Court of King's Bench, 1743. 1 Wils. 23, 95 Reprint, 471.)

In trover for some pictures it was moved, that plaintiff should be obliged to take the pictures and costs upon an affidavit that they are all the goods that the defendant has of the plaintiff, and that not denied.

But PER CURIAM: This action is for damages; and you cannot oblige the plaintiff to accept the thing itself.[16]

ALLEN v. FOX.

(Court of Appeals of New York, 1873. 51 N. Y. 562, 10 Am. Rep. 641.)

This action was brought to recover the possession of a horse. The horse had been taken in the action, and delivered to the plaintiff and retained by him to the time of the trial. There was conflicting evidence as to the title of the horse, but the jury found the title to be

mencement of the suit. It appears that the letter was stolen by some one: but whether by a third person, or a servant of the defendant, the defendant is not liable as for a conversion. In Conner & Johnson v. Allen & Reynolds, 33 Ala. 515, it was said: 'Trover is one of the actions, the boundaries of which are distinctly marked, and carefully preserved by the Code. A conversion is now, as it has ever been, the gist of that action, and without proof of it the plaintiff can not recover, whatever else he may prove, or whatever may be his right of recovery in another form of action.' On the facts shown by the record, the defendant is not liable as for a conversion of the money. Reversed and remanded.")

See, on the general bearings of this question, the article by Professor Emlin McClain in 14 Columbia Law Rev. 632, 639 (1914).

16 "Note: In Buxton and Gabell, Trin. 9 G. I, trover for a ring; and Pas. 9 or 10 G. II, in trover for goods, this Court refused the like motion."

See also Harding v. Wilkin (1754) Sayer, 120 (motion that upon bringing into court a gold watch and a diamond ring, for the conversion of which the action was brought, the proceedings in trover might be stayed). But see Fisher v. Prince (1762) 3 Burr. 1364, where Lord Mansfield and Mr. Justice Wilmot both concurred in the following distinction: "That where trover is brought for a specific chattel, of an ascertained quantity and quality, and unattended with any circumstances that can enhance the damages above the real value, but that its real and ascertained value must be the sole measure of the damages, there the specific thing demanded may be brought into court; (and Mr. Justice Wilmot said this was the more reasonable, as this action of trover comes in the place of the old action of detinue:) where there is an uncertainty either as to the quantity or quality of the thing demanded, or that there is any tort accompanying it that may enhance the damages above the real value of the thing, and there is no rule whereby to estimate the additional value, there it shall not be brought in." The rule thus announced has been followed in England. Pickering v. Truste (1796) 7 T. R. 531; Tucker v. Wright (1826) 3 Bing. 601; Gibson v. Humphrey (1833) 1 Cr. & M. 544. And see 27 Halsbury's Laws of Eng. 911, 912 (1913).

On the American rule, see Carpenter v. Manhattan Life Ins. Co. (1880) 22 Hun (N. Y.) 47 ("A party whose goods are converted, cannot be forced to receive them back"); Livermore v. Northrup (1870) 44 N. Y. 107; Railroad Co. v. O'Donnell (1892) 49 Ohio St. 489, 32 N. E. 476; Cernahan v. Chrisler (1900) 107 Wis. 645, 83 N. W. 778; 38 Cyc. 2102; 47 Cent. Dig. "Trover and Conversion," § 277; Key-No. "Trover and Conversion," § 58.

in the defendant, and assessed its value at $175, and damages for its detention by the plaintiff at $75. The defendant, for the purpose of proving his damages for the detention, gave evidence of the value of the use of the horse. The plaintiff objected to this evidence, claiming that the value of the use was not the proper measure or rule of damage. This objection being overruled raised the only question considered upon this appeal.

EARL, C. * * * In actions of trover, in cases where there has been no increase in the value of the property converted intermediate the conversion and the time of the trial, the measure of damages is the value at the time of the conversion, and interest thereon to the time of the trial, and it would have to be a very special case that would authorize greater damages. The claim here is, that the same rule applies in an action of replevin, and I shall endeavor to show that it does not apply in all cases, and that this case is one of a class to which it cannot be applied.

The very nature of the two kinds of action shows that the same rule of damages should not be inflexibly applied in each.

In the action of trover, the plaintiff does not seek to recover his property, but its value as a substitute for the property. He abandons the property to the defendant, preferring to pursue him for its value. He makes a kind of forced sale of it, without any expectation or intention of retaking it. Hence, in such cases, he can be expected at once to go into the market and supply himself with the same property at its market value if he desires it. But in the action of replevin, the plaintiff seeks to recover the property and is, in all stages of the case to final judgment, in pursuit of that, and not its value. And during the whole time the defendant may have the possession and the use (if it can be used) of his property. At the termination of the suit it is not optional with him to take the property or its value. If the defendant has the property, and will permit him to take it, he is obliged to take it. Code, § 277; Dwight v. Enos, 9 N. Y. 470; Fitzhugh v. Wiman, 9 N. Y. 559. Hence the plaintiff cannot always be expected or required, in such cases, to go into the market and supply himself with the same kind of property at its market value. Suppose the controversy be about a canal boat or a carriage, or an expensive machine. If the plaintiff should go into market and buy another, at the end of the litigation, in case of success, he would have on hand duplicates of the article, and would thus be subjected to further loss and inconvenience. These observations are made simply to show that there is nothing in the nature of the two actions requiring the application of the same rule of damages. * * *

In the action of replevin, under the Code, the jury are required to assess the value of the property, and damages for its detention. The value here intended is the value at the time of the trial. In case the prevailing party can obtain a delivery of the property, he must take it as it then is; if he cannot obtain such delivery, then the value is

intended as a substitute and precise equivalent of the property. The damages for detention are the same, whether the party recover the property or its value. * * *

Suppose the plaintiff had taken defendant's boat, worth $2,000, and kept it a whole year before it was ordered, as the result of the action, to be returned to the defendant, would the interest be a fair compensation to the defendant for the loss of the use of his boat? Instead of a boat, suppose it had been a carriage, worth $1,000, would the interest be a sufficient allowance for the use of the carriage a whole year? The same supposition may be made as to any article of personal property having a usable value. There would be very few cases where the interest would give the owner a fair or adequate indemnity, and thus two of the fundamental rules of damages would be violated: The owner would not be completely or fully indemnified for the loss of the use of his property, and the wrong-doer who had had the use of it would make a profit out of his own wrong, which the law does not tolerate.

This case illustrates the injustice of the rule contended for by the plaintiff as well as any. The jury found the value of the horse to be $175 and the value of the use to be $75 for one year and three months. For the same period the interest would have been $15.31, and if that had been taken as the measure of damages, the owner would have lost about sixty dollars and the wrong-doer would have made that much profit out of his wrong. A rule of damage which works out such a result, cannot have a basis of principle or justice to stand upon. * * *[17]

It follows that the rule of damages adopted below was right, and that the judgment must be affirmed with costs.

(b) Subject-Matter of Trover and Conversion

MACKINTOSH v. TROTTER et al.

(Court of Exchequer, 1838. 3 Mees. & W. 184, 49 R. R. 565.)

Trover for fixtures, furniture, &c. Plea, that the goods and chattels in the declaration mentioned were not, nor were any of them, the property of the plaintiff. At the trial, it appeared that the action was brought by the plaintiff, an innkeeper at Liverpool, to recover from the defendants, his assignees under a fiat in bankruptcy, which he alleged to be void, the value of certain tenant's fixtures and household furniture, which they, as his assignees, had put up to sale by auction, together with the lease of his house and the goodwill of his

[17] Part of the opinion, discussing and limiting Twinam v. Swart, 4 Lans. (N. Y.) 263, is omitted.

business. The fixtures and furniture were sold in one lot, for £79. 8s. 8d., and it was proved that the former still remained affixed to the freehold, not having been removed by the purchaser. It was contended, for the defendants, that the fixtures were not recoverable in trover. The learned Judge was disposed to think that the defendants, by selling them, had, as between themselves and the plaintiffs, treated them as goods and chattels: he however desired the jury to assess the value of the fixtures separately; and they having stated their value at £55., a verdict passed for the plaintiff for £79. 8s. 8d., leave being reserved to the defendants to move to reduce the damages by the sum of £55.

In Michaelmas Term, Cowling obtained a rule accordingly.

Cresswell, Wightman, and Addison now showed cause: These were fixtures which the plaintiff, being tenant, might have removed; and for such fixtures, if the tenant be dispossessed of them during his term, he may maintain trover. * * * If trespass was maintainable for the wrongful taking, so trover would lie for the wrongful conversion and detention of them. (PARKE, B. Would trover lie for a crop of standing corn? Your argument amounts to this, that the plaintiff may maintain trover for preventing him from exercising his right of removal.)

Alexander and Cowling, in support of the rule, were stopped by the Court.

PARKE, B. Minshall v. Lloyd, 2 M. & W. 450, is a direct authority on this point. I gave my opinion in that case, not on my mere impression at the time, but after much consideration of this point, that the principle of law is, that whatsoever is planted in the soil belongs to the soil, quicquid plantatur solo, solo cedit; that the tenant has the right to remove fixtures of this nature during his term, or during what may, for this purpose, be considered as an excrescence on the term; but that they are not goods and chattels at all, but parcel of the freehold, and as such not recoverable in trover. That case is a direct authority, so far as my opinion and that of my brother Alderson go; and I think it was a correct decision.

BOLLAND and GURNEY, BB., concurred.

Rule absolute.[18]

[18] Compare Rogers v. Gilinger (1858) 30 Pa. 185, 72 Am. Dec. 694, where the question of the subject-matter of conversion relates to fragments of a large frame building blown down by a wind, "leaving the foundation and floors nearly entire, but breaking the superstructure, so that its materials could not be replaced, or used in the construction of a similar building."

WOOD v. SMITH.

(Court of King's Bench, 1606. Cro. Jac. 129, 79 Reprint, 112.)

Action of trover of divers goods (naming them particularly), and converting of them. The defendant pleaded not guilty; and it was found against him, and damages assessed to £40. And it was now moved in arrest of judgment,

First, the action is brought of divers things by an administrator, of goods of the intestate's found and converted; and it appears that parcel of those goods are things fixed to the freehold, and as parcel thereof, for which this action lies not, for the declaration is, that he was possessed de duobus articulis vocat. portal, cum suspensis vocat. hinges, et de uno molendino vocat. an hand-mill, et de uno plumbo vocat. a lead, et de una alveolâ vocat. a washing-fat, and lost them, &c. which things appear to be fixed to the house, and are as parcel thereof, and are not accounted as goods; so the action lies not for them; for the portal is a door of the house, and the hand-mill and the lead (which is a brewing lead), and the washing-fat (which is parcel of the brewing vessels), are always fixed things, and go to the heir and not to the executor, as 20 Hen. VII is.

Sed non allocatur; for it is alleged in the declaration, that he was possessed of them ut de bonis propriis; and it may be that those things were severed from the freehold, and things lying by; and it shall be so intended, when the plaintiff so declares; and the contrary appears not to the Court by any matters shewn to them by the defendant's plea. * * *

Adjudged for the plaintiff.[19]

GRYMES v. SHACK.

(Court of King's Bench, 1610. Cro. Jac. 262, 79 Reprint, 226.)

Action of trover and conversion of one hundred muskcats and sixty monkies. The defendant pleads not guilty; and it was found against him: and it was moved in arrest of judgment, that an action lay not, because he doth not shew that they were tame or reclaimed; as 12 Hen. VIII and 14 Eliz. Dyer, for a hawk.

Sed non allocatur; for they are merchandise, and valuable. And so it is of an action for a parrot. Wherefore it was adjudged for the plaintiff.

[19] Only so much of the case is given as relates to the one point.

KINASTON v. MOOR.

(Court of Common Pleas, 1627. Cro. Car. 89, 79 Reprint, 678.)

Error in the Exchequer Chamber of a judgment in the King's Bench in action of trover and conversion of divers goods, and among other things of £190 in pecuniis numeratis. Upon not guilty pleaded, a verdict was found for the plaintiff, and entire damages given. The error was assigned, because trover and conversion cannot be of money out of a bag.

But all the Justices and Barons agreed, that it well lies: for although it was alleged that money lost cannot be known; and so whether it was the plaintiff's money, whereof the trover and conversion was, as is the charge of this action, yet the Court said, it being found by a jury that he converted the plaintiff's money (for the losing is but a surmise and not material, for the defendant may take it in the presence of the plaintiff, or any other who may give sufficient evidence; and although he take it as a trespass, yet the other may charge him in an action upon the case in a trover, if he will), the plaintiff had good cause of action. Wherefore the judgment before well given was now affirmed.

The Justices and Barons said, that this action lies as well for money out of a bag, as of corn which cannot be known.

ORTON v. BUTLER.

(Court of King's Bench, 1822. 5 Barn. & Ald. 652, 106 Reprint, 1329.)

The declaration in this case contained three counts; the third count was as follows:

> And, whereas also the said defendant afterwards, to wit, on, etc. at, etc. had and received for the use of the plaintiff, a certain sum of money; to wit, the sum of ten shillings to be paid by the defendant to the plaintiff upon request. Yet the defendant, not regarding his duty in that behalf, but contriving, etc. hath not, although often requested, paid to the plaintiff the last mentioned sum of money, or any part thereof, but hath wholly omitted so to do; and on the contrary thereof, afterwards, to wit, on, etc. at, etc. converted and disposed thereof to his own use.

The defendant pleaded to the first two counts the general issue, and demurred specially to the last count.

ABBOTT, C. J. The law has provided certain specific forms of action for particular cases, and it is of great importance that they should be preserved; we ought therefore to look with great jealousy to an innovation of this sort. The present count states, that the defendant had and received to the use of the plaintiff, a certain sum of money, to wit, ten shillings to be paid to the plaintiff, but which the defendant converted to his own use. It is contended, that this is a count in

trover. Now, the action of trover is only maintainable for specific property; it will lie for so many pieces of gold or silver, and in that case a defendant can only redeem himself by tendering to the plaintiff the same specific pieces. But in this case he clearly might do so by returning an equal sum of money. There is, therefore, not merely a want of certainty in the count, but it states that which is not the subject of an action of trover at all. The demurrer therefore must be allowed.

BEST, J. This is an innovation upon the old forms established by law, and therefore ought not to be allowed. There is a broad distinction between actions ex contractu and ex delicto. Here, it arises out of a breach of contract, and the party ought not to be allowed to proceed in the present mode of framing his count ex delicto, which would be attended by the inconveniences pointed out in argument. The defendant might be deprived of his set off, and if he lived within the jurisdiction of an inferior Court, of his costs, and in addition to that, would not be able to pay money into Court. The action of trover is clearly not maintainable in a case like the present: there a party recovers damages for the detention of specific goods. But it would be inconsistent with justice, if where a sum of money was delivered generally to a defendant, the Court were to hold, that he could not defend himself unless he could prove that he had restored the same specific money delivered to him. But this would be the case if we were to allow the action of trover to be maintainable.

Judgment for the defendant.

ROYCE, ALLEN & CO. v. OAKES.

(Appellate Division, Supreme Court of Rhode Island, 1897. 20 R. I. 252, 38 Atl. 371.)

Action of trespass on the case. Certified from the Common Pleas Division and heard on demurrer to each count in the declaration.

TILLINGHAST, J. The plaintiffs set out in the first count of their declaration that on January 15, 1894, they delivered to the defendant the sum of $1,714.60 in money together with three gross of napkin rings of the value of $49.26, said money and goods being the property of the plaintiffs, for safe keeping, and to be redelivered by the defendant to the plaintiffs thereafterwards on the same day; that the defendant received said money and merchandise for the purpose aforesaid, yet, not regarding his duty in that behalf, afterwards on the same day, intending and contriving to injure the plaintiffs, fraudulently and unlawfully converted said money and goods to his own use, and, although thereafterwards duly requested, he neglected and refused to deliver said money and goods, or any part thereof, to the plaintiffs.

To the first count of the declaration the defendant demurs, on the grounds:

(1) That the matters therein stated do not set forth a cause of action against the defendant. (2) That, whereas said action is trespass on the case, said count states no cause of action against the defendant unless the same be an action for breach of contract. (3) That said count does not state facts constituting an action of trespass on the case against the defendant, but if any cause of action sounding in tort is therein stated, the same is an action of trover, and not a trespass on the case. And (4) that said plaintiffs join a cause of action for breach of contract with a cause of action sounding in tort.

We think the demurrer to the first count should be overruled; for, while it is somewhat inartificially drawn, yet it sufficiently states a case in trover, which is a species of action on the case. It sets out property in the plaintiffs, alleging a value thereof, together with the conversion thereof by the defendant at a certain time and place; and we think this is sufficient. For, while it is customary to incorporate into the declaration the legal fiction that the plaintiff casually lost the goods and chattels described, and that the same thereafterwards came to the defendant's hands by finding, yet we think it is sufficient to allege that they came to his hands generally, the conversion being the gist of the action. See Oliv. Prec. (3d Ed.) 467; Gen. Laws R. I. c. 235, §§ 4, 5.

But the defendant contends that trover lies only for the conversion of personal chattels, and does not lie for the failure to deliver to the plaintiffs money, as such;[20] and that the proper form of action as to that is assumpsit, for money had and received. It is true that the obligation to pay money to another is primarily within the confines of assumpsit, or debt; but the cause stated in said first count shows something more than a debt. It shows a trust coupled with a specific duty, together with a breach of the trust and a fraudulent violation of the duty. It shows that the defendant received the money in question simply for safe keeping, the same to be delivered to the plaintiffs on demand, and that instead of discharging the duty thus devolved upon him he wrongfully converted the money to his own use. Having received the money in specie, simply for safe keeping, it was his duty to deliver the same specific money to the plaintiffs on demand. See Donohue v. Henry, 4 E. D. Smith (N. Y.) 162; Worley v. Moore, 97 Ind. 15; Richmond v. Soportos (City Ct. N. Y.) 18 N. Y. Supp. 433;

[20] "'Tis pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench; and mistake their meaning. It has been quaintly said 'that the reason why money cannot be followed is, because it has no ear mark': but this is not true. The true reason is, upon account of the currency of it: it cannot be recovered after it has passed in currency. So in case of money stolen, the true owner cannot recover it; after it has been paid away fairly and honestly upon a valuable and bona fide consideration: but before money has passed in currency, an action may be brought for the money itself." Per Lord Mansfield, in Miller v. Race (1758) 1 Burr. 452, 457.

26 Am. & Eng. Ency. L. 766; Coffin v. Anderson, 4 Blackf. (Ind.) 395; Govett v. Radnidge, 3 East, 62–70.

As to the napkin rings, of course no question is made that they are the subject of trover and conversion.

But the defendant contends that the plaintiffs have joined in the same count a cause of action ex contractu with a cause of action ex delicto, and hence that it is demurrable. As we construe the count there is no such misjoinder. It simply sets out the manner in which the defendant became possessed of the property in question, his duty regarding the same, and his wrongful conversion thereof to his own use. In short, it states a case wholly sounding in tort and not in assumpsit. * * *

The demurrer to the first count is overruled.[21]

(c) Effect of a Judgment for Plaintiff

ADAMS v. BROUGHTON.

(Court of King's Bench, 1737. Andrews, 18, 95 Reprint, 278.)

An action of trover was brought by the present plaintiff against one Mason, wherein he obtained judgment by default, and afterwards had final judgment; whereupon a writ of error was brought. And another action of trover was now brought by the same plaintiff, and for the same goods for which the first action was brought, against Broughton. It was thereupon moved by Solicitor General Strange, on an affidavit that the goods converted amounted to more than £10 that the defendant may be held to special bail. And he compared this to the case of an indorsee of a bill of exchange, who may bring an action both

[21] Part of the opinion, relating to a second count, is omitted.

Compare Larson v. Dawson (1902) 24 R. I. 317, 53 Atl. 93, 96 Am. St. Rep. 716: (The declaration set out that on July 19, 1901, the plaintiff was possessed of $900 lawful money of the United States, and that on said day he intrusted said money to the defendant with the request that he should purchase for the plaintiff out of said money a certain lot of land situate on Greene street in Pawtucket, the defendant to pay for said lot the sum of $650, and that with the remaining $250 he was to commence the erection of a house on said lot for the plaintiff; that the defendant received said money in pursuance of said request, and afterwards, to wit, on October 23, 1901, he informed the plaintiff that he would not purchase said lot of land with said money, nor would he return the money to the plaintiff; that the plaintiff thereupon demanded of the defendant the said $900, which the defendant refused to deliver, and, not minding or regarding his duty in this behalf, but intending and contriving to injure and defraud the plaintiff, fraudulently and unlawfully converted said money to his own use by expending or dissipating the same, or otherwise disposing thereof contrary to law. And the plaintiff avers that criminal proceedings were instituted against the defendant, for embezzling said money, before the commencement of this action. To this declaration the defendant demurred, on the ground, among others, that the action of trover will not lie for money delivered to the defendant under the circumstances above set forth.)

And see Clark and Lindsell on Torts (1908) 258, and 38 Cyc. 2011 et seq.

against the drawer and the indorser, and hold them both to bail: and he cited the cases of Wyndham and Wither, and Wyndham and Trull, East, 8 Geo. I, where upon a motion to stay proceedings it was held, that an indorsee of a bill of exchange may bring an action thereon, both against the indorser and drawer; and the Court is only to see that the plaintiff hath but one satisfaction. So here the plaintiff may sue both Mason and the present defendant, and is entitled to the same process against the last, as if the action had been brought against him only. And he urged, in answer to an objection made by Page, J., that by a judgment obtained by the plaintiff in trover, the goods are become the defendant's; that a special property only is thereby vested in him: and in the present case, it is evidence only of a property as between the plaintiff and Mason, but not as between the present parties.

But PER CUR' (LEE, C. J., absente): The property of the goods is intirely altered by the judgment obtained against Mason, and the damages recovered in the first action are the price thereof; so that he hath now the same property therein as the original plaintiff had; and this against all the world. And therefore the motion was denied.[22]

[22] See the remarks of Willes, J., in Brinsmead v. Harrison (1871) L. R. 6 C. P. 584, 588: "This question whether the property is changed by the mere recovery in trover appears to have led to much difference of opinion. The authority mainly relied upon by Mr. Powell was the dictum of Jervis, C. J., in Buckland v. Johnson (1854) 15 C. B. 145, 157, in which that very learned and accurate judge did lay it down, upon the authority of a case in Strange, Adams v. Broughton (1737) 2 Str. 1078, that the property is changed by the mere recovery, without any satisfaction. I would observe, however, that the case, as reported in Strange, is far from satisfactory. It is also reported in Andrews, 18, where the case is thus stated. * * * The loose expressions of the Court,—that 'the property of the goods is entirely altered by the judgment obtained against Mason, and the damages recovered in the first action are the price thereof; so that he hath now the same property therein as the original plaintiff had; and this against all the world,'—were quite unnecessary. The same may be said as to the dictum of Jervis, C. J., in Buckland v. Johnson (1854) 15 C. B. 145. * * * On the other hand, there is a series of decisions showing that a mere recovery, without satisfaction, has not the effect of changing the property. * * *"

A like result was reached by the majority of the bench in Miller v. Hyde (1894) 161 Mass. 472, 37 N. E. 760, 25 L. R. A. 42, 42 Am. St. Rep. 424, but with Field, C. J., and Holmes and Knowlton, JJ., dissenting. "I am of opinion," said Mr. Justice Holmes in his dissenting opinion, "that the plaintiff ought to be barred in this action by her recovery of judgment in trover for the same horse. I am aware that the doctrine that title passes by judgment without satisfaction is not in fashion, but I never have been able to understand any other. It always has seemed to me that one whose property has been converted has an election between two courses, that he may have the thing back or may have its value in damages, but that he cannot have both: that when he chooses one he necessarily gives up the other, and that by taking a judgment for the value he does choose one conclusively. He cannot have a right to the value of the thing, effectual or ineffectual, and a right to the thing at the same time. The defendant is estopped by the judgment to deny the plaintiff's right to the value to the thing. Usually estoppels by judgment are mutual. It would seem to follow that the plaintiff also is estopped to deny his right to the value of the thing, and therefore is estopped to set up an inconsistent claim. In general an election is determined by judgment. Butler v. Hildreth (1842) 5

Metc. (Mass.) 49; Bailey v. Hervey (1883) 135 Mass. 172, 174; Goodyear Dental Vulcanite Co. v. Caduc (1887) 144 Mass. 85, 86, 10 N. E. 483; Raphael v. Reinstein (1891) 154 Mass. 178, 179, 28 N. E. 141. I know of no reason why a judgment should be less conclusive in this case than any other. Of course, I am speaking of a judgment for the value of the chattel, not of one giving nominal damages for the taking. The argument from election is adopted in White v. Philbrick (1827) 5 Greenl. 147, 150, 17 Am. Dec. 214, which so far as I know is still the law of Maine, notwithstanding the remark in Murray v. Lovejoy (1863) 2 Cliff. 191, 198, Fed. Cas. No. 9963. See also Shaw, C. J., in Butler v. Hildreth (1842) 5 Metc. (Mass.) 49, 53. The most conspicuous cases which have taken a different view speak of the hardship of a man's losing his property without being paid for it, and sometimes cite the dictum in Jenkins, 4th Cent., Case 88, 'Solutio pretii emptionis loco habetur,' which is dogma, not reasoning, or if reasoning, is based on the false analogy of a sale: but they leave the argument which I have stated unanswered, not, as I think, because the judges deemed it unworthy of answer or met by paramount considerations of policy, but because they did not have either that or a clue to the early cases before their mind. Lovejoy v. Murray (1865) 3 Wall. 1, 17, 18 L. Ed. 129; Brinsmead v. Harrison (1871) L. R. 6 C. P. 584, 587; s. c., L. R. 7 C. P. 547, 554. It is not the practice of the English judges to overrule the common law because they disapprove it, and to do so without discussion. In Brinsmead v. Harrison, Mr. Justice Willes thought he was proving that the common law always had been in accord with his position. So far as the question of policy goes, it does not seem to me that the possibility—it is only the possibility—of an election turning out to have been unwise, is a sufficient reason for breaking in upon a principle which must be admitted to be sound on the whole, and for overthrowing the doctrine of the common law by a judicial fiat. I am not informed of any statistics which establish that judgments for money usually give the judgment creditor only an empty right. That the view which I hold is the view of the common law I think may be proved by considering what was the theory on which the remedies of trespass and replevin were given. In Y. B. 19 Hen. VI, 65, pl. 5, Newton says: 'If you had taken my chattels it is at my choice to sue replevin, which shows that the property is in me, or to sue a writ of trespass, which shows that the property is in the taker; and so it is at my will to waive the property or not.' In 6 Hen. VII, 8, pl. 4, Vavisor uses similar language, and adds, 'And so it is of goods taken, one may devest the property out of himself, if he will, by proceedings in trespass, or demand property by replevin or writ of detinue,' if he prefers. There is no doubt that the old law was that replevin affirms property in the plaintiff and trespass disaffirms it, and that the plaintiff has election. Bro. Abr. Trespass, pl. 134; 18 Vin. Abr. 69 (U); Anderson and Warberton, JJ., in Bishop v. Montague (1601) Cro. Eliz. 824. The proposition is made clearer when it is remembered that a tortious possession, at least if not felonious, carried with it a title by wrong in the case of chattels as well as in the case of a disseisin of land, as appears from the page of Viner just cited, and as has been shown more fully by the learned researches of Mr. Ames and Mr. Maitland, 3 Harv. Law Rev. 23, 326. See 1 Law Quarterly Rev. 324. I do not regard that as a necessary doctrine, or as the law of Massachusetts, but it was the common law, and it fixed the relations of trespass and replevin to each other. Trespass, and on the same principle trover, proceed on the footing of affirming property in the defendant, and of ratifying the act of the defendant which already has affirmed it. I do not see on what other ground a judgment for the value can be justified. If the title still is in doubt, or remains in the plaintiff, the defendant ought not to be charged for anything but the tortious taking. Again, cannot the plaintiff take the converted chattel on execution? And on what principle can he do so if it does not yet belong to the defendant? I say but a word as to the practical difficulties of the prevailing rule. No doubt they can be met in one way or another. Suppose the plaintiff after judgment were to retake the chattel by his own act, it would strike me as odd to say that this satisfied the judgment, and as impossible to say that it satisfied the whole judgment, which was for the tort, as well as for the value of the property. Yet on the

HEPBURN v. SEWELL.

(Court of Appeals of Maryland, 1821. 5 Har. & J. 211, 9 Am. Dec. 512.)

Trover for negro slaves, brought by the appellant against the appellee.

DORSEY, J. The appellant in this cause, as administrator of Jane Fishwich, instituted an action of trover against the appellee, to recover the value of certain negroes, among whom were Sall, Patt and Phillis, the property of the appellant's intestate, and obtained a verdict for the sum of $7,153.50, on which judgment was rendered. The appellee appealed from that judgment to the court of appeals, and the same was affirmed at June term, 1818; and the amount of the judgment, with costs, was paid by the appellant to the appellee before the trial but after the issue was joined in the present suit. After the commencement of the action of trover, in which the verdict was rendered, the slaves, Sall, Patt and Phillis, each had a child, and the present action of trover was instituted by the appellant to recover the value of the said children. The court below decided that the action could not be maintained, and this court concur in that decision. The British authorities lay down the general proposition, that if the plaintiff in an action of trover has recovered damages for the conversion of the goods, the property thereof vests in the defendant, who, as damages to the value have been recovered against him, is to be considered as a purchaser. Adams v. Broughton, 2 Str. 1078; 6 Bacon's Abr. tit. Trover, A, p. 679. This court are of an opinion, that the judgment per se doth not clothe the defendant with the legal character of a purchaser; but that the judgment and its fruit, to wit, the payment of

view which I oppose I presume that the judgment could not be collected. See Coombe v. Samsom (1822) 1 Dowl. & Ry. 201. It seems to me that the opinion which I hold was the prevailing one in England until Brinsmead v. Harrison. Bishop v. Montague (1601) Cro. Eliz. 824; Fenner, J., in Brown v. Wootton (1605) Cro. Jac. 73, 74; s. c., Yelv. 67; Moore, 762; Adams v. Broughton (1737) 2 Strange, 1078; s. c., Andrews, 18, 19; Buckland v. Johnson (1854) 15 C. B. 145, 157, 162, 163; Sergt. Manning's note to 6 Man. & Gr. 640. See Lamine v. Dorrell (1705) 2 Ld. Raym. 1216, 1217. And I should add that I see a relic of the ancient and true doctrine in the otherwise unexplained notion that when execution is satisfied the title of the defendant relates back to the date of the conversion. Hepburn v. Sewell (1821) 5 Har. & J. 211, 9 Am. Dec. 512; Smith v. Smith (1872) 51 N. H. 571, and (1870) 50 N. H. 212. Compare Atwater v. Tupper (1877) 45 Conn. 144, 147, 148, 29 Am. Rep. 674. The only authorities binding upon us are the ancient evidences of the common law as it was before the Revolution and our own decisions. I have shown what I think was the common law. Our own decisions leave the question open to be decided in accordance with it. Campbell v. Phelps (1822) 1 Pick. (Mass.) 62, 65, 70, 11 Am. Dec. 139; Bennett v. Hood (1861) 1 Allen (Mass.) 47, 79 Am. Dec. 705. Many cases in other states are collected in Freem. Judgments (4th Ed.) § 237."

For other cases on the point see 38 Cyc. 2112, notes 24, 25, and 26; 47 Cent. Dig. "Trover and Conversion," § 314; 19 Dec. Dig. "Trover and Conversion," § 70.

the amount thereof, must both concur, to vest the right of property in the defendant. But the question occurs, to what epoch shall the title of the defendant relate on his satisfying the amount of the judgment? And we think his title relates back to the time of the conversion. If the thing converted should from any cause, whether natural or artificial, be destroyed during the interval intervening between the period of conversion and the payment of the judgment, the loss must be sustained by the defendant; and it would seem to follow, that if the thing should improve in value during that period, the benefit ought to inure to the defendant, on the principle qui sentit onus, sentire debet et commodum.

It must be borne in mind that the plaintiff in an action of trover compels the defendant to become a purchaser against his will; and from what period does he elect to consider the defendant as a purchaser, or as answerable to him for the value of the thing converted? He selects the date of conversion as the epoch of the defendant's responsibility, and claims from him the value of the property at that period, with interest, to the time of taking the verdict. The inchoate right of the defendant as a purchaser must, therefore, be considered as coeval with the period of conversion, and his right being consummated by the judgment and its discharge, must, on equal and equitable principles, relate back to its commencement. The generality of our expressions must not be misunderstood; we do not mean to decide that in all cases of trover the payment of the damages assessed vests the right of property in the defendant. Thus, if property converted is returned and received by the owner before the institution of an action of trover, as damages could only be given for a partial conversion, the payment thereof would not divest the right of property out of the plaintiff and vest it in the defendant.

Judgment affirmed.

(B) Elements of the Prima Facie Cause in Trover and Conversion

It is an action of trover. * * * In form it is a fiction; in substance, a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes the defendant may have come lawfully by the possession of the goods. This action lies, and has been brought in many cases where, in truth, the defendant has got the possession lawfully. Where the defendant takes them wrongfully, and by trespass, the plaintiff, if he thinks fit to bring this action, waives the trespass, and admits the possession to have been lawfully gotten. Hence, if the defendant delivers the thing upon demand, no damages can be recovered in this action, for having taken it.

This is an action of tort; and the whole tort consists in the wrongful conversion. Two things are necessary to be proved, to entitle the

plaintiff to recover in this kind of action: First, property in the plaintiff; and secondly, a wrongful conversion by the defendant.

Lord Mansfield, in Cooper v. Chitty (1756) 1 Burr. 20, 31.

(a) The Plaintiff's Right in Conversion [23]

WILBRAHAM v. SNOW.

(Court of King's Bench, 1670. 2 Wms. Saund. 47, 85 Reprint, 624.)

Trover, upon special verdict, the case was this: the plaintiff, being sheriff, seized goods in execution by virtue of the writ of fieri facias; and afterwards, and before they were sold, the defendant took and carried them away, and converted them to his own use; for which the plaintiff brought his action. And on the first argument it was adjudged that the action well lies; and that the plaintiff, being sheriff, has such a property in the goods, by seizing them in execution, that he may maintain an action of trespass or trover at his election; and judgment was given for the plaintiff nisi, &c. but it was not moved afterwards.[24]

ARMORY v. DELAMIRIE.

(Court of King's Bench, at Nisi Prius, in Middlesex, Coram Pratt, C. J., 1722. 1 Str. 505, 93 Reprint, 664.)

The plaintiff being a chimney sweeper's boy found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who under pretence of weighing it, took out the stones, and calling to the master to let him know it came to three halfpence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled:

1. That the finder of a jewel, though he does not by such finding

[23] "The 'right to possession' which is necessary to found an action of trover is often described as a 'special property' in the goods. This is a most unfortunate expression: for in one of the best known cases it is expressly laid down that the term 'special property' includes interests which do not carry the right to possession, and which, therefore, are not sufficient to found actions of trover. See Webb v. Lawrence (1797) 7 T. R. at p. 398, per Lawrence, J. On the other hand, a person whose goods have been distrained for rent can sue a third party in trover. Turner v. Ford (1846) 15 M. & W. 212." J. C. Miles, in Dig. Eng. Civ. Law, Bk. II, Part III, 414.

[24] Elaborate notes to this case, by Serjeant Williams in 1802, and by later hands, touching many points in the doctrine of trover, will be found in the reports named.

acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.[25]

2. That the action well lay against the master, who gives a credit to his apprentice, and is answerable for his neglect.

BUCKLEY v. GROSS et al.

(Court of Queen's Bench, 1863. 3 Best & S. 566, 122 Reprint, 213, 129 R. R. 457.)

This was an action for the conversion of certain goods and chattels of the plaintiff, that is to say, a quantity of fat and tallow mixed together: to which the defendants pleaded Not guilty, and a traverse of the goods and chattels in the declaration being the goods and chattels of the plaintiff: on both of which pleas issue was joined.

[25] Accord: Bridges v. Hawkesworth (1851) 21 L. J. Q. B. 75, 91 R. R. 850: (P. had called at D.'s shop on business. As P. was leaving he noticed and picked up a small parcel which was lying on the floor. He immediately showed it to one of the shopmen and on opening it found that it contained bank notes to the value of £55. P. told D. that he had found a parcel of notes and requested D. to keep them to deliver to the owner. D. advertised for the owner, but without response. Three years having elapsed, and no owner appearing, P. applied to D. for the notes, offering to pay the expense of the advertisements and to indemnify D. against any claim. The latter refused to deliver the notes. P. sues for conversion.)

Compare McAvoy v. Medina (1866) 11 Allen (Mass.) 548, 87 Am. Dec. 733: (P., being a customer in D.'s barber shop, saw and took up a pocketbook which was lying upon a table there, and said, "See what I have found." D. came to the table and asked where P. found it. P. laid it back in the same place and said, "I found it right there." D. then took it and counted the money, and P. told him to keep it, and if the owner came to give it to him; otherwise to advertise it, which D. promised to do. Subsequently P. made three demands for the money, and D. never claimed to hold the same till the last demand. It was agreed that the pocketbook was placed upon the table by a transient customer of D. and accidentally left there, and was first seen and taken up by P., and that the owner had not been found. Said Dewey, J., delivering the opinion: "It seems to be the settled law that the finder of lost property has a valid claim to the same against all the world except the true owner, and generally that the place in which it is found creates no exception to this rule. 2 Parsons on Cont. 97; Bridges v. Hawkesworth (1851) 7 Eng. Law & Eq. R. 424. But this property is not, under the circumstances, to be treated as lost property in that sense in which a finder has a valid claim to hold the same until called for by the true owner. This property was voluntarily placed upon a table in the defendant's shop by a customer of his who accidentally left the same there and has never called for it. The plaintiff also came there as a customer, and first saw the same and took it up from the table. The plaintiff did not by this acquire the right to take the property from the shop, but it was rather the duty of the defendant when the fact became thus known to him, to use reasonable care for the safe keeping of the same until the owner should call for it. In the case of Bridges v. Hawkesworth the property, although found in a shop, was found on the floor of the same, and had not been placed there voluntarily by the owner, and the court held that the finder was entitled to the possession of the same except as to the owner.")

On the trial, it appeared that, in June, 1861, a severe fire broke out among some wharves and warehouses on the Surrey side of the river Thames below London Bridge. In those warehouses were deposited large quantities of fat and tallow, the property of different persons, which, being melted by the fire, flowed down into the main sewers, and was by them conveyed into the river, from both of which large portions of it were unwarrantably taken by different persons. Among these was one B., a servant in the employ of the Metropolitan Board of Works, who, having obtained some of the tallow, whether from the sewer or river did not appear, sold it to the plaintiff. Early on the morning of the 1st July, a policeman in one of the streets of the metropolis stopped a cart with the plaintiff and a boy in it conveying this tallow, which the plaintiff, on being questioned, said belonged to one M. The policeman took possession of the tallow, and charged the plaintiff and the boy before a magistrate with the possession of tallow supposed to have been stolen or unlawfully obtained, who dismissed the charge, but ordered the tallow to be detained under 2 & 3 Vict. c. 71, § 29, for regulating the police courts in the metropolis. The tallow was accordingly detained, and deposited in a yard with other portions of tallow which had been seized by the police from other persons, until, the whole becoming a nuisance, it was, in the course of a few days, taken away and sold by direction of Sir Richard Mayne, the Commissioner of the Police of the metropolis. The defendants were the purchasers of the tallow in question, and, having refused to deliver it up to the plaintiff on demand, this action was brought.

On this evidence a verdict was, under the direction of the learned Judge, entered for the defendants, with leave reserved to move to enter a verdict for the plaintiff for £12., the value of the tallow, if the Court should be of opinion that he had a sufficient property in it to maintain the action, it being agreed that the Court should be at liberty to draw any inferences of fact from the evidence that a jury might properly draw.

A rule nisi was accordingly obtained and argued.

CROMPTON, J. It is clearly established that possession alone is sufficient to maintain trover or trespass against a wrong-doer who takes property from a person having possession of it. It is not clear, however, that the plaintiff, or the person from whom he purchased this tallow, was a finder of it within the principle of Armory v. Delamirie, 1 Str. 505, and other cases. I think, on the evidence and the inferences to be fairly drawn from it, that he is more in the position of a person who has unlawfully or feloniously, perhaps the latter, obtained possession of it, whereas I look on the term "finder" in those cases to mean an innocent finder. This action must be founded on possession; here the possession was divested out of the plaintiff, and he cannot revert to a right of property to re-establish it. I agree with my LORD CHIEF JUSTICE that where possession is lawfully divested out of a man, and the property is ultimately converted by a person

who does not claim through an original wrong-doer, the party whose possession was so divested had no property at the time of the conversion. Here, in my mind, the plaintiff's possession was gone. The goods were properly taken from him, and there is no such doctrine as that it will reinvest in him in the manner contended for; otherwise every person who was possessor of goods for any time, however short, might bring an action against any person afterwards found in possession of them, however he may have come by it. That would be pressing too far the doctrine of sufficient title against a wrong-doer. But here the plaintiff obtained the goods under circumstances which show that he knew they came from these burning warehouses. I cannot think that when property of different persons is mixed together, any third person does not commit a crime in taking it—I think he does. Neither is this a derelict—it is, as my brother Blackburn says, more like property seized by wreckers; and if I were obliged to draw an inference, I should say that the plaintiff came by it feloniously. I consider that it was the duty of the constable to take the tallow and the plaintiff into the custody of the law, and that even without reference to Stat. 2 & 3 Vict. c. 71. The defendants here do not claim under the constable, and, supposing they did, the constable did nothing wrong.[26]

Rule discharged.

AVERILL v. CHADWICK.

(Supreme Judicial Court of Massachusetts, 1891. 153 Mass. 171, 26 N. E. 441).

Tort for the conversion of two rabbits. At the trial there was evidence tending to show the following facts:

The plaintiff kept a provision store in Salem, and on March 2, 1889, exposed therein a pair of rabbits for sale. The defendant came to the store, and, after looking at the rabbits, told the plaintiff that he was an officer and should have to take them away. The plaintiff supposed from his statement that he was an officer, and, as he testified, let the defendant "take them; I did not give them to him or sell them; he (the defendant) said he should take them away, and he took them away." The defendant was a deputy of the board of game commissioners, and had no further authority either as a constable or otherwise. He acted upon the occasion in question under a direction of the game commissioners, to seize and remove all game unlawfully offered for sale. He had no warrant, and had received no order from any court to make the seizure, and his purpose was, as he testified, "to enforce the law as I understood the statute."

The judge ruled that there was no question of fact for the jury, and ordered a verdict for the plaintiff; the defendant alleged exceptions.

[26] The arguments of counsel are omitted, and the opinions of Lord Chief Justice Cockburn and Blackburn, J., with whom Crompton, J., concurred.

By the Court.[27] The following opinion was prepared by Mr. Justice Devens, and was adopted as the opinion of the court after his death by the Justices who sat with him at the argument.

We have no occasion to consider whether the rabbits, for the conversion of which this action is brought, were unlawfully exposed for sale in violation of the St. of 1886, c. 276, § 5, nor whether, upon proper proceedings had, they might have been adjudged to be forfeited. Without so deciding, we assume these positions in favor of the defendant's contentions. His own statement, which in the present posture of the case must be taken as correct, does not show him to have been either a constable or police officer, even if these officers could have made a seizure of the property without a warrant, which again we do not intend to decide. He was a deputy of the board of inland fisheries and game commissioners, and he stated that he had orders from them to seize and remove whatever of this nature was offered for sale unlawfully. He did not pretend that he had orders from any court, or any warrant, but took the rabbits to destroy them. It is quite clear that neither the commissioners nor their deputy could, without power, seize, remove, and destroy property, even though the same was unlawfully exposed for sale. No right to do this is given by the statute, nor is any authority cited to us which justifies it.

Even if the taking of the rabbits was unlawful, yet, the possession of them being illegal, it is the contention of the defendant that the plaintiff cannot avail himself of this illegal possession to maintain the action. In Commonwealth v. Rourke, 10 Cush. 397, it is held to be well established at common law that property unlawfully acquired may, nevertheless, be the subject of larceny; and it is said that "even he, who larceniously takes the stolen object from a thief whose hands have but just closed upon it, may himself be convicted therefor, in spite of the criminality of the possession of his immediate predecessor in crime." In Commonwealth v. Coffee, 9 Gray, 139, where the article stolen was intoxicating liquor, purchased in violation of the statute of Massachusetts, and intended to be sold in violation of the act, it was held to be the subject of larceny. Even, therefore, if, as we have assumed in the case at bar, the plaintiff might have forfeited and lost his property if it had been seized upon proper legal process, and it had appeared that it was kept for an illegal purpose, he was only to be deprived of it upon such proof, and by the methods which the law points out. In the plaintiff's hands the rabbits were still property, even if unlawfully kept for sale. If deprived of them by a wrongful seizure, the party taking them should be made responsible to him for their value. * * *

Exceptions overruled.

[27] A part of the opinion, on a question of defense, is omitted.

On the general principle involved compare the opinion of Mitchell, J., in Anderson v. Gouldberg (1892) 51 Minn. 294, 53 N. W. 636.

JONES v. WINSOR.

(Supreme Court of South Dakota, 1908. 22 S. D. 480, 118 N. W. 716.)

CORSON, J. This is an appeal by the defendant from an order overruling his demurrer to the complaint. It is alleged in the complaint, in substance:

That on or about the 1st of April, 1907, the plaintiffs, being desirous of securing a franchise for a city railway system in the city of Sioux Falls, employed the defendant to act as an attorney for them in securing or attempting to secure an ordinance from the city council granting the plaintiffs such license; that carrying out their purpose, or attempting to carry out the same, it became necessary for the plaintiffs to make a deposit with the city treasurer, and on said day the plaintiffs delivered to the defendant the sum of $2,500 to be by him deposited with the said treasurer of the city, and which money was so deposited, as appears by the receipt of the treasurer of said city copied in the said complaint; that on or about the 4th day of April the defendant received a further sum of $130, which was to be used by the defendant for these plaintiffs in securing or attempting to secure the said franchise; that the said franchise which plaintiffs were attempting to secure from said city was not granted to these plaintiffs, and thereupon, about the 17th day of April, the city treasurer returned to the defendant the said sum of $2,500 "as money belonging to these plaintiffs and for their use and benefit"; that on or about the same day the said defendant rendered to these plaintiffs an account of all moneys received by him for and on account of these plaintiffs, with an itemized statement of all disbursements, and in connection therewith a pretended charge for his services or fee of $1,250, and with said account was a draft drawn in favor of the plaintiffs for $1,012.25; that the pretended charge of the defendant of the sum of $1,250 as shown upon said account and alleged to be for services rendered by him is unjust, unlawful, and fraudulent, and the reasonable value of the services rendered by the defendant was not and is not of the value of more than $250; that of the moneys so received by the defendant for and on behalf of these plaintiffs and for their use and benefit there remains in his hands the sum of $1,000, which he has refused and still refuses to pay over to these plaintiffs, although frequently requested so to do, and "he has wrongfully and fraudulently converted to his own use the said sum of $1,000"; that on or about the 10th day of September, 1907, the plaintiffs demanded of the said defendant payment of the aforesaid sum of money, being "the amount wrongfully and fraudulently retained by the said defendant at the time he made to the plaintiffs his accounting as aforesaid," and remitted to them by draft the sum of $1,012.25, with interest upon the said sum from April 17th, "but the said defendant then and there refused and still refuses to pay the same or any part thereof to the plaintiffs and has wrongfully converted the same to his own use." Wherefore "plaintiffs demand judgment against the said defendant for the sum of $1,000 and interest thereon from the 17th day of April, 1907, for the wrongful conversion of said property and for the costs of this action."

To this complaint the defendant interposed a demurrer on the ground that "said complaint does not state facts sufficient to constitute a cause of action."

It is contended by the appellant that the complaint does not state facts sufficient to constitute a cause of action in trover or conversion, for the reason that the complaint nowhere alleges ownership by the plaintiffs of the property alleged to have been converted at the time the action was brought; nor does it allege ownership or possession of the property in the plaintiffs at the time it is alleged to have been

converted which is absolutely essential in the form of action. Assuming that the complaint in this case was intended to state an action for the conversion of this money by the defendant, it is clearly insufficient in not alleging that the plaintiffs, at the time the defendant is charged with having converted it, were the owners or in possession of the money so alleged to have been converted. In Irving v. Hubbard et al., 12 S. D. 67, 80 N. W. 156, this court, in discussing a similar question, uses the following language: "In actions for conversion the pleader must, of course, allege ownership or possession of the property in the plaintiff at the time it is alleged to have been taken." Smith v. Force, 31 Minn. 119, 16 N. W. 704; Sawyer v. Robertson, 11 Mont. 416, 28 Pac. 456; Kennett v. Peters, 54 Kan. 119, 37 Pac. 999, 45 Am. St. Rep. 274. * * *

The order of the circuit court overruling the demurrer is reversed.[28]

NICHOLS & SHEPARD CO. v. MINNESOTA THRESHING MFG. CO.

(Supreme Court of Minnesota, 1897. 70 Minn. 528, 73 N. W. 415.)

Action of trover against the Minnesota Threshing Manufacturing Company. Finding for defendant. The plaintiff appeals from an order denying a new trial.

CANTY, J. The complaint alleges in substance, that in June, 1892, one Kenitzer was the owner of a threshing machine and engine, which was then in South Dakota, where Kenitzer then resided; that on that day he mortgaged the same to the plaintiff corporation to secure the payment of $325 then due by him to it, and that the mortgage was then duly recorded in the proper office in the county of his residence; that thereafter, in 1893, while said mortgage was in full force and effect, and after the conditions thereof were broken, and when plaintiff was entitled to the immediate possession of the mortgaged property, the defendant corporation obtained possession of all of the property, and "wrongfully converted the same to its own use." The answer is a general denial. On the trial before the court without a jury, the court found for defendant, and from an order denying a new trial plaintiff appeals. * * *[29]

2. The trial court found all of the facts hereinbefore stated, and found as a conclusion of law that plaintiff is not entitled to recover. The court seemed to be of opinion that these facts do not show a conversion. We are of the opinion that they do. True, the mortgage

[28] In an omitted portion of the opinion, the question whether, under the principle of the one form of action, the complaint could be construed as setting up a cause for money had and received, was considered at length, and answered in the negative.

[29] Part of the opinion is here omitted.

did not pass the title of the mortgaged property to the mortgagee, but is a mere lien. It is also true that the mortgagor had a vendible interest in the property. Defendant could not be held guilty of conversion if nothing more appeared than that it purchased the property from the mortgagor for an adequate consideration, which implies good faith. Kellogg v. Olson, 34 Minn. 103, 24 N. W. 364; Sanford v. Elevator Co., 2 N. D. 6, 48 N. W. 434. But something more does appear. Defendant sold the property to Hayden. The sale implies a warranty against incumbrances, including this lien (Benj. Sales [6th Ed.] 632), unless the contract of sale expressly provided to the contrary; and it does not appear that it did so provide. Then the finding that defendant sold the property to Hayden amounts to a finding that it "exercised dominion over the property in exclusion and defiance of the rights" of plaintiff, which will, in a case where the mortgage passes the legal title, amount to a conversion. See 4 Am. & Eng. Enc. Law, 108; Bish. Noncont. Law, 406. The same is true where the plaintiff has but a mere lien, if it entitled him to the immediate possession. 1 Jones, Liens (2d Ed.) 1035; Sanford v. Elevator Co., supra. The fact that it was not in the power of defendant to deprive plaintiff of its rights in the property is not the test of whether trover will lie. The defendant, being in possession, may be taken at its word; and, if it exercises a dominion over the property hostile to and inconsistent with the rights of plaintiff, the latter may maintain an action for conversion.

This disposes of the case. The order appealed from is reversed, and a new trial granted.

RAYMOND SYNDICATE v. GUTTENTAG.

(Supreme Judicial Court of Massachusetts, 1901. 177 Mass. 562, 59 N. E. 446.)

The superior court gave judgment for the plaintiff; the defendant brings exceptions. It appeared that the plaintiff's chattels were attached by the defendant while they were in the possession of one Wyman under a contract that he should have the use of them for a term not yet expired and then either purchase or return them.

BARKER, J. The declaration alleges "that the defendant has converted to his own use the property of the plaintiff." The bill of exceptions purports to state the facts of the case, and that the defendant requested rulings that the plaintiff could not recover upon the evidence, and that upon the evidence the plaintiff was not entitled to the possession of the goods, and consequently could not maintain the action. Both briefs are addressed to the question whether, upon the facts stated, the action would lie upon the declaration, and we therefore consider that question.

The declaration follows a statute form first given in St. 1851, c. 233, and which is also found in St. 1852, c. 312, Gen. St. c. 129, and

Pub. St. c. 167. None of these statutes abolished the action of trover. Each of them enacted that there should be only three divisions of personal actions, one of which divisions, actions of tort, has always included the action of trover by that name, the two first statutes designating it as the action "now known as trover," and the two last as the action "heretofore known as trover." St. 1851, c. 233, § 1; St. 1852, c. 312, § 1; Gen. St. c. 129, § 1; Pub. St. c. 167, § 1. Under the old practice, the owner of chattels could not maintain trover for their conversion, unless when the acts complained of were done he had possession or the right to immediate possession. Fairbank v. Phelps, 22 Pick. 535, and cases cited. The owner's remedy for damage to his reversionary interest in chattels, done when he had neither possession nor the right to immediate possession, was an action on the case. Ayer v. Bartlett, 9 Pick. 156; Forbes v. Parker, 16 Pick. 462. After the adoption of the practice acts, it was held that they made no change in the rules of evidence applicable to the causes of action comprehended under the designation of actions of tort, and that it was still necessary, under the statute form given for trover, that the evidence should be such as would have proved a conversion in an action of trover at common law. Robinson v. Austin, 2 Gray, 564; Winship v. Neale, 10 Gray, 382.

It is settled that to maintain tort under a declaration like the present one the plaintiff must show possession or the right to immediate possession. Winship v. Neale, 10 Gray, 382; Landon v. Emmons, 97 Mass. 37; Ring v. Neale, 114 Mass. 111, 19 Am. Rep. 316; Clapp v. Campbell, 124 Mass. 50; Baker v. Seavey, 163 Mass. 522, 526, 40 N. E. 863, 47 Am. St. Rep. 475; Field v. Early, 167 Mass. 449, 451, 45 N. E. 917. The ground of action of one not in possession, or having the right to immediate possession should be set forth in a different form. Baker v. Seavey, supra.

The facts stated show that, when the plaintiff's chattels were attached by the defendant, the plaintiff had neither possession nor the right to possession. There is nothing to show that the attachment of the goods worked a forfeiture of Wyman's right to retain and use them under his contract with the plaintiff, or gave the latter a right to retake them. See Ayer v. Bartlett, 9 Pick. 156, 160. Therefore the plaintiff could not recover in the action upon the facts, and the jury should have been instructed to that effect, in accordance with the defendant's requests. * * *[30]

Exceptions sustained.

[30] A portion of the opinion, on a question of the proper evidence of damage in conversion, is omitted

Compare Gordon v. Harper (1796) 7 T. R. 10: (Goods leased by P. to B. as furniture with a house were taken on execution by D., a sheriff, under an execution against S. The levy is wrongful. P. brings trover. The lease is still in force.)

(b) THE DEFENDANT'S ACT

(aa) As Part of the Plaintiff's Case

ATTERSOL v. BRIANT.

(At Nisi Prius, Adjourned Sittings in London, 1808. 1 Camp. 409.)

Trover for 5000 bricks. The case opened on the part of the plaintiff was, that the bricks in question had been sent to the defendant, to be carried by him as a common carrier, and delivered to one Stiles; that he had asserted to the plaintiff he had delivered them to Stiles accordingly; but that in truth he had not done so, and they had never reached Stiles's hands. Under these circumstances, it was contended, the defendant must be taken to have converted the bricks to his own use.

LORD ELLENBOROUGH, however, said, that the facts stated were not sufficient evidence of a conversion to support an action of trover. Although the defendant might have been guilty of a tort respecting the bricks, it did not appear that he was guilty of the specific tort mentioned in the declaration. The action was therefore misconceived.

Plaintiff nonsuited.

DRUDE v. CURTIS.

(Supreme Judicial Court of Massachusetts, 1903. 183 Mass. 317, 67 N. E. 317, 62 L. R. A. 755.)

The plaintiff, an infant, made a contract of purchase from the defendant, also an infant, and paid the consideration. After the seller had spent the money so paid him, the plaintiff elected to avoid the contract, and brought trover for the consideration. The superior court ruled in favor of the plaintiff, and the defendant brought exceptions.

HAMMOND, J. Both parties being infants at the time of the contract, either could avoid it without a return of the consideration. But neither could avoid it in part. He must avoid it wholly, if at all. And if the infant, when avoiding the contract, has in his hands any of the specific fruits, the act of avoiding the contract by which he acquired such property will divest him of all right to retain the same, and the other party may reclaim it. Chandler v. Simmons, 97 Mass. 508, 514, 93 Am. Rep. 117. The plaintiff, who was the buyer, sought first to exercise his right to avoid, and brought this action to recover the money; and, if the defendant also had not been an infant, he would have had no defense, upon the count in contract, because the law would have implied a contract upon his part to refund the money. But the difficulty with the plaintiff's case is that the defendant is meeting the plain-

tiff with a weapon like that used by him, to wit, avoidance of a contract on the ground of infancy. And while the infancy of the plaintiff is a shield to him, it does not prevent the defendant from relying upon his own infancy in turn as a shield to him. So far as respects the right of the defendant to take advantage of his own infancy, it is immaterial whether the plaintiff be an infant or an adult. Can the plaintiff recover in this action the money paid by him to the defendant? The defendant spent it before the plaintiff avoided the contract. His plea of infancy is a complete defense to the counts in contract. So the court ruled, and we do not understand that the correctness of this ruling is contested by the plaintiff. If at the time the plaintiff elected to avoid the contract the defendant had in his possession the same money which he received from the plaintiff, then since, by reason of the avoidance, the defendant had no right further to hold it, the plaintiff perhaps might have maintained replevin, or, upon proper proceedings taken, have maintained trover as for a subsequent conversion.

The plaintiff contends that trover will lie even if, at the time he avoided the contract, the money had been spent. But one great difficulty upon the facts in this case is to find any conversion, any tortious dealing with the money. There was no tortious act on the part of the defendant in obtaining it. It was paid to him to be held and used by him as his own money, in accordance with the terms of a contract which is not claimed to have had in it any element of fraud. There was nothing tortious in that. Having received it as his own money, he spent it as such, and all this the plaintiff, not yet having avoided the contract, must be held to have expected and consented to. There was, therefore, nothing tortious in any act of the defendant, with reference to the money, before the contract was avoided. Nor has the defendant been guilty of any tortious act since, unless it be his failure to refund an equal sum to the plaintiff; but that failure at the most can be considered only as a breach of an implied contract, and this the law permits him to avoid. To hold that, while for this failure to pay over under these circumstances he cannot be held in contract, but still can be held in tort, is to convert that which arises out of a contract into a tort, and to take away the shield which the law throws around the infant for his protection. Upon this theory money lent to an infant might be recovered. The plaintiff finds himself where any one is likely to be who places money into the hands of an infant with the right to spend it as his own money, and the right has been exercised. Upon this general subject see Slayton v. Barry, 175 Mass. 513, 56 N. E. 574, 49 L. R. A. 560, 78 Am. St. Rep. 510, and cases cited; Carr v. Clough, 26 N. H. 280, 59 Am. Dec. 345.

The plaintiff relies upon Walker v. Davis, 1 Gray, 506, as decisive in favor of the right to maintain this action, but an examination of the case will show that the ground upon which the decision was based in no way conflicts with the conclusion to which we have come. In that case, which was trover for the conversion of a cow, it appeared

that the defendant, an infant, plied the plaintiff, who was an old man, with liquor until he became drunk, and then took advantage of the plaintiff's incompetent condition to trade for a cow. The defendant took the cow, and gave his note in payment. When the note became due, the plaintiff brought a suit upon it, in which the defendant prevailed upon the plea of infancy. The plaintiff then brought the suit in trover. The defense was that the plaintiff had waived the tort, and affirmed the contract, and also that, when the note fell due, the defendant had sold the cow, and parted with all control over her. The court held the action maintainable, disposing of the first ground of the defense by saying that, since the defendant also had avoided the contract, the plaintiff's attempted affirmance did not become operative, and, as to the second ground, that there had been a conversion, and consequently trover would lie. But the conversion relied upon was not the sale of the cow, but the taking at the time of the contract. The contract was voidable by the plaintiff upon the ground of fraud. Upon coming to his senses, the plaintiff might have rescinded the contract, and, without any demand, have brought trover for the cow upon the ground that she had been tortiously taken from him under a fraudulent contract (Thurston v. Blanchard, 22 Pick. 18, 33 Am. Dec. 700); and since, at the time of this suit, his right to rescind still existed, the remedy still existed. And the plea of infancy was no defense, because, in the language of Thomas, J.: "The defendant obtained the possession of * * * the cow by fraud, a fraud to which infancy would constitute no defense." It is thus seen that the action was sustained upon the ground that the original taking, being fraudulent, was tortious. No question seems to have been made as to whether infancy would have been a defense to such a fraud. The court assumed that it would not be a defense, and, having so assumed, held that the taking of the cow at the time of the contract was tortious. Walker v. Davis is therefore no authority for the contention that the subsequent spending of the money by the defendant in this case was tortious.

Exceptions sustained.

McCARTHY et al. v. HEISELMAN et al.

(Supreme Court of New York, Appellate Division, 1910. 140 App. Div. 240, 125 N. Y. Supp. 13.)

The action was against three defendants, for an alleged conversion. Two of the defendants moved for judgment on the pleadings, and appeal from an order refusing this judgment.

CARR, J. This action is to recover for an unlawful conversion of moneys belonging to the plaintiffs. There are three defendants. One is a boy, under age, and the other two are his parents. The complaint alleges that the boy was hired by the plaintiffs to work in their store with the consent of the parents, and that during the employment he

turned over his wages to them. It then alleges that the boy from time to time

"in the due course and line of his employment and without the knowledge or consent of the plaintiffs, * * * took from the possession of the plaintiffs and unlawfully and illegally retained and kept, and converted to the use of the defendants, various small sums of money, aggregating, however, to about $1,000."

The defendant parents have moved for judgment on the pleadings, claiming that, as against them, the complaint states no cause of action. On a motion of this character the complaint is to be searched as on demurrer. A demurrer cannot be sustained simply because the facts in a complaint are averred imperfectly or informally, but the pleading will be deemed to allege whatever can be implied from its statements by fair and reasonable intendment. Kain v. Larkin, 141 N. Y. 144, 36 N. E. 9.

It will be noted that the complaint does not state that the parents have received from the boy the moneys which he stole, nor aver that the stealing was done at their suggestion or with their consent. The pleading does state that the boy gave his wages to the parents, and the pleaders contend that there is a fair implication that he likewise turned over his stealings to them. To hold this would push the doctrine of fair intendment or implication to an absurd length. It is clearly not permissible here. It is true that the essence of a conversion is not an evil intent, and that the exercise of an unlawful dominion over the chattel or personal property, even in good faith, may constitute a conversion. Boyce v. Brockway, 31 N. Y. 490. And, where a complaint sets forth the receipt or possession of the chattel by the defendant in order to charge conversion, it is not necessary to specify in detail the tortious acts of dominion exercised by the defendant, and a mere statement that he "converted it to his own use" will be held sufficient. Decker v. Mathews, 12 N. Y. 313.

Yet, in this pleading, the charge is that the boy converted the moneys, not simply to his own use, but "to the use of the defendants," including himself and his parents. As to them, there is no allegation of a taking or possession on their part on which can be based any implication of the exercise by them of a dominion over the chattels. If, however, the action be treated as one for money had and received, there is likewise no sufficient allegation in the complaint that the parents ever received and had the moneys in question. The complaint states a good cause of action for conversion by the boy, but none as against the parents, unless they are to be held liable for the boy's tort. The general rule of the common law is that a parent is not liable for the torts of a child without some participation on his part in the unlawful act. Tifft v. Tifft, 4 Denio, 175; 29 Cyc. 1665. Such participation is to be alleged and proved. It is not presumed, as a matter of law, from the simple relation of parent and child.

The facts of the case as developed on a trial may give rise to a pre-

sumption of fact, as in Beedy v. Reding, 16 Me. 362, and Hower v. Ulrich, 156 Pa. 410, 27 Atl. 37. In both these cases the parent was held liable for the trover of minor children who carried away wood and corn from third persons, and the parent kept and used the articles. These cases were decided, however, on the theory that the parent by his acts had either constituted the child as his agent or had subsequently ratified an implied agency. The liability arose clearly not from the relation of parent, but from the principles of agency. In the pleading before us, there is no fact alleged to indicate any agency of the boy for the parents in the conversion or the disposition of the proceeds of the conversion. Was the boy in this case, while employed by the plaintiffs, the agent of his parents in any aspect? It is true he went into the plaintiffs' service with the consent of his parents, and turned over his wages to them. This fact alone does not make him the servant of his parents while engaged in the service of another. To hold otherwise would enlarge the scope of a parent's liability for the torts of a child beyond reasonable limits, and lead to a result not only most inconvenient, but contrary to the common understanding.

The order should be reversed with $10 costs and disbursements, and the motion for judgment granted, unless within 20 days the plaintiffs apply at Special Term and obtain leave to serve an amended complaint. All concur.

(bb) Conversion through Demand and Refusal

MAGEE v. SCOTT.

(Supreme Judicial Court of Massachusetts, 1851. 9 Cush. 148, 55 Am. Dec. 49.)

SHAW, C. J. This is an action of trover for furniture, in which a verdict was found for the plaintiff, and the case comes before us on the defendant's exceptions. This cause has been very elaborately argued, but, when understood, it appears to us to be governed by a few plain principles. It turns upon the directions of the judge, who tried the cause, in matter of law.

It is to be regretted that the facts appearing on the trial, showing the relations of the parties, and the circumstances under which the goods, admitted to be the property of the plaintiff, came into the possession of the defendant, are not stated, in order to show the application of the rule of law laid down by the court. Such circumstances will usually indicate what was the nature and character of such change of possession, whether in consequence of a sale or temporary loan, or how.

The plaintiff is proved to be the owner of the property, and that right of property will continue until a change proved as by sale, lien, or voluntary loan. Whoever relies on such change must prove it; the proof lies on him. All that appears in the present case is, that the

property came into the possession of the defendant, with the plaintiff's consent.

How? On what trust or contract? This does not appear. Demand of the goods was made, and a refusal to deliver them by the defendant to the plaintiff, on such demand, before action brought, and this is evidence of a conversion, conclusive, if not rebutted.[31] We are then called on to consider the directions given by the judge on the trial.

The first was, that presumption of ownership continues until some alienation is shown. This is correct. A party having this ownership does not lose it, by permitting another to be in possession. The ordinary mode of proving property is, proving that it was purchased and paid for, and it will be deemed in law to be the purchasers' until something is shown to change the title, and merely parting with the possession affords no conclusive evidence of such change. Possession is prima facie evidence of title, good against everybody but one proving property; that is, against any one but the right owner. Armory v. Delamirie, 1 Stra. 505. This case of the chimney sweeper's boy, from Strange, well illustrates these principles. A chimney sweeper's boy, having found a jewel, carried it to a goldsmith, to ascertain its value, but the goldsmith, by his apprentice, detained it, and refused to restore it. The boy having brought trover, it was held that his possession was some evidence of property, good against any one but the true owner, and that he could maintain trover for it, on such prima facie proof of title; and that refusal to restore it to him, on demand, was evidence of a conversion.

The defendant's possession was prima facie evidence of title in him, but it was rebutted by proof of prior possession, and actual ownership, on the part of the plaintiff. The burden of proof was on her, and she sustained it by proof of title.

Exceptions overruled and judgment on the verdict for the plaintiff.

SEVERIN v. KEPPEL.

(At Nisi Prius, Sittings after Term, at Westminster, 1803. 4 Esp. 156.)

This was an action of trover, for several articles of plate and plated goods, stated in the declaration.

The defendant was a silversmith; and they had been delivered to him for the purpose of putting glasses into them. He had been ap-

[31] Compare the remark of Coke, C. J., in Isaack v. Clark (1613) 2 Bulst. 306, 314: "In this case we do all of us agree in this, that prima facie, a denyer upon a demand is a good evidence to a jury of a conversion; but if the contrary be shewed, then the same is no conversion."

And see the remark of Holt, C. J., in Baldwin v. Cole (1704) 6 Mod. 212: "The very denial of goods, to him that has a right to demand them, is an actual conversion, and not only evidence of it, as has been holden." On the point see also Salmond, Torts (2d Ed.) 297, 298.

plied to, on many occasions, for the articles so delivered to him; he made excuses, and said, the glass was not come from the glass-blower's; there was no denial at any time to deliver the goods, but rather excuses for not delivering them: however, in one instance, the defendant admitted that the glass was come home; but he then said, his wife was out, and he could not deliver them. He afterwards delivered the plated goods, and said he had sent the silver ones home, which was not true.

It was objected by the defendant's counsel, that on the evidence given, there was no conversion sufficient to support the action of trover.

Erskine, for the plaintiff, contended, That the defendant having, in the last instance, admitted his possession of the goods, and having made a frivolous and false pretence for not delivering the articles, after his repeated excuses before made, that it was evidence of conversion sufficient to go to the jury; particularly from the circumstance of his having returned the plated goods, and pretended to have sent home the other; which was not the case.

Lord Ellenborough said, he thought the plaintiff should be non-suited, as there was no evidence to sustain the action in its present form: that what begins in contract, a non-performance of what the party so undertakes to do; or a bare non-delivery of what he undertakes to deliver, is not to be considered as of itself amounting to a tortious conversion. There was a case in the Court of King's Bench some time ago, in which that principle was recognized. It was an action of trover against a carrier, for not delivering goods. If a carrier says he has the goods in the warehouse, and refuses to deliver them, that will be evidence of conversion, and trover may be maintained; but not for a bare non-delivery, without any such refusal. So in this case, the goods were delivered to the Defendant to work upon. There was no evidence of any refusal by him to deliver them; but, on the contrary, he makes excuses for not doing it. The plaintiff must be called.[32]

[32] Compare Whiting v. Whiting (1913) 111 Me. 13, 87 Atl. 381: D. held eight $1,000 bonds for his brother, who assigned them to his wife, P. She made a demand upon D. at his residence in his last illness, shortly before his death. D. kept the bonds in a safe deposit box away from his residence, and when the demand was made said that he could not deliver the bonds because the grandfather of his brother's children by his first wife had requested him not to do so. Held that, as there was no evidence of a negation of the owner's right, there was no conversion. And see, in general, as to what amounts to a refusal, 38 Cyc. 2039–2040, notes 18–24: 47 Cent. Dig. "Trover and Conversion," § 78; 19 Dec. Dig. "Trover and Conversion," § 9(12); 27 Halsbury's Laws of England, "Trover and Detinue," 894–897.

RUSHWORTH v. TAYLOR.

(Court of Queen's Bench, 1842. 3 Q. B. 699, 114 Reprint, 674, 61 R. R. 358.)

Trover for a gun. Plea, not guilty. On the trial before Lord Denman, C. J., it appeared that the plaintiff, in July or August, 1839, put the gun into the possession of one Cross, to be sold. Cross, with the view of obtaining a purchaser, lent it to one Todd; and Todd lent it to the defendant to try. Defendant overcharged the gun, and burst it. Plaintiff afterwards wrote to the defendant as follows:

"Mr. George Taylor: I hereby give you notice that the double-barrelled gun you received from Robert Todd, which he received from Thomas Cross, who had previously received the same from me for the purpose of making sale thereof, is my property; and I hereby demand the same of you, and require you forthwith to deliver the same to me in the same plight and condition as the said gun was in at the time you received the same from the hands of the said Robert Todd. Dated this 11th day of March, 1840.

"John Rushworth."

Defendant said that he would not pay for the repair of the gun. He afterwards redelivered it to Todd, for the purpose, as he said, of his taking it to a gunmaker's; and it was then taken (but by whom it did not distinctly appear) to a gunsmith at Hull, and remained in the possession of the gunsmith or of the defendant, never having been restored to the plaintiff, when this action was brought.

The Lord Chief Justice thought it difficult to say that the qualified demand contained in the letter (that the gun should be delivered up "in the same good plight," &c.), and the refusal which followed, were, of themselves, proof of a conversion; and he directed the jury to find for the defendant on the first count, if, in their opinion, there had been no denial of the plaintiff's right. Verdict for defendant on all the issues.

W. H. Watson now moved for a new trial on the ground of misdirection, and contended that the demand and refusal, if not of themselves evidence of a conversion, fully proved it when coupled with the other facts of the case, to which the jury's attention had not been sufficiently directed in the summing up. (LORD DENMAN, C. J. The claim in trover was founded on a demand and refusal; and the demand was that the gun should be delivered in the same good plight as when the defendant received it. Refusal of such a demand is different from refusing altogether to restore.)

WILLIAMS, J. The case was properly put to the jury as to the demand and the refusal. A demand of the article in statu quo was not a demand on which, in case of refusal, a charge of conversion could be founded. The rest of the evidence did not bear out the declaration.

COLERIDGE, J. I am of the same opinion. The qualified demand could not be complied with; and the rest of the evidence was not clear enough to entitle the plaintiff to recover.

LORD DENMAN, C. J., and WIGHTMAN, J., concurred.

Rule refused.

SMITH v. YOUNG.

(At Nisi Prius, 1808. 1 Camp. 439.)

Trover by Smith, as assignee of a bankrupt, for a lease assigned by the bankrupt to the defendant after an act of bankruptcy. * * *

When the lease was demanded the defendant said "he would not deliver it up; but it was then in the hands of his attorney, who had a lien upon it for a small sum of money due to him."

Garrow, for the plaintiff, contended that the attorney's possession of the lease was in law the possession of the defendant, who must be considered as having a complete control over it, and that the lien did not, under these circumstances, prevent the refusal to deliver up the deed from amounting to a conversion.

LORD ELLENBOROUGH. The defendant would have been guilty of a conversion if it had been in his power; but the intention is not enough. There must be an actual tort. To make a demand and refusal sufficient evidence of a conversion, the party when he refuses must have it in his power to deliver up or to detain the article demanded.[33]

Plaintiff nonsuited.

WRIGHT v. FRANK A. ANDREWS CO.

(Supreme Judicial Court of Massachusetts, 1912. 212 Mass. 186, 98 N. E. 798.)

This was an action by Wright, in tort or contract, for the conversion of a diamond ring or for breach of contract in failure to deliver the ring. The court refused the following request presented by the defendant:

"Eighth. If at the time of the demand upon the defendant by the plaintiff for the delivery of the ring, the ring was not then in the possession of the defendant, the refusal of the defendant to deliver the ring would not constitute conversion."

There was a judgment for plaintiff, and defendant brings exceptions.

SHELDON, J. The jury could find that the plaintiff purchased a particular diamond of the defendant, the title to which at once passed to

[33] Part of the case, raising a question of evidence, is omitted. Reporter's query: "If the defendant had said he had delivered the deed to his attorney, would this have amounted to evidence of a conversion?"

Accord: De Young v. Frank A. Andrews Co. (1913) 214 Mass. 47, 100 N. E. 1080: "When the plaintiff relies upon demand and refusal as independent and basic evidence of conversion, it must appear that at the time of the demand and refusal the defendant has the control of the article so as to be able to comply with the demand; and the burden of proving all this is upon the plaintiff. Lord Ellenborough in Smith v. Young (1808) 1 Camp. 439, 441; 2 Greenl. on Ev. 644, and cases cited. See also, Johnson v. Couillard (1862) 4 Allen (Mass.) 446; Gilmore v. Newton (1864) 9 Allen (Mass.) 171, 85 Am. Dec. 749." Per Hammond, J.

See, also, 38 Cyc. 2034, and notes 85, 86.

the plaintiff, but that he left it with the defendant to be set in a ring, for the whole price of $500, of which he paid down the sum of $100. They also could find that the stone was set in the ring to his satisfaction and acceptance, and that the defendant then retained it until he should make full payment therefor. The plaintiff, as it could be found, could not then pay the residue of the price, and after a considerable delay made an offer to the defendant to rescind the purchase and take back what he had paid; but the defendant did not accept this offer. After still further delay he tendered the balance due to the defendant and demanded the ring, and the defendant merely answered that it did not then have the ring but could get it. By the tender any lien which the defendant had upon the ring was ended, and the plaintiff was entitled to immediate possession thereof, as could be found, but the defendant refused to give it to him. If so, he was entitled to maintain an action for its conversion. Gilmore v. Newton, 9 Allen, 171, 85 Am. Dec. 749; Milliken v. Hathaway, 148 Mass. 69, 19 N. E. 16, 1 L. R. A. 510. The jury need not believe the defendant's testimony that it was not then in possession of the ring. * * *

The eighth request contained a correct statement of the law so far as it went. Johnson v. Couillard, 4 Allen, 446. But it ought not to have been given without leaving it also to the jury to say whether before the demand and refusal the defendant had parted with or converted the ring, or otherwise by its merely wrongful act had disabled itself from delivering it to the plaintiff (Gilmore v. Newton, 9 Allen, 171, 85 Am. Dec. 749; Milliken v. Hathaway, 148 Mass. 69, 19 N. E. 16, 1 L. R. A. 510), or whether the ring, even if not in the immediate possession of the defendant, was yet not within its full control, as the statement of its president testified to by the plaintiff indicated.

Exceptions overruled [34]

DUNLAP v. HUNTING.

(Supreme Court of New York, 1846. 2 Denio, 643, 43 Am. Dec. 763.)

Dunlap sued Hunting before a justice in trover for two law books; and the case was as follows:

The plaintiff was a constable of Ovid, Seneca Co., and had a warrant from the president of a court-martial to collect a fine from the defendant. The plaintiff went to the defendant's office in Farmerville, and levied upon two of his law books, which were left in the defendant's possession on his agreeing to deliver them to the plaintiff at some future time. The plaintiff afterwards saw the defendant at Ovid, and demanded the books. The defendant replied, either that he had not got the books, or that he would not give them up; the impression of the witness was, that he said he had not got the books.

BRONSON, C. J. The proof leaves it somewhat uncertain where and when the books were to be delivered. But assuming that they were

[34] A part of the case, on another point, is omitted. Compare De Young v. Frank A. Andrews Co. (1913) 214 Mass. 47, 100 N. E. 1080.

to be delivered at the defendant's office in Farmerville on demand, it was not indispensable to a right of action that the demand should be made at that place. Property may be demanded of a bailee wherever he may be at the time, and although he is not bound to deliver it at that place. And then if the bailee answer that he is ready to deliver at the proper place, there will be no breach of his duty. But if he deny the right of the bailor and refuse to deliver the property at all, there could be no use in making another demand, and the bailee will be answerable in the proper action. Scott v. Crane, 1 Conn. 255; Higgins v. Emmons, 5 Id. 76, 13 Am. Dec. 41; Slingerland v. Morse, 8 Johns. 474; Mason v. Briggs, 16 Mass. 453; 2 Kent, 508. Now here, although the demand was made at Ovid, if the defendant's answer was that he would not give up the books, that was a full denial of the plaintiff's right, and no further demand could be necessary. If the answer was that he had not got the books, that would make a more doubtful case. But as the defendant did not intimate that he had lost the books, or that anything had happened to discharge his obligation as a bailee, the answer involved a denial of the bailment and amounted to a refusal to deliver the property. At least, the answer may have been so understood by the jury. A bailee is not at liberty to be silent when a reasonable demand is made, though not at the place for delivery. Higgins v. Emmons, 5 Conn. 76, 13 Am. Dec. 41. Here, there was nothing like a satisfactory answer, and I think the evidence was sufficient to carry the cause to the jury. * * *[35]

(cc) Conversion without Demand and Refusal

(1) In General

BRUEN v. ROE.

(Court of King's Bench. 1665. 1 Sid. 264, 82 Reprint, 1095.)

On a special verdict in trover and conversion. * * *

3. It was held by the court on the verdict that if in trover and conversion an actual taking of goods is given in evidence, this is sufficiently good without proving a demand and denial, as the taking of my cap from my head; for that is actual conversion; but when the thing comes by trover, there ought to be an actual demand, etc.[36]

[35] Part of the opinion is omitted.

Compare Richards v. Pitts Agricultural Works (1885) 37 Hun (N. Y.) 1: (P.'s threshing machine is in the possession of D. It is demanded by P. No reply is made by D. "The cases where silence of the person having possession of property, on demand being made on him by the owner, is held to constitue evidence of refusal, are distinguishable from the one at bar." Per Bradley, J., reviewing the authorities.)

[36] The text is a translation from the report in Siderfin. In Fowler v. Hollins (1872) L. R. 7 Q. B. 616, 627, 628, Mr. Justice Brett makes the fol-

IRISH v. CLOYES et al.

(Supreme Court of Vermont, 1836. 8 Vt. 30, 30 Am. Dec. 446.)

Trover. Verdict for the defendants. The plaintiff excepted to the charge to the jury.

REDFIELD, J. In relation to the first point decided by the court here, the question arose in reference to certain "mill logs," which were on the land, conveyed by plaintiff to defendants. There was evidence in the case, that the plaintiff had also sold this lumber to defendants. But this point being controverted, it became necessary to inquire whether any sufficient evidence of a conversion by defendants had been given. The only evidence relied upon was, that after the conveyance of the land, some stranger wishing to purchase the logs, applied to defendants for permission to purchase them of plaintiff. The defendants refused to give any such permission or consent, on the alleged ground that they had already bought the logs of plaintiff. The case finds that the defendants had not in any other way whatever interfered with the property in question.

For the purposes of the consideration of this question it is to be conceded that the "logs" were the property of the plaintiff. And we have no doubt that the mere assertion by defendants, that the property belonged to them, is not in any sense evidence of a conversion, or from which a conversion can be inferred. If this assertion had been made in plaintiff's presence, and at a time when he claimed to take possession of the logs, and for the purpose of deterring him therefrom, it might merit a different consideration. But made as it was to a stranger, and not in the presence of plaintiff, or within view of the logs, it would be too much to say this is evidence from which the jury could be permitted to infer a conversion of the property by defendants.

This is in accordance with the decisions which have been had upon analogous cases. Any mere assertion of the right of dominion is never permitted to go to the jury, in cases of trover, as evidence of a conversion, unless the assertion is made in view of the property, and in presence of the owner, and in order to deter him from exercising his just control over it. A demand and refusal are evidence of a conversion only when the defendant had, at the time of the demand, the actual custody of the property, so that he might have delivered it if he would. Hence in the case of title deeds, which had been wrongfully pledged to an attorney, but were in the custody of the attorney, it was held at nisi prius, and the decision has always been acquiesced in, that a demand upon the defendant and a refusal, under the circumstances,

lowing comment on this case: "The actual taking there described is a taking intentionally without or against the consent of the person in possession. The trover implies an actual possession, but is held to be insufficient to constitute a conversion, because consistently with it the defendant may not be claiming anything more than the mere custody of the goods."

was not evidence of a conversion. Smith v. Young, 1 Com. 439, 1 Camp. 439. And a false assertion by a carrier that he had delivered the goods, does not amount to a conversion. Attersol v. Briant, Id. 409, 1 Camp. 409. And in every case where a demand and refusal is permitted to go to the jury as evidence of a conversion, it must be preceded by evidence that the goods are in defendant's possession, or what is equivalent, in the possession of his servant, with his knowledge or by his consent, either express or implied. Bull. N. P. 44, cited 3 Stark. Ev. 1497, and also 2 Salk. 441, Jones v. Hart.

ELDRED v. OCONTO CO.

(Supreme Court of Wisconsin, 1873. 33 Wis. 133.)

This is an action to recover the possession of 1,446 pine saw logs, which the complaint alleges were unlawfully detained by the defendant from the plaintiff. The complaint is in the usual form, alleging that the plaintiff is the owner and entitled to the possession of the logs. The answer is the general denial. The plaintiff had a verdict and judgment, and the defendant appealed.

LYON, J. * * * The court refused to give the following instructions prayed for on behalf of the defendant:

"If the logs, taken from the land of the plaintiff, were taken by a party or parties other than the defendant, and the defendant purchased said logs in good faith, without knowledge how they came into the possession of said third party or parties, then the defendant is not liable in this action without a previous demand."

* * * The testimony tends to show that the logs in controversy were purchased in good faith by the defendant, of parties who wrongfully took the same from the lands of the plaintiff * * * the defendant supposing and believing that their vendors owned the logs; and no demand therefor was made before this action was commenced. The question is, whether, under these circumstances, a demand is necessary before an action to recover the logs can be maintained against the defendant.

It must be conceded that in New York the courts have uniformly held, that where property which has been wrongfully taken from the owner, comes into the hands of an innocent third party, an action to recover it cannot be maintained by the owner against such bona fide holder thereof, until after demand. But we find a decided weight of authority the other way, and we are satisfied that the New York rule is not sound in principle.

The subject is fully discussed and numerous authorities cited, in the cases of Stanley v. Gaylord, 1 Cush. (Mass.) 536, 48 Am. Dec. 643; Galvin v. Bacon, 11 Me. 28, 25 Am. Dec. 258; and Smith v. McLean, 24 Iowa, 322. The head note to the latter case is as follows: "Demand of possession before commencing an action of replevin need be

made only in those cases where it is necessary to terminate the right of possession in the defendant and confer it upon the plaintiff. Where both parties claim title and the right of possession incident thereto, no demand is necessary." This is precisely such a case. Both parties here "claim title and the right of possession incident thereto." In the Maine and Massachusetts cases above cited it was held that if the bailee of a chattel, without authority to retain or sell it, does sell or mortgage such a chattel, even to a person who believes that he may lawfully do so, and the purchaser or mortgagee takes possession of the same, trover or replevin can be maintained therefor against such innocent purchaser or mortgagee, by the owner, without previous demand. These are not as strong cases for the plaintiff as this, because in this case there was never any bailment of the logs. It is not deemed necessary to enter into a full discussion of the question. It is sufficient to say that we approve of the doctrine of the above cases, and adopt the same as the law of this case.

But it is said that this doctrine is only applicable where the complaint charges a wrongful taking. We do not think that this position can be maintained. By omitting to allege in his complaint that the original taking was tortious, the plaintiff does not admit that the taking was lawful, or preclude himself from showing that it was, in fact, a wrongful taking. And by proving its tortious character he demonstrates that the detention of the logs by the defendant is unlawful. In other words, by proving a state of facts which renders a demand unnecessary, he proves the gravamen of his action, to wit, the unlawful detention of the logs. * * * [37]

Judgment affirmed.

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(2) Different Forms of Such Conversion

DENCH v. WALKER.

(Supreme Judicial Court of Massachusetts, 1780. 14 Mass. 500.)

Trover for four hogsheads of rum. On the trial, the evidence appeared thus: Walker undertook to transport from Boston to Springfield the four hogsheads of rum for the plaintiff. At the time of the delivery to Walker, the rum was good; but on its arrival at Springfield, it was much adulterated and greatly lessened in value; and whether it was thus adulterated by the defendant himself, or by his servant, the teamster, did not appear. It was objected that trover did not lie in this case.

But CUSHING, C. J., with the rest of the Court, held that it will lie For the alteration of the quality of the liquor undertaken to be transported, whether it was done by the defendant or his servant, was an unlawful conversion. Vide Holt, 528.

[37] Only so much of the case is given as relates to the one point.

KEYWORTH v. HILL et ux.

(Court of King's Bench, 1820. 3 Barn. & Ald. 684, 106 Reprint, 811.)

Trover against husband and wife, for a bond and two promissory notes. The declaration stated that the defendants converted and disposed of the same to their own use, plea, not guilty. After verdict for the plaintiff, a rule was obtained in last Easter term for arresting the judgment, on the ground that no action could be supported against the husband and wife for converting goods to their own use, inasmuch as the wife could acquire no property, and the conversion must be by the husband only, and Berry v. Nevys, Cro. Jac. 661, was cited.

ABBOTT, C. J. The question, in this case, arises upon a motion in arrest of judgment. The ground of the objection is, that inasmuch as a married woman cannot acquire property, the conversion of the property can only be the act of the husband, and must be so charged. If the allegation in the declaration, that the defendants converted the property to their own use, necessarily imported an acquisition of property by them, there would be considerable weight in the objection. It seems to me, however, that that is not the necessary import of the expression, for a conversion may be by an actual destruction of the property. And if the allegation does not necessarily import that the defendants acquired a property, we are bound, after the verdict, to consider the conversion to have taken place by other means than by the acquisition of property. I am, therefore, of opinion that the declaration is sufficient, and that this rule should be discharged.

BAYLEY, J. It is quite clear that in trespass the husband and wife might be jointly sued. The reason of which is, that the action is founded on the wrongful act of the defendants. Now, it seems to me, that the action of trover is founded on the tort also. The cases cited on the part of the defendant proceed upon the supposition that the conversion could only take place by the defendants acquiring a property. It seems to me, however, that in trover the foundation of the action is not the acquisition of property by the defendants, but the deprivation of property to the plaintiffs. If the wife were to take up a book, and her husband desired her to put it in the fire and burn it and she did burn it, that would be a conversion, and yet the husband and wife would acquire no property; so, if a man takes my horse and rides it, I may bring trover for the temporary conversion. And if there can be any case of a conversion without an ultimate change of property, we are bound, after verdict, to imply that it was such a conversion as the wife might be guilty of.

Rule discharged.[38]

[38] The arguments of counsel and the concurring opinions of Holroyd and and Best, JJ., are omitted. Best, J., remarked: "There may be a distinction between detinue and trover: in the former, the plaintiff seeks to recover the goods in specie; in the latter he only asks for damages." And see

CROSSIER v. OGLEBY.

(Court of King's Bench, 1717. 1 Str. 60, 93 Reprint, 385.)

Trover by an administrator for rum taken and converted in the intestate's life. Upon evidence it appeared, that the rum was taken in the intestate's life, but not used till after his death. And the question was, whether this evidence of not using it till the administrator's time would not overthrow the declaration of a conversion in the intestate's life.

Sed PER CURIAM. The time of using the rum lay in the breast of the defendant, who ought to have disclosed that matter by his plea: and the taking in the life of the intestate, and keeping it till his death, is a trover and conversion sufficient to maintain this declaration. Wherefore the plaintiff had judgment, this being a point reserved at nisi prius.[39]

TINKLER v. POOLE et al.

(Court of King's Bench, 1770. 5 Burrows, 2657, 98 Reprint, 396.)

This was an action of trover for goods seized by a Custom-House officer. It was a parcel of herrings seized by him for not having satisfied the salt-duty, and carried by him to the King's warehouse. It was agreed that they were not seizable: and the only question was "whether this species of action lay against the officer, for seizing them and carrying them away."

Serjeant Glynn, for the plaintiff, argued that it did. The conversion, he said, was the substantial part of the action: the trover is fictitious. The defendant had no authority to take them. He took them wrongfully. He was a wrong-doer. He acquired a tortious property of them in himself. * * *[40]

Isaac v. Clarke (1613) 2 Bulstr. 308, per Doddridge, J.: "If goods are delivered to husband and wife, no action of detinue lies against them both for these, but against the husband alone."

[39] "Trover also became concurrent with trespass. In 1601 the Court of King's Bench decided that trover would lie for a taking. In the same year the Court of Common Pleas was equally divided on the question, but in 1604, in the same case, it was decided, one judge dissenting, that the plaintiff might have his election to bring trespass or case. The Exchequer gave a similar decision in 1610, Leverson v. Kirk, 1 Roll. Ab. 105, (M), 10. In 1627, in Kinaston v. Moore, Cro. Car. 89, 'semble per all the Justices and Barons, * * * although he take it as a trespass, yet the other may charge him in an action upon the case in a trover if he will.' In all these cases the original taking was adverse." James Barr Ames, in "History of Trover," 11 Harv. Law Rev. 384, 3 Anglo-Amer. Leg. Essays, 442. See also the opinion of Parke, J., in Norman v. Ball (1831) 2 B. & Ad. 190.

[40] In the omitted portion of the argument two nisi prius cases of half a century before were discussed by counsel and Judges: Etriche v. An Officer of the Revenue (1720) Bunbury, 67, and Israel v. Etheridge (1721) Bunbury, 80. In the former, "upon an information of seizure of goods, there had been

LORD MANSFIELD, who tried the present cause, said he saved this point, upon the cases cited out of Bunbury, by the counsel for the defendants. But nothing is clearer, than "that trover lies." It is a wrongful conversion; let the property be in whom it will.

The case of Chapman v. Lamb, in 2 Strange, 943, was mentioned by Mr. Wallace; which was subsequent to the others, being in Michaelmas term 6 G. II. It was trover against a Custom-House officer for 14 shirts, a nightgown, and cap, seized for non-payment of duty; which were stated, negatively, and "not to be imported as merchandize." The plaintiff had judgment; without any objection to its being an action of trover.

The court ordered the postea to be delivered to the plaintiff.

a verdict for the defendant, who afterwards brought trover against the officer, for the goods. The Attorney General objected, that trover did not lie for these goods, for that the seizure of them and putting them into the Custom-House warehouse could not be said to be any conversion to its own use, but trespass, or trespass upon the case; and Mr. Attorney insisting upon a special verdict, and the Chief Baron inclining to be of that opinion, 'that trover would not lie,' the plaintiff chose to be nonsuited." Lord Mansfield said: "Mr. Bunbury never meant that those cases should have been published; they are very loose notes."

In the latter case Baron Price is reported as saying "that trover did not lie against an officer, for seizure absque probabili causa; but trespass would." Baron Montague was of opinion "that neither trover nor trespass would lie, because the seizure is not contra pacem: but that trespass upon the case, setting forth that the seizure was absque probabili causa, would lie."

See also Professor Ames' remark: "Trespass, as the learned reader will remember, would not lie, originally, for a wrongful distress; the taking in such a case not being in the nature of a disseisin. In time, however, trespass became concurrent with replevin. History repeats itself in this respect, in the development of trover. In Dee v. Bacon (1595) Cro. El. 435, the defendant pleaded to an action of trover that he took the goods damage feasant. The plea was adjudged bad as being an argumentative denial of the conversion. Salter v. Butler, Noy, 46, and Agars v. Lisle (1613) Hutt. 10, were similar decisions, because, as was said in the last case, 'a distress is no conversion.' The same doctrine was held a century later in two cases in Bunbury. But in 1770, in Tinkler v. Poole, 5 Burr. 2657, these two cases, which simply followed the earlier precedents, were characterized by Lord Mansfield as 'very loose notes,' and ever since that case it has been generally agreed that a wrongful distress is a conversion. This last step being taken, trover became theoretically concurrent with all of our four actions, appeal of larceny, trespass, detinue, and replevin, and in practice the common remedy in all cases of asportation or detention of chattels or of their misuse or destruction by a defendant in possession. The career of trover in the field of torts is matched only by that of assumpsit, the other specialized form of action on the case, in the domain of contract." History of Trover (1898) 11 Harv. Law Rev. 385, 3 Anglo-Am. Leg. Essays, 444.

RAMSBY v. BEEZLEY.

(Supreme Court of Oregon, 1883. 11 Or. 49, 8 Pac. 288.)

LORD, J. This was an action of trover, and the only question involved in the case is, what will constitute a conversion? It originated in the refusal of the court to give certain instructions asked by the defendant, and an exception to an instruction given, based upon evidence tending to show about this state of facts: That the plaintiff was the owner of the cattle in controversy by purchase from one Smith, which were running at large on the range; that the defendant sold them to Strickland, and received therefor the sum of $500, and that the plaintiff has never seen nor had possession of the cattle since. The defendant admitted that he sold the cattle to Strickland, received the money for them, and "believed and supposed that Strickland had took them," but there was no evidence that the defendant ever exercised any other actual control or dominion over the cattle than such sale to Strickland, or that he actually delivered them to him, or that Strickland ever gathered the cattle in pursuance of such sale, except what may be inferred from the fact that the plaintiff has never seen, nor had possession of his cattle, since the sale, and the payment for the cattle, and the admission of the defendant that he believed and supposed that Strickland had taken the cattle.

Upon this state of facts the court gave the following instruction to the jury, to which the defendant excepted:

"Any assertion of title to or any act of dominion over personal property inconsistent with the rights of the owner is a conversion. A sale of the property of one person by another is a conversion. Therefore, if you find the plaintiff was the owner of the cattle at the time of the alleged taking, and that the defendant sold them without the plaintiff's consent, or in any way appropriated them to his own use without plaintiff's consent, you should find for the plaintiff in such sum as he was damaged thereby. But if you find that the plaintiff was not the owner of the cattle, or that the defendant did not so convert them, you should find for the defendant."

The effect of the instruction asked and the point raised is that, to maintain an action of trover, the defendant must have actual or virtual possession of the property. A conversion is defined to be "any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it." Cooley, Torts, 448. "It may be laid down as a general principle," says Mr. Bigelow, "that the assertion of a title to or an act of dominion over personal property inconsistent with the right of the owner is a conversion." Bigelow, Torts, 428; 2 Hil. Torts, § 3, p. 97. Of the different ways by which a conversion of personal property may be effected, one is, where a party sells the property of another without his authority or consent. Such sale is the assumption of ownership, of dominion over, or right to control the property, inconsistent with, and in denial of the rights of the true owner. Hence, it is said, "Every assuming by one to dispose of the goods of another is a conversion." "Trover,"

Bac. Abr. 631. Or "the assumption of authority over property, and actual sale, constitutes a conversion." Gilman v. Hill, 36 N. H. 324. No actual force need be used, (Gibbs v. Chase, 10 Mass. 128,) nor any manual taking or removal of the property, (Reynolds v. Shuler, 5 Cow. [N. Y.] 326; Connah v. Hale, 23 Wend. [N. Y.] 465,) nor proof that the defendant had actual possession of the property, (Fernald v. Chase, 37 Me. 289,) for, in the language of Shepley, C. J.: "The exercise of such a claim of right or dominion over the property as assumes that he is entitled to the possession, or to deprive the other party of it, is a conversion." See, also, Anonymous, 6 Mod. 212; McCombie v. Davies, 6 East, 540; Reid v. Colcock, 1 Nott & McC. (S. C.) 601, 9 Am. Dec. 729; Dickey v. Franklin, 32 Me. 572.

As applied to the facts, the instruction was not objectionable. The defendant had assumed to himself the property and the right of disposing of the plaintiff's cattle. He sold them, received the money for them, authorized the purchaser to take them, and swears he believed and supposed the cattle were taken. The gist of conversion is the owner's deprivation of his rightful dominion and control over his property. Under this state of facts, the sale of the defendant was a wrongful assumption of authority and dominion, subversive of the rightful dominion and control of the plaintiff over his property. The judgment must be affirmed.[41]

THURSTON et al. v. BLANCHARD.

(Supreme Judicial Court of Massachusetts, 1839. 22 Pick. 18, 33 Am. Dec. 700.)

Trover, to recover the value of certain goods alleged to have been obtained by the defendant, from the plaintiffs, by means of false and fraudulent pretences.

It appeared on the trial that the goods were purchased of the plaintiffs by the defendant, by means of false representations, for the sum of $677.77; that the defendant gave his negotiable promissory note for the amount, payable in six months; that this note had been in the possession of the plaintiffs ever since it was given; that they had never offered to give it up to the defendant; and that they had not made a demand upon him, for the goods, before commencing this suit. The plaintiffs, however, produced the note in court, at the trial, and

41 Compare Mead v. Thompson (1875), 78 Ill. 62: (D. brought an attachment against T., an absconding debtor, and levied on T.'s corn. At the time, P., the landlord of T., had a lien on this corn for rent. Judgment was obtained by D. in his attachment suit, and the corn so levied on being sold at public sale by a constable, D. bid it off and transferred his bid to E., who paid for the property and took it away. There was no further possession or intermeddling by D. In P.'s suit for conversion, it is contended that, however it may be as to E., there is no liability for conversion on the part of D.) See also Geneva Wagon Company v. Smith (1905) 188 Mass. 202, 74 N. E. 299.

there offered to give it up, or to put it on the files of the court; but the defendant declined taking it, and it was placed on the files.

The defendant offered no evidence in his defence, but relied upon the facts, that the note had not been given up or tendered to him by the plaintiffs, and that no demand had been made upon him for a return of the goods. A verdict was taken for the plaintiffs, by consent.

If the Court should be of opinion, that the action could be maintained, judgment was to be rendered on the verdict; otherwise, the plaintiffs were to be nonsuited.

Choate and S. Parker, for the defendant. * * * A demand of the goods was necessary on the part of the plaintiffs. The sale was voidable and not void, even if the evidence proved that the goods were obtained under false pretences. The title therefore passed, voidable only at the election of the vendor.

SHAW, C. J. We are now to take it as proved in point of fact, to the satisfaction of the jury, that the goods, for which this action of trover is brought, were obtained from the plaintiffs by a sale, but that this sale was influenced and effected by the false and fraudulent representations of the defendant. Such being the case, we think the plaintiffs were entitled to maintain their action, without a previous demand. Such demand, and a refusal to deliver, are evidence of conversion when the possession of the defendant is not tortious; but when the goods have been tortiously obtained, the fact is sufficient evidence of conversion. Such a sale, obtained under false and fraudulent representations, may be avoided by the vendor, and he may insist that no title passed to the vendee, or any person taking under him, other than a bona fide purchaser for value and without notice, and in such case the seller may maintain replevin or trover for his goods. Buffington v. Gerrish, 15 Mass. 156, 8 Am. Dec. 97. * * *[42]

Judgment on the verdict for the plaintiffs.

HIORT v. BOTT.

(Court of Exchequer, 1874. L. R. 9 Exch. 86.)

Action of trover for barley, tried before Archibald, J., at the Staffordshire Summer Assizes, 1873. The facts were as follows: The plaintiffs, who were corn merchants, trading under the name of Brochner & Co., at Hull, had been in the habit of employing one Grimmett as their broker. In consequence of a telegram from Grimmett, they, on the 8th of June, 1872, fowarded to the London & North Western Railway station at Birmingham 83 quarters of barley, and at the same

[42] A portion of the case, on the effect of bringing suit without a previous tender of the note given by the fraudulent vendee, is omitted.

See the concluding remarks of Professor Ames' "History of Trover," 11 Harv. Law Rev. 386, 3 Anglo-Am. Legal Essays, 445.

time sent to the defendant, who was a licensed victualler carrying on business at Deritend, Birmingham, a letter, inclosing an invoice for the barley, in which it was stated to be "sold by Mr. Grimmett as broker between buyer and seller," and a delivery order, which made the barley deliverable "to the order of consignor or consignee." The barley had in fact never been ordered by the defendant, who had had no previous dealings with either the plaintiffs or Grimmett. A day or two after the receipt of these documents by the defendant, Grimmett called; the defendant produced the documents, and said, "What does this mean? I never bought any barley through you off Brochner & Co." Grimmett said: "It was a mistake of Brochner & Co.; they had no doubt confused the defendant's name and some other name; they were doing a large business, and might have made a mistake." Grimmett then asked the defendant to indorse the order, telling him that he could not get the barley without, and that by not sending the order back expense would be saved. Thereupon the defendant indorsed the delivery order to Grimmett, who took it to the railway station, obtained delivery of the barley, disposed of it, and absconded.

In answer to a question by the learned judge, the jury found that the defendant, in signing the order, had no intention of appropriating the barley to his own use, but was anxious to correct what he believed to be an error; and, on the learned judge adding, "and with a view of returning the barley to the plaintiffs," they assented. The learned judge then directed the verdict to be entered for the defendant, with leave to the plaintiffs to move to enter the verdict for them for £180, the value of the barley. A rule nisi was obtained accordingly.

BRAMWELL, B.[43] I think the plaintiffs are entitled to recover; though, so far as concerns the defendant, whose act was well meant, I regret the result. Mr. Bosanquet gave a good description of what constitutes a conversion when he said that it is where a man does an unauthorized act which deprives another of his property permanently or for an indefinite time. The expression used in the declaration is "converted to his own use"; but that does not mean that the defendant consumed the goods himself; for, if a man gave a quantity of another person's wine to a friend to drink, and the friend drank it, that would no doubt be as much a conversion of the wine as if he drank it himself. Now here the defendant did an act that was unauthorized. There was no occasion for him to do it; for the delivery order made the barley deliverable to the order of the consignor or consignee, and if the defendant had done nothing at all it would have been delivered to the plaintiffs. And there is no doubt that by what he did he deprived the plaintiffs of their property; because, by means of this order so indorsed, Grimmett got the barley and made away with it, leaving the plaintiffs without any remedy against the railway

[43] The arguments are omitted, and a concurring opinion by Cleasby, B. Compare Mead v. Thompson (1875) 78 Ill. 62, 64.

company, who had acted according to the instructions of the plaintiffs in delivering the barley to the order of the consignee. The case, therefore, stands thus: that by an unauthorized act on the part of the defendant, the plaintiffs have lost their barley, without any remedy except against Grimmett, and that is worthless. It seems to me therefore, that this was assuming a control over the disposition of these goods, and a causing them to be delivered to a person who deprived the plaintiffs of them. The conversion is therefore made out.

Various ingenious cases were put as to what would happen if, for instance, a parcel were left at your house by mistake, and you gave it to your servant to take back to the person who left it there, and the servant misappropriated it. Probably the safest way of dealing with that case is to wait until it arises; but I may observe that there is this difference between such a case and the present one, that where a man delivers a parcel to you by mistake, it is contemplated that if there is a mistake, you will do something with it. What are you to do with it? Warehouse it? No. Are you to turn it into the street? That would be an unreasonable thing to do. Does he not impliedly authorize you to take reasonable steps with regard to it—that is, to send it back by a trustworthy person? And when you say, "Go and deliver it to the person who sent it," are you in any manner converting it to your own use? That may be a question. But here the defendant did not send the order back; but at Grimmett's request indorsed it to him, though, no doubt, as the jury have found, with a view to the barley being returned to the plaintiffs. There is therefore a distinction between the case put and the present one. And there is also a distinction between the case of Heugh v. London & North Western Ry. Co., Law Rep. 5 Ex. 51, which was cited for the defendant, and the present case; because there it was taken that the plaintiff authorized the defendants to deliver the goods to a person applying for them, if they had reasonable grounds for believing him to be the right person.

On these considerations I think the plaintiffs are entitled to recover. But I must add one word. This is an action for conversion, and I lament that such a word should appear in our proceedings, which does not represent the real facts, and which always gives rise to a discussion as to what is, and what is not, a conversion. But supposing the case were stated according to a nonartificial system of pleading, thus: "We, the plaintiffs, had at the London & North Western Railway station certain barley. We had sent the delivery order to you, the defendant. You might have got it, if you were minded to be the buyer of it; you were not so minded, and therefore should have done nothing with it. Nevertheless, you ordered the London & North Western Railway Company to deliver it, without any authority, to Grimmett, who took it away." Would not that have been a logical and precise statement of a tortious act on the part of the defendant,

causing loss to the plaintiffs? It seems to me that it would. I think, but not without some regret, that this rule should be made absolute, to enter the verdict for the plaintiffs.

Rule absolute.

MULTERER v. DALLENDORFER.

(Supreme Court of Wisconsin, 1914. 158 Wis. 268, 148 N. W. 1084.)

Action to recover the value of a quantity of lumber claimed to have been wrongfully taken from plaintiff by defendants and converted by the latter to their own use.

The major question at issue was whether the lumber passed to defendants under a bill of sale made to them by Theresa Multerer, October 4, 1912, when they purchased a farm of her and some personal property, located on and used in connection with it. The lumber was then on the place. Her grantor had piled it there in 1906 for farm building purposes. He sold her farm and the lumber some six years later. The bill of sale made by her in 1912 to defendants described the personal property intended to be conveyed with the place, as follows: "Seven cows, four calves, 30 chickens, 3 pigs, 114 sacks of oats, 18 sacks of barley, 5 tons of hay, one Deering binder, one Deering mower, one rake, one tedder, one Monitor seeder, 2 drags, 1 plow, 1 cultivator, 1 wagon, 3 buggies, one double harness, one single harness, all corn and 30 bushels of potatoes, all small tools such as sacks, forks, etc., including everything but household furniture."

Without taking possession of the farm defendants sold it and the personalty they supposed they obtained with it to one Felton. Thereafter he took possession of the property he supposed to be included in his purchase. There was evidence tending to show that defendants claimed to own the lumber and authorized Felton to take possession of it; that he did so and was in such possession claiming as owner under a conveyance from such defendants when the action was commenced. There was some controversy as to whether the lumber was spoken of, particularly, at the time of the sale to defendants, and some as to whether the bill of sale was changed after its execution.

The cause was submitted to the jury for a special verdict without any question as to whether the lumber was part of the land at the time of the sale to defendants. The jury found as follows: Plaintiff and defendants did not agree, in making the bargain and sale as to the farm and personalty, that the lumber was part of the latter. The bill of sale was not changed after it was signed by plaintiff.

The court decided that the lumber, at the time of the sale to defendants, was not a fixture; that the assertion of right thereto by defendants and taking possession thereof by their grantee by their authority was a wrongful conversion of the property and that the description contained in the bill of sale did not include such property.

Judgment was rendered in plaintiff's favor.

MARSHALL, J. The objections to the judgment are efficiently answered by the following:

1. Whether the lumber at the date of the deed to defendants, was a fixture and so part of the realty, in the most favorable view for respondent, was a mixed question of law and fact, and no request having been made for a finding by the jury in respect thereto, it is presumed that the decision of the matter was left to the court and the result cannot be disturbed, since it is not clearly contrary to the evidence.

2. The verdict of the jury is broad enough to negative there having been any occurrence characterizing the sale of the land to defendants constituting an express or implied agreement that the lumber should pass as part of the subject of the sale transaction, or in the light of which either the bill of sale or the deed should be read as including such property, and the decision in that regard is fairly supported by the evidence.

3. The meaning of the language of the bill of sale to defendants, as regards whether the parties intended thereby to include the lumber, so far as not covered in plaintiff's favor by the verdict, was a matter for the court to determine, and it seems that its construction of the paper is the most reasonable one which can be given. The words "etc., including everything but household furniture" following the long schedule of articles such as, generally, characterize a farm property, in the absence of pretty clear circumstantial indications to the contrary, or express explanation in the writing, should be read as referring to articles of like nature as regards being for and in use as part of the farm property. As said by the trial court, the rule of "noscitur a sociis"; the meaning of a word may be discovered by looking to the plain meaning of the words associated with it, applies. That is very familiar doctrine.

4. The consummated intention of defendants of placing their grantee in possession of the lumber as owner, was a sufficient appropriation of the property to their own use to render them liable in conversion, though there was no manual interference by them with such property.

The judgment is affirmed.

WHEELOCK v. WHEELWRIGHT.

(Supreme Judicial Court of Massachusetts, 1809. 5 Mass. 104.)

The declaration was in case, and alleged that the defendant, on the 15th of January, 1806, hired a horse and sleigh of the plaintiff to ride from Boston into the country four miles, and to return at 7 o'clock in the evening; yet the defendant so carelessly and immoderately drove and rode the said horse and sleigh, and neglected to

take proper care of said horse, and exposed him after said immoderate driving and riding for so long a time to the extreme coldness of the weather, that by means thereof the said horse died, and the said sleigh was broken, &c.

The defendant pleaded the general issue of not guilty, and the cause was tried on the review at the last November term in this county, before the Chief Justice, when a verdict was found for the plaintiff, subject to the opinion of the Court, upon the following case agreed by the parties, viz.:

On the 15th of January, 1806, between 3 and 4 o'clock in the afternoon, the weather being extremely cold, the defendant hired of the plaintiff in Boston the horse mentioned in the declaration, with a sleigh, to ride to the Punch Bowl in Brookline, distant about 4½ miles, the defendant saying that he should return by 7 o'clock in the evening. No express price for the hire was agreed upon. After the defendant had rode to the Punch Bowl, and tarried there about 15 minutes, he rode on about 4½ miles further to Watertown. After staying there until past 9 o'clock in the evening, he returned with the horse and sleigh to Gen. W.'s door in Boston, one of the general's family being in the sleigh, after 10 o'clock. Having remained at the general's about five minutes, he took the horse and sleigh to return them to Wheelock; and having rode about two rods, the horse, after rearing up, fell dead on one of the shafts of the sleigh, which was broken by the fall. The sleigh was returned to Wheelock, and notice given by Wheelwright that the horse was dead. It was agreed that the defendant did not ride the horse immoderately, or neglect to feed or cover him properly with cloths.

If the Court should be of opinion that on this evidence the plaintiff can, in this action, recover damages on account of the horse it was agreed the verdict should stand; otherwise it should be set aside, and a general verdict entered for the defendant, and judgment be rendered accordingly.

PARSONS, C. J. Upon comparing the evidence with the declaration, we are satisfied that the case agreed has negatived the gravamen alleged by the plaintiff in his declaration, and that in this action the plaintiff cannot recover.

The defendant, by riding the horse beyond the place for which he had liberty, is answerable to the plaintiff in trover. For thus riding the horse is an unlawful conversion; and if the horse had been returned to the plaintiff, the defendant might have given it in evidence in mitigation of damages. As the horse was not returned, the defendant might have recovered the value of the horse in damages. What that value was, must be settled by a jury. If the horse in fact labored under a mortal distemper, although unknown before his death, the damages would have been the value of a horse so diseased. But it would have been incumbent on the defendant to have proved that from any causes the horse was not worth the apparent value; and if he failed to satisfy the jury of the reduced value, the plaintiff ought to recover the apparent value.

According to the facts, the plaintiff's action is misconceived. It should have been trover, and not case for improperly using the horse. And if this verdict should stand, it would not be a bar to an action of

trover for a conversion by riding the horse to a place without the contract.

The verdict must be set aside, and a general verdict entered for the defendant.[44]

DAUGHERTY v. REVEAL.

(Appellate Court of Indiana, 1913. 54 Ind. App. 71, 102 N. E. 381.)

Action by Daugherty, a livery stable keeper, to recover damages for the death of a horse which the plaintiff had hired to the defendant. The complaint was in four paragraphs or counts. The first charged a conversion; the second, a breach of contract; the third negligence; the fourth, willful injury. The evidence revealed the following facts:

On June 18, 1910, defendant came to plaintiff's livery barn and asked whether he could get a horse early the next morning to drive to a Mr. Sullivan's. Defendant stated that he would put the horse in the barn at Sullivan's and leave it there until he was ready to return. He was informed that the cost of such hiring would be $2. On the morning of Sunday, June 19, accordingly, defendant procured the

[44] "In the case of Wheelock v. Wheelwright (1809) 5 Mass. 104, which in the facts, as well as the principles, is similar to this, it was decided, not only that case for improperly using the horse would not, but that trover was the only action which would lie." Per Morton, J., in Homer v. Thwing (1826) 3 Pick. (Mass.) 492, 494. In this case a recovery in trover was permitted against an infant who, having hired a horse to drive to the Punch Bowl in Brookline, drove in a different direction and without leave, to Fresh Pond in Cambridge, and then to the Punch Bowl. "The driving of the horse beyond the place to which the defendant had permission to go, was a conversion, and trover is the proper remedy."

See also the remarks of Perley, J., in Woodman v. Hubbard (1852) 25 N. H. 67, 57 Am. Dec. 310: "When the defendant voluntarily drove the horse beyond the limits for which he was hired, he acted wholly without right. He then took the horse into his own control, without any authority or license from the owner. The conversion was in law as complete, the wrongful invasion of the plaintiff's right of property was as absolute, as if, instead of driving the horse a few miles beyond the place for which he had hired him, he had detained and used him for a year, or any other indefinite time, or had driven him to market and sold him. If taking the wrongful control of the horse, and driving him ten miles, was not a substantial conversion, how far must the defendant have driven him? How long must he have detained him? And what other and further wrongful acts was it necessary that he should do in order to make himself a substantial and real wrong-doer? It would seem to be quite clear that if the original act, assuming control over the horse, was not a substantial invasion of the plaintiff's right of property, no subsequent use or abuse of the horse by the defendant could make it so; and that if the defendant can not on the facts of this case be charged for the conversion of the horse, he could not have been if he had sold or willfully destroyed him. In other words, the plaintiff having delivered the horse into the defendant's hands on a contract that was illegal, but which nevertheless left the general property in the plaintiff the defendant may do what he will with the horse, and the plaintiff can have no remedy, because whatever he does can be no more than a breach of his unlawful contract to return the horse. This does not appear to be a reasonable conclusion."

horse and drove to Sullivan's. The plaintiff knew at the time that the defendant was under age.

The evidence further showed that in the forenoon of June 19, the defendant, in company with the daughter of Mr. Sullivan, drove to and from Sunday school a mile and a half or two miles from Sullivan's residence; that between 2 and 3 o'clock in the afternoon he went out driving and returned to Mr. Sullivan's between 5 and 6 o'clock; that on his return the horses were hitched in front of the house for a time and then the horse driven by appellee was again put in the barn about 7 o'clock p. m.; that the horse was driven slowly and was not in any way injured or affected by such use; that later in the evening, when defendant went to turn the horse around, to start home, the horse fell and broke his neck. The defendant thereupon telephoned plaintiff of the accident.

On these facts, there was a directed verdict for the defendant, with judgment accordingly. The plaintiff appeals.

FELT, J. (after stating the facts and holding that there was a failure of proof under the paragraphs of complaint which charged negligence and willful injury and that there was no valid claim for breach of contract). If liable at all, appellee must be held liable on the theory of a conversion by driving the horse beyond the destination fixed by the contract of hiring. * * *[45]

Where there is a bailment the law implies a duty on the part of the bailee to use ordinary care and diligence to protect the property from injury and to return it at the time and place agreed upon. A mere neglect to perform such duty would not subject either a minor or an adult to a suit for conversion of the property. But if the bailee does any willful and positive act in violation of such duty or in repudiation of the contract of bailment, to the injury or loss of the property, the bailor is entitled to the immediate possession thereof and may have his right of action for damages for any tort so committed. Rice v. Boyer, 108 Ind. 472–479, 9 N. E. 420, 58 Am. Rep. 53; Campbell v. Stakes, 2 Wend. (N. Y.) 137, 19 Am. Dec. 561; Eaton v. Hill, 50 N. H. 235, 9 Am. Rep. 189–193; Humphrey v. Douglass, 33 Am. Dec. 177, notes; Lowery v. Cate, 108 Tenn. 54, 64 S. W. 1068, 57 L. R. A. 673, and notes page 680, 91 Am. St. Rep. 744; Collins v. Gifford, 203 N. Y. 465, 96 N. E. 721, 38 L. R. A. (N. S.) 202, Ann. Cas. 1913A, 969–974.

The facts of this case do not tend to show any intention on the part of appellee to repudiate the contract of hiring or to willfully and intentionally injure the horse. They at most only show a deviation from the terms of the bailment of a character insufficient to bring the case within the rule applicable where a tort has been committed in connection with the property bailed of a character independent of and beyond the contract to such an extent as to show repudiation

[45] Portions of the opinion are omitted.

thereof or a negligent or willful injury of the property. Appellee did put the horse in the barn at the place agreed upon, and it was at Sullivan's residence when the accident occurred. Appellant knew appellee was a minor and understood the purpose of his visit to Mr. Sullivan's when he dealt with him. Viewed in this light, the deviation from the strict terms of the bailment was not sufficient to enable appellant to assert a liability for conversion of the property. Schouler's Bailments (3d Ed.) §§ 139–141; 2 Kent Com. (12th Ed.) § 241; Churchill v. White, 58 Neb. 22, 78 N. W. 369, 76 Am. St. Rep. 64; Caswell v. Parker, 96 Me. 39, 51 Atl. 238; Towne v. Wiley, 23 Vt. 355, 56 Am. Dec. 85; Gilson v. Spear, 38 Vt. 311, 88 Am. Dec. 659; Lowery v. Cate, supra.

In Young v. Muhling, 48 App. Div. 617, on page 619, 63 N. Y. Supp. 181, on page 183, the court said: "The doctrine that a person who hires a horse for a specified journey is liable for conversion if he drives the horse further than the stipulated journey, or on another and different trip, cannot be pressed so far as to make the hirer chargeable as for a tort merely by reason of slight and immaterial departures from the general course of the direction outlined in the contract."

It is generally held to be the law that a bailor may sue in tort for damages to the property bailed, resulting from a violation of the contract of bailment or from a negligent or willful injury to the same. The great weight of authority limits such recovery to loss or injury resulting from such violation of the contract or to cases where the act or omission evinces an intent to convert the property and destroy or defeat the interest of the bailor therein.

Schouler's Bailments (3d Ed.) § 139, states that the suit for the tort is permitted, "not, we may say, on the ground that the hirer has, in the ancient sense of the word, converted the thing let to him, but because the bailee's gross, willful, or wanton violation of his bailor's rights makes it reasonable to treat the bailment as virtually ended." The same author in section 140 states: "On the other hand, it is not difficult to conceive that technical misuse might occur without on actual abuse of the terms of hire and where it would be harsh to visit deviation with such disastrous penalties. A conclusion is reached in one case, after a searching review of the authorities, that in a bailment for hire upon a certain term, and not merely during pleasure, the hirer's use of the property differently in purpose or manner from what had been mutually intended will not amount to a conversion justifying trover, unless the chattel's destruction was thereby occasioned, or, at least, unless the act was done with intent to convert. * * * In truth, the leaven of common sense, which keeps our law in constant ferment, is here at work, recalling the injustice of visiting blameworthy and blameless deviation with the same penalties of absolute or insurance accountability."

In Harvey v. Epes, 53 Va. 153, pages 176, 178, 182, we have a long and exhaustive discussion of the question and a review of the English and American decisions. Among other things it is said: "Upon the whole, I am of opinion that in the case of a bailment upon hire for a certain term, * * * the use of the property by the hirer during the term, for a different purpose or in a different manner from that which was intended by the parties, will not amount to a conversion for which trover will lie, unless the destruction of the property be thereby occasioned, or at least unless the act be done with intent to convert the property, and thus to destroy or defeat the interest of the bailor therein. * * * The act of misuser, to be a conversion, must occasion the loss of the property or be done with the actual intent to convert it. * * * A contrary doctrine would be attended with very harsh and unjust consequences. The true rule on the subject is not, properly speaking, a general rule subject to exceptions but is a simple rule to this effect: That if hired property be used by the hirer for a purpose or in a manner not authorized by the terms of the hiring, and the loss of the property be occasioned by such misuser, he is liable in trover for its value." See, also, Story on Bailments (9th Ed.) § 413 et seq., and notes; Cooley on Torts (3d Ed.) p. 184; Davis v. Garrett, 6 Bingham, 716, 722–724; 19 Eng. Com. Law, 321; Spencer v. Pilcher, 35 Va. 565.

In Churchill v. White, supra, the Supreme Court of Nebraska approved an instruction which stated at page 26 of 58 Neb., at page 371 of 78 N. W. (76 Am. St. Rep. 64): "The rule that one who hires property of this kind for one purpose and uses it for another or different purpose from that contemplated by the parties in the contract of hiring is liable for any harm that may happen it while he is so using it applies to minors as well as to adults."

There is no evidence in this case tending to show that the death of the horse was in any way connected with or occasioned by any use of the horse outside the strict terms of the contract of hiring as given by appellant himself. Nor is there any evidence tending to show that appellee had any intention of converting the property and depriving appellant thereof. There being a failure of evidence tending to connect the death of the horse with any violation of the terms of the bailment and to show any intention to convert the property, the court did not err in directing a verdict or in overruling appellant's motion for a new trial. * * * Judgment affirmed.

(C) The Defense in Trover and Conversion

(a) In General

[Historical Note.—In the action of trespass at common law, a plea of "not guilty" was deemed to deny the act of trespass charged against the defendant but not the wrongfulness of that act. If the physical act, committed vi et armis by the defendant against the plaintiff, was shown, there was, without more, an apparent wrong; the plaintiff's cause was prima facie complete. There might be, of course, cotemporaneous facts which, in legal effect, rendered the defendant's act not wrongful, as when, for instance, the act charged against him in trespass for assault and battery was a blow struck by him in self-defense. In these cases the defendant who would use this cotemporaneous fact must plead it affirmatively, in confession and avoidance in excuse. Although a possibly vital fact in the occurrence, it was not within the case presented by the plea of not guilty.

In trover and conversion, however, the plea of "not guilty" was deemed at common law to deny both the physical act charged against the defendant and the wrongfulness of this act. The effect was that in trover a defendant who had pleaded merely "not guilty" could introduce evidence of various states of fact having the general character of those which in an action of trespass he could show only if he had alleged them affirmatively, through a plea in confession and avoidance.

For instance, in trover for the conversion of personal property, the fact that it was destroyed by the executive officer of the board of health, as required by law, to prevent the spread of disease, can be shown under the plea of "not guilty"; but, in trespass for taking away personal property, the fact that the act was done under legal process cannot be shown under a plea of "not guilty."

A further effect of this doctrine appears now and again in the trover cases. A well-established rule of the common-law procedure required that a plea which amounted to the general issue should be so pleaded, under risk of a special demurrer. But, from the nature of the common-law theory of trover and conversion, nearly every possible plea of excuse amounted to the general issue. "As the conversion, which is the gist of the action in trover, is, ex vi termini, a tortious act, which cannot in law be justified or excused, it is manifest that any plea alleging matter of justification or excuse (as a license from the plaintiff, an authority derived from the law, etc.) is equivalent to the plea of not guilty, since it must involve a denial of the conversion." Thus, in detinue the detention was to be denied or justified, but in trover both results were reached by a denial of the conversion. "Conversion is always a wrongful act and cannot be confessed and avoided."

This deviation from the principles of scientific pleading was corrected, in large part, in England, by the Rules of Hilary Term of 1833. Regularly, under the American Codes and the English Judicature Acts, if the defendant in an action of tort admits the prima facie case charged against him, but wishes to show that it was not wrongful, he must plead his justification specially, by way of confession and avoidance. But in some of the trover cases under the Codes, the older theory still finds an echo.

Where this view prevails, whether at common law or under the Code, the doctrine of excuses for conversion lacks a clear-cut edge. —*Ed.*]

ROCKWOOD v. FEASAR.

(Court of Queen's Bench, 1590. Cro. Eliz. 262, 78 Reprint, 517.)

Action of trover in London. The defendant pleaded, that long time before the conversion supposed to be, J. S. was possessed of these goods, as of his own goods, at B. in Norfolk; and that he before the conversion supposed did casually lose them and they came to the hand of J. Palmer by trover, who gave them to the plaintiff, who lost them in London; and the defendant found them, and afterward did convert them to his own use, by the command of the said J. S. as it was lawful for him to do. It was moved, that this is no plea, for it amounts to the general issue.[46]

But all the justices held it a good plea; for it confesseth the possession and property in the plaintiff, against all but the lawful owner.

Nota.—This plea was devised by Coke to alter the trial.[47]

HARTFORD v. JONES.

(Court of King's Bench, 1698. 2 Salk. 654, 91 Reprint, 556.)

In trover and conversion the defendant pleaded, that the goods were cast away, and they saved and detained them till they were paid for their pains. On demurrer, HOLT, C. J., held that they might retain for payment, as a carrier for his hire; and salvage is allowed by all nations: he that serves another ought in reason to be paid for his serv-

[46] On this point see the note to Hartford v. Jones, infra.

[47] Compare Ward v. Blunt (1588) Cro. Eliz. 146: In trover for divers loads of corn and hay. The defendant pleaded that he had cut the corn and hay on his own land and was possessed of them until he lost them; that the plaintiff found them, but lost them; that they then came to the hands of the defendant, and he converted them, as it was lawful for him to do. Held open to demurrer, as amounting to the general issue.

ice; but the plea is naught; for if the detainer be lawful, he does not confess a conversion: I never knew but one special plea good in trover, viz. Yelv. 198.[48] And the rule was in the principal case, to waive the plea and plead not guilty.

NORMAN v. BELL et al.

(Court of King's Bench, 1831. 2 Barn. & Adol. 190, 109 Reprint, 1114.)

Trover for wheat, &c. Plea, not guilty. At the trial before Parke, J., at the Carlisle Spring Assizes, 1831, it appeared, that in November preceding, the defendant was employed to take toll of corn for the Earl of Egremont in Cockermouth market. The toll was taken by putting the hand into the sack of corn as it stood in the market, taking out a handful, and placing it in a bowl held near the top of the sack: and the complaint in this action was, that the defendant had varied from the mode previously used, so as to bring away a quantity exceeding the lawful toll. The regular mode was described as lifting, that practised by the defendant as sweeping. It was objected, on behalf of the defendant, that trover was not maintainable. The learned Judge overruled the objection, and the jury found a verdict for the plaintiff with nominal damages.

F. Pollock now moved for a new trial. The question in this case is as to the form of action, which has subjected the defendant to the expense of proving title to the tolls, when it ultimately turned out that the real matter of complaint was only an excessive taking. If the defendant had been a wrong-doer in the whole of his proceeding, there would have been no difficulty; but here, the right to some toll being admitted, the action is brought in respect of part of the corn taken. How is that part to be distinguished in a mixed quantity? * * *

Lord Tenterden, C. J. The plaintiff, by adopting this form of action, has certainly subjected the defendant to considerable difficulty and expense, in consequence of the generality of the pleadings. On the other hand, the proceeding has its conveniences; but the question is not, now, on which side the advantage preponderates; we must take the law as we find it. The defendant in this case was entitled to take, as toll, a certain quantity of corn, amounting perhaps to a pint. He takes a pint and a half. There is no doubt that he is a wrong-doer: the question is as to the form of action. If the declaration had been in trespass, the defendant must have justified by a

[48] "The plea in Yelverton was, that the defendant took the wine mentioned in the declaration for prisage due to the King. The following pleas in trover have been also held good: a former recovery in trespass for the same goods, Show. 146; a recovery in trover against a stranger, Cro. Jac. 73; or against the defendant, 2 Str. 1078; that an innkeeper detained a horse for his meat, 2 Bulst. 289; the Statute of Limitations, Lut. 99. Vide Bull. N. P. 48."—*Reporter's Note.*

prescription to take so much corn for toll, and on proof that he had taken more, he would undoubtedly have been liable on account of the excess. If this would have been so in an action of trespass, I think in the present form of action the result must be the same.

PARKE, J. This case may be made clear by considering how it would have stood if this defence had been specially pleaded in an action of trespass. Suppose, to a declaration in that form, the defendant had pleaded a prescription to take a certain toll of corn, amounting to one handful, and that he took in pursuance of such prescription; and the plaintiff had alleged in his replication or new assignment a taking of two handfuls, or more than one handful, would such replication or new assignment have been good as supporting the declaration, or would it have been bad on demurrer? If bad, the present application is rightly made; if good, it is not; and if the plaintiff, on such pleadings in trespass, would have been entitled to recover, he is certainly entitled to recover in this action of trover; for a plaintiff may always bring an action of trover where an action of trespass de bonis asportatis would lie. Now it appears to me that a replication, in trespass, that the defendant had taken more than the quantity claimable under the prescription, would clearly have been sufficient in point of law; and, therefore, this action may be supported.[49]

WHITE v. SPETTIGUE.

(Court of Exchequer, 1845. 13 Mees. & W. 603, 67 R. R. 753.)

Trover for books; pleas, not guilty and not possessed. At the trial, it appeared that the plaintiff, a solicitor, had missed from day to day several volumes of the Statutes at Large, which he suspected to have been stolen by a young man who was at that time a clerk in his office. The defendant, a bookseller carrying on business in London, became possessed of the books by a bona fide purchase of them on different days, from a young man who brought them to his shop and offered them for sale. The defendant having sold the books, this action was brought to recover the value of them.

On the above facts appearing in evidence, it was objected for the defendant, that, as the plaintiff had done nothing to prosecute the person who has stolen the books, he could not maintain the action. Grimson v. Woodfull, 2 Car. & P. 41; Peer v. Humphrey, 41 R. R. 471, 2 Ad. & El. 495, 4 Nev. & M. 430. The learned Judge, however, told the jury that there was no evidence to show who stole the books, and that the property in the goods, being originally in the plaintiff, could not be taken out of him by any act of a third party; and he

[49] Part of the argument is omitted. Littledale and Patterson, JJ., concurred.

directed them to find for the plaintiff, unless they believed the defendant received the goods knowing them to have been stolen, in which case the right would then merge in the felony, and the plaintiff would not be entitled to recover. The jury having found for the plaintiff, Merewether now moved for a new trial, on the ground of misdirection.

PARKE, B. I think there is not the least foundation for a rule in this case. In the first place, independently of the point of law, there are neither pleadings to warrant the defence, nor facts to support it. The only pleas on the record are Not guilty, which puts in issue the conversion, and Not possessed, which puts in issue the plaintiff's title at the time of conversion. * * * [50]

Rule refused.

NICHOLS & SHEPARD CO. v. MINNESOTA THRESHING MFG. CO.

(Supreme Court of Minnesota, 1897. 70 Minn. 528, 73 N. W. 415.)

CANTY, J.[51] * * * It is assigned as error that the court permitted defendant to prove a certain statute of South Dakota, against the objection that it was not pleaded in the answer, which statute, as the courts of that state have construed it, provides that a chattel mortgage shall not pass the title to the property covered by it until after foreclosure, but that it shall confer on the mortgagee merely a lien as security for the payment of the indebtedness. We are of the opinion that the evidence was competent, if material. The plaintiff did not allege the manner in which defendant converted the property and under its complaint might have proved that defendant converted it in any one of several different ways. The proof was that defendant received the mortgaged property from the mortgagor in exchange for other property, and then sold the mortgaged property to one Hayden. The defendant was not obliged to anticipate this proof in the answer, but had a right to meet it by any evidence that showed that it was not guilty of converting the mortgaged property. Johnson v. Oswald, 38 Minn. 550, 38 N. W. 630, 8 Am. St. Rep. 698; Adamson v. Wiggins, 45 Minn. 448, 48 N. W. 185.

[50] The statement of the case is slightly abridged. Only so much of Baron Parke's opinion is given as relates to the one point. There were concurring opinions by Pollock, C. B. ("Moreover, the defense sought to be raised is not admissible under these pleas"), Alderson, B. ("I also think that this defence ought to be specially pleaded"), and Rolfe, B.

[51] For the statement of facts and the opening portion of the opinion, see this case, ante, p. 462.

KERWOOD v. AYRES.

(Supreme Court of Kansas, 1898. 59 Kan. 343, 53 Pac. 134.)

The action, by Kerwood, resulted in a judgment for the defendant. The plaintiff brings error.

DOSTER, C. J. The defendant in error, as sheriff, levied an attachment upon certain goods as the property of one Denny. The plaintiff in error, claiming ownership of the goods by purchase from Denny, brought an action against the sheriff for damages for their conversion. The petition, however, did not characterize the act of conversion as performed by the defendant in his official capacity. To this petition only a general denial by way of answer was filed. The jury found in defendant's favor. Judgment was rendered in accordance with the verdict, and the plaintiff prosecutes error to this court.

Upon the trial the district court, over the plaintiff's objections, received evidence tending to show that the claim of purchase of the goods from Denny was fraudulent. The admission of this evidence constitutes the principal ground of complaint. The argument is that, in actions for damages for conversion of goods, affirmative defenses, such as justification or impeachment of plaintiff's title, are not admissible under the general denial; that under such denial the defendant is limited to counter evidence of the charge of conversion. The plaintiff in error is mistaken. The rule is the same in actions for conversion as in replevin. According to repeated decisions of this court, the filing of a general denial in the last-mentioned class of actions fully puts in issue the plaintiff's title to the property claimed. Wilson v. Fuller, 9 Kan. 176; Holmberg v. Dean, 21 Kan. 79. The courts apply the same rule in actions for conversion. "A general denial traverses, not only the conversion, but also the plaintiff's title; and hence a defendant may, under such a pleading, show the sources from which he claims title, or that he has no title, or that the property belonged to a third person, who transferred it to the plaintiff without consideration and with intent to cheat the third person." 1 Kinkead, Code Pl. § 474. In Steel Works v. Bresnahan, 66 Mich. 489, 33 N. W. 834, the supreme court of that state said: "We are cited by the plaintiff's counsel to the general rules of practice, 4 Wm. IV (1833), as authority for his position that the general issue in trover is a denial of the conversion only, and not of the plaintiff's title to the goods. But these rules have not been adopted into our practice, and the general issue in this state, as formerly in England, puts the whole declaration in issue. To entitle the plaintiff to recover, two points are essential to be proved: First, property in himself, and a right of possession at the time of conversion; and, second, a conversion of the goods by the defendant to his own use; and under

the general issue the defendant may prove by any competent evidence that the title to the goods was in himself, either absolutely as general owner, or specially as bailee, or by way of lien." * * *[52]

Judgment affirmed.

(b) THE DEFENSE WHEN THE CONVERSION WAS THROUGH A DEMAND AND REFUSAL

BALDWIN v. COLE.

(Court of Queen's Bench, 1705. 6 Mod. 212, 87 Reprint, 964.)

Trover. The case, upon evidence, was this: A carpenter sent his servant to work for hire to the Queen's yard; and having been there some time, when he would go no more, the surveyor of the work would not let him have his tools, pretending a usage to detain tools to enforce workmen to continue until the Queen's work was done. A demand and refusal was proved at one time, and a tender and refusal after.

HOLT, C. J. The very denial of goods to him that has a right to demand them is an actual conversion, and not only evidence of it, as has been holden; for what is a conversion, but an assuming upon one's self the property and right of disposing another's goods, and he that takes upon himself to detain another man's goods from him without cause, takes upon himself the right of disposing of them: so the taking and carrying away another man's goods is a conversion: so if one come into my close, and take my horse and ride him, there it is conversion: and here if the plaintiff had received them upon the tender, notwithstanding the action would have lain upon the former conversion, and the having of the goods after would go only in mitigation of the damages: and he made no account of the pretended usage, but compared it to the doctrine among the army, that if a man came into the service, and brought his own horse, that the property thereof was immediately altered, and vested in the Queen; which he had already condemned.

And here one of the particulars in the declaration being ill laid, the defendant was found not guilty as to that, and guilty as to the rest.

SMITH v. YOUNG.

(At Nisi Prius, 1808. 1 Camp. 439.)

See ante, p. 473, for a report of the case.

[52] Part of the opinion is omitted.

LOPARD v. SYMONS.

(Supreme Court of New York, Appellate Term, 1904. 85 N. Y. Supp. 1025.)

The action was by Lopard. The judgment was for the defendant, and the plaintiff appealed.

FREEDMAN, P. J. The facts that are undisputed in this case are as follows:

Plaintiff, a diamond dealer, on October 7, 1902, intrusted to the defendant, at his request, a diamond stud. The defendant was a proposed purchaser, and took the stone for the purpose of having it appraised. He executed a writing by which he agreed to return the stone on demand. It was shown upon the trial, without objection, that the defendant was to return the stud within an hour. Subsequently, and a few hours later on the same day, the plaintiff called at the defendant's place of business and asked for the return of the stone, saying that he had another customer for it. The defendant thereupon promised to return it within half an hour. This he did not do, but, instead, took it home; and some time during that night his room was entered by a burglar, who stole the diamond, together with defendant's watch, chain, money, etc.

Upon suit being brought by plaintiff for conversion, the defendant interposed this theft as his defense, and succeeded in the court below. The judgment must be reversed.

Upon failure by the defendant to return the stone upon the demand made by the plaintiff, the defendant assumed to exercise act of control over the property of the plaintiff in hostility to his rights as owner, and was then liable in an action for conversion. Boyce v. Brockway, 31 N. Y. 490. He could not excuse himself from refusing to return the stud upon demand by showing that the property was subsequently stolen from him, even if he showed that he exercised the greatest care in its preservation.

Judgment reversed. New trial ordered, with costs to the appellant to abide the event. All concur.

ALEXANDER v. SOUTHEY.

(Court of King's Bench, 1821. 5 Barn. & Ald. 247, 106 Reprint, 1183, 24 R. R. 348.)

Trover for printing types and other goods. Plea, general issue. At the trial at the last Guildhall sittings before Best, J., it appeared that the defendant, who was the servant of the Albion Insurance Company, had in his custody in a warehouse, of which he kept the key, certain goods belonging to the plaintiff, saved from a fire at the plaintiff's house, and which had been carried to the warehouse by the servants of the company. The only evidence of a conversion was, that when the plaintiff demanded the goods from the defendant, the latter said that he could not deliver them up without an order from the Albion Office. The learned Judge left it to the jury to say, whether

this qualification of the defendant's refusal was a reasonable one, telling them, that if so, he was of opinion, that there was not sufficient evidence of a conversion. The jury accordingly found a verdict for the defendant. And now

Denman moved for a new trial, on the ground of a misdirection.

BAYLEY, J. If the plaintiff in this case had informed the defendant that he had previously made application to the Insurance Company, and that they had refused permission for the delivery of the property, or had told the defendant, that he expected him to go and get an order, authorizing the delivery of the property, and after that, the defendant had refused either to deliver the goods or to go and get such order, I think it would have amounted to a conversion on his part: but here the defendant had the goods in his possession as the agent of the Insurance Company, and he would not have done his duty if he had given them up without an application to his employers. He only gave, as it seems to me, a qualified, reasonable, and justifiable refusal.

BEST, J. I thought at the trial that I might properly have nonsuited the plaintiff, but that the safer course was to leave the question to the jury. An unqualified refusal is almost always conclusive evidence of a conversion; but if there be a qualification annexed to it, the question then is whether it be a reasonable one. Here, the jury thought the qualification a reasonable one, and that the refusal did not amount to a conversion of the property, and I think they were right in that conclusion.

Rule refused.[53]

VAUGHAN v. WATT.

(Court of Exchequer, 1840. 6 Mees. & W. 492, 55 R. R. 712.)

Trover for different articles of wearing apparel, &c. Pleas: First, not guilty; secondly, that the goods were not the property of the plaintiff: on which issues were joined. At the trial, before Rolfe, B., the following appeared to be the facts of the case:

On the 24th of July, 1839, the goods in question were pledged with the defendant, a pawnbroker, by a female of the name of Hubbard, in the name (as the defendant understood it) of Mary Warne, and the duplicate was so made out. On the next day he was sent to by that person (whom he did not then know, but who afterwards proved to be the plaintiff's wife), to say that she had lost the duplicate, and she demanded and obtained from him a copy thereof, and also a form of a declaration of the loss of it, pursuant to the Stat. 39 & 40 Geo. III, c. 99, § 16, and 5 & 6 Will. IV, c. 62, § 12.[54]

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[53] The concurring opinions of Abbott, C. J., and Holroyd, J., are omitted. See the comment on this case by Mr. Justice Blackburn in Hollins v. Fowler, when that case was before the House of Lords in 1875. L. R. 7 H. L. 757, 767.

[54] By the terms of this statute the person obtaining the copy "shall thereupon prove his or her property in or right to such goods and chattels, to the satisfaction of some justice of the peace of the place where the goods or chattels shall have been pledged."

Some days afterwards, upon an allegation that this document also was lost, she obtained from the defendant another similar form. On the 6th of August, the plaintiff Vaughan produced the duplicate to the defendant, and demanded the goods, tendering the amount of the pledge and the interest. The defendant refused to give them up, on the ground of the declarations having been obtained from him. On the 7th, the plaintiff made an application to a police magistrate, for the purpose of compelling the restoration of the goods, and a summons was granted for the defendant's appearance. The plaintiff stated that it was his wife by whom the goods had been pledged; but the magistrate, after hearing the circumstances, declined to interfere. The plaintiff then brought this action.

It was contended for the defendant, that there was no evidence of such an absolute refusal by him to deliver up the goods to the plaintiff, as constituted a conversion; and that he was justified in refusing to do so, by the circumstance of the declarations having been obtained by another party claiming to be the owner. The learned Judge thought that the mere fact of these documents having been obtained was no defence as against the real owner of the goods, who might, in that case, never have it in his power to recover possession of them and under his Lordship's direction, a verdict was found for the plaintiff, damages £10, leave being reserved to the defendant to move to enter a nonsuit.

A rule for a nonsuit or for a new trial was accordingly obtained and argued.[55]

PARKE, B. The learned Judge was incorrect in telling the jury that the mere refusal to deliver the goods to the real owner was a conversion. It was a question for the jury whether the defendant meant to apply them to his own use, or assert the title of a third party to them, or whether he only meant to keep them in order to ascertain the title to them, and clear up the doubts he then entertained on the subject, and whether a reasonable time for doing so had not elapsed, without which it would not be a conversion. It ought therefore to have been left to the jury, whether the defendant had a bona fide doubt as to the title to the goods, and if so, whether a reasonable time for clearing up that doubt had elapsed. The party obtaining the declaration is bound to go before a magistrate, and satisfy him by evidence that he is the real owner of the goods; and if a reasonable time had elapsed in this case for doing so, the defendant had no longer any reasonable ground for detaining them on the 6th of July, for a supposed defect of title. That was a question for the jury. The statute supposes that the party will go before the magistrate immediately; and if three or four days elapse without his doing so, the jury would be well warranted in finding that the reasonable time had elapsed. But it is all for the jury; however strong the facts, the Judge cannot take it upon himself to refuse to leave the question to them.

[55] The argument on the rule is omitted.

Therefore, although the result will clearly be the same, in strict law the defendant is entitled to have the facts submitted to the jury. There must therefore be a new trial.[56]

BOARDMAN v. SILL.

(At Nisi Prius, Sittings after Michaelmas Term, 1809. 1 Camp. 410, note.)

Trover for some brandy which lay in the defendant's cellars, and which when demanded he had refused to deliver up, saying it was his own property. At this time certain warehouse rent was due to the defendant on account of the brandy, of which no tender had been made to him. The Attorney General contended that the defendant had a lien on the brandy for the warehouse rent, and that till this was tendered trover would not lie.

But Lord ELLENBOROUGH considered, that as the brandy had been detained on a different ground, and as no demand of warehouse rent had been made, the defendant must be taken to have waived his lien, if he had one, which would admit of some doubt. The plaintiff had a verdict.[57]

ALLGEAR v. WALSH.

(Kansas City Court of Appeals, Missouri, 1887. 24 Mo. App. 134.)

PHILIPS, P. J. The plaintiff sued the defendant in trover for the conversion of a barrel of whiskey. The answer, after tendering the general issue, pleaded that prior to the general state election in 1884, the plaintiff made a bet with one Flaisig, to the effect, that the plaintiff wagered $100 against one barrel of whiskey, the property of Flaisig, that Marmaduke would be elected governor of the state; that prior to this bet the said Flaisig, in order to induce defendant to go on a note with him as surety to the Saxton National Bank, of St. Joseph, for the sum of $2,200, agreed to, and did, turn over to defendant thirty barrels of whiskey as collateral security; that he accordingly executed said note, which has not been paid off or satisfied; that at the time of the making of the said bet the plaintiff and Flaisig came to him, when plaintiff asked if he (defendant) had a barrel of whiskey belonging to Flaisig, to which he answered that he had, but without explaining to

[56] The concurring opinions of Lord Abinger, C. B., and of Rolfe, B., are omitted.

[57] Compare: Marine Bank v. Fiske (1877) 71 N. Y. 353: (P. demands a larger quantity of wheat than he is entitled to; D. refuses upon the ground that no part of the wheat belongs to P.) Singer Mfg. Co. v. King (1884) 14 R. I. 511: An agent who had received a chattel from his principal refused to deliver it to the owner, not in order to consult his principal as to the title, but in co-operation with his principal in the unlawful withholding from the owner.

plaintiff how he held the same. The answer alleged that he held said barrel by reason of said pledge, and that the wager between the said parties was illegal, etc. Plaintiff had judgment, from which defendant has appealed.

The appellant presents his case on the theory, first, that this action, in its essence, is to enforce a wagering contract, or to recover from a stakeholder property won on a bet on an election. It is manifest, from the instructions given and refused by the court, that it tried the case on the theory that plaintiff's cause of action was predicated on a transaction independent of the wagering contract, and which supervened after the performance by the parties. * * *

In Armstrong v. Toler, 11 Wheat. 258, 6 L. Ed. 468, while the general rule was recognized, that the courts will not enforce contracts growing immediately out of, or connected with, an illegal act, yet it was held that if the promise on which the action is predicated be disconnected from the illegal act, and founded on a new undertaking, it is not affected by such act, though it was known to the promisee, who abetted the illegal act. In recognition, no doubt, of this ruling, it has been held that the test whether a claim connected with an illegal transaction be enforceable at law is whether the plaintiff requires the aid of the forbidden transaction to establish his case. If he can fully develop his cause, without predicating it on the illegal matter, so that it is not in fact and law dependent thereon, the action is maintainable. Swan v. Scott, 11 Serg. & R. (Pa.) 164; Thomas v. Brady, 10 Pa. 170; Holt v. Green, 73 Pa. 198, 13 Am. Rep. 737; Tyler v. Larimore, 19 Mo. App. 458; Parsons v. Randolph, 21 Mo. App. 353.

All that was necessary to enable plaintiff to make out the case stated in the petition was to prove the agreement by which Flaisig, the admitted original owner of the whiskey, consented that the defendant should turn the same over to plaintiff, and the defendant's assent to hold the same subject to plaintiff's order, the demand and refusal to return to plaintiff. This case is little distinguishable in principle from that of Gowan, Adm'r, v. Gowan, 30 Mo. 472, in which it was held that where a debtor deposits personal property in the hands of another as bailee for the purpose of fraudulently screening it from his creditors, the bailee cannot avail himself of the fraudulent intent of the depositor, to defeat an action brought against him by the bailor for the recovery of such property. Napton, J., in delivering the opinion of the court, very appositely observed: "The plaintiff simply asks that the bailment may be enforced; that as he put the property in the defendant's hands, subject to his order, he shall now have it again when demanded. No document or fact is alleged to show that the transaction was any otherwise than it appeared to be."

The same principle, in effect, was again recognized by the Supreme Court in Watson v. Harmon, 85 Mo. 443, where the vendor of goods was left in possession by the vendee as a cloak to defraud the creditors

of the vendee. The vendee was allowed to maintain trover against the vendor who refused on demand to surrender the goods.

So in Charles v. McCune, 57 Mo. 166, the plaintiff, who had sent certain stock from Missouri into Texas during the war, in contravention of the non-intercourse proclamation of the president, was held to be entitled to maintain trover against the defendant, who acquired the possession of the stock, and converted the same to his own use. While the violation of the proclamation rendered the stock subject to confiscation, that fact constituted no defence to the conduct of the defendant. * * *

Judgment affirmed.[58]

ENGLAND v. COWLEY.

(Court of Exchequer, 1873. L. R. 8 Exch. 126.)

Trover for household furniture. Plea: Not guilty by statute.[59] Issue.

The plaintiff was the holder of a bill of sale over the household furniture of Miss Morley, the tenant to the defendant of a house in River Terrace, Chelsea. The bill of sale contained the usual clauses enabling the plaintiff to take possession of, and remove and sell the furniture in case of default upon Miss Morley's part in payment of the sum advanced. She having made default, the plaintiff put a man in possession early in August, 1872, and upon the 11th of August sent two of his men with vans to remove the furniture from the house. It was then after sunset. The men were met at the house by the defendant, the landlord, who alleged that half a year's rent was due and in arrear, and stated that he did not intend to allow the goods to be removed, as he meant to distrain on the day following. One of the men returned, and informed the plaintiff of what had passed. The plaintiff thereupon went to the house himself, and was told by the defendant, who was in the passage, that he would not suffer any of the goods to be taken away until his rent was paid. The defendant had also engaged a policeman, whom he stationed outside, to prevent the removal of the goods. The plaintiff thereupon gave up the attempted removal and went away, leaving a man still in possession. The defendant did not himself actually take possession of or remove any of the goods upon this occasion. His object was to prevent the plaintiff's removing them in order to distrain the next day at a legal hour.

[58] The arguments and part of the opinion are omitted.

[59] The statute referred to is the Act of 11 Geo. II, c. 19, § 21 (1738), declaring that in actions of trespass or on the case against persons entitled to rent, it shall be lawful for the defendant "to plead the general issue, and give the special matter in evidence."

The cause was tried before Bramwell, B., at the Surrey summer assizes, 1872. In summing up the learned judge directed the jury in the following terms:

"If you are of opinion that the defendant did not deprive the plaintiff of his goods, did not take possession of, nor assume dominion over, them, but merely prevented the plaintiff from removing them from one place to another, allowing him to remain in possession of them if he liked, then there is no cause of action."

The jury answered this question in favour of the defendant, and a verdict was entered for him accordingly, with leave to enter a verdict for the plaintiff for £40, the value of the goods, if the Court should be of opinion that the learned judge ought to have directed a verdict for the plaintiff. A rule was obtained in Michaelmas Term accordingly, on the ground that the learned judge ought to have directed the jury that the conversion was proved.

MARTIN, B. I think this rule should be made absolute. The real question is whether the defendant "converted to his own use, or wrongfully deprived" the plaintiff of his goods. Now it appears that the plaintiff had a bill of sale over the goods of one Morley, whose landlord the defendant was. After sunset on the 11th of August, 1872, when a distress was impossible, the plaintiff, who had previously put a man in possession, went himself to the house, with the view of removing the goods, there having been a default under the bill of sale. The defendant could not distrain that evening, but in order to have the opportunity of distraining he told the plaintiff that he would prevent the goods being removed, and he took steps accordingly, placing a policeman to watch the house and to prevent the removal. I think this was a conversion. The plaintiff was not bound to resist the defendant, and to remove his goods at the peril of coming into collision with him. He was deprived, by the plaintiff's act, of the power over his goods which he was entitled to exercise. That is, in my opinion, enough to enable him to maintain this action. If the defendant had been in the room where the goods were, and had said to the plaintiff, "These goods shall not be removed," surely that would have been a "wrongful deprivation." The defendant was, in fact, not in the room but in the passage, with equal means, however, of stopping the removal. I can see no difference between the two cases.

KELLY, C. B. I am of opinion that this rule should be discharged. The defendant, in my judgment, never converted these goods to his own use. The plaintiff was himself in actual possession of them, and all the defendant did was to say, "Rent is due to me, and before that rent is paid I will not allow these goods to be removed." This is no conversion. Many illustrations might be put to shew how absurd would be the consequences of so holding. For instance; suppose a lodger was ill, and an attempt were made to remove the bed he was lying on. Someone interferes, and says to the man who wants to remove, and who is the true owner, "You shall not do so." This is an

interference with his dominion over his own property; yet there would be no conversion. Indeed, it is only by relying upon the somewhat vague language which has been used about this form of action that any plausible argument can be maintained. Apart from mere dicta, no case, so far as I am aware, can be found where a man not in possession of the property has been held liable in trover unless he has absolutely denied the plaintiff's right, although, if in possession of the property, any dealing with it, inconsistent with the true owner's right would be a conversion. A limited interference with the plaintiff's property, where all along the plaintiff is himself in possession, does not constitute conversion. In the case of Fowler v. Hollins, Law Rep. 7 Q. B. 616, the cotton was in the defendant's actual possession. I thought him not guilty because he was acting as broker merely; but even assuming the case was well decided, the plaintiff was out of possession, and the defendant had full control over the goods. So also in Willbraham v. Snow, 2 Wms. Saund. 87, the plaintiff's tools were entirely under the control of the defendant. Nor does the case referred to by my Brother Martin, of Fouldes v. Willoughby, 8 M. & W. 540, really assist the plaintiff; for the dictum of Alderson, B., which at first sight appears to favour his contention, is founded upon the assumption that the plaintiff was out of actual possession of the goods.

I think, therefore, that the plaintiff must fail in this form of action. He may have another remedy by some form of action of trespass on the case, but the measure of damages would be different. It would be unjust that, under the circumstances proved, he should recover against the defendant the value of the goods. The rule must, therefore, be discharged.

Rule discharged.[60]

[60] Pollock and Bramwell, BB., concurred with the Chief Baron. In his concurring opinion Bramwell, B., remarked: "Here the defendant did not 'convert' the goods to his own use, either by sale or in any other way. Nor did he deprive the plaintiff of them. All he did was to prevent, or threaten to prevent, the plaintiff from using them in a particular way. 'You shall not remove them,' he said, but the plaintiff still might do as he pleased with them in the house. Assume that there was actual prevention, still I think this action cannot be maintained. Take some analogous cases, by way of illustration. A man is going to fight a duel, and goes to a drawer to get one of his pistols. I say to him 'You shall not take that pistol of yours out of the drawer,' and hinder his doing so. Is that a conversion of the pistol by me to my own use? Certainly not. Or, again, I meet a man on horseback going in a particular direction, and say to him, 'You shall not go that way, you must turn back;' and make him comply. Who could say that I had been guilty of a conversion of the horse? Or I might prevent a man from pawning his watch, but no one would call that a conversion of the watch by me. And really this case is the same with these."

DONNELL v. CANADIAN PAC. RY. CO.

(Supreme Judicial Court of Maine. 1912. 109 Me. 500, 84 Atl. 1002, 50 L. R. A. [N. S.] 1172.)

SPEAR, J. This case, coming up on report, imposes jury powers upon the court. It is the opinion of the court that the following facts may be found upon a preponderance of evidence:

This is an action of trover for the conversion of personal property, consisting of various kinds of merchandise of the alleged value of $2,600, the amount of which is not in dispute. The plaintiff was a large dealer in groceries, provisions, and feed in the village of Presque Isle, and had been so engaged for at least seven years. The defendant is a railroad corporation, having a station, freight house, and place of business at Presque Isle.

The defendant company and the Bangor & Aroostook Railroad Company are competing roads as common carriers of freight at Presque Isle. Prior to the 7th day of June, 1909, for several years the plaintiff had an agreement with the defendant that the bulk of his freight coming in car load lots should come over the defendant road, and that in consideration for this business the defendant should set apart a portion of its freight house for the storage of his goods, and keep them separate from the goods of other shippers, and allow the plaintiff and his servants at any time to remove them, for the storage of which no charge was to be made. This arrangement was admitted by the defendant's agent, and had existed for some years prior to the date of the fire. As a necessary result the defendant, his agents, and employés had been furnished with a key, whenever called for, for the purpose of storing and removing goods from the storehouse. Previous to the day of the fire, neither the plaintiff nor any one of his employés had ever been refused the use of the key, upon request, to give them access to the building.

On the afternoon of June 7, 1909, a fire started in the western part of the village of Presque Isle, about one-half mile from the freight and store house of the defendant, which rapidly developed, threatened, and finally consumed a large part of the village, including the freight house in question. At this time the goods alleged to have been converted, together with five barrels of sugar, which were removed, were in the storehouse without insurance. When the plaintiff became alarmed at the progress of the fire, he took his team, with three servants, and proceeded to the storehouse. Immediately upon arriving, he sent one of his men, Mr. McKenney, who had long been a clerk in his store and well known to the defendant's agent as his clerk, to obtain the key to the storehouse to enable him to unlock it and remove his goods to a place of safety. This was from three-quarters of an hour to an hour before the fire was communicated to the freight house. The defendant's agent, although he said in his testimony, "I

presumed he wanted the key for the purpose of removing his goods," refused to deliver the key. He also says that he gave Mr. McKenney no reasons whatever for refusing him the key. McKenney returned without the key, and the plaintiff himself then proceeded to the station, found the defendant's agent, and requested the key. As to what occurred between the plaintiff and the defendant's agent with reference to what seems to have been a fatal delay in not turning over the key to the plaintiff, there appears to be a material conflict in the testimony, which must be solved in the light of the circumstances and probabilities, because it is not controverted that the plaintiff, had he been given the key when he first approached the agent, would have been able to save all his goods. Therefore the loss of the time between the request for the key and receiving it was responsible for the burning of the goods. The defendant contends that this loss of time was due to the voluntary concession of the plaintiff, based upon the conclusion that the storehouse was not in danger. The plaintiff, however, contends that he was unable to obtain the key until the burning of the warehouse was imminent. * * *

We therefore think that the plaintiff's testimony, corroborated by the probabilities, sustains the burden of proof in favor of his contention as to the cause of the delay. Upon this conclusion of fact, did the refusal of the defendant to deliver the key to the plaintiff constitute a conversion?

Again, the circumstances under which the plaintiff was acting constitute an important element in determining, not only the facts, but his legal rights upon the question of conversion. Under ordinary conditions we should gravely doubt if the acts of the defendant's agent could be regarded as tantamount to a conversion. The right to possession of goods in the hands of a bailee may depend, however, so intimately upon immediate surrender that a delay of a few minutes even may result in the difference between salvage and partial or total loss. And the typical illustration of this rule would occur in case of fire. It is the opinion of the court that it did occur in the case at bar. While the defendant's agent did not refuse to deliver the goods, nor claim title in them, nevertheless, under the circumstances, he exercised a dominion over them, in refusing the key, more disastrous to the plaintiff than an ordinary delay for a month to allow him to enter the storehouse. Upon the plaintiff's demand, emphasized by the immediate presence of dangerous conditions, it would seem that almost any hesitancy or delay to give him the quickest possible possession of his goods was wrongful. And, as we understand the law, a wrongful detention upon proper demand will support an action of trover. In Fifield v. Me. Central R. R. Co., 62 Me. 77, it is said: "To constitute it, there must have been either a wrongful taking, or wrongful detainer, or an illegal using or a misusing, or an illegal assumption of ownership." In Fernald v. Chase, 37 Me. 289, it is said: "To make out a conversion, there must be proof of a wrongful possession, or

of the exercise of a dominion over it, in exclusion or defiance of the owner's rights, or of an unauthorized and injurious use, or of a wrongful detention after demand." To the same effect is Fuller v. Tabor, 39 Me. 519. Cooley on Torts, 524, says: "Any distinct act of dominion, wrongfully exerted over one's property, in defiance of his right or inconsistent with it, is a conversion. * * * It is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, that is in law a conversion, be it either his own or another person's use." We think the rule is too well established to require further citation that, when one person exercises a dominion over personal property inconsistent with the possession of the owner, in consequence of which the property is lost or destroyed, the exercise of such dominion constitutes a conversion.

Nor, in the case at bar, can the intention with which the defendant's agent withheld the key become material. 28 Am. & Eng. Enc. Law (2d Ed.) 681, and cases cited; 38 Cyc. 2029. See also Ingalls v. Bulkley, 15 Ill. 224.

In accordance with the terms of the report the entry must be: Judgment for the plaintiff for $2,600 and interest from the date of the writ.[61]

(c) The Defense When the Conversion was through a Destruction or an Asportation

BIRD v. ASTCOCK.

(Court of King's Bench, 1615. 2 Bulst. 280, 80 Reprint, 1122.)

In a special action upon the case brought by the plaintiff against the defendant, being a carryer, a boatman, for a trover and conversion of his goods to him delivered, and they miscarryed: two actions by him brought, the one a trespass, the other a trover and conversion: upon a motion now made, the rule of the Court was, that he should proceed in one of the actions onely, in the trover and conversion.

Coke. There was a case resolved in the C. B. when I was there, concerning Gravesend Barge, in which were a great number of passengers; one there had a pack of great value, and of great weight in the barge, there suddenly happened a very great storm, and they were all in great danger, and were, for their own safety, enforced to throw out a great part of the goods, for the safeguard of their lives which were then in the barge; amongst which goods, for the lightning of the barge, this pack of goods was thrown over: afterwards, he which was the owner of this pack, brought his action upon the case against the bargeman, for these his goods thus cast over; and we all there did resolve it clearly, that this being the act of God,

[61] Part of the opinion is omitted.

this sudden storm which occasioned the throwing over of the goods, and could not be avoided, and for this cause he recovered nothing; upon this reason is the case in 6 Eliz. in Dalison's Reports, where one was bound to keep and maintain the sea walls from overflowing; if this happen by his negligence, this shall be wast, otherwise if it so happen by the act of God suddainly, and so unavoidable; the whole Court agreed with him herein.

BUSHEL v. MILLER.

(At Guildhall, Coram Pratt, C. J., 1718. 1 Str. 128, 93 Reprint, 428.)

Upon the Custom-House quay there is a hut, where particular porters put in small parcels of goods, if the ship is not ready to receive them when they are brought upon the quay. The porters, who have a right in this hut, have each particular boxes or cupboards, and as such the defendant had one. The plaintiff being one of the porters puts in goods belonging to A. and lays them so that the defendant could not get to his chest without removing them. He accordingly does remove them about a yard from the place where they lay, towards the door, and without returning them into their place goes away, and the goods are lost. The plaintiff satisfies A. of the value of the goods, and brings trover against the defendant. And upon the trial two points were ruled by the C. J.

1. That the plaintiff having made satisfaction to A. for the goods, had thereby acquired a sufficient property in them to maintain trover.

2. That there was no conversion in the defendant. The plaintiff by laying his goods where they obstructed the defendant from going to his chest, was in that respect a wrong-doer. The defendant had a right to remove the goods, so that thus far he was in no fault. Then as to the not returning the goods to the place where he found them; if this were an action of trespass, perhaps it might be a doubt; but he was clear it could not amount to a conversion.[62]

[62] Compare Shea v. Milford (1887) 145 Mass. 525, 14 N. E. 769: (P. had a contract with D. to build a house on land owned by D. Before the house was finished D. requested P. to remove certain chattels, then on the land and used by P. in building the house, to another part of the lot. P. neglected to do this, and D. then removed them to another part of the lot, doing no unnecessary damage. P. sued for a conversion of these chattels. Said W. Allen, J.: "The evidence negatived a conversion of the property by the defendants, and showed that they claimed no title to it, assumed no dominion over it, and did nothing in derogation of the plaintiff's title to it, and that all that was claimed by the defendants was the right to remove the goods from one place to another on their own land. All that was done was in assertion of their right in the land, and in recognition of the plaintiff's right of property in the chattels. If the plaintiff had the right to occupy the land which he claimed, the act of the defendants was wrongful, and they would be liable to the plaintiff for damages for breach of contract, or for the trespass, but not for the value of property converted to their own use. Farnsworth v. Lowery [1883] 134 Mass. 512; Foulds v. Willoughby [1841] 8 M. & W. 540; Heald v. Carey [1852] 11 C. B. 977.")

FORSDICK v. COLLINS.

(King's Bench [at Nisi Prius] Hilary Term, 1816. 1 Starkie, 173, 18 R. R. 757.)

Trover for the value of a block of Portland stone. The stone had been placed by the plaintiff on the land adjoining some shells of houses, which he had purchased in Hunter Street. The defendant afterwards coming into possession of the land, refused to permit the plaintiff to carry the stone away, and afterwards removed it himself to Burton Crescent Mews.

Puller, for the defendant, contended that he had a right to remove it from his own premises.

LORD ELLENBOROUGH. But he is not justified in removing it to a distance. In an action of trespass at the suit of the owner, he must in his justification have alleged, that he removed it to some adjacent place for the use of the owner; he could not have justified this removal.

Puller insisted that no sufficient demand had been proved.

LORD ELLENBOROUGH. A demand is unnecessary where the party has been guilty of a conversion, and he is guilty of a conversion where he oversteps the authority of law; here the defendant overstepped that authority by removing the property to a distance.

Verdict for the plaintiff.

WILSON v. McLAUGHLIN.

(Supreme Judicial Court of Massachusetts, 1871. 107 Mass. 587.)

Tort for conversion of a horse. At the trial, after a general denial, the facts were found as follows:

On October 26, 1867, a horse of value of $250, belonging to the plaintiff, escaped from a pasture in Milford, and appeared a day or two afterwards in a highway in West Roxbury near an avenue which led from the travelled road into the messuage of Matthew Bolles. The defendant, who was in the employment of Bolles, supposing that the horse belonged to a neighbor, one of whose beasts had previously strayed upon the land of Bolles and done damage there, drove it from the highway into an inclosed pasture belonging to Bolles, for the purpose of preventing it from straying on Bolles's cultivated land. This was done without the direction, knowledge or authority of Bolles, who was not aware of what had been done until the horse had been in his pasture for two nights and a day, when he immediately directed the defendant to turn it into the highway again, and the defendant did so, and the plaintiff never recovered it. The defendant never caused any notice of the horse to be entered with the town clerk and posted up, or the horse to be cried.

The judge ruled that these facts would not sustain the action, and ordered judgment for the defendant. The plaintiff alleged exceptions.

AMES, J. It appears that, when the horse was taken up, he was going at large in the highway, and was supposed to be about to enter upon the premises of the defendant's employer. Under such circumstances, the act of turning him into an inclosed pasture was not

an interference with the owner's possession, or a conversion of the horse to the defendant's own use. Nothing is shown at all inconsistent with a purpose on the defendant's part to keep the horse for the owner; and it has been decided that the finder of an estray may keep it for the owner, and is not liable in trover unless he uses the estray, or refuses to deliver it on demand. Nelson v. Merriam, 4 Pick. 249. We do not understand the plaintiff to complain of this act, except on the ground that the defendant afterwards violated his trust as a voluntary bailee by turning the horse into the highway again. But this, it appears to us, was the act of his employer, and not of himself. He could not keep the horse on another man's land, against the will of such other man. The turning out into the highway was therefore an act which he could not prevent, and for which he cannot be held responsible; and the plaintiff has no cause of action under his first count. * * *

Exceptions overruled.[63]

RYAN v. CHOWN.

(Supreme Court of Michigan, 1910. 160 Mich. 204, 125 N. W. 46, 136 Am. St. Rep. 433.)

Action by Daniel W. Ryan against Eunice Chown. A justice's judgment for plaintiff was reversed on appeal to the circuit court, and plaintiff brings error.

BROOKE, J. The plaintiff in July, 1907, was the owner of a hen turkey and 14 young ones. Defendant, who also owned turkeys, resided about a mile and a half distant from plaintiff's farm. One of defendant's hen turkeys had been astray for some weeks. About the middle of July, defendant, while driving along the highway, in the vicinity of plaintiff's farm, found a hen turkey and chicks in the road. She seems to have believed that the mother bird was the one belonging to her own flock, which was astray. At any rate, she caught the mother and brood of 10, conveyed them to her home and shut them up that night. Upon the same day, she was advised by one Thick, a neighbor of both plaintiff and defendant, who had passed her while she was securing the brood, that he believed she had made a mistake, that he thought the turkey she had taken belonged to plaintiff and that her turkey was on the corner. Plaintiff, missing his brood, and being advised by Thick of the fact that defendant had taken a brood, which he (Thick) believed belonged to Ryan, drove over to defendant's farm to make inquiries about his property. There, defendant admitted possession of the brood, said she did not know whether it belonged to Ryan or not, but that if he said it did, he might take it. At that time, the brood was in a field of standing oats and it could not be seen or captured. The oats were cut the following week. A few days

[63] The statement is abridged. The argument for the plaintiff and the opinion on a second count are omitted.

later, and after the oats were cut, a note was written by plaintiff, demanding a return of the property, and threatening suit if it was not returned. Upon receipt of this note, defendant claims to have taken the turkey and her brood, one night after dark, back to the place in the highway where she had found them, and there liberated them, without notice to plaintiff, and he has never regained possession of them. Plaintiff, knowing nothing of the return (if such return was made), commenced suit in trover on August 29th, which resulted in a judgment in his favor for $22. Defendant appealed from said judgment to the circuit court, where it was reversed. Plaintiff has removed the case to this court for review on writ of error.

The trial court charged the jury in part as follows:

"I charge you, further, that in order for defendant to avoid the liability in an action for trover she must have returned the turkeys to plaintiff, before suit, and the fact that the turkeys were in the neighborhood some time after the commencement of the suit would be no defense to this action. Now, counsel ask me to say to you that if she turned the turkeys loose in the highway, that would not be a return, but I decline to give it in that form, and leave it a question for the jury to determine, whether leaving the turkeys where they were found in the highway was a return of the turkeys to the plaintiff. I say to you that if you find, considering the nature of the turkeys in view of all the circumstances of this case, that that was a proper, fair, and reasonable return of the property to Mr. Ryan, if they were his turkeys, and she did that before the suit, and she is sure about the date, then she would not be liable, but if you find that the leaving of them that distance from his house, at that time of day, or evening, or night without giving him any notice was not a fair and reasonable return of the property, then there is no question but that she was liable, if the turkeys were Mr. Ryan's."

We think error is properly assigned upon this instruction. The record shows that it is the nature of turkeys to wander. The alleged return, the fact of which, as to time, is not clear upon the record, was not such a return as would relieve defendant from liability, because the property was not in fact, placed in plaintiff's possession, nor was he notified of defendant's act. Assuming that defendant did just what she claims, her act indicated rather a desire to avoid liability than a purpose in good faith to repossess plaintiff of his property.

Plaintiff assigns error upon the admission of an advertisement, inserted by plaintiff, in a local newspaper, to the effect that 10 stray turkeys came to his place about October 12th. We think the exception well taken. Plaintiff had recovered judgment against defendant for the value of the property on September 20th. That judgment put an end to his right to reclaim the property, even supposing the property advertised to have been identical with that in litigation, which is not shown. Kenyon v. Woodruff, 33 Mich. 310. But the admission of the advertisement may have led the jury to infer that plaintiff had recovered his property, and was therefore not entitled to relief. * * *

The judgment is reversed and a new trial granted.[64]

[64] Part of the opinion is omitted.

GURLEY v. ARMSTEAD.

(Supreme Judicial Court of Massachusetts, 1889. 148 Mass. 267, 19 N. E. 389, 2 L. R. A. 80, 12 Am. St. Rep. 555.)

Tort for the conversion of certain articles of personal property belonging to the plaintiff. The case was submitted to the superior court, and, after judgment for the defendant, to this court, on appeal, on an agreed statement of facts, which, so far as material, appears in the opinion.

DEVENS, J. The defendant, who was a job teamster, removed the goods alleged to have been by him converted from a room in the dwelling-house of one Whittier to the store of one Davis, and there delivered them to Whittier, by whose direction he had acted. Although the goods were in the house of Whittier, they were in a room hired by the plaintiff from him. The contract between them was one for rent, and not for storage, Whittier reserving no control over the room. It was, however, neither locked nor fastened, although no goods were in it except those of the plaintiff. In all that he did the defendant acted in good faith, without any intention of depriving the rightful owner of her property, and in ignorance of the fact that the plaintiff was such owner, neither asserting title in himself nor denying title to any other, nor exercising any act of ownership except by the removal above stated.

The legal possession of the goods was, under these circumstances, undoubtedly in the plaintiff, and as they were in the room hired by her, the actual possession was also hers. The apparent control of them was, however, in Whittier, as they were in his house, and he had further the present capacity to take actual physical possession, as the room in which they were was neither locked nor fastened.

It is conceded that whoever receives goods from one in actual, although illegal, possession thereof, and restores the goods to such person, is not liable for a conversion by reason of having transported them. Strickland v. Barrett, 20 Pick. 415; Leonard v. Tidd, 3 Metc. 6. And this would be so apparently, even if the goods thus received were restored to the wrongful possessor, after notice of the claim of the true owner. Loring v. Mulcahy, 3 Allen, 575; Metcalf v. McLaughlin, 122 Mass. 84.

Upon the precise question raised, we have found no direct authority, nor was any cited in the argument; but the principle on which the decisions above cited rest is not unreasonably extended when it is applied to the circumstances of the case at bar. The act of removing goods by direction of the wrongful possessor of them is an act in derogation of the title of the rightful owner; but the party doing this honestly is protected because from such actual possession he is justified in believing the possessor to be the true owner. He does no more than such

possessor might himself have done by virtue of his wrongful possession.

The defendant was a job teamster, and thus in a small way a common carrier of such wares and merchandise as could appropriately be transported in his team or wagon. He exercised an employment of such a character that he could not legally refuse to transport property such as he usually carried, which was tendered to him at a suitable time and place with the offer of a reasonable compensation. If he holds himself out as a common carrier, he must exercise his calling upon proper request and under proper circumstances. Buckland v. Adams Express Co., 97 Mass. 124, 93 Am. Dec. 68; Judson v. Western Railroad, 6 Allen, 486, 83 Am. Dec. 646. His means of ascertaining the true title of the freight confided to him are of necessity limited. He must judge of this as it is fairly made to appear. If Whittier had actually gone into the room, as he might readily have done, and taken physical possession of the goods, the defendant upon well established authority would have been justified in obeying the order, and transporting the goods to Whittier at another place; and he should not be the less justified where Whittier, in apparent control of the goods in his own house, and capable of immediately taking them into his actual custody, by entering the room through the unlocked door, has directed the removal.

If a person standing near and in sight of a bale of goods lying on the sidewalk belonging to another, and thus in the legal possession of such other, is able at once to possess himself of it actually, although illegally, and directs a carrier to remove it and deliver it to him at another place, compliance with this order in good faith cannot be treated as a conversion; and apparent control, accompanied with the then present capacity of investing himself with actual physical possession, must be equivalent to illegal possession in protecting a carrier who obeys the order of one having such control.[65]

Judgment for the defendant.

[65] Accord: Greenway v. Fisher (1824) 1 C. & P. 190: (D., a packer, acting under the orders of S., who had employed him, shipped the goods of P., in the ordinary course of business. Said Abbott, C. J.: "While he is a mere conduit pipe in the ordinary course of trade, I think he is not liable.") Nanson v. Jacob (1887) 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531; Leuthold v. Fairchild (1886) 35 Minn. 99, 27 N. W. 503, 28 N. W. 218; Hodgson v. St. Paul Plow Co. (1899) 78 Minn. 172, 80 N. W. 956, 50 L. R. A. 644, and note 652; Walker v. First National Bank (1903) 43 Or. 102, 72 Pac. 635.

Compare Liefert v. Galveston L. & H. Ry. Co (1900, Tex. Civ. App.) 57 S. W. 899: A railway company employed by P. to transport his goods to Galveston as their destination, by mistake there delivered them to D., a steamship company, for transportation to New York. "In this case," said the court, "the steamship company received the goods from the Laporte Company, who had neither authority nor consent from the owner to export them. The rule seems to be that there is no lien in favor of the carrier where the goods have been received from a wrongful holder or from one not authorized to ship them. 5 Am. & Eng. Enc. Law (2d Ed.) 403, note. And in such a case the true owner can maintain an action for conversion, however innocent the defendant may be."

KNAPP v. GUYER.

(Supreme Court of New Hampshire, 1909. 75 N. H. 397, 74 Atl. 873.)

The action was by Knapp for the alleged conversion of 5,875 pounds of potatoes. There was a judgment in the superior court for the plaintiff, after which the case was transferred to the Supreme Court.

The plaintiff was a farmer at Piermont, and the defendant was a merchant at Hanover. In May, 1908, one Blood, an innkeeper at Hanover, was in financial difficulties. He desired to purchase 100 bushels of potatoes, intending to use most of them himself, and to sell the remainder, and arranged with the defendant for the shipment of potatoes to Hanover in the latter's name. Blood called at the plaintiff's farm, purchased 100 bushels of potatoes, informed the plaintiff that the purchase was for Guyer, paid $10, and took a receipt therefor in his own name, and directed that the potatoes be billed to the defendant. Shipment was made in accordance with Blood's instructions. When the potatoes arrived at their destination, the station agent notified the defendant, who replied that he was not expecting potatoes, and did not know about them. Shortly thereafter Blood called at the station and inquired for the potatoes, and was informed that they were billed to the defendant. He thereupon left the station, but soon returned with an order written and signed by the defendant, directing the delivery of the potatoes to Blood. The order was complied with and Blood took possession of the potatoes, which were immediately attached by his creditors and held for his debts. Blood had no authority from the defendant to purchase potatoes in his name, and the latter derived no benefit from the transaction. He merely acted for the accommodation of Blood, and permitted the shipment of potatoes as above stated.

BINGHAM, J. It is clear from the facts found that the plaintiff did not sell the property in question to the defendant, although he billed it to him upon the representation of Blood that the defendant was the purchaser. It is equally clear that he did not sell it to Blood, and that in delivering it to the railroad billed to the defendant he parted with the possession, but not with his title and right of possession. Having the title and right of possession at the time that the defendant gave the order to the railroad to deliver the property to Blood, the order was an act in itself implying an assertion of title or right of dominion over the property, inconsistent with the plaintiff's title and right of possession, and was in law a wrongful act and a conversion. Brown v. Ela, 67 N. H. 110, 111, 30 Atl. 412; Baker v. Beers, 64 N. H. 102, 105, 6 Atl. 35; Evans v. Mason, 64 N. H. 98, 99, 5 Atl. 766.

If the defendant could be said to have honestly mistaken his rights, that fact would be of no consequence in this case. "The defendant's act in assuming dominion over the property was none the less an in-

vasion of the plaintiff's right * * * because he did not intend a wrong, or know that he was committing one. An encroachment upon a legal right must constitute a legal wrong; and it is familiar law that intention is of no account in a civil action brought by one man to recover damage for a wrongful interference with his property by another. The law gives the plaintiff compensation for the injury he has sustained, whether the defendant intended such injury or not." Farley v. Lincoln, 51 N. H. 577, 579, 12 Am. Rep. 182. At any rate, the purpose or intention of the defendant would become material only when the act done would not in itself imply an assertion of title or right of dominion. Evans v. Mason, 64 N. H. 98, 99, 5 Atl. 766.

The original act of the defendant in asserting dominion over the property being wrongful, a demand was not necessary. Porell v. Cavanaugh, 69 N. H. 364, 366, 41 Atl. 860; Farley v. Lincoln, 51 N. H. 577, 581, 12 Am. Rep. 182; Bartlett v. Hoyt, 33 N. H. 151, 169.

Exception overruled. All concurred.

(d) The Defense When the Conversion was through User

DRAKE v. SHORTER.

(At Nisi Prius, 1803. 4 Esp. 165.)

Trover for a boat. Plea of the general issue. The case stated on the part of the plaintiff was, that the defendant, who was employed in an invention for making a vessel sail against wind and tide, had employed the plaintiff to work on her; that while the vessel was so working on, she took fire; that the defendant took a boat belonging to the plaintiff, to endeavour to extinguish it; but that she sunk, and was lost.

Garrow, for the defendant, states his defence to be, that while the plaintiff was working on the vessel, it was his duty to have taken care of her; and that the interference, in this case, was to prevent the fire spreading, by means of which the accident happened; which he contended was lawful.

Lord Ellenborough said, That if the fact was so, he thought it amounted to a defence: that what might be a tort under one circumstance, might, if done under others, assume a different appearance. As for example: If the thing for which the action was brought, and which had been lost, was taken to do a work of charity, or to do a kindness to the party who owned it, and without any intention of injury to it, or of converting it to his own use; if, under any of these circumstances, any misfortune happened to the thing, it could not be deemed an illegal conversion; but as it would be a justification in an action of trespass, it would be a good answer to an action of trover.

The defendant failed in proving the circumstances as to the ship being in the plaintiff's care; so that the accident of the fire proceeded from the defendant himself; and the plaintiff had a verdict.

WARING v. PENNSYLVANIA R. CO., for Use, etc.

(Supreme Court of Pennsylvania, 1874. 76 Pa. 491.)

This was an action of trover against Waring, surviving member of the firm of Waring & Lafferty, oil refiners. The action was brought for the value of three car loads of crude oil delivered by the Pennsylvania Railroad Company by mistake to Waring & Lafferty. The oil belonged to other persons. It was delivered by the plaintiffs by running a train of tank cars into the siding of Waring & Lafferty at the refinery, and leaving the cars intended for them without further notice. The cars were, as soon as could be, unloaded by pumping them into the refiners' tanks. There were no marks on the cars indicating to whom the oil was consigned. The oil had been received from the consignors by the Allegheny Railroad Company, the use-plaintiffs, and they had paid the owners of the oil for it upon ascertaining that it had not been delivered to them.

The trial resulted in a verdict and judgment for the plaintiffs. The defendant took a writ of error.[66]

GORDON, J. Lord Mansfield defines the action of trover to be, "a remedy to recover the value of personal chattels wrongfully converted by another to his own use." 1 Chit. Plead. 146. The taking may have been lawful, hence the gist of the action lies in the wrongful conversion. Where one has the lawful possession of the goods of another, and has not converted them, this action will not lie until there has been a refusal to deliver them upon demand made. Ordinarily where such goods have been converted by the bailee, the law presumes it to be wrongful, and the action may be brought without a previous demand; but such presumption may be rebutted, showing a permission from the plaintiff to convert the property. So we may suppose a case of this kind: A. purchased a ton of wheat flour from B., a miller, B. delivers to A. a ton of wheat flour belonging to C., and A. converts it to his own use. Now it cannot be that B., as bailee of C., can maintain trover against A., without first explaining to him the mistake, and demanding of him a return of C.'s flour; for here the conversion is not wrongful, but permissive, there being nothing in the transactions which would lead A. to suppose that he had gotten any but his own property.

This example will apply to the case in hand. The defendant offered to prove that he had received from the railroad company no more car loads of oil than he was entitled to. This, as we understand the offer, not by way of recoupment, which was not permissible, but to

[66] A portion of the statement of the case and the arguments are omitted.

show that he received the oil in good faith, supposing it to be his own. By his subsequent offers, he proposed to prove, that if he received the oil in dispute at all, it was by a delivery from the plaintiffs' agents; if there was an error, it was produced by the plaintiffs, and finally that the defendant received the property "at the instance and request of the plaintiffs."

The offers should not have been overruled. Had the proof therein proposed been produced, it is clear the plaintiffs had no case.

On such showing the defendant did no wrong, there was no wrongful conversion, and the action of trover would not lie. We observe no error in the charge, or in the answer to the points. Under the evidence, as admitted, they were correct. A wrongful conversion of the oil in question by the defendant, would sustain the action, and if he, or the firm of which he was a member, knowingly took advantage of the mistake of the plaintiffs' agents, and appropriated the property of another to the use of the firm, it would be such a conversion. This is the substance of the charge, and is, so far as it goes, a sound exposition of the law.[67]

The judgment reversed, and a venire facias de novo awarded.

HOMER v. THWING.

(Supreme Judicial Court of Massachusetts, 1826. 3 Pick. 492.)

Trover for a horse. One of the defendants was defaulted. Thwing, who was an infant, defended by guardian.

The plaintiff offered evidence that the horse was let by him to the defendants to drive in a chaise to the Punch Bowl in Brookline, and

[67] Compare Tidey v. Kent Circuit Judge (1914) 179 Mich. 580, 146 N. W. 224: (A limited copartnership, of Hamilton, Ontario, being indebted in the sum of $425 to the "Grand Rapids Textile Machinery Company," then located in Grand Rapids, Mich., sent their check for said amount to Grand Rapids for the purpose of paying this indebtedness; the check was made out and mailed to the "Grand Rapids Machinery Company," the word "Textile" being omitted by a clerical error. D. was doing business at Greenville, Mich., under the name of the "Grand Rapids Machinery Company," and had formerly done business in Grand Rapids in that name, selling secondhand machinery, and after he went to Greenville he instructed the Grand Rapids postmaster to forward his mail to the latter place. D. had authorized his wife to look after his business affairs in his absence, to open his letters, read his mail, and cash his checks. The letter containing the check in question was forwarded from Grand Rapids to Greenville, where it was received by relator's wife in his absence, the check taken out and indorsed by her, as relator's agent, "Grand Rapids Machinery Company, A. L. Tidey," and cashed at the Greenville bank, the money being received thereon and delivered to D., who spent it. "The fact," said Steere, J., delivering the opinion, "that relator [D.] acted under mistake, in ignorance of who was the actual owner, or even in the belief that the money was his own instead of that of another, does not constitute a defense in trover. 38 Cyc. 2011; Gibbons v. Farwell [1886] 63 Mich. 349, 29 N. W. 855, 6 Am. St. Rep. 301; Kenney v. Ranney [1893] 96 Mich. 617, 55 N. W. 982.")

that they went to Fresh Pond in Cambridge without leave, and afterwards to the Punch Bowl, and that the horse was returned much injured.

The counsel for Thwing contended that, as this was a transaction arising originally on contract, in which the infancy of Thwing would have been a good defence, the plaintiff should not recover upon the same facts by changing the form of his action to tort.

But the jury were instructed, for the purposes of this trial, that the action would lie against Thwing, notwithstanding his infancy; and a verdict was found for the plaintiff.

If the Court should be of opinion, that the instruction to the jury was wrong, the plaintiff was to be nonsuited; but otherwise judgment was to be entered according to the verdict.[68]

Morton, J. The defence in this case is infancy. It is contended, that this action is founded in contract, and that the defendant cannot be ousted of this defence by changing the form of action from contract to tort.

Infants are liable in actions arising ex delicto, but not in those arising ex contractu. The defendant however contends, that there is a qualification of this rule, and that infants are liable for positive wrongs only, and not for constructive torts. But we know of no such distinction, and in the case of Jennings v. Rundall, 8 T. R. 335, so much relied upon by the defendant's counsel, it is expressly rejected. It is true, that an infant cannot become a trespasser by any prior or subsequent consent. But he may be guilty of torts, as well by omissions of duty, as by the commission of positive wrongs. 1 Chit. Pl. 65 (6th Amer. Ed. 87); Co. Litt. 180b, Butler's note 56. He is also liable for frauds, as well as for torts. And his liability is to be determined by the real nature of the transaction, and not by the form of the action. 1 Dane's Abr. 143; 1 Esp. Rep. 172.

Although an infant shall not be charged in trover for goods sold to him with a knowledge of his infancy (Manby v. Scott, 1 Sid. 129), and although an action will not lie against an infant for affirming himself to be of full age in the execution of a contract (Johnson v. Pie, 1 Lev. 169, and 1 Keb. 905), yet detinue will lie against an infant for goods delivered upon a special contract for a specific purpose, after the contract is avoided; Mills v. Graham, 1 New Rep. 140; and assumpsit will lie against an infant for money embezzled; for the Court will look through the form of the action into the tortious nature of the transaction. 1 Esp. Rep. 172.

It has been holden, that trover will not lie against an infant for immoderately using a horse which he had contracted to use moderately, on the ground that the action could only be supported upon the contract. Jennings v. Rundall, before cited. But in the case at bar, the

[68] The statement of the case is abridged.

driving of the horse beyond the place to which the defendant had permission to go, was a conversion, and trover is the proper remedy. In the case of Wheelock v. Wheelwright, 5 Mass. 104, which in the facts, as well as the principles, is similar to this, it was decided, not only that case for improperly using the horse would not, but that trover was the only action which would lie.

Whenever trover is the proper form of action, it will lie against an infant. The defence therefore is insufficient, and judgment must be entered on the verdict.

STEPHENS et al. v. ELWALL.

(Court of King's Bench, 1815. 4 Maule & S. 259, 105 Reprint, 830, 16 R. R. 458.)

Trover for goods by the assignee of two bankrupts. Plea, not guilty. At the trial before Le Blanc, J., at the last Lancaster assizes the case was this:

The bankrupts being possessed of the goods in question sold them after their bankruptcy to one Deane, to be paid for by bills on Heathcote, who had a house of trade in London, and for whom Deane bought the goods. Heathcote was in America, and the defendant was his clerk, and conducted the business of the house. Deane communicated to the defendant information of the purchase on the day it was made, and the goods were afterwards delivered to the defendant, and he disposed of them by sending them to America to Heathcote. No demand was made upon the defendant until nearly two years after the purchase.

The learned Judge inclined to think, and so stated to the jury, that if the defendant was acting merely as the clerk of Heathcote he was not liable; but if he was transacting business for himself, though in the name of another, then he would be liable. The jury found a verdict for the defendant. A rule nisi was obtained for a new trial, in order to question the accuracy of the learned Judge's direction in point of law.[69]

Lord Ellenborough, C. J. The only question is, whether this is a conversion in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master; but nevertheless his acts may amount to a conversion; for a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it. And the Court is governed by the principle of law, and not by hardship of any particular case. For what can be more hard than the common case in trespass, where a servant has done some act in assertion of his master's right, that he

[69] The argument is omitted.

shall be liable, not only jointly with his master, but if his master cannot satisfy it, for every penny of the whole damage; and his person also shall be liable for it; and what is still more, that he shall not recover contribution?

LE BLANC, J. I think the rule of law is very different from what I considered it at the trial. The great struggle made at the trial was, whether the goods were for Heathcote or not; but that makes no difference if the defendant converted them. And here was a conversion by him long before the demand.

PER CURIAM. Rule absolute.

LOESCHMAN v. MACHIN.

(At Nisi Prius, 1818. 2 Starkie, 311, 20 R. R. 687.)

This was an action of trover, brought to recover the value of two pianofortes.

The plaintiff was a maker of pianofortes, and the defendant was an auctioneer. The plaintiff had lent one of the pianos, the larger, to a person of the name of Brown, whose wife was a musical teacher, on hire, for which Brown was to pay at the rate of 18s. per month, if he kept it for the whole year; and if for a less period, he was to pay a guinea per month. With respect to the other piano, it did not appear very clearly on what terms it had been delivered by the plaintiff to Brown, whether upon hire, or that he might dispose of it for the plaintiff. Brown had sent both these pianos to the defendant, to be sold by auction, and he, upon the plaintiff's application to deliver the pianos to him, refused to deliver them unless the plaintiff would pay the amount of certain expenses which had been incurred.

ABBOTT, J., in summing up to the jury said: I wish you to find whether the smaller piano was let on hire, or sent to be sold by Brown, if an opportunity offered; this is a question of fact for your consideration; and although I am of opinion that it will make no difference as to the verdict, it will give the party an opportunity of making the distinction. The general rule is, that if a man buy goods, or take them on pledge, and they turn out to be the property of another, the owner has a right to take them out of the hands of the purchaser; except, indeed, in the case of a sale in market overt. With that exception, it is incumbent on the purchaser to see that the vendor has a good title. And I am of opinion that if goods be let on hire, although the person who hires them has the possession of them, for the special purpose for which they are lent, yet, if he send them to an auctioneer to be sold, he is guilty of a conversion of the goods; and that if the auctioneer afterwards refuse to deliver them to the owner, unless he will pay a sum of money which he claims, he is also guilty of a conversion.

The jury found that the smaller piano had been sent to Brown for the purpose of a sale, and the plaintiff had a verdict for the value of both the pianos.

Leave was given to Marryatt, for the defendant, to move the point.[70]

GENEVA WAGON CO. v. SMITH.

(Supreme Judicial Court of Massachusetts, 1905. 188 Mass. 202, 74 N. E. 299.)

The Geneva Wagon Company sued Ida Smith for conversion of certain wagons. The court found for the plaintiff, and the defendant excepted.

HAMMOND, J. The evidence warranted a finding that the title to the wagons was to remain in the plaintiff until paid for in money, and that they never were so paid for; and therefore that the title never passed to the Hendersons. Upon the uncontradicted evidence, the wagons were included in the mortgage. The language of the mortgage included them, and Henderson, both as mortgagor and as agent for the defendant, the mortgagee, intended that they should be included. After the mortgage, Henderson had the key to the building in which the wagons were kept, and the court could properly find upon the evidence that he acted as agent for the defendant, so far as respected her supposed rights as mortgagee, and kept them for her under a claim of right inconsistent with the rights of the plaintiff. This was a tortious act on the part of the defendant, and no demand was necessary before bringing the suit. Baker v. Lothrop, 155 Mass. 376, 29 N. E. 643, and cases cited. We see no error in the rulings given by the court.

Exceptions overruled.

[70] "In Loeschman v. Machin, p. 687, a sound and important rule is laid down perhaps for the first time in a civil action (it is really identical with the doctrine of 'breaking bulk' in the law of larceny, which dates from the fifteenth century), but the reasons are not given. These are supplied in several later cases, and especially by the judgment of Parke, B., in Fenn v. Bittleston (1851) 7 Ex. 152, 21 L. J. Ex. 41. The latest reported application of the principle appears to be in Nyberg v. Handelaar (1892) 2 Q. B. 202, 61 L. J. Q. B. 709. Although the bailee has lawful possession and the immediate right to possess, he destroys that right by parting with the possession in a manner wholly unauthorized by the terms of the bailment, and at common law, therefore, not only is guilty of a conversion, but confers no right to possession as against the bailor, not even a qualified one, on a person who receives the chattel from him, however innocently." Per Sir Frederick Pollock, in preface to Vol. XX of Rev. Rep. p. vi.

DEVEREUX v. BARCLAY.

(Court of King's Bench, 1819. 2 Barn. & Ald. 702, 106 Reprint, 521, 21 R. R. 457.)

Trover for oil; plea not guilty. At the trial, before Abbott, C. J., the plaintiffs proved a purchase of four tuns of sperm oil, then lying in the defendants' warehouses, from a person of the name of Collinson. The following delivery order was given, dated 13th February, 1818:

"To Messrs. A. and W. Barclay, Leicester Square.

"Please to deliver to the order of Messrs. Devereux and Lambert, the under-mentioned goods (enumerating them). Charges from 27th February, to be paid by Messrs. Devereux & Co. Edward Collison."

Soon after this transaction, Collinson, who had in the meantime purchased from Mr. Gamon, a broker, without the defendants' knowledge, some dark sperm oil of inferior value, then also lying at the defendants' warehouse, sold this latter quantity, about three tuns, to a third person, and gave the following delivery order, dated 3d March, 1818:

"To Messrs. A. and W. Barclay.

"Please to deliver to Mr. Dale's carts my dark sperm oil."

The defendants, not being aware that the two parcels of oil both belonged to Collinson, by mistake, delivered the first parcel of oil to the second delivery order, the first delivery order not having been at the time presented to them by the plaintiffs. The plaintiffs, on the 28th of March, presented their delivery order, and demanded the oil. Abbott, C. J., being of opinion that this misdelivery, by mistake, did not amount to a conversion, so as to entitle the plaintiffs to maintain trover, directed a nonsuit. A rule nisi for a new trial having been obtained,

Scarlett and Manning now shewed cause: The mistake which has occurred is solely imputable to the negligence of the plaintiffs, in not sooner sending their delivery order to the defendants. The conversion must be an injurious act. A mere mis-delivery by mistake will not do. * * *

Abbott, C. J. What effect the production of further evidence may have, the Court cannot anticipate at present; it is quite sufficient to say that this cause having been stopped too soon, the plaintiffs are entitled to a new trial. This is not the case of an innocent delivery, for it is one contrary to the knowledge which, in point of law, the defendants ought to have had. There is a great distinction between an omission and an act done. In the case cited from Burrow [Ross v. Johnson (1772) 5 Burr. 2825] no act was done, and Lord Mansfield expressly said that it was a mere omission. But here there is an act done by the defendants, which, in its consequences, is injurious

to the plaintiff. Upon this evidence therefore, I am now of opinion that trover may be maintained.

BAYLEY, J. The case of Youl v. Harbottle [1791] 1 Peake, N. P. 49, shews that a carrier is liable in trover for a mis-delivery.

Rule absolute.[71]

POGGI v. SCOTT.

(Supreme Court of California, 1914. 167 Cal. 372, 139 Pac. 815, 51 L. R. A. [N. S.] 925.)

Action by Poggi to recover $2,000 damages for an alleged conversion by Scott, the sole defendant, of some 210 barrels of wine, stored in a room in the cellar of a business building in San Diego. This building was rented to a Laundry Company, who sub-rented the cellar-room to Poggi at $2 a month. The full barrels were in tiers along the wall. Near the door were empty barrels. Poggi, who lived 15 miles from San Diego, kept the door of this room locked, but came to San Diego about twice a month, and on each visit looked after his wine. Once a year he racked it off.

Before the tenancy of the Laundry Company had expired, the owner of the building sold it to Scott. In due course the Laundry Company moved out, but Poggi's wine was left where it was. Knowing nothing of the change of ownership, Poggi supposed that he should pay his rent to the former owner of the building. In this state of things, two Italians, Bernardini and Ricci, called upon Scott and told him that there were some empty barrels in the cellar of his laundry building which they desired to buy. Scott replied that he did not know that there were any barrels there, and made an appointment with them to visit the place the next day. He did so, meeting Bernardini alone. Bernardini took him to where the barrels were stored. There was no lock on the door, and exposed to view were some broken barrels. Further back, as Scott subsequently testified in criminal proceedings against Bernardini and Ricci, there were more barrels, apparently whole. "I went back and tapped them, and so far as I could discover they were empty." He told Bernardini that he knew nothing of the value of the barrels, and asked what they were worth. Bernardini said they were worth $10 or $15. Scott regarded the barrels as old junk, and offered Bernardini to sell them for $15, provided Bernardini would clean the whole cellar out. This offer being accepted, Bernardini and his companions carted off the wine in barrels and shipped it away. They were subsequently arrested and tried for the fraud and theft.

[71] Part of the argument of counsel is omitted. Holroyd and Best, JJ., concurred.

In the light of these facts, the trial court, in Poggi's action for conversion, granted a nonsuit. From the judgment which followed, the plaintiff appealed.[72]

In support of the non-suit the respondent argued that as Scott thought that he was disposing of so much junk or rubbish in the form of barrels, he could not be held for the conversion of full barrels of wine, or for the value of wine in barrels. It was further argued that the asportation of the wine could not be charged to any act of Scott.

HENSHAW, J. (after stating the facts). The foundation for the action of conversion rests neither in the knowledge nor the intent of the defendant. It rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results. Therefore neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are of the gist of the action. "The plaintiff's right of redress no longer depends upon his showing, in any way, that the defendant did the act in question from wrongful motives, or, generally speaking, even intentionally; and hence the want of such motives, or of intention, is no defense. Nor, indeed, is negligence any necessary part of the case. Here, then, is a class of cases in which the tort consists in the breach of what may be called an absolute duty; the act itself (in some cases it must have caused damage) is unlawful and redressable as a tort. 1 Bigelow on Torts, p. 6. And says Judge Cooley (Cubit v. O'Dett, 51 Mich. 347, 16 N. W. 679): "Absence of bad faith can never excuse a trespass, though the existence of bad faith may sometimes aggravate it. Every one must be sure of his legal right when he invades the possession of another." And without further quotation, reference may be made to 1 Street on Foundations of Legal Liability, pp. 231, et seq.; 38 Cyc. p. 2015; Horton v. Jack, 4 Cal. Unrep. Cas. 758, 37 Pac. 653; s. c., 126 Cal. 526, 58 Pac. 1051; Budd v. Multnomah Co., 12 Or. 271, 7 Pac. 99, 53 Am. Rep. 355; Bolling v. Kirby, 24 Am. St. Rep. 795, Prof. Freeman's note; Isle Royal Mining Co. v. Hertin, 37 Mich. 332, 26 Am. Rep. 520; Galvin v. Bacon, 11 Me. 28, 25 Am. Dec. 258; Donahue v. Shippee, 15 R. I. 453, 8 Atl. 541; Hobart v. Hagget, 12 Me. 67, 28 Am. Dec. 159; Davis v. Tacoma Ry. & Power Co., 35 Wash. 203, 77 Pac. 209, 66 L. R. A. 802; Cook v. Monroe, 45 Neb. 349, 63 N. W. 800; Gibbs v. Chase, 10 Mass. 128.

In consonance with the principles of law thus declared, no question can arise of the defendant's responsibility under the evidence. Conceding all that may be argued as to the absence of improper motives on the part of the defendant, the all-important fact yet remains, under his own testimony, that he sold barrels that did not belong to him, and which did with their contents belong to the plaintiff. That he did not know that the barrels contained wine did not excuse his conduct. He had no legal right to sell the barrels whether or not they contained

[72] The statement of the case is much abridged.

wine. He was exercising an unjustifiable and unwarranted dominion and control over the property of another, and from his acts great loss resulted to that other. * * *

An appellate court is always reluctant to review evidence the primary duty of weighing which rests with a jury. It does so only, as here, under compulsion. The views which it is forced to express are not to be taken as conveying anything beyond what the necessities of the consideration require. So here, those views are to be considered as expressing merely this court's conviction that the evidence offered by plaintiff demanded the consideration of the case by the jury, and that the trial court was therefore in error in withholding that consideration from the jury and in granting a nonsuit.

The judgment appealed from is therefore reversed.[73]

We concur: MELVIN, J.; LORIGAN, J.

CERNAHAN v. CHRISLER.

(Supreme Court of Wisconsin, 1900. 107 Wis. 645, 83 N. W. 778.)

This action was brought in justice court to recover for the conversion by defendant of a horse, buggy, and harness. The trial resulted in a judgment for plaintiff for six cents damages and costs. The case was appealed to the circuit court, and was tried and disposed of upon the justice's return of testimony. The judgment of the court below was affirmed. The defendant brings this appeal. The following facts are shown by the record:

Plaintiff purchased the property of Mrs. Lowe, a widow, who at his direction left it at a livery stable in the city of Eau Claire. Mrs. Lowe eloped, leaving several children. William Lowe, a brother of her deceased husband, took charge of the children. He came to Eau Claire to look up any property she may have left, and at his request the defendant, who was undersheriff, assisted him. The defendant found the property at the livery stable, and directed the persons in charge not to let any one have it. He returned soon afterwards with Mr. Lowe, and directed the livery stable keeper to deliver the property to him, and it was taken away. He acted on the supposition that it belonged to Mrs. Lowe. The following day he was informed by plaintiff that he owned the property. He replied that he had acted a little too quick in the matter, and that he would have the horse brought in the next day. After the suit had been commenced, and before trial, Lowe brought the property back to the stable, and made claim for keeping of the horse. Plaintiff declined to pay, and took the property and sent it to his farm.

BARDEEN, J. Two questions are suggested by the record: (1) Does the evidence show that defendant was guilty of a conversion of the

[73] Only so much of the opinion is given as relates to the one point. In the testimony there were facts which tended to show that the defendant had some knowledge of the plaintiff's tenancy, and a suspicion that the barrels were not empty.

property sued for? (2) Was the taking of the property by plaintiff pending the suit a waiver of his cause of action for conversion?

1. We will first inquire what acts of a party constitute a conversion. Perhaps as terse a definition as can be found in the books is given in Cooley, Torts (2d Ed.) 524. The learned author says: "Any distinct act of dominion wrongfully exercised over one's property in denial of his right, or inconsistent with it, is a conversion." It is not necessary that there should be a manual taking, or that it should be shown that he applied it to his own use. The test is, does he exercise a dominion over it in exclusion or in defiance of the plaintiff's rights? If he does, that, in law, is conversion, be it for his own or another person's use. Neither is it any defense to say that he acted as agent. "But one who assists in a wrongful taking of goods is liable, though he acted as agent merely, for agency cannot be recognized as a protection in wrongs." Id. 529. Neither is the motive which controlled the party available as a defense, except, in cases where exemplary damages are claimed, it may be shown in mitigation. Railroad Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 21 L. R. A. 117, 34 Am. St. Rep. 579; Tobin v. Deal, 60 Wis. 87, 18 N. W. 634, 50 Am. Rep. 345. In view of these rules, it seems entirely unnecessary to discuss the evidence. The defendant clearly exercised dominion over the plaintiff's property in defiance of his rights. It does not serve to excuse him that he was ignorant of plaintiff's title, or supposed title was in Mrs. Lowe, or that he was acting in the interest of Mr. Lowe. We say, therefore, that there is evidence to support the plaintiff's cause of action.

2. After this suit was commenced the plaintiff took possession of the property, and it is now claimed by defendant that he waived his right to further prosecute his action. We are referred to Collins v. Lowry, 78 Wis. 329, 47 N. W. 612, as an authority sustaining that proposition. This was an action for the conversion of certain shares of stock. Pending the action the defendant brought such shares into court and tendered them to plaintiff. At the trial plaintiff announced his readiness to accept the stock, and thereupon introduced the stock certificate in evidence. He claimed also the right to recover damages for his time, trouble, and expense in attempting to secure a return of the stock. The court directed a verdict for nominal damages. The recovery being less than $50, judgment for costs was entered for defendant. In this court the plaintiff insisted that he was entitled to recover for his expenses, etc. In denying a recovery under the circumstances, the following language was used:

"The theory of the case is that the defendant is only answerable for the value of the property, and that he or his vendee or transferee is to be regarded as the owner. Such being the nature of the action, a verdict for the value of the property converted necessarily covers and includes the damages for such conversion, and the acceptance by the plaintiff of the thing converted necessarily covers and includes its value, and hence such acceptance extinguishes the alleged cause of action for such value. In

other words, the plaintiff pending such action, cannot waive the alleged tortious conversion by taking back the property, and at the same time continue the action and recover the full or partial value of the thing converted, not even to recover costs."

It will be observed that no cases are cited to sustain this proposition. It is true that in actions for conversion of property the measure of damages is generally the value of the property at the time and place of the conversion, with interest; but, when the circumstances show special damage over and above the value of the property, the almost universal current of authority is that such damage may be recovered in such action. This rule was recognized in Churchill v. Welsh, 47 Wis. 39, 1 N. W. 398, is incidentally referred to in Ingram v. Rankin, 47 Wis. 406, 2 N. W. 755, 32 Am. Rep. 762, and is expressly stated in Parroski v. Goldberg, 80 Wis. 339, 50 N. W. 191. In Churchill v. Welsh, 47 Wis. 39, 1 N. W. 398, and again in Warder v. Baldwin, 51 Wis. 450, 8 N. W. 257, this court discussed the circumstances under which there may be a return of the property converted, in mitigation of damages, pending the suit. The conclusion arrived at was that in case of such return, and in the absence of evidence showing special damage, the recovery should be limited to nominal damages. In Farr v. Bank, 87 Wis. 223, 58 N. W. 377, 41 Am. St. Rep. 40, the rule is again referred to and affirmed. It is there distinctly said that unless the plaintiff has suffered special damages, apart from the value of the property, the recovery must be limited to nominal damages, although in that case the return was made before the action was brought. It will be observed that the court speaks of the return of the property as being in mitigation of damages, and not in extinguishment of the cause of action.

This seems to be the rule everywhere, as will be seen by reference to the following authorities: Cooley, Torts (2d Ed.) 535, note 1; 2 Add. Torts, p. 513, 534; 2 Jag. Torts, 720; Walker v. Fuller, 29 Ark. 448 (where it is explicitly stated that, although the plaintiff could not recover the full value of the goods after retaking them, yet the receipt back of the goods alone would not bar the action; the fact should have gone in mitigation of damages); Bank v. Leavitt, 17 Pick. 1 (where it is said, "It is also well settled that, if the property for which the action is brought be returned to and received by the plaintiff, it shall go in mitigation of damages"); s. c. 28 Am. Dec. 268, and note. The case of Bigelow Co. v. Heintze, 53 N. J. Law, 69, 21 Atl. 109, contains an extended discussion of this question. The court there says: "In trover the cause of action is complete upon proof of the conversion. The return of the property is no bar to the action, but is admissible in mitigation of damages." Many other cases might be cited, but to do so would incumber the record. The rule is universal, and rests upon the ground that the return of the property does not extinguish the cause of action, but simply goes in mitigation of the damages.

It being established in this state that special damages may be recovered in actions of this kind, the infirmity of the rule stated in Collins v. Lowry becomes apparent. The theory of the case is not that "the defendant is only answerable for the value of the property." He is answerable, not only for the value of the property, but for any special damage the plaintiff has sustained. Hence a return or retaking of the property goes only to mitigate the damages, and not in bar of the action. In the case at bar, however, no special damages are shown. In Hiort v. Railway Co., 4 Exch. Div. 188, 195, Bromwell, L. J., said: "A conversion cannot be purged, and if a defendant is guilty of conversion he must pay some damages. A return of the goods undoubtedly might be shown, to reduce the damages, in the case of conversion, not only when the owner voluntarily received back the goods, but when he took them back against his will. In an action of trover and conversion, the practice was for a defendant to apply to the court for a stay of proceedings on a delivery up of the goods, and on payment of nominal damages and costs; but if the plaintiff refused to accept delivery, and insisted on proceeding with his action for substantial damages, he did so at his peril, and if he failed to get substantial damages he was made to pay the costs of the action. It is clear, therefore, that on a return of the goods the plaintiff would recover, not their value, but the damages he had sustained by the wrongful act, which was called the conversion."

The rule above suggested, when a return of the property had been had, of applying to the court to stay or dismiss the action upon tender or payment of nominal damages and costs, was referred to and approved in Bigelow Co. v. Heintze, supra, and is one that furnishes ample protection to the defendant. It is certainly against the policy of the law to permit parties to carry on litigation when only the question of costs is involved. The case of Machine Co. v. Smith, 36 Wis. 295, 17 Am. Rep. 494, however, does not quite strike the situation here presented. There the payment of the note in suit extinguished the entire cause of action, and the court held there could be no judgment for costs without a judgment for damages. Here the plaintiff was entitled, at least, to a judgment for nominal damages, which was a sufficient foundation to carry costs. The defendant might easily have protected himself by setting up the facts in his answer, and tendering payment of nominal damages and costs, as hereinbefore suggested. The judgment of the circuit court is affirmed.

IV. Seduction and Loss of Service [74]

Actions for loss of service are of great antiquity and had their origin in a state of society when service as a rule was a matter not of contract but of status. At common law if A. took the servant of B., he took what originally at any rate was regarded as the chattel of B., and thereby he committed a trespass. So if a servant was beaten this was a trespass on the property of the master. It was early settled, however, that such a trespass was not actionable per se, but that it was necessary to allege, with a per quod,[75] actual damage by reason of the loss of service. The action, therefore, though founded on a notion of trespass, was in substance for the consequential damage, and there was considerable fluctuation of opinion as to its proper form.[76] It was, however, finally settled that the plaintiff might declare either in trespass or case.

Clerk & Lindsell, Torts, 220 (1906).

[74] The torts which at the outset were characteristically of this class have developed under several distinctive heads. An important part of the law of domestic relations, including Master and Servant, Parent and Child, Husband and Wife, began in actions for injuries to a proprietary interest in the service of another. These early actions are also the starting point of the modern doctrine of tort liability for inducing a third person to break his contractual relation with the plaintiff.

Cases on this latter doctrine will be given in Part III of this volume, under the subject Torts through Malice. The earlier aspects of torts through loss of service will be given here, but briefly, with reference only to their bearings on the general doctrine of torts.—[*Ed.*

[75] "Per quod servitium amisit." The clause was characteristic of and essential to the cause. Compare Robert Marys' Case (1613) 9 Co. Rep. 113a: "If my servant is beat, the master shall not have an action for this battery, unless the battery is so great that by reason thereof he loses the service of his servant, but the servant himself for every small battery shall have an action; and the reason of the difference is, that the master has not any damage by the personal beating of his servant, but by reason of a 'per quod,' viz. 'per quod servitium &c. amisit:' so that the original act is not the cause of his action, but the consequent upon it, viz., the loss of his service is the cause of his action; for be the battery greater or less, if the master doth not lose the service of his servant, he shall not have an action."

[76] "The action was generally on the case, but it might be trespass: e. g., Tullidge v. Wade (1769) 3 Wils. 18, an action for seducing the plaintiff's daughter, where the declaration was in trespass vi et armis. How this can be accounted for on principle I know not, short of regarding the servant as a quasi chattel. The difficulty was felt by Sir James Mansfield, Woodward v. Walton (1807) 2 B. & P. N. R. 476, 482. For a time it seemed the better opinion, however, that trespass was the only proper form. Ibid.; Ditcham v. Bond (1814) 2 M. & S. 436. See 14 R. R. 836, note. It was formally decided as late as 1839 (without giving any other reason than the constant practice) that trespass or case might be used at the pleader's option. Chamberlain v. Hazelwood (1839) 5 M. & W. 515, 9 L. J. Ex. 87. The only conclusion which can or need at this day be drawn from such fluctuations is that the old system of pleading did not succeed in its professed object of maintaining clear logical distinctions between different causes of action." Pollock, Torts (7th Ed.) 225, note.

The offences created by the series of Labour statutes and ordinances which followed on the occurrence of the Black Death and the Peasants' Revolt, have left a permanent mark on our law.[77] It was part of the policy of that code to compel all persons under a certain rank to serve any one who was willing to employ them, at the statutory rate of wages; and severe penalties were imposed upon a servant who refused to serve or departed from his service. Naturally, the Courts regarded any attempt to seduce a servant from his employment as violating the spirit of the Acts; and, accordingly, the action of Case for seduction or harbouring of a servant made its way into the books. The form of the writ is given by Fitzherbert, who expressly bases it on the statute of 1349, and says that it lies against both enticer and servant. By a well-meaning, but rather clumsy analogy, this action was, later on, extended to cover the case of debauching a woman; but the many anomalies of that form of action show how ill fitted is the machinery to achieve its object.

Edward Jenks, Short Hist. Eng. Law, 147.

The much abused English action for seduction is quite in harmony with legal principles. The person wronged is not the girl herself, who ex hypothesi has consented to the act, but her parent, or other person entitled to her services, who is damnified by its results. It is true that English law has, on grounds of policy, allowed damages to be recovered in this action far in excess of the value of the lost service.

Holland, Elements of Jurisprudence (10th Ed.) 173.

[77] "I come then to the Statute of Labourers (23 Edw. III); and my object now is to show that nothing in the provisions or policy of that statute will warrant the action under the circumstances of this case; and that the older authorities are decidedly against it. As we learn from the preamble, it was enacted in consequence of the great mortality among the lower classes, especially workmen and servants, in a pestilence which had prevailed in 1348–49. This pestilence will be found mentioned in our historians. And in the preamble it is said: 'Many seeing the necessity of masters, and great scarcity of servants, will not serve unless they may receive excessive wages, and some rather willing to beg in idleness, than by labour to get their living; we considering the grievous incommodities, which of the lack especially of ploughmen and such labourers may hereafter come, have' &c. 'ordained.' This preamble is followed by an enactment, that every person of whatever condition, free or bond, able in body, and under the age of sixty, not living by merchandise nor having any certain craft, nor having of his own wherewith to live, nor land of his own on the cultivation of which he may occupy himself, and not being in service, shall be compelled to enter into service when required on customary wages. By the second section it is made penal by imprisonment for any mower, reaper, or other labourer or servant of whatsoever state or condition he shall be, to depart from service before the expiration of the term agreed on; and no one is to receive or retain such offender in his service under like pain of imprisonment. This ordinance is the foundation of the action for the seduction of a hired servant." Coleridge, J., dissenting in Lumley v. Gye (1853) 2 El. & Bl. 216, 261, 95 R. R. 531.

This action [of trespass vi et armis, de uxore rapta et abducta] lay at common law; and thereby the husband shall recover, not the possession of his wife, but damages for taking her away; and by statute Westm. I, 3 Edw. I, c. 13, the offender shall also be imprisoned two years, and be fined at the pleasure of the king. Both the king and the husband may therefore have this action; and the husband is also entitled to recover damages in an action on the case against such as persuade and entice the wife to live separate from him without a sufficient cause.

Blackstone, 3 Com. 139.[78]

HART v. ALDRIDGE.

(Court of King's Bench, 1774. 1 Cowp. 54, 98 Reprint, 964.)

This came before the Court on a case reserved upon the following question: Whether under the circumstances of this case the plaintiff was entitled to recover? It was an action of trespass on the case for enticing away several of the plaintiff's servants who used to work for him in the capacity of journeymen shoemakers. The jury found that Martin and Clayton were employed as journeymen shoemakers by the plaintiff, but for no determinate time but only by the piece, and had at the time of the trespass laid each of them a pair of shoes unfinished; that the defendant persuaded them to enter into his service and to leave these shoes unfinished, which they accordingly did.

Mr. Darell, for the plaintiff, stated it to be a question of common law, and that the only point for the opinion of the Court was, "whether a journeyman was such a servant as the law takes notice of?" In support of which proposition he insisted that a journeyman is as much a servant as any other person who works for hire or wages; that neither in reason nor at common law is there any distinction between a servant in one capacity or another, and that the injury of seduction is in all cases the same, though the recompence in damages may be different. To shew that an action lay at common law for taking a servant out of his master's service, he cited Brooke, Abr. tit. Action sur le Case, pl. 38; 11 Hen. IV, 23, pl. 46. In Fitzherbert, 168, D, it is laid down, that "if a man take an infant or other out of another's service, he shall be punished, although the infant or other were not retained." In Brooke, tit. Lab. p. 21, a distinction is taken between the taking a servant out of his master's service, and the procuring him to depart or retaining him after a voluntary departure, being apprised of his first retainer: in the two last of which cases, an action on the case is the

[78] See Winsmore v. Greenbank (1745) Willes, 577, 125 Reprint, 1330. Compare Macfadzen v. Olivant (1805) 6 East, 387, 102 Reprint, 1335.
And see 21 Cyc. 1617; 16 Halsbury's Laws of England, 318 (1911).

proper remedy; in the former, trespass, at common law. But he insisted that in no case had there ever been a distinction taken with respect to the time for which a servant might be hired; nor indeed before the Stat. 5 Eliz. c. 4, was any precise time necessary; the object of which statute was very different from the question before the Court. He pressed the argument ab inconvenienti, stating that it would be of great detriment to the town, where the whole trade was in a great measure carried on by this sort of servant. That the verdict had found the defendant to be apprised of the retainer of the servants, it being in proof that he had desired them to leave their work then in hand unfinished.

Mr. Willes, contra. The single question is, whether the enticing away a journeyman shoemaker, who is hired to make a single pair of shoes, is such an injury to his master as that an action will lie for it? Now the jury have found that there was no hiring for any determinate time, but only by the piece: if so, they could not be the plaintiff's servants; for the term "journeyman" does not import that they belong to any particular master.

Lord Mansfield interrupted him. The question is, whether saying that such a one is a man's journeyman, is as much as to say, that he is such a man's servant; that is, whether the jury by finding him to be the plaintiff's journeyman do not ex vi termini find him to be his servant? A journeyman is a servant by the day; and it makes no difference whether the work is done by the day or by the piece. He was certainly retained to finish the work he had undertaken, and the defendant knowingly enticed him to leave it unfinished.

What is the gist of the action? That the defendant has enticed a man away who stood in the relation of servant to the plaintiff, and by whom he was to be benefited. I think the point turns upon the jury finding that the persons enticed away were employed by the plaintiff as his journeymen. It might perhaps have been different if the men had taken work for everybody, and after the plaintiff had employed them the defendant had applied to them, and they had given the preference to him in point of time. For if a man lived in his own house and took in work for different people, it would be a strong ground to say that he was not the journeyman of any particular master: but the gist of the present action is, that they were attached to this particular master.

Aston, Justice. It is clear that a master may maintain an action against any one for taking and enticing away his servant upon the ground of the interest which he has in his service and labour. And even supposing, as my Lord has stated, that the servant did live in his own house, if he were employed to finish a certain number of shoes for a particular person by a fixed time, and a third person enticed him away, I think an action would lie. If not, it might be a very bad consequence in trade. He is a servant quoad hoc, and though the seducer

and enticer is much the worse, yet the law inflicts a penalty upon workmen leaving their work undone.

Mr. Justice WILLES and Mr. Justice ASHHURST concurred.

PER CUR. Let the postea be delivered to the plaintiff.[79]

BLAKE v. LANYON.

(Court of King's Bench, 1795. 6 Term R. 221, 101 Reprint, 521, 3 R. R. 162.)

The first count in the declaration stated that the plaintiff, who was a currier, had hired and retained W. Hobbs to be his servant and journeyman, &c. and that the defendant persuaded and enticed Hobbs to leave his service, &c. In the second count it was alleged that Hobbs, while he was so hired and employed by the plaintiff in his trade as such servant, &c. wilfully and without the leave or license and against the will of the plaintiff departed and absented himself from and left the service of the plaintiff, &c. and then and there went to the defendant; yet the defendant well knowing Hobbs to be the servant of the plaintiff, and to have been and to be so retained, hired, and employed by the plaintiff, &c. but contriving, &c. did then and there receive and harbour the said W. Hobbs, and did then and there retain, keep, and employ the said Hobbs in his (defendant's) said service, and wholly refused to deliver him to the plaintiff his master, although requested, &c. and unlawfully detained, entertained, and kept the said

[79] Accord: Hartley v. Cummings (1847) 5 C. B. 247, 136 Reprint, 871, 75 R. R. 722: (Action "upon the case against the defendant for seducing workmen from the service of the plaintiff, a glass and alkali manufacturer." It appeared that "the defendant had seduced from the plaintiff's service several workmen, who were in his service under agreements as follows." These agreements, one of which is set forth in full in the report, were to this effect: "A. contracted to serve B. and his partner or partners for the time being, for seven years, in his business of a glass and alkali manufacturer, and at all times during the term to do his best endeavours, and use his utmost care and diligence in the works; and, further, that he would not, at any time during the term, neglect or absent himself from the said service, without the consent in writing of B. or his partner or partners for the time being, or either or such of them as should carry on the business; nor would work for or serve any other person or persons, without such consent: in consideration of which service, B. agreed to pay A. 24s. per week for a certain amount of work, and to find him some other description of work, provided he should not require that quantity of the specified work, so that A.'s wages should not be less than 24s. per week, except when a furnace should be out, when A. agreed to work for 21s. per week: and it was agreed, that, if A. should be sick or otherwise incapacitated from performing the service, or in case of misconduct, or if B., or his partner or partners for the time being, or either or such of them as should carry on the trade, should discontinue the trade during the term, in either of such cases, B. or his partners should be at liberty to retain or employ any other person in the room or stead of A., without being obliged to pay him any wages or satisfaction."

Hobbs, so then being the servant and journeyman of the plaintiff, in his (the defendant's) service, &c., whereby,[80] etc.

At the trial at the last Launceston assizes it appeared that Hobbs, who was retained by the plaintiff to work by the piece, left the plaintiff's service on a dispute between them, the plaintiff having beaten him; that at the time of his departure he had some work in hand; that he then applied for work to the defendant, who was also a currier, and who employed him, not knowing of his engagement with the plaintiff; but that in the course of a few days afterwards the defendant, having been apprised by the plaintiff that Hobbs was his servant, and had left his work unfinished, and being threatened with an action in case he continued to employ Hobbs, requested the servant to return to his former master and finish his work: this Hobbs refused, and the defendant continued him in his service. No evidence being given in support of the first count; it was objected on behalf of the defendant that the action could not be supported on the second count, because it either imported that the defendant had retained Hobbs in his service, knowing him to be the servant of the plaintiff, which was not established in proof, or that he merely continued Hobbs in his service after he had notice of Hobb's engagement with the plaintiff, for which no action could be maintained, it appearing that the defendant did not know that Hobbs was the plaintiff's servant, at the time he first employed him. But Mr. J. Lawrence, before whom the case was tried, over-ruled the objection, saying that the plaintiff might recover upon the second count, if the jury were of opinion that the defendant continued to employ Hobbs after he knew that Hobbs was the plaintiff's servant. The jury having given a verdict for the plaintiff:

Gibbs now renewed his objection, and moved either to enter a nonsuit, or to arrest the judgment; stating that great inconveniences would result from a determination against the defendant, for that in such a case a person engaged in a great manufacture might be deprived of the benefit of the service of a journeyman whom he had retained to do a particular piece of work, not knowing at the time of

[80] "The old forms of pleading in actions for enticing away or harbouring servants, besides alleging knowledge of the service, always alleged that the defendant did the act complained of, 'contriving and intending to injure the plaintiff.' Whether the latter averment was regarded as material and traversable was not very clear. No doubt in the majority of cases the fact of knowledge is practically conclusive of malice. But there may be cases in which the defendant bona fide, in the servant's own interest, advises him to break his contract. It was at one time thought that in such cases action would not lie, but in view of the decision of the House of Lords in the case of the South Wales Miners' Federation v. Glamorgan Coal Co., [1905] A. C. 239, this presumption is no longer tenable. Nor is it in all cases essential that the defendant should have been actuated by a desire either to injure the plaintiff or to benefit himself at the plaintiff's expense. The old theory that the whole gist of the right of action lies in the malicious intent, and that only where this is made out to the satisfaction of the Court is the aggrieved party entitled to damages against the defendant, in the light of recent decisions, being no longer a correct exposition of the law." Clerk & Lindsell, Torts, 222 (1906).

hiring that the journeyman was under any engagement with any other master, before the servant had finished his work, and at a moment when the materials then in work might be totally spoiled if left in an unfinished state. And he cited Adams v. Bafeald, 1 Leon. 240, where it was held by Tansfield, J., and Fenner, J., against the opinion of Gawdy, J., that an action does not lie for retaining the servant of another, unless he procure the servant to leave his first master.

Sed PER CURIAM. An action will lie for receiving or continuing to employ the servant of another after notice, without enticing him away. Here no fault could be imputed to the defendant, for taking Hobbs into his service in the first instance, because then he had no notice of Hobb's prior engagement with the plaintiff: but as soon as he had notice of that fact, he ought to have discharged him. A person who contracts with another to do certain work for him is the servant of that other till the work is finished, and no other person can employ such servant to the prejudice of the first master; the very act of giving him employment is affording him the means of keeping out of his former service.[81]

Rule refused.

BUTTERFIELD v. ASHLEY.

(Supreme Judicial Court of Massachusetts, 1850. 6 Cush. 249.)

This was an action of trespass on the case, for enticing away the plaintiff's son and servant from his employment. The action was tried in the court of common pleas, before Perkins, J., and came into this court upon exceptions to the judge's instructions to the jury.

METCALF, J. The question now to be decided is, whether the instructions given to the jury, upon the evidence introduced at the trial, were warranted by the law of the case.

The declaration contains a single count, in which it is alleged that the defendants, knowing that the plaintiff's son was in his employment and service, enticed him into their employment, put him on board a vessel, and sent him to sea on a whaling voyage. The evidence was, that the son left his father's house in New Hampshire, without his father's consent, and went to New Bedford; that he there applied to the defendants to employ him in a whaling vessel; that they, knowing him to be a minor at first refused to employ him; but that, at his urgent solicitation and upon his representation that he had his father's consent to go on a voyage, they took him into their employment and sent him to sea. Upon this evidence, the jury were instructed that the defendants were liable in this action, if the

[81] Accord: Fawcet v. Blayres (1684) 2 Lev. 63, 83 Reprint, 451; Milburne v. Byrne (1805) 1 Cranch, C. C. 239, Fed. Cas. No. 9,542, where the fact of employment by the defendant, who knew that the servant had left his master, was held presumptive evidence of the enticement.

plaintiff never assented to his son's being employed by them, although they honestly believed that he had given his full consent. And we are of opinion that these instructions were wrong.

A master may maintain an action on the case against one who, knowing that another is his servant, entices him away from his service, or retains and employs him, after he has wrongfully left that service without being enticed away; and also against one who continues to employ his servant, after notice that he is such, though the defendant, at the time of retaining or employing him, did not know him to be a servant; and a father is the master of his minor child, within these rules of law. The books of entries contain forms of declarations adapted to these three distinct causes of action. And a plaintiff generally inserts at least two counts in his declaration; one for enticing, and another for employing or harboring; so that he may succeed on the latter, though he may fail to support the former. But in either form of declaring, it is a material and necessary allegation, that the defendant knew, at the time of enticing, employing, or harboring, that the party enticed away, employed, or harbored, was the servant of the plaintiff, or that he afterwards had notice thereof, and continued to employ or harbor the servant, after such notice. And such knowledge or notice must be proved, in order to support the action. See Wentw. Pl. 438; 2 Chit. Pl. (6th Amer. Ed.) 645, 646; 1 Bl. Com. 429; 3 ib. 142; Fawcet v. Beavres, 2 Lev. 63; Blake v. Lanyon, 6 T. R. 221; Reeve's Dom. Rel. 291; Sherwood v. Hall, 3 Sumner, 127, Fed. Cas. No. 12,777; Ferguson v. Tucker, 2 Har. & Gill (Md.) 182; Conant v. Raymond, 2 Aik. 243; Fores v. Wilson, Peake's Cas. 55.

The gist of an action like that now before us is, says Lord Mansfield, "that the defendant has enticed away a man who stood in the relation of servant to the plaintiff." Hart v. Aldridge, Cowp. 54, 56. And the enticing must be proved. 3 Stark. Ev. 1310; Stuart v. Simpson, 1 Wend. (N. Y.) 376. Now what is meant by "enticing away from the service" of another? So far as we know, the word "entice" has no technical meaning. But, in a declaration like that in this case, it must mean something quite different from a reluctant employment of another's servant, under a belief that the master has consented to that employment. The word is often joined, in the precedents of forms, with the words "solicit, seduce, persuade, and procure"; and it evidently imports an active and wrongful effort to detach a servant from his master's service, by offering inducements adapted to that end. In Keane v. Boycott, 2 H. Bl. 511, Eyre, C. J., describes enticement and its effect as a dissolution of the relation of master and servant "officiously." We see no evidence of enticement, in the present case. The son had wrongfully left his father's service, before he was employed by the defendants; so that the plaintiff's declaration is not sustained by the proof. If evidence of the

mere employment of another's servant, knowing him to be such, would support a declaration for enticing him from his master, there would be no necessity for a count which omits the allegation of enticement, and charges only a retaining, employing, or harboring.

Besides, if, in the opinion of the jury, the defendants believed that the plaintiff had fully consented to their employing his son, then the material averment in the declaration, that they well knew that he was in the plaintiff's service, was not proved, but was disproved. For it is impossible that they should know him to be in the service of one whom they believed to have dispensed with his service. New trial ordered.

NICHOL et al. v. MARTYN.

(At Nisi Prius, Sittings after Term at Guildhall, 1799. 2 Esp. 732.)

This was a special action on the case, against the defendant, for seducing the plaintiffs' customers.

The plaintiffs were wholesale ironmongers, who carried on a very extensive business; the defendant had been employed by them as their rider or traveller, to get orders in the course of their business; and the foundation of the action was, that the defendant, who at the time of bringing the action was in the same line of business with the plaintiffs, had, during the time that he was in their employment, endeavoured to seduce the several country shopkeepers who were in the habits of dealing with the plaintiffs, to leave off dealing with them, and to transfer their business to the defendant.

To prove the plaintiffs' case, they called some of those country shopkeepers. Their evidence proved that the defendant on his last coming to their shops as rider to the plaintiffs, and on their business, had told them that he was himself going into the same business with the plaintiffs after Christmas, and would then be obliged to them for an order on his own account.

It appeared, however, on the cross-examination of those witnesses, that he took the orders regularly for the plaintiffs on that journey, and that they were executed on the plaintiffs' account; and that no solicitation was used by the defendant for any order at that time, which might have been supplied by the plaintiffs.

It was also admitted, that in fact, the time of the defendant's engagement to serve the plaintiffs, expired at the beginning of the year; so that, in truth, in the month of March he would have been completely his own master.

LORD KENYON, Chief Justice. The conduct of the defendant in this case, may perhaps be accounted not handsome, but I cannot say that it is contrary to law. The relation in which he stood to the plaintiffs, as their servant, imposed on him a duty which is called of imperfect obligation, but no such as can enable the plaintiffs to maintain

an action. A servant while engaged in the service of his master, has no right to do any act which may injure his trade, or undermine his business; but every one has a right, if he can, to better his situation in the world; and if he does it by means not contrary to law, though the master may be eventually injured, it is damnum abs. injuria. There is nothing morally bad, or very improper in a servant, who has it in contemplation at a future period to set up for himself, to endeavour to conciliate the regard of his master's customers, and to recommend himself to them, so as to procure some business from them as well as others. In the present case, the defendant did not solicit the present orders of the customers: on the contrary, he took for the plaintiffs all those he could obtain: his request of business for himself was prospective, and for a time when the relation of master and servant between him and the plaintiffs would be at an end.

It was suggested in the course of the cause, that the defendant had seduced some of the servants of the plaintiffs to quit their service and to enter into his when he went into business.

Upon that point LORD KENYON said, that seducing a servant, and enticing him to leave his master while the master by the contract had a right to his services, was certainly actionable; but that to induce a servant to leave his master's service at the expiration of the time for which the servant had hired himself, although the servant had no intention at the time of quitting his master's service, was not the subject of an action.

The plaintiffs were nonsuited.

DEAN v. PEEL.

(Court of King's Bench, 1804. 5 East, 45, 102 Reprint, 986, 7 R. R. 653.)

This was an action on the case for debauching and getting with child the plaintiff's daughter. The declaration stated that the defendant, wrongfully intending to injure the plaintiff, debauched and carnally knew E. D. then being the daughter and servant of the plaintiff, whereby she became pregnant, &c. and diseased, &c. by means whereof the said E. D. was rendered unable to perform the necessary affairs and business of her said father and master, during all which time he was deprived of her service, and was obliged to expend so much in nursing and taking care of her. The cause was tried before Chambre, J., at the last assizes at Lancaster; when the facts appeared to be that the daughter, who was 19 years of age when she was seduced, was then living in the house of one Taylor, who had before married her sister, a few doors from her father's house in Manchester. Taylor kept a public house; and his wife having then lately died, the plaintiff's daughter acted as his housekeeper, and had the care of the bar: but no contract was made with her brother-in-law for

wages, either by herself or the plaintiff her father, nor did she in fact receive any: and she might have left him when she pleased: but while her sister lay dead in the house Taylor told her that she might take what money she wanted. Finding herself with child she returned to her father's house and afterwards lay in there at his expense: and after her removal thither she applied to Taylor for wages, who refused to pay any. The daughter, by whom the above facts were proved, added, upon her examination, that if this misfortune had not befallen her she had determined not to return to her father's house. On this evidence the learned Judge nonsuited the plaintiff, on the ground that there was no service proved to the father at the time of the seduction and getting with child: and that the daughter being under age at the time (which was pressed upon him as distinguishing this from former cases) made no difference, particularly as she had no animus revertendi to her father's family.

Topping now moved to set aside the nonsuit and for a new trial, on the distinction before taken. * * *

LORD ELLENBOROUGH, C. J. In those cases [82] the implied relationship of master and servant continued. But here there was no animus revertendi: the daughter declared on her examination that she had no intention of returning to her father's house before this misfortune; and she was actually in the service of another person. I think therefore that the opinion of the learned Judge who tried the cause was correct.

PER CURIAM. Rule refused.

CARR v. CLARKE.

(Court of King's Bench, 1818. 2 Chitty, 260, 23 R. R. 748.)

This was an action for debauching the plaintiff's daughter; and at the trial before Mr. Baron Wood, the plaintiff was nonsuited, on the ground that the daughter was not proved to be the plaintiff's servant. It appeared that she was sixteen years of age, and that the plaintiff her father, on removing from his residence, had left her behind with a relation, a Mrs. Shapert, in whose employment she was at the time of the seduction. The father, however, received from his daughter a part of the wages. Scarlett now moved to set aside the nonsuit and have a new trial. He contended that there was in this case an animus revertendi on the part of the daughter; and that her father receiving part of the wages and she herself being under age,

[82] The reference is to two cases referred to by Topping, in which Wilson, J., at nisi prius had given it as his opinion that "if the daughter were under age the action was maintainable for her seduction though she was not living with her father at the time."

And see Hedges v. Tagg (1872) L. R. 7 Ex. 283; Whitbourne v. Williams [1901] 2 K. B. 722.

there was sufficient evidence of service to maintain the action. Dean v. Peel, 5 East, 45, and other cases cited, were contended to be distinguishable; the daughter, although under age, being actually in the service of another person, and having no intention of returning. In Postlethwaite v. Parkes, 3 Burr. 1878, the daughter was in another service, and of full age at the time of the seduction. Bennett v. Allcott, 2 T. R. 168. "The rule that there must be a contract for service, is too narrow for the liberal sentiments of the present time. The slightest service has been held sufficient."

ABBOTT, C. J. Even making tea has been said to be an act of service. But here there was in fact a service with another person, who could undoubtedly have brought the action; and then there might be two actions. The declaration states that the injury was committed, "the party then being the daughter and servant of the plaintiff."

BAYLEY, J., mentioned Fores v. Wilson, 1 Peake, 77. The cases go upon the express ground, that the relation of master and servant must exist; but the evidence may be very slight. The parties must stand in the relation of master and servant, although a temporary absence may not be sufficient to destroy that relation. If it had been established that Mrs. Shapert had paid the father the wages, perhaps the plaintiff might have succeeded.

ABBOTT, C. J. This action is founded on the situation of master and servant, not upon that of parent and child. When the father is in a condition to bring the action, and the child is his servant, that circumstance may increase the damages; but we can go no farther. In this case, the allegation that the child is the servant of the plaintiff is not proved. She was the servant of another person.

BAYLEY, J., was of the same opinion, and referred to Satterthwaite v. Duerst, 5 East, 47. The action is supported by the evidence of one of the criminal parties, and therefore should be kept within close bounds. The declaration must state that the girl was the servant of the plaintiff. Lord Mansfield, in the case referred to, after looking into the cases said, that the action would not lie, unless it was laid per quod servitum amisit.

Scarlett then observed, that WOOD, B., was anxious that the motion should be brought before the Court. And,

ABBOTT, C. J., observed, that it was very natural that any person should feel anxious that the law upon this subject was rather different from what it is.

Rule refused.

MANVELL v. THOMSON.

(At Nisi Prius, Adjourned Sittings at Guildhall, 1826. 2 Car. & P. 303, 31 R. R. 666.)

Trespass for seducing the plaintiff's niece and servant.

The plaintiff was a ticket porter, and his niece, the subject of the action, was a girl of about sixteen years of age, whose parents had been dead some years. A sum of nearly £500 apiece was left by her parents to herself and her brothers and sisters, which was deposited in the Bank till they should come of age. She was brought up at her uncle's and was for some time out at service, but returned to her uncle's house previously to the time when she was debauched by the defendant. It appeared that while she was at her uncle's, who had several children, she assisted them in the domestic business of the house, as they kept no regular servant.

Denman, for the defendant. The action is not maintainable; the evidence of service is too slight. The presumption of her being a servant to her uncle, is rebutted by the fact of her having so large a sum of money; and the relation of uncle and niece is not of itself sufficient.

ABBOTT, C. J. Certainly the relation of uncle and niece of itself will not do; but I think there is enough in the evidence to constitute the relation of master and servant. Suppose a son has money enough to find himself in clothes, the relation of father and son is not destroyed by that circumstance. In this case, the uncle is in loco parentis. The smallest degree of service will do. It seems there was no servant kept; and it is reasonable to conclude, that all the members of the family assisted in turn in the performance of the household work.

The cousin of the girl, and a surgeon, proved, that when she returned to her uncle's house, after she had been seduced and abandoned by the defendant, she was in a state of very great agitation, and continued so for some time; that she received medical attendance, and was obliged to be watched, lest she should do herself some injury. This was taken as evidence raising the presumption of loss of service by the uncle; and he had a

Verdict—damages £400.

MURRAY v. FITZGERALD.

(King's Bench Division of the High Court of Justice in Ireland. Nov., 1905; Court of Appeal, Feb., 1906. [1906] 2 I. R. 254.)

Action by Michael Murray against William FitzGerald for damages for seduction by the defendant of Bridget Murray, the sister and servant of the plaintiff.

The following facts were proved: Bridget Murray lived with her brothers Michael and Pat on a farm at Clashmore, in the county of Waterford. Their father had owned the farm. He died over twenty-eight years before the action, leaving a widow and the three children. He left a will, which had not been proved. After his death the mother managed the farm until her death about twenty years ago. At the time of the mother's death Bridget Murray, who was the only one adult, managed the farm and paid the rent, and got the receipts in the name of the representatives of Murray, and also did the work which an indoor servant would have done (no servant being kept) doing both outside and inside work. The money produced by the farm went to pay the bills and the rent. The rate receipts were in the name of Michael. When Michael grew up, he took up the housework; there was no inside servant kept. During the time that Bridget was ill, Michael paid for the nurse to attend to her. It was stated that there was an arrangement that if Bridget married, she was to have £100.

The jury found that at the times of the seduction and birth of the child, Bridget Murray was the servant of the plaintiff, and they found a verdict for £100.

The defendant moved to set aside the verdict and judgment for the plaintiff, and that judgment should be entered for the defendant, on the ground that there was no evidence to sustain the finding of the jury that the relation of master and servant existed between the plaintiff and Bridget Murray.

In the King's Bench Division it was held by ANDREWS and BOYD, JJ., GIBSON, J., dissenting, that there was evidence upon which the verdict in favour of the plaintiff could be sustained. The defendant appealed.[83]

In the Court of Appeal.

FITZGIBBON, L. J. I find it impossible to question the verdict in this case without disturbing the settled law as to the action for seduction. The judgments of ANDREWS, J., and BOYD, J., appear to me to put the plaintiff's right on its proper foundation. The judgment of GIBSON, J., is rather a doubting than a dissenting judgment. He truly says that it is a hard case; but I cannot agree with him that "the action is so far founded on fiction that sometimes it is impossible to reconcile the view of the Court with common sense or reality."

I am unable to disturb the verdict, because I cannot hold that a reasonable jury could not find, on the evidence, that the relation of master and servant—as legally understood for the purposes of such an action—existed between the plaintiff and his sister, and that a loss of her service was caused to the plaintiff by her seduction.

[83] The opinions of Andrews, Boyd, and Gibson, JJ., in the King's Bench Division, the opinion of Walker, C., in the Court of Appeal, who concurred with FitzGibbon, L. J., portions of the opinions by FitzGibbon and Holmes, L. JJ., and the arguments of counsel are omitted.

The "fiction" which GIBSON, J., regarded as irreconcilable with common sense or reality, can be defined. It is the fiction of "actual service"; but the word "service" is ambiguous, and Sir Frederick Pollock says, of "the relation of master and servant," that in modern law it is "created by contract, but for some purposes" (including that of supporting the action of seduction) it "is still regarded as belonging to the permanent organism of the family, and having the nature of status." The "difficulty in fixing the boundary where the sphere of domestic relation ends and that of pure contract begins, is only a difficulty of degree."

We have here, in my opinion, ample evidence to establish "the domestic relation" of master and servant, and that relation is quite enough to sustain the action. "Service" is the test word. In the Imperial Dictionary I find the following definitions of it: "Labor performed in the interest of others;" "any work done for the benefit of another;" "the act of helping another or of promoting his interests in any way." In these senses it means little more than assistance. It also includes "the work of a person in any way held to obedience or duty," and "the official duty or work required of one." The so-called fiction only imports obligation into the relation which supports the action of seduction, and as to that Sir Frederick Pollock says: "The test of the plaintiff's right has come to be, not whether he has been injured as the head of the family, but whether he can make out a constructive loss of service." [Pollock on Torts, p. 223.]

It is clearly settled that seduction can be maintained where there is no servitude—no actual obligation to serve. The domestic relationship does not necessarily depend on blood relationship—it is not confined to parent and child. A lady has maintained the action for the seduction of even an unpaid companion. It is sufficient if help of appreciable value is rendered by one member of a household to another member of the same household, who is "head of the house." The defendant's counsel asked Bridget Murray, "Weren't you the head of the house?" and she answered, "Yes." But Johnson, J., asked her, "Who is the man of the house at the farm?" and she answered, "My brother Michael is." I think the fair meaning of these answers is, that she was the housekeeper, and he was the head of the family. If reasonable men could accept that evidence, we cannot disturb the verdict.

What are the facts? We have to deal with the family of a farmer, who at his death left a widow and daughter and two sons surviving him. The widow afterwards died. There is some confusion as to the ages of the children at the dates of the deaths of the father and mother; but we cannot set aside a verdict because the dates are vague. When the father died, the youngest son must have been very young. The daughter was the eldest of the three. The mother survived the father for some time, and she died about 20 years ago. At that time the

daughter only was adult. While the widow lived, she certainly was the head of the house. The widow managed the farm and household until her death. She certainly could have maintained the action if her daughter had been seduced during her life. While she managed the place, her position in respect of ownership, as the widow of the deceased tenant, seems to me to have been exactly the same, both in law and in fact, towards her daughter, as that which was taken up by the elder son, as soon as he became old enough to undertake the management. Until then the rent was paid by the daughter, but in the name of her father's representatives; but from the time when the plaintiff took up the management, he paid the rates, he employed all the farm servants, and the rent was paid out of the produce of the farm, still in the name of the father's representatives. The ordinary house-work of the family—all the work of a female domestic servant—was done by the sister. The younger brother may be left out of consideration, for he was not old enough to take any part in the management, and if his sister rendered any "service" to him she did so for her elder brother too. Not only did she perform all the necessary domestic service of the household, but when she was incapacitated, the elder brother had to employ and pay some one else to do her work, and if she had not been there he would have had to pay a domestic servant. He paid the nurse who attended his sister when she was ill. Under these circumstances—as the law stands—I think the jury was not only justified, but was right, in finding that, at the times of the seduction and birth of the child, Bridget Murray was the servant of the plaintiff.

My view of the law is put by Sir Frederick Pollock so clearly that I take the liberty of adopting the following passages from his book (Pollock on Torts [7th Ed.] p. 226), and incorporating his language with my judgment:

"In this kind of action it is not necessary to prove the existence of a binding contract of service between the plaintiff and the person seduced. The presence * * * of seduction * * * is not a necessary part of the cause of action, but only a circumstance of aggravation. Whether that element be present or absent, proof of a de facto relation of service is enough * * * when once the relation of master and servant, at the time of the acts complained of is established. * * * Some evidence of such a relation there must be, but very little will serve. * * * The fact of a child living with a parent, or any other person in loco parentis, as a member of the family of which that person is the head, is deemed enough to support the inference that the relation of master and servant, determinable at the will of either party, exists between them.

"Partial attendance in the parents' house is enough to constitute service, as where a daughter employed elsewhere in the daytime is, without consulting her employer, free to assist and does assist, in the

household when she comes home in the evening. Some loss of service, or possibility of service, must be shown as consequent on the seduction, since that is, in theory, the ground of action; but when that condition is once satisfied, the damages that may be given are by no means limited to an amount commensurate with the actual loss of service proved or inferred. The awarding of exemplary damages is indeed rather encouraged than otherwise. It is immaterial whether the plaintiff be a parent or kinsman, or a stranger in blood, who has adopted the person seduced.[84]

"On the same principle or fiction of law a parent can sue in his own name for any injury done to a child living under his care and control, provided the child is old enough to be capable of rendering service; otherwise not, for the gist of the action depends upon the capacity of the child to perform acts of service." * * *

This being so, I am clearly of opinion that the case is brought well within the authorities, and that there is ample evidence of the existence of the relationship necessary to entitle the plaintiff to maintain the action.

HOLMES, L. J. * * * The action of seduction is founded on the wrong done to a person who is entitled to, or enjoys, the benefit of the services of the person seduced. It cannot be maintained without some proof of service or liability to service, although such proof is often very slight, and the service purely conventional. No difficulty arises where there is a contract to serve, express or implied. The master in such a case can always sue; and an implied contract may be inferred from very trifling circumstances. For example, a lady taken as a companion by another lady, without salary, and from motives of friendship, might be regarded in an action of this kind as the latter's servant, if she makes herself useful in the house. It would be a reasonable inference that she gives this assistance in return for, and in consideration of, the comforts of a home.

I think that at least one of the Judges of the Divisional Court held that in the present case the jury were at liberty to infer from the facts a contract of service. I am of opinion that there is no evidence from which such an inference can be drawn. What was the consideration given by the plaintiff for such a contract? No doubt Bridget did the indoor work, thus saving the wages of a servant, just as her brothers, by their labour on the farm, reduced the need of hired help; but the sister was no more serving them than they were serving her. Their position might be compared to the case of three ladies carrying on a trading establishment as partners, each superintending a different department of the business. If one becomes temporarily incapacitated for work, the loss is felt by all; but it would be, I think, absurd to

[84] On the general principle here, see Tittlebaum v. Boehmcke (1911) 81 N. J. Law, 697, 80 Atl. 323, 35 L. R. A. (N. S.) 1062, Ann. Cas. 1912D, 298, and 35 Cyc. 1303, notes, 64, 65, 66.

suggest that, if such incapacity arose from pregnancy, the others would have a cause of action against the seducer. It would only intensify the absurdity, if the two other partners were in turn seduced, to assert that an action lay at the suit of the partner who had already yielded to temptation.

I have thus far considered the case on the basis of implied contract, which was, I think, the ground taken by the majority of the Divisional Court. I do not, however, forget that there is a kind of service wholly unconnected with contract that will support an action of this kind. It has always been held that where a daughter, living with a parent, is seduced, the parent is entitled to sue the wrongdoer, upon showing that the girl has rendered the slightest service in the family. I have no doubt that this rule of law arose from the idea that she is under a moral obligation to carry out the wishes of, and to make herself useful to, a parent, under whose protection and guidance she is living. This principle has been extended in two directions. It has been held to apply in a few exceptional cases where, at the time of the seduction, the daughter is not actually living, at least permanently living, with the parent. It has also been held to apply to cases where the nominal services are rendered, not to a parent but to a person in loco parentis. It is unnecessary for me to examine the authorities on those branches of the rule; for in the first the parent is always the plaintiff; and as to the second, no one could suggest that Michael Murray was in loco parentis to a sister, ten or thirteen years older than himself, who managed the money of the family, who gave card-parties and other entertainments, and who was, as she said in her evidence, the head of the house.

For these reasons I concur in the opinion of GIBSON, J., that the defendant was entitled to a direction in his favour at the close of the plaintiff's case.[85]

[85] In his opinion Mr. Justice Gibson had said: "I fear the evidence is at least as consistent with the work having been done for the brothers as partners: and if that were so, the action could not be maintained. It is a difficult case, as is apparent from what my Brother Andrews has said. The action is so far founded on fiction that sometimes it is impossible to reconcile the view of the Court with common sense or reality. On the whole, I think that the onus of proof which the plaintiff must establish is not supported. The case is remarkable in this, that there is no other master in existence, and that there has been a real pecuniary loss imposed on the brothers by the act of the defendant. If the view of my Brother Andrews is correct, that wherever there is interference with services rendered to the prejudice of the person enjoying such services that is sufficient to give a cause of action, the plaintiff must succeed; but I think the law requires something further: the services must be rendered to someone entitled to them as master. In cases where there is a real contract, as in the ordinary case of master and servant, there is no difficulty; it is only where service is attributed to some moral duty that a question arises. Here the parties were co-owners: and it being legitimate to refer the services rendered to that relationship, my view is in favour of the defendant."

TAYLOR v. DANIEL.

(Court of Appeals of Kentucky, 1907. 98 S. W. 986.)

LASSING, J. Matilda Taylor filed her suit in the Bell circuit court against White Daniel seeking to recover damages for the seduction of her illegitimate daughter, Annie Belle Howard. A demurrer was filed to the petition and sustained, and an amended petition filed, and a demurrer being sustained to the petition as amended, and plaintiff declining to plead further, her petition was dismissed, with judgment for costs, and she appeals.

The petition as amended fails to state that the daughter, Annie Belle Howard, was, at the date of the acts complained of, under 21 years of age, or that she was in the service of her mother, Matilda Taylor. In the case of Woodward v. Anderson, 9 Bush, 624, this court said: "At common law actions for seduction are based solely upon the relation of master and servant, and no one but those entitled to the services of the female could maintain it. The action is usually instituted by the parent, and the allegation and proof of loss of service was at common law, indispensable to a recovery." Section 2 of the Kentucky Statutes of 1903 has modified the common-law rule to the extent that actions for seduction may now be maintained without any allegation or proof of the loss of service of the female by reason of the wrongful act of the defendant. But, as said in the case of Woodward v. Anderson, supra: "This statute does not give the right of action to any other persons than those who could maintain it at common law." The statute being silent on the question as to who may bring such an action, the common-law rule upon this question is, therefore, in full force, and the relation of master and servant, or parent and child, must still appear in the pleading. This being the case, and the plaintiff in her petition having failed to allege that her daughter was under 21 years of age, or was in her service, or that she was entitled to her service, we are of opinion that the petition failed to state a cause of action for seduction.

The judgment is affirmed.[56]

[56] On the change effected in the doctrine by statute, see 35 Cyc. 1298, and cases cited in notes 29, 30, 31; 43 Cent. Dig. "Seduction," §§ 9, 16; Key-No. "Seduction," § 8. See also the remarks of Daniel, J., in Lee v. Hodges (1857) 13 Grat. (Va.) 726, 734, and the remarks of Campbell, J., in Stoudt v. Shepherd (1889) 73 Mich. 588, 41 N. W. 696. Compare Tittlebaum v. Boehmcke (1911) 81 N. J. Law, 697, 80 Atl. 323, 35 L. R. A. (N. S.) 1062, and note, Ann. Cas. 1912D, 298.

PETERS v. JONES.

(High Court of Justice, King's Bench Division. [1914] 2 K. B. 781.)

The action was brought to recover damages for the seduction of a girl aged twenty-two, the adopted daughter of the plaintiff, a married woman.

The statement of claim originally alleged that the girl who had been seduced was the sister and servant of the plaintiff. At the trial this description was amended and she was described as the adopted daughter and servant of the plaintiff.

The plaintiff, Mrs. Peters, lived with her husband. She adopted the girl in 1906. The girl lived in the house with the plaintiff and her husband, and without any specific contract of service either with the plaintiff or her husband performed there the ordinary domestic services of the household. She was given by the plaintiff about 5s. a week for pocket-money. Her clothes also were provided for her. The clothes and pocket-money were provided out of the husband's money. The plaintiff had no separate estate. The action was tried at Cardiff Assizes, before Avory, J., and a special jury, when evidence of the facts stated above was given, and that the defendant had seduced the girl. The jury having found a verdict for the plaintiff for £25. the case was adjourned to London for further consideration as to whether the action would lie at the suit of the plaintiff.

Wilfred Lewis, for the plaintiff. The girl who was seduced was not a servant of the plaintiff in the strict sense. She was the adopted daughter of the plaintiff. The plaintiff therefore stood in loco parentis to the girl. As the adopted daughter the girl owed a duty to her adopted parent. Any one in loco parentis is entitled to maintain an action in respect of the seduction of his or her daughter: Irwin v. Dearman (1809) 11 East, 23. * * *

Avory, J. * * * The plaintiff is the wife of Ebenezer Peters, and the question for decision is whether Mrs. Peters is entitled to maintain this action for the seduction of the girl, who for the purposes of this action may be treated as the adopted daughter of the plaintiff. On behalf of the plaintiff it has been contended that inasmuch as that fact is admitted or established, and as she in fact rendered services in the house, both at the time of the seduction and also at the time of the confinement, there is sufficient to entitle Mrs Peters to sue, and that it is only a person who stands in loco parentis who can sue for damages for seduction. Now, that contention appears to me to be a violation of the real principle upon which this action can be maintained. I shall refer in a moment to the judgments in Hamilton v. Long, [1903] 2 I. R. 407. But I wish to say for myself that the principle on which an action for seduction can be maintained is not, as the argument on behalf of the plaintiff suggests, that there must be the relationship of parent and child, or any

quasi-relationship of parent and child, but that the relationship necessary is merely that of master and servant. And when one looks at the authorities in which it has been decided that a father may maintain the action in respect of a daughter who is under twenty-one years of age without proving any actual services rendered, but that if she is over twenty-one years of age he must give evidence of actual services rendered by the daughter, I think it is plain that the foundation of the action is not the relationship of parent and child but that of master and servant.

If I had had any doubt about that being the true principle I should turn to Hamilton v. Long, [1903] 2 I. R. 407, where the facts in my judgment gave rise to the very question of law that has to be determined in this case. In that case a daughter was seduced while her father and mother were alive and while she was living in their house. A child was born after the father's death, and the daughter continued to live with the widow. It was found as a fact that the daughter rendered ordinary household services to her mother after her father's death. In these circumstances it was held that an action could not be maintained by the widow either by virtue of the common law or the Married Women's Property Acts. Now it is admitted to be the law that the relationship which justifies the maintenance of the action must exist at the time of the seduction and also at the time of the illness consequent upon it that deprives the plaintiff of the girl's services. That being so, the Court in Hamilton v. Long, [1903] 2 I. R. 407, had to determine whether, if the services were rendered to the mother at the time of the illness, it could in that case be said that the services were also being rendered to the mother at the time of the seduction, and, if they were, whether the mother could maintain the action. The effect of the judgment was that as the father was alive and the daughter living in his house at the time of the seduction, he alone was the person who could have maintained the action, and that the mother could not, because at the time of the seduction the services were rendered to the father and not to the mother. If I had had any doubt upon the point, I should have willingly followed this decision of Lord O'Brien, C. J., Gibson, J., and Madden, J., for although the decision is not binding upon me it is of great authority.

Lord O'Brien, C. J., said: "Now, at common law the action would not, in my opinion, be maintainable for this reason, namely, that to sustain an action of seduction it must be shewn that the act of seduction took place while the relation of master and servant existed, and that relation in the father's lifetime existed exclusively between the father as head of the family, and the daughter as his child, and one of the family and one of the household which he maintained." He then deals with the Married Women's Property Acts and finds that there is nothing in those Acts which alters the position which the

wife occupies at common law in respect of this matter. Gibson, J., said: "The action is founded on a wrongful interference, to the master's injury, with a subsisting relationship of master and servant. Such relationship is supported by acts of service voluntarily rendered without any enforceable contract, but the service must be to some one whom the law recognizes as master. The question here is who was the master? At common law certainly it was the father. He and his wife were one. As head of the family he was guardian of his daughter during minority, and when she became adult, so long as she resided under his protection in the family home, he was regarded as master in respect of all services yielded to or for him in the course of family duty. There is no trace of suggestion in the English law books that a mother during the father's lifetime could be regarded at common law as mistress" (that means mistress of the servant) "jointly with her husband or separately. She was merged in her husband." Madden, J., said: "So long as the plaintiff's daughter was an infant living under the dominion of her father, he was in law entitled to her services. After she became sui juris some evidence of actual services rendered in the household became necessary in order to give rise to the legal fiction of the existence between parent and child of the contractual relation of master and servant upon which the action of seduction is founded." That decision was approved in the Irish Court of Appeal, [1905] 2 I. R. 552, by Lord Ashbourne, L. C., and FitzGibbon, Walker, and Holmes, L. JJ. I hold exactly the same view as was expressed in that case. In my judgment the action can only be maintained by proof of an actual or implied contract of service. The relationship of parent and child gives rise to the legal fiction that there is a contract of service. The legal relationship of father and child does not by itself justify the maintenance of the action. The maintenance of the action is only justified by the legal fiction that a child living with the parent is a servant, and the action is maintainable where the daughter is under twenty-one years of age without any proof of actual services rendered, but after that age is passed there must be proof of actual services.

That being the principle, the question in this case is between whom did the relationship of master and servant exist. On behalf of the plaintiff it has been contended that because Mrs. Peters stood in loco parentis she alone was the person who could maintain this action, and that the husband would not have been entitled to sue; that as there was no actual contract of service, such services as were rendered must be deemed to have been rendered to the plaintiff, Mrs. Peters. But the passages I have read from the judgments in the Irish case of Hamilton v. Long, [1903] 2 I. R. 407, shew that while Mrs. Peters was living with her husband any ordinary domestic servant employed in the house was the servant of Mr. Peters and not of his wife.

Whether such a servant was paid wages or whether she was remunerated by gifts of clothes or pocket-money is, I think, immaterial. The moment that one appreciates that the action is based on the relationship of master and servant and not on that of parent and child one sees that the only question for determination is, who was the girl's master at the material times? There is only one answer to that question. Mr. Peters was the master; Mrs. Peters was not the mistress of the servant, and so she was not entitled to bring this action and, being a person admittedly without any separate property of her own, cannot be rendered liable for the costs of it. No application was made to me to add Mr. Peters as a plaintiff. In my opinion the plaintiff was not entitled to maintain this action, and there must be judgment for the defendant.

Judgment for defendant.[87]

V. Defamation

(A) Origin of the Tort, and the Kinds of Defamation

(a) Its Recognition in the Courts of Law

The king's court [in the thirteenth century] gave no action for defamation. This in our eyes will seem both a serious and a curious defect in the justice that it administered. What is usually accounted the first known instance of such an action comes from the year 1356, and even in that instance the slander was complicated with contempt of court. In 1295 a picturesque dispute between two Irish magnates had been removed to Westminster, and Edward I's court declared in solemn fashion that it would not entertain pleas of defamation; in the Irish court battle had been waged. At the end of the Middle Ages we may see the royal justices beginning to reconsider their doctrine and to foster an "action on the case for words"; but they were by this time hampered by the rival pretensions of the courts Christian. The tribunals of the church had been allowed to punish defamation as a sin, and the province which had thus been appropriated by the canonists was not very easily recovered from them until the Protestant Reformation had weakened their hands.

We should be much mistaken, however, if we believed that the temporal law of the Middle Ages gave no action to the defamed. Nothing could be less true than that our ancestors in the days of their barbarism could only feel blows and treated hard words as of no account. Even the rude Lex Salica decrees that if one calls a man "wolf" or "hare" one must pay him three shillings, while if one calls a woman "harlot" and cannot prove the truth of the charge,

[87] Part of the statement of facts and part of the opinion are omitted.

one must pay her forty-five shillings. The oldest English laws exact bot and wite if one gives another bad names. In the Norman Custumal it is written that the man who falsely calls another "thief" or "manslayer" must pay damages, and, holding his nose with his fingers, must publicly confess himself a liar. Shame was keenly felt. In almost every action before an English local court of the thirteenth century the plaintiff will claim compensation not only for the damage (damnum) but also for the shame (huntage, hontage, dedecus, pudor, vituperium) that had been done him, and we may suspect that in the king's court this element was not neglected when compensation was awarded. But further, we find that in the local courts, not only were bad words punished upon presentment in a summary way, but regular actions for defamation were common. We may gather that in such an action the defendant might allege that his words were true; veritas non est defamatio. We may gather that the English for "meretrix" was actionable, though an interchange of this against the English for "latro" left one shilling due to the man. We already hear that a slander was uttered "of malice aforethought" and sometimes a plaintiff alleges "special damage." But until further researches have been made among the records of our manorial courts, we shall know little of the mediaeval law of defamation. Probably in this matter those courts did good enough justice, and for this reason it was that no royal writ was devised for the relief of the slandered. In later days, when the old moots were decaying, the ecclesiastical procedure against the sin of defamation seems to have been regarded as the usual, if not the only, engine which could be brought to bear upon cases of libel and slander, and in yet later days the king's court had some difficulty in asserting its claims over a tract of law that it had once despised.

Pollock and Maitland, Hist. Eng. Law (2d Ed.) Vol. 2, p. 536.

The jurisdiction of the ecclesiastical courts was recognized both by the legislature and the judges. But it was soon seen that an unlimited jurisdiction over cases of defamation might be used, as an unlimited jurisdiction over breaches of faith was used, to get indirectly control over cases which ought to have gone to the king's court. Thus persons indicted and acquitted had a habit of suing the indictors for defamation in the ecclesiastical courts. It was enacted that in such cases a prohibition should lie. In Edward IV's reign we get an odd tale of a similar perversion of the action for defamation, told of no less a person than the Abbot of St. Albans. He had sent for a certain married woman, detained her in his chamber, and solicited her chastity without success. Her husband then sued the abbot for the imprisonment of his wife. The abbot thereupon sued him for defamation before the

ecclesiastical court. In such a case the court found no difficulty in awarding a prohibition to the ecclesiastical court and declining to grant a writ of consultation. In self-defence, then, the courts of common law would prohibit certain actions for defamation. But, in spite of one doubtful case to the contrary, it is clear that all through this period they declined to entertain actions merely for defamation. It is not until Henry VIII's reign, in the very last of the Year Books, that we have any hint that the courts are beginning to think of claiming some share in this jurisdiction. Here, as in other branches of the law of crime and tort, the decline of the ecclesiastical courts and the competition of the Court of Star Chamber led to important developments in the common law.

W. S. Holdsworth, Hist. Eng. Law, Vol. III, pp. 316, 317 (1909).

Early in the Middle Ages reputation was amply protected in England by the combined secular and spiritual authorities. In the course of the nationalization of justice by the king's judges the jurisdiction of the seignorial courts fell into decay; and, after a long and bitter struggle, the jurisdiction of the ecclesiastical courts was also absorbed by the royal tribunals. When, however, the king's courts acquired jurisdiction over defamation, during the latter half of the sixteenth century, various social and political conditions combined to contract the actionable right, or remedy. The king's courts granted only a limited remedy, the selection being based partly upon the character of the imputation, partly upon the consequences resulting therefrom; moreover, even this limited remedy was little concerned in theory with the right to reputation as such. By reason of its growth in this way the early common law of defamation consisted merely of a series of exceptions to entire license of speech. When, at length, early in the seventeenth century, the potentialities of the printing press dawned upon the absolute monarchy, the emergency was met, not by further additions to the list of actionable imputations, but by a direct importation of the Roman law, without regard to Roman limitations, and with certain additions adapted to the purpose in hand. This special provision for written or printed defamation, first adopted in the criminal law, eventually became also a principle of civil judicature. In this way a new principle of actionable defamation, based upon mere form, was introduced in the law. The original common law doctrine of defamation, based upon the nature of the imputation, became stereotyped as the law of spoken defamation, or slander; the doctrine inherited from the Roman law, through the Star Chamber, became the law of written and printed defamation, or libel. The English law of defamation, therefore, was first limited by a process of selection, and then confused by a formal distinction which is not

only unknown in other systems of law, but is also wholly accidental in origin and irrational in principle.

Van Vechten Veeder, "The History and Theory of the Law of Defamation." [88]

(b) SLANDER

(aa) Limitations because of the Ecclesiastical Jurisdiction

PALMER v. THORPE.

(Court of King's Bench, 1583. 4 Coke, Rep. 20a, 76 Reprint, 909.)

Touching defamation determinable in the Ecclesiastical Court, it was resolved, that such defamation ought to have three incidents: 1. That it concerns matter merely spiritual and determinable in the Ecclesiastical Court, as for calling him "heretic, schismatic, adulterer, fornicator, &c." 2. It ought to concern matter merely spiritual only; for if such defamation touches or concerns anything determinable at the common law, the Ecclesiastical Judge shall not have cognizance of it. 3. Although such defamation is merely spiritual, and only spiritual; yet he who is defamed cannot sue there for amends or damages, but the suit ought to be only for the punishment of the sin, pro salute animæ. * * *

GRAVES v. BLANCHET.

(Court of Queen's Bench, 1705. 2 Salk. 696, 91 Reprint, 589.)

Action for these words, "She is a whore, and had a bastard by her father's apprentice;" judgment was arrested. The Court said they could not overthrow so many authorities. The reason of the law is, that fornication is a spiritual offence; and no action lay at common law for what the common law took no notice of, without special damage.[89]

[88] This interesting article by Judge Veeder was published in the Columbia Law Review, vol. 3, pp. 546-573 (1903), and vol. 4, pp. 33-56 (1904). The first part, on the history of defamation, was republished, in 1909, in Select Essays in Anglo-American Legal History, vol. 3, pp. 446-473. The second part, on the theory of the present law of defamation, does not appear in the Legal Essays, but should be consulted in the Columbia Law Review.

See also 3 Holdsworth, Hist. Eng. Law, 315-317 (1909), and for certain historical bearings of the doctrine of defamation see the opinion of Holmes, C. J., in Rutherford v. Paddock (1902) 180 Mass. 289, 62 N. E. 381, 91 Am. St. Rep. 282.

[89] "Holt, C. J., said that to say of a young woman that 'she had a bastard' is a very great scandal, and for which, if he could, he would encourage an action; but it is not actionable, because it is a spiritual defamation, punishable in the Spiritual Court. So it is to call a man a 'heretick.'" Dictum in Ogden v. Turner (1703) 6 Mod. 104.

Compare Chaucer's reference, in the Friar's Tale, to the vigorously ex-

(bb) Oral Defamation Now within the Jurisdiction of the Courts of Law

(1) Slander Per Se

(i) Words Imputing Crime

ANONYMOUS.

(Court of King's Bench, 1536. 1 Dyer, 19a, 73 Reprint, 40.)

An action upon the case was brought by two, for that the defendant called them "two false knaves and thieves," and shewed in proof of it, &c. And Mountague intended to demur in law upon the writ, because the tort which one has by the words spoken is not the tort which the other has: therefore they ought to sever in their actions, as of false imprisonment; and of that opinion was the Court, &c.[90]

EATON v. ALLEN.

(Court of Common Pleas, 1598. 4 Coke, Rep. 16b, 76 Reprint, 896.)

The defendant said of the plaintiff, "he is a brabler and a quarreller, for he gave his champion counsel to make a deed of gift of his goods to kill me, and then to fly out of the country, but God preserved me." And it was strongly urged that the action should be maintainable, and divers cases cited. * * * But upon great consideration and advisement it was adjudged that in the principal case the words were not actionable: for the purpose or intent of a man without act, is not punishable by law, et ubi non est lex, ibi non est transgressio quoad mundum. And although for such conspiracy he might be punished in the Star Chamber, that is by the absolute power of the Court, and not by the ordinary course of the law. Nota bene, this case, and the cause and reason of this judgment.[91]

ercised jurisdiction of the archdeacon "in punyschyng of fornicacioun, of wicche-craft, and eek of bauderye, of diffamacioun, and avoutrie." 1 Holdsworth's Hist. of Eng. Law, 352, 387, 2 Legal Essays, 255, 295.

[90] It is not until after the crucial years of the Reformation, viz. in the year 1536, that we find an action of slander reported in the King's Courts." Edward Jenks' Short History of English Law, 145.

[91] Part of the opinion is omitted. Accord: Bays v. Hunt (1882) 60 Iowa, 251, 252, 14 N. W. 785: (The words were: "Bays will steal.") Fanning v. Chace (1891) 17 R. I. 388, 22 Atl. 275, 13 L. R. A. 134, 33 Am. St. Rep. 878: (The words were: "He is going to start a house of ill fame.")

Compare Cornelius v. Van Slyck (1839) 21 Wend. (N. Y.) 70: (Here the words "He will steal and I can prove it," were held to import a charge that the plaintiff had stolen.)

And see Browning v. Commonwealth (1963) 116 Ky. 282, 76 S. W. 19: (The defendant in a letter to one Newman had written "Beard will purloin all the [printing] outfit if he has a chance at it: so I will look to you to protect it for the present." Held sufficient to support an indictment for criminal libel.)

MARSHAL v. STEWARD.

(Court of Common Pleas, 1615. 1 Brown. & G. 8, 123 Reprint, 631.)

Action upon the case, reciting the Statute of 1 Jac. against invocation, &c., for these words, "The devil appeareth to thee every night in the likeness of a blackman, riding on a black horse, and thou conferrest with him, and whatsoever thou dost ask, he doth give it thee, and that is the reason thou hast so much money, and this I will justife." Judgment for the plaintiff.[92]

BROOKER v. COFFIN.

(Supreme Court of Judicature of New York, 1809. 5 Johns. 188, 4 Am. Dec. 337.)

Action for slander, with a declaration in two counts. There was a general demurrer to the first count.[93]

SPENCER, J. The first count is for these words: "She is a common prostitute, and I can prove it;" and the question arises, whether speaking these words gives an action, without alleging special damages. By the statute (1 R. L. 124) common prostitutes are adjudged disorderly persons, and are liable to commitment, by any justice of the peace, upon conviction, to the Bridewell or House of Correction, to be kept at hard labor for a period not exceeding 60 days, or until the next General Sessions of the Peace. It has been supposed that, therefore, to charge a woman with being a common prostitute, was charging her with such an offense as would give an action for slander.

The same statute which authorizes the infliction of imprisonment on common prostitutes or disorderly persons, inflicts the same punishment for a great variety of acts, the commission of which renders the persons liable to be considered disorderly; and to sustain this action would be going the whole length of saying, that every one charged with any of the acts prohibited by that statute, would be entitled to maintain an action for defamation. Among others, to charge a person with pretending to have skill in physiognomy, palmistry, or pretending to tell fortunes, would, if this action is sustained, be actionable. Upon the fullest consideration we are inclined to adopt this as the safest rule, and one which, as we think, is warranted by the cases. In case the charge, if true, will subject the party charged to an indictment for a

[92] See Statute 1 Jac. I, c. 12: An act against conjuration, witchcraft, and dealing with evil and wicked spirits (1604). Repealed, 9 Geo. II, c. 5 (1736).

And see Hughs v. Farrer (1629) Cro. Car. 141: ("Thou art a witch and didst bewitch my master's drink." Held actionable.) George v. Harvy (1634), Cro. Car. 324: ("You are a witch and a strong witch." Finally held no slander within the statute, because no act of witchcraft alleged.)

[93] The statement of the case is abridged, the arguments of counsel are omitted, and only so much of the opinion is given as relates to the first count.

crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable; and Baron Comyns considers the test to be, whether the crime is indictable or not. 1 Com. tit. Action on the Case for Defamation, F, 20. There is not, perhaps, so much uncertainty in the law upon any subject, as when words shall be in themselves actionable.[94] From the contradiction of cases, and the uncertainty prevailing on this head, the court think they may, without overleaping the bounds of their duty, lay down a rule which will conduce to certainty, and they, therefore, adopt the rule I have mentioned as the criterion.[95] In our opinion, therefore, the first count in the declaration is defective. * * *

The defendant must, therefore, have judgment.

WEBB v. BEAVAN.

(Queen's Bench Division, 1883. 11 Q. B. Div. 609.)

The statement of claim alleged that the defendant falsely and maliciously spoke and published of the plaintiff the words following:

"I will lock you" (meaning the plaintiff) "up in Gloucester Gaol next week. I know enough to put you" (meaning the plaintiff) "there" (meaning thereby that the plaintiff had been and was guilty of having committed some criminal offence or offences).

The defendant demurred on the ground that no cause of action was disclosed. Joinder in demurrer.[96]

W. H. Nash, in support of the demurrer, contended that, in order to make the words actionable, the innuendo should have alleged that they imputed an offence for which the plaintiff could have been indicted, and that it was not sufficient to allege that they imputed a criminal offence merely.

POLLOCK, B. I am of the opinion that the demurrer should be overruled. The expression "indictable offence" seems to have crept into the text books, but I think the passages in Comyns' Digest are conclusive to shew that words which impute any criminal offence are actionable per se. The distinction seems a natural one, that words imputing that the plaintiff has rendered himself liable to the mere infliction of a

[94] On the diversity of doctrine in America as to what words imputing the commission of a crime are actionable per se, see 25 Cyc. 273; Burdick on Torts (3d Ed.) 352.

[95] The rule adopted in 1809 in Brooker v. Coffin has had a very extensive following in America. The cases are grouped by states in 25 Cyc. 270, note 34. See also the remarks of Mr. Justice Clifford in Pollard v. Lyon (1875) 91 U. S. 225, 230, 23 L. Ed. 308, and Cooley on Torts (Student's Ed.) 201. On moral turpitude as an element in the tort, see Sipp v. Coleman (1910, C. C.) 179 Fed. 997, and 25 Cyc. 272, note 43.

[96] The statement of the case is abridged, and part of the argument of counsel is omitted.

fine are not slanderous, but that it is slanderous to say that he has done something for which he can be made to suffer corporally.

LOPES, J. I am of the same opinion. I think it is enough to allege that the words complained of impute a criminal offence. A great number of offences which were dealt with by indictment twenty years ago are now disposed of summarily, but the effect cannot be to alter the law with respect to actions for slander.[97]

Demurrer overruled.

KREBS v. OLIVER.

(Supreme Judicial Court of Massachusetts. 1858. 12 Gray, 239.)

Tort for slander, in accusing the plaintiff of the crime of larceny, by words in substance as follows: "Dr. Krebs was imprisoned many years in a penitentiary in Germany for larceny." Verdict for the plaintiff. The defendant alleged exceptions.[98]

BIGELOW, J. We cannot doubt that the words alleged in the declaration are actionable. It is not necessary that the language used, in order to be slanderous, should be so spoken, as, if true, to expose the person concerning whom it is uttered to a criminal prosecution. That is one of the tests by which to determine whether it constitutes a good cause of action, but it is not the only one. The other is that it imputes to a person a species of misconduct to which the law attaches a criminal punishment, and thereby he is subjected to obloquy and social degradation and disrepute. The imputation of crime is essential as a test whether the words used do amount to a legal slander; but it

[97] Compare: Hellwig v. Mitchell [1910] 1 K. B. 609, 613: (Slander for words which imputed that P. had been guilty of a criminal offence punishable by fine only, but involving a liability to summary arrest. Bray, J., remarks: "It was contended that the words are capable of bearing the meaning alleged, namely, that the plaintiff had been guilty of disorderly conduct and of committing breaches of the peace, and it was said that a person who commits a breach of the peace may be arrested either by a private individual or by a constable. That is true, but the offence is not punishable by imprisonment. It was contended, however, that the rule does not require that the criminal offence should be one punishable by imprisonment, and that it is sufficient if the offence be one which renders the offender liable to summary arrest and detention. This is not a question of principle, but of judge-made law, and therefore I must look at the authorities to see how far they support this contention. * * * I cannot find in the books a trace of authority for saying that words imputing that the plaintiff has done an act for which he may be arrested, but which is only punishable by a fine, are actionable without proof of special damage, or that a mere liability to arrest is sufficient to make the crime one for which the offender can be said to suffer corporally. Strictly speaking, it is incorrect to say that a person who commits a breach of the peace, can be made to suffer corporally. The arrest in that case is not a punishment; it is merely a method of preventing the continuing of the offence.") And see 18 Halsbury, Laws of England, 637, notes (m) and (n).

[98] Only so much of the case is given as relates to the one point. The statement is slightly abridged, and the argument of counsel is omitted.

does not take away their actionable qualities, that they are so spoken as to indicate that the party has suffered the penalty of law or is no longer exposed to danger of punishment. In Van Ankin v. Westfall, 14 Johns. (N. Y.) 234, the court say: "The right of the plaintiff to sustain the action does not depend upon the question whether he was liable to be prosecuted and punished for the crime charged against him." And in a more recent case, where the words spoken were, "He is a returned convict," it was held that they were actionable, Lord Denman saying: "They import, to be sure, that the punishment has been suffered, but the obloquy remains." * * * [99]

Exceptions overruled.[100]

[99] Referring to Fowler v. Dowdney (1838) 2 M. & Rob. 119; Carpenter v. Tarrant (1736) Cas. temp. Hardwicke, 339; Gainford v. Tuke (1619) Cro. Jac. 536; Boston v. Tatam (1621) Cro. Jac. 623; Cuddington v. Wilkins, Hob. 81; Smith v. Stewart (1847) 5 Pa. 372; Shipp v. McCraw (1817) 7 N. C. 463, 9 Am. Dec. 611.

[100] Compare: Wiley v. Campbell (1827), 5 T. B. Mon. (Ky.) 396: (Slander. The words laid in the declaration were: "You have been cropped for felony.) Smith v. Stewart (1847) 5 Pa. 372: (Slander for words charging the plaintiff with having been a convict in another state.) Stewart v. Howe (1855) 17 Ill. 71: (Slander. The words were: "She [the plaintiff] stole $90; she is a smart little thief." It appeared that the plaintiff was under ten years of age: and by an Illinois statute then in force, no child under ten years could be punished for larceny.) Klumph v. Dunn (1871) 66 Pa. 141, 5 Am. Rep. 355: (Slander. The words, spoken in Pennsylvania, charged the plaintiff with adultery in Georgia.)

"Nothing seems to be better settled than that liability to prosecution or punishment is not the criterion. Both ancient and modern cases agree in this. * * * What then is the criterion? Mr. Starkie, after an elaborate review of the cases, comes to the conclusion that, as it is necessary to have some clear and certain rule by which the line of demarcation between actionable and non-actionable words can be drawn, none could be adopted more convenient than that which refers the question to the criminal law, and confirms the action to imputations of offences of moral turpitude, punishable in the temporal courts. 1 Starkie on Slander, 27. But to what law are the courts to refer to ascertain whether the offence charged is of this character? Upon every principle of reason and policy the answer seems to be the law of the country where the words are spoken. That law is the exponent of the moral sense of that community—of the estimation in which they hold offences against the moral law, and words which accuse a man of any crime, condemned and subjected to infamous punishment by that law, expose him in that community to obloquy and contempt. The moral character of the act cannot be affected by the place where it is committed. What matters it to those to whom the words are addressed, or in whose hearing they are spoken, that the crime is charged to have been committed in a state or country where such actions are not subject to punishment? Even if they are to be presumed to know that the act was not a crime punishable by the law of the country where it was alleged to have been committed, would it any the less injure the moral character and standing of the party charged? Is it possible that a man living in Pennsylvania can be accused of having committed the crime inter Christianos non nominandum upon some uninhabited coast or island where there is no government and no law, or among some barbarous people where such practices may be, as they have been, tolerated? Is such a plaintiff to be turned out of court unless he can prove some special damage? This may be an extreme case, but nevertheless it tests the principle. If the criminal code laid its heavy hand upon such calumniators, there might be some good reason for requiring special damage to be shown in all actions of slander, but we know that it does not, and

(ii) Words Imputing Disease

TAYLOR v. PERKINS.

(Court of King's Bench, 1607. Cro. Jac. 144, 79 Reprint, 126.)

Action for these words: "Thou art a leprous knave." It was demurred upon the declaration, because the defendant conceived an action lay not for these words. But upon the first motion all the Court held, that the action well lay; for they are as well actionable as if he had said, "Thou wast laid of the pox." Wherefore, without argument, it was adjudged for the plaintiff.[1]

COUNT JOANNES v. BURT.

(Supreme Judicial Court of Massachusetts, 1863. 6 Allen, 236, 83 Am. Dec. 625.)

Tort brought in the name of "George, the Count Joannes," seeking to recover damages for slander. The defendant demurred to the declaration as not setting forth any legal cause of action.

HOAR, J. * * * The declaration is in tort for slander, by orally imputing insanity to the plaintiff. We are aware of no authority for maintaining such an action, without the averment of special damage. The authorities upon which the plaintiff relies are both cases of libel. The King v. Harvey, 2 B. & C. 257; Southwick v. Stevens, 10 Johns. (N. Y.) 443. An action for oral slander, in charging the plaintiff with disease, has been confined to the imputation of such loathsome and infectious maladies as would make him an object of disgust and aver-

unless the lash is placed in the hands of the injured party they must go 'unwhipped of justice.'" Per Sharswood, J., in Klumph v. Dunn (1870) 66 Pa. 141, 145, 5 Am. Rep. 355.

[1] Compare Simpson v. Press Pub. Co. (1900) 33 Misc. Rep. 228, 67 N. Y. Supp. 401, a case of libel in which Gaynor, J., remarked: "The defendant contends that it is now scientifically established that leprosy is not infectious or contagious, but only hereditary, and that therefore it is no longer within the definition of slander. When an indictable crime ceases to be such it is no longer slander to charge one with it. When the penal statutes against Catholics and witchcraft existed in England it was slander to say of one that he was a Papist, or went to mass, or that he was a witch, or used witchcraft. Walden v. Mitchell (1690) 2 Vent. 265; Smith v. Flynt (1612) Cro. Jac. 300; Rogers v. Gravat (1597) Cro. Eliz. 571; Dacy v. Clinch (1662) 1 Sid. 53. But I do not think it is a parallel case if the progress of science has revealed that leprosy was erroneously classed as infectious or contagious. It remains a term of slander until the law is changed. To say of one that he went to mass or practiced witchcraft might still be slander if the law had not been changed, even though the progress of enlightenment had revealed to most people that to hear mass was not bad, or that there was no such thing as a witch. Besides, the bane in the charge of leprosy which made the courts classify it as slanderous was its tendency to cause one to be shunned and excluded from society, and that still exists."

sion, and banish him from human society. We believe the only examples which adjudged cases furnish are of the plague, leprosy, and venereal disorders. * * *[2]

Appeal dismissed.

SMITH'S CASE.

(Court of Common Pleas, 1604. Noy, 151, 74 Reprint, 1112.)

An action upon the case for words, "Thou hast had the French pox." And upon issue not guilty, it is found for the plaintiff. It was now moved in arrest of judgment. Because the words are in the preterperfect tense, and the party it may be now is well, and sound, and no scandal. To which all the Court agreed, and judgment arrested. COOKE, Chief Justice, took this difference of such a slander, de tempore præterito, when it touches the mind, and when it touches the body. If it be a scandal to the mind, and the affections, as perjury, felony, &c. there the mind that remains is slander. But if it be of an accidental infirmity, or disease of the body, otherwise it is. For none now will forbear his company, although he had the plague in times past.[3]

[2] Parts of the opinion are omitted.

See Bac. Abr. "Slander," B, 2: "Man being formed for society, and standing in almost constant need of the advice, comfort, and assistance of his fellow creatures, it is highly reasonable that any words, which import the charge of having a contagious distemper, should be in themselves actionable; because all prudent persons will avoid the company of a person having such distemper. It makes no difference, whether the distemper be owing to the visitation of God, to accident, or to the indiscretion of the party therewith afflicted, for, in every one of the cases, the being avoided, from whence the damage arises, is the consequence." But the only instances cited by Bacon are leprosy and venereal disease.

Compare 18 Halsbury's Laws of England, 625 (1911): "The imputation of a present infectious or contagious disease is not defamatory, if the imputation is not calculated to bring the person to whom it is imputed into hatred, contempt, or ridicule, although the imputation tends to exclude him from society. It does not lower the reputation of any one to impute that he is suffering from scarlet fever or influenza; it is otherwise to say that he has and (probably) to say that he has had, a verminous disease."

See, also, McDonald v. Nugent (1904) 122 Iowa, 651, 98 N. W. 506: P. charged D. with saying of him that he (P.) had a venereal disease. The trial court instructed the jury that a charge that the plaintiff was affected with a venereal disease was not slanderous per se. Held, that the charge was erroneous. "From an early date in the development of the common law of slander and libel," said Weaver, J., delivering the opinion, "a charge made by one person that another is infected with a venereal disease has been held to constitute one of the few exceptions to the general rule applicable to oral slander—that, to be actionable per se, the words must impute some crime to the person defamed."

[3] Accord: Taylor v. Hall (1743) 2 Str. 1189, Reprint; Carslake v. Mapledoram (1788) 2 T. R. 474, 475, 100 Reprint, 255, 256, where Ashhurst, J., remarks: "Charging a person with having committed a crime is actionable, because the person charged may still be punished; it affects him in his liberty. But charging another with having had a contagious disorder is not

(iii) Words Disparaging in Trade, Profession, or Office

STANLEY v. OSBASTON.

(Court of King's Bench, 1592. Cro. Eliz. 268, 78 Reprint, 534.)

Action for these words: "He was a bankrupt;" and alleged he was a shoemaker, and used buying and selling of leather. And it was adjudged that the action did lie, although the plaintiff was not a merchant, but he got his living by buying and selling.

COLLIS v. MALIN.

(Court of King's Bench, 1633. Cro. Car. 282, 79 Reprint, 847.)

Action for words. Whereas the plaintiff had used per magnum tempus the trade of buying and selling of cattle, and divers times bought upon his credit; that the defendant said of him, "Thou art a bankrupt." The defendant pleaded not guilty; and found against him. And because he did not say, that he used the trade at the time of speaking the words, but per magnum tempus usus fuit, which may be divers years before, and the action lies not, unless at the time of speaking the words he used the trade of buying and selling of cattle, therefore it was adjudged for the defendant.[4]

DAY v. BULLER.

(Court of Common Pleas, 1770. 3 Wils. 59, 95 Reprint, 932.)

Action for slandering the plaintiff in his profession of an attorney, by saying of him these words: "What, does he pretend to be a lawyer? He is no more a lawyer than the devil!" Verdict for the plaintiff.

And now Serjeant Davy moved an arrest of judgment; alledging, that it was not actionable to say of an attorney he was no lawyer, any more than to say of an apothecary that he was no physician; that it was no more necessary for an attorney to be a lawyer, than for an apothecary to be a physician.

actionable; for unless the words impute a continuance of the disorder at the time of speaking them, the gist of the action fails; for such a charge cannot produce the effect which makes it the subject of an action, namely, his being avoided by society. Therefore, unless some special damage be alleged in consequence of that kind of charge, the words are not actionable." Nichols v. Guy (1850) 2 Ind. 82: (The declaration, in two counts, laid the words, first, as "Silas Guy had the clap;" secondly, "Silas Guy has the clap.")

[4] Compare Allen v. Hillman (1831) 12 Pick. (Mass.) 101, where the words imputed misconduct in an office which had ceased to exist.

But PER CURIAM, to say of an attorney he is no lawyer, is a great reflection upon him, and means that he does not understand his business; besides, (they said) an attorney must have a competent knowledge of the law, or he cannot draw a common writ or declaration.

And per YATES Justice, the words are as great a slander upon the plaintiff, and as injurious to him, as any words possibly can be.

So the serjeant took nothing by his motion, and the plaintiff had judgment.[5]

DOYLEY v. ROBERTS.

(Court of Common Pleas, 1837. 3 Bing. N. C. 835, 132 Reprint, 632, 43 R. R. 810.)

Slander. The plaintiff declared that he was an attorney, and that the defendant had falsely and maliciously spoken and published of the plaintiff, and of and concerning him in the way of his business or profession, that "he had defrauded his creditors, and had been horsewhipped off the course at Doncaster." Special damage, that one H. Gyde, had, in consequence, declined to employ the plaintiff.

At the trial before Parke, B., last Worcester Assizes, the words were proved to have been spoken by the defendant, of the plaintiff, who was more engaged on the turf than in law, and had had creditors in sporting transactions; and the jury found, in answer to questions put to them by the learned Baron:

That the words were spoken of and concerning the plaintiff; that they were not spoken of him in his business of an attorney; that they had a tendency to injure him morally and professionally; but, that H. Gyde did not in consequence of them decline to employ the plaintiff.

A verdict was given for the plaintiff, with £50. damages; but the defendant had leave to move to enter a nonsuit instead, if the Court should be of opinion that the words were not actionable unless spoken of the plaintiff in the way of his business as an attorney.[6]

TINDAL, C. J. * * * The case will stand thus: The plaintiff is an attorney, and carries on business as such, but appears to have had creditors in certain sporting transactions; the defendant says of him

[5] Compare Oakley v. Farrington (1799) 1 Johns. Cas. (N. Y.) 129, 1 Am. Dec. 107: (D. said of P., a justice of the peace, who was usually called "Squire Oakley," to distinguish him from others of the same name: "Squire Oakley is a damned rogue.")

Spears v. McCoy (1913) 155 Ky. 1, 159 S. W. 610, 49 L. R. A. (N. S.) 1033: (D. said of P., a public school teacher: "I do not want such a teacher because he is all the time courting the girls, and did court them last year in the school. He would dismiss the boys last year in school and keep the girls in and give them candy and court them.")

[6] The argument of counsel, part of the opinion of Tindal, C. J., and the opinions of Park, Vaughan, and Coltman, JJ., concurring with the Chief Justice, are omitted.

generally, that he has defrauded his creditors, and the jury find that these words were not spoken of him in his business of attorney. Now in Comyns' Digest, Action on the Case for Defamation, it is laid down, D. 27, that "words, not actionable in themselves, are not actionable when spoken of one in an office, profession, or trade, unless they touch him in his office;" and these words, though spoken of an attorney, do not touch him in his profession, any more than they would touch a person in any other trade or profession. It is found, indeed, that the words have a tendency to injure him morally and professionally; and that is true; but it applies equally to all other professions, for a person cannot say any thing disparagingly of another, that has not that tendency: upon that subject the authority of Ayre v. Craven, 2 A. & E. 2, is conclusive; and a rule for arresting judgment in this case must therefore be made absolute.

Rule absolute.

FOULGER v. NEWCOMB.

(Court of Exchequer, 1867. L. R. 2 Exch. 327.)

The declaration was in two counts, to both of which the defendant demurred. The first count alleged:

That the plaintiff was a warrener, gamekeeper, horse-slaughterer, and grease manufacturer; that he carried on these businesses in the neighbourhood of Ridler's Wood, and that he was accustomed to be employed in his business of gamekeeper by occupiers of land in that neighbourhood; that many of the persons who so employed him were accustomed to hunt foxes, and it was considered by them a very improper act to kill or destroy foxes in the neighbourhood, and a person who should be guilty of so killing and destroying foxes would be looked upon by them with disfavour and suspicion, and would not be employed by them, and the plaintiff was always employed as such warrener and gamekeeper upon the terms and understanding that he should not nor would kill foxes in the neighbourhood; that the plaintiff had been employed as such warrener and gamekeeper upon the terms aforesaid by one of the said occupiers, and had by reason of such employment to perform his calling in Ridler's Wood, but not to kill foxes there, and it would have been a gross breach of his duties as such warrener and gamekeeper, and in his said employment, had he killed foxes in the wood, of all which premises the defendant at the time, &c. had notice; yet the defendant falsely and maliciously spoke and published of the plaintiff, and of him as such warrener and gamekeeper, and of his conduct whilst he was so employed, the words following: "It is no wonder we did not find any foxes in Ridler's Wood because Foulger trapped three foxes. I can prove it myself;" meaning thereby that the plaintiff, whilst he was so employed as aforesaid, in breach of his duty, killed and destroyed three foxes in the said wood; whereby the plaintiff has been greatly injured in his credit, reputation, and circumstances, and in his said occupations and businesses of a gamekeeper, warrener, horse-slaughterer, and grease manufacturer.

Special damage was alleged from the refusal of occupiers of the land to employ the plaintiff in the way of his occupations.

CHANNELL, B. These are demurrers to a declaration for slander containing two counts. The words complained of charge the plaintiff

with trapping foxes. To say simply of a man that he trapped foxes would not, we think, be actionable. There are, however, various circumstances set out in this declaration, which it is asserted show that there is a good cause of action.

The form of the declaration, and the somewhat peculiar circumstances of the case, gave rise to some little confusion on the argument of the case as to the principle on which an action for defamation is maintainable; and the apparent novelty of some of the points raised induced us to reserve our judgment. One essential ingredient of a good cause of action for defamation is damage. The rules as to the damage necessary to constitute a good cause of action, and as to the cases in which such damage is implied by law, are somewhat arbitrary; but the more important principles of them are now clearly defined. The two rules which we have to consider and apply to the facts of the present case are, first, that from spoken words which impute misconduct in an office, trade, profession, or business, the law implies actionable damage; secondly, that where words are spoken which are of a defamatory nature yet such that the law will not imply damage from them, still they are actionable if they are shown actually to cause (as their legal and natural consequence) damage of a character which the law will recognise. In order that the rule as to slander of a man in his business may apply, it is necessary that the words (being capable of having reference to the business) should in fact be spoken of him in respect of his business. This is alleged in the present case, and for the present purpose the allegation must be taken to be true. Next, it must appear that they tend to prejudice him in that business. This, as well as whether the words are capable of having reference to the business, must of course depend upon the nature of the business.

Now, we think that the rule as to words spoken of a man in his office or trade is not necessarily confined to offices and trades, of the nature and duties of which the Court can take judicial notice. The only limitation of which we are aware is, that it does not apply to illegal callings; as, for instance, to the keeping open rooms for pugilistic encounters, as in Hunt v. Bell, 1 Bing. 1; see also Morris v. Langdale, 2 B. & P. 284, a case relating to stock-jobbers, in which the decision proceeded on the ground that stock-jobbers were at that time of two classes, one honest, the other practising what the legislature by the statute then in force called "the infamous practice of stock-jobbing;" and that there was not in the declaration any averment of which business the plaintiff carried on, or whether the contracts he was unable, or said to be unable, to carry out, were legal or illegal contracts. On the same principle, that words having a particular meaning in a particular trade, or a particular locality, may be explained by averment and innuendo in the declaration, we think that the nature and duties of the trade or business may be explained by averment in the declaration, so as to show how the words spoken affect the business.

In the present case we could not, we think, take judicial notice that it could be the duty of a gamekeeper not to trap foxes, or that it would be a disparaging thing to say of him that he trapped foxes. It is, however, alleged, not only that the plaintiff was a gamekeeper, but that it was his duty as such gamekeeper not to kill foxes; that he was employed on the terms of his not doing so; and that the defendant knew all this.

So far, then, it is clear that, this being the true nature of the plaintiff's business and employment, to hear that he trapped foxes would prejudice him with respect to his business, at all events, with all persons who knew the real nature of his employment. It is not, however, quite clear that, where the nature of the business would not be generally understood, it might not be necessary to show that the hearers were aware of the facts necessary to give the words their defamatory sense. Here the declaration does not appear to contain a distinct allegation that the hearers knew that the plaintiff's duty was not to kill foxes. It does set forth something as to what the people of the neighbourhood knew and thought, but it does not state that the slander was uttered to people of the neighbourhood. It does, however, contain an innuendo that the words imputed a breach of duty. We think that this may be taken to be equivalent to an allegation that the words would convey that meaning to the hearers, and, taking it with the rest of the declaration, we think it is sufficient to make the declaration good without special damage.

In Ayre v. Craven, the physician's case, which was the principal authority relied on in support of the demurrers, the decision proceeded on the ground that the declaration did not set forth in what manner the misconduct was connected with the plaintiff's profession.[7] Here the declaration does set forth that it was the duty of the plaintiff, in his employment, not to do that which the words complained of charged him with doing. Therefore the objection which was successful there does not arise here. On the whole, therefore, we think that the pres-

[7] In Ayre v. Craven (1834) 2 A. & E. 2, 111 Reprint, 1, 41 R. R. 359, a declaration for slander alleged that the defendant used words imputing adultery to the plaintiff, a physician, and the words were laid to have been spoken "of him in his profession;" no special damage was laid, and after verdict for the plaintiff, judgment was arrested, the court holding that such words, merely laid to be spoken of a physician, were not actionable without special damage, and that if they were so spoken as to convey an imputation upon his conduct in his profession, the declaration ought to have shewn how the speaker connected the imputation with the professional conduct. Lord Denman, C. J., remarked: "Some of the cases have proceeded to a length which can hardly fail to excite surprise; a clergyman having failed to obtain redress for the imputation of adultery, Parret v. Carpenter, Noy, 64; S. C. (1597) Cro. Eliz. 502, and a school mistress having been declared incompetent to maintain an action for a charge of prostitution, Wharton v. Brook (1669) 1 Ventr. 21. Such words were undeniably calculated to injure the success of the plaintiffs in their several professions; but not being applicable to their conduct therein, no action lay."

See the comment on Ayre v. Craven, by C. Allen, J., in Morasse v. Brochu (1890) 151 Mass. 567, 25 N. E. 74, 8 L. R. A. 524, 21 Am. St. Rep. 474.

ent declaration shows a good cause of action, independently of special damage.

It is, however, clearly shown on the declaration that the words are capable of bearing a defamatory sense, viz., the imputing a breach of duty to the plaintiff, and it is alleged that the defendant, knowing the circumstances that made the words defamatory, falsely and maliciously used them in the defamatory sense. That being so, even if the law will not imply damage under the circumstances, still the words are actionable, and the defendant is responsible if they cause, as their legal and natural consequence, actual damage. Here actual pecuniary damage in the plaintiff's business or employment generally is alleged, and we think that this allegation at all events makes the declaration good. Of course if the plaintiff should only prove damage in the horse slaughtering or grease manufacturing departments of his trade, that would not help his case; but, as it is alleged in his business as a whole, we must take it that he means to prove damage in the other branch of his business, in which case it may well be the legal and natural consequence of the words.

There is a second count alleging that the words imputed a trespass as well as a breach of duty; this does not appear to differ substantially from the other.

MILLER v. DAVID.

(Court of Common Pleas, 1874. L. R. 9 C. P. 118.)

The declaration, framed in several counts, alleged that the plaintiff was a working stone mason residing at Llanelly and earning his living as such in Llanelly and its neighborhood, and that the defendant falsely and maliciously spoke and published of him the words following:

"He was the ringleader of the nine-hour system." "He has ruined the town by bringing about the nine-hour system, and he has stopped several good jobs from being carried out, by being the ringleader of the system at Llanelly"

—whereby the plaintiff was prevented from obtaining employment in his trade at Llanelly.

Demurrer, on the ground that the words were not in themselves defamatory, and that special damage consequent thereon, therefore, gave no action. Joinder in demurrer.

Bray, in support of the demurrer. * * * That the words were spoken of the plaintiff in the way of his trade of a mason, is matter of law to be inferred from the circumstances. (LORD COLERIDGE, C. J. That might and ought to have been averred, but it is not.) Nobody can doubt that the word "ringleader" is one which is capable of being used in a defamatory and injurious sense: and whether or not it is so used is a question for a jury, not for the Court. Jenner v. A'Beck-

ett, Law Rep. 7 Q. B. 11. (DENMAN, J. In that case there was an innuendo giving the words a defamatory sense.) [8]

Cur. adv. vult.

LORD COLERIDGE, C. J. In this case time was taken to consider our judgment, from the wish entertained by at least one member of the Court to hold, if there were authority for the proposition, that a statement false and malicious made by one person in regard to another whereby that other might probably, under some circumstances, and at the hands of some persons, suffer damage, would, if the damage resulted in fact, support an action for defamation. No proposition less wide in its terms than this would support the present declaration; for to call a man "the ringleader of the nine-hours system," and to say of him that he "had ruined a place by bringing about that system," could not under many circumstances and at the hands of many people do the subject of such statements any damage at all. But we are unable to find any authority for a proposition so wide and general in its terms as would alone support this action.

The rule, as laid down by De Grey, C. J., in Onslow v. Horne,[9] that words are actionable if they be of probable ill consequence to a person in a trade or profession or an office, is expressly disapproved of by the Court of Exchequer in Lumby v. Allday.[10] Bayley, B., there says: "Every authority which I have been able to find either shews the want of some general requisite, as, honesty, capacity, fidelity, or the like; or connects the imputation with the plaintiff's office, trade, or business." In that case, the words proved were a very strong imputation on the morality of the plaintiff, who was a clerk to a gas company. But the Court held them not actionable, because the imputation conveyed by them did not imply the want of any of those qualities which a clerk ought to possess, and because the imputation had no reference to his conduct as clerk. That case and the language of Bayley, B., in delivering the judgment of the Court, have since been repeatedly approved of, and are really decisive of this case.

The words before us are not actionable in themselves. No expression in them was argued to be so except the word "ringleader": and,

[8] The statement of the case is abridged, and the argument of counsel is for the most part omitted.

[9] (1771) 3 Wils. 177, 186, 2 W. Bl. 753.

[10] (1831) 1 Cr. & J. 305, 35 R. R. 715: (The declaration stated that P. was clerk of a gas company, and that D. spoke of P. these words: "You are a fellow, a disgrace to the town, unfit to hold your situation for your conduct with whores.")

Accord: Hogg v. Dorrah (1835) 2 Porter (Ala.) 212, Oram v. Franklin (1838) 5 Blackf. (Ind.) 42.

Compare: Stannard v. Wilcox & Gibbs Sewing Machine Co. (1912) 118 Md. 151, 84 Atl. 335, 42 L. R. A. (N. S.) 515, Ann. Cas. 1914B, 709; Nicholas v. Daily Reporter Co. (1905) 30 Utah, 74, 83 Pac. 573, 3 L. R. A. (N. S.) 339, 116 Am. St. Rep. 796, 8 Ann. Cas. 841, and the remarks of Lord Herschell in Alexander v. Jenkins, [1892] 1 Q. B. 797, 800, C. A. See also 18 Halsbury's Laws of England, 621, 622.

as to that, it is sufficient perhaps to say that Dr. Johnson points out the mistake of supposing that the word is by any means necessarily a word of bad import; for, amongst other authorities, he cites Barrow as calling St. Peter the "ringleader" of the Apostles. Neither are the words connected with the trade or profession of the plaintiff, either by averment or by implication; so that, on neither ground can the declaration be supported. There is no averment here that the consequence which followed was intended by the defendant as the result of his words; and therefore it is not necessary to consider the question which was suggested on the argument, whether words not in themselves actionable or defamatory spoken under circumstances and to persons likely to create damage to the subject of the words, are, when the damage follows, ground of action. The judgment of Lord Wensleydale in Lynch v. Knight, 9 H. L. C. at p. 600, appears in favour of the affirmative of this question. But it is not necessary for us, for the reasons given, to express any opinion upon it; and upon this demurrer there must be judgment for the defendant.

Judgment for the defendant.

REILLY v. CURTISS.

(Supreme Court of New Jersey, 1912. 83 N. J. Law, 77, 84 Atl. 199.)

Reilly sued Curtiss for slander, and obtained a judgment below. The defendant appealed.

TRENCHARD, J. In this action for slander, the judge of the district court, sitting without a jury, gave the plaintiff a judgment for $50.

The state of demand averred in effect, and the proof showed, that the defendant, in a certain discourse, falsely said that the election board of the Fourth district of the Eighth ward of the city of Elizabeth was drunk while on duty on registration day, and was totally unfit to receive names for registry. It was also averred and admitted that the plaintiff was a member of that board.

The sole contention of the defendant on this appeal is that the judge erred in not limiting the judgment to nominal damages. We are of opinion that there is no merit in the contention.

Every district board of registry and election is composed of four members. P. L. 1911, p. 277, § 4. A sweeping charge of misconduct, leveled against a public board without exception, necessarily points the finger of condemnation at every member thereof, though none are named; and every member of the board may maintain an action therefor. Levert v. Daily States Pub. Co., 123 La. 594, 49 South. 206, 23 L. R. A. (N. S.) 726, 131 Am. St. Rep. 356; 25 Cyc. 352, 362, 363.

The office of member of a district board of registry and election is one of profit (P. L. 1911, p. 283, § 11); and, under section 9, a member is subject to removal, if shown to be disqualified. Words spoken false-

ly, imputing drunkenness while on duty, and unfitness for duty, to a member of such board reflect upon his capacity, and tend to work a detriment, from a pecuniary point of view, by rendering his tenure precarious, and are actionable per se. 25 Cyc. 346; Heller v. Duff, 62 N. J. Law, 101, 40 Atl. 691.

When words spoken are actionable per se, plaintiff is not required to introduce evidence of actual damage to entitle him to substantial damages, since, in the absence of any evidence of damage, the law presumes damage. 25 Cyc. 531.

The case of Alexander v. Jenkins [1892] 1 Q. B. 797, cited by the defendant, is not in point. There the office for which the plaintiff was said to be unfit was not an office of profit, and the distinction was there carefully drawn.

The award [11] of substantial damages in the case at bar being justified, the judgment of the court below will be affirmed.

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(2) Slander through Special Damage

Now, if there was no special damage, on what grounds are the words actionable? They do not allege any crime; they do not allege a particular kind of infectious disease; they do not allege any other

[11] In Alexander v. Jenkins, [1892] 1 Q. B. 797, the charge was: "Alexander is never sober, and is not a fit man for the [town] council. On the night of the election he was so drunk that he had to be carried home." In holding that the action would not lie, Lord Herschell, in the Court of Appeal, said: "There is no case in which an action of slander has been held to lie for an imputation that a man by reason of his conduct is unfit for an office, except where, by reason of that misconduct, if it existed, he could have been deprived of the office. In Mr. Starkie's work, this liability—this danger of exclusion from office—is said to be that which gives rise to the action; and, at all events, there is there an intelligible ground upon which these actions may be rested, even if it be not altogether a satisfactory one. But we are asked today to make an extension, and to say that an action will lie where a person is charged with being unfit for his office, although he could not—however true the charge—be excluded for that reason from the office. That would be a step in advance, and I do not think it is a step in advance which we are justified in taking. It is on that ground exclusively that I desire to rest my judgment; I will put it shortly thus: That where the imputation is an imputation not of misconduct in an office, but of unfitness for an office, and the office for which the person is said to be unfit is not an office of profit, but one merely of what has been called honour or credit, the action will not lie, unless the conduct charged be such as would enable him to be removed from or deprived of that office."

Compare the remarks of Lopes, L. J., in Booth v. Arnold (1895) 1 Q. B. 571, 576: "In my judgment, words imputing want of integrity, dishonesty, or malversation to any one holding a public office of confidence or trust, whether an office of profit or not, are actionable per se. On the other hand, when the words merely impute unsuitableness for the office, incompetency, or want of ability, without ascribing any misconduct touching the office, then, according to the decision in Alexander v. Jenkins, [1892] 1 Q. B. 797, no action lies, where the office is honorary, without proof of special damage. It is said that this view is contrary to the recent case of Alexander v. Jenkins, [1892] 1 Q. B. 797; but a careful perusal of that case leads me to a different conclusion."

of the peculiar matters for which slander may be actionable without special damage, unless they ought to be construed as impugning the capacity or conduct of the plaintiff in the way of his profession as a solicitor.

Wright, J., in Dauncey v. Holloway.[12]

When our ancestors years ago drew the distinction between libel and slander they exercised that kind of wise discretion which they always exercised over the whole field of common law. It would, to my mind, be very dangerous for us nowadays to relax in any way the rule of law which confines actions for spoken words, in the absence of proof of special damage, to a very limited number of cases.

Vaughan Williams, L. J., in Dauncey v. Holloway.[12]

MATTHEW v. CRASS.

(Court of King's Bench, 1614. Cro. Jac. 323. 79 Reprint, 276.)

Action for these words, "Thou art a whoremaster, for thou hast lain with Brown's wife," by reason of which words he lost his marriage, ad damnum &c.

After verdict for the plaintiff, it was moved in arrest of judgment, that the words were not actionable, but examinable only in the Spiritual Court; and that this was the first precedent where loss of marriage was ever laid for words spoken of a man; and so not like to Anne Davies' Case, 4 Co. 16.

But it was conceived by the Court that there was not any difference betwixt the cases, as to the hinderance of marriage either of a man or of a woman; which being alleged in this case, and a temporal loss and damage to ensue thereby, though the crime is to be punished in the Ecclesiastical Court, yet these words give the Temporal Court jurisdiction, and make them here actionable. So the calling of one "bastard" is triable and determinable in the Spiritual Court; yet when matter subsequent is laid which is triable in a Temporal Court (as to entitle himself to be heir, or where he shews

[12] Dauncey v. Holloway, [1901] 2 K. B. 441, was an action for slander. The plaintiff was a solicitor in active practice. The words spoken of him were: "Have you heard about our neighbor (meaning the plaintiff) along here? They tell me he has gone for thousands instead of hundreds this time;" and, upon another occasion: "Have you heard anything about Mr. Dauncey. It seems to be a worse job than the other was. Miss Allen told me Mr. Dauncey has lost thousands." No special damage was shown. It was held by Wright, J., in the King's Bench Division, and by A. L. Smith, M. R., and Vaughan Williams and Romer, L. JJ., in the Court of Appeal, that in the absence of special damage the words were not actionable, as they were not reasonably capable of being construed as conveying an imputation on the plaintiff in his business as a solicitor.

some possibility of being heir), this maketh the calling of him "bastard" to be actionable at the common law: so here, by reason of the allegation of his loss of marriage by these words spoken, the action is maintainable; and judgment was given for the plaintiff.

SELL v. FACY.

(Court of King's Bench, 1615. 2 Bulst. 276, 80 Reprint, 1119.)

In an action upon the case for scandalous words, upon non culp. pleaded, a verdict was found for the plaintiff: it was moved for the defendant in arrest of judgment, that the declaration here is not good, in regard that he lays for the ground of his action, a loss of his marriage, by reason of the speaking of the words; he lays the same in this manner, quod intendebat & conatus fuit, to have such a woman in marriage, and that by reason of the words spoken of him, recusavit, she did refuse to have him; intendebat, this is but onely to shew what his intention was; he lays no communication of marriage, and therefore the declaration is not good, for that he ought to have laid, quod colloquium habitum fuit de matrimonio, but it is not so, and therefore not good.

CROKE, Justice. The words here are scandalous (being that he had a bastard, or such like words), if he had said, quod recusavit, and had laid the motion of marriage to her, this had been good, but not as it is here laid, with a conatus fuit, this is not good.

HAUGHTON, J. If all the women in this town should say, hearing of these words, spoken of him, that they would not have him for a husband, shall this be sufficient to give him cause of action, by no means it shall not, but he ought to lay specially in his declaration, that there was a motion of marriage for him, and this ought to be certainly laid, and not by intendment, as here he hath laid the same to be, and then also to lay a refusal for this, and so a breaking off by reason of the words thus spoken of him, and being thus laid, the declaration would then have been good, and the words actionable, but here this declaration is not good, and so the plaintiff ought not to have his judgment.[13]

[13] The concurring opinions of Coke, C. J., and Dodderidge and Croke, JJ., are omitted. "The court was all clear of opinion against the plaintiffe, that the declaration here was not good; and therefore they advised him, to begin his sute again, and to lay in his declaration, an express colloquium de matrimonio; and a breach, or falling off, by reason of these words; but this declaration, as it is, is too short, and not good, and so judgment ought to be given against the plaintiffe, and accordingly the rule of the Court was, quod querens nil capiat per billam."

Compare Rade v. Press Pub. Co. (1902) 37 Misc. Rep. 254, 75 N. Y. Supp. 298. The charge was that the defendant had falsely published of the plaintiff that he had consumption. As special damage the complaint alleged, inter alia, "that the young lady with whom he kept company avoids him."

BARNES v. BRUDDEL.

(Court of King's Bench, 1668–69. 1 Lev. 261, 83 Reprint, 397.)

Case for saying of her, being a virgin of good fame, "She was with child by Simons;" whereby she was in her parents' displeasure, and in danger of being put out of their house; afterwards judgment was stayed, for that the words were not actionable, there being no loss of marriage, which was the sole reason of Anne Davies's case: and the case in 1 Roll. 35. An action for saying, "She was with child," whereby she lost the society of her neighbours, held not to be law; but that 3 Cro. 639, "She had a child, and if she have not a child she has made it away," may be law, because it imports felony.

But note, in that case loss of marriage is laid also.

MOORE, Gent., v. MEAGHER.

(In the Exchequer Chamber, 1807. 1 Taunt. 39, 9 R. R. 702, 127 Reprint, 745.)

This was a writ of error from a judgment of the Court of King's Bench in an action on the case for defamation. The plaintiff below, in her declaration, alleged * * * that the defendant spoke and published the defamatory words complained of (imputing incontinence to the plaintiff), by means of the speaking of which—

the plaintiff had been and was greatly injured in her credit and reputation, and brought into public scandal, &c. and her friends and neighbours, and especially the several persons herein-before in that behalf named, had wholly refused to hold or permit any intercourse or society with her, or to receive and admit her into their respective houses or company, or to find or provide for her meat, drink, or any other benefits and advantages in any manner whatsoever, as they before that time had done, and otherwise would have continued to do; whereby the plaintiff had lost all those valuable benefits and advantages, being to her theretofore of great value, to wit, of the value of £100, and had been and was greatly reduced and prejudiced in her fortunes and pecuniary circumstances, and obliged to incur a much greater expense in her necessary living and supporting herself, to a large amount, to wit, the annual amount of £100, than she theretofore had done, and otherwise would have continued to do, and had been and was greatly impoverished, and all her friends had wholly withdrawn their friendship, &c.

A verdict was found for the plaintiff for £100 damages, and judgment was entered accordingly. The errors assigned were that none of the words alleged in the declaration were in themselves actionable, (which was admitted by the defendant in error,) and that no substantial or real specific damage, or legal or specific injury, was al-

This said Gaynor, J., "is no allegation of special damage by the loss of marriage. * * * Not only are the names and particulars not given, but there is not even any allegation that there existed any contract, purpose or intention of marriage."

leged to have been sustained in consequence of the words so spoken and published.

Richardson, for the defendant in error. The declaration has not been sufficiently stated in the plaintiff's argument. It alleges that the persons named gratuitously received the defendant in error into their houses, and provided her with meat and drink to the great reduction of her expenses, and increase of her riches. The defendant below demurred specially, and assigned for cause that this was not a temporal damage; but the court on argument held, that the question whether this were a temporal damage or not, was a matter of fact, and not a matter of law, and that if the provisions furnished to the plaintiff by her friends were of the annual value of £100, as the declaration alleged, the loss of them was a real damage, and directed the defendant to withdraw the demurrer and plead to the action. The jury have found the damages to be £100. And it is now contended, that this cannot be a special damage. The plaintiff below receives real benefit from the assistance of her friends; the defendant for malicious purposes speaks these words, by which she loses that assistance. It is admitted, that if the least pecuniary salary were lost, an action would lie: how can it be otherwise upon the loss of that which is equivalent in value to money? Com. Rep. 7 Ld. Raym. 266, and other authorities show, that, as against a wrongdoer, a possessory title is sufficient. It is urged that these persons were not bound to provide her entertainment: but they did in fact entertain her, and would have continued to entertain her, as the jury have found; whose verdict cannot now be controverted. Words spoken of a tradesman, are actionable, if spoken with reference to his trade: but words spoken of him, though not referring to his trade, are actionable if he thereby loses a customer. 1 Lev. 140. Yet no individual customer is bound to frequent any particular shop; but it is sufficient if he would in fact have come, except for the malicious interference of a stranger. The case of Hartly v. Herring, 8 Term Rep. 130, was an action brought by a preacher, for words imputing incontinence, per quod persons frequenting the chapel discontinued giving him the gains and profits which they had usually given. There the court held there was no objection to the declaration; and Lord Kenyon said it was sufficient if the plaintiff lost his occasional employment. * * *

Curwood, in reply. All the cases cited are cases of legal damage. The value of customers to a tradesman is fully recognized by the law: so is slander of title. If this action lies, no words are not actionable with the aid of an ingenious special pleader. (HEATH, J. Undoubtedly all words are actionable, if a special damage follows.)

MANSFIELD, C. J. This case is not distinguishable from that of Hartly v. Herring. We do not know how to say that this is not a special damage, sustained in consequence of words imputing infamy.

They have deprived this lady of an income derived from the bounty of others, which now, after verdict, we must assume, would have continued, if the defendant had not spoken these words. We cannot say the action will not lie.

Judgment affirmed.[14]

POLLARD v. LYON.

(Supreme Court of the United States, 1875. 91 U. S. 225, 23 L. Ed. 308.)

MR. JUSTICE CLIFFORD delivered the opinion of the court:

Words both false and slanderous, it is alleged, were spoken by the defendant of the plaintiff: and she sues in an action on the case for slander to recover damages for the injury to her name and fame.

Controversies of this kind, in their legal aspect, require pretty careful examination; and, in view of that consideration, it is deemed proper to give the entire declaration exhibited in the transcript, which is as follows:

"That the defendant, on a day named, speaking of the plaintiff, falsely and maliciously said, spoke and published of the plaintiff the words following: 'I saw her in bed with Captain Denty.' That at another time, to wit, on the same day, the defendant falsely and maliciously spoke and published of the plaintiff the words following: 'I looked over the transom-light and saw Mrs. Pollard,' meaning the plaintiff, 'in bed with Captain Denty'—whereby the plaintiff has been damaged and injured in her name and fame, and she claims damages therefor in the sum of $10,000."

Whether the plaintiff and defendant are married or single persons does not appear; nor is it alleged that they are not husband and wife, nor in what respect the plaintiff has suffered loss beyond what may be inferred from the general averment that she had been damaged and injured in her name and fame.

Service was made, and the defendant appeared and pleaded the general issue; which being joined, the parties went to trial; and the jury, under the instructions of the court, found a verdict in favor of the plaintiff for the whole amount claimed in the declaration. None of the other proceedings in the case, at the special term, require any notice, except to say that the defendant filed a motion in

[14] The statement of facts is abridged.

Accord: Davies v. Solomon (1871) L. R. 7 Q. B. 112: (The declaration, by Davies and Isabella, his wife, charged that the defendant had published a defamatory statement concerning Mrs. Davies, and that thereby the plaintiff Isabella was injured in her character and reputation, and became alienated from and deprived of the cohabitation of her husband, and lost and was deprived of the companionship and ceased to receive the hospitality of divers friends, and especially of her husband, John Davies, "and one M. D. and one G. H. T. and one A. J. M.," who have by reason of the premises withdrawn from the companionship and ceased to be hospitable to or friendly with the plaintiff Isabella. The defendant demurred, insisting that the special damage alleged was too remote.)

arrest of judgment, on the ground that the words set forth in the declaration are not actionable, and because the declaration does not state a cause of action which entitles the plaintiff to recover; and the record shows that the court ordered that the motion be heard at general term in the first instance. Both parties appeared at the general term and were fully heard; and the court sustained the motion in arrest of judgment, and decided that the declaration was bad in substance. Judgment was subsequently rendered for the defendant, and the plaintiff sued out the present writ of error. * * *

Examined in the light of these suggestions,[15] and the authorities cited in their support, it is clear that the proposition of the plaintiff, that the words alleged are in themselves actionable, cannot be sustained.

Concede all that, and still the plaintiff suggests that she alleges in the second paragraph of her declaration that "she has been damaged and injured in her name and fame," and she contends that the averment is sufficient, in connection with the words charged, to entitle her to recover as in an action of slander for defamatory words with averment of special damage.

Special damage is a term which denotes a claim for the natural and proximate consequences of a wrongful act; and it is undoubtedly true that the plaintiff in such a case may recover for defamatory words spoken of him or her by the defendant, even though the words are not in themselves actionable, if the declaration sets forth such a claim in due form, and the allegation is sustained by sufficient evidence; but the claim must be specifically set forth, in order that the defendant may be duly notified of its nature, and that the court may have the means to determine whether the alleged special damage is the natural and proximate consequence of the defamatory words alleged to have been spoken by the defendant. Haddan v. Lott, 15 C. B. 429.

Whenever proof of special damage is necessary to maintain an action of slander, the claim for the same must be set forth in the declaration, and it must appear that the special damage is the natural and proximate consequence of the words spoken, else the allegation will not entitle the plaintiff to recover. Vicars v. Wilcocks, 8 East, 3; Knight v. Gibbs, 1 Ad. & Ell. 46; Ayre v. Craven, 2 Ad. & Ell. 8; Roberts v. Roberts, supra [5 B. & S. 389].

When special damage is claimed, the nature of the special loss or injury must be particularly set forth, to support such an action for

[15] In the omitted passage, Mr. Justice Clifford, after an elaborate consideration of the questions involved, reached these conclusions: First, that the plaintiff had failed to show that the words alleged imputed any criminal offence for which, under the law of the District of Columbia, she could be indicted and punished; secondly, that although the words spoken imputed misconduct which was derogatory to the character of the plaintiff, and highly injurious to her social standing, still they were not actionable at common law unless special damage was alleged and proven.

words not in themselves actionable; and, if it is not, the defendant may demur. He did demur in the case last cited; and Cockburn, C. J., remarked that such an action is not maintainable, unless it be shown that the loss of some substantial or material advantage has resulted from the speaking of the words. Add. Torts (3d Ed.) 805; Wilby v. Elston, supra [8 M., G. & S. 142].

Where the words are not in themselves actionable, because the offense imputed involves neither moral turpitude nor subjects the offender to an infamous punishment, special damage must be alleged and proved in order to maintain the action. Hoag v. Hatch, 23 Conn. 590; Andres v. Koppenheafer, supra [3 Serg. & R. 255, 8 Am. Dec. 647]; Buys v. Gillespie, 2 Johns. (N. Y.) 117, 3 Am. Dec. 404.

In such a case, it is necessary that the declaration should set forth precisely in what way the special damage resulted from the speaking of the words. It is not sufficient to allege generally that the plaintiff has suffered special damages, or that the party has been put to great costs and expenses. Cook v. Cook, 100 Mass. 194.[16]

By special damage in such a case is meant pecuniary loss; but it is well settled that the term may also include the loss of substantial hospitality of friends. Moore v. Meagher, 1 Taunt. 42; Williams v. Hill, 19 Wend. (N. Y.) 306.

Illustrative examples are given by the text writers in great numbers, among which are loss of marriage, loss of profitable employment, or of emoluments, profits or customers; and it was very early settled that a charge of incontinence against an unmarried female, whereby she lost her marriage, was actionable by reason of the special damage alleged and proved. Davis v. Gardiner, 4 Co. 16 b, pl. 11; Reston v. Pomfreict, Cro. Eliz. 639.

Doubt upon that subject cannot be entertained; but the special damage must be alleged in the declaration, and proved; and it is not suf-

[16] Accord: Chamberlain v. Boyd (1883) 11 Q. B. D. 407: The words were: "The conduct of the Messrs. Chamberlain was so bad at a club in Melbourne that a round robin was signed urging the committee to expel them. As, however, they were there only for a short time, the committee did not proceed further." The defendant's demurrer was overruled by the trial court. The Court of Appeal gave judgment for the defendant. "It is not alleged," said Bowen, L. J., "that the defendant's words prevented the election of the plaintiff, and that is the fatal blot in the plaintiff's case."

Accord: Ford v. Lamb (1902) 116 Ga. 655, 42 S. E. 998: The defendant had falsely said of the plaintiff (Lamb) to one Bass, with whom the plaintiff was negotiating a trade: "Don't sell Lamb anything. He is no good. He will not pay for anything he gets." The petition set out this statement, and alleged that because of it Bass broke off the trade, "greatly to petitioner's worry and mortification," that the words spoken were false and malicious, and that they had injured the plaintiff in the sum of $3,000. There was no allegation as to the character of the plaintiff's business, or that he had any business, office, or occupation.

Compare the analogous principle in the libel case of Reporters' Association v. Sun Printing & Publishing Company (1906), before the Appellate Division of the New York Supreme Court, 112 App. Div. 246, 98 N. Y. Supp. 294, and the Court of Appeals, 186 N. Y. 437, 79 N. E. 710.

ficient to allege that the plaintiff "has been damaged and injured in her name and fame," which is all that is alleged in that regard in the case before the court. Hartley v. Herring, 8 T. R. 133; Add. Torts, 805; Hill. Torts (2d Ed.) 622; Beach v. Ranney, 2 Hill (N. Y.) 309.

Tested by these considerations, it is clear that the decision of the court below, that the declaration is bad in substance, is correct.

Judgment affirmed.

SPEAKE v. HUGHES.

(In the Court of Appeal. [1904] 1 K. B. 138.)

The action was for slander. It was tried before the assessor of the Court of Passage at Liverpool, who nonsuited the plaintiff.

COLLINS, M. R. This is an appeal from a decision of the learned assessor of the Passage Court at Liverpool. The action is brought in respect of spoken words which, in any point of view, cannot, in my opinion, be actionable in the absence of special damage resulting from them. The words alleged to have been spoken were these: "You have a barman in your employ, named Speake, who has removed from his landlord's house, leaving £2 owing for a month's rent, and I cannot get the money from him." The plaintiff alleges that special damage resulted from these words having been spoken by the defendant to a person, who, at the defendant's request, repeated them to the plaintiff's employers, the damage so alleged being that they thereupon dismissed the plaintiff from their service. It is a question of law whether such damage can, in point of law, be reasonably looked upon as a consequence of the words alleged to have been spoken by the defendant. The defendant might, I think, fairly be taken to have contemplated that, as a result of those words, the plaintiff's employers would exercise some pressure upon him to make him pay the rent owing to the defendant; but that, instead of doing that, the plaintiff's employers should, on the words being repeated to them, thereupon proceed to dismiss him, does not appear to me, in point of law, to be a natural consequence of the words spoken, or one which the defendant can reasonably be taken to have contemplated when he spoke them. That being so, I think the chain of causality between the words spoken and the alleged damage breaks down, and there is therefore no special damage upon which the plaintiff can rely in order to establish a cause of action. On these grounds I think the appeal fails.

MATHEW, L. J. I agree. It cannot, I think, be contended that the words alleged to have been spoken in this case can be actionable per se: and the special damage alleged is not such as, in my opinion, can be regarded as a natural consequence of the words spoken. The defendant might reasonably be supposed to have contemplated, when he

spoke the words, that the plaintiff's employers would remonstrate with him on the subject, but not that they would dismiss him from their service.[17]

Appeal dismissed.

(c) LIBEL

In spite of the dictum of Fletcher Moulton, L. J., in Jones v. Hulton, [1909] 2 K. B., at page 458, it cannot be admitted that "the action of libel" (or, indeed, any form of defamation except the anomalous statutory scandalum magnatum[18]) "is a very ancient action for a tort at common law." On the contrary, in spite of the fact that there had been three attempts in the year 1493 to bring cases of slander before the Star Chamber (Selden Soc. "Star Chamber," pp. 28–45), it was fully admitted, by the three judges, in an important case which came before the King's Bench at the end of the fifteenth century (Y. B. 12 Hen. VII (1498) Tr. pl. 2, fo. 22a) that slanderous words were then matter for the ecclesiastical courts; though it is clear, from other evidence, that actions for slander had long been familiar in the local courts of the manor and borough.[19] More than a hundred years later, in the Court of Star Chamber, libel, so far as the King's Courts were concerned, was treated as a purely criminal matter; whether it was directed against a private person or against a magistrate.[20] The procedure is in that case said to be (a) indictment at the common law, or (b) bill or confession in the Star Chamber; and the purely criminal character of the offence is emphasized by the statement, made without any qualification, that the truth of the libel and the character of the party libelled, are immaterial. Between 1498 and 1605, however, the action of Case for slanderous words had been adopted by the King's Courts; and there are several reported decisions of the sixteenth century, the first being, apparently, in the year 1536 (Anon., Dyer, 19a), when it was held by the Court of Common Bench, that two plaintiffs who had been called by the defendant "two false knaves and thieves" could not join in one action against him. In the following year, in Russell's Case (1537) Dyer, 26b, the principle that words imputing crime are actionable per se, was clearly adopted by the same Court on a plea of non dammificatus; and thereafter the action of Case for spoken words becomes common in the reports of Dyer, Godbolt and Jenkins, though

[17] The reporter's statement of the case and the argument of counsel for the plaintiff are omitted. It is remarked by the reporter that "it does not appear to have been suggested that any evidence could have been called of any special circumstances known to the defendant tending to shew that he contemplated the dismissal of the plaintiff as a probable consequence of the statement made by him. See Odgers on Libel and Slander (3d Ed.) c. 5, § 5, p. 168, and chapter 12, § 6, p. 371." As to this see infra, Part III.

[18] See 3 Holdsworth's History of Eng. Law, 315.—*Ed.*

[19] S. S. Select Pleas in Manorial Courts, pp. 36, 82, 95, &c.; Id. The Court Baron, &c., pp. 133, 136.

[20] Case of Scandalous Libels (1605) 5 Rep. 125a.

the other sixteenth century reporters apparently ignore it. In the year 1586, we get the interesting decision, that the allegation of malice in a declaration of slander is only formal, and that its omission is not fatal (Mercer's Case, Jenk. 268).

On the other hand, though the introduction of the printing press would seem to have rendered such a remedy essential, the action of Case for libel does not make its way into the books until the seventeenth century, when it begins to be regarded as an alternative of a bill in the Star Chamber (Lake v. Hatton (1618) Hob. 252); and it is then admitted by the reporter that to the action of Case, as distinguished from a bill or indictment, a plea of truth is a good answer. Another difference early taken was that, while communication to a party libelled may be a sufficient publication for a criminal prosecution, it is insufficient for an action of Case. * * *[21]

The jurisdiction of the ecclesiastical courts in Defamation was not abolished until 1855 (18 & 19 Vict. c. 41); but as, long before that time (Palmer's and Thorpe's Case (1583) 4 Rep. 20), the King's Courts had adopted the rule of prohibiting suits in the ecclesiastical courts where the plaintiff had a remedy at law, and as the ecclesiastical courts themselves would only entertain suits in respect of words imputing an ecclesiastical offence (Harris v. Butler (1798) 1 Hagg. 463n), the scope of the jurisdiction must have been small. It seems to have been chiefly resorted to in the case of spoken words imputing unchastity, which, until the passing of the Slander of Women Act, 1891, were not actionable per se in the common law courts, and are now so actionable only when spoken of a woman.

It seems, therefore, that, while the common law action of slander may be as old as 1535, the common law action of libel only dates from the commencement of the seventeenth century.

J. C. Miles, Digest Eng. Civ. Law, 501.

VILLERS v. MONSLEY.

(Court of Common Pleas, 1769. 2 Wils. 403, 95 Reprint, 886.)

Action upon the case * * * for a libel upon the plaintiff, in the words following:

> "Old Villers, so strong of brimstone you smell,
> As if not long since you had got out of hell,
> But this damnable smell I no longer can bear,
> Therefore I desire you would come no more here;
> You old stinking, old nasty, old itchy old toad,
> If you come any more you shall pay for your board."

* * * The defendant pleaded not guilty: a verdict was found for the plaintiff and sixpence damages, at the last assizes for the

[21] Edwardes v. Wootton (1607) reported in Hawarde's Cases in the Star Chamber, Ed. Baildon, pp. 343, 344; Barrow v. Lewellin (1616) Hob. 62; Hick's Case (1619) Id. 215.

county of Warwick. And now it was moved by Sergeant Burland, in arrest of judgment, that this was not such a libel for which action would lie; that the itch is a distemper to which every family is liable; to have it is no crime, nor does it bring any disgrace upon a man, for it may be innocently caught or taken by infection; the small-pox, or a putrid fever are much worse distempers; the itch is not so detestable or so contagious as either of them, for it is not communicated by the air, but by contact or putting on a glove, or the clothes of one who has the itch, and although it be an infectious distemper, yet it implies no offence in the person having it, and therefore no action will lie for saying or writing that a man has got the itch. It is not like saying or writing that a man has got the leprosy, or is a leper, for which an action upon the case will lie, because a leper shall be removed from the society of men by the writ of de leproso amovendo (1 Roll. Abr. 44; Cro. Jac. 144; Hob. 219), although it be a natural infirmity.

BATHURST, J. I wish this matter was thoroughly gone into, and more solemnly determined; however, I have no doubt at present, but that the writing and publishing anything which renders a man ridiculous is actionable; and whether the itch be occasioned by a man's fault or misfortune, it is a cruel charge, and renders him both ridiculous and miserable, by being kept out of all company: I repeat it, that I wish there was some more solemn determination, that the writing and publishing anything which tends to make a man ridiculous [22]

[22] Compare: Cook v. Ward (1830) 6 Bing. 409, 130 Reprint, 1338: (To entertain a party of friends, P. told as a joke on himself that he had attended a murder trial and been addressed there as the hangman; D. printed the story as a fact in his newspaper.) McBride v. Ellis (1856) 9 Rich. (S. C.) 313: (D. caused the publication in a local newspaper of an obituary notice of P., a lady. "The residence and name were truly given, though the age was greatly exaggerated.") Funston v. Pearson, in the King's Bench Division (London Times, March 12, 1915): (D., the proprietor of certain dental surgeries, advertised them on a theater curtain. The advertisement had these features: On one side of the curtain was the photograph of a lady absolutely without teeth. On the other side was a photograph of the same lady with a full set of teeth. Under the first picture was written "Before," and under the other "After." The photographs were both those of P., an actress, performing in London. Underneath the pictures appeared the following lines:

"Laugh and the world laughs with you,
But not when your teeth are bad,
So hustle and pay us a visit,
And get the laugh that's glad."

In P.'s action for libel, it was submitted, for the defendant, that the matter complained of was not reasonably susceptible of a defamatory meaning. Said Scrutton, J.: "Not to show a young and good-looking person with all her teeth out? I am entirely against you." Verdict for the plaintiff with £30 damages, and judgment thereon.)

But see Cohen v. New York Times Co. (1912) 153 App. Div. 242, 138 N. Y. Supp. 206, 210: ("The question, then, whether this publication [of an obituary notice of the plaintiff] could be a libel per se, involves the inquiry whether it could have injured the reputation of the plaintiff. Here is a bare item of news in a newspaper. The item states that an event has come

or infamous ought to be punished; for saying a man has the itch, without more, perhaps an action would not lie without other malevolent circumstances. I am of the same opinion that judgment must be for the plaintiff.

GOULD, J. What my Brother BATHURST has said is very material; there is a distinction between libels and words; a libel is punishable both criminally and by action, when speaking the words would not be punishable in either way; for speaking the words "rogue" and "rascal" of anyone, an action will not lie; but if these words were written and published of any one, I doubt not an action would lie. If one man should say of another that he has the itch, without more, an action would not lie; but if he should write those words of another, and publish them maliciously, as in the present case, I have no doubt at all but the action well lies. What is the reason why saying a man has the leprosy or the plague is actionable? It is because the having of either cuts a man off from society; so the writing and publishing maliciously that a man has the itch and stinks of brimstone, cuts him off from society. I think the publishing anything of a man that renders him ridiculous is a libel and actionable, and in the present case am of opinion for the plaintiff.

Judgment for the plaintiff PER TOT. CUR. without granting any rule to shew cause.

THORLEY v. LORD KERRY.

(In the Exchequer Chamber, 1812. 4 Taunt. 354, 13 R. R. 626.)

This was a writ of error brought to reverse a judgment of the King's Bench, in an action on a libel in a letter written by the defendant. The defamation was found in this passage in the letter, which was set out in the declaration:

"I sincerely pity the man (meaning the plaintiff) that can so far forget what is due, not only to himself but to others, who, under the cloak of religious and spiritual reform, hypocritically, and with the grossest impurity, deals out his malice, uncharitableness, and falsehoods."

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to pass which is looked for in the history of every man, is regarded as beyond his control, and therefore does not permit the inference that the man has done any act or suffered any act which he could not have done or which he need not have suffered. Prematurity is the sole peculiarity. How can the publication of such an event, merely as a matter of news, hold up the subject to scorn, to hatred, to contempt, or to ridicule, so that his reputation is impaired? Such publication may be unpleasant; it may annoy or irk the subject thereof; it may subject him to joke or to jest or banter from those who knew him or knew of him, even to the extent of affecting his feelings; but this in itself is not enough. Samuels v. Evening Mail Association [1875] 6 Hun, 5; Lombard v. Lennox [1891] 155 Mass. 70, 28 N. E. 1125, 31 Am. St. Rep. 528; Duvivier v. French [1900] 104 Fed. 278, 43 C. C. A. 529. The question is, as we have seen, whether the publication 'tends to lower him in the opinion of men whose standard of opinion the court can properly recognize or to induce them to entertain an ill opinion of him.' Lord Halsbury's Laws of England, vol. 18, p. 619." Per Jenks, P. J.)

Upon not guilty pleaded, the writing of the letter by the defendant was proved, and that he delivered it unsealed to a servant to carry, who opened and read it: a verdict was found for the plaintiff with £20 damages, and judgment was passed for the plaintiff without argument in the Court below. The plaintiff in error assigned the general errors.

Barnewall for the plaintiff in error, argued that there were no words in this case, for which, if spoken, the action would be maintainable, and he denied that there was any solid ground, either in authority or principle, for the distinction supposed to have prevailed in some cases, that certain words are actionable when written, which are not actionable when spoken. He contended that all actionable words were reducible to three classes: (1) Where they impute a punishable crime; (2) where they impute an infectious disorder; (3) where they tend to injure a person in his office, trade, or profession, or tend to his disherison, or produce special pecuniary damages. 1 Ro. Ab. Action sur case pur parols, passim; Co. Dig. Action upon the Case for Defamation, passim. And these words do not come within either of those classes. Neither of those books recognize the distinction between written and unwritten slander. All the older cases treat them on the same footing. * * * The reason assigned, that the printing or writing indicated a greater degree of malice than mere speaking, is a bad one; for it is not the object of an action at law to punish moral turpitude, but to compensate a civil injury: the compensation must be proportionate to the measure of the damage sustained; but it cannot be said that the publication of written slander is in all cases attended with a greater damage than spoken slander, for if a defendant speaks words to a hundred persons assembled, he disseminates the slander and increases the damage an hundred fold, as much as if he only wrote it in a letter to one.[23]

MANSFIELD, C. J. * * * The words, if merely spoken would not be of themselves sufficient to support an action. But the question now is, whether an action will lie for these words so written, notwithstanding that such an action would not lie for them if spoken; and I am very sorry it was not discussed in the Court of King's Bench, that we might have had the opinion of all the twelve Judges on the point, whether there be any distinction as to the right of action, between written and parol scandal; for myself, after having heard it extremely well argued, and especially, in this case by Mr. Barnewall, I cannot, upon principle, make any difference between words written and words spoken, as to the right which arises on them of bringing an action.

For the plaintiff in error it has been truly urged, that in the old books and abridgments no distinction is taken between words written

[23] The statement of the case has been abridged. Part of Barnewall's argument, all of Dampier's argument, and part of Chief Justice Mansfield's opinion are omitted.

and words spoken. But the distinction has been made between written and spoken slander as far back as Charles the Second's time, and the difference has been recognized by the Courts for at least a century back. It does not appear to me that the rights of parties to a good character are insufficiently defended by the criminal remedies which the law gives, and the law gives a very ample field for retribution by action for words spoken in the cases of special damage, of words spoken of a man in his trade or profession, of a man in office, of a magistrate or officer; for all these an action lies. But for mere general abuse spoken, no action lies. In the arguments both of the judges and counsel, in almost all the cases in which the question has been, whether what is contained in writing is the subject of an action or not, it has been considered, whether the words, if spoken, would maintain an action. It is curious that they have also adverted to the question, whether it tends to produce a breach of the peace: but that is wholly irrelevant, and is no ground for recovering damages. So it has been argued that writing shews more deliberate malignity; but the same answer suffices, that the action is not maintainable upon the ground of the malignity, but for the damage sustained. So, it is argued that written scandal is more generally diffused than words spoken, and is therefore actionable, but an assertion made in a public place, as upon the Royal Exchange, concerning a merchant in London, may be much more extensively diffused than a few printed papers dispersed, or a private letter: it is true that a newspaper may be very generally read, but that is all casual.

These are the arguments which prevail on my mind to repudiate the distinction between written and spoken scandal; but that distinction has been established by some of the greatest names known to the law, Lord Hardwicke, Hale, I believe, Holt, C. J., and others. Lord Hardwicke, C. J., especially has laid it down that an action for libel may be brought on words written, when the words, if spoken, would not sustain it. Co. Dig. tit. Libel, referring to the case in Fitzg. 122, 253, says there is a distinction between written and spoken scandal, by his putting it down there as he does, as being the law, without making any query or doubt upon it, we are led to suppose that he was of the same opinion. I do not now recapitulate the cases, but we cannot, in opposition to them, venture to lay down at this day that no action can be maintained for any words written, for which an action could not be maintained if they were spoken: upon these grounds we think the judgment of the Court of King's Bench must be affirmed.

The purpose of this action is to recover a compensation for some damage supposed to be sustained by the plaintiff by reason of the libel. The tendency of the libel to provoke a breach of the peace, or the degree of malignity which actuates the writer, has nothing to do with the question. If the matter were for the first time to be decided at this day, I should have no hesitation in saying, that no action could be

maintained for written scandal which could not be maintained for the words if they had been spoken.[24]

Judgment affirmed.

TRIGGS v. SUN PRINTING & PUBLISHING ASS'N.

(Court of Appeals of New York, 1904. 179 N. Y. 144, 71 N. E. 739, 66 L. R. A. 612, 103 Am. St. Rep. 841, 1 Ann. Cas. 326.)

Appeal taken in pursuance of leave granted by the Appellate Division of the Supreme Court, which certified that a question of law had arisen which, in its opinion, ought to be reviewed by the Court of Appeals. This question was stated as follows: Does the complaint state facts sufficient to constitute a cause of action?

The complaint, without alleging special damage, set forth three articles which had been published in the defendant's newspaper, alleged that the plaintiff was and for seven years had been engaged in teaching in the Department of English at the University of Chicago, and in writing on subjects connected with English literature, and prayed judgment in damages for a libel.

The character of these articles is indicated in the following extract:

"We cannot boast of having discovered Triggs, for he was born great, discovered himself early, and has a just appreciation of the value of this discovery. But in our humble way we have helped communicate him to the world, assisted in his effusion and diffusion, and beckoned reverent millions to his shrine. We have joyed to see him perform three heroic labors, viz.:

"1. 'Knock out' old Whittier and Longfellow.

"2. 'Do up' the hymn writers.

"3. Name his baby at the end of a year of solemn consultation.

"But these achievements are only the bright beginning of a long course of halcyon and vociferous proceedings. As yet, Prof. Triggs is but in the

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[24] "It is not easy to perceive why any distinction should be made between written and oral slander, but the case referred to, Thorley v. Lord Kerry, has established it too firmly to be shaken." Best, C. J., in Archbishop of Tuam v. Robeson (1828) 5 Bing. 17, 21, 30 R. R. 530, 533.

"The civil doctrine of libel was first announced by Lord Chief Baron Hale in King v. Lake in the Exchequer, in 1670, Hardres, 470. There are a few earlier cases in which the defamation was in writing, but on no occasion was this regarded as a title to a remedy if the matter written did not come within recognized exceptions. King was a barrister who claimed to have been damnified in his good name and credit and profession by reason of the fact that Sir Edward Lake had written of a petition to Parliament drawn up by King that it was stuffed with illegal assertions, ineptitudes and imperfections, and clogged with gross ignorances, absurdities, and solecisms. Hale held that 'although such general words spoken once without writing or publishing them would not be actionable, yet here, they being writ and published, which contains more malice than if they had been once spoken, they are actionable.' * * * The matter may be said to have been finally determined by the judgment of the Exchequer Chamber in the case of Thorley v. Lord Kerry, in 1812, 4 Taunton, 355." Van Vechten Veeder, "History of the Law of Defamation," 3 Col. Law Rev. 569, 3 Legal Essays, 471–473.

bud. He came near blossoming the other day, and the English drama would have blossomed with him. A firm which is to produce 'Romeo and Juliet' offered him $700 a week to be the 'advance agent' of the show and to 'work up enthusiasm by lecturing.' Prof. Triggs was compelled to decline the offer, but the terms of his refusal show that it is not absolute, and that 'some day,' as the melodramas cry, he will illuminate Shakespeare, dramatic literature, and the public mind. * * * If these plays are to be put upon the stage, they must be rewritten: and Prof. Triggs is the destined rewriter, amender, and reviser. The sapless, old-fashioned rhetoric must be cut down. The fresh and natural contemporary tongue, pure Triggsian, must be substituted. For example, who can read with patience these tinsel lines?

"'Madam, an hour before the worshipped sun
'Peered forth the golden window of the east,
'A troubled mind drave me to walk abroad.'

"This must be translated into Triggsian, somewhat like this:

"'Say, lady, an hour before sunup I was feeling wormy, and took a walk around the block.'

"Here is more Shakesperian rubbish:

"'O, she doth teach the torches to burn bright!
'Her beauty hangs upon the cheek of night,
'As a rich jewel in an Ethiop's ear.'

"How much more forcible in clear concise Triggsian:

"'Say, she's a peach! a bird!'

"Hear 'Pop' Capulet drivel:

"'Go to, go to,
'You are a saucy boy.'

"In the Oscar dialect this is this:

"'Come off, kid! You're too fresh.'

"Compare the dropsical hifalutin:

"'Night's candles are burnt out, and jocund day,
'Stands tiptoe on the misty mountain's tops.'

—with the time-saving Triggsian version:

"'I hear the milkman.'"

To the complaint the defendant demurred upon the ground that it did not state facts sufficient to constitute a cause of action. The issue of law thus raised was tried at the Special Term, and the court found (1) that the complaint states facts sufficient to constitute a cause of action; and (2) that the statements complained of are libelous per se. It thereupon directed an interlocutory judgment overruling the demurrer, with costs, with leave to the defendant to answer within 20 days upon payment of costs, and, in default, that final judgment should be entered. The defendant appealed from such interlocutory judgment to the Appellate Division, where it was reversed, and the demurrer of the defendant sustained, with costs, with leave to the plaintiff to amend his complaint. Thereupon he appealed from the order of the Appellate Division by permission of that court.[25]

MARTIN, J. (after stating the facts). This action was for libel. The defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. By interposing a demurrer upon that ground, all the facts alleged in the complaint,

[25] The statement of the case is abridged.

or which can by reasonable and fair intendment be implied from the allegations thereof, are deemed admitted. Marie v. Garrison, 83 N. Y. 14; Sanders v. Soutter, 126 N. Y. 193, 195, 27 N. E. 263; Ahrens v. Jones, 169 N. Y. 555, 559, 62 N. E. 666, 88 Am. St. Rep. 620. A written or printed statement or article published of or concerning another which is false, and tends to injure his reputation, and thereby expose him to public hatred, contempt, scorn, obloquy, or shame, is libelous per se. Riggs v. Denniston, 3 Johns. Cas. 198, 2 Am. Dec. 145; Steele v. Southwick, 9 Johns. 214; Van Ness v. Hamilton, 19 Johns. 349, 367; Root v. King, 7 Cow. 613; Cooper v. Greeley, 1 Denio, 347; Shelby v. Sun Printing & P. Ass'n, 38 Hun, 474, affirmed 109 N. Y. 611, 15 N. E. 895; McFadden v. Morning Journal Ass'n, 28 App. Div. 508, 51 N. Y. Supp. 275; Bergmann v. Jones, 94 N. Y. 51, 64; Moore v. Francis, 121 N. Y. 199, 23 N. E. 1127, 8 L. R. A. 214, 18 Am. St. Rep. 810; Morey v. Morning Journal Ass'n, 123 N. Y. 207, 25 N. E. 161, 9 L. R. A. 621, 20 Am. St. Rep. 730; Mattice v. Wilcox, 147 N. Y. 624, 42 N. E. 270; Gates v. N. Y. Recorder Co., 155 N. Y. 228, 49 N. E. 769; Morrison v. Smith, 177 N. Y. 366, 69 N. E. 725.[26]

When the articles published by the defendant of and concerning the plaintiff are read in the light of the foregoing principles of law, it becomes obvious, we think, that they were libelous per se. It seems impossible for any fair-minded person to read the articles alleged in the complaint without reaching the conclusion that they were not only intended, but necessarily calculated, to injure the plaintiff's reputation, and to expose him to public contempt, ridicule, or shame. * * *[27]

The order of the Appellate Division should be reversed, the judgment of the Special Term affirmed, and the question certified answered in the affirmative.

PECK v. TRIBUNE CO.

(Circuit Court of Appeals, Seventh Circuit. 1907. 83 C. C. A. 202, 154 Fed. 330. Supreme Court of United States. 1909. 214 U. S. 185, 29 Sup. Ct. 554, 53 L. Ed. 960, 16 Ann. Cas. 1075.)

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

The case in the court below was an action at law by plaintiff in error, a citizen of Iowa, against defendant in error, a corporation organized under the laws of Illinois, to recover damages for the printing in its newspaper by defendant in error of the advertisement given on the following page.

[26] See, also, Holm v. Holm (1911) 146 App. Div. 75, 130 N. Y. Supp. 670, and cases in "Libel and Slander," Cent. Dig. §§ 1-9; Dec. Dig. § 16.

[27] For the remainder of the opinion, see infra, under Fair Comment.

The first two counts of the declaration proceeded as for libel, and alleged that the plaintiff was not Mrs. Schuman, was not a nurse, and was a total abstainer from whisky and all spirituous liquors. There was also a count for publishing the plaintiff's likeness without leave. The defendant pleaded not guilty. At the trial, subject to exceptions, the judge excluded the plaintiff's testimony in support of her allegations just stated, and directed a verdict for the defendant.[28]

In the Circuit Court of Appeals.

GROSSCUP, Circuit Judge. The plaintiff in error indisputably has suffered a wrong, the gist of which is that by the publication of her picture in connection with a patent medicine advertisement, people who recognize the portrait will be led to think that she has loaned her face, and perhaps her name, in a way that a self-respecting person would not have consented to. Were the case under review an application for an injunction to restrain future publications, or were it an action at law against the parties consciously responsible for the make-up of the advertisement, a question wholly different from the one presented by this record would be involved.

The first question presented here is, whether the plaintiff in error made out a case of libel in her declaration and proof—the gravamen of the action, as set forth in the declaration, being, that whereas plaintiff in error was not a nurse, and did not either for herself, or as nurse, use Duffy's Malt Whiskey as a tonic, the advertisement was calculated to convey the impression that she was a nurse, and that both for herself, and as nurse, she had used Duffy's Malt Whiskey as a tonic. This being the whole of the libel charged, and there being no averment of special damages, the question is: Is such a publication libelous per se? We think not. It is not, in our opinion, libelous, per se, to say of a person that she is a nurse, or that she has used as a tonic Duffy's Pure Malt Whiskey, or has recommended its use. Nor do we think that these things said of a person, independently of other averments or circumstances, make out a case to go to a jury for determination. Doubtless there are people, by whom the use of whiskey as a tonic is considered wrong; and there may be people among whom to be a nurse, is considered something less desirable than not to be a nurse. But the world has not yet arrived at a concensus of opinion on these matters, that to say these things of a person is, independently of all other considerations, to libel him. * * *[28]

[28] The statement of the case is abridged, and the opinions of Judge Grosscup in the Circuit Court of Appeals and of Mr. Justice Holmes in the Supreme Court are given only so far as they bear upon the one point.

The third count, framed on the theory of a right of privacy, was held defective, there being no showing of substantial damage.

In the Supreme Court of the United States.

On a Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit.

Mr. Justice Holmes delivered the opinion of the Court. * * * The question then is whether the publication was a libel. It was held by the Circuit Court of Appeals not to be, or at most to entitle the plaintiff only to nominal damages, no special damage being alleged. It was pointed out that there was no general concensus of opinion that to drink whisky is wrong, or that to be a nurse is discreditable. It might have been added that very possibly giving a certificate and the use of one's portrait in aid of an advertisement would be regarded with irony, or a stronger feeling, only by a few. But it appears to us that such inquiries are beside the point. It may be that the action for libel is of little use, but, while it is maintained, it should be governed by the general principles of tort. If the advertisement obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of a majority vote.

We know of no decision in which this matter is discussed upon principle. But obviously an unprivileged falsehood need not entail universal hatred to constitute a cause of action. No falsehood is thought about or even known by all the world. No conduct is hated by all. That it will be known by a large number, and will lead an appreciable fraction of that number to regard the plaintiff with contempt, is enough to do her practical harm. Thus, if a doctor were represented as advertising, the fact that it would affect his standing with others of his profession might make the representation actionable, although advertising is not reputed dishonest, and even seems to be regarded by many with pride. See Martin v. The Picayune (Martin v. Nicholson Pub. Co.) 115 La. 979, 4 L. R. A. (N. S.) 861, 40 So. 376. It seems to us impossible to say that the obvious tendency of what is imputed to the plaintiff by this advertisement is not seriously to hurt her standing with a considerable and respectable class in the community.[29] Therefore it was the plaintiff's right to prove her case and go to the jury, and the defendant would have got all that it could ask if it had been permitted to persuade them, if it could, to take

[29] Compare D'Altomonte v. New York Herald Co. (1913) 154 App. Div. 453, 139 N. Y. Supp. 200: (A sensational article, under a half page illustration and the heading, "Stopping a Congo cannibal Feast," was published in the defendant's newspaper. In a subheading it named the plaintiff, a distinguished traveller and writer, as its author, gave a short biographical sketch of him, and represented him as describing himself in the act of rescuing a young and courageous American "just as he was about to be killed and eaten by savages." The article was a fabrication by some person unknown to plaintiff. It was "not avowedly written in jest with a view to amusing the readers of the newspaper," but was apparently written "in a perfectly serious vein.")

a contrary view. Culmer v. Canby, 41 C. C. A. 302, 101 Fed. 195, 197; Twombly v. Monroe, 136 Mass. 464, 469. See Gates v. New York Recorder Co., 155 N. Y. 228, 49 N. E. 769.

It is unnecessary to consider the question whether the publication of the plaintiff's likeness was a tort per se. It is enough for the present case that the law should at least be prompt to recognize the injuries that may arise from an unauthorized use in connection with other facts, even if more subtlety is needed to state the wrong than is needed here. In this instance we feel no doubt.

Judgment reversed.

(B) Elements of the Prima Facie Cause in Defamation

(a) Nature of the Charge.

(aa) Defamatory

KELLY v. PARTINGTON.

(Court of King's Bench, 1833. 5 Barn. & Adol. 645, 110 Reprint. 929.)

The declaration in its second count stated that the defendant, falsely and maliciously spoke and published of and concerning the plaintiff as a shopwoman and servant, these defamatory words: "She (meaning the plaintiff) secreted 1s. 6d. under the till; stating, these are not times to be robbed." The declaration concluded with an allegation of special damage, that one Stenning, by reason of the speaking of the words, refused to take the plaintiff into his service. The jury found a general verdict for the plaintiff.

Sir James Scarlett obtained a rule nisi for arresting the judgment, on the ground that the words in the second count, taken in their grammatical sense, were not disparaging to the plaintiff; and therefore that no special damage could result from them.

The Solicitor-General shewed cause. The words in the second count (as the Court has already decided) are not actionable without special damage. The question is, whether they are actionable even with special damage. (Denman, C. J. It is contended that the words import that the plaintiff secreted her own money from excessive caution.) The words may not be actionable of themselves, but such words, if a jury find them to have been spoken with a malicious intent to injure the plaintiff, as charged in this declaration, are actionable by reason of special damage. Comyns, C. B., in his Digest, tit. Action on the Case for Defamation, D, 30, after having stated, under the previous heads, many instances of words actionable in themselves, says, that an action may be maintained "for any words by which the party has a special damage." Even, therefore, if the words in question, bore the sense ascribed to them, yet being spoken

falsely and maliciously with intent to injure, and followed by special damage, they are actionable. And these were in fact not innocent, but disparaging words, or at all events, equivocal; and it was for the jury to find in what sense they were used. The word "secreted" is used in a bad sense, it usually imputes some bad motive. If the words "stating, these are not times to be robbed," apply to the plaintiff, they are ambiguous, they may have been used by her as a pretence for secreting money belonging to another, and that question was for the jury. (LITTLEDALE, J. Suppose a man had a relation of a penurious disposition, and a third person, knowing that it would injure him in the opinion of that relation, tells the latter a generous act which the first has done, by which he induces the relation not to leave him money, would that be actionable?) If the words were spoken falsely with intent to injure, they would be actionable. At all events, if the words were not laudatory but would bear a bad sense, and a jury might find (as they did here) that they were used in that sense, and an injury is stated to have ensued in consequence, they are actionable.[30]

LITTLEDALE, J. I cannot agree that words laudatory of a party's conduct would be the subject of an action if they were followed by special damage. They must be defamatory or injurious in their nature. In Comyn's Dig., tit. Action on the Case for Defamation (D), 30, it is said generally, that any words are actionable by which the party has a special damage, but all the examples given in illustration of that rule are of words defamatory in themselves, but not actionable, because they do not subject the party to a temporal punishment. In all the instances put, the words are injurious to the reputation of the person of whom they are spoken. The words here are extraordinary; if they had stood merely, "She secreted 1s. 6d. under the till," they might perhaps have been actionable,[31] but coupled with the subsequent words, which appear only to import great caution on the part of the plaintiff, I think we cannot say that they impute anything injurious to the plaintiff.[32]

Rule absolute.

[30] The statement of facts has been abridged, and the opinions of Denman, C. J., and Taunton, J., are omitted.

[31] It appears that the words in the second count, "stating these are not times to be robbed," were in fact part of the expressions supposed to have been used by the defendant himself, but had by mistake been inserted in this count as if spoken by the plaintiff.

[32] Whether words which are not defamatory may be actionable as a tort of some other description, see infra, Part III.

On the extension of Slander and Libel to include nondefamatory statements affecting the plaintiff in his business, see infra.

Compare: Knight v. Blackford (1884) 14 D. C. 177, 51 Am. Rep. 772: (D. falsely stated to S. that P., a clerk in the employ of the government, had spoken disrespectfully of his chief, this report came to the knowledge of the latter, and he discharged P.)

Lombard v. Lennox (1891) 155 Mass. 70, 28 N. E. 1125, 31 Am. St. Rep. 528: (P. was in the employ of S., a manufacturer, as an apprentice. D., also

ARNE v. JOHNSON.

(Court of King's Bench, 1712. 10 Mod. 111, 88 Reprint, 651.)

An action was brought for these words spoken of an upholster:

"You are a soldier, I saw you in your red coat doing duty: your word is not to be taken."

The words were ruled to be actionable; because it is known to be a common practice for tradesmen to protect themselves against their creditors by a counterfeit listing; nor can it be worth a tradesman's while for any other purpose, but to defraud his creditors, by subjecting himself to the power of an officer. A soldier has by Act of Parliament, which the Court must take notice of, the privilege of not being held to special bail; and those words, "your word is not to be taken," are plainly an inference from the former.

BOYDELL v. JONES.

(Court of Exchequer, 1838. 4 Mees. & W. 446, 51 R. R. 676.)

Libel. The declaration stated, that whereas the plaintiff, for a long time before and at the time of the committing of the grievances by the defendant as hereinafter mentioned, resided and still does reside in Devonshire Street, Queen Square, London, and had been and was and still is an attorney of the Court of our Lady the Queen before the Queen herself, and had used, exercised and carried on the profession and business of attorney-at-law, with great credit and reputation, and whereas before the time of the committing of the grievances by the defendant as hereinafter mentioned, certain orders had been made by one of the Judges of the said Court of our Lady the Queen before the Queen herself, for setting aside with costs certain proceedings in a certain action then pending in the said last mentioned court, in which action the now defendant was the attorney of the then plaintiff, and the now plaintiff was the attorney of the then defendant; and before the time of the committing of the grievances by the now defendant as hereinafter mentioned, the said costs had been and were ascertained and taxed by one of the Masters of the said Court; and whereas before and at the time of the committing of the grievances by the now defendant as hereinafter mentioned, sharp practice in the profession of an attorney was and is, and was and is considered to be and to import, disreputable practice, and practice discreditable to the attorney

a manufacturer, believing P. to be an apprentice of his, so informed S., who thereupon discharged P. In fact, P. had been an apprentice of D., but was not so at the time.)

See, also, 25 Cyc. 353-354.

adopting or pursuing the same; whereof the now defendant then had notice: yet the now defendant, well knowing the premises, but contriving and falsely and maliciously intending to injure the now plaintiff in his good name, fame, and credit, and also in his said profession and business of an attorney-at-law, and to cause it to be suspected and believed that the now plaintiff had been guilty of such sharp practice as aforesaid in the said action, and that he the now plaintiff had been reprimanded by the said Master for such practice as aforesaid in the said action, &c., heretofore, to wit, on &c., wrongfully, maliciously, and injuriously composed and published a certain ironical, false, scandalous, malicious, and defamatory libel of and concerning the now plaintiff, and of and concerning him in the way of and in respect of his said profession and business of attorney-at-law, and of and concerning the said action, and of and concerning the practice of the now plaintiff as such attorney with respect to the aforesaid orders, then wrongfully supposed by the now defendant to be such sharp practice as aforesaid, and of and concerning the said Master, containing therein the ironical, false, &c., matter following, of and concerning the now plaintiff, &c. &c., (that is to say):

"An honest lawyer (thereby meaning the now plaintiff, and intending to represent that he was not an honest lawyer), a person by the name of Charles Boydell (meaning the now plaintiff), an attorney in Devonshire Street, Queen Square, was severely reprimanded by one of the Masters of the Queen's Bench (meaning the aforesaid Master) the other day, for what is called sharp practice in his profession" (meaning and alluding to the now plaintiff's practice with respect to the aforesaid orders in the said action, and that such practice had been and was sharp practice as aforesaid). By means of which, &c.

The questions argued were (inter alia) whether the declaration showed a good cause of action. Upon this question, after hearing argument for the defendant, judgment was given as follows:

PARKE, B. Suppose he had ceased to practice as an attorney—this is not an action for words but for a libel. This is a libel on him as a man. Suppose he had retired from his profession, and taken his name off the roll, to write of him that whilst he was an attorney, he had been guilty of sharp practice, would be a libel upon him. With respect to the other point, I think it was a sufficient prefatory averment, that the libel was ironical. * * *

The rest of the Court concurred.

Judgment for the plaintiff.[33]

[33] The statement of facts is abridged and part of the opinion is omitted.

DOOLING v. BUDGET PUB. CO.

(Supreme Judicial Court of Massachusetts, 1887. 144 Mass. 258, 10 N. E. 809, 59 Am. Rep. 83.)

Tort, for an alleged libel, contained in the following words:

"Probably never in the history of the Ancient and Honorable Artillery Company was a more unsatisfactory dinner served than that of Monday last. One would suppose, from the elaborate bill of fare, that a sumptuous dinner would be furnished by the caterer, Dooling; but instead, a wretched dinner was served, and in such a way that even hungry barbarians might justly object. The cigars were simply vile, and the wines not much better."

At the trial in the Superior Court, before Pitman, J., the publication of the words by the defendant was admitted.

The plaintiff's counsel, in opening the case to the jury, stated that the plaintiff was a caterer in the city of Boston with a very large business, and acted as caterer upon the occasion referred to. Upon the statement of the plaintiff's counsel that he should offer no evidence of special damage, the judge ruled, without reference to any question of privilege that might be involved in the case, that the words set forth were not actionable per se, and that the plaintiff could not maintain his action without proof of special damage; and, the plaintiff's counsel still stating that he should offer no evidence of special damage, directed a verdict for the defendant; and reported the case for the determination of this court.

If the ruling was correct, judgment was to be entered on the verdict; otherwise, the case to stand for a new trial.

C. ALLEN, J. The question is, whether the language used imports any personal reflection upon the plaintiff in the conduct of his business, or whether it is merely in disparagement of the dinner which he provided. Words relating merely to the quality of articles made, produced, furnished, or sold by a person, though false and malicious, are not actionable without special damage. For example, the condemnation of books, paintings, and other works of art, music, architecture, and generally of the product of one's labor, skill, or genius, may be unsparing, but it is not actionable without the averment and proof of special damage, unless it goes further, and attacks the individual. Gott v. Pulsifer, 122 Mass. 235, 23 Am. Rep. 322; Swan v. Tappan, 5 Cush. 104; Tobias v. Harland, 4 Wend. (N. Y.) 537; Western Counties Manure Co. v. Lawes Chemical Manure Co., L. R. 9 Ex. 218; Young v. Macrae, 3 B. & S. 264; Ingram v. Lawson, 6 Bing. N. C. 212. Disparagement of property may involve an imputation on personal character or conduct, and the question may be nice, in a particular case, whether or not the words extend so far as to be libellous, as in Bignell v. Buzzard, 3 H. & N. 217.

The old case of Fen v. Dixe, W. Jones, 444, is much in point. The plaintiff there was a brewer, and the defendant spoke of his beer in

terms of disparagement at least as strong as those used by the present defendant in respect of the plaintiff's dinner, wines, and cigars; but the action failed for want of proof of special damage.

In Evans v. Harlow, 5 Q. B. 624, 631, Lord Denman, C. J., said: "A tradesman offering goods for sale exposes himself to observations of this kind; and it is not by averring them to be 'false, scandalous, malicious, and defamatory,' that the plaintiff can found a charge of libel upon them."

In the present case there was no libel on the plaintiff, in the way of his business. Though the language used was somewhat strong, it amounts only to a condemnation of the dinner and its accompaniments. No lack of good faith, no violation of agreement, no promise that the dinner should be of a particular quality, no habit of providing dinners which the plaintiff knew to be bad, is charged, nor even an excess of price beyond what the dinner was worth; but the charge was, in effect, simply that the plaintiff, being a caterer, on a single occasion, provided a very poor dinner, vile cigars, and bad wines. Such a charge is not actionable, without proof of special damage.[34]

Judgment on the verdict.

[34] Accord: Tobias v. Harland (1830) 4 Wend. (N. Y.) 537: (D. said of P., a watch maker: "His watches are bad.") Kennedy v. Press Publishing Co. (1886) 41 Hun (N. Y.) 422: (P. was the proprietor of a Coney Island saloon. D.'s newspaper published an article which charged that Coney Island saloons were the resort of improper characters.) Victor Safe & Lock Co. v. Deright (1906) 147 Fed. 211, 77 C. C. A. 437, 8 Ann. Cas. 809, and note: (The plaintiff was a corporation engaged in making the "Victor" safe. The defendant, engaged in selling other safes, wrote to a purchaser of a "Victor" safe that "the Victor plate safe is very cheaply constructed and can be easily burglarized; the Victor so-called 'manganese steel safe' is weaker still, and can be opened inside of a vault or any where else in a few moments time.") Dust Sprayer Mfg. Co. v. Western Fruit Grower (1907) 126 Mo. App. 139, 103 S. W. 566: (D. published a letter in a fruit growers' magazine, stating that he had used P.'s remedy for brown rot on peach trees, and had found it disastrous.) Hopkins Chemical Co. v. Read Drug & Chemical Co. (1914) 124 Md. 210, 92 Atl. 478: (D. stated that a certain tooth paste was "nothing else but grit, was very harmful to the gums, and would take the enamel off your teeth." P. was the sole manufacturer of this tooth paste.)

Compare the remark of Cullen, J., in Kennedy v. Press Publishing Co. (1886) 41 Hun (N. Y.) 423: "A libel on a thing may constitute a libel on a person. Thus, to say of a brewer that he adulterates his beer would be a libel upon him in his trade, not because of the allegation that the beer was bad, but because the language would import deceit and malpractice on the part of the brewer. It is, therefore, at times difficult to determine whether the publication attacks the person or merely the thing, and any apparent conflict in the authorities arises out of this difficulty." And see infra.

MERLE v. SOCIOLOGICAL RESEARCH FILM CORPORATION.

(Supreme Court of New York, Appellate Division, First Department, 1915. 152 N. Y. Supp. 829.)

The action was against the Sociological Research Film Corporation. To the complaint, setting forth two causes of action, the defendant demurred. The facts appear in the opinion of the court below, by Lehman, J., which was as follows:

The plaintiff in his complaint attempts to set forth two causes of action, both based upon the production of a moving picture film or play entitled, "The Inside of the White Slave Traffic," in which the producer depicts a factory and building bearing the plaintiff's firm name of August G. Merle & Co. The defendant has demurred to both causes of action. The first cause of action is for libel, and the only allegations which are, in my opinion, possibly material to a personal action for libel as distinguished from an action for libel of the plaintiff's business, are: That the plaintiff does business under the firm name of August G. Merle & Co., has an excellent name and reputation, and that he employs a large number of hands; that the defendants have produced and exhibited a moving picture film or play called "The Inside of the White Slave Traffic," wherein they purported to portray the life of those engaged or associated in the said white slave traffic, wherever possible showing the actual places where the traffickers operate; and that in said play they showed the building wherein the plaintiff's business is located, and prominently displayed thereon and as part thereof the plaintiff's name and his business sign, "August G. Merle & Co., Infants' and Children's Headwear," and also showed a factory purporting to be located in said building and to be plaintiff's said establishment and factory as places where the said cadets and traffickers plied their vicious trade and obtained victims from among the girls employed in said building and establishment, and as places used by said cadets and traffickers as rendezvous between them and the unfortunate victims whom they succeeded in obtaining or procuring in said building and factory; "that the defendants thereby falsely, untruthfully, and maliciously charged, and intended to charge, the plaintiff with being in some way identified or connected with or related to the said white slave traffic or system or with said cadets or traffickers, with allowing or permitting the said trafficking in his establishment or in and around the building wherein his place of business was located, either for gain or otherwise, and that in the said building and in the plaintiff's said establishment there was grave and serious danger for the girls and women and for the young men employed therein that they might be approached or enticed or seduced or molested by these cadets or white slave traffickers and induced, corrupted, enticed, or forced into a life of vice, crime, shame, and prostitution, and that in some way the plaintiff had knowledge or notice of this condition of affairs, and that he participated therein, or at least acquiesced in or countenanced the same."

A suit for libel based upon a moving picture production is a somewhat novel proceeding, but there is no doubt that if the production tends to bring a person into disrepute it may give rise to such an action. The serious question in this case is, however, whether the alleged libel is a libel directed against the plaintiff's business or a libel against himself personally, for concededly the complaint does not contain allegations of special damage sufficient to state a cause of action if the libel is directed only against his business. The distinction between the two classes of cases is pointed out in the case of Marlin Fire Ins. Co. v. Shields, 171 N. Y. 384, 390, 64 N. E. 163, 59 L. R. A. 310. The rule seems to be that words spoken or written primarily against a man's business cannot give rise to an action for damages without special damage unless they also directly charge the plaintiff with a personal wrong.

Whether the picture used in this case does charge the plaintiff personally with any wrongdoing must be determined from the description of the picture itself, and, though upon this motion the description of the picture must be taken as true, the reasonable inferences which can be drawn from that picture cannot be extended by innuendo. It seems to me that the only fair inference to be drawn from that picture is that it contains a charge that the plaintiff's place of business is a place where cadets and white slave traffickers ply their vicious trade and obtain victims and is used as a rendezvous between them and their victims, and so far supports at least the innuendo that the plaintiff permits the traffic to proceed upon his premises. It does not, however, charge the plaintiff with actual knowledge of such traffic. The case therefore seems to me to come directly down to the question: Does a charge that a place of business where many girls are employed is used as a place where the white slave trade may be recruited and as a rendezvous for cadets and their victims reasonably imply such moral wrong against the owner of the place of business as would bring him personally into general disrepute?

It seems to me quite clear that, even if we may assume that the owner of the place of business is ignorant of such conditions, yet public opinion would hold him in abhorrence for being so careless of the conditions surrounding the place where his women employés work that evil men can use the place to entice them into vice. Moreover, it would seem that a charge that a business is being carried on in a vicious manner might well reasonably imply that the owner of the business is morally responsible therefor.

The defendant, however, relies upon the case of Kennedy v. Press Publishing Co., 41 Hun, 422, in which it was held that a charge that the plaintiff's saloon was the resort of improper characters, and that the influence of association had there was bad, was held not to be a libel on the plaintiff personally, and on the case of Bosi v. N. Y. Herald Co., 33 Misc. Rep. 622, 68 N. Y. Supp. 898, affirmed on opinion below, 58 App. Div. 619, 68 N. Y. Supp. 1134, where a similar construction was given to an article charging that the plaintiff's restaurant was a resort favored by anarchists. Both these cases seem to rest upon the principle that a restaurant or saloon keeper is not personally responsible for the character of his guests, and that therefore the articles affect the plaintiff only in his business; but, whatever may be the moral responsibility of a saloon or restaurant owner to keep out vicious guests, the measure of responsibility resting upon a factory owner, who has complete control of his premises and can restrict visitors there in any way he sees fit, is obviously governed by different considerations.

It follows that the demurrers to the first cause of action are overruled. * * *[35]

PER CURIAM. Order affirmed, on the opinion of Lehman, J., with leave to defendant to withdraw demurrer and answer on payment of costs.

MOORE v. FRANCIS et al.

(Court of Appeals of New York, 1890. 121 N. Y. 199, 23 N. E. 1127, 8 L. R. A. 214, 18 Am. St. Rep. 810.)

The action was for libel. There was a verdict for the defendants, with judgment thereon. From a judgment of the General Term of the Supreme Court, affirming the judgment below, and an order denying a motion for a new trial, the plaintiff appealed.

ANDREWS, J. The alleged libelous publication which is the subject of this action was contained in the "Troy Times" of September 15,

[35] The second cause of action is omitted. The demurrer to it was sustained.

1882, in an article written on the occasion of rumors of trouble in the financial condition of the Manufacturers' National Bank of Troy, of which the plaintiff was, at the time of the publication, and for eighteen years prior thereto had been, teller. The rumors referred to had caused a "run" upon the bank, and it is claimed by the defendants, and it is the fair conclusion from the evidence, that the primary motive of the article was to allay public excitement on the subject. That part of the publication charged to be libellous is as follows:

"Several weeks ago it was rumored that Amasa Moore, the teller of the bank, had tendered his resignation. Rumors at once began to circulate. A reporter inquired of Cashier Wellington if it was true that the teller had resigned, and received in reply the answer that Mr. Moore was on his vacation. More than this the cashier would not say. A rumor was circulated that Mr. Moore was suffering from overwork, and that his mental condition was not entirely good. Next came reports that Cashier Wellington was financially involved, and that the bank was in trouble. A Times reporter at once sought an interview with President Weed of the bank, and found him and Directors Morrison, Cowee, Bradwell and others in consultation. They said that the bank was entirely sound, with a clear surplus of $100,000: that there had been a little trouble in its affairs occasioned by the mental derangement of Teller Moore, and that the latter's statements, when he was probably not responsible for what he said, had caused some bad rumors."

The complaint is in the usual form, and charges that the publication was false and malicious, made with intent to injure the plaintiff in his good name and credit in his occupation as bank teller, and to cause it to be believed that by reason of mental derangement he had become incompetent to discharge his duties, and had caused injury to the bank, etc.

The court on the trial was requested by the plaintiff's counsel to rule as a question of law that the publication was libellous. The court refused, but submitted the question to the jury. The jury found a verdict for the defendants, and as the verdict may have proceeded upon the finding that the article was not libellous, the question is presented whether it was per se libellous. If it was, the court erred in leaving the question to the jury. It is the settled law of this state that in a civil action for libel, where the publication is admitted and the words are unambiguous and admit of but one sense, the question of libel or no libel is one of law which the court must decide. Snyder v. Andrews, 6 Barb. 43; Matthews v. Beach, 5 Sandf. 256; Hunt v. Bennett, 19 N. Y. 173; Lewis v. Chapman, 16 N. Y. 369; Kingsbury v. Bradstreet Co., 116 N. Y. 211, 22 N. E. 365. Of course an error in submitting the question to the jury would be harmless if their finding that the publication was not libellous was in accordance with its legal character. The import of the article, so far as it bears upon the plaintiff, is plain and unequivocal. The words amount to a distinct affirmation: first, that the plaintiff was teller of the bank; second, that while acting in this capacity he became mentally deranged; third, that the derangement was caused by overwork; fourth, that while teller, and suffering from this mental alienation, he made injurious

statements in respect to the bank's affairs, which occasioned it trouble.

The cases of actionable slander were defined by Chief Justice De Grey, in the leading case of Onslow v. Horne, 3 Wilson, 177, and the classification made in that case has been generally followed in England and this country. According to this classification, slanderous words are those which (1) import a charge of some punishable crime; or (2) impute some offensive disease which would tend to deprive a person of society; or (3) which tend to injure a party in his trade, occupation or business; or (4) which have produced some special damage.

Defamatory words, in common parlance, are such as impute some moral delinquency or some disreputable conduct to the person of whom they are spoken. Actions of slander for the most part are founded upon such imputations; but the action lies in some cases where the words impute no criminal offense, where no attack is made upon the moral character, nor any charge of personal dishonor. The first and larger class of actions are those brought for the vindication of reputation, in its strict sense, against damaging and calumnious aspersions. The other class fall, for the most part, at least within the third specification in the opinion of Chief Justice De Grey, of words which tend to injure one in his trade or occupation. The case of words affecting the credit of a trader, such as imputing bankruptcy or insolvency, is an illustration. The action is maintainable in such a case, although no fraud or dishonesty is charged, and although the words were spoken without actual malice. The law allows this form of action, not only to protect a man's character as such, but to protect him in his occupation also against injurious imputations. It recognizes the right of a man to live, and the necessity of labor, and will not permit one to assail by words the pecuniary credit of another except at the peril, in case they are untrue, of answering in damages. The principle is clearly stated by Bayley, J., in Whittaker v. Bradley, 7 D. & R. 649: "Whatever words have a tendency to hurt, or are calculated to prejudice a man who seeks his livelihood by any trade or business, are actionable." When proved to have been spoken in relation thereto, the action is supported, and unless the defendant shows a lawful excuse, the plaintiff is entitled to recover without allegation or proof of special damage, because both the falsity of the words and resulting damage are presumed. 1 Saund. 243, note; 1 Am. Ldg. Cas. 135.

The authorities tend to support the proposition that spoken words imputing insanity are actionable, per se, when spoken of one in his trade or occupation, but not otherwise, without proof of special damage. Morgan v. Lingen, 8 L. T. Rep. 800; Joannes v. Burt, 6 Allen (Mass.) 236, 83 Am. Dec. 625. The imputation of insanity in a written or printed publication is a fortiori libellous where it would constitute slander, if the words were spoken. Written words are libellous in all cases where, if spoken, they would be actionable, but they may be libellous where they would not support an action for oral slander.

There are many definitions of libel. The one by Hamilton, in his argument in People v. Croswell, 3 Johns. Cas. 337, append., viz.: "A censorious or ridiculing writing, picture or sign, made with malicious intent towards government, magistrates or individuals," has been often referred to with approval; but, unless the word censorious is given a much broader signification than strictly belongs to it, the definition would not seem to comprehend all cases of libellous words. The word "libel," as expounded in the cases, is not limited to written or printed words which defame a man, in the ordinary sense, or which impute blame or moral turpitude, or which criticise or censure him. In the case before referred to, words affecting a man injuriously in his trade or occupation, may be libellous, although they convey no imputation upon his character. Words, says Starkie, are libellous if they affect a person in his profession, trade or business, "by imputing to him any kind of fraud, dishonesty, misconduct, incapacity, unfitness or want of any necessary qualification in the exercise thereof." Starkie on Slander, § 188. * * *

The publication now in question is not simply an assertion that the plaintiff is or has been affected with "mental derangement," disconnected with any special circumstances. The assertion was made to account for the trouble to which the bank had been subjected by reason of injurious statements made by the plaintiff while in its employment. Words to be actionable on the ground that they affect a man in his trade or occupation, must, as is said, touch him in such trade or occupation; that is, they must be shown, directly or by inference, to have been spoken of him in relation thereto and to be such as would tend to prejudice him therein. Sanderson v. Caldwell, 45 N. Y. 405, 6 Am. Rep. 105. The publication did, we think, touch the plaintiff in respect to his occupation as bank teller. It imputed mental derangement while engaged in his business as teller, which affected him in the discharge of his duties. The words conveyed no imputation upon the plaintiff's honesty, fidelity or general capacity. They attributed to him a misfortune, brought upon him by an over-zealous application in his employment. While the statement was calculated to excite sympathy, and even respect for the plaintiff, it nevertheless was calculated also to injure him in his character and employment as a teller. On common understanding, mental derangement has usually a much more serious significance than mere physical disease. There can be no doubt that the imputation of insanity against a man employed in a position of trust and confidence such as that of a bank teller, whether the insanity is temporary or not, although accompanied by the explanation that it was induced by overwork, is calculated to injure and prejudice him in that employment, and especially where the statement is added that in consequence of his conduct in that condition the bank had been involved in trouble. The directors of a bank would naturally hesitate to employ a person as teller, whose mind had once given away under stress of similar duties, and run the risk of a recurrence

of the malady. The publication was, we think, defamatory in a legal sense, although it imputed no crime and subjected the plaintiff to no disgrace, reproach or obloquy, for the reason that its tendency was to subject the plaintiff to temporal loss and deprive him of those advantages and opportunities, as a member of the community, which are open to those who have both a sound mind and a sound body. The trial judge, therefore, erred in not ruling the question of libel as one of law. The evidence renders it clear that no actual injury to the plaintiff was intended by the defendants, but it is not a legal excuse that defamatory matter was published accidentally or inadvertently, or with good motives and in an honest belief in its truth.

The judgment should be reversed and a new trial granted. All concur.

Judgment reversed.[36]

SHEPHEARD v. WHITAKER.

(Court of Common Pleas, 1875. L. R. 10 C. P. 502.)

The declaration stated that the defendant falsely and maliciously printed and published in a certain newspaper called The Bookseller, the words following, that is to say:

"The Gazette. First meeting under the new Bankruptcy Act. Shepheard, Shepheard, and Yeomans, Garrick Street and Cheapside, under the firm of British and Foreign Stationery Company, stationers, printers, and booksellers, as regards Charles Yeomans,"

the defendant meaning thereby that the plaintiff's firm had been bankrupt, or had taken proceedings in liquidation or for composition, and that a first meeting of creditors under their bankruptcy or proceedings in liquidation or for composition was about to be held. Plea, not guilty. Issue thereon.

At the trial, it appeared that, through the negligence of persons in the defendant's employ, instead of announcing, in the extracts from the London Gazette inserted in their newspaper called The Bookseller, published on the 1st of January, 1875, that there had been a dissolution of the partnership of their firm, the advertisement announcing it was inserted amongst the first meetings under the Bankruptcy Act. Upon the discovery of the mistake, the defendant, whose publication appeared monthly, printed and circulated amongst the trade 4000 copies of the Bookseller's Circular explaining the blunder, and inserted an ample apology in his next issue, on the 1st of February, and also in the Stationers' Circular of the 5th.

The learned judge left it to the jury to say whether or not the publication was libellous, telling them that at all events it was not a case for serious damages. The jury returned a verdict for the plaintiff, damages £50.

[36] Part of the opinion is omitted.

Weatherfield moved for a new trial on the grounds of misdirection and that the damages were excessive: he also moved to arrest the judgment, on the ground that the declaration disclosed no cause of action. He submitted that the form in which the announcement appeared was such that no person of ordinary intelligence could have been misled by it; that the learned judge ought not to have left the case to the jury; that, if anybody was likely to be affected by the publication, it was Yeomans only; and that, at all events, the damages were unjustifiably large.[37]

BRETT, J. Whether a publication amounts to a libel or not is a question for the jury; and, as it is impossible for us to say that the words could not by possibility amount to a libel, the judgment cannot be arrested. The damages doubtless are somewhat high, seeing that no malice is suggested. But it is not surprising that a jury should give large damages where bankruptcy is imputed to a trader.

Rule refused.[38]

(bb) Of and Concerning the Plaintiff

JOHNSON v. SIR JOHN AYLMER.

(Court of King's Bench, 1605. Cro. Jac. 126, 79 Reprint, 109.)

Action; for that the defendant "hæc falsa et scandalosa verba sequentia dixit et publicavit":

"Mr. Price, you do my Lord Burleigh wrong, that you do not apprehend Jeremy Johnson" (innuendo the plaintiff) "for a felon, and seize his goods: for he" (innuendo the plaintiff) "hath stolen a sheep from Wright, of Rirsby" (innuendo John Wright).

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[37] The statement of the case is abridged, and an opinion by Lord Coleridge, C. J., is omitted. It appeared that the third member of the partnership, Yeomans, had brought a similar action, which was settled by a nominal verdict.

[38] "The law has always been very tender of the reputation of tradesmen, and therefore words spoken of them in the way of their trade will bear an action that will not be actionable in the case of another person." Per Curiam in Harman v. Delany (1731) 2 Stra. 898, 93 Reprint, 925.

"A statement is defamatory if it imputes insolvency to a trader; and this is so whether or not the statement includes any suggestion of discreditable conduct or incapacity. It may be doubted, indeed, whether this is strictly logical. It would seem that, apart from any such suggestion, an allegation of insolvency should be classed merely as an injurious falsehood, not as defamation. For insolvency is not a personal quality or defect like insanity, which in itself excites the disrespect or dislike or ridicule of other persons. It is a misfortune which is consistent with a high regard for the character and competence of the insolvent. Nevertheless it is settled law that a charge of insolvency is to be classed as defamatory, and is subject to all the severities of the law of libel, and not to the more lenient rules which govern cases of injurious falsehood. In view of the very serious mischief which an unfounded allegation of insolvency may work, it is well that responsibility for it should be maintained at this high level." Salmond, Law of Torts (2d Ed.) 405.

The defendant pleaded not guilty; and found against him, and damages assessed to £50. After verdict, it was moved in arrest of judgment, that the words are too generally laid to maintain the action; for they are not alledged to be spoken of the plaintiff in the writ or count; but only in reciting the words he saith, "innuendo the plaintiff;" and the innuendo, without expressly alledging the words to be spoken of the plaintiff, will not maintain the action.

And THE COURT was of that opinion, wherefore, it was adjudged for the defendant.

NORTHROP v. TIBBLES.

(Circuit Court of Appeals of the United States, Seventh Circuit, 1914. 131 C. C. A. 407, 215 Fed. 99.)

BAKER, Circuit Judge. To plaintiff in error's declaration for libel a demurrer for want of facts was sustained, plaintiff declined to amend, and judgment for defendant was entered.

Many objections are urged by defendant; but, if the declaration is deficient in any material respect, the judgment must be affirmed.

So we may assume that the letter written and mailed by defendant to a third person contains matter libelous per se (though this is strenuously controverted), that defendant intended to defame plaintiff, and that plaintiff, when she somehow obtained a copy, applied the libel to herself. But the letter does not name plaintiff as the person intended to be libeled; and the declaration fails to charge (either as a conclusion of fact, if such pleading is permissible, or by an exhibition of extraneous facts that have the necessary effect of showing) that the recipient of the letter, or any other third party, understood the libelous matter to refer to plaintiff.

To allege that defendant wrote and published (by mailing) the letter "of and concerning plaintiff" is not enough. As this court said in Duvivier v. French, 104 Fed. 278, 43 C. C. A. 529: "The gravamen of an action for libel is not injury to the plaintiff's feelings, but damage to his reputation in the eyes of others. * * * It is not enough, to constitute libel, that the plaintiff knew that he was the subject of the article, or that the defendants knew of whom they were writing; it must appear upon the face of the declaration that persons other than these must have reasonably understood that the article was written of and concerning the plaintiff, and that the so-called libelous expressions related to him."

See, also, Robinson v. Drummond, 24 Ala. 174; De Witt v. Wright, 57 Cal. 576; Patterson v. Edwards, 7 Ill. (2 Gilman) 720; McLaughlin v. Fisher, 136 Ill. 111, 24 N. E. 60; McCallum v. Lambie, 145 Mass. 234, 13 N. E. 899; Carlson v. Minnesota Tribune Co., 47 Minn. 337, 50 N. W. 229; Miller v. Maxwell, 16 Wend. (N. Y.) 9; Sasser

v. Rouse, 35 N. C. 145; Dunlap v. Sundberg, 55 Wash. 609, 104 Pac. 830, 133 Am. St. Rep. 1050.

As plaintiff refused to plead the necessary additional facts, we must believe that (but for the filing of her present declaration) her reputation with the world at large remained as good as if the letter had been written in a code unknown to any one except defendant and herself.

The judgment is affirmed.

WANDT v. HEARST'S CHICAGO AMERICAN.

(Supreme Court of Wisconsin, 1906. 129 Wis. 419, 109 N. W. 70, 6 L. R. A. [N. S.] 919, 116 Am. St. Rep. 959, 9 Ann. Cas. 864.)

The action was brought by Rose Wandt against Hearst's Chicago American. There was a judgment for the plaintiff, and the defendant appealed.

WINSLOW, J. This is an action for libel. The complaint charged in effect that the defendant corporation published and circulated in its newspaper, in the city of Milwaukee, the following article with the picture or photograph of the plaintiff immediately under the first headline:

"Suicide Girl Laid to Rest.

"Evelyn Daly, Suicide.

[Photograph]

"Milwaukee, Aug. 17.—Evelyn Daly, daughter of Mrs. E. L. Daly, of East Lake, Mich., and who, under the name of Cecil Davis, of Cadillac, Mich., succeeded in ending her life after twenty-five attempts, was buried here today. Here are some of the attempts she has made within the last three months.

"June 5—Took morphine; went to Emergency Hospital and asked to be pumped out. * * *" [39]

—and that the defendant thereby falsely, willfully, and maliciously charged the plaintiff with having committed suicide, and with having many times attempted to commit suicide, to her great damage. A general demurrer to the complaint was overruled, and the defendant appeals.

It is elementary that written or printed publications which falsely tend to bring the plaintiff into public disgrace, contempt, or ridicule are libelous. Bradley v. Cramer, 59 Wis. 309, 18 N. W. 268, 48 Am. Rep. 511. It is also elementary that a libel need not be in printed language, but that a caricature, or picture, or effigy, with or without printed language, which is understood to refer to the plaintiff, and which has the tendency to bring disgrace, contempt, or ridicule upon the plaintiff, is libelous. Newell on Slander and Libel (2d Ed.) p. 43, c. 4, § 1. A printed statement to the effect that a person is a suicide

[39] The rest of the article, referring throughout to "Miss Daly," and two of its headlines, are omitted.

fiend, has attempted suicide 25 times, and would usually go to the hospital and ask to be pumped out, certainly has a tendency to bring that person into public contempt and ridicule. Had the article in question given no name, but simply stated that the person whose picture was given had done these things, there would be little doubt in the mind of any one that it would have been libelous, provided the picture was accurate enough to be recognized as the plaintiff's picture. From the allegations of the complaint it must be assumed that the picture was fairly accurate, as it is called a photograph, doubtless meaning a halftone reproduction of a photograph, which can now be made with a considerable degree of accuracy. The insertion of the picture under the headline of the article is, of course, in effect a statement that it is a picture of the person referred to in the article. Hence the article and picture together constitute a libel as matter of law, unless the fact that the article states that the suicide's name was Evelyn Daly can be held to be an antidote to the otherwise libelous effect.

This contention is strongly made by the appellant, and is in fact the only contention worthy of very serious consideration. It seems quite true, as urged by the appellant, that persons who knew the plaintiff well, and knew her residence and family, would probably not be misled, but would at once conclude that the picture was inserted by mistake; but there may well be a considerable number of persons, who only know the plaintiff by sight or have merely a slight acquaintance, who would recognize the picture at once, and would conclude that the article in fact did refer to the plaintiff, concluding (if they knew the plaintiff's name at all) that such name was merely another alias. The complaint alleges that the plaintiff has been greatly damaged by the publication. There is ample room for the inference that she may well have been damaged in the estimation of the classes of people last mentioned. The fact that she may not have been damaged in the estimation of friends who knew her well would only affect the extent of injury and mitigate the damages. A very similar case where a like result was reached will be found in De Sando v. New York Herald Co., 88 App. Div. 492, 85 N. Y. Supp. 111.[40]

Order affirmed.

[40] In Peck v. Tribune Co. (1909) 214 U. S. 185, 29 Sup. Ct. 554, 53 L. Ed. 960, 16 Ann. Cas. 1075, Mr. Justice Holmes, referring to the pictorial advertisement in that case (see ante, p. 591), remarked: "The publication was of and concerning the plaintiff notwithstanding the presence of another fact, the name of the real signer of the certificate, if that was Mrs. Schuman, that was inconsistent when all the facts were known, with the plaintiff's having signed or adopted it. Many might recognize the plaintiff's face without knowing her name, and those who did know it might be led to infer that she had sanctioned the publication under an alias."

On the collateral question, when the defendant has published the plaintiff's picture without his consent, but also without any defamatory matter, see "The Right to Privacy," 4 Harv. Law Rev. 193 (1890), "The Right of Privacy," 2 Columbia Law Rev. 437, and cases under Key-No. "Torts," § 8.

JONES v. E. HULTON & CO.

(Court of Appeal. [1909] 2 K. B. 444.)

E. HULTON & CO. v. JONES.

(House of Lords. [1910] A. C. 20.)

Application by the defendants for judgment or a new trial in an action before Channell, J., with a special jury.

The plaintiff, Mr. Thomas Artemus Jones, a barrister practising on the North Wales Circuit, brought the action to recover damages for the publication of an alleged libel concerning him contained in an article of the Sunday Chronicle, a newspaper of which the defendants were the printers, proprietors, and publishers. The article, which was written by the Paris correspondent of the paper, purported to describe a motor festival at Dieppe, and the parts complained of ran thus:

"Upon the terrace marches the world, attracted by the motor races—a world immensely pleased with itself, and minded to draw a wealth of inspiration—and, incidentally, of golden cocktails—from any scheme to speed the passing hour. * * * 'Whist! there is Artemus Jones with a woman who is not his wife, who must be, you know—the other thing,' whispers a fair neighbour of mine excitedly into her bosom friend's ear. Really, is it not surprising how certain of our fellow countrymen behave when they come abroad? Who would suppose, by his goings on, that he was a churchwarden at Peckham? No one, indeed, would assume that Jones in the atmosphere of London would take on so austere a job as the duties of a churchwarden. Here, in the atmosphere of Dieppe, on the French side of the Channel, he is the life and soul of a gay little band that haunts the Casino and turns night into day, besides betraying a most unholy delight in the society of female butterflies."

The plaintiff had in fact received the baptismal name of Thomas only, but in his boyhood he had taken, or had been given, the additional name of Artemus, and from that time he had always used, and had been universally known by, the name of Thomas Artemus Jones or Artemus Jones. He had, up to the year of 1901, contributed signed articles to the defendants' newspaper. The plaintiff was not a churchwarden, nor did he reside in Peckham. Upon complaint being made by the plaintiff of the publication of the defamatory statements in the article, the defendants published the following in the next issue of their paper:

"It seems hardly necessary for us to state that the imaginary Mr. Artemus Jones referred to in our article was not Mr. Thomas Artemus Jones, barrister, but, as he has complained to us, we gladly publish this paragraph in order to remove any possible misunderstanding and to satisfy Mr. Thomas Artemus Jones we had no intention whatsoever of referring to him."

The defendants alleged that the name chosen for the purpose of the article was a fictitious one, and having no reference to the plaintiff, and chosen as unlikely to be the name of a real person, and they denied that any officer or member of their staff who wrote or printed or published before publication the words complained of knew the plaintiff

or his name or his profession, or his association with the journal or with the defendants, or that there was any existing person bearing the name of or known as Artemus Jones. They admitted publication, but denied that the words were published of or concerning the plaintiff. On the part of the plaintiff the evidence of the writer of the article and of the editor of the paper that they knew nothing of the plaintiff, and that the article was not intended by them to refer to him, was accepted as true. At the trial witnesses were called for the plaintiff, who said that they had read the article and thought it referred to the plaintiff. The jury returned a verdict for the plaintiff with £1750 damages, and the learned judge gave judgment for the plaintiff. The defendants appealed.

FARWELL, L. J.[41] The appellants contend that the verdict and judgment in this case cannot stand, because it was proved that neither the writer of the libellous article nor any person in the defendants' employment under whose notice it came before it was published knew or had even heard of the existence of the plaintiff, and that it therefore necessarily follows that the defendants cannot have intended the libellous words to apply to the plaintiff. The question for us is whether this contention is right.

The old declaration in an action for libel still accurately states the issues that have to be proved, namely, that the defendants falsely and maliciously printed and published of the plaintiff in the A. paper (or as the case may be) the words following (setting them out), meaning thereby that the plaintiff, &c., &c. It is hardly necessary to say that actual malice is not necessary: malice in law is sufficient, and that is shewn by the falsity and defamatory nature of the words, as soon as it has been proved that they were written of the plaintiff. But the plaintiff has to prove (1) the publication, and (2) that it is of the plaintiff; and then he has to prove the libellous nature of the words, that is, the innuendo. It is contended that the libel cannot be published of the plaintiff if it be proved that his existence was unknown to the defendant. A plaintiff need not, of course, be named in the libel: it is sufficient if he be sufficiently described, and for this purpose recourse may be had to the innuendo. As Lord Campbell says in Le Fanu v. Malcomson, 1 H. L. C. at pp. 637, 668, "It comes round to the old rule, that you cannot by an innuendo extend the natural meaning of the words which are spoken or written, but by the innuendo you may point out the particular individual to whom these words apply." The first step is to prove that the words published, whether by name, nickname, or description, are such as reasonably to lead persons acquainted with the plaintiff to believe that he is the person to whom the libel refers; the next step is to prove that that is the true intent and meaning of the words used. This is what I understand to be meant by Lord

[41] The statement of facts is abridged, and opinions of Lord Alverstone, C. J., and Moulton, L. J., and part of opinion of Farwell, L. J., are omitted.

Cottenham in Le Fanu v. Malcomson, 1 H. L. C., at p. 664: "If a party can publish a libel so framed as to describe individuals, though not naming them, and not specifically describing them by any express form of words, but still so describing them that it is known who they are, as the jurors have found it to be here, and if those who must be acquainted with the circumstances connected with the party described may also come to the same conclusion, and may have no doubt that the writer of the libel intended to mean those individuals, it would be opening a very wide door to defamation, if parties suffering all the inconvenience of being libelled were not permitted to have that protection which the law affords. If they are so described that they are known to all their neighbours as being the parties alluded to; and if they are able to prove to the satisfaction of a jury that the party writing the libel did intend to allude to them, it would be unfortunate to find the law in a state which would prevent the party being protected against such libels." Lord Campbell, 1 H. L. C., at page 668, says: "Whether a man is called by one name or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on, know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done, as would be done if his name and Christian name were ten times repeated." It is however, argued that when Lord Cottenham says "the writer of the libel intended to mean these individuals" he is referring to the intention in the writer's mind as distinct from the intention expressed in the words that he has used, as explained by the relevant surrounding circumstances. In my opinion this is not so, and I may remark that it was not the contention of the appellants' counsel in that case; he opened his case by asserting that it was necessary to shew "that the libel on the record should point to the plaintiffs," &c. The rule is well settled that the true intention of the writer of any document, whether it be contract, will, or libel, is that which is apparent from the natural and ordinary interpretation of the written words; and this, when applied to the description of an individual, means the interpretation that would be reasonably put upon those words by persons who knew the plaintiff and the circumstances. * * *

In the present case the jury have found that the libellous article described an actual scene at Dieppe, and that "Artemus Jones" mentioned therein described an actual person and not a mere type. If the defendants had proved in the present case not only that the writer of the article did not know of the plaintiff's existence, but also that there was an Artemus Jones other than the plaintiff, who was present at Dieppe in the company alleged, then the circumstances with reference to which the words "Artemus Jones" were used would shew that the plaintiff was not the person intended; but the writer of the libel has chosen to state as a fact that Artemus Jones was present in order (as he says) to avoid the banality of using A. B. or a blank: he has, therefore, for his own purposes chosen to assert a fact of a person bearing

the very unusual name of Artemus Jones, recklessly, and caring not whether there was such a person or not, or what the consequences might be to him.

An action for defamation differs from other actions, such for instance as trespass, in that it is of the essence of defamation that the plaintiff should be aimed at or intended by the defendant. The man who throws a squib into a crowd not intending to hit any one is liable for the consequences of his act, whatever his intentions may have been, because the two necessary constituents of tort, namely, a wrongful act by the defendant and actual damage to the plaintiff, are both present. But it is not enough for a plaintiff in libel to shew that the defendant has made a libellous statement, and that the plaintiff's friends and acquaintances understood it to be written of him: he must also shew that the defendant printed and published it of him; for if the defendant can prove that it was written truly of another person the plaintiff would fail. To this extent I agree with Fletcher Moulton, L. J., but we differ as to the meaning of the word "intended." In my opinion the defendant intended the natural meaning of his own words in describing the plaintiff as much as in the innuendo: the inquiry is not what did the defendant mean in his own breast, but what did the words mean having regard to the relevant surrounding circumstances. For example, fraud is proved in an action of deceit not only when a false representation is made knowingly, but also when it is made recklessly, careless whether it be true or false, and although there was no intention to cheat or injure the person to whom the statement was made—Derry v. Peek, 14 App. Cas. 337, at p. 374—and yet the fraudulent intent is of the essence of the action. So the intention to libel the plaintiff may be proved not only when the defendant knows and intends to injure the individuals, but also when he has made a statement concerning a man by a description by which the plaintiff is recognized by his associates, if the description is made recklessly, careless whether it hold up the plaintiff to contempt and ridicule or not. In such a case it is no answer for the defendant to say that he did not intend the plaintiff, because he had never heard of him: he intended to describe some living person: he can suggest no one else; and the plaintiff proves that he is believed by his acquaintances and friends to be the person aimed at, and has suffered damage thereby. The element of intention, which is as essential to an action of defamation as to an action of deceit, can be proved in the same way in both actions. The issue of fact is whether the plaintiff is the person intended by the libeller; but sufficient evidence to prove it may be given, although the defendant had no intention of injuring the plaintiff and had never heard of his existence. The squib thrower is liable for the injury done by his squib to the plaintiff, whether he aimed at or intended to hit him or not: the libeller is not liable to the plaintiff unless it is proved that the libel was aimed at or intended to hit him; the manner of proof being such as I have already stated. If the libel was true

of another person and honestly aimed at and intended for him, and not for the plaintiff, the latter has no cause of action, although all his friends and acquaintances may fit the cap on him. If this were not so, no newspaper could ever venture to publish a true statement of A., lest some other person answering the description should suffer thereby.

It is said that this would enable several plaintiffs to bring several and distinct actions in respect of one libel, and I think that this is so; but I am unable to see the objection. If the libel consisted in defamation of a number of individuals described generally, that is to say, "as the owners of some Irish factories," as in Le Fanu v. Malcomson, 1 H. L. C. 637, every member of the class who could satisfy the jury that he was a person aimed at and defamed could recover; and I can see no reason why two or more persons of the name of Artemus Jones who produced evidence from their acquaintances and others in different parts of the kingdom similar to that produced by the plaintiff in this case, the other circumstances being similar, should not recover. It is quite possible that a defendant might know two persons of the same name and might use words equally applicable to both, and describe each so that he appeared to his own circle of friends and acquaintances to be the person attacked, and might really intend to strike at both: it would certainly be somewhat shocking if such a man could successfully defend an action by one Artemus Jones by producing evidence that shewed conclusively that the other was aimed at, and then defeat an action by that other by producing evidence that shewed conclusively that the first was aimed at: the evidence in both cases would be true, and the libeller would escape because he had successfully libelled two persons in one libel. The case would be nearly as bad if the first plaintiff succeeded and the judgment obtained by him was held sufficient to defeat the action of the other person aimed at. If a man chooses to make statements of fact about persons whom he names, as in this case, I see no reason why he should not be liable to every one whom he injures who can convince a jury that he is reasonably intended by the words used.

I am therefore of opinion that the defendant cannot complain of Channell, J.'s, summing up. I do not think that he intended to rule anything more than that the alleged actual, as distinguished from the expressed, intention of the defendant was under the circumstances of this particular case immaterial. I do not understand him to have withdrawn from the jury the question whether the plaintiff was the person of whom the libel was published, which was, in my opinion, a question for them to decide, but to have ruled that the fact that any one of the plaintiff's names was unknown to the writer and to every one in the defendants' office through whose hands the libel passed was not a conclusive defence requiring him to stop the case; and in this he was, in my opinion, right. The ignorance was of course a material fact, both in considering the question of the true intent of the defendants and also in considering the damages, but I think that these were before

the jury. It was said that there was some misdirection on the point of negligence, but I do not think that this is so. Negligence is immaterial on the question of libel or no libel, but may be material on the question of damages. The recklessness to which I have referred, founding myself on Derry v. Peek, 14 App. Cas. 337, is quite different from mere negligence.

Then it is said that the amount of damages is excessive. It is no doubt large, but the evidence shews how serious the consequences have been and may yet be to the plaintiff. It is difficult to estimate the consequences of libel in a newspaper: as Best, C. J., says in De Crespigny v. Wellesley (1829) 5 Bing. 392, at p. 402, it may "circulate the calumny through every region of the globe." Those who read it may never read the subsequent explanation or the report of the trial; and some of those who read both may forget the result, and be left with a general recollection that the plaintiff was a man of whom a discreditable story was reported in a paper. Such newspapers as publish libellous statements do so because they find that it pays: many of their readers prefer to read and believe the worst of everybody, and the newspaper proprietors cannot complain if juries remember this in assessing damages. The amount of damage is peculiarly their province, and I see no ground for interference. In my opinion the appeal should be dismissed with costs.

Appeal dismissed.

[The defendants thereupon appealed to the House of Lords.]

Norman Craig, K. C. (Isaacs, K. C., with him), for the appellants. It is a necessary element in a cause of action for libel that the words complained of should have been written "of and concerning" the plaintiff. There must have been intention in the writer to apply the words to the plaintiff, and there can be no such intention when the writer does not know even of the existence of the person who imagines the language to be directed to himself. The principle of innuendo has never been applied where the question is one of identity. No doubt a man must be taken to know the reasonable construction of the words he employs; but he cannot know every combination of names in the directory. This principle has been recognized and enforced for centuries. * * * The question is, who was meant? (LORD LOREBURN, L. C. Is it not rather who was hit?) No. A man cannot be held responsible for remote and improbable results of his actions. * * * The test is not the impression of bystanders or the influence of friends, but whether the defendant used words which were admittedly defamatory "of and concerning" the plaintiff. * * *

LORD LOREBURN, L. C.[42] My Lords, I think this appeal must be dismissed. A question in regard to the law of libel has been raised

[42] The statement of facts, the opinions of Lords Atkinson and Gorell, and part of opinion of Lord Shaw of Dunfermline, are omitted.

which does not seem to me to be entitled to the support of your Lordships. Libel is a tortious act. What does the tort consist in? It consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it? A person charged with libel cannot defend himself by shewing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both. He has none the less imputed something disgraceful and has none the less injured the plaintiff. A man in good faith may publish a libel believing it to be true, and it may be found by the jury that he acted in good faith believing it to be true, and reasonably believing it to be true, but that in fact the statement was false. Under those circumstances he has no defence to the action, however excellent his intention. If the intention of the writer be immaterial in considering whether the matter written is defamatory, I do not see why it need be relevant in considering whether it is defamatory of the plaintiff. The writing, according to the old form, must be malicious, and it must be of and concerning the plaintiff. Just as the defendant could not excuse himself from malice by proving that he wrote it in the most benevolent spirit, so he cannot shew that the libel was not of and concerning the plaintiff by proving that he had never heard of the plaintiff. His intention in both respects equally is inferred from what he did. His remedy is to abstain from defamatory words.

It is suggested that there was a misdirection by the learned judge in this case. I see none. He lays down in his summing up the law as follows:

"The real point upon which your verdict must turn is, ought or ought not sensible and reasonable people reading this article to think that it was a mere imaginary person such as I have said—Tom Jones, Mr. Pecksniff as a humbug, Mr. Stiggins, or any of that sort of names that one reads of in literature used as types? If you think any reasonable person would think that, it is not actionable at all. If, on the other hand, you do not think that, but think that people would suppose it to mean some real person—those who did not know the plaintiff of course would not know who the real person was, but those who did know of the existence of the plaintiff would think that it was the plaintiff—then the action is maintainable, subject to such damages as you think under all the circumstances are fair and right to give to the plaintiff." [43]

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[43] Compare Newton v. Grubbs (1913) 155 Ky. 479, 159 S. W. 994, 48 L. R. A. (N. S.) 355: (In an action for slander, the appellee, who was defendant below, was a practicing physician. He had related to several persons an experience in his practice with a young woman, "but not only did he never use appellant's name in that connection, but never so far as this record shows did he ever indicate who the young woman was. The evidence wholly fails to show that he ever used appellant's name in telling this experience, or by innuendo or suggestion intimated that she was the person. But it appears that in some unexplained way the appellant's name became associated with this episode, and several of the witnesses say they had heard this, and therefore thought from outside rumors that appellee when he was telling of it referred to appellant, although her name was never used by appellee. Appellee testified that he had such an experience in his practice,

I see no objection in law to that passage. The damages are certainly heavy, but I think your Lordships ought to remember two things. The first is that the jury were entitled to think, in the absence of proof satisfactory to them (and they were the judges of it), that some ingredient of recklessness, or more than recklessness, entered into the writing and the publication of this article, especially as Mr. Jones, the plaintiff, had been employed on this very newspaper, and his name was well known in the paper and also well known in the district in which the paper circulated. In the second place the jury were entitled to say this kind of article is to be condemned. There is no tribunal more fitted to decide in regard to publications, especially publications in the newspaper press, whether they bear a stamp and character which ought to enlist sympathy and to secure protection. If they think that the license is not fairly used and that the tone and style of the libel is reprehensible and ought to be checked, it is for the jury to say so; and for my part, although I think the damages are certainly high, I am not prepared to advise your Lordships to interfere, especially as the Court of Appeal have not thought it right to interfere, with the verdict.

LORD SHAW OF DUNFERMLINE. * * * My Lords, with regard to this whole matter I should put my propositions in a threefold form, and, as I am not acquainted by training with a system of jurisprudence in which criminal libel has any share, I desire my observations to be confined to the question of civil responsibility.

In the publication of matter of a libellous character, that is matter which would be libellous if applying to an actual person, the responsibility is as follows: In the first place there is responsibility for the words used being taken to signify that which readers would reasonably understand by them; in the second place there is responsibility also for the names used being taken to signify those whom the readers would reasonably understand by those names; and in the third place the same principle is applicable to persons unnamed but sufficiently indicated by designation or description.

My Lords, I demur to the observation so frequently made in the argument that these principles are novel. Sufficient expression is given to the same principles by Abbott, C. J., in Bourke v. Warren, 2 C. & P. 307 (cited in the proceedings), in which that learned judge says: "The question for your consideration is whether you think the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant. It is not neces-

but that he never told who the young woman was, and that it was not appellant.")

And see Brown v. Journal Newspaper Co. (1915) 219 Mass. 486, 107 N. E. 358: (D.'s newspaper, without naming any one, charged that there was collusion between those who conducted the tax sales in Boston and the "tax title sharks." P. was collector of taxes in Boston, and as such was the only person authorized by law to conduct the tax sales there.)

sary that all the world should understand the libel; it is sufficient if those who know the plaintiff can make out that he is the person meant." I think it is out of the question to suggest that that means "meant in the mind of the writer" or of the publisher; it must mean "meant by the words employed." The late Lord Chief Justice Coleridge dealt similarly with the point in Gibson v. Evans, 23 Q. B. D. 384, at p. 386, when in the course of the argument he remarked: "It does not signify what the writer meant; the question is whether the alleged libel was so published by the defendant that the world would apply it to the plaintiff."

Order of the Court of Appeal affirmed and appeal dismissed with costs.

(b) PUBLICATION

WEIR v. HOSS.

(Supreme Court of Alabama, 1844. 6 Ala. 881.)

The action was for a libel. Upon the trial, under the general issue, the plaintiffs proved the loss of the original libel; and then proved three copies of it; each of which was proved to be a substantial copy of the original libel; and all of which differed from each other in some respects, and offered the said copies in evidence. To the introduction of each of said copies in evidence, the defendant objected. The objections were overruled, and all of said copies read to the jury; and defendant excepted.

The court charged the jury, that if they were satisfied from the proof, that either of the copies of the libel offered in evidence, was substantially a copy of the original libel, and that it was either composed, or published, by defendant, they ought to find for the plaintiffs, to which the defendant excepted.

ORMOND, J. * * * The court charged, that if the defendant either composed or published the libel, the jury must find for the plaintiff. This is a plain error. To constitute either verbal or written slander, there must be a publication—the contents must be made known to some third person or persons. This is not denied by the counsel for the defendant in error, who insisted that the point was not made in the court below, that publication was conceded, as is evident from the fact that there were so many copies of the libel extant. It is, to be sure, very probable that such was the fact; but still it may be that the libel was not intended for publication, and that the copies were taken without the consent of the defendant. There is nothing in the record which conclusively shows that publication was made; and as the charge was clearly erroneous in point of law, and upon a point necessarily involved in the issue, it is impossible that we should

say that the defendant was not prejudiced by it. It may have been the point on which the case turned; and for this error, the judgment must be reversed, and the cause remanded.[44]

SHEFFILL v. VAN DEUSEN.

(Supreme Judicial Court of Massachusetts, 1859. 13 Gray, 304, 74 Am. Dec. 632.)

Action of tort for slander. Trial in the court of common pleas, before Briggs, J., who signed this bill of exceptions:

"The words claimed to have been slanderous, were spoken, if at all, at the dwelling house of the defendants and at that part called the bakery, where bread and other articles were sold to customers; and were spoken by Mrs. Van Deusen to Mrs. Sheffill.

"The defendants asked the court to instruct the jury that if the words alleged in the plaintiffs' declaration were spoken to Mrs. Sheffill, and no other person but Mrs. Sheffill and Mrs. Van Deusen were present, there was no such publication of the words as would maintain the action.

"The court declined so to instruct, but did instruct the jury that if the words were publicly uttered in the bakery of the defendants, there was a sufficient publication, though the plaintiff has not shewn that any other person was present, at the time they were spoken, but Mrs. Sheffill and Mrs. Van Deusen. The jury returned a verdict for the plaintiffs, and the defendants except."

BIGELOW, J.[45] Proof of the publication of the defamatory words alleged in the declaration was essential to the maintenance of this action. Slander consists in uttering words to the injury of a person's reputation. No such injury is done when the words are uttered only to the person concerning whom they are spoken, no one else being present or within hearing. It is damage done to character in the opinion of other men, and not in a party's self estimation, which constitutes the material element in an action for verbal slander. Even in a civil action for libel, evidence that the defendant wrote and sent a sealed letter to the plaintiff, containing defamatory matter, was held insufficient proof of publication;[46] although it would be other-

[44] The statement of facts is abridged and part of the opinion is omitted.

[45] Part of the opinion is omitted.

[46] Accord: Economopoulos v. Pollard Co. (1914) 218 Mass. 294, 105 N. E. 896: (D.'s clerk said to P., in a store: "You have stolen a handkerchief." There was no evidence that a third person heard the words.) Phillips v. Jansen (1798) 2 Esp. 624: (D. wrote and mailed to P. a sealed letter which defamed P.) Yousling v. Dare (1904) 122 Iowa, 539, 98 N. W. 371. Clutterbuck v. Chaffers (1816) 1 Stark. 471, 18 R. R. 811: (D. wrote and sent to P. by S. a folded but unsealed letter which defamed P. Without reading it or allowing any other person to read it, S. delivered the letter to P.) Fonville v. McNease (1838) Dud. (S. C.) 303, 31 Am. Dec. 556: (D. wrote a letter which defamed P., sealed it, addressed it to P., "or Miss Susan Sloan," and threw it sealed into an inclosure, where it was picked up by a stranger and delivered to P., who opened and read it aloud.) Western Union Telegraph v. Cashman (1906) 149 Fed. 367, 81 C. C. A. 5, 9 L. R. A. (N. S.) 140, 9 Ann. Cas. 693: (A libelous message was delivered to an office boy to make

wise in an indictment for libel, because such writings tend directly to a breach of the peace. * * *[47]

It is quite immaterial in the present case that the words were spoken in a public place. The real question for the jury was, were they so spoken as to have been heard by a third person? The defendants were therefore entitled to the instructions for which they asked.

Exceptions sustained.

WENMAN v. ASH.

(Court of Common Pleas, 1853. 13 C. B. 836, 138 Reprint, 1432, 93 R. R. 761.)

This was an action for a libel contained in a letter addressed by the defendant to the wife of the plaintiff. The defendant pleaded Not guilty, and on this issue submitted that there was no proof of a publication. A verdict was taken for the plaintiff, damages 20s., subject to leave reserved for the defendant to enter a verdict for him.

Byles, Serjt., moved accordingly: There was no publication; the sending the letter to the plaintiff's wife, was like sending it to the plaintiff himself; for husband and wife are for all legal purposes one. (MAULE, J. Is a man's character with his wife worth nothing?) It is difficult to see how he could sustain injury from a communication made to her. * * *[48]

a letter press copy. The boy made the copy. There was no evidence that he read the letter.)

Compare Kiene v. Ruff (1855) 1 Iowa, 482: (The libelous letter was transcribed by S. and then mailed to P.) And see 18 Halsbury's Laws of England, 658–659 (1911); 25 Cyc. 365, 366; Cent. Dig. "Libel and Slander," §§ 106–108; Dec. Dig., Key-No., "Libel and Slander," §§ 23–25.

[47] See Edwards v. Wooton (1602) 12 Co. Rep. 35, a case in the Star Chamber, between Edwards, a physician, plaintiff, and Wooton, a doctor in physic, defendant. The defendant had sent a libel written in a letter sealed and directed to the party libeled. "The doctor thought that this could not be punished in any manner: but it was resolved, that the said infamous letter, which in law is a libel, shall be punished (although it was solely writ to the plaintiff without any other publication) in the Star Chamber, for that it is an offence to the King, and is a great motive to revenge, and tends to the breaking of the peace and great mischief: and for that reason it was necessary, that it should be punished either by indictment, or in the Star Chamber, to prevent such occasions of mischief."

See, also, Yousling v. Dare (1904) 122 Iowa, 539, 98 N. W. 371, 372, where McClain, J., remarks: "The difference between the criminal law and the law of torts in this respect is manifest. The act of publishing a libel may be criminal for the reason that it provokes the person libeled to wrath, and tends to create a breach of the peace. 1 Bishop, New Crim. Law, § 591 (4); 2 McClain, Crim. Law, § 1055. But in a civil action it is essential that some damage to the person libeled must appear, either directly or by legal inference, and no such inference can be drawn from the communication of the libelous matter to the very person concerning whom the language was used. Such a distinction is illustrated by the statutory provision as to the publication of libelous matter respecting one who is deceased. Such a publication may constitute a crime (Code, § 5086), but cannot form the basis of an action for civil damages in behalf of any person. Bradt v. New Nonpareil Co. [1899] 108 Iowa, 449, 79 N. W. 122, 45 L. R. A. 681."

[48] The statement of the case is abridged, and parts of opinions of Jervis, C. J., and Maule, J., and opinion of Creswell, J., are omitted.

JERVIS, C. J. I am of opinion that this rule must be discharged. It was sufficiently pointed out in the course of the discussion that it must necessarily be injurious to a man to have a communication like that in question addressed to his wife. Notwithstanding the ingenious argument of my Brother Byles, it is enough to say that I think there was a publication, and that of a matter calculated to operate injuriously to the plaintiff, and sufficient to maintain this action. * * *

MAULE, J. I am of the same opinion. In the eye of the law, no doubt, man and wife are for many purposes one: but that is a strong figurative expression, and cannot be so dealt with as that all the consequences must follow which would result from its being literally true. For many purposes, they are essentially distinct and different persons, and, amongst others, for the purpose of having the honour and the feelings of the husband assailed and injured by acts done or communications made to the wife. * * *[49]

Rule discharged.

[49] Accord: Schenck v. Schenck (1843) 20 N. J. Law, 208; Luick v. Driscoll (1895) 13 Ind. App. 279, 41 N. E. 463, 55 Am. St. Rep. 224.

On the question whether a communication to the plaintiff's agent is a publication on which the plaintiff may rely, see Duke of Brunswick v. Harmer (1849) 14 Q. B. 185, 117 Reprint, 75, 80 R. R. 241: (In 1830 a libel of P. was published in D.'s newspaper. In 1847 P. sent S. to the office of this newspaper, to purchase a copy of the paper containing this libel of 17 years before. S. made the purchase of D., and handed the copy to P. It was contended that there was no publication within six years. Said Coleridge, J., delivering the opinion: "It appeared that the publication relied on was a sale of a copy of the newspaper to a person sent by the plaintiff to procure it, who, on receiving it, carried it to the plaintiff. It was said that this was a sale to the plaintiff himself, and, therefore, not a sufficient publication to sustain a civil action for damages. And, in some sense, it is true that it was a sale and delivery to the plaintiff; but we think it was also a publication to the agent. The question arises as on a plea of Not guilty in an ordinary case. The defendant, who, on the application of a stranger, delivers to him the writing which libels a third person, publishes the libellous matter to him, though he may have been sent for the purpose of procuring the work by that third person. So far as in him lies, he lowers the reputation of the principal in the mind of the agent, which, although that of an agent, is as capable of being affected by the assertions as if he were a stranger. The act is complete by the delivery: and its legal character is not altered, either by the plaintiff's procurement or by the subsequent handing over of the writing to him. Of course that this publication was by the procurement of the plaintiff is not material to the question we are now considering." See, also, Massee v. Williams (1913) 207 Fed. 222, 229, 124 C. C. A. 492; Brown v. Elm City Lumber Co. (1914) 167 N. C. 9, 82 S. E. 961.

But see the doctrine of decoy publication as a defense, given infra, "Other Excuses for Defamatory Charges Confessedly Untrue."

Compare: Wennhak v. Morgan (1888), 20 Q. B. D. 635, where Huddleston, B., delivering the opinion remarks: "This is as far as we know the first time it has ever been alleged in cases of this kind that the handing over of a libel by the libeller to his wife is a publication. I think that the question can be decided on the common law principle that husband and wife are one."

Sesler v. Montgomery (1889) 78 Cal. 486, 21 Pac. 185, 3 L. R. A. 653, 12 Am. St. Rep. 76. In this case, McFarland, J., commenting on Schenck v. Schenck (1843) 20 N. J. Law, 208, remarked: "Whether or not that decision was a correct exposition of the law, it is clear, at least, that another principle was involved. As the court say in that case: "Such a communication made

RUMNEY v. WORTHLEY.

(Supreme Judicial Court of Massachusetts, 1904. 186 Mass. 144, 71 N. E. 316, 1 Ann. Cas. 189.)

Tort to recover damages for a libel contained in two letters sent by the defendant to the plaintiff through the mail. The letters were sent to the plaintiff at his residence, and were opened and read aloud by his wife and daughter. The superior court found that there was no publication of the letters, and directed a verdict for the defendant.

KNOWLTON, C. J.[50] * * * The question in this case is whether there was any evidence which would have warranted the jury in finding that the defendant believed, or had good reason to believe, that the letters might be opened and read by the plaintiff's daughter in his absence, and that she was authorized to open her father's letters. The question of difficulty is whether there was evidence that the defendant was aware that she was accustomed or authorized to read such letters addressed to her father. On this point the testimony is very unsatisfactory. She testified that she had known the defendant for five years; that he came to the store a great many times for the purpose of selling goods; that during the year immediately prior to the receipt of these letters he had seen her at least two or three times receive mail addressed to her father and open it in his presence; that she knew this had happened several times, and that she could not state the exact number of times; that he had seen her, after opening the letters, walk with them to her father, and show him the con-

directly to the wife is an attempt to poison the fountain of domestic peace, conjugal affection, and filial obligation, at their very sources.' There the exception which was allowed to the general rule was in support of the confidential relation of marriage; while in the case at bar the exception sought to be established would be destructive of that relation. Our conclusion is, that a communication from a husband to a wife, not in the presence of any other person, does not constitute a publication within the meaning of the law of slander. It follows from this conclusion that the judgment in the case at bar was erroneous."

But see Trumbull v. Gibbons (1816) 3 City Hall Recorder (N. Y.) 97, commented on in Wemhak v. Morgan, ante: (D. printed in New York fifty copies of a pamphlet which libeled P. Five copies were sent by D. to his wife in New Jersey; four of them bore the names of acquaintances of his wife, but there were no instructions as to what she should do with them. She delivered two copies in New Jersey to the persons whose names they bore, and handed the rest to P. in New Jersey. Held, that there was a publication by D. in New Jersey.)

[50] Part of the opinion, on the effect of sending a libelous letter through the mail to the person libeled, with no reason to suppose that it will be opened and read by any one else, is omitted. On this point, Knowlton, C. J., referred to Clutterbuck v. Chaffers (1816) 1 Stark. 471; Delacroix v. Thevenot (1817) 2 Stark. 63; Robinson v. Jones (1879) 4 L. R. (Ir.) 391; Fonville v. McNease (1838) Dud. (S. C.) 303, 31 Am. Dec. 556; Fry v. McCord (1895) 95 Tenn. 678, 33 S. W. 568; Sylvis v. Miller (1896) 96 Tenn. 95, 33 S. W. 921; Spaits v. Poundstone (1882) 87 Ind. 522, 44 Am. Rep. 773; McIntosh v. Matherly (1848) 9 B. Mon. (Ky.) 119; Warnock v. Mitchell (1890 C. C.) 43 Fed. 428.

tents of them. Without repeating her testimony on this point, which was of considerable length, we are of opinion that the jury fairly might have inferred from it that, as clerk in the store which was owned by her mother and conducted by her father, she was accustomed to open letters addressed to him, at least if they looked like letters pertaining to the business, and that the defendant knew it. Printed on the face of the libelous letters were these words: "In five days return to D. E. Worthley, 27 Canada Street, Lowell, Mass." This was the defendant's business address. We infer that the letters appeared externally like the ordinary business letters of the defendant. We do not attach much importance to the fact that they were addressed to No. 12 Burt street, instead of No. 14 Burt street, for the dwelling house and store were connected. If the case stood upon the testimony in direct examination, we should think the jury well might infer knowledge on the part of the defendant that the plaintiff's daughter was accustomed to open letters which looked like these, and, with considerable hesitation, we are inclined to think that the cross-examination, taken in connection with the direct examination, would warrant the jury in coming to the same conclusion. If he sent the letters, having good reason to believe that they were likely to be opened by an authorized person other than the plaintiff, his sending them by mail was a publication.[51]

Verdict set aside.

[51] Accord: Delacroix v. Thevenot (1817) 2 Stark. 63: (D. wrote, sealed, and mailed to P. a letter which defamed P. The letter was opened in regular course of business by P.'s clerk, the letter not being marked "private." D. knew of the clerk's employment in this way.) Pullman v. Hill & Co. [1891] 1 Q. B. 524: (A letter which libeled the plaintiffs was addressed in the name of the firm of which they were members. The letter was opened by a clerk in the ordinary course of business and was read by two other clerks. If it had been directed to the plaintiffs in their individual capacity, the letter would probably not have been opened by a clerk.) Allen v. Wortham (1890) 89 Ky. 485, 13 S. W. 73, 11 Ky. Law Rep. 697: (D. writes and mails to P. a letter which defames him, but P. is unable to read, and has S. read the letter to him.) And see the remark of Taft, J., in Wilcox v. Moon (1892) 64 Vt. 450, 24 Atl. 244, 15 L. R. A. 760, 33 Am. St. Rep. 936: "Sending [a letter] to a party who cannot read, if this is known to the sender, and the party to whom it is sent from necessity procures another to read it, is likewise evidence of a publication."

Compare: Huth v. Huth (1915), in the Court of Appeal, London Times for March 27, 1915: (In 1898 Miss Edith Greaves was married to Captain Huth. In 1913 Mrs. Huth, because of differences with her husband, left his house and went to live at Torquay. The alleged libel was in a document sent by Mr. Huth, the defendant, to Mrs. Huth by post in an unsealed envelope bearing a ½d. stamp, and addressed "Miss Edith Greaves, care of Mrs. Stark, Torquay." This letter was received at Mrs. Huth's house in Torquay by her butler. Yielding to his curiosity over the unusual address, the butler took the document out of its unsealed envelope and read it. It was contended that there had been a publication by the defendant in two respects: The butler had in fact read the document; the defendant had sent it in the unsealed envelope by the post. In his opinion in the Court of Appeal, the Lord Chief Justice said that he found no evidence of publication to the butler. It could not be contended that it would amount to a publication by the sender if a third person in breach of his duty opened and read a letter when the

PRICE v. JENKINGS.

(In the Exchequer Chamber, 1601. Cro. Eliz. 865, 78 Reprint, 1091.)

Action for words. And declares, that the defendant spake these words in Welsh (reciting them particularly), signifying hæc Anglicana verba: "Thou hast murdered thy wife." After verdict, and judgment for the plaintiff, error was brought and assigned in hoc, that it is not averred that the words were spoken in the company of Welshmen, or of such who understood the Welsh tongue; but it is alledged that they were spoken in presentia et auditu quamplurimorum subditorum dominæ reginæ. And the action was brought in the county of Monmouth, which was once parcel of Wales, but was now an English county.

And all the Justices and Barons held that for this cause it was erroneous: for it shall not be intended that any there understood the said tongue, unless it had been shewn; and then it was not any slander, no more than if one spake slanderous words in French or Italian, an action lies not, unless it be averred that some there present understood those languages; as it was held in the case of Johns v. Daux. But because the damages were found to £50 and if the plaintiff should begin de novo he might not have peradventure so great damages, they moved him to accept of £10 and to make an end without further proceedings: and so it was done, and no judgment entered.[52]

sender had no reason to expect anything of the kind. As to the suggestion of publication in the post office, the Lord Chief Justice remarked that he would be sorry to lay down anything that would allow libels to be published with greater safety. In the case of a postcard, it was presumed, in the absence of evidence to the contrary, that some person, other than the addressee would read it. But the contention that the same presumption would be made in the case of a letter of which the envelope was not fastened down amounted to saying that a document without a cover was the same thing as a document with a cover. In his opinion there was no such presumption. It was true that the post office authorities had a right to examine documents enclosed in envelopes with ½d. stamps, but that in itself was not enough; to show publication it would be necessary to call some one from the post office who had in fact opened the letter.

Compare also: Wilcox v. Moon (1892) ante: (D. addressed a libelous letter to P. It was received at the post office by P.'s husband, and delivered to her unopened, whereupon she broke the seal and they read it together.)

Shepard v. Lamphier (1914) 84 Misc. Rep. 498, 146 N. Y. Supp. 745, 748: (D., a married man, addressed and mailed to P., a married woman, a letter proposing immoral conduct. P. laid the letter before the postal authorities.)

[52] Accord: Jones v. Davers (1596) Cro. Eliz. 497: (The plaintiff alleged that the defendant dixit et propalavit hæc Latina verba in præsentia diversorum, qui intellexerunt Romanam linguam, viz. "inimicus meus (innuendo the plaintiff) is an extortioner." On the plaintiff's demurrer to a defective plea, it was contended that the declaration was defective, for "it is supposed that the defendant spoke slanderous words in Latin, in præsentia diversorum who understood linguam Romanam, which well may be; for lingua Romana at this day intends the Italian tongue, and not the Latin

SADGROVE v. HOLE.

(In the Court of Appeal. [1901] 2 K. B. 1.)

The defendant, as managing director of a limited company, employed an architect on behalf of the company to prepare plans and drawings relative to a proposed addition to the company's premises. The architect was directed to employ a quantity surveyor to make out a bill of quantities, and he instructed the plaintiff to do this. The bill of quantities was accordingly prepared by the plaintiff, and copies were sent to seven builders whose names had been supplied by the defendant, and to whom invitations to tender for the work had been given. The contents of the bill of quantities came to the knowledge of the defendant, who appears to have thought that the amount of work indicated therein was much in excess of that which the company desired should be done. The defendant thereupon wrote and sent by post to one of the seven builders a post-card which was as follows: "The quantities sent you this morning by architect are entirely wrong. I have plans &c., here, and you can give me prices on these. Yours, &c., S. Hole." The defendant also wrote and sent by post to another of the seven builders a post-card which was as follows: "There are great errors in the quantities posted to you this morning. If you will call here you can see plans and give me price on these. Yours obediently, S. Hole."

The plaintiff brought an action for libel on these two post-cards, alleging that they were defamatory of him in his calling of quantity surveyor. The defence was a denial that the words were published concerning the plaintiff, that they bore the interpretation placed upon them in the statement of claim, and that they amounted to defamatory matter. The defendant also pleaded that the publication to the builders was privileged and made bona fide and without malice. To this the plaintiff replied alleging express malice, and that the contents of the post-cards were necessarily communicated and published to the postmen and clerks through whose hands they respectively passed before reaching the persons to whom they were addressed. No one through whose hands either of the post-cards had passed was called as a witness at the trial.

The learned judge held that the words were capable of a defamatory meaning; that the occasion was not privileged; and he left the

tongue.") Economopoulos v. Pollard Co. (1914) 218 Mass. 294, 105 N. E. 896: (D.'s clerk said to P. in D.'s store: "You have stolen a handkerchief of us and have it in your pocket." The words were spoken in Greek, and in the hearing of others, but there was no evidence that any one understood them except P.)

Compare: Steketee v. Kimm (1882) 48 Mich. 322, 12 N. W. 177: (Action for a libel published in the Dutch language in a newspaper having a large circulation among Hollanders in Michigan.)

case to the jury, who returned a verdict for the plaintiff for £5, and judgment was entered for that amount. The defendant appealed.

A. L. SMITH, M. R.[53] * * * The plaintiff to succeed in the action must prove a publication of and concerning him of libellous matter, and if he does not satisfy the onus of proof which is on him in this respect there is no cause of action. It is certainly my opinion that if a man writes a libel on the back of a post-card and then sends it through the post there is evidence of publication, as in the case of a telegram. The cases cited shew that the two stand on the same footing. What, then, did the plaintiff prove? He proved the sending of a post-card; but, on the evidence, it is clear that he did not prove any publication of a libel on him until the post-card got into the hands of the builder, because then for the first time could any knowledge arise as to the person to whom the post-card referred. I quite agree that if the name of the plaintiff had appeared on the post-card there would have been plenty of evidence of publication to persons other than the builder.[54] That, however, was not the case, and the plaintiff did not prove publication to any one before the post-card got into the builder's hands, and as a communication to him it was privileged unless there was evidence of express malice. * * *[55]

I come to the conclusion, therefore, that the appeal must be allowed and judgment entered for the defendant.

OWEN v. OGILVIE PUB. CO.

(Supreme Court of New York, Appellate Division, Second Department, 1898. 32 App. Div. 465, 53 N. Y. Supp. 1033.)

The action was against the publishing company. From a judgment for the plaintiff and an order denying a new trial, the defendant appealed.

HATCH, J.[56] * * * The libel consisted in the dictation of a letter by the defendant's general manager to a young lady employed by the corporation as a stenographer and typewriter in the private office of the general manager. The letter was written in reference to the business of the corporation, and had relation to a small sum of money

[53] Part of the opinion, as well as the concurring opinion of Collins, L. J., are omitted.

[54] That sending a defamatory statement by postal card or by telegram is a publication, see Williamson v. Freer (1874) L. R. 9 C. P. 393; Robinson v. Jones (1879) 4 L. R. Ir. 391; Logan v. Hodges (1907) 146 N. C. 38, 59 S. E. 349, 14 Ann. Cas. 103; 18 Halsbury's Laws of England, 661; 25 Cyc. 369.

[55] The Master of the Rolls was, however, of opinion that there was no evidence of express malice: "It is said that the mere writing of a post-card and sending it by mail, instead of sending a closed letter, was evidence of malice, and I agree that if the name of the plaintiff had appeared on the card that would have been so; but in this case there was nothing to connect the libel with the plaintiff, and no evidence of malice."

[56] Parts of the opinion are omitted.

missing from the cash drawer, and the letter expressed a suspicion that the money had been taken by the plaintiff during her employment by the defendant, on the day before.

The law is elementary that there can be no libel without a publication of the libelous matter. We may assume that this letter was libelous. Was there a publication of it by the corporation, within the meaning of the law? Ordinarily, when a letter is written and delivered to a third person, with the intent and expectation that it shall be read by such person, and it is actually read, the publication is complete. Youmans v. Smith, 153 N. Y. 214, 47 N. E. 265. Has such rule application to the facts of this case? The letter was dictated to the stenographer, and was by her copied out, was signed by the manager, was then inclosed in an envelope, and sent by mail to the address of the plaintiff. It may be that the dictation to the stenographer and her reading of the letter would constitute a publication of the same by the person dictating it, if the relation existing between the manager and the copyist was that of master and servant, and the letter be held not to be privileged. Such, however, was not the relation of these persons. They were both employed by a common master, and were engaged in the performance of duties which their respective employments required. Under such circumstances we do not think that the stenographer is to be regarded as a third person in the sense that either the dictation or the subsequent reading can be regarded as a publication by the corporation. It was a part of the manager's duty to write letters for the corporation, and it was the duty of the stenographer to take such letter in shorthand, copy it out, and read it for the purpose of correction. The manager could not write and publish a libel alone, and we think he could not charge the corporation with the consequences of this act, where the corporation, in the ordinary conduct of its business, required the action of the manager and the stenographer in the usual course of conducting its correspondence. The act of both was joint, for the corporation cannot be said to have completed the act which it required by the single act of the manager, as the act of both servants was necessary to make the thing complete. The writing and the copying were but parts of one act; i. e. the production of the letter. Under such conditions we think the dictation, copying, and mailing are to be treated as only one act of the corporation; and, as the two servants were required to participate in it, there was no publication of the letter, in the sense in which that term is understood, by delivery to and reading by a third person. There was in fact but one act by the corporation, and those engaged in the performance of it are not to be regarded as third parties, but as common servants engaged in the act. We do not deny but that there can be publication of a libel by a corporation by reading the libelous matter to a servant of such corporation, or delivering it to be read. Where the duties devolved upon such servant are distinct and independent of the process by which the libel was produced, he might

well stand in the attitude of a third person through whom a libel can be published. But such rule may not be applied where the acts of the servants are so intimately related to each other as is disclosed in the present record, and the production is the joint act of both. As there was no other proof of publication aside from the reading by the stenographer, it is insufficient to uphold a finding that the libel was published.[57] * * *

It follows that the judgment should be reversed, and a new trial granted; costs to abide the event. * * * All concur.

[57] In Pullman v. Hill & Co., [1891] 1 Q. B. 524, a defamatory letter was dictated by the defendants' managing director to a short-hand clerk, who transcribed it by a typewriter machine. Lord Esher, M. R., delivering an opinion in the Court of Appeal, reasoned thus: "The first question is whether, assuming the letter to contain defamatory matter, there has been a publication of it. What is the meaning of 'publication'? The making known the defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it: for you cannot publish a libel of a man to himself. If there was no publication, the question whether the occasion was privileged does not arise. If a letter is not communicated to any one but the person to whom it is written, there is no publication of it. And, if the writer of a letter locks it up in his own desk, and a thief comes and breaks open the desk and takes away the letter and makes its contents known, I should say that would not be a publication. If the writer of a letter shews it to his own clerk in order that the clerk may copy it for him, is that a publication of the letter? Certainly it is shewing it to a third person: the writer cannot say to the person to whom the letter is addressed, 'I have shewn it to you and to no one else.' I cannot, therefore, feel any doubt that, if the writer of a letter shews it to any person other than the person to whom it is written, he publishes it. If he wishes not to publish it, he must, so far as he possibly can, keep it to himself, or he must send it himself straight to the person to whom it is written. There was, therefore, in this case a publication to the typewriter."

In accord with Pullman v. Hill & Co. are Gambrill v. Schooley (1901) 93 Md. 48, 48 Atl. 730, 52 L. R. A. 87, 86 Am. St. Rep. 414; Ferdon v. Dickens (1909) 161 Ala. 181, 49 South. 888; Puterbaugh v. Gold Medal Mfg. Co. (1904) 7 Ont. L. Rep. 582, 1 Ann. Cas. 100: (S., the manager of D., a mercantile corporation, having written out the draft of a letter to P., which charged him with theft, handed the draft to a clerk of D., to be copied on a typewriter. The clerk did so, stamped the company's name at the foot of the copy, and brought it to S., who wrote his name beneath that of the company, and gave it back to the clerk, to be closed and mailed to P., which was done.)

In Puterbaugh v. Gold Medal Mfg. Co., ante, the Ontario Court of Appeal, reversing the divisional Court (5 Ont. L. Rep. 680), held that there had been a publication of the libel by the defendant, on the authority of Pullman v. Hill & Co. But on the principle involved, Moss, C. J. O., remarked: "It appears to me that in view of recognized methods of conducting the business affairs of large commercial and manufacturing corporations in this country it would not be unreasonable to hold that where the manager or other officer of such a corporation within the scope of whose duty falls that of dealing with any matter of concern to the business, dictates a letter on a business matter of the corporation to a stenographer in its employ who thereupon transcribes it for signature in the ordinary course, such acts ought not to be treated as publication so as to render the corporation liable to an action for libel for the matter contained in the letter. The stenographer ought not to be regarded as a third person. The communication to him ought to be treated as privileged. There is to my mind much force in the statement of the learned Judge who delivered the judgment of the Court in Owen v. J. S. Ogilvie Pub. Co. [1898] 32 App. Div. 467 [53 N. Y. Supp. 1033]."

In England, the doctrine of Pullman v. Hill & Co. has been materially quali-

VIZETELLY v. MUDIE'S SELECT LIBRARY, Limited.

(In the Court of Appeal. [1900] 2 Q. B. 170.)

The action was for a libel contained in a book, copies of which had been circulated and sold by the defendants, who were the proprietors of a circulating library with a very extensive business. The defendants in their defence stated that, if they sold or lent the book in question, they did so without negligence, and in the ordinary course of their business as a large circulating library; that they did not know, nor ought they to have known, that it contained the libel complained of; that they did not know and had no ground for supposing that it was likely to contain libellous matter; and that under the circumstances so stated they contended that they did not publish the libel.

The libel complained of was a short passage in a book called "Emin Pasha: His Life and Work," published in October, 1898, by Archibald Constable & Co. The special circumstances in the case brought to the attention of the jury were as follows:

The plaintiff on becoming aware of the libel brought an action for libel against Messrs. Constable & Co., which was settled by their paying £100 damages, apologizing, and undertaking to withdraw the libel from circulation. In the issue of the Publishers' Circular, a recognized medium for trade advertisements of the kind, for November 12, 1898, a notice was inserted to the effect that Messrs. Archibald Constable & Co. requested that all copies of vol. 1 of "The Life and Work of Emin Pasha" might be returned to them immediately, as they wished to cancel a page, and insert another one in its place, and stating that they would of course defray the carriage both ways, if desired. A similar notice was inserted on the same date in the Athenæum newspaper, a well-known medium of communication among literary people. In March, 1899, it came to the plaintiff's knowledge that the defendants were lending copies of the work as originally published to subscribers, and also selling surplus copies of the same, and he thereupon commenced the action against them. It appeared that none of those engaged in the conduct of the defendants' business had seen the before-mentioned notices in the Publishers' Circular and Athenæum, though the defendants took in those papers. Mr. A. O. Mudie, one

fied and distinguished in Boxsius v. Goblet Frères, [1894] 1 Q. B. 842, and Edmondson v. Birch & Co., [1907] 1 K. B. 371. In the former case the decision in Pullman v. Hill & Co. is put on the ground that it does not fall within the ordinary business of a merchant to write such defamatory statements, and that, if he does so, it is not reasonably necessary, as he is doing a thing not in the ordinary course of his business, that he should cause the statement to be copied by a clerk in his office. In the Edmondson Case, Fletcher Moulton, C. J., concurring with Collins, M. R., and Cozens-Hardy, L. J., summed up the doctrine thus: "In my opinion the law on the subject, as laid down in the cases, amounts to this: If a business communication is privileged, as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business."

of the defendants' two managing directors, who was called as a witness for the defendants, gave evidence to the effect that the defendants did not know when they circulated and sold the book in question that it contained the passage complained of. He stated that the books which they circulated were so numerous that it was impossible in the ordinary course of business to have them all read, and that they were guided in their selection of books by the reputation of the publishers, and the demand for the books. He said in cross-examination that there was no one else in the establishment besides himself and his co-director who exercised any kind of supervision over the books; that they did not keep a reader or anything of that sort; that they had had books on one or two occasions which contained libels; that that would occur from time to time; that they had had no action brought against them for libel before the present action; and that it was cheaper for them to run an occasional risk of an action than to have a reader.

In summing up, Grantham, J., directed the jury to consider whether, having regard to this evidence, the defendants had used due care in the management of their business. The jury found for the plaintiff, damages £100. The defendants applied for a judgment or a new trial.[58]

ROMER, L. J. The law of libel is in some respects a very hard one. In the remarks which I am about to make I propose to deal only with communications which are not privileged. For many years it has been well settled law that a man who publishes a libel is liable to an action, although he is really innocent in the matter, and guilty of no negligence. That rule has been so long established as to be incapable of being altered or modified, and the Courts, in endeavouring to mitigate the hardship resulting from it in many cases, have only been able to do so by holding that, under the circumstances of cases before them, there had been no publication of the libel by the defendant. The result, in my opinion, has been that the decisions on the subject have not been altogether logical or satisfactory on principle. The decisions in some of the earlier cases with which the Courts had to deal are easy to understand. Those were cases in which mere carriers of documents containing libels, who had nothing to do with and were ignorant of the contents of what they carried, have been held not to have published libels.

Then we have the case of Emmens v. Pottle,[59] in which vendors of

[58] The statement of the case is abridged. The arguments of counsel and the opinions of A. L. Smith and Vaughan Williams, L. JJ., and part of the opinion of Romer, L. J., are omitted.

[59] 16 Q. B. D. 354 (1885). In this case the statement of defence was in two paragraphs. The first denied that the defendants had published the libel. The second paragraph alleged that the defendants "are newsvendors carrying on a large business at 14 and 15, Royal Exchange, in the city of London, and as such newsvendors, and not otherwise, sold copies of the said periodical called Money in the ordinary course of their said business, and without any knowledge of its contents, which is the alleged publication."

newspapers in the ordinary course of their business sold a newspaper which contained a libel. It was clear that selling a document which contained a libel was prima facie a publication of it, but the Court there held that there was no publication of the libel under the circumstances which appeared from the special findings of the jury, those findings being (1) that the defendants did not know that the newspapers at the time they sold them contained libels on the plaintiff; (2) that it was not by negligence on the defendants' part that they did not know that there was any libel in the newspapers; and (3) that the defendants did not know that the newspaper was of such a character that it was likely to contain libellous matter, nor ought they to have known so. Lord Esher, M. R., in this Court was of opinion that, though the vendors of the newspapers, when they sold them, were prima facie publishers of the libel, yet, when the special findings of the jury were looked at, the result was that there was no publication of the libel by the defendants. Bowen, L. J., put his judgment on the ground that the vendors of the newspapers in that case were really only in the same position as an ordinary carrier of a work containing a libel.[60]

The decision in that case, in my opinion, worked substantial justice; but, speaking for myself, I cannot say that the way in which that result was arrived at appears to me altogether satisfactory; I do not think that the judgments very clearly indicate on what principle Courts ought to act in dealing with similar cases in future. That case was followed by other cases, more or less similar to it, namely, Ridgway v. Smith & Son (1890) 6 Times L. R. 275, Mallon v. W. H. Smith & Son, 9 Times L. R. 621, and Martin v. Trustees of the

In his reply, the plaintiff joined issue on the first paragraph of the defence, and alleged, as to its second paragraph, "that the allegations therein contained are bad in substance and in law, on the ground that, even if the defendants sold copies of the said periodical without any knowledge of their contents and in the ordinary course of their business, as alleged in their defence, still, inasmuch as the defendants sold the said copies as newsvendors for reward in that behalf, the said allegations disclose no answer to the plaintiff's claim."

[60] "A newspaper is not like a fire; a man may carry it about without being bound to suppose that it is likely to do an injury. It seems to me that the defendants are no more liable than any other innocent carrier of an article which he has no reason to suppose likely to be dangerous. But I by no means intend to say that the vendor of a newspaper will not be responsible for a libel contained in it, if he knows, or ought to know, that the paper is one which is likely to contain a libel." Per Bowen, L. J., in Emmens v. Pottle (1885) 16 Q. B. D. 354, 358.

Compare: Arnold v. Ingram (1912) 151 Wis. 438, 138 N. W. 111, Ann. Cas. 1914C, 976: (S., a clergyman, delivered a political sermon, and sent a synopsis of it to a newspaper, which published it. D. in person delivered the manuscript of this synopsis to the publisher of the paper.) Wahlheimer v. Hardenbergh (1914) 160 App. Div. 190, 145 N. Y. Supp. 161: (D. was the general manager of an association of newspapers, organized to furnish news to the papers in the association. As such D. had power to employ reporters to collect and disseminate news. One of his reporters sent out a libelous statement to the newspapers in the association. D. had no actual knowledge of this until nearly two years later.)

British Museum (1894) 10 Times L. R. 338. The result of the cases is I think that, as regards a person who is not the printer or the first or main publisher of a work which contains a libel, but has only taken, what I may call, a subordinate part in disseminating it, in considering whether there has been publication of it by him, the particular circumstances under which he disseminated the work must be considered. If he did it in the ordinary way of his business, the nature of the business and the way in which it was conducted must be looked at; and, if he succeeds in shewing (1) that he was innocent of any knowledge of the libel contained in the work disseminated by him, (2) that there was nothing in the work or the circumstances under which it came to him or was disseminated by him which ought to have led him to suppose that it contained a libel, and (3) that, when the work was disseminated by him, it was not by any negligence on his part that he did not know that it contained the libel, then, although the dissemination of the work by him was prima facie publication of it, he may nevertheless, on proof of the before-mentioned facts, be held not to have published it. But the onus of proving such facts lies on him,[61] and the question of publication or non-publication is in such a case one for the jury.

Applying this view of the law to the present case, it appears to me that the jury, looking at all the circumstances of the case, have in effect found that the defendants published the libel complained of, and therefore the defendants are liable, unless that verdict is disturbed. Looking at the special circumstances of the case which were brought to the attention of the jury, I cannot say that they could not reasonably find as they did. * * *

Application dismissed.

[61] "I agree that the defendants are prima facie liable. They have handed to other people a newspaper in which there is a libel on the plaintiff. I am inclined to think that this called upon the defendants to shew some circumstances which absolve them from liability, not by way of privilege, but facts which shew that they did not publish the libel." Per Lord Esher, M. R., in Emmens v. Pottle (1885) 16 Q. B. D. 354, 357.

"Every sale or delivery of a written or printed copy of a libel is a fresh publication, and every person who sells a written or printed copy of it may be sued therefor, and the onus of proving that he was ignorant of its contents is on the defendant." Per Manning, J., in Staub v. Van Benthuysen (1884) 36 La. Ann. 467, 469. The libel here was a cartoon in a newspaper sold at a news stand "where all the local newspapers and the principal ones from other cities are constantly sold."

(c) "Falsely and Maliciously" [62]

GREENWOOD v. PRICK.

(Court of King's Bench. Cited in Cro. Jac. 91, 79 Reprint, 78.)

Coke cited a case where Parson Prick in a sermon recited a story out of Fox's Martyrology, that one Greenwood, being a perjured person and a great persecutor, had great plagues inflicted upon him, and was killed by the hand of God; whereas in truth he never was so plagued, and was himself present at that sermon; and he thereupon brought his action upon the case, for calling him a perjured person: and the defendant pleaded not guilty. And this matter being disclosed upon the evidence, Wray, Chief Justice, delivered the law to the jury, that it being delivered but as a story, and not with any malice or intention to slander any, he was not guilty of the words maliciously; and so was found not guilty. 14 Hen. 6, pl. 14. 20 Hen. 6, pl. 34. And Popham affirmed it to be good law, when he delivers matter after his occasion as matter of story, and not with any intent to slander any.[63]

[62] The common law declaration in trespass on the case for slander or libel regularly contained this allegation: "Yet the said defendant, well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and contriving and wickedly and maliciously intending to injure the said plaintiff, * * * then and there falsely and maliciously spoke and published" (or, in libel, "falsely, wickedly and maliciously composed and published) of and concerning the plaintiff." See Whittier's Cases on Common Law Pleading, 127–130; Stephen on Pleading (Williston's Ed.) 44.

The Common Law Procedure Act of 1852 prescribed this form for slander: "That the defendant falsely and maliciously spoke and published of the plaintiff the words following, that is to say;" and this for libel: "That the defendant falsely and maliciously printed and published of the plaintiff in a newspaper called ———, the words following, that is to say." (15 & 16 Vict. c. 76, Schedule (B), 32, 33.)

The Commissioners of the New York Code of 1848 recommend the following: "That the defendant on the ———, at ———, published the following libel concerning the plaintiff, viz." (First Report of the Commissioners on Practice and Pleadings, p. 267.)

[63] In Crawford v. Middleton (1678) 1 Lev. 82, 83 Reprint, 308, Twysden "mentioned a case tried before Hobart, which he himself heard; where the plaintiff brought an action against one, for falsely and maliciously saying of him, 'that he heard he was hanged for stealing of an horse;' and on the evidence it appeared that the words were spoken in grief and sorrow for the news; and Hobart caused the plaintiff to be non-suit, for it was not maliciously; which all the Court here agreed to be done according to law."

Compare the query of Lord Denman in Hearne v. Stowell (1840) 12 Ad. & E. 719, 725, where Greenwood v. Prick was cited for the proposition that "malice is the gist of the action" for libel: "Do you pretend that I am justified in illustrating an argument by making a charge against a third party? Is Greenwood v. Prick good law now?" But see Chancellor Walworth's comment on this case in Hastings v. Lusk (1839) 22 Wend. (N. Y.) 410, 415, 34 Am. Dec. 330.

MERCER v. SPARKS.

(Court of King's Bench, 1586. Owen, 51, 74 Reprint, 892.)

Mercer had judgment to recover against Sparks in the Common Pleas, upon an action of the case for words; and Sparks brought a writ of error in the King's Bench, and assigned for error, that the plaintiff did not express in the declaration that the defendant spake the words malitiose, but it was adjudged, that it was no error, because the words themselves were malicious and slanderous, wherefore judgment was affirmed.[64]

[64] "In an indictment a thing must be expressed to be done 'falso et malitiose,' because that is the usual form, but in a declaration these words are not necessary." Anon. (1652) Style, 392.

"As to malice, the plaintiff in practice always alleges in his statement of claim, in actions of libel and slander, that the defendant falsely and maliciously wrote, or spoke, and published of and concerning the plaintiff the words complained of. But it is not necessary for the plaintiff to allege that the defendant did so maliciously. A publication calculated to convey an actionable imputation is prima facie a libel, or a slander. The law implies malice if the words are defamatory and untrue, unless indeed the occasion is privileged, in which case malice in fact must be proved." 18 Halsbury's Laws of England, 608 (1911). This practice holds in America, as in England.

"There has been much confusion in the law of defamation concerning malice as an ingredient of the offence. The use of the term may be traced to the ecclesiastical courts. By the canon law a bad intent, called 'malitia,' was essential in 'injuria': and it is likely that its use in the spiritual courts was primarily jurisdictional. These courts punished offences which were sinful because they were sinful, the essential element being 'malitia.' The defamer was punished 'pro salute animæ'; the matter was looked at from a moral, not from a legal point of view, to see if the speaking of the words were sinful. But it was no more true in the thirteenth century than it is now that an imputation upon a man's character was always or necessarily malicious. Such imputations were known, however, as a matter of common experience, to be malicious in most cases. And upon this presumption (though sometimes contrary to fact) the ecclesiastical jurisdiction was based. From being a necessary ground of jurisdiction in the spiritual courts, it came to be considered afterwards, when the civil courts acquired jurisdiction, that malice was the ground of temporal redress, though of course the jurisdiction of the temporal courts was not based upon malice. In other words, the common law adopted the ecclesiastical presumption as the gist of the action. Early cases may be found which proceeded strictly upon this basis. * * * But when the remedy came to be applied to cases in which there was obviously no actual wrongful intent, the courts resorted, as usual, to a fiction to preserve their consistency. They affirmed that malice was in all cases the gist of the action, but to find malice that did not exist they implied it. The whole doctrine of applied malice, in defamation as in other branches of the common law, is pure scholasticism. Malice if it means anything means malevolence or ill will; any other use of the term is fictitious. But the law was stated in this way: Words spoken without ill will may be actionable, but in such cases the law is said to imply malice from the act of speaking or publication. This kind of malice which the law is said to imply is called 'legal malice,' as differing from malevolence, which is called 'malice in fact'; and legal malice is said to consist in speaking defamatory matter without legal excuse, because when words are thus spoken the law implies malice." Van Vechten Veeder, "History and Theory of the Law of Defamation," 4 Columbia Law Review, 32, 35, 36.

"The exposition of the law of defamation was at one time encumbered by

SHEPHEARD v. WHITAKER.

(Court of Common Pleas, 1875. L. R. 10 C. P. 502.)

[See ante, p. 606, for a report of the case.] [65]

a useless legal fiction known as the doctrine of implied malice. It used to be said that malice was an essential element in all actions for libel and slander, whether the occasion was privileged or not; but when there was no privilege, malice was conclusively presumed from the mere fact of publication. The existence of privilege, on the other hand, excluded any such presumption. Absolute privilege excluded it conclusively; but when the privilege was qualified merely, it remained open to the plaintiff to prove as a fact that malice existed. Malice which was thus presumed in law was called implied malice, while that which was proved as a fact in cases of qualified privilege was known as express or actual malice. Implied malice has now been eliminated from the law. It is now recognized that malice is no more an essential element in the wrong of defamation than in that of trespass or conversion." Salmond, Law of Torts (2d Ed.) 419, note.

See also 25 Cyc. 372, and compare the remark of Burch, J., in Coleman v. MacLennan (1908) 78 Kan. 711, 98 Pac. 281, 20 L. R. A. (N. S.) 361, 130 Am. St. Rep. 390, and of Bunn, J., in Dodge v. Gilman (1913) 122 Minn. 177, 142 N. W. 147, 47 L. R. A. (N. S.) 1098, Ann. Cas. 1914D, 894.

[65] Accord: Taylor v. Hearst (1895) 107 Cal. 262, 40 Pac. 392: (D., the proprietor of a newspaper, had published an article charging fraud by "J. W. Taylor"; the statement was untrue of him, and D. had not intended to name him, but to make the charge against another person, whose name was "J. N. Taylor.")

Upton v. Times-Democrat (1900) 104 La. 141, 28 South. 970: (A dispatch to the defendant's newspaper referred to P. as "a cultured gentleman." Through a mistake in transmission, this became "a colored gentleman." Under a standing rule in D.'s newspaper office, this was changed so as to read "a negro," and so published, in New Orleans.)

Morrison v. Ritchie & Co., [1902] 4 F. 645, 39 S. L. R. 432, 9 S. L. T. 476: (On August 15, 1901, the following appeared among the birth notices in the "Scotsman," published by the defendants: "Morrison: At the Caledonian Hotel, Ullapool, on the 11th inst., the wife of George Morrison, of 33 South Back Conongate, of twin sons. Ross-shire papers please copy." The statement was false, and Mr. and Mrs. Morrison had been married on July 12, 1901. Of these facts, however, the publishers of the Scotsman had no actual knowledge. In an action against them for written slander the following issues were proposed for the pursuers: Whether the pursuers were married as alleged, whether the defenders had published the notice on the date mentioned, and whether the notice was of and concerning the pursuers and "was false and calumnious." These issues were approved by the Lord Ordinary (Kincairney), who remarks as follows:

"This is an action of damages against the proprietors of a newspaper on account of defamatory advertisements. There can be no doubt that the pursuers had suffered a very cruel wrong, and would doubtless recover exemplary damages from the mean scoundrel who sent the advertisements, if they could discover him and if he were found to be sane and able to pay them. But their action against the newspaper raises a question of much importance and apparently of some novelty, since no precise or very close precedent has been quoted.

"I do not inquire whether sufficient vigilance was exercised in the 'Scotsman' office before inserting this advertisement. A very slight inquiry would have disclosed the fraud. A telegram to Ullapool would have disclosed it. The instructions were not signed, but bore the name of Mrs. Sutherland, 7 Albert Street, and an examination of the Directory would have disclosed the fact that no such house existed. But these precautions were not taken. I am far from imputing any blame on that account, because I suppose it would be barely possible to make such inquiries about the multitude of such

WILLIAMS v. HICKS PRINTING CO.

(Supreme Court of Wisconsin, 1915. 159 Wis. 90, 150 N. W. 183.)

The action was against the printing company to recover damages for a libelous publication in the defendant's newspaper. The plaintiff was a lawyer in good standing, and it was claimed that the article in question was willfully and maliciously composed and published with intent to injure him in his good name and fame as a lawyer and to bring him into public contempt and ridicule. The complaint contained allegations to this effect, with other allegations essential to support a recovery, including a copy of the article.

The defendant admitted the publication, but pleaded that it was neither false nor defamatory, and took issue on all allegations of the complaint as to the defendant's conduct being actionable.[66] The cause was submitted to the jury under instructions permitting a verdict for the defendant. After a motion for a new trial had been overruled, judgment for the defendant was rendered on the verdict.

MARSHALL, J. * * * In general, malice is an essential element of libel, but not, necessarily, malice in the sense of actual ill will and intent to injure, constructive malice, so called,—perpetration of the act without lawful excuse,—is sufficient. One need not go further on the subject of malice in proving a charge of libel than to prove the publication, unless the situation is such as to fall within the field of conditional privilege, and then malice in law is circumstantially rebutted and malice in fact, or express malice, as it is otherwise called, is required.

advertisements which reach the 'Scotsman.' But that is a matter which has no bearing on the question under consideration, because this action is not laid on neglect, but simply upon slander, there being no plea about neglect.

"Malice in the ordinary sense, or in any sense which can reasonably be put on the word, is not in the case. It is certain that there has been no malice. There hardly ever is when the action is laid against the proprietors of a newspaper on account of what has appeared in its columns, but the law is that the proprietors of the newspaper represent their correspondent, and are liable for the injurious paragraph as he would have been. I do not think that the law does so strange a thing as to imply malice where it manifestly and certainly does not exist."

On the effect of a retraction or apology, see Turton v. N. Y. Recorder Co. (1894) 144 N. Y. 144, 38 N. E. 1009; Coffman v. Spokane Pub. Co. (1911), 65 Wash. 1, 117 Pac. 596, Ann. Cas. 1913B, 636; De Severinus v. Press Pub. Co. (1911) 147 App. Div. 161, 132 N. Y. Supp. 89: "This [the retraction subsequently published] goes only to show absence of actual malice, but it does not exonerate from the consequences of original recklessness." Per Carr, J. And see 18 Halsbury's Laws of England, 726, 727 (1911); 25 Cyc. 424; Key. No. "Libel and Slander," § 66.

On constitutional questions as to a statute giving effect to a retraction, see Hanson v. Krehbiel (1904) 68 Kan. 670, 75 Pac. 1041, 64 L. R. A. 790, 104 Am. St. Rep. 422, and Osborn v. Leach (1904) 135 N. C. 628, 47 S. E. 811, 66 L. R. A. 648.

[66] The defendant pleaded also in excuse and justification, and in mitigation of damages. Only so much of the case is given as relates to the one point. The result of the appeal was a reversal of the judgment below.

So it is not to be thought that mere good faith, honest belief in the correctness of the publication, or good motives, or accident or inadvertence, is, of itself, a defense, or even sufficient to mitigate as to actual damages, because such faith, belief and motive are not inconsistent with malice in law arising, as a legal result, from the perpetration of the act of publishing an article, the natural tendency of which is to make its victim appear ridiculous or contemptible, or a subject of hatred, or to disgrace him in society or injure him in his business.

If a published article naturally tends, as suggested, the right to recover general damages follows as matter of course, in the absence of truth as a justification or circumstances of legal excuse, this, as indicated, not including mere negligence, accident, good faith, good motives or sense of duty, except as said, in the field of conditional privilege where something more than implied malice is required. General damages, which so follow, may be added to by exemplary damages, upon proof of that actual malice which overcomes the protection of conditional privilege. Thus one cannot efficiently claim immunity from liability for damages inflicted by publishing with express malice a false and defamatory article, by putting up the shield of conditional privilege. Joseph v. Baars, 142 Wis. 390, 125 N. W. 913, 135 Am. St. Rep. 1076; Arnold v. Ingram, 151 Wis. 438, 138 N. W. 111, Ann. Cas. 1914C, 976.

(d) Actual Damage [67]

The practice of awarding damages to the libelled party, in addition to the fine or imprisonment due to the criminal character of the offence, was introduced by the Star Chamber itself;[68] and it would, therefore, have been natural that, on the abolition of the Star Chamber in 1641, the civil action for damages should at once take the place of the older procedure. Nevertheless, though there is a thin stream of reported cases from the Restoration onwards,[69] libel continued for some time to be regarded mainly as a criminal offence punishable on indictment or information; and it may be to this fact that we owe the rule (certainly anomalous in an action of case) that in libel no damage need be proved.

Miles, in Digest Eng. Civ. Law, 502, 503.

[67] On the importance of actual damage in slander cases, see ante, "Slander through Special Damage." The question here is: When, if at all, is actual damage essential to the prima facie cause in libel?

[68] "As in Edwardes v. Wootton (1607) Hawarde's Cases in the Star Chamber 343, and in Lake's Case of 1619 (see Cal. Stat. Pap. (Dom.) III, pp. 19, 21, and Hudson, Star Chamber, p. 227."

[69] "One of the earliest being the well-known Lake v. King, on parliamentary privilege, in 1668."

HERIOT v. STUART.

(At Nisi Prius, Sittings after Term at Westminster, 1796. 1 Esp. 437.)

The plaintiff was proprietor of a newspaper called the True Briton. The defendant was printer of another paper called The Oracle; and the action was brought for a libel inserted in the latter paper, concerning the former. The libel was in the following terms, in the form of a paragraph in the Oracle:

"Times versus True Briton.

"In a morning paper of yesterday was given the following character of the True Briton: That 'it was the most vulgar, ignorant, and scurrilous journal ever published in Great Britain.' To the above assertion we assent, and to this account we add, that the first proprietors abandoned it, and that it is the lowest now in circulation; and we submit the fact to the consideration of advertisers."

Erskine, for the plaintiff, admitted, that the first words, charging it with scurrility, &c. were not actionable; but that the latter were, inasmuch as they affected the sale, and profits to be made by advertising.

To which LORD KENYON assented.[70]

MAYOR, ALDERMEN, AND CITIZENS OF MANCHESTER v. WILLIAMS.

(Queen's Bench Division, 1890. [1891] 1 Q. B. 94.)

The statement of claim, by the Municipal Corporation of the City of Manchester, after setting forth a letter by the defendant published in a newspaper further alleged that the defendant meant, and was understood to mean thereby, that bribery and corruption existed in three departments of the Manchester City Council, and that the plaintiffs were either parties thereto or culpably ignorant thereof. It did not, however, contain any averment that the plaintiffs had suffered any special pecuniary damage as the result of such defamatory publication. The defendant raised the objection of law that the words complained of were not capable of being construed into a libel against the plaintiffs, and that the statement of claim disclosed no cause of

[70] Part of the case is omitted.

Because of a variance, a stat processus was entered by consent.

Compare the remark of Bayley, J., in Whittaker v. Bradley (1826) 7 Dowl. & Ry. 649, 16 E. C. L. 310: "Whatever words have a tendency to hurt, or are calculated to prejudice a man who seeks his livelihood by any trade or business, are actionable."

And see South Hetton Coal Co., Ltd., v. North-Eastern News Ass'n, Ltd. (1894) 1 Q. B. 133; Reporter's Ass'n of America v. Sun Printing & Publishing Ass'n (1906) 186 N. Y. 437, 79 N. E. 710. See also the doctrine of Malicious Falsehood, given infra, Part III.

action, and that a municipal corporation cannot sue in its corporate capacity in respect of the alleged words in the sense complained of.

Blake Odgers, for the plaintiffs. If a corporation can be guilty of malice by its servants so as to render it liable to be sued for a malicious prosecution, it must equally be capable of being guilty of corruption so as to entitle it to sue for an imputation of corruption. Moreover, the libel here complained of contains charges which can only refer to the corporation as a whole. It speaks of "scandalous and abominable expenditure." But the money is voted by the corporate body, and not by the individual members of it.

DAY, J. This is an action brought by a municipal corporation to recover damages for what is alleged to be a libel on the corporation itself, as distinguished from its individual members or officials. The libel complained of consists of a charge of bribery and corruption. The question is whether such an action will lie. I think it will not.

It is altogether unprecedented, and there is no principle on which it could be founded. The limits of a corporation's right of action for libel are those suggested by Pollock, C. B., in the case which has been referred to. A corporation may sue for a libel affecting property, not for one merely affecting personal reputation. The present case falls within the latter class. There must, therefore, be judgment for the defendant.

McLOUGHLIN v. AMERICAN CIRCULAR LOOM CO.

(Circuit Court of Appeals of the United States, First Circuit, 1903. 60 C. C. A. 87, 125 Fed. 203.)

The action was against the American Circular Loom Company, a corporation, and charged a libel in the publication by the defendant of the following letter from Chelsea, Mass., signed by the defendant, and addressed to the plaintiff, at New Orleans:

"Dear Sir: You are aware that we have sent our Mr. Kirkland to New Orleans to make an original investigation of the controversy between yourself and the Board of Underwriters. Mr. Kirkland has returned and has made to us the report of such investigation. It appears, beyond controversy, that you are using, and have been using, our circular loom conduit, not only under the conditions and in the places where it is permitted by the rules, but also in places and under circumstances where it is prohibited by such rules. We desire to impress upon you the fact that this company submits itself to those underwriters' rules; that such rules have been framed with its consent and acquiescence, and that we cannot, and will not, place ourselves in opposition to the execution of those rules as written.

"Under these circumstances, we think it necessary to advise you that unless you are willing to handle our material in accordance with our wishes, and in accordance with the rules of the Board of Underwriters, our business relations must cease, as we cannot afford to have any person connected with us who puts us in hostility to an organization with which we are in entire sympathy.

"Your immediate answer to this letter is requested, and we expect you in that letter to define your future policy in regard of the subject matter of this communication.

"We deem it proper to notify you that we have sent a copy of this letter to the Board of Underwriters, to the various insurance companies operating in New Orleans, and to such other persons as we have deemed it advisable to communicate with."

The declaration alleged that the plaintiff had become the selling agent for the defendant in New Orleans, for the purpose of introducing and establishing the sale of the defendant's product, viz. circular loom conduits, that the statements in the letter were false, and that copies of the letter were sent to insurance companies and agencies in New Orleans, where plaintiff was in the business of installing electrical plants, and to his competitors. The defendant demurred.*

LOWELL, District Judge. The plaintiff did not contend strenuously that the language complained of was libelous per se, without allegation and proof of special damage. Some distinctions applied in an action for defamation are highly technical, and have been adversely criticised even by judges who applied them. The gravamen of an action for defamation is damage to the reputation of the plaintiff, naturally arising from a false report. See Odgers on Libel and Slander (3d Ed.) 95; Morasse v. Brochu, 151 Mass. 567, 25 N. E. 74, 8 L. R. A. 524, 21 Am. St. Rep. 474. Speaking generally, where the false report and consequent damage to the reputation are shown, an action will lie unless the occasion be privileged. From some sorts of false report the law presumes conclusively that damage has followed, and the plaintiff need neither allege nor prove it. Here the language is styled libelous per se. Logically or not, the conclusive presumption of damage arises from some written words, where it does not arise if the same words are merely spoken. Odgers, 3; Thorley v. Kerry, 4 Taunt. 355. Except where this presumption exists, special damage to the plaintiff's reputation must be alleged and proved to have been the actual and natural result of the language used. In an action of defamation, the distinction between injuria and damnum—injury to the plaintiff's reputation and damage arising from the injury—is particularly hard to draw. Some language is deemed injurious without proof of damage, and damage is conclusively presumed to have followed the injury; other language is deemed injurious to the reputation only where damage has actually resulted.

Probably two diverse theories have tended to govern the action: First, that A. is responsible for defaming B. in the ordinary sense of defamation—language libelous per se; second, that A. is responsible to B. for damage naturally resulting from the lies told by A. about B.—special damage. See Ratcliffe v. Evans, [1892] 2 Q. B. 524. It may be that an action for defamation, strictly speaking, is properly maintainable only under the first theory, while under the second the action should be special on the case. But in this country, at any rate, the two theories have not been differentiated. In a few critical cases

* The statement of the case is abridged.

they may lead to results quite different, but in general the law is that above stated. An accurate and readily applicable definition of written language, libelous per se, does not exist, and some well-established distinctions may rest on history rather than on logic. Webb's Pollock on Torts, 290. The language here complained of, if spoken, would not support an action without proof of special damage. In the absence of innuendo and further colloquium, we do not deem that this language, though written, is libelous per se. * * *[71]

(C) Construction and Application[72]

No statement is necessarily and in all circumstances defamatory. There is no charge or imputation, however serious on the face of it, which may not be explained away by evidence that in the special circumstances of the case it was not issued or understood in a defam-

[71] However, in the omitted portion of the opinion the court reached the conclusion that special damage was shown.

Accord: Stannard v. Wilcox & Gibbs Sewing Machine Co. (1912) 118 Md. 151, 84 Atl. 335, 42 L. R. A. (N. S.) 515, Ann. Cas. 1914B, 709: (D., the Sewing Machine Company, sent a letter to another corporation stating that P., their Baltimore manager, refused to complete the payments for his wife's sewing machine and that "if you do not desire to see one of your managers brought up in a civil suit for goods purchased on the installment plan, we would suggest that you communicate with him to the effect that he take some steps" towards meeting this debt. In his suit for libel P. made no claim of any special damage caused him by the writing and sending of this letter, but insisted that it was actionable per se. Said Stockbridge, J., delivering the opinion: "A generalization from all these cases leads to the conclusion that in order for words not ordinarily actionable in themselves to be libelous per se, because affecting the plaintiff in respect to his business, occupation, or profession, it is necessary that the words have a reference to him in that capacity. Words which impute to persons engaged in business, such as merchants, traders, and others in occupations where credit is essential to the successful prosecution of their occupation, nonpayment of debts, want of credit, or actions which tend to lessen their credit, are libelous per se, unless they are privileged communications. In this case Mr. Stannard was not in business on his own account. He was the local manager for a nonresident corporation. It is not alleged or suggested that he had any occasion for the use of credit, or that his credit had been in any way impaired or affected. The statements in regard to him in no way related to the manner of his performance of his duties as manager of the Holmes Electric Protective Company, or charged him with being unfit for the proper performance of them; nor did he lose his position because of the letter in question, in which case he would have sustained special damage. Under these conditions, and applying the rule of law already stated, the letter cannot be regarded as actionable per se, and the trial court committed no error in sustaining the demurrer. That the letter was actuated by malice is admitted by the demurrer, and apparent from the paper itself, and deserving of the most emphatic reprobation; but that will not justify this court in departing from well-established principles upon so important a subject.")

[72] "It is elementary that alleged defamatory matter comes before the court for construction under the ordinary rules for construing pleadings. Among these is that the pleader is supposed to have stated his case in the manner most favorable to himself. The law will not assume as favorable to a party

atory sense. It may be shown to have been made in jest, or by way of irony, or in some metaphorical or secondary innocent sense, and that it was or ought to have been understood in that sense by those to whom it was made. Conversely, no statement is necessarily and in all circumstances innocent. An allegation which on the face of it contains no imputation whatever against the plaintiff may be proved from the circumstances to have contained a latent and secondary defamatory sense.

John W. Salmond, Law of Torts (2d Ed.) 409.

ROBERTS v. CAMDEN.

(Court of King's Bench, 1807. 9 East, 93, 103 Reprint, 508, 9 R. R. 513.)

LORD ELLENBOROUGH, C. J.,[73] delivered judgment: This was a motion in arrest of judgment in an action for words, in which a general verdict was found, with joint damages, upon the whole of the declaration. * * * The first objection turns upon the meaning of the words spoken of the plaintiff by the defendant. The words are these:

"He is under a charge of a prosecution for perjury. Griffith Williams (meaning an attorney of that name) has the Attorney-General's directions (meaning the Attorney-General of the County Palatine of Chester) to prosecute (meaning to prosecute the plaintiff) for perjury."

As it has been settled ever since the case of Underwood v. Parkes, 2 Stra. 1200, that the truth of the words cannot be given in evidence upon not guilty, but must be specially pleaded; the words, not having been so justified, must be assumed to be false: and the words not being accompanied by any qualifying context, nor appearing to be spoken on any warrantable occasion; as in a course of duty, or the like; so as to rebut the malice which is necessarily to be inferred from making a false charge of this kind; provided the charge itself is to be considered as a charge of the crime of perjury; the question amounts simply to this, whether the words amount to such charge; that is, whether they are calculated to convey to the mind of an ordinary hearer an imputation upon the plaintiff of the crime of perjury. The rule which at one time prevailed, that words are to be

anything he has not averred. As was said in Holt v. Scolefield, 6 T. R. 691: 'Either the words themselves must be such as can only be understood in a libelous sense, or it must be shown by the introductory allegations that they have that meaning, otherwise they are not actionable. Words, to be actionable, should be unequivocally so.' Harrison v. Stratton, 4 Esp. Cas. 218. This was the rule in regard to pleadings in libel cases in the English Courts (Folkard, Slander & Libel [7th Ed.] p. 235), and it has been affirmed in many American cases." Per Walker, J., in Walsh v. Pulitzer Pub. Co. (1913) 250 Mo. 142, 157 S. W. 326, Ann. Cas. 1914C, 985.

[73] The statement of facts and part of the opinion are omitted.

understood in mitiori sensu,[74] has been long ago superseded; and words are now construed by Courts, as they always ought to have been, in the plain and popular sense in which the rest of the world naturally understand them.[75]

What then is the plain and popular sense of these words; and what is the imputation meant to be conveyed by a person speaking them untruly of another? They must mean, that he was ordered by the Attorney-General to be prosecuted; (and it is immaterial for this purpose, whether the Attorney-General of the County Palatine or of England were meant;) either for a perjury which he had committed; or, which he had not committed; or, which he was supposed only to have committed. In the first sense they are clearly actionable. In the second, they cannot possibly be understood consistently with the context. And if the defendant had used the words in the last sense, the jury might have acquitted him, according to the doctrine in the case of Oldham v. Peake, both in the Court of Common Pleas, 2 Sir W. Blackstone, 962, and in this Court, Cowp. 275; in which case when in the Common Pleas Mr. Justice Gould laid it down, "That what was the defendant's meaning was a fact for the jury to decide upon." And Lord Mansfield afterwards, when that case was brought into this court, by error, said, "if (the words had been) shewn to be innocently spoken, the jury might have found a verdict for the de-

[74] See The Lord Cromwell's Case (1578) 4 Co. Rep. 13a: "And it was said quod sensus verborum est duplex, scil., mitis et asper; et verba semper accepienda sunt in mitiori sensu."

Brough v. Dennyson (1600) Goulds. 143, 75 Reprint, 1053: (The words were "Thou has stolen by the high-way side." It was remarked by Fenner: "When the words may have a good construction you shall never construe them in an evill sense. And it may be intended he stole a stick under a hedge, and these words are not so slanderous, that they are actionable.") Ball v. Bridges (1600) Cro. Eliz. 746, 78 Reprint, 978: (The words were: "He is a maintainer of thieves, and keepeth none but thieves in his house." A judgment for the plaintiff was reversed; for "he doth not say that he knew them to be thieves whom he maintained, and one may have thieves in his house, and maintain them, and not know them to be thieves, and then it is not any offence.") Foster v. Browning (1624) Cro. Jac. 688, 79 Reprint, 596: (The words were: "Thou art as arrant a thief as any is in England." A motion in arrest of judgment was successful because, inter alia, "he doth not aver that there was any thief in England.")

Southold v. Daunston (1633) Cro. Car. 269, 79 Reprint, 834: (The words were "Southold hath been in bed with Dorchester's wife." They were pleaded with special damage, loss of marriage with a certain woman. After verdict for the plaintiff, Bing, Serjt., contended that the words were not actionable; "for it may be that he was in bed with her when he was a child, she being his nurse, or it may be that her husband was in bed betwixt them, and the words shall be taken in mitiori sensu when any construction can be made to help it." After some hesitation judgment was given for the plaintiff, apparently because of the special damage.)

In Baker v. Pierce (1703) 6 Mod. 23, 87 Reprint, 787, Holt, C. J., after describing these cases in slander as "scrambling things that have gone backwards and forwards," remarks that wherever words tended to take away a man's reputation he would encourage actions for them, "because so doing would contribute much to the preservation of the peace."

[75] See note 75 on following page.

fendant; but they have put a contrary construction upon the words as laid." And certainly, if the sense of the defendant, in speaking these words, had varied from that ascribed to them by the plaintiff, he might by specially pleading have shewn them not actionable, had he not chosen to have rested his defence merely on the general issue.

It appears therefore that these words must fairly be understood in the first of these three senses; namely, that he was ordered to be prosecuted for a perjury which he had committed; and, so understood, they are unquestionably actionable. These words are not less strong in effect than the words which were held actionable in one of the later cases, that of Carpenter v. Tarrant, Rep. temp. Hardw. 339. viz. "Robert Carpenter was in Winchester gaol, and tried for his life; and would have been hanged had it not been for Leggat, for breaking open the granary of farmer A., and stealing his bacon." And without adverting to the long bead roll of conflicting cases which have been cited on both sides in the course of this argument, it is sufficient to say, that these words, fairly and naturally construed, appear to us to have been meant, and to be calculated, to convey the imputation of perjury actually committed by the person of whom they are spoken; and that, therefore, the rule nisi for arresting the judgment must be discharged.[75]

THOMPSON v. BERNARD.

(At Nisi Prius. 1807. 1 Camp. 48.)

Case for slander. It appeared that the defendant had used the following words, which were laid in the declaration, "Thompson is a damned thief; and so was his father before him; and I can prove it;" but that he added "Thompson received the earnings of the ship, and ought to pay the wages." The witness, to whom these words were addressed, had been master of a ship belonging to a person deceased, who had left the defendant his executor; and at the time was applying to him for payment of his wages.

[75] In Harrison v. Thornborough (1713) 10 Mod. 196, 88 Reprint, 691, it was remarked from the Queen's Bench: "Precedents in actions for words are not of equal authority as in other actions, because norma loquendi is the rule for the interpretation of words: and this rule is different in one age from what it is in another. The words which an hundred years ago did not import a slanderous sense now may: and so vice versa. In this kind of action for words, which are not of very great antiquity, the Courts did at first, as much as they could, discountenance them: and that for a wise reason, because generally brought for contention and vexation: and therefore when the words were capable of two constructions, the Court always took them mitiori sensu. But latterly these actions have been more countenanced: for men's tongues growing more virulent, and irreparable damage arising from words, it has been by experience found, that unless men can get satisfaction by law, they will be apt to take it themselves. The rule therefore that has now prevailed is, that words are to be taken in that sense that is most natural and obvious, and in which those to whom they are spoken will be sure to understand them."

LORD ELLENBOROUGH directed a nonsuit; observing, that the word "thief" was used without any intention in the defendant to impute felony to the plaintiff; which must appear to support the declaration.[76]

HANKINSON v. BILBY.

(Court of Exchequer, 1847. 16 Mees. & W. 442, 73 R. R. 563.)

Case. The declaration stated with proper innuendoes that the defendant falsely and maliciously spoke and published of the plaintiff the following defamatory words:

"You are a thief, and a bloody thief. You get your living by it. You have robbed Mr. Lake of £30, and would have robbed him of more, only you were afraid. I did mean what I said; be off, I don't want any bloody thieves here. You know you robbed Mr. Lake of £30."

At the trial, under a plea of Not guilty, before Rolfe, B., it appeared that the words were uttered by the defendant, a toll collector, to the plaintiff, as he passed the turnpike-gate, in the presence of several persons as well as the witness. The nature of the previous conversation between the plaintiff and defendant did not appear. The learned Baron told the jury, that it was immaterial whether the defendant intended to convey a charge of felony against the plaintiff by the words used, the question being, whether the bystanders would understand that charge to be conveyed by them. Verdict for the plaintiff for £5.

Humfrey now moved for a new trial, on the ground of misdirection: No special damage being laid, it was necessary to show the words to be actionable in themselves. The witness called by the plaintiff to prove the words was purposely selected, he not have heard the previous conversation between the plaintiff and defendant. * * * (PARKE, B. The witness appears to have been well acquainted with the affair to which the words related. If the bystanders were equally cognizant of it, the defendant would have been entitled to a verdict; but here the only question is, whether the private intention of a man who utters injurious words is material, if bystanders may fairly understand them in a sense and manner injurious to the party to whom they relate, e. g. that he was a felon.)

Some doubt being suggested as to the facts proved, the Court conferred with Rolfe, B.; and the next day,

POLLOCK, C. B., said: We find from my Brother Rolfe, that there were several bystanders who not only might but must have heard the expressions which form the subject of this action. That disposes of the case as to the matter of law. Words uttered must be construed in the sense which hearers of common and reasonable understanding

[76] Accord: Allen v. Hillman (1831) 12 Pick. (Mass.) 101, 103.
And see the remarks of Spear, J., in Macurda v. Lewiston Journal Co. (1912) 109 Me. 53, 82 Atl. 438, 441.

would ascribe to them, even though particular individuals better informed on the matter alluded to might form a different judgment on the subject.[77]

Rule refused.

BARHAM v. NETHERSALL.

(Court of King's Bench, 1602. Yel. 22, 80 Reprint, 16.)

The plaintiff declared that the defendant spoke these words:

T. Barham (innuendo the plaintiff) hath burnt my barn (innuendo my barn at such a place full of corn) and that with his own hand;

and upon non culp' pleaded, it was found for the plaintiff, and alleg'd in arrest of judgment, that the action did not lie; for these words, the plaintiff hath burnt my barn, are no slander; for such burning of a house is but a trespass, and all one as if he had said, the plaintiff hath cut down my trees, and such like; for to say a man hath committed a trespass is no slander: and then the innuendo (my barn full of corn) will not help the matter; for it is the nature of an innuendo to explain doubtful words, where there is matter sufficient in the declaration to maintain the action. But if the words before the innuendo do not sound in slander, no words produced by the innuendo will make the action maintainable, for it is not the nature of an innuendo to beget an action. And all this was allowed by GAUDY and YELVERTON, Justices (being alone in the King's Bench), and judgment quod nil capiat per billam.

BLOSS v. TOBEY.

(Supreme Judicial Court of Massachusetts, 1824. 2 Pick. 320.)

This was an action of slander with a declaration in seven counts, for the words stated in the opinion. The cause was tried upon the general issue, with a verdict for the plaintiff for $500 damages. The defendant moved in arrest of judgment.[78]

PARKER, C. J. * * * The first count only charges the defendant with having said that the plaintiff had burnt his own store in Alford. The words are introduced with a colloquium "of and concerning the plaintiff and of and concerning a certain store of the plaintiff's

[77] The statement of the case is abridged, and most of the argument of counsel is omitted.

Accord: Phillips v. Barber (1831) 7 Wend. (N. Y.) 439. And see Pollock's comment on the principal case, in 73 R. R. vi. Compare the charge, and the ruling on it, in Jarnigan v. Fleming (1871) 43 Miss. 710, 720, 5 Am. Rep. 514.

[78] The statement of the case is abridged, the arguments of counsel are omitted, and only so much of the opinion is given as relates to the first count.

situated in said Alford, before that time, to wit, on the sixth day of December last past, consumed by fire," and alleges that the defendant did speak, utter and publish the following false, scandalous and malicious words of and concerning the plaintiff, viz.:

He (meaning the plaintiff) burnt it (meaning the plaintiff's store in Alford aforesaid) himself (again meaning the plaintiff; and further meaning and insinuating by the several words aforesaid, that the plaintiff had been guilty of the crime of wilfully and maliciously burning his own store in Alford aforesaid).

Now these words are not actionable, unless it is a crime punishable by law for a man to destroy by fire his own property; and we cannot find that, either by the common law, or by any statute of this commonwealth, such an act, unaccompanied by an injury to, or by a design to injure, some other person, is criminal; and although it is alleged by the innuendo, that the defendant meant and intended to charge the plaintiff with having done this act wilfully and maliciously, yet the words do not thereby acquire any force or meaning which they had not in themselves, the office of an innuendo being only to make more plain what is contained in the words themselves as spoken, not to enlarge or extend their meaning or give them a sense which they do not bear when taken by themselves without the aid of an innuendo. The words spoken, as stated in this count, are simply, "He burnt it." These words are innocent in themselves, though they may have a defamatory meaning, if they relate to any subject the burning of which is unlawful. In order to give them that character, that they may be actionable, the plaintiff should have set forth in a colloquium the circumstances which would render such a burning unlawful, or by an averment in the preceding part of his count, without the form of a colloquium, and then should have averred that the words spoken were of and concerning those circumstances.[79] Thus, if goods belonging

[79] "Let the slanderer disguise his language, and wrap up his meaning in ambiguous givings out, as he will, it shall not avail him, because courts will understand language, in whatever form it is used, as all mankind understand it. * * * If the words have the slanderous meaning alleged, not by their own intrinsic force, but by reason of the existence of some extraneous fact, the plaintiff must undertake to prove that fact, and the defendant must be at liberty to disprove it. The fact then must be averred in a traversable form, with a proper colloquium, to wit, an averment, that the words in question are spoken of and concerning such usage, or report, or fact, whatever it is, which gives to words, otherwise indifferent, the particular defamatory meaning imputed to them." Per Shaw, C. J., in Carter v. Andrews (1834) 16 Pick. (Mass.) 1, 5. See also Winsor v. Offofy (1909) 140 Mo. App. 563, 120 S. W. 693.

For the debt which American literature owes to the common law colloquium, see the reference to Bloss v. Tobey, in Bigelow's Life of William Cullen Bryant, American Men of Letters, pp. 37, 38, note 1.

The Common Law Procedure Act of 1852 (15 & 16 Vict. c. 76, § 61) provided that in actions of libel and slander, the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense, without any prefatory averment to show how such words and matter were used in that sense." See also the provision of the New York Code of Procedure of 1848, 141, which has had a large

to another person were in the store, or if goods belonging to the plaintiff had been insured, it should have been averred that such was the case, and that the words spoken related to a store with such goods in it. But there is nothing in the count which indicates that any goods were in the store, or that any damage had happened or was designed towards any one but the plaintiff himself; so that the whole accusation against him, as represented in this count, is that he wilfully and maliciously burnt his own store. * * *[80]

Judgment arrested.

(D) Defenses to a Prima Facie Cause in Defamation

(a) JUSTIFICATION: TRUTH OF THE CHARGE

PRESS CO. v. STEWART.

(Supreme Court of Pennsylvania, 1888. 119 Pa. 584, 14 Atl. 51.)

Action on the case against the Press Company, to recover damages for the publication of an alleged libel in "The Press," a daily paper of Philadelphia. The plaintiff had leased rooms in a business section of Philadelphia and fitted them up as a school for clerks, salesmen, and reporters, and he professed to be a teacher of shorthand. The outside of his rooms had been alluringly placarded with signs. The attention of the city editor of "The Press" being attracted by the peculiarity of the signs, he detailed a reporter to visit the establishment and ascertain its character. He did so, and "The Press," the next day, contained the report of the interview.

following in America: "In an action for libel or slander, it shall not be necessary to state in the complaint, any extrinsic facts for the purpose of showing the application to the plaintiff, of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff, and if such allegation be controverted, the plaintiff shall be bound to establish, on the trial, that it was so published or spoken." On the effect of such enactments, see Grand v. Dreyfus (1898) 122 Cal. 58, 54 Pac. 389.

[80] Accord: Hopkins v. Beedle (1803) 1 Caines (N. Y.) 348, 2 Am. Dec. 191: (The words were "You have sworn a lie;" but there was no colloquium.) Stafford v. Green (1806) 1 Johns. (N. Y.) 505: ("He swore falsely before Squire Andrews," without a colloquium, but with "a mere innuendo, that it was in a certain cause depending before a justice.") Blair v. Sharp (1820) Breese (Ill.) 30. Tebbetts v. Goding (1857) 9 Gray (Mass.) 254.

Compare Niven v. Munn (1816) 13 Johns. (N. Y.) 48, where the statement was thus pleaded: "The defendant, in a certain discourse which he had of and concerning the trial of a certain cause between David Munn and John Wilson, then lately had, before Samuel Barnard, Esq., a justice of the peace, in and for the County of Sullivan; and of and concerning the testimony of the plaintiff, who was sworn as a witness, by the said Samuel Barnard (he being a justice as aforesaid, and having full power and lawful authority to administer an oath), on the trial of the cause, and testified as a witness therein, spoke and published, concerning the plaintiff, these false, scandalous, malicious and defamatory words: 'What he (meaning to plaintiff) has sworn to is a damned lie' (meaning thereby, that the plaintiff had perjured himself on the trial of the said cause)."

It was this report which formed the subject of the alleged libel. The plaintiff claimed that it was a libel because it exposed him to ridicule, and was calculated to injure him in his business as a teacher.

PAXSON, C. J.[81] * * * The defendant filed what was substantially, though not perhaps in strict technical form, a plea of justification. It alleged that the article in the Press was a just and true account of the interview between its reporter and the plaintiff, and asked the court to instruct the jury that "if they believe that the publication complained of is a fair and true account of an interview had between the plaintiff and Mr. Cooke, your verdict must be for the defendant." The court declined to affirm this point, and therein we think the learned judge erred. While the truth would not have been a defence to an indictment, the rule is otherwise in a civil suit for damages.[82] This is horn-book law. For this error at least the judgment must be reversed.

Judgment reversed.

[81] The statement of the case is abridged, and only so much of the opinion is given as relates to the one point.

[82] On the possible effect of showing the truth of the statement in slander, see the comment of Holt, C. J., in Johnson v. Browning (1703) 6 Mod. 216, when that case was before the King's Bench in 1705: "And he (Holt, C. J.) remembered another very lately, where a fellow brought an action for saying of him 'he was a highway-man'; and it appearing upon evidence that he was so, he was taken in court, committed to Newgate, and convicted and hanged the next sessions: so people ought to advise well before they brought such actions. And Darnell (for the plaintiff) remembered the like fate, which befell a client of his."

It was however at one time received as sound law that "no scandal in writing is any more justifiable in a civil action brought by the party to vindicate the injury done him, than in an indictment or information at the suit of the crown: for though in actions for words, the law, through compassion, admits the truth of the charge to be pleaded as a justification, yet this tenderness of the law is not to be extended to written scandal, in which the author acts with more coolness; and deliberation gives the scandal a more durable stamp, and propagates it wider and farther: whereas in words men often in a heat and passion say things which they are afterwards ashamed of, and though they seem to act with deliberation, yet the scandal sooner dies away, and is forgotten; and therefore from the greater degree of mischief and malice attending the one than the other, though the law allows the party to justify in an action for words, yet it doth not for written scandal; from whence it follows, that the only favour truth affords in such a case is, that it may be shewn in mitigation of damages in an action." Bacon's Abridgment, "Libel," A, 5.

This rested chiefly on the remark ascribed to Lord Hardwicke in The King v. Roberts (1735) Selw. N. P. 986. But Lord Holt in 1707 had already accepted the doctrine that "a man may justify in an action upon the case for words, or for a libel; otherwise in an indictment." Anon. (1706) 11 Mod. 99.

On the reason for the rule, compare 3 Bl. Com. (1765) 125, and Pollock on Torts (7th Ed.) 254.

UNDERWOOD v. PARKS.

(At Middlesex Sittings, 1744. 2 Strange, 1200, 93 Reprint, 1127.)

In an action for words, the defendant pleaded not guilty, and offered to prove the words to be true, in mitigation of damages: which the Chief Justice refused to permit, saying that at a meeting of all the Judges upon a case that arose in the Common Pleas, a large majority of them had determined not to allow it for the future, but that it should be pleaded, whereby the plaintiff might be prepared to defend himself, as well as to prove the speaking of the words. That this was now a general rule amongst them all, which no Judge would think himself at liberty to depart from, and that it extended to all sorts of words, and not barely to such as imported a charge of felony.[83]

CLARK v. BROWN.

(Supreme Judicial Court of Massachusetts, 1875. 116 Mass. 504.)

Tort for slander, for saying of the plaintiff, "he has stolen my iron bar, cart-pin, and ox-yoke." The defendant pleaded that the words were true. On the trial the defendant offered evidence tending to show that the plaintiff had admitted that he took the defendant's iron bar, ox-yoke and cart-pin, but he did not take them to steal them, but to bother or plague the defendant. The jury found for the plaintiff, for $11.75.

DEVENS, J. It is argued for the defendant that, while one may be justly held for slanderous utterances in respect to an innocent person wrongfully defamed, yet that if such a person, by some misconduct of his own, has contributed to produce a belief in the truth of the words thus uttered, he cannot complain of the person expressing it; and that, therefore, if the plaintiff wantonly took the property of the defendant as an idle jest or for the purpose of annoyance, the defendant is not liable for saying that he stole the articles, unless he knew that the plaintiff intended to return them, or only took them thus to annoy him. But in order to justify the defendant in the utterance of words otherwise slanderous, it is necessary that the facts proved by him should be coextensive with the charge; and he cannot protect himself from the consequences of having made it by showing that he believed it to be true, even if such a belief is induced by misconduct or impropriety on the part of the plaintiff, which fell short of that which he had seen fit to impute. Parkhurst v. Ketchum, 6 Allen, 406, 83 Am.

[83] Accord: Bearsley v. Bridgman (1864) 17 Iowa, 290: (Action for slander, under the Iowa code of civil procedure. The defendant answered by denial only. On the trial the defendant offered to prove the truth of the words alleged to have been spoken. The plaintiff's objection was sustained by the trial court.)

Dec. 639, and Watson v. Moore, 2 Cush. 133, 140, are decisive of this point, and the defendant has no ground of complaint in reference to the ruling upon it. * * *

The plaintiff is entitled to retain his verdict if he shall elect to have it amended to one for nominal damages. * * *[84]

WEAVER v. LLOYD.

(Court of King's Bench, 1824. 2 Barn. & C. 678, 107 Reprint, 535.)

Case for a libel published in an Oxford newspaper. The paragraph set out in the declaration charged the plaintiff with the brutal usage of a horse, in riding from Oxford to Abingdon, and after various particulars concluded as follows:

"We learn that, on reaching Abingdon, the horse presented a most shocking spectacle, having one eye literally knocked out, besides being dreadfully lacerated and injured in various parts of its body. Being conscious that its condition would excite attention, he ordered the person who had the care of the horse not to let anyone go into the stables."

The defendant pleaded, first, not guilty; secondly, a justification, averring the truth of each particular of the statement; thirdly, that the matters contained in the supposed libel were true in substance and effect. Replication, de injuria. At the trial the jury found for the plaintiff on the first plea, and as to the others, that two of the matters alleged were not true; viz. that the horse's eye, although much injured, was not literally knocked out, and that the plaintiff had not ordered that no person should be allowed to go into the stable to see the horse; but that the alleged libel was true in substance and effect. The Judge then directed a verdict for the plaintiff, and gave the defendant leave to move to enter a verdict in his favour, if the Court should think the third plea supported by the evidence. The jury accordingly found a verdict for the plaintiff with one shilling damages.

W. E. Taunton now moved to enter a verdict for the defendant, and contended, that the jury were warranted in finding that the alleged libel was true in substance and effect. The horse's eye was shewn to be much injured, although the sight was not entirely destroyed, and the supposed order, not to admit any person into the stable was not any part of the libellous matter, it was therefore unnecessary to prove the truth of it. Edwards v. Bell, 1 Bing. 403.

Per Curiam. The defendant did not succeed in proving either of his special pleas. The second plea, which distinctly averred the truth of the two facts which were not proven, clearly was not supported, and the third plea alleging that the charge was true in substance and effect, must mean that each particular of the charge was true in substance. In the case cited, the passage not proved formed no ingredient

[84] The statement of facts is abridged and parts of the opinion are omitted.

of the charge against the plaintiff. Here, the statement that he knocked out the horse's eye imputed a much greater degree of cruelty than a charge of beating him on the other parts of the body. If we were to hold this a sufficient justification, exaggerated accounts of any transaction might always be given with impunity.

Rule refused.

RUTHERFORD v. PADDOCK.

(Supreme Judicial Court of Massachusetts, 1902. 180 Mass. 289, 62 N. E. 381, 91 Am. St. Rep. 282.)

Tort for slander. The plaintiff alleged that she was a married woman, and that the defendant "charged her with adultery" through speaking these words: "You (meaning the plaintiff) are a dirty old whore, and I can prove it." The defendant pleaded the truth of the charge, in that "the plaintiff had, before said words were spoken and published, committed the crime of adultery." On the trial, the evidence tended to show that the plaintiff had committed adultery two or three times with the same person. The defendant asked the judge to rule as follows:

"The words as alleged in the declaration are actionable, without proof of special damage, only because they charge the plaintiff with, or impute to her, the commission of a crime—the crime of adultery. The defendant therefore justified if she proves that before the words were spoken the plaintiff had committed the crime of adultery. It is not necessary for her to prove, in order to justify, the full truth of the words spoken—i. e., that the plaintiff was a whore in the ordinary acceptation of the word, if she proves that defendant had committed the only crime which those words import, to wit, the crime of adultery."

The judge refused to so rule, and left the case to the jury, who returned a verdict for the plaintiff. The defendant alleged exceptions.

HOLMES, C. J. This is an action of tort brought by a married woman for calling her a dirty old whore. We repeat the qualifying adjectives as bearing on what we have to say. At the trial the defendant asked for a ruling that a justification was made out by proof that before the words were spoken the plaintiff had committed adultery. The judge refused so to rule, but left it to the jury to decide in what sense the words were used, and instructed them that the justification must be as broad as the charge. On this ground the judge further instructed them that proof that the plaintiff had committed adultery at some time would not be a justification, if, that is to say, the jury should be of opinion that the words meant more than the charge of the act on a single occasion, and imported, for instance, making merchandise of the plaintiff's person for hire. The defendant excepted.

No special reference was made to the pleadings in the request or ruling, and so we lay on one side the fact that the justification pleaded followed the innuendo of the declaration, which went little or no fur-

ther than to aver that the defendant charged the plaintiff with the crime of adultery. See Simmons v. Mitchell, 6 App. Cas. 156, 162; Haynes v. Clinton Printing Co., 169 Mass. 512, 515, 48 N. E. 275. Of course the judge was right in his instruction that the justification must be as broad as the charge. Apart from the pleadings, clearly the jury were at liberty to find that the words charged the commission of adultery on more than one occasion, and therefore the ruling requested was wrong.

But, as a general rule, the justification need be no broader than the charge in a legal sense—than the actionable portion or significance of the words. It need not extend to the further abuse with which a sentence or word may be loaded, where the truth of the substance of the imputation has been made out. Morrison v. Harmer, 3 Bing. N. C. 759, 767; Edwards v. Bell, 1 Bing. 403, 409. The judge, by suggesting that usually the epithet carried the notion of hire, implied that if that meaning were found the justification must extend to that. There is no doubt that the jury were warranted in finding that the epithet with its adjectives meant more and worse in a social sense than even repeated lapses from conjugal faith. But it would be rather a stretch to say, and it was not argued, that they could have found that any other crime was charged—for instance, that of being a common nightwalker, or a lewd, wanton and lascivious person in speech or behavior, under Public Statutes, chapter 207, section 29. Therefore, the question is suggested whether we are to confine the cause of action to so much of the charge as imports criminal conduct, or are to recognize as an element to be included in the justification such further import of the word as adds to the heinousness of the crime and possibly affects the degree of the punishment, although it does not change the technical character of the offense.

If we take the former view, we follow to its extreme results a tradition of the common law, the reasons for which have disappeared, and which has been corrected in England and in some of our states by statute. Odgers on Libel and Slander (3d Ed.) 90. By the old law, apart from an allegation of special damage, an action lay in the spiritual courts only, because the offense charged was dealt with only in the spiritual courts, and it was said that therefore the spiritual courts alone could determine the truth of the charge. Y. B. 27 Henry VIII, 14, pl. 4. Perhaps it would have been simpler to say that originally the whole jurisdiction was ecclesiastical, and that it was retained by the church, except in those instances where for special reasons the common law had encroached. In Coke's time the state of the law seems to have been accounted for or justified by treating such charges as "brabling words." Oxford v. Cross, 4 Rep. 18. But see Ogden v. Turner, 6 Mod. 104, 105; Graves v. Blanchet, 2 Salk. 696; Davis v. Sladden, 17 Or. 259, 262, 263, 21 Pac. 140. It has been suggested that the taking by the common-law courts of a portion of the original ecclesiastical jurisdiction over slander started from the fact

that in the cases where the common law interfered the matter charged was the subject of a common-law writ, and that the principal matter drew to it the accessory. In such cases the common-law courts best could determine the truth of the charge: Smith v. Teutonia Ins. Co., Fed. Cas. No. 13,115, 6 Am. Law Rev. 593, 595, 603, 605. Of course at that stage the common law could not present a systematic scheme of liability, but only examples of occasional interference which seemed merely arbitrary when the explanation was lost.

At the present day, when slander is fully domiciled in the common law as a tort and the only remedy recognized as a remedy must be found in the common-law courts, it may be argued with some force that there should be an effort after consistency of theory, and that the remedy for one of the greatest wrongs that can be done by words should not be distorted by the necessity of referring it to the liability to a small fine or imprisonment if the falsehood were true. The older law already has been broken in upon by holding liability to a trivial punishment enough if the crime involves moral turpitude, or if the punishment will bring disgrace. See Miller v. Parish, 8 Pick. 384; Brown v. Nickerson, 5 Gray, 1. Compare Turner v. Ogden, 2 Salk. 696, 6 Mod. 104; Onslow v. Horne, 2 W. Black. 750, 753, 3 Wils. 177, 186; Holt v. Scholefield, 6 Term Rep. 691, 694; Eure v. Odom, 9 N. C. (2 Hawks) 52. At all events, so long as the action for slander is preserved and lies for imputing unchastity to a woman, it is so reasonable to hold the liability coextensive with the imputation that we shall not be more curious than our predecessors in finding an arbitrary and technical limit. In Doherty v. Brown, 10 Gray, 250, 251, it was said by a very able judge, and said as a material part of the reasoning on which the case was decided, that proof of the unchastity of the plaintiff would not be a justification of the charge that she was a whore. We are content to take the law as we find it stated. See Cleveland v. Detweiler, 18 Iowa, 299; Sheehey v. Cokley, 43 Iowa, 183, 22 Am. Rep. 236; Peterson v. Murray, 13 Ind. App. 420, 41 N. E. 836.

Exceptions overruled.

CUDDINGTON v. WILKINS.

(Court of Common Pleas, 1615. Hob. 67, 80 Reprint, 216.)

Cuddington brought an action on the case against Wilkins, for calling him thief; the defendant justified, because beforetime he had stolen somewhat: the plaintiff replied, that since the supposed felony the general pardon in the seventh year of the King was made, and makes the usual averment to bring himself within the pardon. Whereupon the defendant demurs: See Staundford plac. Coronæ, 180, that a man arrested for felony break prison, he shall lose his battail; but yet if the King pardon him that it is restored. F. Coronæ, 281; 1

and 2 E. 3, F. Coronæ, 154. So here the felony is by the pardon extinct.

And in the end this case was adjudged for the plaintiff, though it may be, he knew him not to be within the pardon; for there is no cause to favour idle and injurious words: but perhaps if he had arrested him for the felony after pardon, it might have been excused if he knew it not, because it is an act of justice.[85]

LARSON v. COX.

(Supreme Court of Nebraska, 1903. 68 Neb. 44, 93 N. W. 1011.)

SULLIVAN, C. J. This was an action by Larson against Cox to recover damages for slander. The defamatory words set out in the petition amount to a charge of larceny. The defendant in his answer alleged that the charge was true, and that it was made with good motives and for justifiable ends. The jury found against the plaintiff, and judgment followed the verdict.

The assignments of error discussed by counsel relate for the most part to the plea of justification, and raise the question whether the truth of slanderous matter is per se a complete defense. The contention of counsel for plaintiff is that the truth is unavailing unless it was uttered with a good motive and for a proper purpose. His argument is grounded altogether upon the provision of the Constitution which declares that "in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense." Const. art. 1, § 5. The provision here quoted is a substitute for section 3, art. 1, of the Constitution of 1866, which was an almost literal copy of a New York statute adopted soon after the trial of the celebrated case in which Croswell was convicted of publishing a libel on Thomas Jefferson. People v. Croswell, 3 Johns. Cas. 337, append. This statute was intended to secure and safeguard the freedom of the press, and is now fundamental law in many of the

[85] Accord: Leyman v. Latimer (1877) 3 Ex. Div. 15, 20: (The editor of a newspaper sued for libel in calling him a "felon editor"; the defendants justified, alleging that the plaintiff had been convicted of felony and sentenced to twelve months imprisonment and hard labour. The plaintiff replied that after his conviction he underwent his sentence of twelve months' imprisonment and hard labour and so became as cleared of the crime and its consequences as if he had received the Queen's pardon under the great seal.) Compare the application of the principle in Hay v. Justices of the Tower, [1890] 24 Q. B. D. 561, and in Monson v. Tussauds, Limited, [1894] 1 Q. B. 671, 687.

For an elaborate consideration of the effect of a pardon, and of the doctrine of Cuddington v. Wilkins, see Bronson, J.'s, opinion in Baum v. Clause (1843) 5 Hill (N. Y.) 196.

On the question in general, see "Pardons," 29 Cyc. 1566; 37 Cent. Dig. tit. "Pardon," § 16; Dec. Dig. tit. "Pardon," § 9.

states. It was a modification of the doctrine of the common law that in public prosecutions for libel the truth of the libel is no excuse for its publication.

When considered in the light of history, there is much reason to suppose that the constitutional provision upon which plaintiff relies was designed as a sure and permanent protection, both in civil and criminal actions, to persons who have occasion, in the discharge of some legal, social, or moral duty, to write and publish criticisms on the character and conduct of others, and that it was not any part of its purpose to take away from the defendant in a libel case any right given him either by the statutory law or the common law. The truth of a defamatory publication is still a complete and perfect defense in a criminal case, irrespective of the motive or object of the publisher. The Legislature has made it so by definition of the crime. Section 132 of the Code of Civil Procedure in effect declares that, in an action for a libel or slander, the truth of the defamatory matter may be pleaded and proved as a defense. Castle v. Houston, 19 Kan. 417, 27 Am. Rep. 127. The validity of this section was of course necessarily involved in Pokrok Zapadu Pub. Co. v. Zizkovsky, 42 Neb. 64, 60 N. W. 358, and Neilson v. Jensen, 56 Neb. 430, 76 N. W. 866, which seem to have been decided on the assumption that the constitutional provision above quoted, so far as it relates to libels which are the subjects of civil action, was intended as a restraint upon the freedom of the press, and that it operated as a partial repeal of the statute. It is not necessary at this time to either affirm or deny the doctrine of these cases, as the constitutional provision with which they deal has no reference to actions for slander. Section 132, so far at least as it relates to spoken defamation, is in harmony with the Constitution, and is therefore valid.

Under the instructions given by the court at plaintiff's request, the jury must have found that the plea of justification was sustained by the proof. In our opinion, the evidence was sufficient to warrant the conclusion that Larson had committed the crime imputed to him. This being so, the verdict and judgment are right, even though defendant did not make the accusation with good motives and for justifiable ends. * * * [86] Judgment affirmed.

[86] Part of the opinion is omitted.

Accord: Bamm v. Clause (1843) 5 Hill (N. Y.) 196: (In slander, because D. had said that P. had stolen an axe several years before, D. pleaded the truth of the charge. P. replied that he had been pardoned by the Governor. Said Bronson, J.: "The plaintiff has so far retrieved his character that he has been made one of the inspectors of elections for the town in which he resides. This proves that he enjoys the good opinion of his neighbors, and it was a malicious thing on the part of the defendant to open this old sore. But our law allows a man to speak the truth, although it be done maliciously.") And see the remarks of Chapman, J., in Foss v. Hildreth (1865) 10 Allen (Mass.) 76, 79. So in an action for libel at common law. "The truth is always a complete defense, although the publication may be inspired by malice or ill will and be

(b) PRIVILEGE

SIR JOHN SCOTT LILLIE v. PRICE.

(Court of King's Bench, 1836. 5 Adol. & E. 645, 111 Reprint, 1309.)

Declaration (1836) for libel contained in a letter. Plea, not guilty. On the trial before Lord Denman, C. J., at the sittings in Middlesex after last Trinity term, the defence was, that the alleged libel was a privileged communication. The defendant's counsel objected that this answer could not be given under the plea of not guilty. The Lord Chief Justice thought otherwise, and left the whole case to the jury, who found for the defendant.

Sir W. W. Follett in this term moved for a rule to shew cause why a new trial should not be had, on the ground of misdirection.

LORD DENMAN, C. J. We have consulted the other Judges on this point, and are of opinion that the defence of privileged communication, as it goes to the very root of the matter of complaint, need not be specially pleaded.

Rule refused.[87]

libelous per se." Herald Pub. Co. v. Feltner (1914) 158 Ky. 35, 164 S. W. 371; 25 Cyc. 413, 414, note 25.

But this common law rule as to justification through a showing of the mere truth of the charge, has been modified by constitutional or statutory provisions in a considerable number of states. In some of these states, a plea of the truth in libel is a prima facie justification, but the plaintiff may overcome it by proving a malicious intention on the part of the defendant. Perry v. Porter (1878) 124 Mass. 338; Conner v. Standard Pub. Co. (1903) 183 Mass. 474, 67 N. E. 596. Compare the charge in Cardarelli v. Providence Journal Co. (1911) 33 R. I. 268, 80 Atl. 583, 588. In other states, a plea of the truth in libel is a justification if the defendant goes further and shows that he published it with good motives and for justifiable ends. Neilson v. Jensen (1898) 56 Neb. 430, 76 N. W. 866.

In Hutchins v. Page (1909) 75 N. H. 215, 72 Atl. 689, 31 L. R. A. (N. S.) 132, however, it was held, on common law grounds, that whether truth is a valid defense to an action to recover damages for a libel "depends upon the good faith and real purpose of the publisher." See infra, in the discussion of torts through intentional harm. See also, in general, 25 Cyc. 414, note 26, and the elaborate note to Hutchins v. Page, in 31 L. R. A. (N. S.) 132.

[87] "The defence that the occasion or circumstances under which words of themselves slanderous were spoken afford an excuse for their utterance, and so repel the legal inference of malice, is clearly matter in the nature of avoidance of the cause of action, and must be duly pleaded in the answer in order to enable a defendant to avail himself of it under the provisions of the practice act. Gen. Sts. c. 129, §§ 15, 17, 20, 27." Per Bigelow, C. J., in Goodwin v. Daniels (1863) 7 Allen (Mass.) 61, 63. This principle is now recognized by statute in a number of American states. 25 Cyc. 481, note 86. And under the English Judicature Acts a defendant who relies on a privilege "should set out the facts which he alleges constitute the privileged occasion." 18 Halsbury's Laws of England, 685, note (a).

(aa) Absolute Privileges [88]

RAM v. LAMLEY.

(Court of Common Pleas, 1633. Hut. 113, 123 Reprint, 1139.)

Norff. Ram brought an action upon the case against Lamley, and declared, that whereas he was "bonus & legalis homo and free a suspitione feloniæ," the defendant maliciously went to the Major of Linn, and requested a warrant of him (being a justice of peace) against the plaintiff for stealing his ropes: the major said to him, "be advised and look what you do," the defendant said to the major, "Sir, I will charge him with flat felony for stealing my ropes from my shop," quorum quidem verborum, &c. And after not guilty pleaded, and verdict for the plaintiff, Hitcham moved in arrest of judgment; and the Court unanimously resolved that these words being spoken to the justice of peace when he came for his warrant, which was lawful, would not maintain an action, for if they should, no other would come to a justice to make complaint, and to inform him of any felony. Querens nil capiat per breve.[89]

[88] "I should first like to explain my view, which is derived from the former cases, as to the meaning of what is called 'absolute privilege.' I do not think that it is a very accurate expression, and I am sure that calling it a 'privilege' is sometimes misleading. Privilege means, in the ordinary way, a private right. Now there is no private right of a judge, or a witness, or an advocate to be malicious. It would be wrong of him, and if it could be proved I am by no means sure that it would not be actionable. The real doctrine of what is called 'absolute privilege' is that in the public interest it is not desirable to inquire whether the words or acts of certain persons are malicious or not. It is not that there is any privilege to be malicious, but that, so far as it is a privilege of the individual—I should call it rather a right of the public—the privilege is to be exempt from all inquiry as to malice; that he should not be liable to have his conduct inquired into to see whether it is malicious or not—the reason being that it is desirable that persons who occupy certain positions as judges, as advocates, or as litigants should be perfectly free and independent, and, to secure their independence, that their acts and words should not be brought before tribunals for inquiry into them merely on the allegation that they are malicious. I think there is something more in that distinction than mere words, and the reason that this peculiar doctrine of 'absolute privilege' is sometimes complained of is that it is not thoroughly understood. That explanation of the doctrine will be found here and there in many of the cases, although it never seems to have been put into the head-note, and so it does not appear prominently as the real ground of the doctrine. In Munster v. Lamb, 11 Q. B. D. 588, for instance, the explanation of the doctrine is given in some of the judgments, but it is not to be found in the head-note; and the same remark applies to some of the cases earlier than Munster v. Lamb." Per Channell, J., in Bottomley v. Brougham (1908) 1 K. B. 584.

[89] Accord: Cutler v. Dixon (1585) 4 Co. Rep. 14 b: "If actions should be permitted in such cases, those who have just cause for complaint, would not dare to complain for fear of infinite vexation." Hartsock v. Reddick (1842) 6 Blackf. (Ind.) 255, 38 Am. Dec. 141.

SCOTT v. STANSFIELD.

(Court of Exchequer, 1868. L. R. 3 Exch. 220.)

Declaration, for that the plaintiff carried on the business of an accountant and scrivener, and the defendant spoke and published of and concerning him, in relation to his said business, the words following:

"You," meaning the plaintiff, "are a harpy, preying on the vitals of the poor."

Plea, that at the time when the alleged grievance was committed, the defendant was the judge of a certain court of record, being the County Court of Yorkshire, and spoke and published the words complained of when he was sitting in the said court, and acting in his capacity as such judge, and was as such judge hearing and trying a cause in which the now plaintiff was defendant, the hearing and determination of which was within the jurisdiction of the said court. Replication, that the said words so spoken and published by the defendant—

were spoken falsely and maliciously, and without any reasonable, probable or justifiable cause, and without any foundation whatever, and not bona fide in the discharge of his duty as judge as aforesaid, and were wholly uncalled for, immaterial, irrelevant, and impertinent, in reference to, or in respect of, the matters before him, and were wholly unwarranted on the said occasion, of all which premises the defendant had notice before and at the time of the committing of the said grievance, and then well knew.

To this replication the defendant demurred, and the plaintiff joined in the issue thus raised.

MARTIN, B.[90] It seems to me quite clear that words spoken under the circumstances stated in these pleadings are not the subject of an action of slander. The plea states that the defendant at the time when he spoke the words complained of, was sitting as the judge of a court of record, and spoke them while acting in his capacity of judge, and trying a cause within his jurisdiction in which the present plaintiff was the defendant. If the words spoken under such circumstances were the subject of an action of slander, the most mischievous consequences would ensue; no judge would then be able freely to administer justice, for if it were alleged, as is the case here, that he spoke falsely and maliciously, and not bona fide in the discharge of his duty, and that what he said was irrelevant to the matter in hand, a jury would have to determine the question whether what he said in the course of a case which he had jurisdiction to try was or was not said under the circumstances so alleged. What judge could try a case with any degree of independence if he was to be afterwards subject to have his conduct in the administration of justice commented on to a jury,

[90] The statement of the case is abridged, and the concurring opinions of Kelly, C. B., and Bramwell and Channell, BB., are omitted.

and the propriety of it determined by them? It appears to me that the opinion expressed by Chief Justice Kent, in the American case cited,[91] puts this matter upon its proper foundation, and states, that which is both sound law and good sense in reference to it. I do not think we are really deciding anything new, for to my mind the decisions of the Court of Queen's Bench have gone the full length of our present decision.[92]

Judgment for the defendant.

[91] Yates v. Lansing (1810) 5 Johns. (N. Y.) 282; Id. (1811) 9 Johns. (N. Y.) 395, 6 Am. Dec. 290.

[92] "Why is it that a judge who disgraces his office, and speaks from the bench words of defamation, falsely and maliciously, and without reasonable or probable cause, is not liable to an action? Is not such conduct of the worst description, and does it not produce great injury to the person affected by it? Why should a witness be able to avail himself of his position in the box and to make without fear of civil consequences a false statement, which in many cases is perjured, and which is malicious and affects the character of another? The rule of law exists, not because the conduct of those persons ought not of itself to be actionable, but because, if their conduct was actionable, actions would be brought against judges and witnesses in cases in which they had not spoken with malice, in which they had not spoken with falsehood It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law; but it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty. It must always be borne in mind that it is not intended to protect malicious and untruthful persons, but that it is intended to protect persons acting bona fide, who under a different rule would be liable, not perhaps to verdicts and judgments against them, but to the vexation of defending actions." Fry, L. J., in Munster v. Lamb (1883) 11 Q. B. D. 588, 607.

This immunity of judges from civil action for defamation is but one instance of a doctrine which "has a deep root in the common law." See Chancellor Kent's remarks in Yates v. Lansing (1810) 5 Johns. (N. Y.) 282, 291, and the cases there referred to; Bradley v. Fisher (1871) 13 Wall. 335, 347, 20 L. Ed. 646; Alzua v. Johnson (1913) 231 U. S. 106, 107, 34 Sup. Ct. 27, 58 L. Ed. 142. The action in the last case was against a justice of the Supreme Court of the Philippines. "Whatever may have been the Spanish law," said Mr. Justice Holmes, "this [the immunity of judges] is a principle so deep seated in our system that we should regard it as carried into the Philippines by implication as soon as we established courts in those islands." And it was held therefore that an act of the Philippine commission providing that no judge shall be liable to civil action for official acts done in good faith, is not to be construed as rendering judges of the Supreme Court liable for official acts done in bad faith.

See also the statement and illustration of the general principle in Cooley on Torts (Student's Ed.) 377. For other cases, see "Public Authorities," 23 Halsbury's Laws of England (1912) 323–331, and notes; "Judges," 23 Cyc. 569, note 3; Cent. Dig. §§ 165–173, 178, 179; Dec. Dig. § 36.

BROOK v. SIR HENRY MONTAGUE.

(Court of King's Bench, 1605. Cro. Jac. 90, 79 Reprint, 77.)

Action for words, for that the defendant spake these words of the plaintiff: "He was arraigned and convicted of felony, &c." The defendant pleads, that the plaintiff at another time brought false imprisonment against J. S., one of the serjeants of London, and found against the plaintiff, who brought an attaint: and the defendant being consiliarius et peritus in lege, was retained to be of counsel with the petty jury; and in evidence at the trial spake these words in the declaration; and so justifies. Yelverton and Coke, Attorney General, were of counsel for the defendant.

THE COURT resolved that the justification was good: for a counsellor in law retained hath a privilege to enforce any thing which is informed him by his client, and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it be false or true; but it is at the peril of him who informs it: for a counsellor is at his peril to give in evidence that which his client informs him, being pertinent to the matter in question; otherwise action upon the case lies against him by his client, as Popham said. But matter not pertinent to the issue, or the matter in question, he need not to deliver; for he is to discern in his discretion what he is to deliver, and what not: and although it be false, he is excusable, being pertinent to the matter: but if he give in evidence any thing not material to the issue which is scandalous, he ought to aver it to be true, otherwise he is punishable; for it shall be intended as spoken maliciously and without cause; which is a good ground for an action. So if a counsellor object matter against a witness which is slanderous, if there be cause to discredit his testimony, and it be pertinent to the matter in question, it is justifiable what he delivers by information, although it be false. So here it is material evidence to prove him a person fit to be bound to his good behaviour, and in maintenance of the first verdict; therefore his justification is good. * * * [93]

Wherefore, for these reasons it was adjudged for the defendant.

[93] The statement of the case is slightly abridged.

Accord: Hodgson v. Scarlett (1818) 1 B. & Ald. 232, 19 R. R. 301, where the words used by the defendant, Scarlett, afterwards Lord Abinger, were as follows: "Some actions are founded in folly, some in knavery, some in both, some in the folly of the attorney, some in the knavery of the attorney, some in the folly and knavery of the parties themselves. Mr. Peter Hodgson was the attorney of the parties, drew the promissory note, fraudulently got Bowman to pay into his hands £150 for the benefit of the plaintiff. This was one of the most profligate things I ever knew done by a professional man. Mr. Hodgson is a fraudulent and wicked attorney." The words, said Lord Ellenborough, were "not used at random and unnecessary, but were a comment upon the plaintiff's conduct as attorney," and "were relevant and pertinent to it."

MUNSTER v. LAMB.

(In the Court of Appeal, 1883. 11 Q. B. Div. 588.)

BRETT, M. R.[94] * * * This action is brought against a solicitor for words spoken by him before a court of justice, whilst he was acting as the advocate for a person charged in that court with an offence against the law. For the purposes of my judgment I shall assume that the words complained of were uttered by the solicitor maliciously, that is to say, not with the object of doing something useful towards the defence of his client: I shall assume that the words were uttered without any justification or even excuse, and from an indirect motive of personal ill will or anger towards the prosecutor arising out of some previously existing cause; and I shall assume that the words were irrelevant to every issue of fact which was contested in the court where they were uttered; nevertheless, inasmuch as the words were uttered with reference to, and in the course of the judicial inquiry which was going on, no action will lie against the defendant, however improper his behaviour may have been. * * * It was admitted that so long as an advocate acts bona fide and says what is relevant, owing to the privileged occasion defamatory statements made by him do not amount to libel or slander, although they would have been actionable if they had not been made whilst he was discharging his duty as advocate. But it was contended that an advocate cannot claim the benefit of the privilege unless he acts bona fide, that is, for the purpose of doing his duty as an advocate, and unless what he says is relevant. That is the question which we now have to determine. Certain persons can claim the benefit of the privilege which arises as to everything said or written in the course of an inquiry as to the administration of the law, and without making an exhaustive enumeration I may say that those persons are judges, advocates, parties, and witnesses. * * *

If upon the grounds of public policy and free administration of the law the privilege be extended to judges and witnesses, although they speak maliciously and without reasonable or probable cause, is it not for the benefit of the administration of the law that counsel also should have an entirely free mind? Of the three classes—judge, witness, and counsel—it seems to me that a counsel has a special need to have his mind clear from all anxiety. A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows; he is not called upon to consider, whether the facts with which he is dealing are true or false. What he has to do, is to argue as best he can, without degrading himself, in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position he

[94] The statement of facts and parts of the opinion are omitted.

were to be called upon during the heat of his argument to consider whether what he says is true or false, whether what he says is relevant or irrelevant, he would have his mind so embarrassed that he could not do the duty which he is called upon to perform. For, more than a judge, infinitely more than a witness, he wants protection on the ground of benefit to the public. The rule of law is that what is said in the course of the administration of the law, is privileged; and the reason of that rule covers a counsel even more than a judge or a witness. To my mind it is illogical to argue that the protection of privilege ought not to exist for a counsel, who deliberately and maliciously slanders another person. The reason of the rule is, that a counsel, who is not malicious, and who is acting bona fide, may not be in danger of having actions brought against him. If the rule of law were otherwise, the most innocent of counsel might be unrighteously harassed with suits, and therefore it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct. * * * I will refer to Kennedy v. Hilliard, 10 Ir. Com. Law Rep. (N. S.) 195; and in that case Pigott, C. B., delivered a most learned judgment, in the course of which he said: "I take this to be a rule of law, not founded (as is the protection in other cases of privileged statements) on the absence of malice in the party sued, but founded on public policy, which requires that a judge, in dealing with the matter before him, a party in preferring or resisting a legal proceeding, and a witness in giving evidence, oral or written, in a court of justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel." Into the rule thus stated the word "counsel" must be introduced, and the rule may be taken to be the rule of the common law. That rule is founded upon public policy. With regard to the counsel, the question of malice, bona fides, and relevancy, cannot be raised; the only question is, whether what is complained of has been said in the course of the administration of the law. If that be so, the case against a counsel must be stopped at once. No action of any kind, no criminal prosecution, can be maintained against a defendant, when it is established that the words complained of were uttered by him as counsel in the course of a judicial inquiry, that is, an inquiry before any court of justice into any matter concerning the administration of the law.[95]

[95] "The authorities are clear, uniform and conclusive that no action lies, whether against judges, counsel, witnesses, or parties, for words spoken in the ordinary course of any proceeding before any court or tribunal recognized by law. It is manifest that the administration of justice would be paralysed if those who are engaged in it were to be liable to actions of libel or slander upon the imputation that they had acted maliciously and not bona fide. The doctrine is not confined to the administration of justice in the superior courts. It has been applied in its fullest extent to county courts. It applies not only to all kinds of courts of justice, but to other tribunals recognised by law acting judicially. It has not, however, been

I am of opinion that the rule of law is such as I have pointed out, that it ought to be applied in the present case, and therefore that this action cannot be maintained.

Appeal [by the plaintiff] dismissed.

McLAUGHLIN v. COWLEY.

(Supreme Judicial Court of Massachusetts, 1879. 127 Mass. 316.)

Tort. The second count in the declaration stated in due form that the defendant in a declaration signed and filed by him as attorney for the plaintiff in an action brought by one Leggate against one Moulton had falsely and maliciously charged the present plaintiff with murder and adultery. The trial resulted in a verdict for the plaintiff, and the defendant alleges exceptions.[96]

LORD, J. It was stated in the opinion of this court in the recent case of Rice v. Coolidge, 121 Mass. 393, 23 Am. Rep. 279, that it seems to be settled by the English authorities that judges, counsel, parties and witnesses are absolutely exempted from liability to an action for defamatory words published in the course of judicial proceedings; and that the same doctrine is generally held in the American courts, with the qualification, as to parties, counsel and witnesses, that their statements made in the course of an action must be pertinent and material to the case. The doctrine thus qualified was set forth by Shaw, C. J., in an elaborate opinion, in Hoar v. Wood, 3 Metc. 193. The qualification of the English rule is adopted in order that the protection given to individuals in the interest of an efficient administration of justice may not be abused as a cloak from beneath which to gratify private malice. The question presented by the first exception in this case depends upon the proper application of this rule.

A careful examination of the declaration in the case of Leggate against Moulton shows that that action was brought to recover damages for losses sustained by Leggate in consequence of employing McLaughlin, the plaintiff in the case at bar, as her agent; and that he was so employed because Leggate believed certain false representations made by Moulton as to McLaughlin's trustworthiness and fitness for the agency. The declaration sets forth the representations made, alleges that they were false and that Moulton knew it, and then proceeds with the statements which are here charged to be libellous. These statements relate to matters not mentioned in the

extended further than to courts of justice and tribunals acting in a manner similar to that in which such courts act." 18 Halsbury's Laws of England, 678–681 (1911), and cases there cited.

[96] The statement of the case is abridged, and a portion of the opinion, dealing with other questions, is omitted. The defendant's exceptions were sustained for error in the admission of testimony under a plea of justification.

representations made by Moulton. They do not directly negative the truth of any of his representations, and were not necessary nor material to a full and complete presentation of the case on which Leggate asked for damages. The ground of action was not strengthened by adding them, nor did they furnish any basis for enhancing the damages which might be recovered. They were not pertinent to the action, and were struck out of the declaration, by the court, on motion of Moulton. They contained charges against the present plaintiff of criminal conduct of the grossest character.

To hold that such statements, thus uncalled for and irrelevant, are privileged, as part of pleadings in a cause, would be to disregard the salutary modification of the English rule which has been made by the American courts,[97] and is stated in Rice v. Coolidge. The defendant stands, therefore, as to liability to action on account of these statements, precisely as if he had published them in a newspaper, and cannot justify, by showing his belief that they were true, the sources

[97] "In England, the law seems to be settled now that judges, counsel, parties and witnesses are absolutely exempted from liability to an action for defamatory words published in the course of judicial proceedings (Rice v. Coolidge [1876] 121 Mass. 393, 23 Am. Rep. 279), and it has been broadly stated that this was the rule at common law. As the common law of England, as it existed down to the 4th day of July, 1776, is declared by statute to be of force in this state, let us see what was the state of the common law prior to the time stated. [Mr. Justice Parkhill here reviewed the earlier English cases on the point.] We need not comment upon the other English cases cited by counsel for the defendant in error further than to say that many of them were decided long after the 4th day of July, 1776, and only support the modern doctrine of privilege prevailing in that country. We do not think the rule at common law sustains the contention for an absolute privilege for defamatory words published in the due course of judicial proceeding.

"In the United States, according to the overwhelming weight of authority, in order that defamatory words, published by parties, counsel, or witnesses in the due course of a judicial procedure, may be absolutely privileged, they must be connected with, or relevant or material to, the cause in hand or subject of inquiry. If they are so published and are so relevant or pertinent to the subject of inquiry, no action will lie therefor, however false or malicious they may in fact be." Per Parkhill, J., in Myers v. Hodges (1907) 53 Fla. 197, 44 South. 357, 361, citing many cases.

See also Dodge v. Gilman (1913) 122 Minn. 177, 142 N. W. 147, 47 L. R. A. (N. S.) 1098, Ann. Cas. 1914D, 894. But in Sebree v. Thompson (1907) 126 Ky. 223, 103 S. W. 374, 11 L. R. A. (N. S.) 723, 15 Ann. Cas. 770, a dictum inclines toward the later English view. See, in general, 25 Cyc. 377–380; "Libel and Slander," Cent. Dig. §§ 117–123, Dec. Dig. Key-No. § 38.

The range of the principle of "absolute privilege" is indicated in the following passage from the considered judgment of the Court of Exchequer Chamber in Dawkins v. Lord Rokeby (1873) L. R. 8 Q. B. 255, 268: "Whatever is said, however false or injurious to the character or interests of a complainant, by judges upon the bench, whether in the superior courts of law or equity, or in county courts, or sessions of the peace, by counsel at the bar in pleading causes, or by witnesses in giving evidence, or by members of the legislature in either house of parliament, or by ministers of the Crown in advising the Sovereign, is absolutely privileged and cannot be inquired into in an action at law for defamation." This passage is quoted by Fry, L. J., in Munster v. Lamb (1883) 11 Q. B. D. 588, 606, as a dictum of the highest value and "in my opinion nothing less than a declaration of the common law on the point."

of his information, or his instructions from his client. It is only when words are published on an occasion which makes them privileged, that the belief of the publisher that they are true can be shown. * * *

SEAMAN v. NETHERCLIFT.

(In the Court of Appeal, 1876. 2 C. P. Div. 53.)

Appeal from the decision of the Common Pleas Division, ordering judgment to be entered for the defendant.[98]

COCKBURN, C. J. * * * At the trial before Lord Coleridge it appeared that in the probate suit of Davies v. May the defendant had been examined, as an adept, to express his opinion as to the genuineness of a signature to a will, and he gave it as his opinion that the signature was a forgery. The president of the Court, in addressing the jury, made some very strong observations on the rashness of the defendant in expressing so confident an opinion in the face of the direct evidence. Soon afterwards, on a prosecution for forgery before the magistrate, the defendant was called as an adept by the person charged, when he expressed an opinion favourable to the genuineness of the document. He was then asked by the counsel for the prosecution whether he had been a witness in the suit of Davies v. May. He answered "Yes." And he was then asked, "Did you read a report of the observations which the presiding judge made on your evidence?" He again said "Yes." And then the counsel stopped. I presume the circumstances of the trial were well known, and the counsel thought he had done enough. The defendant, the witness, expressed a desire to make a statement. The magistrate told him he could not hear it. Nevertheless the defendant persisted and made the statement, the subject matter of this action of slander.

On the proof of these facts Lord Coleridge reserved leave to the defendant to move to enter judgment, if the Court should be of opinion that there was no evidence on behalf of the plaintiff which ought to be left to the jury. It occurred to him, however, that it would

[98] Parts of the opinion are omitted.

Seaman v. Netherclift (1876) 1 C. P. D. 540. The pleading in the case was as follows:

Claim: that defendant said of a will, to the signature of which the plaintiff was a witness, "I believe the signature to the will to be a rank forgery, and I shall believe so to the day of my death," meaning that the plaintiff had been guilty of forging the signature of the testator, or of aiding and abetting in the forgery.

Defence: that defendant spoke the words in the course of giving his evidence as a witness on a charge of forgery before a magistrate.

Reply: that the words were not bona fide spoken by defendant as a witness, or in answer to any question put to him as a witness, and he was a mere volunteer in speaking them for his own purposes otherwise than as a witness and maliciously and out of the course of his examination.

be as well to take the opinion of the jury, and they found that the replication was true, viz. that the words were spoken not as a witness in the course of the inquiry, but maliciously for his own purpose, that is, with intent to injure the plaintiff. Upon these findings judgment was entered for the plaintiff, leave being again reserved to enter judgment for the defendant, and the Court of Common Pleas gave judgment for the defendant.

Now, if the findings of the jury had been founded upon evidence by which they could have been supported, I might have had some hesitation about the decision. But they were not; and we are asked to come to a conclusion contrary to what has been established law for nearly three centuries.

If there is anything as to which the authority is overwhelming it is that a witness is privileged to the extent of what he says in the course of his examination. Neither is that privilege affected by the relevancy or irrelevancy of what he says; for then he would be obliged to judge of what is relevant or irrelevant, and questions might be, and are, constantly asked which are not strictly relevant to the issue. But that, beyond all question, this unqualified privilege extends to a witness is established by a long series of cases, the last of which is Dawkins v. Lord Rokeby [1875] Law Rep. 7 H. L. 744, after which to contend to the contrary is hopeless. It was there expressly decided that the evidence of a witness with reference to the inquiry is privileged, notwithstanding it may be malicious; and to ask us to decide to the contrary is to ask what is beyond our power. But I agree that if in this case, beyond being spoken maliciously the words had not been spoken in the character of a witness or not while he was giving evidence in the case, the result might have been different. For I am very far from desiring to be considered as laying down as law that what a witness states altogether out of the character and sphere of a witness, or what he may say dehors the matter in hand, is necessarily protected. I quite agree that what he says before he enters or after he has left the witness-box is not privileged, which was the question in the case before Lord Ellenborough, Trotman v. Dunn [1815] 4 Camp. 211. Or if a man when in the witness-box were to take advantage of his position to utter something having no reference to the cause or matter of inquiry in order to assail the character of another, as if he were asked: "Were you at York on a certain day?" and he were to answer: "Yes, and A. B. picked my pocket there;" it certainly might well be said in such a case that the statement was altogether dehors the character of witness, and not within the privilege.

If, therefore, the findings of the jury, that the defendant had ceased to be a witness when he spoke the words, were justified by the evidence, I should hesitate before I decided in his favour. But I think the defendant was entitled to judgment on the first reservation.

There was no evidence to go to the jury upon the plaintiff's case. What the defendant said was said in his character of witness; for there can be no doubt that the words were spoken in consequence of the question put to him by counsel for the prosecution, the object and effect of the cross-examination having been to damage his credibility as a witness before the magistrate, and of this the witness was conscious. The counsel, having put the question, stops; and if there had been counsel present for the prisoner who had re-examined the witness, he would have put the proper questions to rehabilitate him to the degree of credit to which he was entitled. That such questions would have been relevant I cannot bring myself for a moment to doubt, relating as they do to the credibility of the witness, which is part of the matter of which the magistrate has to take cognizance. That being so, the witness himself, who is sworn to speak the whole truth, is properly entitled, not only with a view to his own vindication, but in the interests of justice, to make such an observation in explanation of his former answer as is just and fair under the circumstances. That is what the defendant did. The sitting magistrate having allowed the disparaging question to be put and answered, ought not to have interfered to prevent the defendant from giving an explanation. I think the statement, coming immediately after the damaging question had been put to him, must be taken to be part of his testimony touching the matter in question, as it affects his credibility as a witness in the matter as to which he was called. It was given as part of his evidence before he had become divested of his character of witness; and but for the question of the opposite counsel he never would have made the statement at all. * * *

In my opinion, the Lord Chief Justice should have nonsuited the plaintiff, which is the conclusion at which the Court of Common Pleas ultimately arrived; for there really was no evidence that the defendant was speaking otherwise than as a witness and relevantly [99]

[99] On this point in the case, Bramwell, J. A., concurring with Cockburn, C. J., remarked: "I am by no means sure that the word 'relevant' is the best word that could be used: the phrases used by the Lord Chief Baron and the Lord Chancellor in Dawkins v. Lord Rokeby (1875) Law Rep. 7 H. L. at page 744, would seem preferable, 'having reference,' or 'made with reference to the inquiry.' Now, were the judges of the Common Pleas Division right in holding that this statement of the defendant had reference to the inquiry? I think that they were. There can be no doubt that the question put by the cross-examining counsel ought not to have been allowed: 'Have you read what Sir James Hannen is reported to have said as to your evidence in Davies v. May?' What Sir James Hannen had said in a former case was not evidence. It was, therefore, an improper question, and the answer to it, if untrue, would not have subjected the witness to an indictment for perjury. But the question having been put, and the answer having been in the affirmative—and the question being, as Lord Coleridge observed, 'ingeniously suggestive,' viz., that the way the defendant had been dealt with on the former occasion did not redound to his credit as a witness—the defendant insisted on making in addition the statement complained of. He did so, in my opinion, very foolishly. It would have been better to have been satisfied with retaining his own opinion without setting it up in direct op-

to the matters in issue, because relevantly to his own character and credibility as a witness in the matter. That being so, even if express malice could have been properly inferred from the circumstances, the case of Dawkins v. Lord Rokeby, Law Rep. 7 H. L. 744, conclusively decides that malice has ceased to be an element in the consideration of such cases, unless it can be shewn that the statement was made not in the course of giving evidence, and therefore not in the character of a witness. A long series of authorities, from the time of Elizabeth to the present time, has established that the privilege of a witness while giving evidence is absolute and unqualified. * * *

The judgment of the Common Pleas must therefore be affirmed.

position to the positive testimony of eyewitnesses. But he foolishly, as I think, and coarsely exclaimed, 'I believe that will to be a rank forgery, and shall believe so to the day of my death.' Suppose after he had said 'yes,' he had added in a decent and becoming manner, 'and I am sorry Sir James Hannen said what he did, for I took great pains to form my own opinion, and I shall always retain it, as I still think it right.' Would not that have had reference to the inquiry before the magistrate? And would it not have been reasonable and right that the witness should have added that statement in justification of himself? Surely, yes. Mr. Clarke said he was prepared to maintain that as long as a witness spoke as a witness in the witness-box, he was protected, whether the matter had reference to the inquiry or not. I am reluctant to affirm so extreme a proposition. Suppose while the witness is in the box, a man were to come in at the door, and the witness were to exclaim, 'that man picked my pocket.' I can hardly think that would be privileged. I can scarcely think a witness would be protected for anything he might say in the witness-box, wantonly and without reference to the inquiry. I do not say he would not be protected. It might be held that it was better that everything a witness said as a witness should be protected, than that witnesses should be under the impression that what they said in the witness-box might subject them to an action. I certainly should pause before I affirmed so extreme a proposition, but without affirming that, I think the words 'having reference to the inquiry' ought to have a very wide and comprehensive application, and ought not to be limited to statements for which, if not true, a witness might be indicted for perjury, or the exclusion of which by the judge would give ground for a new trial; but ought to extend to that which a witness might naturally and reasonably say when giving evidence with reference to the inquiry as to which he had been called as a witness. Taking that view, I think the first proposition is established, that the statement of the defendant was made as witness and had reference to the inquiry."

Amphlett, J. A., also concurring, remarked: "How it would have been if this statement had been volunteered by the defendant, without it being necessary or in any way arising from questions he had been asked, we need not express any opinion. In such a case it may be that the words would not have been spoken in his office of a witness. I must by no means be taken as expressing an opinion that in such a case the witness would not be protected. I can see many reasons why a witness should be absolutely protected for anything he said in the witness box. If he did voluntarily make a scandalous attack while giving evidence, he would be guilty of a gross contempt of Court, and might be committed to prison by the presiding judge; or if he were before an inferior tribunal, and he persevered in his scandalous statements, he might be liable to an indictment for obstructing the course of justice. But this question does not arise here."

LAMBERSON v. LONG.

(St. Louis Court of Appeals, Missouri, 1896. 66 Mo. App. 253.)

The action was slander. The petition charged that the defendant, in the presence and hearing of others, spoke of and concerning the plaintiff certain words which imputed to the plaintiff the crime of larceny. There was an answer in denial, with a verdict for the plaintiff. The defendant appealed.[1]

ROMBAUER, P. J. * * * The assignment of error mainly relied on arises upon the refusal of three instructions asked by the defendant, all of which were to the effect that, if the jury found that the words charged to have been spoken were spoken by the defendant while he was being cross-examined as a witness, and that he was merely undertaking to repeat, in answer to a question asked him, what he had said to plaintiff in a former difficulty between them, the plaintiff could not recover.

There was no controversy touching the fact that the actionable words were spoken by the defendant while he was being cross-examined as a witness in a legal proceeding. There is, however, no pretense that they were responsive to any question propounded to him, and a careful analysis of the evidence has satisfied us that there is no substantial evidence in the record that they were intended by him to be a mere repetition of what he had formerly stated. We have very fully examined the law touching the privileged remarks of witnesses in the recent case of Crecelius v. Bierman, 59 Mo. App. 513, and have there fully defined the character and extent of such a privilege. Under that definition the utterance complained of could not be absolutely privileged, because it was not responsive to any question propounded by counsel, nor did it fairly arise out of any question propounded by counsel. It is well settled that a remark made by a witness in the box, wholly irrelevant to the matter of inquiry and uncalled for in any question of counsel, but introduced by the witness maliciously for his own purposes, will not be privileged. Odgers on Libel and Slander, top page 144. In order to make a statement which is not responsive to a question, and which is irrelevant to the issue, *relatively* privileged, it is incumbent upon the defendant to satisfy the jury that the statement was made by the witness because he deemed it relevant on reasonable grounds, and, moreover, that the witness believed the statement to be true. Had the instructions refused contained these qualifications, it would have been error to refuse them, since there was evidence in the case supporting that hypothesis. As they did not contain these qualifications, but were based upon a hypothesis unsupported by any substantial evidence in the record, we can not put the trial court in the wrong for refusing them.

[1] The statement of the case is abridged and part of the opinion is omitted.

It thus appears that neither of the errors assigned are well assigned, and hence the judgment must be affirmed. So ordered. All the judges concur, Judge BOND in the result.[2]

[2] Compare White v. Carroll (1870) 42 N. Y. 161, 1 Am. Rep. 503: (White was a homeopathic doctor; Carroll, an allopathic doctor. The latter was testifying as a witness on an issue as to the sanity of a testator, whom he had attended. He was asked, "Did any other physician attend him then?" The answer was: "Not as I know of. I understand he had a quack, I would not call him a physician; I understood that Dr. White, as he is called, had been there." The Court held that this answer was not material and pertinent to the enquiry, that it was privileged if the defendant when he gave it believed in good faith that it was, and that whether he so believed was a question of fact for the jury.) See Grover, J., in Marsh v. Ellsworth (1872) 50 N. Y. 309, 313.

See also the remark of Fields, J., in Wright v. Lothrop (1889) 149 Mass. 385, 389, 21 N. E. 963, 965: "The examination of witnesses is regulated by the tribunal before which they testify, and if witnesses answer pertinently questions asked them by counsel which are not excluded by the tribunal, or answer pertinently questions asked them by the tribunal, they ought to be absolutely protected. It is not the duty of a witness to decide for himself whether the questions asked him under the direction of the tribunal are relevant. As the witness is sworn to tell the whole truth relating to the matter concerning which his testimony is taken, he ought also to be absolutely protected in testifying to any matter which is relevant to the inquiry, or which he reasonably believes to be relevant to it. But a witness ought not to be permitted with impunity to volunteer defamatory statements which are irrelevant to the matter of inquiry, and which he does not believe to be relevant. This statement of the law, we think, is supported by the decisions in this Commonwealth. The English decisions, perhaps, go somewhat further than this in favor of a witness: certainly they apply the rule liberally for his protection."

In Buschbaum v. Heriot (1909) 5 Ga. App. 521, 63 S. E. 645, Russell, J., remarked: "The fact that a witness, without inquiry, and influenced by malice, volunteers false testimony defamatory of another, the immateriality of which is apparent to any ordinary mind, is such a circumstance as places the testimony of the witness in the class of conditional privilege, where he is no longer shielded by the law, unless it be made to appear that he bona fide believes that the facts stated by him are true, and unless with at least some show of reason he is of opinion that his testimony is material. What we have said relates wholly to such testimony as is immaterial, and not only immaterial but volunteered by the witness, because, in a case where the testimony is given in direct response to a question propounded by an officer of the court, the witness is not to be the judge of the materiality of his answer, but is required to answer the question, if it is not objected to or is not self-incriminatory. 'Pertinent matter in pleadings, motions, affidavits, and other papers in any judicial proceeding is absolutely privileged, though false and malicious. And in determining whether matter is pertinent or not the court will indulge in no strained, technical, or close construction to deprive the defendant of the protection of the privilege.' 1 Cooley on Torts (3d Ed.) 432, § 251. This rule, which applies especially to parties, is rather extended than restricted in favor of the witness."

But see Hunckel v. Voneiff (1889) 69 Md. 179, 14 Atl. 500, 17 Atl. 1056, 9 Am. St. Rep. 413: "It was perfectly competent for this court, having the questions before them for the first time in these cases, to follow and adopt the current of the American decisions in regard to the privilege of the advocate, and to follow and adopt the rule of the English courts as regards the privilege of the witness. This is what has been done, and it does not seem to me that the privileges of the two are so tied together, either by reason or authority, as to make these decisions inconsistent and irreconcilable." Per Miller, J.

For the principle in other than judicial proceedings, see an article by Judge Van Vechten Veeder in 10 Columbia Law Rev. 131 (1910), on "Absolute

BOND, J. Being unable to agree to all the expressions used in the opinion of my associates, it becomes necessary to state separately my views of the law applicable to this case:

I. A statement made by a witness in a judicial proceeding is presumptively privileged. If the statement is relevant, or believed on reasonable ground to be relevant to the issues on trial, or if it is responsive to an inquiry by court or counsel, the privilege becomes absolute irrespective of the intent of the utterer.

II. To overcome the prima facie presumption of privilege arising from the occasion, it is incumbent on the *plaintiff* (in an action of slander or libel) to show that the statement of the witness was not responsive to a question asked by the court or counsel, and that it was not believed on reasonable grounds to be relevant to the issues on trial. If the jury believes the evidence adduced to this effect, all presumption arising from the fact that the statement was made under examination in court ceases, and the statement, if actionable per se, will authorize a recovery. These principles are sustained by the cases cited in my opinion in Crecelius v. Bierman, 59 Mo. App. 513. As defendant's instructions did not conform to these rules, they were properly refused.

KEELEY v. GREAT NORTHERN RY. CO.

(Supreme Court of Wisconsin, 1914. 156 Wis. 181, 145 N. W. 664.)

The action was against the Great Northern Railway Company for defamation. A demurrer to the complaint was sustained, and the plaintiff appealed.

The complaint, in substance, set forth that in 1907 the husband of plaintiff, while in the employment of defendant, was killed in consequence of defendant's negligence; that she brought an action against the defendant for damages under the death statute, and recovered after a trial in which she was a witness in her own behalf with reference to formal and uncontested points, and in which an employé of the defendant was called as a witness for the plaintiff, and gave relevant and material testimony tending to establish the liability of defendant. After verdict for the plaintiff defendant moved for a new trial. Attached to and made part of the motion papers was an affida-

Immunity in Defamation: Legislative and Executive Proceedings," and see the same topics in 18 Halsbury's Laws of England, 683, 684 (1911).

The nature and extent of legislative immunity is effectively presented in Chief Justice Parsons' opinion in Coffin v. Coffin (1808) 4 Mass. 1, 3 Am. Dec. 189. The case is the more valuable in that it marks the limits of a very wide principle.

For the application of the principle in official communications by executive officers of the government, see Chatterton v. Secretary of State, [1895] 2 Q. B. 189.

vit of one Sandager, a detective in the employment of defendant, made in 1908, reflecting upon the chastity of the plaintiff. It is averred that this affidavit and the statement above referred to were wholly and entirely immaterial, irrelevant, and not pertinent to any issues involved in the action or on said motion, and that the affidavit and statements were not material, pertinent, or relevant to any matter or subject in the action, or considered, or proper to be considered, on said motion, and that neither the affidavit, nor any of the statements therein contained, nor any of the statements quoted therefrom, were proper to be used or filed in said action or upon said motion, which facts were well known to the defendant and its attorneys at and prior to the time of making and filing said affidavit and statements. The defendant, acting through its attorneys at the hearing of the motion for a new trial, read said affidavit and statements in open court. The presiding judge filed an order denying defendant's motion for a new trial, which order contained the following statement: "The affidavits of Zearfoss, Barr, and Sandager presented by defendant's counsel, in the opinion of this court, are improper and ought not to be considered, and they are not considered on the decisions of the several motions." This order and the decision of the circuit judge were affirmed by the Supreme Court. On the day the affidavit was presented and filed in the circuit court plaintiff caused to be served on the defendant a notice in writing, advising the defendant of the filing of the libelous affidavit and statements by its attorneys, but the defendant, after receipt of this notice by and through its attorneys, caused and procured said affidavit containing the alleged libelous statements to be filed in the office of the clerk of the circuit court, and thereafter to be filed with the clerk of the Supreme Court, and made no effort or request to withdraw from the files said affidavit and such statements therein contained. It is further averred that the acts and conduct of Sandager and of said attorneys were fully ratified by the defendant, and that the said acts and conduct were malicious, vindictive, and with the intention and for the purpose of destroying the good name and reputation of the plaintiff, and to cause her disgrace and degradation. It is also averred that the plaintiff has always been, and is now, a woman of chaste character and of good reputation.

TIMLIN, J.[3] * * * It is contended here that the demurrer admits these averments of the complaint which charged lack of good faith, want of reasonable belief in the truth of the affidavit made against the plaintiff, and knowledge on the part of the defendant that the affidavit in question was false and malicious; hence that the de-

[3] In the omitted portion of the opinion it was held that the statement, in the defendant's affidavit for a new trial, that illicit relations existed between the plaintiff and her principal witness, was relevant, since on the trial the witness appeared to be disinterested. And "the fact that the judge apparently disapproved of this attack upon the reputation of the plaintiff, and also denied the motion for a new trial, as he lawfully might do, is immaterial."

fendant cannot shelter itself behind a plea of privilege. This would be true as to conditional privilege. But this complaint shows on its face that the court had jurisdiction to entertain the motion, and that the matter complained of was relevant to the inquiry upon this motion, and in this respect shows a case of absolute privilege within the rule of Jennings v. Paine, 4 Wis. 358; Calkins v. Sumner, 13 Wis. 193, 80 Am. Dec. 738; Larkin v. Noonan, 19 Wis. 82; Schultz v. Strauss, 127 Wis. 325, 106 N. W. 1066, 7 Ann. Cas. 528. The cases of Cottrill v. Cramer, 43 Wis. 242, Eviston v. Cramer, 47 Wis. 659, 3 N. W. 392, and Cochran v. Melendy, 59 Wis. 207, 18 N. W. 24, were cases of communications conditionally privileged, and are not in point here.

In order to bring a witness, counsel, or party in a litigation within the rule of absolute privilege it is only necessary to show that the alleged slanderous or libelous words at the time when made or published were clearly relevant to the pending legal inquiry in which they were uttered or used. Nothing less than this would be an adequate protection. Ogders on Libel and Slander, p. 191; Hoar v. Wood, 3 Metc. (Mass.) 193; Laing v. Mitten, 185 Mass. 233, 70 N. E. 128. Where slanderous or libelous words employed in such a proceeding are irrelevant, they fall within the rule of conditional privilege, and if they are shown to be false, and not put forward with any bona fide belief in their truth or their relevancy, or any other ground of actual malice be shown, the conditional privilege is lost and the utterer liable. Without approving everything said therein we may here cite Myers v. Hodges, 53 Fla. 197, 44 South. 357; Lauder v. Jones, 13 N. D. 525, 101 N. W. 907. In some of the cases and text-books cited the distinction between absolute and conditional privilege is not accurately stated as in Newell on Defamation, Slander and Libel, p. 423; but see page 425 of the same work. Cases from other courts may also be found which ignore the distinction between absolute and conditional privilege, here made to rest upon the nature of the judicial proceeding and the relevancy of the matter complained of. But such cases are not the law of this state.

In legal proceedings, if the matter be relevant but false in fact, the law undertakes to punish for perjury, but civil damages are not recoverable. If irrelevant, false, and uttered or published with express malice, damages may be recovered in a civil action. If irrelevant and false, but uttered or published without actual as contradistinguished from imputed malice, it usually falls within the rule of conditional privilege, depending somewhat upon the degree of its irrelevancy; for if the matter is very obviously irrelevant, that circumstance may impugn the good faith of the utterer or publisher, and either take the case out of the rule of conditional privilege or be considered evidence to support a finding of express malice. Sherwood v. Powell, 61 Minn. 479, 63 N. W. 1103, 29 L. R. A. 153, 52 Am. St. Rep. 614; McLaughlin v. Cowley, 127 Mass. 316; s. c., 131 Mass. 70.

Order affirmed.

WATSON v. McEWAN.

SAME v. JONES.

(House of Lords. [1905] A. C. 480.)

Appeal from the Second Division of the Court of Session, Scotland.

The appellant was Sir Patrick H. Watson, a doctor of medicine; and the respondents were respectively Jessie Prentice Jones or McEwan, wife of Thomas McEwan, and her father, James Jones. The ground of the actions was that the appellant, while being examined as a witness in an action of separation brought by the respondent Jessie McEwan, made certain statements which the respondents alleged were slanderous. The respondent Jessie McEwan alleged that the statements made in the witness-box had been, prior to the trial, and with a view to giving evidence, communicated by the appellant to her husband, Thomas McEwan, his agent and his counsel. The Lord Ordinary and their Lordships of the Second Division were unanimously of opinion that no action would lie against the appellant for the statements made in the witness-box; but their Lordships (Lord Young dissenting) allowed an issue with reference to the information previously given to the husband's law agent. The main question raised in this appeal was whether the averment of the respondent Jessie McEwan that the statements made in the witness-box were previously communicated to her husband and his agent and counsel formed a ground of action against the appellant Sir Patrick H. Watson. * * *[4]

Earl of Halsbury, L. C. * * * By complete authority, including the authority of this House, it has been decided that the privilege of a witness, the immunity from responsibility in an action when evidence has been given by him in a Court of justice, is too well established now to be shaken. Practically I may say that in my view it is absolutely unarguable—it is settled law and cannot be doubted. The remedy against a witness who has given evidence which is false and injurious to another is to indict him for perjury; but for very obvious reasons, the conduct of legal procedure by Courts of justice, with the necessity of compelling witnesses to attend, involves as one of the necessities of the administration of justice the immunity of witnesses from actions being brought against them in respect of evidence they have given. So far the matter, I think, is too plain for argument.

But then comes the question which, so far as I know, has been raised for the first time in this case. The ingenious suggestion has been made that although it is true that a witness is protected from an action in respect of evidence actually given in a Court of justice, yet no such protection exists in respect of his attendance before the solicitor at what is called apparently in Scottish law his precognition—

[4] The statement of the case is abridged, and the arguments of counsel and parts of the opinion are omitted.

what we call the interview between the intended witness and the solicitor who takes from him what we call the proof—that is to say, reduces to writing the evidence which the witness is about to give. One very serious element of difficulty which those who insist upon such a liability have to meet is manifest—namely, that in the whole course of the diligent inquiry that the learned counsel on both sides have made into this matter they have not found that any such liability has ever been sought to be established before. So far as I know personally in my experience no such question has ever arisen. The learned judges who have allowed these issues have done so apparently for the first time in this case.

It appears to me that the privilege which surrounds the evidence actually given in a Court of justice necessarily involves the same privilege in the case of making a statement to a solicitor and other persons who are engaged in the conduct of proceedings in Courts of justice when what is intended to be stated in a Court of justice is narrated to them—that is, to the solicitor or writer to the Signet. If it were otherwise, I think what one of the learned counsel has with great cogency pointed out would apply—that from time to time in these various efforts which have been made to make actual witnesses responsible in the shape of an action against them for the evidence they have given, the difficulty in the way of those who were bringing the action would have been removed at once by saying, "I do not bring the action against you for what you said in the witness-box, but I bring the action against you for what you told the solicitor you were about to say in the witness-box." If that could be done the object for which the privilege exists is gone, because then no witness could be called; no one would know whether what he was going to say was relevant to the question in debate between the parties. A witness would only have to say, "I shall not tell you anything; I may have an action brought against me to-morrow if I do; therefore I shall not give you any information at all." It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must as a necessary consequence involve that which is a step towards and is part of the administration of justice—namely, the preliminary examination of witnesses to find out what they can prove. It may be that to some extent it seems to impose a hardship, but after all the hardship is not to be compared with that which would arise if it were impossible to administer justice, because people would be afraid to give their testimony.

My Lords, the hardship to which I refer is this: that although when a witness does give evidence which is wilfully false you can indict him for perjury, on the other hand, if he makes the same statement not upon oath to a person taking down the evidence he is prepared to give, it seems to be very difficult to devise anything that would bring him to justice for that false statement. The answer, of course, dealing with it as a matter of convenience and indeed of necessity for the ad-

ministration of justice, I suppose, is this: unless he does give evidence in a Court of justice, in which case he can be indicted for perjury if his evidence is wilfully false, nobody knows anything about it—it slumbers, I suppose, in the office of the solicitor, and nobody hears or cares anything about it. Practically, I think that would be the answer. But whether that be a good answer or not, what seems to me to be an overwhelming consideration in the determination of this case is that a witness must be protected for his preliminary statement or he has no protection at all, and that there is that protection established is, as I have already said, beyond all possibility of doubt. * * *

Under these circumstances, my Lords, it appears to me that there is but one point in this case; namely, whether the preliminary examination of a witness by a solicitor is within the same privilege as that which he would have if he had said the same thing in his sworn testimony in Court. I think the privilege is the same, and for that reason I think these judgments ought to be reversed, and I move accordingly.[5]

(bb) Conditional Privilege [6]

(1) Reports in Public Interest

CURRY v. WALTER.

(Court of Common Pleas, 1796. 1 Bos. & P. 525, 4 R. R. 717, 126 Reprint, 1046.)

This was an action for printing and publishing in the newspaper called The Times, under the title of "Law Reports," a libel on the plaintiff. It imported to be an account of an application to the Court of King's Bench for an information against the plaintiff and a Mr. Bingham, both justices of the peace for Hampshire, for refusing to license an inn at Gosport. The ground of the application, as moved by Mr. Erskine, was that the magistrates had conspired with the landlord of the inn-keeper to find a pretence for refusing him a licence, thereby to compel him to surrender a very beneficial lease to his landlord. The supposed libel, which was set out verbatim in the declaration, stated the circumstances of this charge very distinctly, and concluded by shewing that the rule was not granted, because there was no

[5] Lord James and Lord Robertson concurred. The cause was remitted back to the Court of Session in Scotland, with a direction to dismiss the action.

[6] "The term 'qualified privilege' is almost invariably used to distinguish this kind of privilege from 'absolute privilege.' The term 'conditional privilege' is, however, convenient as emphasizing the fact that the defence of privilege which is not absolute is conditional only, and liable to be displaced if the plaintiff establishes that the communication was actuated by express or actual malice." 18 Halsbury's Laws of England, 685, note (a).

affidavit on the part of the prosecutor of the magistrates having had due notice of the motion.

The defendant pleaded the general issue, and at the trial, after the plaintiff had proved the publication of the paper in question by him, produced as witness a person whom he employed to collect legal intelligence for the use of his paper, in order to prove that the report was a true and faithful account of what passed in the Court of King's Bench upon the motion. It was objected on the other side, that this defence ought to have been put upon the record, and could not be given in evidence under the general issue. This objection, however, was overruled by Eyre, C. J., who in summing up, told the Jury, that though the matter contained in the paper might be very injurious to the character of the magistrates, yet he was of opinion, that being a true account of what took place in a court of justice which is open to all the world, the publication of it was not unlawful. The Jury found a verdict for the defendant. A rule nisi for setting aside this verdict was obtained and argued.[7]

THE COURT were of opinion that this action could not be maintained, but some doubts being entertained upon the bench whether the matter of justification ought not to have been pleaded, the case stood over; and no judgment was ever given.[8]

WASON v. WALTER.

(Court of Queen's Bench, 1868. L. R. 4 Q. B. 73.)

A petition of the plaintiff was presented to the House of Lords, charging a high judicial officer with having made a false statement to his own knowledge, in order to deceive a committee of the House of Commons, and praying inquiry and the removal of the officer if the charge was found true. A debate ensued on the presentation of the petition, and the charge was utterly refuted. In the course of the debate statements disparaging to the character of the plaintiff were

[7] The statement is abridged, and the arguments of counsel are omitted.

[8] This case, a pioneer ruling in a doctrine which is now settled law, "has been often criticised but never overturned, and often acted upon. And in Rex v. Wright, it received the unqualified approbation of that great judge, Mr. Justice Lawrence." Per Lord Campbell, C. J., in Lewis v. Levy (1858) El., Bl. & El. 537, 560, 120 Reprint, 610, 617, 113 R. R. 768. The reason which underlies the doctrine was thus expressed by Lawrence, J., in Rex v. Wright (1799) 8 T. R. 293, 298: "Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of Courts of Justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings. The same reasons also apply to the proceedings in Parliament: It is of advantage to the public, and even to the legislative bodies, that true accounts of their proceedings should be generally circulated; and they would be deprived of that advantage if no person could publish their proceedings without being punished as a libellor."

made by the Lord Chancellor and other Lords. The Times newspaper published a faithful and correct report of these proceedings in the House of Lords, including the debate. The plaintiff sued the proprietor of the Times for libel. The defendant pleaded "Not guilty."

At the trial, the Lord Chief Justice told the jury that if they were satisfied that the matter charged as a libel in the first count was a faithful and correct report of the proceedings in the House of Lords, and of the speeches delivered on the occasion, he directed them in point of law that it was a privileged publication, and one which was not the subject of a civil action, and they should find for the defendant on that count.

There was a verdict for the defendant. Afterwards a rule was obtained for a new trial, on the ground of a misdirection in charging the jury that the publication of the libel was privileged if they should find it to be a true and faithful report of the debate in the House of Lords.[9]

COCKBURN, C. J. * * * The main question for our decision is, whether a faithful report in a public newspaper of a debate in either house of parliament, containing matter disparaging to the character of an individual, as having been spoken in the course of the debate, is actionable at the suit of the party whose character has thus been called in question. We are of opinion that it is not.

Important as the question is, it comes now for the first time before a court of law for decision. Numerous as are the instances in which the conduct and character of individuals have been called in question in parliament during the many years that parliamentary debates have been reported in the public journals, this is the first instance in which an action of libel founded on a report of a parliamentary debate has come before a court of law. There is, therefore, a total absence of direct authority to guide us. There are, indeed, dicta of learned judges having reference to the point in question, but they are conflicting and inconclusive, and, having been unnecessary to the decision of the cases in which they were pronounced, may be said to be extrajudicial. In the case of Rex v. Wright, 8 T. R. 293, Lawrence, J., placed the reports of parliamentary debates on the same footing with respect to privilege as is accorded to reports of proceedings in courts of justice, and expressed an opinion that the former were as much entitled to protection as the latter. But it is to be observed that in that case the question related to the publication by the defendant of a copy of a report of a committee of the House of Commons, which report the House had ordered to be printed, not to the publication of a debate unauthorized by the House. * * *

Decided cases thus leaving us without authority on which to proceed in the present instance, we must have recourse to principle in order to

[9] The statement of the case is abridged, and some parts of the opinion are omitted.

arrive at a solution of the question before us, and fortunately we have not far to seek before we find principles in our opinion applicable to the case, and which will afford a safe and sure foundation for our judgment.

It is now well established that faithful and fair reports of the proceedings of courts of justice, though the character of individuals may incidentally suffer, are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible.

The immunity thus afforded in respect of the publication of proceedings of courts of justice rests upon a twofold ground. * * *

The broader principle on which this exception to the general law of libel is founded is, that the advantage to the community from publicity being given to the proceedings of courts of justice is so great, that the occasional inconvenience to individuals arising from it must yield to the general good. It is true that with a view to distinguish the publication of proceedings in parliament from that of proceedings of courts of justice, it has been said that the immunity accorded to the reports of the proceedings of courts of justice is grounded on the fact of the courts being open to the public, while the houses of parliament are not; as also that by the publication of the proceedings of the courts the people obtain a knowledge of the law by which their dealings and conduct are to be regulated. But in our opinion the true ground is that given by Lawrence, J., in Rex v. Wright,[10] namely, that "though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings." In Davison v. Duncan, 7 E. & B. 231, Lord Campbell says: "A fair account of what takes place in a court of justice is privileged. The reason is, that the balance of public benefit from publicity is great. It is of great consequence that the public should know what takes place in court; and the proceedings are under the control of the judges. The inconvenience, therefore, arising from the chance of injury to private character is infinitesimally small as compared to the convenience of publicity." And Wightman, J., says: "The only foundation for the exception is the superior benefit of the publicity of judicial proceedings which counterbalances the injury to individuals, though that at times may be great." * * *

[10] 8 T. R. 293, 298 (1799), where Mr. Justice Lawrence recurs to the facts "of an action brought not many years ago by Mr. Currie against Walter, proprietor of the *Times*," and, in the passage quoted, gives the ratio decidendi in that case. "The same reasons also apply to the proceedings in Parliament: It is of advantage to the public, and even to the legislative bodies, that the accounts of their proceedings should be generally circulated; and they would be deprived of their advantage if no person could publish their proceedings without being punished as a libellor."

We entirely concur with Lawrence, J., in Rex v. Wright, 8 T. R. 298, that the same reasons which apply to the reports of the proceedings in courts of justice apply also to the proceedings in Parliament. It seems to us impossible to doubt that it is of paramount public and national importance that the proceedings of the houses of Parliament shall be communicated to the public, who have the deepest interest in knowing what passes within their walls, seeing that on what is there said and done, the welfare of the community depends. * * * The analogy between the two cases is in every respect complete. If the rule has never been applied to the reports of parliamentary proceedings till now, we must assume that it is only because the occasion has never before arisen. If the principles which are the foundation of the privilege in the one case are applicable to the other, we must not hesitate to apply them, more especially when by so doing we avoid the glaring anomaly and injustice to which we have before adverted. Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied. Our law of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motive of public men has only in very recent times been recognized. Comments on government, on ministers and officers of state, on members of both houses of Parliament, on judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or ex officio informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties? Again, the recognition of the right to publish the proceedings of courts of justice has been of modern growth. Till a comparatively recent time the sanction of the judges was thought necessary even for the publication of the decisions of the courts upon points of law. * * *

It is to be observed that the analogy between the case of reports of proceedings of courts of justice and those of proceedings in Parliament being complete, all the limitations placed on the one to prevent injustice to individuals will necessarily attach on the other: a garbled or partial report, or of detached parts of proceedings, published with intent to injure individuals, will equally be disentitled to protection.

Our judgment will in no way interfere with the decisions that the publication of a single speech for the purpose or with the effect of injuring an individual will be unlawful, as was held in the cases of Rex v. Lord Abingdon, 1 Esp. 226, and Rex v. Creevey, 1 M. & S. 273. * * *

Rule discharged.

STEVENS v. SAMPSON.

(In the Court of Appeal, 1879. 5 Exch. Div. 53.)

In the trial of the action of Nettlefold v. Fulcher in the Marylebone County Court, the defendant in the present action appeared for Nettlefold and made statements reflecting on the plaintiff in the present action, who was a debt collector and employed by Fulcher as agent in the Nettlefold case. Afterwards, the defendant sent a report of these proceedings in the Nettlefold case, including his remarks, to local newspapers, where they were published. This action for libel followed. The case came on for trial before Cockburn, C. J., at the Hilary Sittings, 1879, at Westminster, who left two questions to the jury: 1. Was the report a fair one? 2. Was it sent honestly, or with a desire to injure the plaintiff? The jury answered these questions: 1. That it was in substance a fair report: 2. That it was sent with a certain amount of malice: and found a verdict for the plaintiff with 40s. damages. Cockburn, C. J., directed judgment to be entered for the plaintiff for that amount.

The defendant appealed on the ground that the judgment entered upon the findings of the jury was wrong; and that it should have been directed to be entered for the defendant, the jury having found that an alleged libel, being a report in certain newspapers of proceedings which took place in a court of justice, was a fair report of the proceedings.

Harris and Poulter, for the defendant. The judgment ought to be entered for the defendant, for a true report of proceedings in a court of justice is privileged absolutely. Hoare v. Silverlock, 9 C. B. 20; Lewis v. Levy, 27 L. J. (Q. B.) 282. The motive that the defendant had for sending the report is immaterial. All the public have a right to be present in a court of justice and hear the proceedings. The defendant by the publication of the report has made the proceedings, which were accessible to all who were present, universally known. The publication, though to the disadvantage of a particular individual, is of importance to the public, and it is, therefore, privileged.

LORD COLERIDGE, C. J.[11] The question before us is whether, on the findings of the jury, the entry of the judgment for the plaintiff is right. I am of opinion that it was rightly entered for the plaintiff. The principle which governs this case is plain. It is like that which

[11] The statement of the case is abridged, and a concurring opinion by Bramwell, L. J., is omitted.

governs most other cases of privilege. In order, in cases of libel, to establish that the communication is privileged, two elements must exist; not only must the occasion create the privilege, but the occasion must be made use of bona fide and without malice; if either of these is absent, the privilege does not attach; here the second element is absent, for bona fides is wanting, and malice exists. There are certain cases in which the privilege is absolute. Words spoken in the course of a legal proceeding by a witness or by counsel, and words used in an affidavit in the course of a legal proceeding are absolutely privileged. It is considered advantageous for the public interests that such persons should not in any way be fettered in their statements. This is the first time that a report of proceedings in a court of justice has been sought to be brought within this same class of privilege. I am not disposed to extend the bounds of privilege beyond the principles already laid down, and I find no authority for its extension.

BRETT, L. J. It seems to me that the verdict of the jury means that the defendant did not send this report to be published for the benefit of the public in a matter as to which they ought to be informed, but from a desire to injure the plaintiff. Assuming the report to be a fair and correct account of the proceedings in a court of justice, was it privileged? It seems to me that, whatever privilege is relied upon in an action, the defendant is bound to prove that the occasion is privileged, and that he used the occasion in a privileged way. He is bound to shew that he used the privilege bona fide and without malice; if he fails in either of these incidents, he fails to shew that the communication is privileged. The defendant, in order to establish his defence, must shew that the report was substantially correct and that this substantially correct report was made without malice. It is said that the publication of proceedings in a court of justice is a case of absolute privilege, but there is no authority for that statement, and the case comes within the general rule. The defendant has failed to make out the defence he has put on the record.

Judgment affirmed.

KIMBALL v. POST PUB. CO.

(Supreme Judicial Court of Massachusetts, 1908. 199 Mass. 248, 85 N. E. 103, 19 L. R. A. [N. S.] 862, 127 Am. St. Rep. 492.)

Separate actions for libel were brought against the Post Publishing Company by Kimball and Galletly, and by the same plaintiffs against the Boston Transcript Company. From judgments for the defendants, the plaintiffs bring exceptions.

HAMMOND, J. The articles of which the plaintiffs complain contained reports of certain proceedings in court and also of a meeting of stockholders of a corporation called the Burrows Lighting & Heating Company.

So far as respects the report of the court proceedings the articles were privileged. This case differs materially from Cowley v. Pulsifer, 137 Mass. 392, 50 Am. Rep. 318. In that case there had been no action by the court. Here the bill had been presented to the court and the court had acted upon it so far as to make a special order that the defendants therein should appear and show cause why they should not be enjoined. This act of the court was a judicial proceeding and, whatever might formerly have been the rule, it was a subject for a privileged report, although the cause had not yet been finished. It was an act begun in a case, and in the end there must be a final decision. The words of Esher, M. R., in Kimber v. Press Ass'n (1893) L. R. 1 Q. B. 65, 71, seem to us to be a true statement of the law on this subject: "I am, therefore, of opinion that where the proceedings are such as will result in a final decision being given, a final and accurate report, made bona fide, of those proceedings is privileged, although it be published before the final decision." And in that case the rule was applied to the proceedings upon an ex parte application for the issue of a summons on a charge of perjury. * * *

But there was something more in the articles than the report of the proceedings in court. There was a report of the meeting of the stockholders of a private corporation; and unless this part of the report is also privileged the defense, so far as resting upon that ground, must fail. It is argued by the defendants that "the public is interested and concerned in a meeting of stockholders of a corporation such as is described in the" articles in question, and that reports of such meetings are privileged if fair and made without malice. But the difficulty with this argument is that, unless modified by statutory provision, the law in England and in this commonwealth always has been otherwise. It is to be noted that we are not dealing with what is said at the meeting nor with the person who said it. No doubt a stockholder at such a meeting, speaking to stockholders, may with impunity say things derogatory to an officer or the manager of the company provided that what he says be pertinent to the matter in hand and he speaks in good faith and without malice. His justification rests upon the fact that he is speaking to the stockholders upon a subject in which he and they have an interest. On the contrary, we are dealing with a report in the nature of a repetition of the defamatory remarks, which report is made by a stranger, having no interest in the question, to other strangers, called the public, equally without interest. It is manifest that the grounds for the privilege under which the original speaker, the stockholder, is protected cannot serve the publisher of the report. Davison v. Duncan, 7 El. & Bl. 231; De Crespigny v. Wellesley, 5 Bing. 402. The privilege of the publisher, if any he has, must rest upon other grounds.

It is stated by some authorities that by the common law of England

reports of judicial and parliamentary proceedings alone were privileged. While it is said by Shaw, C. J., in Barrows v. Bell, 7 Gray, 301, 66 Am. Dec. 479, that this statement, unqualified, is too broad, still subsequent decisions seem to show clearly that in England the principle of privilege is confined to reports of judicial or quasi judicial bodies. No privilege was attached to the report of other public unofficial meetings. Hence, if in such a case a report containing any defamatory statement of fact was printed in a newspaper the proprietor's only defense was that the statement was true. Purcell v. Sowler, 1 C. P. D. 781, 2 C. P. D. 215. See, also, Odgers, Libel & Slander (4th Ed.) Append. B, and the authorities therein cited. Since the decision in this last case the law has been somewhat modified so far as respects official and other public meetings. But these statutes have been somewhat strictly construed, and even now a fair report is not always safe. Ponsford v. Financial Times, 16 T. L. R. 248.

The subject was quite freely discussed by Shaw, C. J., in Barrows v. Bell, 7 Gray, 301, 66 Am. Dec. 479, and the following language was used (7 Gray, 313): "Whatever may be the rule as adopted and practiced on in England, we think that a somewhat larger liberty may be claimed in this country and in this commonwealth, both for the proceedings before all public bodies, and for the publication of those proceedings for the necessary information of the people. So many municipal, parochial and other public corporations, and so many large voluntary associations formed for almost every lawful purpose of benevolence, business or interest, are constantly holding meetings, in their nature public, and so usual is it that their proceedings are published for general use and information, that the law to adapt itself to this necessary condition of society, must of necessity admit of these public proceedings, and a just and proper publication of them, as far as it can be done consistently with private rights. This view of the law of libel in Massachusetts is recognized, and to some extent sanctioned by the case of Com. v. Clap, 4 Mass. 163, 3 Am. Dec. 212, and many other cases." And it was held that the publication by a member of the Massachusetts Medical Society of a true account of the proceedings of that society in the expulsion of another member for a cause within its jurisdiction, and of the result of certain suits subsequently brought by him against the society and its members on account of such expulsion, is privileged.

The above language of the court, however liberal its construction, is not to be understood as applying to strictly private meetings. It applies at the most only to meetings public in their nature, or where the proceedings concern the public. In that case it was said that the charter of the Massachusetts Medical Society "invested the society, their members and licentiates, with large powers and privileges, in regulating the important public interest of the practice of medicine and surgery, enabled them to prescribe a course of studies, to examine

candidates in regard to their qualifications for practice, and give letters testimonial to those who might be found duly qualified." It was also stated that it appeared by the acts incorporating this society that it was regarded by the Legislature "as a public institution, by the action of which the public would be deeply affected in one of its important public interests, the health of the people." It was further said that the proceedings of which the report was made "might be rightly characterized, as in the case of Farnsworth v. Storrs, 5 Cush. 412, as quasi judicial." And it was upon the latter ground that the communication was adjudged to be privileged.

The case before us is entirely different. The meeting was simply that of a private corporation invested with no privileges and owing no special duty to the public. It was an ordinary business meeting. Whether any member was in fraudulent possession of stock, or had mismanaged the affairs of the corporation, or whether the plaintiffs were unfit to continue as officers, or the corporation had been made bankrupt, were matters with which the public were in no way concerned. The meeting was for the stockholders alone. Only they or their duly constituted agents were entitled to be present. The meeting was neither public nor for a public purpose. As well might it be said that a private conference between the members of a partnership on partnership matters was a public meeting. For the purposes of the meeting it might have been necessary for charges to be made by one stockholder against another stockholder or an officer, and that the charges should be discussed and their truth or falsity determined; and so far the actors were well within the privilege. They had a duty to perform in a matter in which all were interested. But for obvious reasons hereinbefore stated the mantle of protection cannot cover him who, having no interest, repeats the defamatory words to others also without interest. And in this matter the conductor of a newspaper stands no better than any other person. As was said in Sheckell v. Jackson, 10 Cush. 25, 26, 27, in reply to a contention that conductors of the public press are entitled to peculiar indulgences and have special rights and privileges, "the law recognizes no such peculiar rights, privileges, or claims to indulgence. They have no rights but such as are common to all. They have just the same rights that the rest of the community have, and no more." These words, although spoken more than half a century ago, state the law as it exists today, except so far as it has been modified by statute, and there has been no statute material to the question before us. The result is that the articles were not privileged so far as they reported the proceedings of the corporation.

It is argued by the defendants that inasmuch as the charge in the bill in equity was the same as that made at the meeting, namely, that the majority of the stock was in the fraudulent possession of the plaintiffs, it will be impossible for the plaintiffs to contend that any

alleged damage was suffered from the one rather than from the other, and therefore if one report is privileged the action cannot be maintained. This is untenable. Even if the charge in substance is the same, it is evident that a charge made in a bill in equity filed in court may not be regarded as so serious a matter as a charge made by one's business associates in a business meeting. The difficulty of separating the damages gives no immunity to the defendants.

Exceptions sustained.[12]

TREBBY v. TRANSCRIPT PUB. CO.

(Supreme Court of Minnesota, 1898. 74 Minn. 84, 76 N. W. 961, 73 Am. St. Rep. 330.)

The action was against the Publishing Company for libel. The trial court rendered judgment for the defendant, and denied the plaintiff's motion for a new trial. The plaintiff appeals.

MITCHELL, J. * * * The facts leading up to the publication of the alleged libel were as follows: The city of Little Falls had issued to a waterpower company its bonds to the amount of $25,000 in aid of the improvement of the waterpower of the Mississippi River at this place, whereupon the plaintiff brought an action to restrain the city treasurer from paying the bonds, and to compel the waterpower company to return them, on the ground that they were illegally issued and void. To the complaint in this action the waterpower company demurred on the ground that it did not state a cause of action. The demurrer was overruled, and from the order overruling it the waterpower company appealed to this court. The bonds having been subsequently surrendered and cancelled under some new agreement between the city and the waterpower company, this appeal was not prosecuted further, and was finally dismissed by this court for want of prosecution, and judgment for costs rendered against the waterpower company. Thereupon the plaintiff caused to be published in a St. Paul paper an article to the effect that the judgment of this court in relation to the bonds was in favor of the plaintiff; that the amount in controversy was $25,000; that this decision rendered the bonds void; that the case had been in contest for some time, and was quite important.

This article having come to the notice of some bankers and brokers in Chicago, they wrote to the mayor of the city, asking for the particulars, and inquiring if the city had started on an era of repudiation, and why the bonds were contested. Thereupon some of the citizens of Little Falls presented a petition to the city council, reciting the facts, and stating that they deemed the city had been slandered

[12] Part of the opinion is omitted.

by the publication of the article, and that action should be taken "to make the truth public, so that the good name of the city should be continued." Thereupon the city council passed a resolution set out in the complaint, in which they characterized the plaintiff as a "disreputable person," and recited that the facts were falsely reported by him to the St. Paul paper with full knowledge of the true facts, and that he maliciously and intentionally made a false report, and condemned his conduct as execrable and odious, and as having caused the city irreparable damage. This resolution, preceded by an historical introduction, and headed "The City's Credit" (also set out in the complaint), the defendant published in its newspaper published in the city of Little Falls, and circulated in that city and the surrounding country. This is the publication complained of.

1. We shall spend no time on the question whether this publication was libellous on its face. It was clearly calculated to injure plaintiff in the good opinion and respect of others, and expose him to the contempt and hatred of his neighbors, especially in the city of Little Falls. It was manifestly libellous unless privileged. * * *

2. Defendant contends that the publication was absolutely privileged, because its paper was the official newspaper of the city, and the city charter (Sp. Laws 1889, c. 8, § 52) required all ordinances and resolutions to be published in the official newspaper before they shall be in force. To this there are several answers: First, the provision of the charter invoked does not seem to apply to resolutions of this character, but merely to ordinances which will have some operative force after they are passed; second, this does not purport to be an official publication, but merely the publication of an item of news; and, third, the resolution was not within the scope of the duty of the city council, but wholly outside of it, and privilege can only be claimed of things published within the scope of official authority. The city council had no more authority to libel or traduce the private character of a private citizen than an assemblage of private citizens would have. Buckstaff v. Hicks, 94 Wis. 34, 68 N. W. 403, 59 Am. St. Rep. 853; Wilcox v. Moore, 69 Minn. 49, 71 N. W. 917.

Neither was the publication privileged conditionally. A privileged communication is one made in good faith upon any subject-matter in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty to a person having a corresponding interest or duty, and which contains matter, which, without the occasion upon which it is made, would be defamatory and actionable. Newell, Defam. 388. If the article published by the plaintiff in the St. Paul paper was calculated to unjustly impair the credit of the city, the city council or the defendant would have a perfect right to publish the actual facts, in order to set the city's credit right before the public, although such facts might reflect on the conduct of the plaintiff, but not to make false and defamatory

statements regarding plaintiff's character. Landon v. Watkins, 61 Minn. 137, 63 N. W. 615.

It is true that the publication complained of was, as a matter of news, entirely true; that is, the city council did pass the resolution just as stated by the defendant. But the publication in a newspaper of false and defamatory matter is not privileged because made in good faith as a matter of news. The right to publish through the newspaper press such matters of interest as may be thus properly laid before the public does not go to the extent of allowing the publication concerning a person of false and defamatory matter, there being no other reason or justification for doing so than merely the purpose of publishing news. Mallory v. Pioneer Press Co., 34 Minn. 521, 26 N. W. 904. The article was not privileged, either absolutely or conditionally. * * *

Order reversed and new trial granted.[13]

LUNDIN v. POST PUB. CO.

(Supreme Judicial Court of Massachusetts. 1914. 217 Mass. 213, 104 N. E. 480, 52 L. R. A. [N. S.] 207.)

This action was against the Publishing Company, for libel. Judgment for the plaintiff and the defendant brings exceptions.

SHELDON, J. The defendant published in its newspaper a statement that "it was alleged" that the plaintiff had committed an assault upon a woman named, which had resulted in stated personal injuries to her. For this publication the plaintiff had a right of action, unless it was privileged, or unless it was true, or unless for some other reason it was not libelous. The mere fact that the charge against the plaintiff was not made by direct averment but only by saying that such an allegation had been made was not material; for the statement of unfounded charges is none the less actionable that it is made only by way of repeating them as having been made by others. Kimball v. Post Publishing Co., 199 Mass. 248, 251, 85 N. E. 103, 19 L. R. A. (N. S.) 862, 127 Am. St. Rep. 492, et seq.; Metcalf v. Times Publishing Co., 20 R. I. 674, 678, 40 Atl. 864, 78 Am. St. Rep. 900; Park v. Detroit Free Press Co., 72 Mich. 560, 40 N. W. 731, 1 L. R. A. 599, 16 Am. St. Rep. 544; Popham v. Pickburn, 7 H. & N. 891; Davison v. Duncan, 7 El. & Bl. 229; Purcell v. Sowles, 1 C. P. D. 781, 2 C. P. D. 251. Nor have the publishers of newspapers any greater right to give in this way currency to false charges than other persons. They have no peculiar rights or privileges. Sheckell v. Jackson, 10 Cush. 25, 26; Burt v. Advertiser Newspaper Co., 154 Mass. 238, 243, 28 N. E. 1, 13 L. R. A. 97.

[13] Parts of the opinion are omitted.

The defendant claims that this was a fair report of the fact that a suit for damages had been brought against the plaintiff by the woman named, and that in her declaration she had made charges against him which were fairly and correctly stated in the article complained of; that her writ and declaration had been made the subject of judicial proceedings in open court; and therefore that the article was privileged as a fair and correct report of judicial proceedings published in good faith and without malice. This is the main, though not the only contention now relied on by the defendant.

It is not open to dispute that a fair report in a newspaper of pending judicial proceedings is proper, and that this privilege extends to all matters which have been made the subject of judicial proceedings, though such proceedings may be merely preliminary or interlocutory, or even ex parte. For example, it will render privileged a fair report of the charges made in a bill in equity which has been presented to the court and upon which the court has acted by making an order that the defendants shall appear and show cause why an injunction shall not be issued against them. Kimball v. Post Publishing Co., 199 Mass. 248, 85 N. E. 103, 19 L. R. A. (N. S.) 862, 127 Am. St. Rep. 492; Kimber v. Press Association [1893] 1 Q. B. 65, 71. So it will extend to fair and accurate reports of hearings had upon applications for the issuance of warrants or other criminal process, or upon hearings had after such process has been issued, though they be not final trials upon the merits.[14] * * *

But this principle is limited to matters which really have been made the subject of judicial action. It does not give the right to publish statements made in declarations or other papers filed in court on the ground merely that they have been placed on the files of the court, or until they have been brought to the attention of the court and some judicial action has been taken upon them. Cowley v. Pulsifer, 137 Mass. 392, 50 Am. Rep. 318. As was said by Mr. Justice Holmes in that case, the reasons for allowing fair reports of the proceedings of courts of justice "have no application whatever to the contents of a preliminary written statement of a claim or charge. These do not constitute a proceeding in open court. Knowledge of them throws no light upon the administration of justice. Both form and contents depend wholly on the will of a private individual, who may not be even an officer of the court. It would be carrying privilege farther than we

[14] Mr. Justice Sheldon here cited Conner v. Standard Publishing Co. (1903) 183 Mass. 474, 67 N. E. 596, Perkins v. Mitchell (1860) 31 Barb. (N. Y.) 461, 471, 472, Lewis v. Levy (1858) El., Bl. & El. 537, and Usil v. Hales (1878) 3 C. P. D. 319, and gave the following cases, as being to the same general effect: Parker v. Republican Co. (1902) 181 Mass. 392, 63 N. E. 931; Ackerman v. Jones (1874) 37 N. Y. Super. Ct. 42; Meriwether v. Knapp (1908) 211 Mo. 199, 215, 109 S. W. 750, 16 L. R. A. (N. S.) 953; A. H. Belo & Co. v. Lacy (Tex. Civ. App. 1908) 111 S. W. 215, 218; Curry v. Walter (1796) 1 B. & P. 525, cited and followed in King v. Wright (1799) 8 T. R. 293, 298; Ryalls v. Leader (1866) L. R. 1 Exch. 296; Hope v. Leng (1907) 23 T. L. R. 243. And see 18 Halsbury's Laws of England, 695 (1911).

feel prepared to carry it, to say that, by the easy means of entitling and filing it in a cause, a sufficient foundation may be laid for scattering any libel broadcast with impunity." In that case, to be sure, the paper had been neither presented to the court nor entered upon the docket. But the fundamental ground of the decision was that it had not been made the foundation of any judicial action. The rule again was well stated in Barber v. St. Louis Dispatch, 3 Mo. App. 377, in language which, though used by a court of inferior jurisdiction, often has been quoted with approval by courts of last resort. So too the Supreme Court of Rhode Island has said, in Metcalf v. Times Publishing Co., 20 R. I. 674, 678, 40 Atl. 864, 865 (78 Am. St. Rep. 900), that the rule of privilege "gives no license to publish libelous matter simply because it is found in the files of a court. As publishers of news and items of public importance the press should have the freest scope, but as a scandal-monger it should be held to the most rigid limitation. If a man has not the right to go around to tell the charges made by one against another, much less should a newspaper have the right to spread it broadcast and in an enduring form. It is necessary to the ends of justice that a party should be allowed to make his charges against another, for adjudication, even though they may be of a libelous character, and as such they are privileged. * * * But the right of a party to make charges gives no right to others to spread them." See, also, Park v. Detroit Free Press Co., 72 Mich. 560, 40 N. W. 731, 1 L. R. A. 599, 16 Am. St. Rep. 544, and American Pub. Co. v. Gamble, 115 Tenn. 663, 90 S. W. 1005. The general doctrine of privilege has been limited similarly in analogous cases. Monaghan v. Globe Newspaper Co., 190 Mass. 394, 77 N. E. 467; Sweet v. Post Publishing Co., 215 Mass. 450, 102 N. E. 660; Smith v. Streatfield (1913) 3 K. B. 764.

The averments of the declaration mentioned in the defendant's article had not been made the subject of any judicial action within the rule which we have stated. The woman named in that article had brought an action against this plaintiff, but had failed to enter it in court upon the return day thereof. She then presented to the court a petition that she be allowed to make a late entry of her writ and declaration. Her petition was allowed by the court upon consent of the respondent thereto. But this was merely a permission given to that plaintiff to make a late entry of her action, under R. L. c. 173, § 11. It involved no examination of the averments of her declaration in that action, no passing upon their sufficiency, no consideration of the question whether she was entitled to any special relief pending the suit, or of the question whether any special process should be issued against the defendant therein under the provisions of R. L. c. 167, § 80, or otherwise. There was no question as to the making of any order resting upon the character of her action or of the charges made in her declaration. Indeed, there was and is nothing to indicate that her declaration was presented to any judge for action of any kind, and

the defendant made no pretense at the trial that this was the case. It cannot be said that there was any judicial action whatever upon that declaration. For this reason the case stands now as showing the bare repetition by the defendant of charges made, or claimed to have been made, by a third person in her action against this plaintiff. As we have seen, because the defendant had no privilege to report these charges, it took the risk, when it chose to repeat them, of being held liable for any damage thus caused to this plaintiff. The privilege which that woman enjoyed of stating her charges against this plaintiff for the purpose of having them adjudicated did not extend to this defendant or afford it any defense for the publication of libelous matter. * * * [15]

Exceptions overruled.

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(2) Communications in Pursuance of a Duty

CHILD v. AFFLECK et ux.

(Court of King's Bench, 1829. 9 Barn. & C. 403, 33 R. R. 216, 109 Reprint, 150.)

Case for a libel. Plea, the general issue. At the trial before Lord Tenterden, C. J., at the Westminster sittings after Hilary Term, it appeared in evidence that the plaintiff had been in the service of the defendants, Mrs. Affleck having before she hired her made inquiries of two persons, who gave her a good character. The plaintiff remained in that service a few months, and was afterwards hired by another person, who wrote to Mrs. Affleck for her character, and received the following answer, which was the alleged libel:

"Mrs. A.'s compliments to Mrs. S., and is sorry that in reply to her inquiries respecting E. Child, nothing can be in justice said in her favour. She lived with Mrs. A. but for a few weeks, in which short time she frequently conducted herself disgracefully; and Mrs. A. is concerned to add she has, since her dismissal, been credibly informed she has been and now is a prostitute in Bury."

In consequence of this letter the plaintiff was dismissed from her situation. It further appeared that after that letter was written, Mrs. Affleck went to the persons who had recommended the plaintiff to her, and made a similar statement to them. Upon this evidence it was contended, for the defendants, that there was no proof of malice, and that consequently the plaintiff must be nonsuited. On the other

[15] Accord: Williams v. New York Herald Co. (1914) 165 App. Div. 529, 150 N. Y. Supp. 838, where Scott, J., adopts the language of Stiness, J., in Metcalf v. Times Publishing Co. (1898) 20 R. I. 674, 678, 40 Atl. 864, 78 Am. St. Rep. 900: "It is necessary to the ends of justice that a party should be allowed to make his charges against another, for adjudication, even though they may be of a libelous character, and as such they are privileged, the injured party having a remedy for malicious prosecution when they are made maliciously or without probable cause. But the right of a party to make charges gives no right to others to spread them."

hand, it was urged that Mrs. Affleck's statement of what the plaintiff's conduct had been after she left her service was not privileged, and that, at all events, that part of the letter and the statement that she voluntarily made to other persons, and not in answer to any inquiries, were evidence of malice. Lord Tenterden, C. J., was of opinion that the latter part of the letter was privileged, and that the other communications being made to persons who had recommended the plaintiff were not evidence of malice, and he directed a nonsuit.

PARKE, J. The rule laid down by Lord Mansfield in Edmonson v. Stevenson, Bull. N. P. 8, has been followed ever since. It is, that in an action for defamation in giving a character of a servant, "the gist of it must be malice, which is not implied from the occasion of speaking, but should be directly proved." The question then is, whether the plaintiff in this case adduced evidence, which, if laid before a jury, could properly lead them to find express malice. That does not appear upon the face of the letter. Prima facie it is fair, and undoubtedly a person asked as to the character of a servant may communicate all that is stated in that letter. Independently of the letter, there was no evidence except of the two persons that had recommended the plaintiff. The communication to them, therefore, was not officious, and Mrs. Affleck was justified in making it. In Rogers v. Clifton, 3 Bos. & P. 587, evidence of the good conduct of the servant was given, and the communication also appeared to be officious. In Blackburn v. Blackburn, 29 R. R. 583, 4 Bing. 395, the occasion of writing the alleged libel did not distinctly appear, it was therefore properly left to the jury to say, whether it was confidential and privileged or not, and they found that it was not. Here the letter was undoubtedly prima facie privileged, the plaintiff, therefore, was bound to prove express malice in order to take away the privilege.[16]

Rule refused.

HARRISON v. BUSH.

(Court of Queen's Bench, 1855. 5 El. & Bl. 344, 119 Reprint, 509, 103 R. R. 507.)

LORD CAMPBELL, C. J.[17] This was an action for a libel tried before my brother Crowder at the last Salisbury assizes. The defendant pleaded Not Guilty, and a justification.

It appeared that Dr. Harrison, the plaintiff, before and at the time when the cause of action accrued, was a justice of peace for the county of Somerset, and was in the habit of acting in petty sessions held in the borough of Frome. In the month of October last, there was a contested election for a member to represent this borough in

[16] The opinions of Lord Tenterden, C. J., and of Bayley and Littledale, JJ., are omitted.

[17] The reporter's statement of the facts and parts of the opinion are omitted.

Parliament. During the election, there was much excitement; many windows were broken by the mob; and there were dangerous riots in the streets. The defendant was an elector and an inhabitant of the borough; and, after the election was over, he and several hundred other inhabitants of the borough prepared, signed, and transmitted to Viscount Palmerston a memorial complaining of the conduct of the plaintiff as a magistrate during the election, imputing to him that he had made speeches directly inciting to a breach of the peace; that, after reading the Riot Act, he had sent a man into the streets armed with a bludgeon, and ordered him to strike any person he might meet, indiscriminately; and that he had himself violently struck and kicked several men and women. The memorial alleged that the plaintiff ought not to be allowed to remain in Her Majesty's Commission of the peace, and concluded thus: "Your memorialists therefore earnestly pray that your Lordship will cause such an inquiry to be made into the conduct of the said Dr. Harrison as your Lordship may think fit; and that, on the allegations contained in the memorial being duly substantiated and verified, your Lordship will feel it to be your duty to recommend to Her Majesty that the said Dr. Harrison be removed from the commission of the peace." * * *

The learned Judge said that on the authority of Blagg v. Sturt,[18] he should rule that the memorial to the Secretary of State was not a privileged communication, but would reserve leave to the defendant to move to enter a verdict for him, if the jury found bona fides. On this point, he desired them to consider "whether the memorial was got up and signed by the defendant honestly for the purpose which is stated in it, or whether the defendant had any bye motive? If they found bona fides or not, they would assess damages; but these would vary as they thought defendant was actuated more or less by any malicious feeling. If he acted altogether bona fide, damages would be very considerably modified." The jury found a verdict for the plaintiff, damages 20s., saying: "We consider it a bona fide memorial."

[18] In Blagg v. Sturt (1846) 10 Q. B. 899, it appeared that D. sent to the Secretary of State a letter which imputed to P., who was town clerk, and clerk to the justices, corruption in the latter office. But the Secretary of State had no direct authority in respect of the matter complained of and was not a competent tribunal to receive the application. In Harrison v. Bush, on the other hand, Lord Campbell reached the conclusion that although the defendant might have addressed the memorial to the Lord Chancellor, in which case it would certainly have been privileged, it was equally privileged being addressed to the Secretary of State. "Legally and constitutionally a justice of the peace is appointed and removed by the sovereign, acting, as in every other exercise of the prerogative, by the advice of a responsible minister. Considering this as virtually a communication to the Queen through her Secretary of State, it cannot be doubted that Her Majesty has an interest in the matter; for she is to see that all in authority under her do their duty, and that justice is duly administered to all her subjects. We therefore come to the conclusion that this was a privileged communication, and that the verdict ought to be entered for the defendant."

A rule has been obtained to enter a verdict for the defendant; and this we think ought to be made absolute.

During the argument, a legal canon was propounded for our guidance by the plaintiff's counsel; and this we are willing to adopt, as we think that it is supported by the principles and authorities upon which the doctrine of privileged communications rests. "A communication made bona fide upon any subject matter in which the party communicating has an interest or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contained criminatory matter which, without this privilege, would be slanderous and actionable." In the present case, little need be said to show that the communicator had both an interest and a duty in the subject matter of the communication. Assuming that Dr. Harrison had misconducted himself as a magistrate in the manner alleged, all the electors and inhabitants of Frome had suffered a grievance by the magistrate having fomented the riot instead of quelling it, and having endangered instead of protecting life and property within the borough. They have an interest that they may not longer remain subject to the jurisdiction of a magistrate who so violates the law. Again, if Dr. Harrison had so misconducted himself as a magistrate, he had committed an offence, and it was the duty of those who witnessed it to try by all reasonable means in their power that it should be inquired into and punished. "Duty," in the proposed canon, cannot be confined to legal duties which may be enforced by indictment, action, or mandamus, but must include moral and social duties of imperfect obligation. One mode of proceeding for this offence would have been by applying to us for a criminal information, and seeking to have the offender punished by fine and imprisonment. But another, which though milder, may be more effectual, is to try by lawful and constitutional means to have the offender removed from his office, without calling down upon him the sentence of a criminal Court. In this land of law and liberty, all who are aggrieved may seek redress; and the alleged misconduct of any who are clothed with public authority may be brought to the notice of those who have the power and duty to inquire into it, and to take steps which may prevent the repetition of it. * * *

Rule absolute.

HEBDITCH v. MacILWAINE et al.

(In the Court of Appeal. [1894] 2 Q. B. 54.)

The action was for libel. The defendants pleaded a justification and privilege. It appeared that the plaintiff had been elected to the office of guardian of the poor of the parish of South Petherton. The defendants, who were rate payers of the parish and entitled to vote at the election, signed and sent to the board of guardians a letter

complaining of certain irregularities which they alleged to have occurred at the election, and suggesting that the matter ought to be inquired into. * * * The plaintiff alleged that the effect of the letter was to impute that he himself had participated in the malpractices therein mentioned.

The judge left to the jury the following questions: 1. Whether the letter was libellous with regard to the plaintiff. 2. Whether the plea of justification was proved. 3. Whether the defendants honestly believed it to be their duty to make each and all of the communications contained in the letter to the board of guardians, and did so acting under a sense of that duty. 4. Whether the defendants honestly and reasonably believed that the board of guardians were the proper authority to whom to apply in respect of each and all of the matters mentioned in the letter. The judge reserved any question of actual malice until these questions had been answered. The jury found that the letter was libellous with regard to the plaintiff, and that the plea of justification was not proved. In answer to the third question they found that the defendants acted partly from a sense of duty, and partly not. In answer to the fourth question they found that the defendants did honestly and reasonably believe that the board of guardians were the proper authority to whom to apply. The judge, thinking the effect of these answers ambiguous, asked the jury the following further questions: 1. Whether the defendants wrote the first part of the letter under a sense of duty, and believing the board of guardians to be the proper authority to whom to apply. 2. A similar question with regard to the latter part of the letter. The jury answered the first of these questions in the affirmative, and the second in the negative.

The judge thereupon held that the occasion was not wholly privileged, and, therefore the plaintiff was entitled to damages, the amount of which he asked the jury to assess. The jury assessed the damages at £10, for which sum the judge gave the plaintiff judgment.

J. Alderson Foote, for the defendants. The defendants as rate payers had an interest in the matter to which the letter related. It may be admitted that the board of guardians could take no action in the matter brought before them by the defendants. They could not avoid the plaintiff's election. That could only be done by a petition under the Municipal Corporations Act, 1882, part IV. * * * It is contended however, that, where a person who has a grievance makes a complaint in respect thereof to a person or body, whose duty he honestly and reasonably believes it to be to inquire into and redress such grievance, the occasion is privileged. * * *

LORD ESHER, M. R.[19] * * * It must be borne in mind that the

[19] The statement of the case and the arguments of counsel are abridged and parts of the opinion are omitted. There were concurring opinions by A. L. Smith and Davey, L. JJ.

material part of the cause of action in libel is not the writing, but the publication of the libel. It was proved that the defendants had written and published to the board of guardians matter which the jury found libellous with regard to the plaintiff, and which was untrue. The defendants set up by way of defence that the occasion was privileged. It is for the defendant to prove that the occasion was privileged. If the defendant does so, the burden of shewing actual malice is cast upon the plaintiff, but, unless the defendant does so, the plaintiff is not called upon to prove actual malice. The question whether the occasion is privileged if the facts are not in dispute, is a question of law only, for the judge, not for the jury. If there are questions of fact in dispute upon which this question depends, they must be left to the jury, but, when the jury have found the facts, it is for the judge to say whether they constitute a privileged occasion.

What are the facts upon which the question whether the occasion was privileged, depends in the present case? There had been an election to the office of guardian of the poor, and the paintiff had been elected. The defendants were rate payers who had a right to vote at the election. After the election they wrote and sent the letter containing the matter complained of to the board of guardians. It seems clear that, when that board had received the letter, they could do nothing in the matter. They could not set aside the election. Such being the facts of the case, what was the judge called upon to consider in dealing with the question whether the occasion was privileged? He had first to consider whether the defendants, who published the defamatory matter, had any interest or duty in connection with the subject which they thus brought before the board of guardians. I am not prepared to say that they had not an interest or duty. On the contrary I am inclined to think that they had an interest in the matter. They were electors and had an interest in having the office filled by a person properly elected. Then the position of the board of guardians, to whom the defamatory matter was published, had to be considered. They had no interest in the matter, as it seems to me, and, as I have already said, they had no duty or power to take any action upon the communication made to them. Under these circumstances I think it clear that the occasion was not privileged.

It was argued that, although the board of guardians had no power or duty or interest in the matter, nevertheless the occasion was privileged, because the defendants honestly and reasonably believed that the board had such a duty or power or interest, and were asking them for redress in the matter which they believed they could give. Assuming that the defendants had such a belief, though I confess I cannot see how there could be any reason in such a belief, the argument in substance seems to come to this: that the belief of the defendants that the occasion was privileged makes it privileged. I cannot accept the proposition so put forward. I cannot see how the belief of the defendants who have made a mistake, and have published a

libel to persons who have no interest or duty or power in the matter, can affect the question. The belief of the defendants might have a bearing on the question of malice; if it be assumed that the occasion was privileged, the belief of the defendants might be strong to shew that the communication was privileged, as being made without malice, but I do not think it has anything to do with the question whether the occasion was privileged.[20] * * *

Application [by defendant for judgment or a new trial] dismissed.

TODD v. HAWKINS.

(Northern Spring Circuit, York Assizes, 1837. 8 Car. & P. 88, 56 R. R. 834.)

Libel. Plea, not guilty. It appeared that the plaintiff was a share-broker, and that the plaintiff and the defendant had also been in partnership in the tea trade, but that they had dissolved their partnership in the year 1835. It further appeared that the wife of the defendant was the daughter of the late Dr. Taft, a Wesleyan minister, and that in the year 1836 the plaintiff was paying his addresses to Mrs. Taft, the mother of the defendant's wife. These facts were proved by Mrs. Taft, who also stated, that in the month of July, 1836, she received a letter, which was the subject of the present action, from

[20] Lord Esher here considered the question on authority, found only one case which "really seems to me to be a strong authority in favour of the defendant's contention," Thompson v. Dashwood (1883) 11 Q. B. D. 43, and as to it remarked: "The only way to deal with that case, in my opinion, is to say that we do not agree with it." In his concurring opinion Davey, L. J., remarked: "I desire to say that I agree with the Master of the Rolls in thinking that Tompson v. Dashwood cannot be supported."

The facts in Tompson v. Dashwood (1883) 11 Q. B. D. 43, were as follows: The plaintiff was the managing director, with a salary, of a manufacturing company. The defendant was a director in the same company. The plaintiff and the defendant being about to go to the continent at the expense of the company, the defendant wrote to the chairman of the company, Colonel Wood, a letter suggesting that the secretary's cash book be looked into, to see what sums the plaintiff had charged against the company for travelling expenses, and intimating that they were excessive. At the same time, the defendant wrote another letter, about a different matter, to the secretary of the company, who was the plaintiff's brother. By mistake the defendant put each letter into the envelope intended for the other, so that the letter intended for the chairman went to the secretary, who handed it to his brother. On these facts, it was held in the Queen's Bench Division that the publication was privileged. "It is admitted," said Watkin Williams, J., "that the defendant stood in such a relation to Colonel Wood that in writing to him the legal implication of malice was technically rebutted, and the defendant, in the absence of malice in fact, was protected by privilege; but it is contended for the plaintiff that, the defendant having carelessly put the letter into the wrong envelope, so that it reached the hands of a person with whom he had no such relation, the protection of privilege is destroyed, and the case put into the condition in which the law implies malice. I think there is a fallacy in that contention. The defendant's state of mind was never altered. His intention was always honestly to do that which he conceived to be his duty. I can see nothing to justify the conclusion as a matter of law, that by reason of the defendant's inadvertence the case is taken out of the category of privilege, so that malice should be implied."

the defendant, and that she gave it to the plaintiff, who returned it after a copy had been made of it, and that the original letter was then burnt. In her cross-examination Mrs. Taft said, the defendant would receive an accession of property on her second marriage, or when his youngest child comes of age, which would be about seven years hence, so that property would the sooner come into the possession of the defendant, in right of his wife, by Mrs. Taft's second marriage.

The letter was to the following effect:

"Dear Ma. I feel very severely the coldness and constraint which compels me to communicate my sentiments to you through the medium of a letter, but the misery to yourself and the evil consequences to your family, which must inevitably ensue from the step I fear you are about to take, impel me to waive every private consideration and to do my duty to you honestly, and, I hope you will feel, respectfully, as I am quite sure you would to me under an exchange of circumstances; but whilst in the following remarks I express my own private sentiments, I am anxious you should believe me they also contain the opinion (for there is but one) of all our friends without any exception. * * * Now, I am quite sure from all that I have ever seen and known of your character that wilfully to do so with your eyes open would be utterly abhorent to you, and that it can only be accounted for by your being the victim to the plausible artifice of a wicked and artful man, and I most earnestly wish you to investigate thoroughly his character, for I honestly assure you, and I speak it as free from personal prejudice as I am able, and with the fear of a lie in my heart, that his character in York amongst those who best know him is that of an unprincipled trickster. To make money, by no matter what means, appears to be his principal object, as he is constantly descending in transactions of that nature to the meanest artifice and juggle, which an honest-minded man would rather die than be guilty of. * * * Mamma, examine well into your motives, search deeply your own heart. Is the love of money or anxiety after worldly appearance there? Are you sacrificing to Mammon, and making your children pass through the fire to Moloch? The spoils of the widow and fatherless are in his treasure, the moth and rust will corrupt them, and his money will perish in the using. Do let me press upon you the conduct which, as a prudent person you ought, and as a professor of Christ you dare not but do. I mean, earnest and agonizing prayer for that guidance and direction of the spirit of God which is promised for these special occasions, by thoroughly examining your motives, and weighing well the consequences of such a step; and then, by diligent and extensive inquiry from parties most likely to give you honest and necessary information as to his character, and fitness for increasing and adding to the comfort and establishment of those interests which it is your duty, and I have no doubt your intention to protect—I say, if after having pursued this course you think him a man to whom you can fearlessly surrender your charge, I can only say that no one will more rejoice than myself if the issue be happy. But so contrary is my conviction of the result, that my earnest and daily prayer to God is, that he who has promised to be a husband to the widow, to be her counsellor and guide, and has declared that he will deal kindly with the relicts of his saints, will deliver you from this fatal snare, which has already had an unfavourable effect upon your character in the opinions of respectable and intelligent people both in and without the pale of the Christian church, and will eventually ruin your peace. I pray God bestow upon you every necessary good, and so direct your way that you may keep his testimonies.

"Yours very affectionately, W. Hawkins."

ALDERSON, B.[21] (in summing up). * * * Here is a widow about to contract marriage with the plaintiff; the defendant is her son in law;

[21] Part of the opinion is omitted.

I think, therefore, that he was justified in writing this letter to her, provided you are satisfied that in doing so he acted bona fide, although the imputations contained in the letter be false, or based upon the most erroneous information. There is no doubt, that unless this letter was justified by the occasion, it is a libel, and had Mrs. Taft and the defendant been strangers to each other this would have been a mere question of damages. However, in this case, although the letter be derogatory to the plaintiff's character, and written in stronger language than a prudent man would use, you must consider whether it was written sincerely, and with a desire to benefit the person to whom it was addressed. The letter professes to be so, and you must decide whether that profession is made bona fide. The request that this lady would make diligent and extensive inquiry into the character of Mr. Todd was extremely good advice, and so is the exhortation to her to apply herself to prayer. It may not be judicious on trifling or light occasions to make reference to sacred things; but on an important occasion like that which calls forth this letter, no better advice could be given. The question you have to try is, not whether Mr. Todd was guilty of the charges laid against him, but whether, although the defendant may have acted rashly, he wrote the letter bona fide. So far as pecuniary interests are concerned, it would be to the advantage of the defendant that this lady should marry, and that tends to show bona fides, as men do not in general act maliciously and at the same time against their own interests. The whole of the circumstances are before you, and the occasion is one which prima facie justifies the letter. If, however, the defendant has availed himself of the occasion for malicious purposes, he must answer for what he has done. If, on the other hand, he has used expressions, however harsh, hasty, or untrue, yet bona fide, and believing them to be true, he was justified in so doing. It is for the good of all that communications of this kind should be viewed liberally by juries; and unless you see clearly that this letter was written with a malicious intention of defaming the plaintiff, your verdict ought to be for the defendant.[22]

[22] On the principle involved, see the remarks of Willes, J., in Henwood v. Harrison (1872) L. R. 7 C. P. 606, 621.

See also Clark v. Molyneux (1877) 3 Q. B. D. 237: (D., a clergyman, wrote to S., another clergyman, in whose church P., also a clergyman, was to preach, that D. had heard from trustworthy sources that P., "while curate at Horringer, had seduced two girls." The charge was false.) Stuart v. Bell, [1891] 2 Q. B. 341 C. A.: (When P. and his master, S., were at Newcastle as the guests of D., a magistrate and the mayor of the town, the chief constable of the town shewed D. a letter stating that P. was suspected of theft in a hotel at Edinburgh, which he had recently left. D. made no enquiry, but just before P. and his mother left, D. informed S. privately of the theft and the suspicion.) Cameron v. Cockran (1895) 2 Marv. (Del.) 166, 42 Atl. 454: (D., a physician, referring to a certain prescription by D. for S., which had produced bad effects, said to S.: "That prescription has a mistake in it. The druggist [P.] has made a mistake. He don't know his business anyhow.")

And see 18 Halsbury's Laws of England, 687, note (i) (1911); 25 Cyc. 393, note 34: Key No. "Libel and Slander," § 44.

Verdict for the defendant.

ALDERSON, B. I hope it will be understood that this verdict is founded on the fact that this letter was a confidential communication.

The Foreman of the Jury: My Lord, that is so.

"THE COUNT JOANNES" v. BENNETT.

(Supreme Judicial Court of Massachusetts, 1862. 5 Allen, 169, 81 Am. Dec. 738.)

Tort brought in the name of "The Count Joannes (born 'George Jones')" for two libels upon him contained in letters to a woman to whom he was then a suitor, and was afterwards married, endeavoring to dissuade her from entering into the marriage.

At the trial it appeared that the defendant had for several years held the relation of pastor to the parents of the woman, as members of his church, and to the daughter, as a member of his choir; and there was evidence tending to shew that he was on the most intimate terms of friendship with the parents, and that, being on a visit from his present residence in Lockport, New York, he called upon the father at his place of business in Boston, and was urged by him to accompany him to his residence in South Boston, the father stating that both he and his wife were in great distress of mind and anxiety about their daughter, and that they feared she would engage herself in marriage to the plaintiff. On their way to South Boston, the father stated to the defendant what he and his wife had heard and apprehended about the plaintiff, and their views with regard to his being a suitable match for their daughter, who, with a young child by a former husband, was living with them. On reaching the house it was found that the daughter had gone out; and it was then arranged that the defendant should write a letter, and materials for that purpose were furnished and the letter set forth in the first count was written, addressed to the daughter, and left open and unsealed with the mother, after the principal portion of it had been read aloud at the tea-table in the presence of the parents and a confidential friend of the family. On leaving, the defendant was further requested to do what he thought best to induce the daughter to break up the match. * * *

The judge ruled that neither of the letters was a privileged communication; and a verdict was returned for the plaintiff. The defendant alleged exceptions.

BIGELOW, C. J. The doctrine that the cause or occasion of the publication of defamatory matter may afford a sufficient justification in an action for damages, has been stated in the form of a legal rule or canon, which has been sanctioned by high judicial authority. The statement is this: A communication made bona fide upon any subject

matter in which the party communicating has an interest, or in reference to which he has a duty to perform, is privileged, if made to a person having a corresponding interest or duty, although it contains defamatory matter, which without such privilege would be libellous and actionable. It would be difficult to state the result of judicial decisions on this subject, and of the principles on which they rest, in a more concise, accurate and intelligible form. Harrison v. Bush [1855], 5 El. & Bl. 344, 348; Gassett v. Gilbert [1856], 6 Gray, 94, and cases cited.

It seems to us very clear that the defendant in the present case fails to show any facts or circumstances in his own relation to the parties, or in the motives or inducements by which he was led to write the letter set out in the first count of the declaration, which bring the publication within the first branch of this rule. He certainly had no interest of his own to serve or protect in making a communication concerning the character, occupation and conduct of the plaintiff, containing defamatory or libellous matter. It does not appear that the proposed marriage which the letter written by the defendant was intended to discountenance and prevent, could in any way interfere with or disturb his personal or social relations. It did not even involve any sacrifice of his feelings or injury to his affections. The person to whom the letter was addressed was not connected with him by the ties of consanguinity or kindred. It is not shewn that he had any peculiar interest in her welfare. Under such circumstances, without indicating the state of facts which might afford a justification for the use of defamatory words, it is plain that the defendant held no such relation towards the parties as to give him any interest in the subject matter to which his communication concerning the plaintiff related. Todd v. Hawkins, 2 M. & Rob. 20; s. c., 8 C. & P. 88. No doubt, he acted from laudable motives in writing it. But these do not of themselves afford a legal justification for holding up the character of a person to contempt and ridicule. Good intentions do not furnish a valid excuse for violating another's rights, or give impunity to those who cast unjust imputations on private character.

It is equally clear that the defendant did not write and publish the alleged libellous communications in the exercise of any legal or moral duty. He stood in no such relation towards the parties as to confer on him a right or impose on him an obligation to write a letter containing calumnious statements concerning the plaintiff's character. Whatever may be the rule which would have been applicable under similiar circumstances while he retained his relation of religious teacher and pastor towards the person to whom this letter in question was addressed, and towards her parents, he certainly had no duty resting upon him after that relation had terminated. He then stood in no other attitude towards the parties than as a friend. His duty to render them a service was no greater or more obligatory than was his

duty to refrain from uttering and publishing slanderous or libellous statements concerning another.[23]

It is obvious that if such communications could be protected merely on the ground that the party making them held friendly relations to those to whom they were written or spoken, a wide door would be left open by which indiscriminate aspersion of private character could escape with impunity. Indeed it would rarely be difficult for a party to shelter himself from the consequences of uttering or publishing a slander or libel under a privilege which could be readily made to embrace almost every species of communication. The law does not tolerate any such license of speech or pen. The duty of avoiding the use of defamatory words cannot be set aside except when it is essential to the protection of some substantial private interest, or to the discharge of some other paramount and urgent duty. It seems to us, therefore, that on the question of justification set up by the defendant under a supposed privilege which authorized him to write the letter set out in the first count, the instructions of the court were correct. * * *[24]

[23] "The letter does not appear to have been written in answer to any previous inquiry, but to have been voluntarily written. And it has been said that, where the matter is not of great or immediate importance, interference may be considered officious and meddlesome, although, if the party had been applied to, it would clearly have been his duty to give all the information he could; and an answer to a confidential inquiry may be privileged, where the same information, if volunteered, would be actionable. * * * As has been well said, 'Although the defendant may feel sure that if he were in his neighbor's place, he should be most grateful for the information conveyed, still he must recollect that it may eventually turn out that in endeavoring to avert a fancied injury to that neighbor, he has really inflicted an undoubted and undeserved injury on the plaintiff.'" Per Robinson, J., in Samples v. Carnahan (1898) 21 Ind. App. 55, 58, 51 N. E. 425, 426, quoting from Odgers, Libel & Slander (2d Ed.) 216.

Compare: Byam v. Collins (1888) 111 N. Y. 143, 19 N. E. 75, 2 L. R. A. 129, 7 Am. St. Rep. 726: (P. was paying attention to Dora with a view to matrimony. D. voluntarily wrote Dora a letter making defamatory charges against P. Until three months before, D. and Dora had long been very intimate friends, then they became somewhat estranged and their intimacy ceased. About four years before this letter, and when they were still close friends, Dora often requested D., "if she knew anything about any young man she went with, or in fact any young man in the place, to tell her." Dora was not then contemplating marriage with any young man, and did not know P. The letter, referring to this former friendship and the writer's continuing affection for Dora, declared: "I have decided to hold my peace no longer, feeling that if I do and your life is wrecked (as it is sure to be if you marry or have further acquaintance with that man) I shall in some way be responsible for it, inasmuch as I neglect to do my duty."

[24] The statement of facts is abridged and part of the opinion, dealing with a second count, is omitted. For error in the admission of evidence relating to the second count, a new trial was granted.

WALLER v. LOCH.

(In the Court of Appeal, 1881. 7 Q. B. Div. 619.)

Action for libel. At the trial before Grove, J., it appeared that the defendant was the Secretary of the Charity Organisation Society, one of the objects of which as stated in its circulars to be "the improvement of the condition of the poor by securing due investigation and fitting action in all cases and by repressing mendicity." The society consisted of a federation of local district committees, and by one of its circulars it is stated that the inhabitants of each district, whether subscribers or not, are invited to refer to the committee all cases of applicants for charitable relief which require investigation. "If requested so to do it communicates the result of such investigation to the person desiring inquiry, and should he wish to undertake the case leaves it in his hands. In the absence of such wish the committee deals with each case to the best of its judgment and ability."

The plaintiff was the daughter of a deceased officer in the army and was in distressed circumstances. A lady interested herself in obtaining subscriptions to make some provision for her, and obtained promises of contributions to a considerable amount. Another lady who was interested in the case applied to the society for information. The society communicated to her an unfavourable report on the case, which by their permission she communicated to the other lady. In consequence of this report the plaintiff lost the benefit of the subscriptions. She therefore commenced this action against the defendant, the secretary of the society.

The learned judge held the communication privileged, and left to the jury the question whether there was express malice. The jury found for the defendant. A rule for a new trial on the ground of misdirection and that the verdict was against the evidence was refused by the Divisional Court. The plaintiff appealed.

BRETT, L. J. The jury having found that there was no express malice, a finding, the correctness of which I see no reason to doubt, then, if the communication was privileged it is immaterial whether the justification that the alleged libel was true can be supported or not. I agree that the communications were privileged. I think that the definition by Blackburn, J., in Davies v. Snead, Law Rep. 5 Q. B. 608, 611, is the best, it leaves out all misleading words, saying nothing about "duty," and states in plain terms what I conceive to be the true rule.[25] Then do the facts of this case bring it within the rule? It

[25] The "definition by Blackburn, J., in Davis v. Snead" (1870) L. R. 5 Q. B. 608, 611, as quoted in the concurring opinion of Jessel, M. R., was as follows: "Where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts; then if he, bona fide and without malice, does tell them, it is a privileged communication."

See the approval of this by Andrews, J., in Moore v. Bank (1890) 123 N.

seems to me that they do, if the defendant reasonably believed that the question was asked in order to enable the questioner to decide whether relief should be given or should be continued to be given. It is not material whether the information was really wanted for that purpose or not, it is enough if the defendant reasonably supposed the questioner to be asking it for that purpose. He could not reasonably suppose that the question was asked for any other purpose, and that being so, I think it was right and for the benefit of society that he should answer it. If a person who is thinking of dealing with another in any matter of business asks a question about his character from some one who has means of knowledge, it is for the interests of society that the question should be answered, and if answered bona fide and without malice, the answer is a privileged communication.

Judgment for the defendant.

FLANAGAN v. McLANE.

(Supreme Court of Errors of Connecticut, 1913. 87 Conn. 220, 87 Atl. 727.)

Action for libel and slander. Verdict for the defendant. The plaintiff appeals from the denial of his motion to set aside the verdict as against the evidence.

BEACH, J. The complaint contains three separate counts in libel and one in slander. The plaintiff and his helper worked in and about the house of the defendant's husband for some weeks. During this time a sum of money was missed which afterwards reappeared. While the money was missing the defendant wrote the letter set forth in the first count to one Sturtze, a constable of the town of Hamden, informing him of the loss and of her belief that the plaintiff had taken it. She had already written a similar letter, set forth in the fourth count, to the mother of the plaintiff's helper. After the money reappeared the defendant again wrote to Sturtze the letter which is the basis of the second count, saying in effect that the money had been found in a place where she had never put it and that she would do no more about the matter, but was satisfied that the plaintiff had taken it and brought it back again when he found that he was suspected. The third count of the complaint is in slander. The defendant's answer denied the allegations of the third count, admitted the authorship of the letters, and pleaded privilege and want of malice as to each. * * *

The law implies malice from a libelous publication, except in certain cases of privilege, one of which is "when the author and pub-

Y. 420, 424, 25 N. E. 1048, 11 L. R. A. 753; and by Liddon, J., in Coogler v. Rhodes (1896) 38 Fla. 240, 248, 21 South. 109, 112, 56 Am. St. Rep. 170, 175: "This definition is considered more exact in leaving out the word 'duty,' because it is privileged in the interests of society for a man to bona fide and without malice say those things which no positive legal duty may make it obligatory upon him to say."

lisher of the alleged slander acted in the bona fide discharge of a public or private duty or in the prosecution of his own right or interest." * * *

We think that the letter set forth in the second count, although written after the money was found, must be dealt with as a part of the whole correspondence between the defendant and the officer. It is not very seriously disputed that the first letter to Sturtze, written before the money was found, is, on the facts pleaded, a privileged communication. Sturtze was a constable, and the defendant appealed to him to investigate her loss with a view to get "evidence and threaten them with arrest." She was concerned more with using the law in terrorem than with the punishment of the supposed thief. Then when the money was found she again writes the officer telling him that it is found, but in a place where she never put it; that she will do no more about the matter; and that she is still satisfied that the plaintiff took it and brought it back again. Clearly this second letter would never have been written except for the first. The defendant was in a way bound to let the officer know that the money had been found, and if she said no more her letter would be taken as an admission that her former suspicions were mistaken. We think, under these circumstances, that the defendant in writing to an officer already engaged in investigating the loss was legally entitled, if acting honestly and without malice, to reaffirm her belief in the plaintiff's guilt for the guidance of the officer in case it was or might become his duty to pursue the investigation with a view to criminal proceedings. There is no error.[26]

MACKINTOSH et al. v. DUN et al.

(Judicial Committee of the Privy Council. [1908] App. Cas. 390.)

This is an appeal from a decision of the High Court of Australia, pronounced on cross-appeals from the orders of the Full Court of New South Wales. The action was for libel. It was tried before Cohen, J., and a jury. The question was whether the occasion of the publication of the two libels, which were of and concerning the appellants in relation to their business, was privileged. They were contained in two reports in writing, published to a firm of Holdsworth, Macpherson & Co.

The case for the appellants was that the libels consisted partly of the repetition of alleged rumours and partly of defamatory statements put forward as being within the respondent's own knowledge, and the general purport and effect of them was that the appellants were persons with whom it was not wise to do business in the ordinary way, or upon the ordinary terms of credit; that they had concealed an im-

[26] Parts of the opinion are omitted.

portant change in the constitution of their firm in order to give their business a fictitious appearance of financial stability; that the appellant James Mackintosh was commonly and correctly reported to be living beyond his means, and to possess habits and tastes which were likely to bring the appellants and their business rapidly into a state of insolvency; that the business was grossly mismanaged; and that the appellants were persons without personal resources or assets, except book-debts and a stock that was greatly depreciated, and were heavily in debt and unable to meet their current business liabilities and engagements, which included a heavy overdraft on their account with their bankers, and were struggling with severe financial difficulties which would probably end in disaster.

At the close of the appellants' case before Cohen, J., it was submitted that the appellants should be nonsuited on the ground that the occasion of the publication by the respondents to Holdsworth, Macpherson & Co. of the two reports was privileged and that there was no evidence of express malice to go to the jury. The respondents did not deny the fact of publication, nor that the two reports contained defamatory matter of and concerning the appellants in relation to their business. The trial judge ruled that the occasion was not privileged and so directed the jury. But with a view to a possible appeal against his ruling on the question of privilege the learned judge left to the jury two questions on the subject of malice:

1. Did the defendants in distributing the reports act from a sense of duty or from some indirect or improper motive?
2. Did the defendants distribute the reports recklessly, not caring whether they were true or false?

In reply the jury found that the respondents acted from a sense of duty to their own subscribers, and that they exercised care as far as possible. The plaintiffs obtained a verdict for £800.

The trial judge held that the plea of privilege was bad. The Full Court ruled that the occasion was privileged, and directed a new trial. The High Court held that the occasion was privileged and that judgment should be entered for the respondents. Thereupon an appeal by special leave, limited to the question of privilege, was obtained to the Privy Council.[27]

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. * * * The question, and the only question on the present appeal, is whether the occasion on which the libels were published was or was not a privileged occasion.

The plaintiffs are wholesale and retail ironmongers in Sydney. The defendants (as their acting manager in Sydney stated in an affidavit filed in the action) carry on the business of a trade protective society "in almost all parts of the civilized world" under the name of "The Mercantile Agency." That business, as the acting manager ex-

[27] The statement of facts has been slightly abridged and part of the opinion is omitted.

plained, "consists in obtaining information with reference to the commercial standing and position of persons" in the state of New South Wales "and elsewhere and in communicating such information confidentially to subscribers to the agency in response to specific and confidential inquiry on their part." He stated further that all requests for information directed to the agency by their subscribers are in the following form:

"Subscriber's Ticket.

"The Mercantile Agency. R. G. Dun and Co.

"Give us in confidence and for our exclusive use and benefit in our business, viz., that of aiding us to determine the propriety of giving credit, whatever information you have, respecting the standing, responsibility, &c., of—

"Name .....

"Business .....

"Address .....

"Subscribers to sign the above themselves.

".....

"Subscriber."

The law with regard to the publication of information injurious to the character of another is well settled. The difficulty lies in applying the law to the circumstances of the particular case under consideration. In Toogood v. Spyring,[28] Parke, B., delivering the judgment of the Court of Exchequer, says: "The law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending on the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits."

That passage, which, as Lindley, L. J., observes,[29] is frequently cited, and "always with approval," not only defines the occasion which protects a communication otherwise actionable, but enunciates the principle on which the protection is founded. The underlying principle is "the common convenience and welfare of society"—not the convenience of individuals or the convenience of a class, but, to use the words of Erle, C. J., in Whiteley v. Adams,[30] "the general interest of society."

Communications injurious to the character of another may be made in answer to inquiry or may be volunteered. If the communication be made in the legitimate defence of a person's own interest, or plainly under a sense of duty such as would be "recognized by English peo-

[28] 1 C., M. & R. 181, 193, 40 R. R. 523 (1834).

[29] [1891] 2 Q. B. 346.

[30] 15 C. B. N. S. 392, 418 (1863).

ple of ordinary intelligence and moral principle," [31] to borrow again the language of Lindley, L. J., it cannot matter whether it is volunteered or brought out in answer to an inquiry. But in cases which are near the line, and in cases which may give rise to a difference of opinion, the circumstance that the information is volunteered is an element for consideration certainly not without some importance.

In deference, therefore, to the views of the learned judges of the High Court, the first question would seem to be, under which category does the communication now in question properly fall? No doubt there was a specific request. In response to that request the communication was made. That much is clear. But it is equally clear that the defendants set themselves in motion and formulated and invited the request in answer to which the information complained of was produced. The defendants, in fact, hold themselves out as collectors of information about other people which they are ready to sell to their customers. It cannot matter whether the customer deals across the counter, so to speak, just as and when the occasion arises, or whether he enjoys the privilege of being enrolled as a subscriber and pays the fee in advance.

If, then, the proprietors of the Mercantile Agency are to be regarded as volunteers in supplying the information which they profess to have at their disposal, what is their motive? Is it a sense of duty? Certainly not. It is a matter of business with them. Their motive is self-interest. They carry on their trade, just as other traders do, in the hope and expectation of making a profit.

Then comes the real question: Is it in the interest of the community, is it for the welfare of society, that the protection which the law throws around communications made in legitimate self-defense, or from a bona fide sense of duty, should be extended to communications made from motives of self-interest by persons who trade for profit in the characters of other people? The trade is a peculiar one; still there seems to be much competition in it; and in this trade as in most others, success will attend the exertions of those who give the best value for money and probe most thoroughly the matter placed in their hands. There is no reason to suppose that the defendants generally have acted otherwise than cautiously and discreetly. But information such as that which they offer for sale may be obtained in many ways, not all of them deserving of commendation. It may be extorted from the person whose character is in question, through fear of misrepresentation or misconstruction if he remains silent. It may be gathered from gossip. It may be picked up from discharged servants. It may be betrayed by disloyal employees. It is only right that those who engage in such a business, touching so closely very dangerous ground, should take the consequences if they overstep the law.[32]

[31] [1891] 2 Q. B. 350.

[32] Accord: Pacific Packing Co. v. Bradstreet Co. (1914) 25 Idaho, 696, 139 Pac. 1007, 51 L. R. A. (N. S.) 893, where this passage is quoted as giving whole-

It may not be out of place to recall the striking language of Knight Bruce, V. C.,[33] in reference to a somewhat similar subject. The question before him was the propriety of enforcing disclosure of communications between a client and his legal advisers. "The discovery and vindication and establishment of truth," his Honour says, "are main purposes certainly of the existence of Courts of justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. * * * Truth, like all other good things, may be loved unwisely—may be pursued too keenly —may cost too much." And then he points out that the meanness and the mischief of prying into things which are regarded as confidential, with all the attending consequences, are "too great a price to pay for truth itself."

It seems to their Lordships, following out this train of thought, that, however convenient it may be to a trader to know all the secrets of his neighbour's position, his "standing," his "responsibility," and whatever else may be comprehended under the expression "et cetera," yet, even so, accuracy of information may be bought too dearly—at least for the good of society in general.

It is admitted that in this country there is no authority directly in point. There are direct authorities in the United States in favour of the conclusion at which the High Court has arrived. American authorities are, no doubt, entitled to the highest respect. But this is a question that must be decided by English law. In the dearth of English authority it seems to their Lordships that recourse must be had to the principle on which the law in England on this subject is founded. With the utmost deference to the learned judges of the High Court, their Lordships are of opinion that the decision under appeal is not in accordance with that principle.[34]

Their Lordships will therefore humbly advise His Majesty that the orders appealed from should be discharged and the judgments of the Full Court reversed, with costs in both Courts, including the costs of

some doctrine applicable to the case at bar. The question in the Idaho case arose on demurrer to a complaint which is set forth at length and held sufficient.

[33] In Pearse v. Pearse (1846) 1 De G. & Sm. 12, 28, 63 Reprint, 950, 957, 75 R. R. 4, 16.

[34] On the theory that business welfare demands that a knowledge of the financial and personal trustworthiness of business concerns be readily ascertainable, American courts have protected commercial agencies which have transmitted communications, confidentially and in good faith, to a customer having an interest in the subject matter and requesting information. Ormsby v. Douglass (1868) 37 N. Y. 477. But information which is volunteered, a general report, for instance, sent out to subscribers, has been held not privileged. Douglass v. Daisley (1902) 114 Fed. 628, 52 C. C. A. 324, 57 L. R. A. 475; King v. Patterson (1887) 49 N. J. Law, 417, 9 Atl. 705, 60 Am. Rep. 622.

See 25 Cyc. 396, and cases cited in notes 49, 50.

the cross-appeals, and that any costs already paid by the appellants to the respondents should be repaid by the latter.

The respondents will pay the costs of the appeal.

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(3) Communication in Protection of a Private Interest

McDOUGALL v. CLARIDGE.

(At Nisi Prius, Adjourned Sittings in London, 1808. 1 Camp. 267.)

This was an action for a libel on the plaintiff in his profession as a solicitor. Plea, the general issue.

The libel set out in the declaration was contained in a letter written by the defendant to Messrs. Wright and Co., bankers at Nottingham, and charged the plaintiff with improper conduct in the management of their concerns. It appeared, however, that the letter was intended as a confidential communication to these gentlemen, and that the defendant was himself interested in the affairs which he supposed to be mismanaged by the plaintiff. After the case had been opened by the plaintiff's counsel,—

LORD ELLENBOROUGH [35] said, if the letter had been written by the defendant confidentially, and under an impression that its statements were well founded, he was clearly of opinion that the action could not be maintained. It was impossible to say that the defendant had maliciously published a libel to aggrieve the plaintiff, if he was acting bona fide, with a view to the interests of himself and the persons whom he addressed; and if a communication of this sort, which was not meant to go beyond those immediately interested in it,[36] were the subject of an action for damages, it would be impossible for the affairs of mankind to be conducted. * * *

The Attorney General, for the defendant, said that his client at the time of writing the letter was certainly impressed with a belief of the truth of the charges it contained, but had since seen reason to believe they were groundless. He therefore consented to withdraw a juror.

[35] Part of the opinion is omitted.

[36] In Pearson v. Lemaitre (1843) 5 Man. & G. 700, 710, counsel in argument quoted a remark by Holroyd, J., in Fairman v. Ives (1822) 5 B. & A. 642: "In the case of a confidential communication made between friends, to prevent an injury, and not for the purpose of slandering, the occasion justifies the act." Thereupon Cresswell, J., made this comment: "That must mean a communication to some friend upon some subject in which he is interested." And see Lord Esher's comment in Hebditch v. MacIlwaine (1894) 2 Q. B. 54, 61.

COOK v. GUST.

(Supreme Court of Wisconsin, 1914. 155 Wis. 594, 145 N. W. 225.)

This was an action for slander, by Cook against Gust. It was charged in the complaint that the defendant stated to one Lewer and his wife and son that plaintiff set fire to a certain cheese factory and burned it. The answer set forth facts tending to show that any communications made by defendant to Lewer were privileged. After the factory burned, the farmers in the vicinity decided to erect a new one, and some meetings were had between the proposed stockholders to make the necessary arrangements. At these meetings the advisability of not taking in the plaintiff was discussed, and he was left out apparently because he had caused considerable trouble while he was a member of the old company, and because there was a strong suspicion that he had burned the old factory because of such trouble. Lewer was a newcomer, and it was the purpose of the promoters of the new scheme to interest him in it.

The plaintiff's evidence tended to show that the alleged slanderous words were spoken to Lewer at or near his house, and that the latter then called his wife and 14 year old son to the place where he and defendant were talking and requested the defendant to repeat the statement in their presence, which he did. There was no evidence tending to show malice. The jury returned a general verdict for the defendant. The plaintiff appeals.

BARNES, J.[37] * * * 3. The principal contention of the appellant is that the following instruction given to the jury was erroneous and prejudicial:

"If you find that Mr. Gust spoke to Mr. Lewer on April 8, 1908, concerning Mr. Cook, and that such words were spoken to him as one who was interested in this factory under such circumstances that they would be privileged under the rules just given you, then the fact, if such be the fact, that Mrs. Lewer and her son heard what Mr. Gust said does not, standing alone, take the case out of the privilege, if you find that their presence could not have been avoided by Mr. Gust, or if you find that they happened to be present in the usual course of the business affairs in which Mrs. Lewer and her son were then engaged."

It is not claimed that the alleged statement made to Lewer was not qualifiedly privileged as to him under the circumstances under which it was made, but it is urged that it was not so privileged as to the wife and son. The portion of the instruction which advised the jury that they might find the communication privileged if satisfied that the presence of Mrs. Lewer and the son "could not have been avoided" should not have been given, because there was no evidence which warranted its submission. It is perfectly obvious to any one that their presence could have been avoided. That fact must have been apparent to the jury, and it is altogether improbable that they found for the defendant

[37] The statement of facts is abridged and parts of the opinion are omitted.

because of this part of the instruction, when there were other legitimate grounds on which the conclusions reached might be arrived at. The error committed in giving this part of the charge was not prejudicial under section 3072m, Stats.

The only other portion of the charge complained of is that by which the jury were informed that they might find the communication privileged if the wife and boy were "present in the usual course of the business affairs" in which they were then engaged. At the time of the alleged conversation Lewer had been invited to become a stockholder in the new corporation and was considering the matter. It was planned to leave Cook out, and, if not actuated by malice, the defendant might state the reasons which led him to believe that Cook should be left out. It is probably a very general custom for farmers to consult their wives and members of their family when they are about to engage in a new business enterprise of some importance. Where this practice is pursued, such communication as was here made is privileged as to the other members of the family as well as the husband, assuming that it is made in good faith and not from malicious motives.

What the court did in substance in the instant case was to permit the jurors to decide whether or not it was a matter of common knowledge that farmers counseled and advised with their wives in reference to business transactions of this nature.[38] Had the court so instructed

[38] Accord: Chambers v. Leiser (1906) 43 Wash. 285, 86 Pac. 627, 10 Ann. Cas. 270: (Defamatory statement in a letter from D., a stockholder, to S., another stockholder, with reference to the conduct of P., an officer in the corporation.)

Broughton v. McGrew (C. C., 1889) 39 Fed. 672, 5 L. R. A. 406: (In a meeting of the stockholders of a railway company, D., a stockholder, said of P., the general manager of the company: "He has been drunk frequently, and you can't expect his subordinates to remain sober when he furnishes them such an example. * * * I am reliably informed that he is unfit to do business.")

Trimble v. Morrish (1908) 152 Mich. 624, 116 N. W. 451, 16 L. R. A. (N. S.) 1017: (Defamatory statement by D., a druggist, to S., a physician, about P., a young woman in charge of S.'s office. It appeared that S. and D. had an agreement that the former would send all his prescriptions to D.'s store, and that D. would pay part of S.'s office rent.)

Jarvis v. Hatheway (1808) 3 Johns. (N. Y.) 180, 3 Am. Dec. 473: (In a church meeting, in the regular course of church discipline, "pursuant to the precept in the eighteenth chapter of the evangelist Matthew," D. charged P. with forgery.)

Cadle v. McIntosh (1912) 51 Ind. App. 365, 99 N. E. 779: (D., a member of a Knights of Pythias lodge, said of P., who was seeking admission to the lodge, that he was a thief, a drunkard, and a gambler. All those to whom the charge was made belonged to the order of the Knights of Pythias.)

Hayden v. Hasbrouck (1912) 34 R. I. 556, 84 Atl. 1087, 42 L. R. A. (N. S.) 1109: (D., who was president of a state federation of women's clubs and a director in a subordinate club, in conference with other officers of this club, with reference to thefts which had been committed at its meetings, expressed her belief that P., a member of the club, was the guilty person.)

But compare Peak v. Taubman (1913) 251 Mo. 390, 158 S. W. 656: (D., the president of a bank, chanced to meet on a train one W., who had been a bookkeeper in D.'s bank, and D., in casual conversation with W., said to him that P., who also had been a bookkeeper in D.'s bank, had while bookkeeper

the jury as a matter of law, we would hesitate to hold that the instruction was wrong. This being so, we cannot hold that it was error to submit the question to the jury. * * *

Judgment affirmed.

DELANY v. JONES.

(At Nisi Prius, Sittings after Term at Westminster, 1803. 4 Esp. 191.)

This was an action on the case, for a libel. Plea of Not Guilty. The declaration stated that the defendant, who then carried on the business of a stationer, intending to charge the plaintiff with the crime of bigamy, and to bring him into danger of legal punishment, published the false and malicious libel following; that is to say,

"Ten Guineas Reward: Whereas, by a letter lately received from the West Indies, an event is stated to be announced by a newspaper, that can only be investigated by these means: This is to request, that if any printer, or other person, can ascertain that James Delany, Esq. [the plaintiff], some years since residing at Cork, late Lieutenant in the North Lincoln Militia, was married previous to nine o'clock in the morning of the 10th of August, 1799, they will give notice to ——— Jones [the defendant], No. 14, Duke Street, St. James's, and they shall receive the reward."

There was an innuendo that the defendant meant thereby to insinuate, and to be understood, that the said plaintiff had been, and was married before the time mentioned in the advertisement, and had another wife then living; he being then married to one Elizabeth Weston, his present wife.

The defence relied upon and given in evidence was that this advertisement had been inserted by the authority of the plaintiff's wife, for the purpose of making a discovery which was important for her to know, namely, Whether the plaintiff had another wife living? That beside this, from the terms of the advertisement, no direct slander was conveyed; without which there could be no libel. The advertisement might be to discover an heir, the legitimacy of a person, or for such like purpose; which would not be a libel.

It was answered by Erskine, of counsel for the plaintiff, That, to constitute a libel, it was not necessary that the libel should be apparent to all the world. If a man sends an advertisement to a newspaper so wrapped up, that, though not intelligible to the bulk of mankind, it is so to minds more intelligent, still it was a libel; and that the libellous tendency of this advertisement could not be mistaken.

LORD ELLENBOROUGH, in summing up to the jury, said, This paper is relied upon as necessarily carrying with it the imputation that the plaintiff was guilty of bigamy. You must be of opinion that it does carry such imputation, before you can find a verdict for the plain-

forged checks on the bank. W.'s business relations with the bank had terminated before P.'s alleged forgeries had been discovered, nor were they now under investigation by the bank.)

tiff, as that meaning is necessary to make the paper a libel at all. The plaintiff's counsel contend, that you are to take into your consideration only, whether the advertisement conveys a libellous charge against the plaintiff or not? I am of a different opinion: I conceive the law to be, That though that which is spoken or written may be injurious to the character of the party, yet if done bona fide, as with a view of investigating a fact, in which the party making it is interested in it, is not libellous. If therefore this investigation was set on foot, and this advertisement published by the plaintiff's wife, either from anxiety to know, Whether she was legally the wife of the plaintiff or, Whether he had another wife living when he married her, though that is done through the medium of imputing bigamy to the plaintiff, it is justifiable; but in such a case, it is necessary for the defendant who publishes the libel, to shew that he published it under such authority, and with such a view. The jury are therefore first to say, Whether the advertisement imputes a charge of bigamy to the plaintiff; and if they think it does, then to enquire, Whether the libel was published with a view, by the wife, of fairly finding out a fact respecting her husband, in which she was materially interested. If it was so, the publication is not a libel; and the defendant is entitled to a verdict.

The jury found a verdict for the defendant.

SOMERVILLE v. HAWKINS.

(Court of Common Pleas, 1851. 10 C. B. 583, 84 R. R. 709.)

This was an action upon the case for slander. The first count of the declaration stated that the defendant, in a certain discourse had of and concerning the plaintiff, in the presence and hearing of John Jones and Thomas Williams, the defendant's servants, and of divers other persons, falsely and maliciously spoke and published of and concerning the plaintiff, the false, scandalous, malicious, and defamatory words following, that is to say:

"I discharged that man for robbing me. He is a thief: and if ever you (meaning the said John Jones and Thomas Williams) speak to him again, or have anything to do with him, I shall consider you as bad as him, and shall discharge you."

* * * The defendant pleaded not guilty, and a justification on the ground that the plaintiff had, whilst in the defendant's employ, stolen certain articles the property of the defendant. Upon these pleas issue was joined.

The cause was tried before Wilde, C. J., at the sittings in London after Hilary Term, 1848. It appeared, that the plaintiff had been in the service of the defendant, and had been dismissed on a Thursday, in consequence of some articles being missed, which he was suspected of having stolen; and that, when he went to the defendant's shop on

the following Saturday to receive the wages due to him, the defendant called Jones and Williams, the other two servants, into the counting house, and, speaking of the plaintiff, said to them—"I have dismissed that man for robbing me: do not speak to him any more, in public or private, or I shall think you as bad as him."

For the defendant, it was submitted that this was a privileged communication.

On the other hand it was insisted that the act complained of was perfectly gratuitous, not like a communication made to a confidential person, or a matter that the other servants had any interest in; and that it was a question for the jury, whether the statement was made under circumstances which indicated malice.

The Lord Chief Justice was of opinion that this was a privileged communication, and that there was no evidence of malice, and consequently that the defendant was entitled to a verdict on the first issue. He, however, offered to go on and try the issue on the justification. This the plaintiff declined. His Lordship thereupon directed a nonsuit to be entered.

The plaintiff obtained a rule nisi for a new trial, on the ground of misdirection.

E. James, in support of the rule.—The communication in question clearly was not privileged. A statement to the prejudice of a third person, to justify it, must be made in pursuance of some duty, legal or moral, or in answer to an inquiry bona fide made by some person having an interest in making it. [MAULE, J.—That is narrowing the rule too much: there are many cases in which volunteer statements have been held to be privileged, when made bonâ fide. The question here is, whether the statement was privileged, assuming the defendant to have acted bonâ fide and without malice.

MAULE, J. * * * We think that the case falls within the class of privileged communications, which is not so restricted as it was contended on behalf of the plaintiff. It comprehends all cases of communications made bona fide, in performance of a duty, or with a fair and reasonable purpose of protecting the interest of the party using the words. In this case, supposing the defendant himself to believe the charge,—a supposition always to be made when the question is whether the communication be privileged or not,—it was the duty of the defendant, and also his interest, to prevent his servants from associating with a person of such a character as the words imputed to the plaintiff; as such association might reasonably be apprehended to be likely to be followed by injurious consequences, both to the servants and to the defendant himself.

We think, therefore, the communication in question was privileged, i. e., it was made under circumstances which rebut the presumption of malice, which would otherwise arise from the nature of the words used. That presumption being rebutted, it was for the plaintiff to

show affirmatively that the words were spoken maliciously; for, the question, being one the affirmative of which lies on the plaintiff, must, in the absence of evidence, be determined in favour of the defendant.

On considering the evidence in this case, we cannot see that the jury would have been justified in finding that the defendant acted maliciously. It is true that the facts proved are consistent with the presence of malice, as well as with its absence. But this is not sufficient to entitle the plaintiff to have the question of malice left to the jury; for, the existence of malice is consistent with the evidence in all cases except those in which something inconsistent with malice is shown in the evidence: so that, to say, that, in all cases where the evidence was consistent with malice, it ought to be left to the jury, would be in effect to say that the jury might find malice in any case in which it was not disproved,—which would be inconsistent with the admitted rule, that, in cases of privileged communication, malice must be proved, and therefore its absence must be presumed until such proof is given.

It is certainly not necessary, in order to enable a plaintiff to have the question of malice submitted to the jury, that the evidence should be such as necessarily leads to the conclusion that malice existed, or that it should be inconsistent with the non-existence of malice; but it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than with its non-existence.

In the present case, the evidence, as it appears to us, does not raise any probability of malice; and is quite as consistent with its absence as with its presence: and considering, as we have before observed, that the mere possibility of malice which is found in this case, and in all cases where it is not disproved, would not be sufficient to justify a jury in finding for the plaintiff, we think the Lord Chief Justice was right in not leaving the question to them, and consequently that this rule must be discharged.

Rule discharged.[39]

(c) Other Excuses for Defamatory Charges Confessedly Untrue

McPHERSON v. DANIELS.

(Court of King's Bench, 1829. 10 Barn. & C. 263, 34 R. R. 397, 109 Reprint, 448.)

In an action for slander, for words imputing insolvency spoken of the plaintiff in his trade, the defendant pleaded that these same words, which he set out in his plea, had been spoken of the plaintiff and to the defendant by one T. W. Woor, of Swaffham, in the County of Norfolk, and that when he, the defendant, spoke and published the said words he also declared, in the hearing of those to whom the

[39] The statement of facts is abridged and part of the opinion is omitted.

words were spoken, that he, the defendant, had heard and been told the same by the said T. W. Woor of Swaffham, in the county of Norfolk. General demurrer. The Court called on

Platt, to support the plea: It is a sufficient justification to an action for slanderous words first spoken by a third person, for the defendant to shew that at the time he repeated them he mentioned the name of that person. In the fourth resolution of Lord Northampton's case, this is said: "In a private action for slander of a common person, if J. S. publish that he hath heard J. N. say that J. G. was a traitor or thief; in action of the case, if the truth be such, he may justify. But if J. S. publish that he hath heard generally, without a certain author, that J. G. was a traitor or thief, there an action sur le case lieth against J. S. for this, that he hath not given to the party grieved any cause of action against any, but against himself, who published the words, although that in truth he might hear them; for otherwise this might tend to great slander of an innocent."

Bayley, J. * * * Upon the great point, viz. whether it is a good defence to an action for slander, for a defendant to shew he heard it from another, and at the time named the author, I am of opinion that it is not. Lord Northampton's case was undoubtedly mentioned without disapprobation by Lord Kenyon, a man of a very powerful mind, acute discrimination, and great learning. But whatever respect I may feel for the memory of that noble and learned Judge, I cannot carry that respect so far as to surrender my own judgment. Look at the terms of the resolution and try it by the plain principles of reason and common sense.

"It was resolved, that if A. say to B., did you not hear that C. is guilty of treason, &c.? this is tantamount to a scandalous publication: and in a private action for slander of a common person, if J. S. publish that he hath heard J. N. say that J. G. was a traitor or a thief; in an action on the case, if the truth be such, he may justify."

Now, assuming that it is not there stated, as a qualified proposition, that a person may justify if he believes the slander to be true, and repeats it on a justifiable occasion; but as a general proposition, if he in truth heard the report, from another, and named that other at the time he uttered the slander, that that is in all cases a justification, I think that is a proposition which cannot be supported. At present I have very great doubts whether the repetition of slander is in any case lawful, unless the party believe it to be true. By repeating slander, a person, although he state at the time that he heard it from another, gives it a degree of credit; for the repetition of it, imports a degree of belief in the truth of the slander. If I hear another say that A. is a thief, and that B., though a person of bad character, told him so, I am induced to think, that the person who repeats it gives some credit to the statement. It seems to me, therefore, that a person cannot be justified in repeating slander, unless he believes it to be true. But

that alone is not sufficient. I think it can only be repeated upon a justifiable occasion. Every publication of slanderous matter is prima facie a violation of the right which every individual has to his good name and reputation. The law, upon grounds of public policy and convenience, permits, under certain circumstances, the publication of slanderous matter, although it be injurious to another. But such act being prima facie wrongful, it lies upon the person charged with uttering slander, whether he were the first utterer or not, to shew that he uttered it upon some lawful occasion. Upon the whole, I am of opinion that a man cannot by law justify the repetition of slander by merely naming the person who first uttered it; he must also shew that he repeated it on a justifiable occasion, and believed it to be true.[40]

Judgment for plaintiff.

COOK v. WARD.

(Court of Common Pleas, 1830. 6 Bing. 409, 31 R. R. 456, 130 Reprint, 1338.)

Libel. The declaration stated that, before the committing of the grievances by the defendant as thereinafter mentioned, one Corder, who had been tried and convicted of murder at Bury, was about to be hanged; it then alleged, with the customary innuendos, that the defendant, Ward, proprietor of the Colchester Gazette, had caused the

[40] The statement of the pleadings is abridged. The concurring opinions of Littledale and Parke, JJ., and a part of the opinion of Bayley, J., are omitted. The three judges were at one also in regarding the latter part of the fourth resolution in Lord Northampton's Case (1613) 12 Co. Rep. 134, as not law.

In 1829, also, Best, C. J., in De Crespigny v. Wellesley, 5 Bing. 392, 401, declined to recognize the fourth resolution of Lord Northampton's Case as applying to libel. And see 18 Halsbury's Laws of England, 664, note (n).

In America, the doctrine of Lord Northampton's Case has found an echo or two in slander suits. Tatlow v. Jaquett (1834) 1 Har. (Del.) 333, 26 Am. Dec. 399: ("Where a man hears a slander he may repeat it if he does so in the same words, and gives his author at the time.") Jarnigan v. Fleming (1870) 43 Miss. 710, 5 Am. Rep. 514. But the great weight of American authority, in actions for slander, is the other way. Haines v. Welling (1835), 7 Ohio, 253, 256, pt. 1: (approving McPherson v. Daniels as "consistent with policy, right, justice and common sense.") And see 25 Cyc. 364.

In America as in England the doctrine of Lord Northampton's Case appears to have had no support in libel cases. See the remarks of Kent, C. J., in Dole v. Lyon (1813) 10 Johns. (N. Y.) 447, 6 Am. Dec. 346; 25 Cyc. 363, note 77. The contrary, however, was urged, without causing any change in the doctrine, in Walling v. Commercial Advertiser (1915) 165 App. Div. 26, 150 N. Y. Supp. 906.

Compare Branstetter v. Dorrough (1882) 81 Ind. 527, 531: (D. retailed to S. a slanderous charge against P., "for the purpose of obtaining the opinion of S. whether D. should or should not inform P. of the charge against her.")

Tidman v. Ainslie (1854) 10 Ex. 63, 102 R. R. 478: (The plea, in an action for libel, alleged a repetition on stated authority and "that the defendant then believed all the statements made in the said letter, and particularly the said words of the said letter so published as aforesaid, to be true." To this the plaintiff demurred.)

following defamatory statement to be published of the plaintiff, Cook, in the Gazette:

"The following ludicrous occurrence took place at Bury shortly after the conclusion of the trial of Corder. A respectable deputy overseer, not two miles from the parish of St. Mary's in this town, like many other Gents, had the curiosity to hear Corder's trial. Accordingly, he went to Bury and got admission into court; and the trial being ended he adjourned to an inn (not of the highest class) to take some porter, amidst a dozen others, who were perhaps as risky as himself. His appearance, which we suppose must have been singular, struck the company that he must be a man 'out of the common way.' Accordingly, the question was whispered amongst them, who he could be: at length, after a deal of pro and con, it was decided that he could be no other personage than Jack Ketch. After a short pause, one of them emphatically said to him, 'Pray, Sir, aren't you the gemman that's come down to hang Corder?' Of course such a question was the means of his bidding them a respectful farewell.

The stupid elves mistook him by his look,
'Stead of the Jack, he proved to be the Cook.'"

* * * It appeared that before the publication in the newspaper the plaintiff had told the story of himself to a party of his acquaintances at a public-house in Colchester.

The jury gave a verdict for the plaintiff, with £10 damages. A rule nisi was obtained on the defendant's motion.

TINDAL, C. J. * * * It is urged, however, that the plaintiff could have no claim to damages, because he had told the story of himself. If it could have been shown that he had authorized the publication of the story, the Court would have granted a new trial. But there is a great difference between a man's telling a ludicrous story of himself to a circle of his own acquaintance, and a publication of it to all the world through the medium of a newspaper. The rule must be discharged.

Discharged.[41]

RICHARDSON v. GUNBY.

(Supreme Court of Kansas, 1912. 88 Kan. 47, 127 Pac. 533, 42 L. R. A. [N. S.] 520.)

BENSON, J.[42] This is an action to recover damages for an alleged libel. Mr. Neal of Indianapolis, Ind., addressed a letter to the Altoona State Bank asking for information concerning the Altoona Portland Cement Company and its officers. The letter stated that the company was bidding for investors. Responding to this inquiry, the appellee, who was president of the bank, wrote a letter to Mr. Neal, in which it was stated that the cement company had been characterized as a paper concern by the state bank examiner; that none of its stock had been

[41] The statement of facts is abridged and part of the opinion of Tindal, C. J., and the opinion of Park, J., are omitted.

[42] Parts of the opinion are omitted.

placed locally, because "no one locally has any faith in the integrity or ability of its officers. Its secretary is regarded as one of the most tricky men in this community and a good man to leave strictly alone, and all of his projects." The letter otherwise reflected upon the credit and standing of the company and closed with the statement, "The above information is submitted in confidence and in reply to your inquiry for same and if of any value to you we will expect such information so treated," and was signed "J. F. Gunby, President." The appellant was the secretary of the company. The language of the letter contained within the quotation was held to be actionable per se in Schreiber v. Gunby, 81 Kan. 459, 106 Pac. 276. * * * For a separate defense it was alleged that the letter of inquiry was written at the instance of the plaintiff as a decoy to induce the defendant to make some statement upon which to predicate an action. A demurrer filed to this defense was overruled. The verdict and judgment were for the defendant. * * *

Whatever may be the rule in criminal cases, where the object is punishment for a public offense, in a civil action a party cannot be allowed to recover damages for a libel which he procured or instigated to be published against himself for the purpose of laying the foundation of a lawsuit for his own pecuniary gain. It would be contrary to the principles declared in analogous cases to sustain such an action. It follows that the demurrer to the defense referred to was properly overruled.[43]

Another feature of the case closely related to this remains to be considered. In the tenth instruction the court, referring to the defense last considered, said: "If this letter written by Mr. Neal was the result of a decoy letter sent to Mr. Gunby at the instance and request of Mr. Richardson, plaintiff cannot recover, for the reason that it would

[43] See King v. Waring (1803) 5 Esp. 13, 14 R. R. 751, Smith v. Wood (1813) 3 Camp. 323, and the examination and adoption of these cases in Gordon v. Spencer (1829) 2 Blackf. (Ind.) 286, 287.

"The question [whether a plaintiff who has procured the defamatory utterance, in order to found an action upon it, can maintain his action] has been discussed and passed upon in many cases in the United States, and among them in Gordon v. Spencer (1829) 2 Blackf. (Ind.) 286, 288; Yeates v. Reed (1838) 4 Blackf. (Ind.) 463, 465, 32 Am. Dec. 43; Jones v. Chapman (1839) 5 Blackf. (Ind.) 88; Haynes v. Leland (1848) 29 Me. 233, 234, 243; Sutton v. Smith (1850) 13 Mo. 120, 123, 124; Nott v. Stoddard (1865) 38 Vt. 25, 31, 88 Am. Dec. 633; Heller v. Howard (1882) 11 Ill. App. 554; White v. Newcomb (1898) 25 App. Div. 397, 401, 49 N. Y. Supp. 704; O'Donnell v. Nee (C. C., 1898) 86 Fed. 96; Railroad v. Delaney (1899) 102 Tenn. 289, 294, 295, 52 S. W. 151, 45 L. R. A. 600, and Shinglemeyer v. Wright (1900) 124 Mich. 230, 240, 82 N. W. 887, 50 L. R. A. 129. See also 25 Cyc. pp. 370, 371. In most of these cases the supposed ruling of Lord Ellenborough, C. J., in Smith v. Wood, and the opinion expressed by Lord Alvanley, C. J., in King v. Waring were recognized as correct statements of the law, and followed." Per Meredith, C. J., delivering the opinion of the Ontario Divisional Court in Rudd v. Cameron (1912) 4 D. L. R. 567, 571. This court, however, distinguishes King v. Waring and Smith v. Wood, and follows Duke of Brunswick v. Harmer (1849) 14 Q. B. 185. See also Rudd v. Cameron (1914) 8 D. L. R. 622, C. A.

place the plaintiff in the situation of publishing a libel against himself —a thing which the law will not tolerate." This statement lacks an important qualification. The reason why a person cannot recover in such a case, where he instigates or invites the libel, is that he does it, as charged in the reply, for the purpose of predicating an action for damages upon it. He may not thus assist in building up a cause of action for the purpose of gathering the fruitage to himself. If, however, the plaintiff instigated or set on foot the inquiry for the purpose of ascertaining whether the defendant, or the bank of which he was president, was disseminating evil reports concerning the cement company or its officers, in order that such influences might be counteracted, or for any other proper purpose, and not for the purpose of predicating an action for damages in his own behalf, he was not estopped from maintaining an action. * * *[44]

Following the instruction last quoted, if the jury found from the evidence that the so-called decoy letter was written at the instance and request of appellant, they were precluded from giving him a verdict, regardless of his purpose or motive in causing the inquiry. This was an error affecting his substantial rights, and for this the judgment is reversed, with directions to grant a new trial.

[44] Benson, J., here quoted the dictum of Lord Alvanley in King v. Waring (1803) 5 Esp. 13. See also Rudd v. Cameron (1912) 8 D. L. R. 622, C. A.: (Finding that slanders concerning him in his business as a building contractor were being circulated, but not knowing who was responsible, P. placed the matter in the hands of a detective agency, who sent two detectives to investigate. They were not told or asked by P. to go to D. The detectives, having made the acquaintance of D., told him that they were going to erect a club house and that P. wished to get the contract. This ruse brought out from D. a repetition of the slander already in circulation. In P.'s action, based upon this statement, D. contended that he had been induced to utter the slanderous words by detectives employed by P. for that purpose, and that it was as if D. had spoken the words to P. himself and at his request. But a judgment for P. was sustained in the Divisional Court and in the Ontario Court of Appeal. "If the plaintiff," said Meredith, J. A., "had by subterfuge induced the defendant to speak defamatory words of him merely for the purpose of having an action for damages, I cannot think that such an action would lie. * * * That which one procures another to do for him, may be said, very properly, to be done by himself, in fishing for actions as well as in other things. But that is not this case; it was the case referred to by Lord Avanley in his ruling in King v. Waring [1803] 5 Esp. 15. It is quite a different thing for one who has been defamed by a secret enemy, and who in honest and not unusual or unreasonable endeavours to discover the wrongdoer, is again defamed—by one whom he suspected of the secret defamation—to bring such an action as this—even though the new slanders were published only to detectives employed by him and under false statements made by them in such an endeavour. And that is this case: and was very like the case of Duke of Brunswick v. Harmer [1849] 14 Q. B. 185; see also Griffiths v. Lewis [1845] 7 Q. B. 61. The plaintiff was not seeking a new defamation of his character with a view to recovering damages because of it; he was seeking knowledge with a view to putting a stop to the secret slanders which he neither desired nor had induced: and so, in this action, is not taking advantage of his own wrong, or answered by a defence of leave and license.")

POUCHAN v. GODEAU.

(Supreme Court of California, 1914. 167 Cal. 692, 140 Pac. 952.)

PER CURIAM.[45] This case was transferred from the District Court of Appeal of the First District by reason of a disagreement of the justices. MR. JUSTICE HALL was in favor of a reversal of the judgment and order, and this court agrees with the view which he took. He said:

"Plaintiff recovered judgment against defendant, in an action for slander, in the sum of $1,500. The appeal is from the judgment and the order denying defendant's motion for a new trial.

"The only grounds relied upon for a reversal are alleged errors committed by the court in giving and refusing certain instructions and in its rulings upon certain objections to testimony.

"The language which it is charged that defendant used with regard to plaintiff was spoken in the French tongue at the entrance of a hall, wherein a meeting of French people was about to be held, to consider matters concerning the French Hospital and the election of officers thereof. The language charged to have been used is set out in the complaint, together with its translation into English. It is charged that defendant intercepted plaintiff at the doorway of said hall, and in the presence and hearing of divers persons said to him, 'Thieves are not allowed in here,' to which plaintiff responded, 'Then you call me a thief,' to which the defendant replied, 'Yes, you are a thief.' The evidence amply sustains the charge as it is set forth in the complaint.

"The defendant requested the court to give to the jury two instructions, as follows:

"'I charge you that if you believe or if you find that the words alleged to have been uttered by the defendant, as set forth in plaintiff's complaint, were in reply to a question or questions propounded by defendant to plaintiff, then said replies are privileged, and that you may not assess any damages against defendant.' And: 'I charge you that if you find the publication was proved at the trial, and that it was brought about by the plaintiff's own contrivance, this does not constitute sufficient evidence of publication, and your verdict must then be for the defendant.'

"The court refused to give either of said instructions.

"Each and every witness who testified to the use of the language complained of testified to the effect that defendant intercepted and barred the entrance of plaintiff to the hall, and at the same time opened the conversation by saying to him, 'Thieves are not allowed in here.' This language, under the circumstances of its use, clearly in itself and without further explanation prima facie carries the inference that plaintiff was a thief, or that defendant so charged.

"The fact that plaintiff, by a question, drew out a reiteration in

[45] Parts of the opinion are omitted.

more direct language of the charge already made, in the presence of the same people, does not bring the case within the rule of 'Volenti non fit injuria,' relied upon by defendant in support of his request for the rejected instructions.

"Where a defendant, not in the presence or hearing of third persons, makes a slanderous statement about a plaintiff, and thereafter, at the request of the plaintiff, repeats the statement in the presence and hearing of third persons, such repetition cannot be made the basis of an action for slander. Such a case is within the rule now invoked by defendant.[46] * * *

"But under no phase of the evidence in the case at bar does it appear that the language complained of and proven to have been used was but a repetition, at the request of plaintiff, of language previously used but not in the presence of third persons. All the evidence that tends to show the use of the language complained of shows that it was used under the circumstances above detailed, and that the first remark was made by defendant to plaintiff, as above stated, under such circumstances as of itself to carry the meaning that plaintiff was a thief.

"The witnesses for the defendant denied that the language complained of or any part of it was used at all by the defendant. Under this condition of the evidence, there was nothing to justify the giving of either of the refused instructions. * * *

WILLIAMS et al. v. NEW YORK HERALD CO.

(Supreme Court of New York, Appellate Division, 1915. 165 App. Div. 529, 150 N. Y. Supp. 838.)

The action was by Williams and another against the New York Herald Company. From a judgment for plaintiffs, and from an order denying a new trial, the defendant appeals.

[46] The Court here cited Patterson v. Frazer (Tex. Civ. App., 1904) 79 S. W. 1082; O'Donnell v. Nee (C. C., 1898) 86 Fed. 96; (P. said to S.: "The watchman [D.] has accused me of hiding brass to steal." S., turning to D., said: "Is that so?" Thereupon D. said "Yes.") Heller v. Howard (1882) 11 Ill. App. 554; (A defamatory statement made to the plaintiff alone was afterwards repeated at plaintiff's request in the hearing of a third person. "The repetition was at her special request, and the maxim volenti non fit injuria will apply." Per McAllister, J.) Shinglemeyer v. Wright (1900) 124 Mich. 230, 82 N. W. 887, 50 L. R. A. 129; (P. had sent for a police officer for the purpose of having D. repeat in his hearing the false charge of theft which D. had made to P. alone.)

See also Sutton v. Smith (1850) 13 Mo. 120; (P. put "an apron full of her own corn" into D.'s corn crib, and afterwards, when D. is watching her, throws it out in a successful attempt to "devil" him into a charge of theft.) Melcher v. Beeler (1910) 48 Colo. 233, 110 Pac. 181, 139 Am. St. Rep. 273; Howland v. Blake Mfg. Co. (1892) 156 Mass. 543, 570, 31 N. E. 656; 25 Cyc. 370, notes 24, 25; "Libel and Slander," Cent. Dig. §§ 131, 132, 154; Dec. Dig. Key-No. § 47.

SCOTT, J.[47] The action is for libel. The defendant is the publisher of a newspaper. The plaintiffs, under the name of the Lambert Dairy Company, carry on the business of selling and supplying milk and cream to their customers in the city of New York. The libel complained of consists of an article accusing the Lambert Dairy Company of selling watered and adulterated milk. This article was a fairly accurate summary of the allegations contained in a complaint in an action by the French-American Stores Company against the plaintiffs and others. This complaint was filed in the office of the county clerk, but up to the time of the publishing of the libel it had never been presented to the court, nor had any application, based upon it, been made to the court for any preliminary or provisional order or process. It developed upon the trial that plaintiffs had never filed the certificate required by law to enable them to carry on business under the name Lambert Dairy Company, which they had adopted and used. Hence, while the business they were conducting was a perfectly lawful and legitimate one, the manner of conducting it was unlawful and constituted a misdemeanor. Penal Law, §§ 440, 924; Partnership Law, § 22. The damages claimed in the complaint were those claimed to have been suffered by plaintiffs in their business. The amount recovered was not excessive, if they are entitled, as a matter of law, to recover at all.

The appellant urges two reasons why, as it is claimed, the judgment should not stand: First. It claims a qualified privilege in that the article complained of was a fair and true report of a judicial proceeding or of a paper duly filed in the course of such a proceeding. Second. Because the plaintiffs were engaged in a criminal undertaking in carrying on their business as they did, and consequently cannot claim damages in respect thereto. * * *

The defendant's second objection to the judgment rests, in our opinion, on a sounder foundation. The damages claimed are for injury to the business in which the plaintiffs are engaged, and it certainly seems anomalous that one may recover for injury to a business, the carrying on of which is unlawful and criminal. Plaintiff's claim is that the libel injured the fair fame and reputation, and consequently the business value of the Lambert Dairy Company, a name which they had unlawfully appropriated and used. In principle the case is not unlike Marsh v. Davison, 9 Paige, 580, wherein the slander sued for was that the plaintiff had killed a woman by the use of misapplied remedies. It was pleaded in defense that the plaintiff had not registered as a medical practitioner. The court said: "It is doubtful whether the words charged to have been spoken by him are actionable. For it appears by the bill itself that Davison was not a regular physician or surgeon; nor was he licensed to practice as such according to the laws of this state. And as he cannot, therefore,

[47] Part of the opinion is omitted.

recover any compensation for his services under the provision of the Revised Statutes (1 R. S. [2d Ed.] 451, § 24), he cannot maintain an action of slander for charging him with malpractice in a profession which he cannot legally exercise." [48]

So in the present case it must, we think, be said that plaintiffs cannot recover for damages to a business which they could not lawfully carry on in the manner in which they did carry it on. When this case was before us on demurrer, the present question was not presented, for it did not appear that plaintiff's use of this fictitious name was unlawful. For aught that appeared, they might have taken the necessary steps to render the use of the name lawful. Fry v. Bennett, 28 N. Y. 324; Trimmer v. Hiscock, 27 Hun, 364. If plaintiffs were suing for damages to themselves as individuals, a different question would be presented, with which we are not now called upon to deal.

Our conclusion is that, for the reason above assigned, the defendant was entitled to a dismissal of the complaint at the trial. It follows that the judgment and order appealed from must be reversed, and the complaint dismissed, with costs to the appellant in all courts. All concur.

[48] Accord: Collins v. Carnegie (1834) 1 Ad. & E. 695, 110 Reprint, 1373: ("The statute imposes no penalty on unlicensed practitioners, but the prohibitory words are strong enough to make the practice unlawful. This action cannot, therefore, be maintained for slander of the plaintiff in a profession which by law he could not exercise." Per Lord Denman, C. J.)

Hargan v. Purdy (1892) 93 Ky. 424, 20 S. W. 432: ("As defamatory words, either spoken or written, of a person in respect to his office or employment, as to say of a physician 'He is an empiric' or 'a quack,' are actionable per se, the petition would have contained, prima facie, a cause of action if appellant had been contented to state the simple fact that he was a regular physician duly and legally authorized to practice that profession, and being so employed the words mentioned were spoken of him. But he undertook to state how and by what authority he was entitled to practice as a physician; and thus is presented the question, to be considered on general demurrer, whether he was, at the time the alleged slanderous words were published, legally authorized to practice the medical profession. For if he was then undertaking to practice medicine in violation of the statute of the State, he could not, in contemplation of law, have been injured or sustained damage from being called an empiric or quack; or, at all events, he could not be heard in a court of justice to complain that words had been spoken or written of him having the simple effect to disable or deter him from violating a penal law." Per Lewis, J.)

For a distinction when the libel "reflects on the plaintiff in his private character" and not merely as a practitioner, see the remarks of Tindal, C. J., in Long v. Chubb (1831) 5 C. & P. 431. Here the plaintiff had declared for a libel published "of and concerning him, and of and concerning him as a medical practitioner."

(d) Fair Comment

SIR JOHN CARR, Knt., v. HOOD et al.

(London Sittings, after Trinity Term, 1808. 1 Camp. 355, note, 10 R. R. 701, note.)

The declaration stated that the plaintiff, before the publishing of any of the libels thereinafter mentioned, was the author of a certain book entitled "The Stranger in France," a certain other book entitled "A Northern Summer," a certain other book entitled "The Stranger in Ireland," which said books had been respectively published in 4to, yet that defendant, intending to bring upon plaintiff great contempt, laughter and ridicule,

falsely and maliciously published a certain false, scandalous, malicious, and defamatory libel, in the form of a book, of and concerning the said books, of which the said Sir John was the author as aforesaid, which same libel was entitled "My Pocket Book, or Hints for a Ryghte Merrie and Conceited Tour," in quarto, to be called, 'The Stranger in Ireland in 1805' (thereby alluding to the said book of the said Sir John, thirdly above mentioned), by a Knight Errant (thereby alluding to the said Sir John), and which same libel contained therein a certain false, scandalous, malicious, and defamatory print, of and concerning the said Sir John, and of and concerning the said books of the said Sir John, 1st and 2ndly above mentioned, therein called "Frontispiece," and entitled "The Knight (meaning the said Sir John) Leaving Ireland with Regret," and containing and representing in the said print, a certain false, scandalous, and malicious, defamatory, and ridiculous representation of the said Sir John, in the form of a man of ludicrous and ridiculous appearance, holding a pocket handkerchief to his face and appearing to be weeping, and also containing therein, a certain false, malicious, and ridiculous representation of a man of ludicrous and ridiculous appearance, following the said representation of the said Sir John, and representing a man loaded with, and bending under the weight of, three large books, one of them having the word "Baltic," printed on the back thereof, &c. and a pocket handkerchief appearing to be held in one of the hands of the said representation of a man, and the corners thereof appearing to be held or tied together, as if containing something therein, with the printed word "Wardrobe" depending therefrom (thereby falsely, scandalously and maliciously meaning and intending to represent, for the purpose of rendering the said Sir John ridiculous, and exposing him to laughter, ridicule and contempt, that one copy of the said 1st mentioned book of the said Sir John, and two copies of the said book of the said Sir John 2ndly above mentioned, were so heavy as to cause a man to bend under the weight thereof, and that his the said Sir John's wardrobe was very small, and capable of being contained in a pocket handkerchief.

The declaration concluded by laying as special damage that the plaintiff had been prevented and hindered from selling to Sir Richard Philips, Knt., for £600, the copyright of a certain book of which the plaintiff was the author, containing an account of a tour by him through part of Scotland. Plea, Not guilty.

Lord Ellenborough, as the trial was proceeding, intimated an opinion, that if the book published by the defendants only ridiculed the plaintiff as an author, the action could not be maintained.

Garrow for the plaintiff allowed, that when his client came forward

as an author, he subjected himself to the criticism of all who might be disposed to discuss the merits of his works; but that criticism must be fair and liberal; its object ought to be to enlighten the public, and to guard them against the supposed bad tendency of a particular publication presented to them, not to wound the feelings and to ruin the prospects of an individual. If ridicule was employed it should have some bounds. While a liberty was granted of analyzing literary productions, and pointing out their defects, still he must be considered as a libeller whose only object was to hold up an author to the laughter and contempt of mankind. A man with a wen upon his neck perhaps could not complain if a surgeon in a scientific work should minutely describe it, and consider its nature and the means of dispersing it; but surely he might support an action for damages against any one who should publish a book to make him ridiculous on account of this infirmity, with a caricature print as a frontispiece. The object of the book published by the defendants clearly was, by means of immoderate ridicule to prevent the sale of the plaintiff's works, and entirely destroy him as an author. In the late case of Tabart v. Tipper [49] his Lordship had held that a publication by no means so offensive or prejudicial to the object of it, was libellous and actionable.

LORD ELLENBOROUGH. In that case the defendant had falsely accused the plaintiff of publishing what he had never published. Here the supposed libel has only attacked those works of which Sir John Carr is the avowed author; and one writer in exposing the follies and errors of another may make use of ridicule however poignant. Ridicule is often the fittest weapon that can be employed for such a purpose. If the reputation or pecuniary interests of the person ridiculed suffer, it is damnum absque injuria. Where is the liberty

[49] 1 Camp. 350, 10 R. R. 698. In this case, the defendant had published in a periodical called "The Satirist or Monthly Meteor" an article reflecting upon the plaintiff as a publisher of children's books and imputing to him the following "magnificent poem":

"There was a little maid, and she was afraid,
Her sweetheart would come to her,
She bound up her head when she went to bed
And she fastened her door with a skewer."

On the trial the defendant "allowed that the plaintiff had not published the poem imputed to him." Lord Ellenborough remarked that "liberty of criticism must be allowed, or we should neither have purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication therefore I shall never consider as a libel, which has for its object, not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality." But after the evidence was in, his Lordship informed the jury, that "it was certainly actionable gravely to impute to a bookseller having published a poem of this sort, to which he was a stranger; as the evident tendency of the unfounded imputation was to hurt him in his business."

See also the charge in Post Pub. Co. v. Peck (1912) 199 Fed. 6, 13, 120 C. C. A. 1.

of the press if an action can be maintained on such principles? Perhaps the plaintiff's "Tour through Scotland" is now unsaleable; but is he to be indemnified by receiving a compensation in damages from the person who may have opened the eyes of the public to the bad taste and inanity of his compositions? Who would have bought the works of Sir Robert Filmer after he had been refuted by Mr. Locke? But shall it be said that he might have sustained an action for defamation against that great philosopher, who was labouring to enlighten and ameliorate mankind? We really must not cramp observations upon authors and their works. They should be liable to criticism, to exposure, and even to ridicule, if their compositions be ridiculous; otherwise the first who writes a book on any subject will maintain a monopoly of sentiment and opinion respecting it. This would tend to the perpetuity of error. Reflection on personal character is another thing. Shew me an attack on the moral character of this plaintiff, or any attack upon his character unconnected with his authorship, and I shall be as ready as any judge who ever sate here to protect him; but I cannot hear of malice on account of turning his works into ridicule.

The counsel for the plaintiff still complaining of the unfairness of this publication, and particularly of the print affixed to it, the trial proceeded.

Lord Ellenborough said: Every man who publishes a book commits himself to the judgment of the public, and any one may comment upon his performance. If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right. In the present case, had the party writing the criticism followed the plaintiff into domestic life for the purposes of slander, that would have been libellous; but no passage of this sort has been produced, and even the caricature does not affect the plaintiff, except as the author of the book which is ridiculed. The works of this gentleman may be, for aught I know, very valuable; but whatever their merits, others have a right to pass their judgment upon them—to censure them if they be censurable, and to turn them into ridicule if they be ridiculous. The critic does a great service to the public, who writes down any vapid or useless publication, such as ought never to have appeared. He checks the dissemination of bad taste, and prevents people from wasting both their time and money upon trash. I speak of fair and candid criticism; and this every one has a right to publish, although the author may suffer a loss from it. Such a loss the law does not consider as an injury; because it is a loss which the party ought to sustain. It is in short the loss of fame and profits to which he was never entitled. Nothing can be conceived more threatening to the liberty of the press than the species of action before the Court. We ought to resist an attempt against free and liberal criticism at the threshold.

THE CHIEF JUSTICE concluded by directing the jury, that if the writer of the publication complained of had not travelled out of the work he criticised for the purpose of slander, the action would not lie; but if they could discover in it any thing personally slanderous against the plaintiff, unconnected with the works he had given to the public, in that case he had a good cause of action, and they would award him damages accordingly.

Verdict for the defendants.

POST PUB. CO. v. HALLAM.

(Circuit Court of Appeals of the United States, Sixth Circuit, 1893. 59 Fed. 530, 8 C. C. A. 201.)

Action by Hallam against the Post Publishing Company for libel. Verdict for plaintiff. Motion for a new trial denied, and judgment for plaintiff on the verdict. The defendant brings error. The petition set forth the publication by the defendant of and concerning the plaintiff, in the Cincinnati Post, of the following article:

The Berry-Hallam congressional fight in the Sixth Kentucky district is still on,—that is to say, Banquo's ghost bobs up now and then, to the annoyance of the congressional nominee, Berry, and the mortification of the defeated candidate, Theo. F. Hallam. The Boone County Recorder delivers a broadside at the Kenton county delegates, and naively asks: "Why don't they come out and tell the truth about what induced them to go to Berry? The world knows." Yes, the world knows, and you may say Mars and the planets know it also. Proprietor Roth, of the St. Nicholas Hotel, has an inside cinch on this inside information. Everyone knows Colonel Berry. * * * Hallam is a successful lawyer at Covington; but legal eminence does not mean the fat incomes that are its synonyms on this side of the Ohio. Hallam is one of the bhoys, loves ward politics for the fun, if not the emoluments, and is about as poor as a church mouse. In fact, he owes several hundred dollars for taxes. The two counties, Kenton and Campbell, threw out their hooks for the congressional nomination. Kenton swore by Hallam, while Campbell vowed that * * * Albert S. Berry, should be the nominee. The fight waxed hot. The convention was held at Warsaw, commencing on September 27th, and ending September 30th. The Kenton boys prepared for the fray. The principal preparation consisted in engaging the steamer Henrietta to carry the delegates to Warsaw, and the carte blanche orders of Mr. Roth, of the St. Nicholas hostelry, to fill her up from truck to keelson with the best the cellar and the larder of the house afforded. * * * Hallam and his crowd did all the feasting and the drinking. The Campbell county men were not in it. But the bill was made out to Colonel A. S. Berry. Here is the bill: "St. Nicholas. Edward N. Roth. Cincinnati, October 10, 1892. Colonel A. S. Berry, per Theodore F. Hallam, to the St. Nicholas Hotel Company, Dr.: For meals, service, wine, and cigars served on board the steamer Henrietta, $865.15." Then again: At Warsaw the battle raged four days. On the last day Colonel Berry and Lawyer Hallam were seen to go arm in arm to the rear of the courthouse, where the convention was held. They had a quiet and confidential chat. At its conclusion Hallam called his warriors about him, and spoke to them in whispers. Immediately thereafter the whole Kenton county delegation cast its vote for Colonel Berry, and he received the nomination. Is Colonel Berry carrying out all and every one of the promises he made? Ah, there's the rub. Mr. Roth, of the St. Nicholas, has sent a bill of $865.15 to Colonel A. S. Berry. That bill is for "dry" and "wet" provisions ordered by Hallam, and disposed of by Hallam's supporters. Such generosity on the part of the victor to the vanquished is truly touching.

The defendant's answer admitted the publication of the article, but denied the other allegations in the petition. The evidence for the plaintiff tended to show that the charge or insinuation that he had received any consideration for influencing his supporters to transfer their votes to Berry was unfounded.[50]

TAFT, Circuit Judge. * * * Finally, we come to those assignments of error which are based on the charge of the court in regard to privileged communications. The court in effect told the jury that the article in question, relating, as it did, to a matter of public interest, came within a class of communications that were conditionally privileged; that the public acts of public men (and candidates for office were public men) could be lawfully made the subject of comment and criticism,[51] not only by the press, but also by all members of the public, for the press had no higher rights than the individual; but that while criticism and comment, however severe, if in good faith, were privileged, false allegations of fact, as, for instance, that the candidate had committed disgraceful acts, were not privileged, and that, if the charges were false, good faith and probable cause were no defense, though they might mitigate damages. Counsel for the plaintiff in error and the defendant below has argued with great vigor and an array of authorities that we ought not to adopt the view of the circuit court upon this important question, but should hold that the privilege extends to statements of fact as well as comment.

The argument is this: Privileged communications comprehend all bona fide statements in performance of any duty, whether legal, moral, or social, even though of imperfect obligation, when made with a fair and reasonable purpose of protecting the interest of the person making them, or the interest of the person to whom they are made. Townsh. Sland. & L. § 209. It is of the deepest interest to the public that they should know facts showing that a candidate for office is unfit to be chosen. Therefore, every one who has reasonable ground for believing, and does believe, that such a candidate has committed disgraceful acts affecting his fitness for the office he seeks, should have the right to give the public the benefit of his information, without making himself liable in damages for untrue statements, unless malice is shown. Though of imperfect obligation, it is said to be the highest duty of the daily newspaper to keep the public informed of facts concerning those who are seeking their suffrages and confidence. Can it be possible, it is asked, that public policy will make privileged an unfounded

[50] The statement of the case is abridged and parts of the opinion are omitted. For the case below, see Hallam v. Post Publishing Co. (C. C., 1893) 55 Fed. 456.

[51] Compare Walsh v. Pulitzer Pub. Co. (1913) 250 Mo. 142, 157 S. W. 327, Ann. Cas. 1914C, 985: (A newspaper published by D. stated of P., who was a lawyer extensively engaged for the defense in criminal prosecutions and at the time was a candidate for the office of district attorney, that "the mere candidacy of such a person should fill the city with alarm. He has no qualifications for the office.")

charge of dishonesty or criminality against one seeking private service, when made to the private individual with whom service is sought, and yet will not extend the same protection to him who in good faith informs the public of charges against applicants for service with them? Is it not, at least, as important that the high functions of public office should be well discharged, as that those in private service should be faithful and honest?

The a fortiori step in this reasoning is only apparent. It is not real. The existence and extent of privilege in communications are determined by balancing the needs and good of society against the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed. Where conditional privilege is extended to cover a statement of disgraceful fact to a master concerning a servant or one applying for service, the privilege covers a bona fide statement, on reasonable ground, to the master only, and the injury done to the servant's reputation is with the master only. This is the extent of the sacrifice which the rule compels the servant to suffer in what was thought to be, when the rule became law, a most important interest of society. But, if the privilege is to extend to cases like that at bar, then a man who offers himself as a candidate must submit uncomplainingly to the loss of his reputation, not with a single person or a small class of persons, but with every member of the public, whenever an untrue charge of disgraceful conduct is made against him, if only his accuser honestly believes the charge upon reasonable ground. We think that not only is such a sacrifice not required of every one who consents to become a candidate for office, but that to sanction such a doctrine would do the public more harm than good.

We are aware that public officers and candidates for public office are often corrupt, when it is impossible to make legal proof thereof, and of course it would be well if the public could be given to know, in such a case, what lies hidden by concealment and perjury from judicial investigation. But the danger that honorable and worthy men may be driven from politics and public service by allowing too great latitude in attacks upon their characters outweighs any benefit that might occasionally accrue to the public from charges of corruption that are true in fact, but are incapable of legal proof. The freedom of the press is not in danger from the enforcement of the rule we uphold. No one reading the newspaper of the present day can be impressed with the idea that statements of fact concerning public men, and charges against them, are unduly guarded or restricted; and yet the rule complained of is the law in many of the states of the Union and in England.

In Davis v. Shepstone, 11 App. Cas. 187, Lord Chancellor Herschell delivered the judgment of the Judicial Committee of the Privy Coun-

cil in an appeal from a judgment for libel recovered in the supreme court of Natal. The plaintiff below was a resident commissioner of Great Britain in Zululand, and the alleged libel charged him with having committed unprovoked and altogether indefensible assaults upon certain Zulu chiefs. The publication was made in the colony of Natal, where the conduct of the resident commissioner in Zululand was of great public interest. It was claimed that the article was conditionally privileged, and that the plaintiff ought to have succeeded only on proof of express malice. This claim was denied. The Lord Chancellor thus stated the law:

"There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or approved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct. In the present case the appellants, in the passages which were complained of as libelous, charged the respondent, as now appears, without foundation, with having been guilty of specific acts of misconduct, and then proceeded, on the assumption that the charges were true, to comment upon his proceedings in language in the highest degree offensive and injurious. Not only so, but they themselves vouched for the statements by asserting that, though some doubt had been thrown upon the truth of the story, the closest investigation would prove it to be correct. In their lordships' opinion there is no warrant for the doctrine that defamatory matter thus published is regarded by the law as the subject of any privilege."

Other English cases laying down the same doctrine are Campbell v. Spottiswoode, 3 Fost. & F. 421, 432, affirmed 3 Best & S. 769, and Popham v. Pickburn, 7 Hurl. & N. 891, 898. The latest American case, and the most satisfactory, is that of Burt v. Newspaper Co., [1891] 154 Mass. 238, 242, 28 N. E. 1, 13 L. R. A. 97, where Justice Holmes discusses the question, and quotes with approval the foregoing passage from the judgment in Davis v. Shepstone.[52] * * *

Judgment of the Circuit Court affirmed.[53]

[52] Judge Taft here cited the following American cases as approving the same rule: Smith v. Burrus (1891) 106 Mo. 94, 101, 16 S. W. 881, 13 L. R. A. 59, 27 Am. St. Rep. 329; Wheaton v. Beecher (1887) 66 Mich. 307, 33 N. W. 503; Bronson v. Bruce (1886) 59 Mich. 467, 26 N. W. 671, 60 Am. Rep. 307; Brewer v. Weakley (1807) 2 Overt. (Tenn.) 99, 5 Am. Dec. 656; Sweeney v. Baker (1878) 13 W. Va. 158, 31 Am. Rep. 757; Hamilton v. Eno (1880) 81 N. Y. 126; Rearick v. Wilcox (1876) 81 Ill. 77; Negley v. Farrow (1883) 60 Md. 158, 176, 45 Am. Rep. 715; Jones v. Townsend (1885) 21 Fla. 431, 451, 58 Am. Rep. 676; Banner Pub. Co. v. State (1885) 16 Lea (Tenn.) 176, 57 Am. Rep. 216; Publishing Co. v. Moloney (1893) 50 Ohio, 71, 33 N. E. 921; Seely

[53] See note 53 on following page.

TRIGGS v. SUN PRINTING & PUBLISHING ASS'N.

(Court of Appeals of New York, 1904. 179 N. Y. 144, 71 N. E. 739, 66 L. R. A. 612, 103 Am. St. Rep. 841, 1 Ann. Cas. 326.)

MARTIN, J. * * * [54] It is contended by the respondent that the articles published were a mere comment or criticism of matters of public interest and concern, and hence were privileged. While every one has a right to comment on matters of public interest, so long as

v. Blair, Wright (Ohio, 1833) 358, 683; Wilson v. Fitch (1871) 41 Cal. 383; Edwards v. Publishing Co. (1893) 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70; State v. Schmitt (1887) 49 N. J. Law, 579, 586, 9 Atl. 774; Eviston v. Cramer (1883) 57 Wis. 570, 15 N. W. 760.

[53] See Haynes v. Clinton (1897), 169 Mass. 512, 48 N. E. 275, 276 (where Holmes, J., remarks: "It is settled that newspapers as such have no peculiar privilege, and it is equally settled that the privilege of comment and criticism on matters of public interest which a possible murder may be assumed to be for the purposes of decision does not extend to false statements"); Morris v. Sailer (1911) 154 Mo. App. 305, 134 S. W. 98, 99; Walsh v. Pulitzer Pub. Co. (1913) 250 Mo. 142, 157 S. W. 326, 330, Ann. Cas. 1914C, 985; Schwarz Bros. Co. v. Evening News Pub. Co. (1913) 48 N. J. Law, 486, 87 Atl. 148, 153 (where Mr. Justice Swayze quotes with approval from Lord Herschell's opinion, given in the text, in Davis v. Shepstone [1886] 11 App. Cas. 187, with this preliminary comment: "There could hardly be a case where freedom of speech was more important"). Ott v. Murphy (1913) 160 Iowa, 730, 141 N. W. 463, 467: ("It is sometimes said that fair and honest criticism in matters of public concern are privileged, but there is a manifest difference between fair and honest criticism of public events and privileged communications. In the latter case the words may be defamatory, but the defamation is excused or justified by reason of the occasion, while in the former case the words are not defamatory of the plaintiff, and are not libelous—the stricture or criticism is not upon the person himself, but upon his work. In other words, it is impersonal. Bearce v. Bass [1894] 88 Me. 521, 34 Atl. 411, 51 Am. St. Rep. 446; Burt v. Advertising Co. [1891] 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97. Criticism must be founded on truth, and false statements or attacks on private character are not permitted." Per Deemer, J.) Parsons v. Age Herald Pub. Co. (1913) 181 Ala. 439, 61 South. 345, 350: ("The privilege [of fair comment] is limited to comment or criticism, and must be with reference to admitted or proven facts or conduct." Per Somerville, J.)

For other late cases on the point, see 25 Cyc. 404–406, and especially notes 83, 84, 85, 86; Key No. "Libel and Slander," § 48; 18 Halsbury's Laws of England (1911) 702–709, and notes.

So it was remarked by Cockburn, C. J., in the Queen v. Carden (1879) 5 Q. B. D. 1, 8: "It is true that a comment upon given facts, which would otherwise be libellous, may assume a privileged character, because, though unjust and injurious, yet being founded on facts not in themselves libellous, it is a comment which any one is entitled to make upon a public man. For instance, suppose that any one states facts not in themselves libellous of a candidate for election to parliament, and on them bases the conclusion that he is not an honest politician. The comment may be injurious, but it may be privileged as a fair comment on the facts, if not malicious, because made on a public man. On the other hand, to say that you may first libel a man, and then comment upon him, is obviously absurd."

And in Digby v. Financial News [1907] 1 K. B. 502, 507, it was remarked by Collins, M. R., in the Court of Appeal: "Comment, in order to be fair,

[54] The statement of the facts in this case, and so much of the opinion as relates to the question of libel, apart from the question of fair comment, are reported ante, page 589.

one does so fairly, with an honest purpose, and not intemperately and maliciously, although the publication is made to the general public by means of a newspaper, yet what is privileged is criticism, not other defamatory statements; and, if a person takes upon himself to allege matters otherwise actionable, he will not be privileged, however honest his motives, if those allegations are not true. When a publisher goes beyond the limits of fair criticism, his language passes into the region of libel, and the question whether those limits have been transcended may become a question of law, but ordinarily presents a question for the jury. Fay v. Harrington, 176 Mass. 270, 57 N. E. 369. It is true that an author, when he places his work before the public, invites criticism; and, however hostile it may be, the critic is not liable for libel, provided he makes no misstatements of material facts contained in the writing, and does not go out of his way to attack the author. The critic must, however, confine himself to criticism, and not make it the veil for personal censure, nor allow himself to run into reckless and unfair attacks merely for the purpose of exercising his power of denunciation. If, under the pretext of criticising a literary production or the acts of one occupying a public position, the critic takes an opportunity to attack the author or occupant, he will be liable in an action for libel. Cooper v. Stone, 24 Wend. 434; Mattice v. Wilcox, 71 Hun, 485, 488, 24 N. Y. Supp. 1060, affirmed 147 N. Y. 624, 42 N. E. 270; Hamilton v. Eno, 81 N. Y. 116. Moreover, it is difficult to perceive how this privilege can be tried on demurrer, as the question whether the criticism was fair and just, or willfully assailed the reputation of the plaintiff, would be for the jury. In this case it is obvious that the articles complained of go far beyond the field of fair and honest criticism, and are attempts to portray the plaintiff in a ridiculous light.

must be based upon facts, and if a defendant cannot shew that his comments contain no misstatements of fact, he cannot prove a defense of fair comment. The usual way to begin such a plea is by asserting that the facts on which the comment is based are true, that is, that the defendant has made no misstatements in formulating the materials upon which he has commented. If the defendant makes a misstatement of any of the facts upon which he comments, it at once negatives the possibility of his comment being fair. It is therefore a necessary part of a plea of fair comment to shew that there has been no misstatement of facts in the statement of the materials upon which the comment was based."

But see Cleveland Leader Printing Co. v. Nethersole (1911) 84 Ohio, 118, 95 N. E. 735, Ann. Cas. 1912B, 978. The plaintiff, an actress and producer of plays upon the stage, sued for an alleged libel in an article published in the defendant's newspaper. This article, referring to a play called "The Labyrinth," in which the plaintiff had just appeared in Cleveland, contained this statement: "Cleveland received it frigidly, as is the American way when displeased or disgusted, but when it was produced in London it was hissed so soundly that Miss Nethersole had hysterics." The two statements as to the London production were false. A judgment for the plaintiff, who asserted no special damage, was reversed by the Supreme Court, apparently on two grounds, that the defendant was within the protection of fair comment, and that the false statements were not a "libel upon the person," but only a "libel upon the play." See an interesting note on this case in 10 Mich. Law Rev. 44 (1911).

As was in effect said by the learned judge in the dissenting opinion below: The articles complained of represent the plaintiff as illiterate, uncultivated, coarse, and vulgar, and his ideas as sensational, absurd, and foolish. They also represent him as egotistical and conceited in the extreme, and convey the impression that he makes himself ridiculous both in his method of instruction and by his public lectures. They also ridicule his private life, by charging that he was unable to select a name for his baby until after a year of solemn deliberation. In short, they effect to represent him as a presumptuous literary freak. These representations concerning his personal characteristics were not within the bounds of fair and honest criticism, and are clearly libelous per se.

It is likewise claimed by the respondent that these articles were written in jest, and hence that it is not liable to the plaintiff for the injury he has sustained. It is, perhaps, possible that the defendant published the articles in question as a jest, yet they do not disclose that, but are a scathing denunciation, ridiculing the plaintiff. If, however, they can be regarded as having been published as a jest, then it should be said that, however desirable it may be that the readers of, and the writers for, the public prints shall be amused, it is manifest that neither such readers nor writers should be furnished such amusement at the expense of the reputation or business of another. In the language of Joy, C. B.: "The principle is clear that a person shall not be allowed to murder another's reputation in jest;" or, in the words of Smith, B., in the same case: "If a man in jest conveys a serious imputation, he jests at his peril." Donoghue v. Hayes [1831], Hayes, Irish Exchequer, 265, 266. We are of the opinion that one assaulting the reputation or business of another in a public newspaper cannot justify it upon the ground that it was a mere jest, unless it is perfectly manifest from the language employed that it could in no respect be regarded as an attack upon the reputation or business of the person to whom it related.

The single purpose of the rule permitting fair and honest criticism is that it promotes the public good, enables the people to discern right from wrong, encourages merit, and firmly condemns and exposes the charlatan and the cheat, and hence is based upon public policy. The distinction between criticism and defamation is that criticism deals only with such things as invite public attention or call for public comment, and does not follow a public man into his private life, or pry into his domestic concerns. It never attacks the individual, but only his work. A true critic never indulges in personalities, but confines himself to the merits of the subject-matter, and never takes advantage of the occasion to attain any other object beyond the fair discussion of matters of public interest, and the judicious guidance of the public taste. The articles in question come far short of falling within the line of true criticism, but are clearly defamatory in character, and are libelous per se. * * *

(E) Defeating a Prima Facie Justification or Excuse in Defamation: Malice, Excess

(a) As a Reply to the Plea of Justification

PERRY v. PORTER.

(Supreme Judicial Court of Massachusetts, 1878. 124 Mass. 338.)

Tort, with a count for libel and thirteen counts for slander. After the former decision, reported 121 Mass. 522, the case was tried in this court, before Soule, J., who, after a verdict for the defendant, allowed a bill of exceptions.

MORTON, J. * * * In regard to the count for libel, the vital question is as to the correctness of the ruling of the court, that, if the jury found the matter contained in the publication charged as libellous to be true, this was a complete defence to the action.

The plaintiff relied upon the Gen. Sts. c. 129, § 77, and contended that the truth was not a justification and defence, if it was proved that the article was published with express malice. But the court ruled that the exception in the statute was not applicable to a civil action, and that proof of the truth was not of itself a defence.

At common law, in private actions for libel or slander, proof of the truth is a justification. But in public prosecutions the rule was otherwise, and it was accordingly held, in Commonwealth v. Blanding, 3 Pick. 304, 15 Am. Dec. 214, that on an indictment for libel the truth of the matter published was not admissible in evidence. Probably in consequence of this decision, the Legislature enacted in 1827 that in every prosecution for libel the defendant might give in evidence in his defence the truth of the matter charged to be libellous, but that such evidence should not be a justification unless it was made to appear that such matter was published with good motives and for justifiable ends. St. 1826, c. 107, 1.

This was re-enacted in the Rev. Sts. c. 133, § 6, and remained the law until 1855 when it was provided that "in every prosecution, and in every civil action for writing or for publishing a libel, the defendant may give in evidence, in his defence upon the trial, the truth of the matter contained in the publication charged as libellous; and such evidence shall be deemed a sufficient justification, unless malicious intention shall be proved." St. 1855, c. 396, § 1.

This provision was without change incorporated in the Gen. Sts. c. 129, § 77. It is true that all the prior legislation had been, not in the direction of limiting the effect of proof of the truth in civil actions, but in the direction of enlarging its effect in favour of the defendant in a criminal prosecution. The St. of 1826 for the first time permitted the truth to be given in evidence as a justification in criminal prosecutions. Under its provisions the burden of proof was upon the defendant to

show not only the truth of the matter charged to be libellous, but also that it was published with good motives and for justifiable ends. Commonwealth v. Bonner, 9 Metc. 410.

The St. of 1855 goes further in favor of the defendants in criminal prosecutions and throws the burden on the government, if the defendant establishes the truth, of proving that the publication was made with malicious intention. In this respect, it accords with the general tendency of modern legislation to make the proof of the truth more effective in the defence of a prosecution for libel.

These considerations, and the further argument that, if the Legislature had intended to make so important a change in the law of libel in civil suits, it would have done so in direct affirmative language, afford some ground for the inference that it was not intended that the exception in the concluding words of the St. of 1855 should apply to civil actions.

But, on the other hand, we must construe the words of the statute "according to the common and approved usage of the language" unless such construction would be inconsistent with the manifest intent of the Legislature. Gen. Sts. c. 3, § 7, cl. 1.

This statute in its terms is made applicable "in every prosecution and in every civil action for writing or for publishing a libel." The provisions that the truth may be given in evidence, and if proved shall be sufficient justification, undoubtedly were intended to apply to civil and criminal proceedings. According to the common and approved usage of the language, the exception or qualification contained in the words, "unless malicious intention shall be proved," also applies to civil actions as well as to criminal prosecutions; and we are not able to see either in the context or in the history of previous legislation upon the subject, sufficient evidence of a manifest intent of the Legislature that it should be limited to criminal prosecutions.

We are of opinion, therefore, that the court erroneously ruled at the trial that the exception in the statute did not apply to a civil action, and that the proof of the truth was of itself a defence. But, as this error affected only the count for libel, and as the plaintiff has fully tried his counts for slander, we are of opinion that a new trial should be granted only upon the count for libel.

Exceptions sustained.[55]

[55] Part of the opinion is omitted.

Compare: Conner v. Standard Pub. Co. (1903) 183 Mass. 474, 67 N. E. 596: (Certain testimony in an action for libel had been admitted "on the question of whether the article was written honestly and in good faith." Said Loring, J., delivering the opinion: "At common law, the truth of the statement complained of is an absolute defense to an action of libel, and such evidence is not admissible because it does not tend to prove the truth of the facts charged. This is the ground upon which Shaw, C. J., rests his opinion in Sheckell v. Jackson [1852] 10 Cush. 25. But an act was passed in 1855 [St. 1855, p. 782, c. 396] which provided that the truth of the matter should not be a defense if a malicious intention was proved. It was held in Perry v. Porter [1878] 124 Mass. 338, that the burden of proving malice was

HUTCHINS v. PAGE.

(Supreme Court of New Hampshire, 1909. 75 N. H. 215, 72 Atl. 689, 31 L. R. A. [N. S.] 132.)

Case, by Hutchins against Page, for an alleged libel. In opening his case the plaintiff's counsel stated that he expected to prove that the defendant, being tax-collector for the city of Portsmouth and having an overdue tax against the plaintiff, advertised the property for sale by posting the notices required by the statute and also by publishing like notices in two newspapers. These publications were alleged to have been made maliciously and for no purpose except to injure the plaintiff. Upon this statement a nonsuit was ordered, subject to exception.

PEASLEE, J. However the law may be elsewhere,[56] it is well settled in this state that the truth is not always a defense to an action on the case to recover damages for the publication of a libel. State v. Burnham, 9 N. H. 34, 31 Am. Dec. 217. The rule there suggested, that if the occasion be lawful the motive for the publication is immaterial, if the truth of the charge be established, was materially modified when a case arose in which the question was directly in issue. "It seems to us that in order to settle whether the occasion was lawful we must generally inquire into the motives of the publisher. There may be some cases where the occasion renders, not only the motive, but the truth, of the communication immaterial. Thus it may be the better rule that no relevant statement made by a witness or by counsel in the course of a trial is actionable, even though false and malicious. See Revis v. Smith, 18 Com. Bench, 126. But in the great majority of instances, and certainly in the present case, the lawfulness of the occasion depends upon the good faith and real purpose of the publisher. Most of what are called 'privileged communications' are 'conditionally,' not 'absolutely' privileged. 'The question is one of good faith,' or motive, and can be settled only by a jury. A court cannot rule that a communication is privileged without assuming the conditions on which it is held to be privileged, namely, that it was made in good

on the plaintiff; and in Brown v. Mass. Title Ins. Co. [1890] 151 Mass. 127, 23 N. E. 733, and Fay v. Harrington [1900] 176 Mass. 270, 57 N. E. 369, that by "malicious intention" was meant malice, in the popular sense of hatred or ill will. In pursuance of the latter case, the words "actual malice" have been substituted in the act for the original words, "malicious intention." Rev. Laws, c. 173, § 91. * * * We are of opinion that this evidence was admissible in the issue of "actual malice.")

See, also, Pierce v. Rodliff (1901) 95 Me. 346, 50 Atl. 32, and 25 Cyc. 414.

[56] Compare: Foss v. Hildreth (1865), 10 Allen (Mass.) 76. The defendant requested an instruction that the truth is not a defence to an action of slander, if the words were spoken maliciously or without any reason on the part of the defendant to believe they were true. "But in respect to verbal slander the law has always been otherwise. A special plea in justification sets forth the truth of the words merely. 3 Chit. Pl. 1031." Per Chapman, J. See, also, 25 Cyc. 414, note 25.

faith, for a justifiable purpose, and with a belief, founded on reasonable grounds, of its truth." Palmer v. Concord, 48 N. H. 211, 217, 97 Am. Dec. 605; Carpenter v. Bailey, 53 N. H. 590, 594; Id., 56 N. H. 283, 290.

Under this rule the plaintiff states a case. While it was the defendant's duty to publish the fact that the plaintiff had failed to pay the taxes assessed against him, "by posting advertisements thereof in two or more public places in the town" (Pub. St. 1901, c. 60, § 14), it was not his duty to otherwise publish the fact unless he thought such publication was essential to the success of the tax sale. If he did not so believe, but, on the contrary, used this occasion to maliciously proclaim in a public manner that the plaintiff had not paid his taxes, there is neither legal nor ethical reason why an action should not lie for the damage caused by the malicious and unwarranted act.[57]

The claim that the defendant is exonerated by the provision that he shall not be liable "for any cause whatever except his own official misconduct" (Pub. St. 1901, c. 60, § 16) cannot be sustained. The misconduct here charged is "his own." He can no more use the statutory power to advertise as a cloak for a malicious assault upon the plaintiff's character than he could make the power to arrest a commission for the infliction of bodily chastisement.

Exception sustained. All concurred.

(b) As a Reply to the Plea of Privilege

SCOTT v. STANSFIELD.

(Court of Exchequer, 1868. L. R. 3 Exch. 220.)

[See ante, p. 660, for a report of the case.]

WILLIAMSON v. FREER.

(Court of Common Pleas, 1874. L. R. 9 C. P. 393.)

This was an action for a libel, tried before Brett, J. The facts were as follows: The plaintiff was employed as assistant in the shop of the defendant, a shoemaker, at Leicester. The defendant having accused the plaintiff of robbing him of money, sent two post-office telegrams to her father, who resided in London, to inform him of his suspicions. The first telegram was to this effect: "Come at once to Leicester, if you wish to save your child from appearing before a magistrate." The second was as follows: "Your child will be given in

[57] For the broader doctrine of this case, see infra, Part III, Chapter 2. "Torts through Acts of Intentional Harm."

charge of the police unless you reply and come to-day. She has taken money out of the till."

The charge was persisted in down to the trial; but there was no evidence to support it. It did not appear that, beyond the officials of the post-office, through whose hands the telegrams passed, they had come to the knowledge of any other persons than the father, mother, and brother of the plaintiff.

On the part of the defendant it was contended that the messages if sent in sealed letters would clearly have been privileged communications, and that they did not lose this privilege by being transmitted by telegraph. The learned judge told the jury that, although the statements, if made bona fide and without malice, would have been privileged if they had been contained in letters addressed to the father, they might be if libellous, deprived of that privilege by being sent by telegraph. And he left it to the jury to say whether the statements were libellous, and whether it was reasonable to transmit them by telegraph rather than by post.

The jury found that the statements were libellous, and that it was not reasonable to send them by telegraph, and they returned a verdict for the plaintiff, damages £100.

BRETT, J. I reserved the point because I thought it was a very important one. It is whether, where a communication is to be made to a relative of a person against whom a charge is preferred, which communication would be privileged if sent by letter in the ordinary way, the privilege is not lost by sending it in the form of a telegram,—whether a communication in that form can be said to be made to one person, when in point of fact it passes through several hands before it reaches its ultimate destination. Privilege is not wanted unless the publication is libellous. The question then is whether the character of an innocent person is to be destroyed because the libeller thinks fit to send the libel in this shape rather than in a sealed letter. I do not mean to say that there was malice in fact here. But I agree with my Lord that sending the messages by telegraph when they might have been sent by letter was evidence of malice. I desire, however, to put this higher. I think that a communication which would be privileged if made by letter becomes unprivileged if sent through the telegraph office, because it is necessarily communicated to all the clerks through whose hands it passes. It is like the case of a libel contained on the back of a post-card. It was never meant by the legislature that these facilities for postal and telegraphic communication should be used for the purpose of more easily disseminating libels. Where there is such a publication, it avoids the privilege, because it is communicated through unprivileged persons.[58] As to the damages, I am not at all

[58] Accord: Brown v. Croome (1817) 2 Starkie, 297, 19 R. R. 727: (D. published in a newspaper an advertisement for a meeting of the creditors of P., a bankrupt. The advertisement contained defamatory statements. Lord Ellenborough, ruling against a claim of privilege, remarked: "The defend-

disposed to think them excessive. The charge against the plaintiff was of a very grave character. It was made with considerable severity, and it was insisted upon even down to the trial.

ODDY v. LORD GEORGE PAULET.

(At Nisi Prius, 1865. 4 Fost. & F. 1009, 142 R. R. 743.)

Slander upon a trader in the way of his business. The first count laid the words to be: "You and your family are all a set of rogues, and you have robbed me ever since I have dealt with you." Plea, not guilty.

The plaintiff was a corn dealer, and the defendant had dealt with him. The orders were given by servants, and there was a book in the usual way in which supplies were entered. The defendant had gone to the plaintiff's shop on several occasions in one week, and had—as was proved by the plaintiff and his son, and a third person who happened to be in hearing—spoken the words complained of in evident heat and anger. The son of the plaintiff was in the shop on one of the occasions, and the third person who was in hearing on another occasion was a traveller, who was in a parlour at the back of the shop, and, as he swore, heard the words uttered. It was also sworn on the part of the plaintiff that the defendant spoke the words very loudly,

ant made no progress in his defense, unless he could show that such a publication was the only effectual mode of convening the creditors. A communication sufficient for the purpose might have been made in measured language. The want of proper caution had rendered the publication actionable, as being published to the world at large.")

Muetze v. Tuteur (1890) 77 Wis. 236, 46 N. W. 123, 9 L. R. A. 86, 20 Am. St. Rep. 115: (D. sent to P. a letter demanding payment of a debt. The letter was enclosed in a red envelope bearing, in large type, the name of a certain association and the statement that it was for collecting bad debts.)

Sheftall v. Central of Georgia Ry. (1905) 123 Ga. 589, 51 S. E. 649: (P., a conductor on the defendant railway, had been discharged. He had in his possession, as part of his conductor equipment, certain unused tickets. These he failed to turn in. The railway company sent out a circular describing the tickets as "lost and scalped" and requiring the conductors to decline to honor them if presented for transportation. This circular, in which P. was named as failing to surrender the tickets, was sent to all the defendant's conductors, and posted for ten days on bulletin boards in public places.)

Bingham v. Gaynor (1911) 203 N. Y. 27, 96 N. E. 84: (D., a judge in New York City, sent to S., the mayor of the city, a letter containing defamatory statements of P., a police commissioner of the city. S. was the superior officer of P. Before the delivery of this letter to S., it was, through D.'s act, published in newspapers in the city.)

Compare: Ashcroft v. Hammond (1910) 197 N. Y. 488, 90 N. E. 1117: (D., in reply to a telegram from S., who with D. was interested in the proper management of a corporation, and the settlement of a controversy over the validity of an election of its board of directors, sent a telegram reflecting upon the competency of P., who had been manager of the corporation and was active in the pending controversy. The telegram from S., drafted by P. and sent with his knowledge, asked D. to "telegraph reply" to a certain address.)

and so as to be heard by every one standing by, and, moreover, that he had stood outside and repeated the words loudly, so that he could be heard by persons passing by; and that some persons were passing by at the time and might have heard it. At the close of the case for the plaintiff,

Coleridge submitted that the words were privileged, because spoken to a trader by a customer, and as words of remonstrance and complaint.

LUSH, J. No doubt a customer may complain to a tradesman with whom he deals of what he deems irregular or dishonest; but if he does so outside the door of the tradesman's shop—so as to be heard by the public—or if even inside the shop, he speaks slanderous words unnecessarily in the presence of third parties, or to third parties, and uses language which is extreme and beyond the occasion—all this, with the tone and manner in which the words were spoken, will be evidence for the jury to consider whether in the law the words were spoken maliciously and without excuse. The case, therefore, cannot be withdrawn from the jury.

Coleridge thereupon yielded to an apology.

TOOGOOD v. SPYRING.

(Court of Exchequer, 1834. 1 Cromp., M. & R. 181, 40 R. R. 523.)

This was an action of slander for words alleged to have been spoken of the plaintiff as a journeyman carpenter, by the defendant on three different occasions. The declaration, the facts of which sufficiently appear in the opinion, was in five counts. The defendant pleaded the general issue, and, in two special pleas, the truth of the charge. The plaintiff replied to the special pleas with a de injuria. There was a verdict for the plaintiff. The defendant moved for a nonsuit or a new trial, on the ground of misdirection.[59]

PARKE, B. * * * The defendant, who was a tenant of the Earl of Devon, required some work to be done on the premises occupied by him under the Earl, and the plaintiff, who was generally employed by Brinsdon, the Earl's agent, as a journeyman, was sent by him to do the work. He did it, but in a negligent manner; and, during the progress of the work, got drunk; and some circumstances occurred which induced the defendant to believe that he had broken open the cellar door, and so obtained access to his cider. The defendant a day or two afterwards met the plaintiff in the presence of a person named Taylor, and charged him with having broken open his cellar door with

[59] The statement of facts is abridged. The arguments of counsel and part of the opinion are omitted. The opinion in this case has been referred to as one of "the judgments by Baron Parke which in a few years raised the Exchequer to a fully equal position with the other Courts." 40 R. R. vi.

a chisel, and also with having got drunk. The plaintiff denied the charges. The defendant then said he would have it cleared up, and went to look for Brinsdon; he afterwards returned and spoke to Taylor, in the absence of the plaintiff; and, in answer to a question of Taylor's, said he was confident that the plaintiff had broken open the door. On the same day the defendant saw Brinsdon, and complained to him that the plaintiff had been negligent in his work, had got drunk, and he thought he had broken open the door, and requested him to go with him in order to examine it.

Upon the trial it was objected, that these were what are usually termed "privileged communications." The learned Judge thought that the statement to Brinsdon might be so, but not the charge made in the presence of Taylor; and in respect of that charge, and of what was afterwards said to Taylor, both which statements formed the subject of the action, the plaintiff had a verdict. We agree in his opinion, that the communication to Brinsdon was protected, and that the statement, upon the second meeting, to Taylor, in the plaintiff's absence, was not; but we think, upon consideration, that the statement made to the plaintiff, though in the presence of Taylor, falls within the class of communications ordinarily called privileged; that is, cases where the occasion of the publication affords a defence in the absence of express malice. In general, an action lies for malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.

Among the many cases which have been reported on this subject, one precisely in point has not, I believe, occurred; but one of the most ordinary and common instances in which the principle has been applied in practice is, that of a former master giving the character of a discharged servant; and I am not aware that it was ever deemed essential to the protection of such a communication that it should be made to some person interested in the inquiry, alone, and not in the presence of a third person. If made with honesty of purpose to a party who has any interest in the inquiry (and that has been very liberally construed, Child v. Affleck, 33 R. R. 216, 9 B. & C. 403, 4 Man. & Ry. 338), the simple fact that there has been some casual bystander cannot alter the nature of the transaction. The business of life could not be well carried on if such restraints were imposed upon this and

similar communications, and if, on every occasion in which they were made, they were not protected unless strictly private. In this class of communications is, no doubt, comprehended the right of a master bona fide to charge his servant for any supposed misconduct in his service, and to give him admonition and blame; and we think that the simple circumstance of the master exercising that right in the presence of another, does by no means of necessity take away from it the protection which the law would otherwise afford. Where, indeed, an opportunity is sought for making such a charge before third persons, which might have been made in private, it would afford strong evidence of a malicious intention, and thus deprive it of that immunity which the law allows to such a statement, when made with honesty of purpose; but the mere fact of a third person being present does not render the communication absolutely unauthorized, though it may be a circumstance to be left with others, including the style and character of the language used, to the consideration of the jury, who are to determine whether the defendant has acted bona fide in making the charge, or been influenced by malicious motives. In the present case, the defendant stood in such a relation with respect to the plaintiff, though not strictly that of master, as to authorize him to impute blame to him, provided it was done fairly and honestly for any supposed misconduct in the course of his employment; and we think that the fact that the imputation was made in Taylor's presence, does not, of itself, render the communication unwarranted and officious, but at most is a circumstance to be left to the consideration of the jury.

We agree with the learned Judge, that the statement to Taylor, in the plaintiff's absence, was unauthorized and officious, and therefore not protected, although made in the belief of its truth, if it were, in point of fact, false; but, inasmuch as no damages have been separately given upon this part of the charge alone, to which the fourth count is adapted, we cannot support a general verdict, if the learned Judge was wrong in his opinion as to the statement to the plaintiff in Taylor's presence; and, as we think that at all events it should have been left to the jury whether the defendant acted maliciously or not on that occasion, there must be a new trial.

Rule absolute for a new trial.

DUNCOMBE v. DANIELL.

(Adjourned Sittings at Westminster after Michaelmas Term, 1837. 8 Car. & P. 222.)

Libel. The declaration was upon two letters written by the defendant, who was a barrister and an elector of the borough of Finsbury, and published in the "Morning Post" newspaper, addressed to the plaintiff, Mr. Duncombe, who had been member of parliament for, and at the time of the publication was a candidate for the representation

of, that borough. Plea—Not guilty; and three pleas of justification, stating in substance that the matters contained in the letters were true. Verdict for the defendant, damages £100.

In the ensuing term, Sir W. Follett for the defendant applied for a new trial upon several grounds, the last of which was that it was justifiable for an elector bona fide to communicate to the constituency any matter respecting a candidate which he believed to be true, and believed to be material to the election.

COLERIDGE, J. You must go further than that, and make out that the elector is entitled to publish it to all the world. This publication was in a newspaper.

Sir W. Follett submitted that if no more was done than was necessary to make the matters known to the electors the publication was privileged, and that whether or not any thing more was done was a question for the jury.

LORD DENMAN, C. J. However large the privilege of electors may be, it is extravagant to suppose that it can justify the publication to all the world of facts injurious to a person who happens to stand in the situation of a candidate.

Rule refused on the last ground, and granted on the others.[60]

COLEMAN v. MacLENNAN.

(Supreme Court of Kansas, 1908. 78 Kan. 711, 98 Pac. 281, 20 L. R. A. [N. S.] 361, 130 Am. St. Rep. 390.)

BURCH, J. In August, 1904, the plaintiff held the office of Attorney General of the state and was a candidate for re-election at the general election, which occurred in the following November. By virtue of his office, he was a member of the commission charged with the management and control of the state school fund. The defendant was the owner and publisher of the Topeka State Journal, a newspaper published at Topeka, and circulated both within and without the state. In the issue of the date mentioned appeared an article purporting to state facts relating to the plaintiff's official conduct in connection with

[60] The statement of the case is abridged.

Accord: Buckstaff v. Hicks (1896) 94 Wis. 34, 68 N. W. 403, 59 Am. St. Rep. 853: (In a meeting of the city council, S., who represented the city in the legislature, made remarks which were defamatory of P. as the city's representative in the state senate. A true report of these remarks, including the defamatory statement, was published in D.'s newspaper, which circulated, not only in the city, but in adjoining counties and cities and outside the state.)

State v. Haskins (1899) 109 Iowa, 656, 80 N. W. 1063, 47 L. R. A. 223, 77 Am. St. Rep. 560: (When P. was a candidate for election as judge in the fourteenth judicial district, an article falsely charging him with fraudulently altering a judicial record was published in D.'s newspaper, which circulated in this district, in other districts, and outside the state.)

a school fund transaction, making comment upon them and drawing inferences from them. Deeming the article to be libelous, the plaintiff brought an action for damages against the defendant, alleging that the matter published concerning him was false and defamatory, and that its publication was the fruit of malice. Among other defenses the defendant pleaded facts which he claimed rendered the article and its publication privileged. * * *

The plaintiff argues that the defense of privilege was destroyed by the fact that copies of the defendant's newspaper circulated in other states, complains of the instructions given upon the subject, and insists that the instruction offered by him should have been given. The instruction given was correct and follows the rule announced by this court in Redgate v. Roush, 61 Kan. 480, 59 Pac. 1050, 48 L. R. A. 236. There a matter of interest to communicants of a church was published in the church papers in Indiana, Ohio, Texas, and Nebraska. It was inevitable that they should be read by people of other denominations. The syllabus reads: "Where the publication appears to have been made in good faith and for the members of the denomination alone, the fact that it incidentally may have been brought to the attention of others than members of the church will not take away its privileged character." This accords with the general rule stated in 25 Cyc. 387. See, also, Hatch v. Lane, 105 Mass. 394; Mertens v. Bee Publishing Co., 5 Neb. (Unof.) 592, 99 N. W. 847.

In the cases of State of Iowa v. Haskins, 109 Iowa, 656, 80 N. W. 1063, 47 L. R. A. 223, 77 Am. St. Rep. 560, Buckstaff v. Hicks, 94 Wis. 34, 68 N. W. 403, 59 Am. St. Rep. 853, and Sheftall v. Central Railway Co., 123 Ga. 589, 51 S. E. 646, language is used from which it might be inferred that privilege will be destroyed if the communication should reach the eyes of others than persons interested. This would be the end of privilege for all newspapers having circulation and influence. Generally the publication must be no wider than will meet the requirements of the moral or social duty to publish. If it be designedly or unnecessarily or negligently excessive, privilege is lost. But, if a state newspaper published primarily for a state constituency have a small circulation elsewhere, it is not deprived of its privilege in the discussion of matters of state-wide concern because of that fact.[61] * * *

[61] Parts of the opinion are omitted.

Accord (incidental excess): Hatch v. Lane (1870) 105 Mass. 394: (D., a baker who employed several drivers to deliver bread in Taunton and adjoining towns, inserted in the Taunton Daily Gazette a notice that, P. "having left my employ and taken upon himself the privilege of collecting my bills, this is to give notice that he has nothing farther to do with my business.")

Shurtleff v. Stevens (1879) 51 Vt. 501, 519, 31 Am. Rep. 698, 707: (At a meeting of an association of Congregationalist ministers in Vermont, a resolution defamatory of P., a member of the association, was passed and a copy of this resolution was, by order of the meeting, published in two newspapers which were the organs of the Congregationalist churches and cir-

SAVAGE v. STOVER.

(Supreme Court of New Jersey, 1914. 92 Atl. 284.)

Savage brought an action against Stover for libel and had judgment below. The defendant appeals.

PARKER, J. This is a libel suit coming up from the district court of Hoboken. The plaintiff is the president and, as claimed, the virtual owner of a bread-baking concern, and the defendant is an attorney at law who had two claims against the corporation on behalf of former employés who had deposited $100 each as security for the faithful performance of their duties, and after their dismissal or resignation were able to get only part of it back. The corporation was represented by the counsel for the present plaintiff, and the libel consisted in a letter written by the defendant Stover, in which, among other things, he spoke of the plaintiff, Savage, as follows, after declining to make a settlement in the two cases:

"Your client is one of the most cold-blooded of men I have ever met. Not only did I see his actions in the Townsend matter where he provoked an assault and battery, but he sent me a very insulting letter when I wrote him in a friendly way in spite of the fact that my folks bought his bread. I have a good mind to tell my folks to discontinue buying his bread. He treats his men laborers like dogs. Not only does this contract exemplify that, but I have heard tales from drivers and from men close to you and him how he insults and squeezes them. Personally if I were you I would not lend myself to do the work of that fellow Savage. How can he expect to build up a business on the reputation he is getting throughout the county? I would ship him long ago were he my client. I would not want his reputation to redound on my shoulders. Kindly let me know at once whether you will try or settle it."

This was sent to Mr. Burtis in the usual course. The case was tried by a judge without a jury, and he found a verdict for $75 damages and costs, which is the judgment now complained of.

culated chiefly, but not exclusively, among Congregationalists in Vermont and New England.)

Broughton v. McGrew (C. C. 1889) 39 Fed. 672, 5 L. R. A. 406: (At a meeting of the stockholders of a railway company, D., a stockholder, made to the other stockholders a statement which was defamatory of the general manager of the corporation, in his official capacity. Three attorneys, who were not stockholders, were present on invitation from officers of the road.)

Conrad v. Roberts (Kan. 1915) 147 Pac. 795: (In an action for slander D. pleaded that the words were spoken by her in a conversation with her husband, S., at a time when she understood that he was in danger of arrest for his conduct with P. and another woman where he lived, that this would bring disgrace upon the family of D. and S., and that she desired to warn S. in his own interest, as well as in that of the family. The court in substance charged the jury that if a third person overheard the defamatory remark concerning P. which D. made to S. on this occasion, the remark was not privileged unless such third person was a mere eavesdropper. But, said the reviewing court, "it was privileged, though a third person, without being an eavesdropper, heard it, provided it was made in good faith. 'Where the presence of bystanders is a mere casual incident, not in any sense sought for by the defendant, he will not be deprived of his privilege.'" Per Porter, J., referring to 18 Am. & E. Encyc. of L. 1047, and cases there cited.

It is now claimed that the court should have entered a nonsuit or directed a verdict (there was no jury) on several grounds, the principal of which is that the letter was privileged. No doubt it was privileged as to what it said about Savage in connection with the two cases that were then pending, but it is very far from confining itself to those matters. It is rather a general personal admonition from one attorney to another that the client of the latter is not fit to be regarded as a client and ought to be sent about his business. This was clearly outside the scope of the business under discussion between the two attorneys, and raised the question whether the letter was privileged as to such surplus matter. The authorities appear to be in some conflict on this point. 25 Cyc. 386, 387. In Fahr v. Hayes, 50 N. J. Law, 275, 280, 13 Atl. 261, 263, a slander suit, the defendant on a privileged occasion used strong language, but this court held that his motive "did not betray the defendant into any expression beyond what was pertinent to the subject of * * * (the) inquiry, and was honestly believed by the defendant, and therefore was legalized by the privileged occasion and motive." The inference is open that, if the language used had been "beyond what was pertinent to the subject of * * * (the) inquiry," another view of defendant's liability would have been taken. In the case at bar the language was not spoken, but written; and was not in response to any inquiry, confidential or otherwise, but was manifestly volunteered. Hence it clearly exceeded the demands of the occasion; and in such case we think the true rule is that such excessive language is not covered by the privilege.

If, however, the rule be otherwise, the judgment below is not necessarily erroneous. The burden of showing privilege is on the defendant, and if he sustains it the plaintiff may still hold him liable by showing express malice. Fahr v. Hayes, supra. This might appear from the very language used. Id.; 25 Cyc. 387. As we read this letter, its very language was evidence justifying the jury, or the court sitting as a jury, in finding the existence of express malice.

The other points made are insignificant. * * *[62] Judgment affirmed.

JENOURE v. DELMEGE.

(Judicial Committee of the Privy Council. (1891] A. C. 73.)

On appeal from the Supreme Court of Jamaica.

This was an action of libel brought by the respondent Delmege against the appellant Jenoure. Delmege was a Government medical officer. Jenoure was a justice of the peace, residing in the same parish. The libel was contained in the following letter signed by Jenoure

[62] Part of the opinion is omitted.

as justice of the peace and sent by him to the inspector of constabulary for the district:

"Sir—I have been informed on good authority that Dr. Delmege, of Manchioneal was called by one Lindsay (who, I believe, is his servant) to attend a woman in labour named Zipporah Henry, of Manchioneal, on Sunday, 8th January; that, although implored by Lindsay to attend the woman, the doctor refused to do so without the fee, and that consequently the woman died on Monday morning from want of medical attendance. I shall be obliged in the interest of humanity, especially as I am informed it is by no means an uncommon occurrence for Doctor Delmege to refuse to attend such cases, if you will inquire into this matter and if the facts prove to be as stated, that you will report the case to the proper authority, as such wilful neglect cannot be allowed."

The appellant pleaded that the statements contained in the letter were true in substance and in fact, and that the occasion of the publication was privileged. The jury returned a general verdict for the plaintiff with £50 damages, and judgment was entered accordingly.

A motion for a new trial was granted on the ground of misdirection with regard to the question of privilege. But on argument, the Court unanimously confirmed the judgment. The appellant subsequently obtained special leave from Her Majesty in Council to prefer an appeal. In the Privy Council the judgment of their Lordships was delivered by

LORD MACNAGHTEN.[63] * * * The Chief Justice told the jury that it was the duty of the appellant, as a justice of the peace, to bring circumstances such as those mentioned in his letter to the notice of the proper authorities. Their Lordships may observe in passing that, in their opinion, nothing turns on the position of the appellant as a justice of the peace. To protect those who are not able to protect themselves is a duty which every one owes to society. The Chief Justice went on to tell the jury that the proper authority to whom such a complaint should have been submitted was the superintending medical officer; but he also told them that, if they thought that the appellant had addressed the letter to the inspector of constabulary by an honest unintentional mistake as to the proper authority to deal with the complaint, then the communication would not be deprived of any privilege to which it would have been entitled had it been addressed to the superintending medical officer. So far the summing up seems to be open to no objection.

The Chief Justice then proceeded to explain to the jury that the existence of privilege was contingent on whether in their opinion, the appellant honestly believed the statements contained in the letter to be true. The meaning of the Chief Justice is made perfectly clear by what follows. After referring to the cases where the alleged defamatory matter was spoken or written by masters with reference to the characters of servants, he points out that, in such cases, "no question

[63] The reporter's statement of facts and parts of the opinion are omitted.

as to the bona fides of the defendant arises as preliminary to the existence of privilege." Where, however, "it is alleged that the defamatory communication was made in discharge of a duty," his view was that the defendant must "satisfy the jury that he made the communication with a belief in its truth." "No doubt," he adds, "the dicta of some of the judges in the masters and servants cases cited seem to extend to all classes of privileged communications; but no case was cited, and I have been able to find none, where, when privilege was claimed on the ground that the communication was made in discharge of a duty, it has been held that the plaintiff, to support his action, must prove express malice. In the one case there can be no room for doubt that, if the defendant established the relation which existed between him and the plaintiff, a privilege arises which can only be overcome by proof of express malice. In the other, the authorities already cited shew that, where a defendant claims privilege in respect of a charge of misconduct volunteered by him, he must satisfy the jury that he acted bona fide before the question of privilege arises for the determination of the judge."

There can be no doubt, therefore, that the learned Chief Justice gave the jury to understand that it lay upon the appellant to prove affirmatively that he honestly believed the statements contained in the alleged libel to be true, and that, unless and until that was made out by him to their satisfaction, it was not incumbent on the respondent to prove express malice.

Curran, J., took the same view of the authorities, and Northcote, J., concurred.

Notwithstanding some dicta which, taken by themselves and apart from the special circumstances of the cases in which they are to be found, may seem to support the view of the Chief Justice, their Lordships are of opinion that no distinction can be drawn between one class of privileged communications and another, and that precisely the same considerations apply to all cases of qualified privilege. "The proper meaning of a privileged communication," as Parke, B., observes, Wright v. Woodgate, 2 C., M. & R. 577, "is only this: that the occasion on which the communication was made rebuts the inference prima facie arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact—that the defendant was actuated by motives of personal spite or ill will, independent of the occasion on which the communication was made." There is no reason why any greater protection should be given to a communication made in answer to an inquiry with reference to a servant's character than to any other communication made from a sense of duty, legal, moral, or social. The privilege would be worth very little if a person making a communication on a privileged occasion were to be required, in the first place, and as a condition of immunity, to prove affirmatively that he honestly believed the statement to be true. In such a case bona fides is always to be presumed.

Their Lordships consider the law so well settled that it is not in their opinion necessary to review the authorities cited by the Chief Justice. The last case on the subject is Clark v. Molyneux, 3 Q. B. D. 237, to which, unfortunately, the attention of the Supreme Court was not called. That was a case, not of master and servant, but of a communication volunteered from a sense of duty. A verdict was found for the plaintiff. But it was set aside by the Court of Appeal on the ground of misdirection. In giving his judgment, Cotton, L. J., used the following language, every word of which is applicable to the present case. "The burden of proof," he says, "lay upon the plaintiff to shew that the defendant was actuated by malice; but the learned judge told the jury that the defendant might defend himself by the fact that these communications were privileged, but that the defendant must satisfy the jury that what he did he did bona fide, and in the honest belief that he was making statements which were true. It is clear that it was not for the defendant to prove that he was acting from a sense of duty, but for the plaintiff to satisfy the jury that the defendant was acting from some other motive than a sense of duty." [64]

Their Lordships are therefore of opinion that there was a misdirection on a material point, which may have led to a miscarriage. Indeed, it is difficult to see how the jury could have done anything but find for the plaintiff, having regard to the way in which the question was presented to them. The jury were told that it was for the defendant to prove that he honestly believed the statements in his letter to be true; whereas the letter itself put these statements forward, not

[64] Compare: Henry v. Moberly (1893) 6 Ind. App. 490, 33 N. E. 981: A complaint in an action for libel alleged that the defendant, who with two others constituted a board of school trustees before whom the plaintiff's application for employment as a teacher was pending, filed his protest before this board, objecting in "false, malicious, and libelous language" to plaintiff's employment. The defendant's charge was that the plaintiff "had claimed wages not due her" and to obtain them "had made statements which in my opinion she knew to be false." The complaint was held demurrable. "In her complaint appellee avers that appellant published the 'malicious' language quoted. This expression, without explanation, would be equivalent to saying that he so published the words without sufficient excuse. In the same connection, however, in the complaint, the facts are stated which disclose a legal excuse, unless he was prompted by express or actual malice. Inasmuch as she has stated these facts, it appears to us, on reason and analogy, that it was incumbent on her to allege that he acted maliciously. If he was in fact prompted by malicious motives, instead of a desire to discharge the duties of his office, in publishing the defamatory matter recited in his protest, he is, under the authorities, undoubtedly liable; but when appellee concedes, as she does in her complaint, the privilege under which appellant was acting on the only occasion of which she complains, it is then incumbent on her to aver facts sufficient to negative the rights which accrue to him on account of such privilege." Per Davis, J. And see Henry v. Moberly (1899) 23 Ind. App. 305, 51 N. E. 497. See also the opinion of Collins, M. R., in Thomas v. Bradbury, Agnew & Co., [1906] 2 K. B. 627, given in text infra.

as matters of the truth of which the writer has satisfied himself, but as matters calling for inquiry and consideration by the proper authorities.

Their Lordships think that the verdict cannot stand; that the judgment entered thereon, and the orders of the 26th of July, 1888, and the 5th of September, 1888, ought to be discharged, and that there ought to be a new trial; but only on the terms that the plea of justification is not to be raised again. It seems to their Lordships that that issue has been finally disposed of. * * *

BAVINGTON v. ROBINSON.

(Court of Appeals of Maryland, 1914. 124 Md. 85, 91 Atl. 777.)

This was an action, by Bavington against Robinson, for slander. Under the instructions of the court below, a verdict was rendered for the defendant. The plaintiff appealed from the judgment thereon. The declaration, framed in several counts, alleged the following defamatory statements by the defendant of the plaintiff:

"Don't you know you are stealing my corn? Well, you are." "Don't you know you are criminally liable? You are." "I (meaning the defendant) am going to see the state's attorney; you (meaning the plaintiff) have been robbing me long enough."

* * * The defendant pleaded the general issue, and filed a special plea of justification to the second count. At the conclusion of the testimony for the plaintiff the court directed a verdict for the defendant, on the ground that the alleged slanderous words were privileged and the plaintiff had failed to offer any proof of express malice; and it is from that ruling that the only question in this appeal arises. * * *

From the testimony it appears that the appellant is a young man engaged in farming, and has canned tomatoes since 1906 in his home county, Harford. * * * The appellee is a canner and canned goods broker. The canning operations of the appellant had been financed since their beginning by the appellee until the difficulty which gave rise to this suit. The business of the appellant did not prosper, * * * and, in 1908, he gave to the appellee a bill of sale to cover his indebtedness to him of $2,000. * * * The property under this bill of sale included 250 barrels of corn, then in the field unhusked, the number of barrels being estimated, as well as a lot of farming machinery and some live stock, all of which remained in the possession of the appellant. On the 18th of December, 1909, the appellee loaned the appellant $700 on the joint note of the appellant and his father, payable two months after date. The appellant agreed with the appellee at this time that the corn that was covered by the bill of sale should be hauled and sold by him and the proceeds therefrom applied to the payment of the note. It was not agreed, however, that it should be

hauled at once, but in several conversations it was agreed that it should be held until it advanced to $4 a barrel. On February 21, 1910, the appellant was standing in the corridor of the Bel Air courthouse, talking with some people, when the appelleee called to him. After the appellant had walked over to him the appellee said to him: "How about that corn, have you hauled any of it out?" Appellant told him he had hauled out about 35 barrels. Upon the appellee demanding the money the appellant told him he had part of it to his credit in bank, a part his father, with whom he lived, had, and a part of the corn had not been paid for, and that since he had not the weights with him he could not tell how much he had received, and, therefore, could not pay him that day. Whereupon, shaking his finger at him, the appellee in a loud voice spoke the words set out in the declaration. Several persons, who were in the corridor of the courthouse, testified as to the use of these words and the manner of the appellee.

The only question presented, is, should the court have ruled, upon this state of facts, that the appellee was entitled to the protection of a privileged communication? The law upon the subject of privilege is too well settled to admit of serious controversy. The statement of the testimony shows that if this is to be classed as a privileged communication, it is of course a qualified privilege. Malice is the essential of the action of slander, but it is not necessary that it be proved; when once the slanderous words are proved, malice is presumed. However, when the words alleged to be slanderous are embraced in the class of privileged communications, the plaintiff is bound to prove the existence of malice as the real motive of the defendant's language. * * *

It is a question for the court to decide, in the first instance, whether words alleged to have been slanderous were privileged by the occasion, assuming them to have been spoken in good faith, without malice, and in the belief that they were true; and, if so privileged, then the plaintiff must show express malice in order to recover. And if there is any evidence tending to prove express malice, that question should be submitted to the jury. Brow v. Hathaway, 13 Allen (Mass.) 239; Fresh v. Cutter, 73 Md. 87, 20 Atl. 774, 10 L. R. A. 67, 25 Am. St. Rep. 575. But it is proper for the court, where the facts are controverted, to instruct the jury as to what facts amount to privilege, and leave it to the jury to determine whether those facts are proved. Brinsfield v. Howeth, 107 Md. 278, 68 Atl. 566, 24 L. R. A. (N. S.) 583. "But the plaintiff has the right, notwithstanding the privileged character of the communication, to go to the jury, if there be evidence tending to show actual malice, as when the words unreasonably impute crime, or the occasion of their utterance is such as to indicate, by its unnecessary publicity or otherwise, a purpose wrongfully to defame the plaintiff. * * * Expressions in excess of what the occasion warrants do not per se take away the privilege, but such excess may be evidence of malice." Fresh v. Cutter, supra.

Applying the above principles to the facts of the present case, it is plain that the occasion of the utterance of the slanderous words was such as to throw upon the appellant the burden of showing express malice. We are also of the opinion that the court was in error in ruling that there was no evidence tending to show the existence of malice.

Could the appellee have believed, from the facts known to him, that the appellant was guilty of crime? It is true he had a bill of sale upon the corn, but from the testimony it was a bill of sale in form only. It was clearly a mortgage. The only evidence in the case shows he had directed the appellant to sell the corn. When the appellant was in the act of carrying out this direction he was accused of a crime. Therefore, if the jury should find from the evidence that the accuser did not believe the accusation he had made was true, there would be a fact from which they could infer malice. The use of the words, "You have been robbing me long enough," might also tend to show malice, if the jury should think they were in excess of what the occasion demanded. Did not the facts tend to show, in the light of the knowledge the appellant had, that it was an unreasonable imputation of crime? If, then, the jury could have found from them malice, it was not for the court to pass its judgment upon them, but to have left that question to be determined by the jury, with proper instructions from the court.

Judgment reversed, and new trial awarded, with costs to the appellant.[65]

SMITH v. STREATFEILD et al.

(King's Bench Division. [1913] 3 K. B. 764.)

The defendant the Reverend Canon G. S. Streatfeild wrote a pamphlet containing defamatory statements of the plaintiff and employed the other defendants, the Robert Spennell Press, a firm of printers, to print and publish it. The pamphlet was circulated only among those who had a common interest with the defendant Canon Streatfeild in the contents. As regards him a qualified privilege was admitted. The Court was of opinion that as it was a natural and proper course to print the pamphlet in order to get it published to those having a common interest in its contents, the privilege extended to the printers also. The jury found that Canon Streatfeild was actuated by malice in publishing the pamphlet, but that the printers were not.

McCardie, for the defendants the Robert Spennell Press. These defendants are entitled to judgment. The evidence must shew that the defendants themselves were actuated by malice; otherwise the plaintiff cannot recover against them. It is not enough to shew that some one else was so affected: Hennessy v. Wright (1888) 24 Q. B. D.

[65] Parts of the opinion are omitted.

445, n. In an action against the publisher of a magazine evidence of the writer's personal malice is inadmissible: Robertson v. Wylde (1838) 2 Moo. & R. 101.

Further, these defendants having printed and published the pamphlet in the ordinary course of business may claim a privilege separate and distinct from that of their co-defendant. Where matter is published on a privileged occasion all incidental acts such as printing or copying, if done in the ordinary course of business, are privileged also: Baker v. Garrick (1894) 1 Q. B. 838.

Sir F. Low, in reply. There is no authority for the position that printers can claim privilege on the ground that printing was in the ordinary course of their business and incidental to the publication of the matter complained of. The words of Lord Macnaghten in Macintosh v. Dun, [1908] A. C. 390, at p. 400, apply most aptly to these defendants: "What is their motive? Is it a sense of duty? Certainly not. It is a matter of business with them. Their motive is self-interest. They carry on their trade, just as other traders do, in the hope and expectation of making a profit." They admit the printing and publication of a libel. The only way in which they can set up a privilege is by sheltering themselves behind their co-defendant. His privilege does not cover him and consequently they stand unprotected.

BANKES, J. * * * It remains only to consider the proposition contended for by Mr. McCardie that the printers are entitled to judgment, as the jury have negatived any malice on their part. Mr. McCardie's contention in substance amounted to this, namely, that his clients' privilege was what he called an incidental privilege—that is to say, that, though it arose out of the same facts as constituted the privilege of Canon Streatfeild, it was independent of it in the sense that his clients were entitled to the protection of the privilege even though Canon Streatfeild might have disentitled himself to any protection. It appears to me that Mr. McCardie's argument fails, whether the question is regarded from the point of view of the law applicable to privilege, or of the law applicable to the case of joint tortfeasors.

To take the last first: the publication here complained of was a joint publication—that is to say, a single publication to each rural dean for which both defendants were jointly responsible. This publication was admitted by the printers. The finding of the jury establishes the fact that the defendant Canon Streatfeild was a tortfeasor as regards this publication. It necessarily follows, in my opinion, that the printers are joint tortfeasors with him. The ordinary rule of law is that each tortfeasor is liable for all the consequences of the joint tort. In Clark v. Newsam (1847) 1 Ex. 131, Rolfe, B., states the rule thus: "When two persons have so conducted themselves as to be liable to be jointly sued, each is responsible for the injury sustained by their common act." In my opinion it follows from this rule of law that in the case of a joint publication of a libel each tortfeasor is liable for the

malice of the other. It may very well be that in assessing damages the jury may take into account the fact that one of the two persons jointly responsible for the publication of the libel may be morally blameless, and may consequently refuse to give anything in the nature of vindictive damages in a verdict which will affect him, but this does not affect his liability for the publication.

The same result, in my opinion, follows if the matter is looked at from the point of view of privilege. The principle upon which the law of qualified privilege rests is, I think, this: that where words are published which are both false and defamatory the law presumes malice on the part of the person who publishes them. The publication may, however, take place under circumstances which create a qualified privilege. If so, the presumption of malice is rebutted by the privilege, and in an action for libel or slander founded on a publication upon a privileged occasion the plaintiff has to prove express malice on the part of the person responsible for the publication. The effect of proving express malice is sometimes spoken of as defeating the privilege. This is a convenient expression, and conveys in a single word a correct idea of what has really happened, namely, that although the occasion remains a privileged occasion, the privilege afforded by the occasion ceases to be an effective weapon of defence. The reason for this is obvious. Qualified privilege is a defence only to the extent that it throws on the plaintiff the burden of proving express malice. Directly the plaintiff succeeds in doing this the defence vanishes, and it becomes immaterial that the publication was on a privileged occasion. Qualified privilege in one sense may be said to be the privilege of the individual, in that it arises out of the circumstances in which the individual is placed, but as a defence it is attached to the publication. Where therefore, as here, the plaintiff is complaining of a joint publication, if the defence of privilege as to that publication fails because of the proof of express malice, it fails, in my opinion, altogether, and the plaintiff establishes his right to succeed in respect of that particular publication.

From whichever point of view, therefore, Mr. McCardie's contention is approached, the result is, in my opinion, the same, and his clients cannot derive any benefit, so far as liability for the publication of the libel is concerned, from the fact that the jury have negatived any express malice on their part. In the result, therefore, I give judgment against both defendants for £50 damages.

Judgment for plaintiff.[66]

[66] The statement of facts is abridged and part of the opinion is omitted.

(c) As a Reply to the Plea of Fair Comment

THOMAS v. BRADBURY, AGNEW & CO., Limited, et al.

(In the Court of Appeal. [1906] 2 K. B. 627.)

The plaintiff was a journalist, and the author of a book entitled "Fifty Years of Fleet Street, being the Life and Recollections of Sir John R. Robinson." The defendants Bradbury, Agnew & Co. were the proprietors and publishers of "Punch," to which the other defendant, Henry W. Lucy, contributed articles under the pseudonym of "Toby, M. P." Sir John Robinson was a journalist who had been at one time the editor and for many years the manager of the "Daily News," until his retirement in 1901. He died in 1903. The plaintiff had been his private secretary. The alleged libel was in the following review, published in "Punch":

"Mangled Remains.

"Extract from the Recess Diary of Toby, M. P.

"Been reading 'Fifty Years of Fleet Street,' just issued by Macmillan. Purports to be the 'Life and Recollections of Sir John Robinson,' the man who made, and for a quarter of a century maintained at high level, the Daily News. The story is written by Mr. F. M. Thomas, who has added a new terror to death. There are biographies of sorts ranging in value with the personality of the subject and the skill of the compiler. The former occasionally suffers from the incapacity of the latter. But at least his individuality is scrupulously observed. Like Don José, what he has said he has said, his observations and written memoranda not being mixed up with what his biographer thinks he himself thought, uttered and recorded. Mr. Thomas goes about the biographer's business in fresh fashion, complacently announced by way of introduction to the volume. 'I have not thought it necessary or desirable,' he writes, 'to indicate in all cases what is his (Sir John Robinson's) and what is my own. If there is anything amusing or entertaining in these pages, I am quite content that my dear old chief should have the credit of it. The dulness I take upon myself.' Here is generosity! Here is magnanimity! It is true that in the performance of his task Mr. Thomas occasionally falls from his high estate. More than once he airily alludes to 'our diary'—'our notes,' as if he had prepared them in collaboration with his chief. Possibly conscious for a moment of this indiscretion, and reverting to a more generous mood, he, approaching a particular narrative, introduces it with the remark, 'the incident may be given in the diarist's own words.' The procedure is perhaps not unusual with the earlier biographers. With Mr. Thomas the lapse is rare. When he does let the hapless subject speak for himself, he is relegated to small type. For the rest it is Mr. Thomas who loquitur, retelling poor Robinson's cherished stories as if they were his own, sometimes with heavy hand brushing off the bloom. Even in these depressing circumstances there is no mistaking Robinson's sly humor, his gift of graphic characterization. The worst of it is that, happening in the very same page upon some banal remark, some pompous platitude, the alarmed reader, recognizing Mr. Thomas, hastily turns over half a dozen pages, and possibly misses a handful of the genuine ore. These are hard lines, unjust to Robinson, unfair to the public. It is plain to see from the few unmutilated extracts from Robinson's manuscript which illuminate the book, that the materials at hand for a delightful biography were abundant. For nearly forty years the manager of the Daily News lived in the very heart of things. He was behind most scenes of public life, was more or less intimately acquainted with the principal personages figuring in it. His sym-

pathies were bountifully wide, his observation alert, his sense of humor keen. He loved his newspaper work with almost passionate affection. For him fifty years of Fleet Street was worth a cycle of Cathay. That he habitually made notes of what he saw and heard with a view to publication in biographical form is undoubted; Mr. Thomas, impregnable in the chain armor of complacency, positively admits it. 'Robinson' he says, 'did leave some diaries —our diaries—more or less fragmentary, and a number of thick, closely written volumes of jottings in his own handwriting, descriptive of events of which he had been an eye-witness, and people he had seen and known.' Where is this treasure trove? Presumably portions the biographer was good enough to regard as worth adapting are filtered through the wordy pages of larger type. Happily the material is so good, its original literary form so excellent, that even this unparalled atrocity cannot quite spoil the book. We who knew Robinson on his throne on Bouverie Street and at the well known table in the dining room of the Reform Club, rich in the recollections of William Black, Payn, and Sala; who watched him enjoying himself like a boy at theatre first nights; who recognized his rare capacity as a newspaper man; who knew the kind heart hidden behind a studiously cultured severity of manner in business relations—we, perhaps, jealously cherish his memory, and regret the surprising chance that has made possible this slight upon it."

The plaintiff claimed damages for libel in respect of this review. The defendants pleaded that the words complained of were incapable of a defamatory meaning; and further, that they were written and published as a criticism and fair comment upon the plaintiff's book without any malice towards the plaintiff, and were a fair and bona fide criticism upon the book which was a matter of public interest.

At the trial the plaintiff's case was first, that the language of the review itself was such as to furnish evidence that the writer was not in truth criticizing the book, but was maliciously attacking the author; and, secondly, that there was evidence outside the review that the defendant Lucy, in writing the criticism, was actuated by malice towards the plaintiff. As extrinsic evidence of malice the plaintiff relied upon the strained relations between Lucy and himself before the criticism was published; on the fact that the criticism was published as a separate article under the heading "Mangled Remains," and was not included in that part of the journal usually devoted to the reviews of books under the heading "Our Booking Office"; and on the answers and demeanour of Lucy in the witness box at the trial. At the close of the plaintiff's case counsel for the defendants submitted that there was no case to go to the jury, upon the grounds that the article was incapable of defamatory meaning, and that there was no evidence that it exceeded the limits of fair comment. The judge declined to withdraw the case from the jury, who found a verdict for the plaintiff with £300 damages. The defendants appealed.[67]

COLLINS, M. R. * * * The defendants do not complain of misdirection other than that involved in holding that there was any evidence fit for the consideration of a jury. They ask for judgment on the ground that there was nothing in the article which any reasonable jury could find to fall outside the limits of fair comment, or in the

[67] The statement of the case is abridged, and parts of the opinion are omitted.

alternative they ask for a new trial on the ground that the verdict was against the weight of evidence. * * *

I have already said that extrinsic evidence of malice, which I have attempted to summarize, was allowed to go to the jury. The defendants contended that this evidence amounted to nothing, that no reasonable jury could act upon it, but they also raised a contention, which alone, as it seems to me, gives any importance to this case. Their point was that if the article itself, apart from the extrinsic evidence, did not raise a case for the jury that the bounds of fair comment had been overstepped, proof of actual malice on the part of the writer could not affect the question or disturb his immunity. This is a formidable contention. It involves the assertion that fair comment is absolute, not relative, and must be measured by an abstract standard; that it is a thing quite apart from the opinions and motives of its author and his personal relations towards the writer of the thing criticized. It involves the position also that an action based on a criticism is wholly outside the ordinary law of libel, of which malice, express or implied, has always been considered to be the gist.

The basis of this contention, such as it is, appears to be a misconception of the effect of the gloss, if I may so phrase it, first put upon the law of libel in relation to fair comment in the dicta of Crompton, J., and Blackburn, J., in Campbell v. Spottiswoode, 3 B. & S. 769, at pp. 778, 780, decided in 1863, and subsequently approved in Merivale v. Carson, 20 Q. B. D. 275, decided in 1887. * * *[68] In cases of

[68] "What is the principle upon which the defence [of fair comment] is founded, and what are the limits of its application?

"As to the first point there are two rival theories. The one is that expounded by the Court of Common Pleas (Willes, Byles, and Brett, JJ.) in Henwood v. Harrison (1872) L. R. 7 C. P. 606. The Court there says (at p. 622): 'The principle upon which these cases are founded is an universal one, that the public convenience is to be preferred to private interests, and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice, notwithstanding that they involve relevant comments condemnatory of individuals.' And the Court therefore came to the conclusion (at p. 625) 'that the fair and honest discussion of, or comments upon, a matter of public interest is in point of law privileged, and that it is not the subject of an action, unless the plaintiff can establish malice.' In other words, the Court in that case held that the defence of 'fair comment' is merely a branch of the defence of 'qualified privilege' in the ordinary sense.

"The rival view was first expounded by Blackburn and Crompton, JJ., in Campbell v. Spottiswoode (1863) 3 B. & S. 769, 32 L. J. Q. B. 185, and has since received the adhesion of the Court of Appeal in Merivale v. Carson (1887) 20 Q. B. D. 275. In the first of these cases, Blackburn, J., puts the matter thus: 'I think it of considerable consequence to bear in mind that the case is not one of privilege, properly so called, but the question is whether the article complained of is a libel or not.' And Crompton, J., says: 'The first question is libel or no libel, which is for the jury; and they have to say whether the writing complained of goes beyond fair comment: if it does not it is no libel.' * * *

"What then would be the logical solution of the matter? That the true basis of the defence of 'fair comment' is that laid down in Henwood v. Harrison, and not that laid down in Campbell v. Spottiswoode and Merivale v. Carson. Both Blackburn, J., in the former case, and Bowen, L. J., in the

privilege, properly so called, nothing that falls outside the privilege is protected by it, and if defamatory it must be otherwise justified. The occasion being privileged, the extent of the privilege may vary according to the nature of the case and the limits of the right or duty which is the basis of the privilege. But this is precisely the position in the case where the right exercised is one shared by the rest of the public, and not one limited to an individual or a class. The extent of the right has to be ascertained, and in respect of any communication which falls within it the immunity, if it be not absolute, can be displaced only by proof of malice. In the case of comment on literary works the occasion is created by the publication, and a right then arises to criticize honestly, however adversely. No such occasion arises in respect of a private unpublished letter. If a writer were to get hold of a private letter of a well known author and publish a damnatory article on the author's literary style and taste, as evidenced by the letter, it seems to me that he would have no immunity from the ordinary law in respect of defamatory writings. The only difference then, in the legal incidents of ordinary privilege, limited to individuals on the one hand and the right in the public to criticize on the other, would seem to me that one might, with somewhat less latitude than the other, though not perhaps, with perfect accuracy, be described as "privilege." * * *

latter, distinguish the defence of 'fair comment' from that of 'privilege,' properly so called, by saying that the latter is the peculiar right of a particular individual under particular conditions, a true privilegium; while 'fair comment' is the right of every member of the public. With the greatest deference to the opinion of these two great lawyers, is that distinction sound? It may possibly be correct as regards what is known as 'absolute privilege'—the privilege of a Member of Parliament, a Judge upon the Bench, and the like. But is not 'qualified privilege' the equal right of all the world? It is the occasion which is privileged and not the man. Every one has an equal right to use defamatory language in giving the character of a servant, in making complaint of a subordinate to his superior, and the like. It does not depend upon his position in life, or upon his being a member of any particular class. It is based solely upon public utility. It is hard to see any logical distinction between the defence of 'fair comment' and that of 'qualified privilege' in the ordinary sense. It is to the public advantage that public matters and the actions of public men should be fully and freely discussed, and, therefore, although in such discussion defamatory language may be used, it is privileged. The 'occasion' which gives rise to the 'privilege' is the discussion of matters of public importance, and of those alone: in which sense the privilege is limited by the 'occasion' just as any other kind of 'qualified privilege.' The true view would therefore seem to be that the decision in Henwood v. Harrison is right—that 'fair comment' is only a form of 'qualified privilege,' and that proof of actual malice will do away with the protection which would otherwise prevail. But how? Surely not by importing a kind of defamatory flavour into that which would otherwise not be defamatory, but on a different principle. Certain occasions justify the use of defamatory words, but on public grounds alone. If a man tries to make use of the occasion as a 'cloke of maliciousness,' he forfeits the special protection which he would otherwise enjoy, because the raison d'être of his defamatory statement is not a bona fide exercise of a public right, but a desire to gratify his private spite."

Mr. Francis R. Y. Radcliffe, 23 Law Quart. Rev. 97 (1907).

If the analysis be strictly carried out it will be found that the two rights, whatever name they are called by, are governed by precisely the same rules. The only practical difference is, that in an action based on a criticism of a published work the transaction begins, by the admission on the part of the plaintiff, implied from the averment by him of publication of the work criticized, that the comment came into existence on a protected occasion. He is placed, therefore, in precisely the same position as he would have been in had he sued in respect of a defamatory writing prima facie unprotected and therefore actionable, but had gone on to aver facts which created a privilege strictly so called.[69] Beginning thus at this stage in the transaction he would have accepted the onus of proving malice in fact. If he had veiled the fact that the writing criticized had become matter of public interest by publication it would have been prima facie libellous, and the defendant would have had to plead such a publication as would let in the right to comment on a matter of public interest in order to bring himself within the protection. * * *

It is of course possible for a person to have a spite against another and yet to bring a perfectly dispassionate judgment to bear upon his literary merits; but, given the existence of malice, it must be for the jury to say whether it has warped his judgment. Comment distorted by malice cannot in my opinion be fair on the part of the person who makes it. I am of opinion, therefore, that evidence of malice actuating the defendant was admissible, that the learned judge was right in letting the evidence in this case go to the jury.

But I am also of opinion on a close examination of the alleged libel that, apart from the extrinsic evidence of malice, the learned judge could not have withdrawn the case from the jury. One point made by the plaintiff would, I think, of itself suffice to establish this position. The defendant Lucy says in the alleged libel "it is plain to see from the few unmutilated extracts * * * that the materials at hand for a delightful biography were abundant." This statement was described by the plaintiff in a letter to the editor of "Punch" as "simply untrue." A short statement was thereupon published in the issue of December 7, in which the defendant, while accepting the plaintiff's statement as to the paucity of materials, quotes a passage from the preface to the book dealing with the existence of materials, and concludes thus: "Toby, M. P., had at the time of writing no knowledge of the subject beyond the definite statements quoted in the biographer's own words. He regrets that, accepting them in their ordinary sense, he received and conveyed an impression of Mr. Thomas's literary methods which turns out to have been erroneous." He is thus in the difficulty of having to admit a misstatement of fact in respect of which, to put it at the lowest, a question must arise for the jury

[69] Accord: Henry v. Moberly (1893) 6 Ind. App. 490, 33 N. E. 981, where the point, on a question of privilege, is elaborately considered.

whether the passage he relied upon justifies the statement. I think also that the learned judge could not have properly held that there was no evidence fit for the consideration of the jury as to some of the innuendoes averring imputations of discreditable motives. I am of opinion, therefore, that we could not direct judgment for the defendants without usurping the functions of the jury. Neither can we say that the evidence is so slight as to justify us in ordering a new trial on the ground that the verdict is against the weight of the evidence.

A point was made by the defendants' counsel that the plaintiff had admitted that he did not rely upon evidence of malice outside that which was to be inferred from the article itself. Some thing to this effect certainly appears in the Times report, but it has not found its way into the judge's note, and the point of personal spite was forcibly put by the plaintiff's counsel throughout the whole case, which the judge refused to withdraw from the jury without any limitation as to any of the evidence given. I think, therefore, that we should not be justified in treating this answer as excluding all extrinsic evidence of malice from the discussion. Libel or no libel, I need hardly add, is pre-eminently a question for the jury where there is any evidence fit for their consideration.[70]

Appeal dismissed.

VI. Other Acts at Peril

(A) Keeping His Fire

ANONYMOUS.

(Court of Common Pleas, 1583. Cro. Eliz. 10, 78 Reprint, 276.)

Snagg moved this case, and demanded the opinion of the Judges in it. J. S. with a gun at the door of his house shoots at a fowl, and by this fireth his own house, and the house of his neighbour; upon which he brings an action on the case generally, and doth not declare upon the custom of the realm, as 2 Hen. 4, viz. for negligently keeping his fire.

The question was, if this action doth lie? And all the Court held it did, for the injury is the same, although this mischance was not by a common negligence, but by misadventure:[71] and if he had counted upon the custom of the realm, as 2 Hen. 4, the action had not been well brought; yet "consuetudo regni est communis lex."

[70] Cozens-Hardy, L. J., and Sir Gorell Barnes, President, agreed with the judgment of the Master of the Rolls.

[71] "If my fire by misfortune burns the goods of another man, he shall have his action on the case against me. If a fire breaks out suddenly in my house, I not knowing it, and it burns my goods and also my neighbor's house,

TUBERVIL v. STAMP.

(Court of King's Bench, 1697. 1 Salk. 13, 91 Reprint, 13.)

Case on the custom of the realm quare negligenter custodivit ignem suum in clauso suo, ita quod per flammas blada quer. in quodam clauso ipsius quer. combusta fuerunt. After verdict pro quer. it was objected, the custom extends only to fire in his house, or curtilage (like goods of guests), which are in his power. Non alloc. For the fire in his field is his fire as well as that in his house; he made it, and must see it does no harm, and answer the damage if it does. Every man must use his own so as not to hurt another; but if a sudden storm had risen which he could not stop, it was matter of evidence, and he should have shewed it. And Holt, Rokesby, and Eyre against the opinion of Turton, who went upon the difference between fire in an house which is in a man's custody and power, and fire in a field which is not properly so; and it would discourage husbandry, it being usual for farmers to burn stubble, etc. But the plaintiff had judgment according to the opinion of the other three.*

FAHN v. REICHART.

(Supreme Court of Wisconsin, 1859. 8 Wis. 255, 76 Am. Dec. 237.)

The complaint averred that the defendant on the 1st of April, 1858, carelessly set fire to a large log pile on his own lands and about three feet from the boundary of the plaintiff's lands; that the fire continued to burn for three days, when the wind blew hard, and blew the sparks

he shall have his action on the case against me. So, if the fire is caused by a servant or a guest, or any person who entered the house with my consent. But otherwise, if it is caused by a stranger who entered the house against my will." Rolle's Abr. Action on the Case, B., tit. "Fire."

* "The short name of the action ('for negligent garder son feue') is a misleading one; it means merely 'for failing to keep in his fire,' and the responsibility was absolute." John H. Wigmore, 7 Harv. Law Rev. 315, 448 (1893); 3 Anglo-Am. Legal Essays (1909) 474, 511. Compare Jenks' Short Hist. Eng. Law (1912) 311.

Ten years after Tubervil v. Stamp, the Statute of 6 Anne, c. 31, § 6, provided that for the space of three years no action should be maintained "against any person in whose house or chamber any fire shall accidentally begin." This temporary act was declared in 1711 to "have been found useful and beneficial" and was then made perpetual. In 1774, the exemption from liability for accidental fires was extended to the person "in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall accidentally begin." Stat. 14 Geo. III, c. 78, § 86.

For the historical bearings of the doctrine see Professor Wigmore's article on "Responsibility for Tortious Acts," 7 Harv. Law Rev. 315, 448 (1893); 3 Anglo-American Legal Essays, 474, 511.

For the effect of the statutes of 1711 and 1774 on the rule in America, see Lansing v. Stone (1862) 37 Barb. (N. Y.) 15. Compare Field v. New York Central Ry. Co. (1865) 32 N. Y. 339, 349.—[*Ed.*

and fire from the log pile, about twelve rods, to a straw stack of the plaintiff's, close to the plaintiff's barn, and so burnt the stack and barn with its contents. The answer denied the complaint. The verdict was for the defendant, and the plaintiff sued out this writ of error. The only point complained of was whether the instruction of the court was proper or not.[72]

COLE, J. We do not think that the plaintiff in error could have been prejudiced by the charge of the circuit court. For suppose the evidence had been clear and incontestible, that the defendant in error by himself or servants, had set fire to the logs and brush upon his own land, and that the fire had been communicated to the plaintiff's barn, and destroyed it; still the action might not be sustained. A man may burn logs and brush upon his own land. The act is not unlawful or necessarily attended with injurious consequences to his neighbors. So the jury would not only have to find that the defendant caused the fire to be set there, but also that there was negligence or carelessness in putting the fire at that place at the time. An action will not lie for any injury resulting from doing a lawful act in a lawful manner. "A possible damage to another in the cautious and prudent exercise of a lawful right is not to be regarded, and if a loss is the consequence, it is damnum absque injuria." Clark v. Foot, 8 Johns. (N. Y.) 421; Panton v. Holland, 17 Johns. (N. Y.) 92, 8 Am. Dec. 369; Thurston v. Hancock, 12 Mass. 220, 7 Am. Dec. 57.

The defendant could not be held answerable in damages for the reasonable and proper exercise of a lawful right, attended by a cautious regard for the rights of others, when there is no negligence, unskillfulness or malice in the act done. The charge seems to be predicated upon the idea that the defendant would be liable if he set on fire the brush and log heaps upon his own land, and the plaintiff's barn was burned from the sparks and cinders from this fire thus existing. But if the defendant was not guilty of negligence in the care and management of the fire set by him, he would not be liable. * * *

Judgment affirmed.[73]

[72] The statement of the case is abridged and part of the opinion is omitted.

[73] Accord: Clark v. Foot (1811) 8 Johns. (N. Y.) 421; Stuart v. Hawley (1856) 22 Barb. (N. Y.) 619. And see Professor Burdick's remark: "In this country, the common-law liability for fire has never been enforced. A person does not start a fire on his land at his peril. If it spreads beyond his premises and harms others, his liability for the harm must be grounded on his negligence." Burdick on Torts (3d Ed.) 509. See also Mr. Justice Gray's résumé of the doctrine in St. Louis & San Francisco Ry. v. Mathews (1896) 165 U. S. 1, 5, 6, 9, 10, 17 Sup. Ct. 243, 41 L. Ed. 611.

SECKERSON v. SINCLAIR.

(Supreme Court of North Dakota, 1913. 24 N. D. 625, 140 N. W. 239.)

Appeal from a judgment for $1,528.73 and interest thereon from the time of the injury, in all $1,664, for damages occasioned by a fire alleged in one count of the complaint to have been negligently set by the defendant, and in another to have been negligently allowed by him to spread from his land to that of the plaintiff.

BRUCE, J. * * *[74] The proposed instruction was also erroneous in that in it the court was requested to instruct the jury that the plaintiffs could not recover—

"unless the jury found that the fire was set by the defendant to the stubble, and negligently permitted to escape from the stubble to the prairie, and thence to and over and upon the lands of the plaintiffs, or any of them, and that it destroyed the alleged property."

This proposed instruction told the jury that, if the defendant set the fire, he was not liable unless he negligently permitted it to escape. This is not the law. Setting fire to prairie land in the month of March renders the one who does so absolutely liable. It is not even necessary, indeed, that it should have been done with any negligent or malicious purpose. Section 2061, R. C. 1905; 19 Cyc. 981; Thoburn v. Campbell, 80 Iowa, 338, 45 N. W. 769; Conn v. May, 36 Iowa, 241; Dunleavy v. Stockwell, 45 Ill. App. 230. We know that counsel contends that section 2061 does not specify straw stacks, but it does specify grass or stubble lands. To say that setting fire to a straw stack, which is in the midst of stubble, and, in turn, sets fire thereto, is not setting fire to the stubble itself is an absurdity. Kelley v. Anderson, 15 S. D. 107, 87 N. W. 579." * * *

Judgment for plaintiff, if interest remitted from date of injury to the verdict.[75]

[74] Only so much of the case is given as relates to the one point.

[75] Compare: St. Louis & San Francisco Ry. v. Mathews (1897) 165 U. S. 1, 22, 17 Sup. Ct. 243, 251 (41 L. Ed. 611). The question was whether a statute which made a railway company absolutely liable for damages by fire communicated by its locomotives to the property of others was constitutional. Mr. Justice Gray, delivering the opinion, remarked:

"The learning and diligence of counsel have failed to discover an instance in which a statute, making railroad companies absolutely liable for damages by fire communicated from their locomotive engines to the property of others, has been adjudged to be unconstitutional, as to companies incorporated before or since its enactment. This review of the authorities leads to the following conclusions: First. The law of England, from the earliest times, held any one lighting a fire upon his own premises to the strictest accountability for damages caused by its spreading to the property of others. Second. The earliest statute which declared railroad corporations to be absolutely responsible, independently of negligence, for damages by fire communicated from their locomotive engines to property of others, was passed in Massachusetts in 1840, soon after such engines had become common. Third. In England, at the time of the passage of that statute, it was undetermined whether a railroad corporation, without negligence, was liable to a civil ac-

(B) Liability for Animals

NOYES v. COLBY.

(Supreme Court of Judicature of New Hampshire, 1855. 30 N. H. 143.)

Trespass for breaking and entering the plaintiff's close. Plea, the general issue.

The plaintiff proved that towards night, on June 27, the defendant's cow was grazing on the plaintiff's land. The defendant offered to

tion, as at common law, for damages to property of others by fire from its locomotive engines; and the result that it was not so liable was subsequently reached after some conflict of judicial opinion, and only when the acts of Parliament had expressly authorized the corporation to use locomotive engines upon its railroad, and had not declared it to be responsible for such damages. Fourth. From the time of the passage of the Massachusetts statute of 1840 to the present time, a period of more than half a century, the validity of that and similar statutes has been constantly upheld in the courts of every State of the Union in which the question has arisen.

"In this court, the constitutionality of such a statute has never been directly drawn into judgment. But it appears to have been assumed in Grand Trunk Railway v. Richardson (1875) 91 U. S. 454, 472, 23 L. Ed. 356, and it rests upon principles often affirmed here. * * * The motives which have induced, and the reasons which justify, the legislation now in question, may be summed up thus: Fire, while necessary for many uses of civilized man, is a dangerous, volatile and destructive element, which often escapes in the form of sparks, capable of being wafted afar through the air, and of destroying any combustible property on which they fall; and which, when it has once gained headway, can hardly be arrested or controlled. Railroad corporations, in order the better to carry out the public object of their creation, the sure and prompt transportation of passengers and goods, have been authorized by statute to use locomotive engines propelled by steam generated by fires lighted upon those engines. It is within the authority of the Legislature to make adequate provision for protecting the property of others against loss or injury by sparks from such engines. The right of the citizen not to have his property burned without compensation is no less to be regarded than the right of the corporation to set it on fire. To require the utmost care and diligence of the railroad corporations in taking precautions against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of the railroads. When both parties are equally faultless, the Legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railroad company, which employs the instruments and creates the peril for its own profit, rather than upon the owner of the property, who has no control over or interest in those instruments. The very statute now in question, which makes the railroad company liable to damages for property so destroyed, gives it, for its protection against such damages, an insurable interest in the property in danger of destruction, and the right to obtain insurance thereon in its own behalf; and it may obtain insurance upon all such property generally, without specifying any particular property. Eastern Railroad v. Relief Ins. Co. (1868) 98 Mass. 420. The statute is not a penal one, imposing punishment for a violation of law; but it is purely remedial, making the party, doing a lawful act for its own profit, liable in damages to the innocent party injured thereby, and giving to that party the whole damages, measured by the injury suffered. Grand Trunk Railway v. Richardson (1875) 91 U. S. 454, 472, 23 L. Ed. 356; Huntington v. Attrill (1892) 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123. The statute is a constitutional and valid exercise of the legislative power of the State, and applies to all railroad corporations alike."

prove that on June 27 he pastured this cow in a certain pasture, and that one Heath then pastured his cow in the same pasture; that on the evening in question, when Heath drove his cow home, he let the defendant's cow also out of pasture; that he did this without any authority, or the defendant's knowledge or assent; and that Heath drove the cow some distance from the pasture to a cross-roads, about 200 feet from the plaintiff's land, when she strayed along the road and into the plaintiff's land, which was unfenced.

On these facts, the defendant contended that he was not a trespasser merely because he owned the cow; that he had done no wrongful act; that Heath's act, being without the plaintiff's knowledge or assent, and without his authority, could not make him liable in trespass; that if there was any trespass, the action should have been against Heath.

There was no dispute as to the facts. The court ruled that the action could not be maintained, and a verdict was taken for the defendant.[76]

WOODS, C. J. "A man is answerable for not only his own trespass, but that of his cattle also; for if by his negligent keeping they stray upon the land of another (and much more if he permits or drives them on), and they there tread down his neighbor's herbage, and spoil his corn or his trees, this is a trespass for which the owner must answer in damages." 3 Black. Com. 211. Such is the law as stated in the words of the author of the Commentaries, which are themselves very high authority on such subjects, and such has been the uniform practice and understanding of the law in all times, so far as the books show, and it is therefore too late to inquire whether the remedy by an action of trespass is founded upon the strictest logical propriety,[77] where the cause of the damage is the negligence, and not the wilful act of the owner of the mischievous beasts.

It is hardly necessary to remark, but for the course of the defendant's argument, that the proposition quoted from Blackstone relates to the case in which the beasts "stray upon the land of another," and not to the case in which they are driven upon it by a stranger; for then the stranger is the author of the wrong, and the horse that he rides, or drives, is the mere passive instrument in his hands, and the owner of it, unless he have lent it for the purpose of the wrong, is as wholly guiltless as any other person. For in that case, the beast does not by the owner's negligent keeping stray upon the land of his neighbors.

It is substantially upon this ground that Tewksbury v. Bucklin, 7 N. H. 518, was decided; in which it was held that a party having the custody of the cattle was answerable for the trespass which they committed by straying upon another's inclosure.

[76] The statement of the case is slightly abridged.

[77] See Salmond on Torts (2d Ed.) 164, note 13; Id. 197, note 10.

The case finds that the cow "strayed along the road," and committed the act complained of. It would not be just to hold the party to the strict meaning of a single word, if it appeared by the context to have been used inaccurately; but it appears distinctly that the animal, although driven by Heath some distance from the pasture in the direction of the locus in quo, was not driven upon it so as to be in his hands a mere instrument for committing a trespass. Heath's trespass was upon the chattel of the defendant, but not upon the soil of the plaintiff. He abandoned the cow, and she being no longer in his custody, "strayed," and involved the owner in the consequences ordinarily incident to permitting beasts to stray into the inclosures of others.

When Heath abandoned the cow, she was about twelve rods from the lands of the plaintiff. From that period she was no longer under the control of Heath, but was again in the legal possession of the defendant, and under his general custody and control; and like other owners having the care and custody of their beasts at the time, he is answerable in trespass for her act in straying upon the close in question, and grazing there. * * *[78]

BROWN, Esq., v. GILES.

(At Nisi Prius, 1823. 1 Car. & P. 118, 28 R. R. 769.)

This was an action against the defendant, for breaking the plaintiff's close with dogs, &c., and trampling down his grass in a certain close, called Bryant's close, in the parish of A., on divers days. The defendant pleaded the general issue.

The usual notice not to trespass was proved; and a witness proved, that, after the notice, he saw the defendant walking down the turnpike road, and his dog jumped into the field, called Bryant's close.

PARK, J., was decidedly of opinion, that the dog jumping into the field, without the consent of its master, not only was not a wilful trespass, but was no trespass at all, on which an action could be maintained; he should therefore nonsuit the plaintiff.

MASON v. KEELING.

(Court of King's Bench, 1699. 12 Mod. 332, 88 Reprint. 1359.)

Action on the case; in which the plaintiff declared that on the twentieth of June, in the eleventh of the King, the defendant quendam canem molossum valde ferocem did keep, and let him go loose unmuzzled per publica compita, so that pro defectu curæ of the defendant the plaintiff was bit and worried by the said dog, as he was peaceably

[78] Part of the opinion is omitted.

going about his business in such a street. There was another count, in which it was laid that the defendant knew the dog ad mordend. assuet. To the first count there was a demurrer, and to the second not guilty.

And it was strongly insisted, that the laying it to be canem valde ferocem, and suffered to go about the streets unmuzzled, and pro defecto curæ, supplied the want of sciens, &c., for it was said to be part of the excellency of the law of England, that it leaves no man without a remedy, that has suffered a wrong through the fault of another.[79] * * *

GOULD, J. No doubt but in the case of sheep there ought to be a sciens, because that is an accidental quality, and not in the nature of a dog. And as to property of a dog, the books distinguish; for a man has a property in a dog that is a mastiff or spaniel, for the one is for the guard of his house, the other for his pleasure; but this here is a mongrel, and laid to be valde ferocem, and that must be an innate fierceness, and not accidental; and if a dog be assuet. to bite cows and the master know it, that will not be sufficient knowledge to make him liable for his biting sheep. Besides, this case is distinguishable in respect of the place, for the law takes notice of highway, and is a security for passengers; and it would be dangerous to keep such dogs near the highway, where all sorts of people pass at all hours; and to maintain this issue, they must give a natural fierceness in evidence.

HOLT, C. J. If it had been said, that the defendant knew the dog to be ferox, I should think it enough. The difference is between things in which the party has a valuable property, for he shall answer for all damages done by them; but of things in which he has no valuable property, if they are such as are naturally mischievous in their kind, he shall answer for hurt done by them without any notice; but if they are of a tame nature, there must be notice of the ill quality; and the law takes notice that a dog is not of a fierce nature, but rather the contrary; and the presumption is against the plaintiff; for can it be imagined a man would keep a fierce dog in his family wittingly? If any beast in which I have a valuable property do damage in another's soil, in treading his grass, trespass will lie for it; but if my dog go into another man's soil, no action will lie. See the case of Millan v. Hawtree, 1 Jones, 131, that scienter is the gît of the action; and so is 1 Cro., where it was doubted whether the scienter should go to the keeping or quality; nor does it appear here but it was an accidental fierceness, or suppose it were an innate one to this dog particularly; and it had been given to the owner but an hour before, shall he take notice of all the qualities of his dog at his peril, or shall he have his action against the giver for bestowing him a naughty dog? In case a dog bites pigs, which almost all dogs will do, a scienter is necessary. 1 Cro. 255. And I do not doubt but if it be generally laid that a dog

[79] A large part of the argument is omitted.

was used to bite animalia, and the defendant knew of it, it will be enough to charge him for biting of sheep, &c.; and by animalia shall not be intended frogs or mice, but such in which the plaintiff has property.

And judgment was given for the defendant by HOLT, Chief Justice, and TURTON, Justice; GOULD, Justice, mutante opinionem suam.[80]

MAY et ux. v. BURDETT.

(Court of Queen's Bench, 1846. 9 Q. B. 101, 115 Reprint, 1213.)

LORD DENMAN, C. J., now delivered the judgment of the Court.[81]

This was a motion to arrest the judgment in an action on the case for keeping a monkey which the defendant knew to be accustomed to bite people, and which bit the female plaintiff. 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 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 that the injury might have been entirely occasioned by the carelessness and want of caution of the plaintiff herself.

[80] In the report of this case in 1 Ld. Raym. 606, 608, it is stated that the case was adjourned, and that afterwards the parties agreed, "and therefore no judgment was given."

On opinion of Holt, C. J., as reported in 1 Ld. Raym. 608, see the comment of Willes, J., in Cox v. Burbidge (1863) 13 C. B. N. S. 430, 440. And see 2 Cyc. 370, 371, note 84.

[81] The elaborate arguments of counsel are omitted. The declaration stated that the defendant "before and at the time of the damage and injury hereinafter mentioned to the said Sophia the wife of the said Stephen May, wrongfully and injuriously kept a certain monkey, he the defendant well knowing that the said monkey was of a mischievous and ferocious nature and was used and accustomed to attack and bite mankind, and that it was dangerous and improper to allow the said monkey to be at large and unconfined: which said monkey, whilst the defendant kept the same as aforesaid, heretofore and before the commencement of this suit, to wit on the 2nd of September 1844, did attack, bite, wound, lacerate and injure the said Sophia, then and still being the wife of said Stephen May, whereby the said Sophia became and was greatly terrified and alarmed, and became and was sick, sore, lame and disordered, and so remained and continued for a long time, to wit from the day and year last aforesaid to the time of the commencement of this suit; whereby, and in consequence of the alarm and fright occasioned by the said monkey so attacking, biting, wounding, lacerating and injuring her as aforesaid, the said Sophia has been greatly injured in her health," etc. This case was tried on the issue raised by a plea of not guilty.

A great many cases and precedents were cited upon the argument; and the conclusion to be drawn from them appears to us to be that the declaration is good upon the face of it; and that whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is prima facie liable in an action on the case at the suit of any person attacked and 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.

The precedents, both ancient and modern, with scarcely an exception, merely state the ferocity of the animal and the knowledge of the defendant, without any allegation of negligence or want of care. A great many were referred to upon the argument, commencing with the Register and ending with Thomas v. Morgan, 2 C. M. & R. 496, 5 Tyr. 1085; and all in the same form, or nearly so. In the Register, 110, 111, two precedents of writs are given, one for keeping a dog accustomed to bite sheep, and the other for keeping a boar accustomed to attack and wound other animals. The cause of action, as stated in both these precedents, is the propensity of the animals, the knowledge of the defendant, and the injury to the plaintiff; but there is no allegation of negligence or want of care. In the case of Mason v. Keeling, 1 Ld. Ray. [606], and 12 Mod. [332], much relied upon on the part of the defendant, want of due care was alleged, but the scienter was omitted; and the question was, not whether the declaration would be good without the allegation of want of care, but whether it was good without the allegation of knowledge, which it was held that it was not. No case was cited in which it had been decided that a declaration stating the ferocity of the animal and the knowledge of the defendant was bad for not averring negligence also; but various dicta in the books were cited to show that this is an action founded on negligence, and therefore not maintainable unless some negligence or want of care is alleged.

In Comyns' Digest, tit. "Action upon the Case for Negligence" (A 5), it is said that "an action upon the case lies for a neglect in taking care of his cattle, dog, &c;" and passages were cited from the older authorities, and also from some cases at nisi prius, in which expressions were used showing that, if persons suffered animals to go at large, knowing them to be disposed to do mischief, they were liable in case any mischief actually was done; and it was attempted to be inferred from this that the liability only attached in case they were suffered to go at large or to be otherwise ill secured. But 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. The precedents as well as the authorities fully warrant this conclusion. The negligence

is in keeping such an animal after notice. The case of Smith v. Pelah, 2 Stra. 1264, and a passage in 1 Hale's Pleas of the Crown, 430,[82] put the liability on the true ground. It may be that if the injury was solely occasioned by the wilfulness of the plaintiff after warning, that may be a ground of defence, by plea in confession and avoidance; but it is unnecessary to give any opinion as to this; for we think that the declaration is good upon the face of it, and shows a prima facie liability in the defendant.

It was said, indeed, further, on the part of the defendant, that, the monkey being an animal feræ naturæ, he would not be answerable for injuries committed by it if it escaped and went at large without any default on the part of the defendant, during the time it had so escaped and was at large, because at that time it would not be in his keeping nor under his control; but we cannot allow any weight to this objection; for, in the first place, there is no statement in the declaration that the monkey had escaped, and it is expressly averred that the injury occurred whilst the defendant kept it: we are besides of opinion, as already stated, that the defendant, if he would keep it, was bound to keep it secure at all events.

The rule [to show cause why judgment on a verdict for the plaintiff with £50 damages should not be arrested] will therefore be discharged.

FILBURN v. PEOPLE'S PALACE & AQUARIUM CO., Limited.

(In the Court of Appeal, 1890. 25 Q. B. Div. 258.)

The action was brought to recover damages for injuries sustained by the plaintiff by his being attacked by an elephant, which was the property of the defendants, and was being exhibited by them. The learned judge left three questions to the jury: whether the elephant was an animal dangerous to man; whether the defendant knew the elephant to be dangerous; and whether the plaintiff brought the attack

[82] After stating that "if a man have a beast, as a bull, cow, horse, or dog, used to hurt people, if the owner know not his quality, he is not punishable," etc. Hale adds (citing authorities) that "these things seem to be agreeable to law: (1) If the owner have notice of the quality of his beast, and it doth any body hurt, he is chargeable with an action for it. (2) Though he have no particular notice, that he did any such thing before, yet if it be a beast that is feræ naturæ, as a lion, a bear, a wolf, yea an ape or monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage, and so I knew it adjudged in Andrew Baker's case, whose child was bit by a monkey, that broke his chain and got loose. (3) And therefore in case of such a wild beast, or in case of a bull or cow, that doth damage, where the owner knows of it, he must at his peril keep him up safe from doing hurt, for though he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer damages." 1 Hale's P. C. 439, part 1, c. 33, as quoted in 9 Q. B. 112, note (b).

on himself. The jury answered all three questions in the negative. The learned judge entered judgment for the plaintiff for a sum agreed upon in case the plaintiff should be entitled to recover.

The defendants appealed.[83]

LORD ESHER, M. R. The only difficulty I feel in the decision of this case is whether it is possible to enunciate any formula under which this and similar cases may be classified. The law of England recognizes two distinct classes of animals; and as to one of those classes, it cannot be doubted that a person who keeps an animal belonging to that class must prevent it from doing injury, and it is immaterial whether he knows it to be dangerous or not. As to another class, the law assumes that animals belonging to it are not of a dangerous nature, and any one who keeps an animal of this kind is not liable for the damage it may do, unless he knew that it was dangerous. What, then, is the best way of dealing generally with these different cases? I suppose there can be no dispute that there are some animals that every one must recognize as not being dangerous on account of their nature. Whether they are feræ naturæ so far as rights of property are concerned is not the question; they certainly are not so in the sense that they are dangerous. There is another set of animals that the law has recognized in England as not being of a dangerous nature, such as sheep, horses, oxen, dogs, and others that I will not attempt to enumerate. I take it this recognition has come about from the fact that years ago, and continuously to the present time, the progeny of these classes has been found by experience to be harmless, and so the law assumes the result of this experience to be correct without further proof. Unless an animal is brought within one of these two descriptions,—that is, unless it is shown to be either harmless by its very nature, or to belong to a class that has become so by what may be called cultivation,—it falls within the class of animals as to which the rule is, that a man who keeps one must take the responsibility of keeping it safe. It cannot possibly be said that an elephant comes within the class of animals known to be harmless by nature, or within that shewn by experience to be harmless in this country, and consequently it falls within the class of animals that a man keeps at his peril, and which he must prevent from doing injury under any circumstances, unless the person to whom the injury is done brings it on himself. It was, therefore, immaterial in this case whether the particular animal was a dangerous one, or whether the defendants had any knowledge that it was so. The judgment entered was in these circumstances right, and the appeal must be dismissed.

LINDLEY, L. J. I am of the same opinion. The last case of this kind discussed was May v. Burdett,[84] but there the monkey which did

[83] The argument in support of the appeal is omitted.

[84] (1846) 9 Q. B. 101.

the mischief was said to be accustomed to attack mankind, to the knowledge of the person who kept it. That does not decide this case. We have had no case cited to us, nor any evidence, to shew that elephants in this country are not as a class dangerous; nor are they commonly known here to belong to the class of domesticated animals. Therefore a person who keeps one is liable, though he does not know that the particular one that he keeps is mischievous. Applying that principle to this case, it appears that the judgment for the plaintiff was right, and this appeal must be dismissed.

BOWEN, L. J. I am of the same opinion. The broad principle that governs this case is that laid down in Fletcher v. Rylands,[85] that a person who brings upon his land anything that would not naturally come upon it, and which is in itself dangerous, must take care that it is kept under proper control. The question of liability for damage done by mischievous animals is a branch of that law which has been applied in the same way from the times of Lord Holt [86] and of Hale until now. People must not be wiser than the experience of mankind. If from the experience of mankind a particular class of animals is dangerous, though individuals may be tamed, a person who keeps one of the class takes the risk of any damage it may do. If, on the other hand, the animal kept belongs to a class which, according to the experience of mankind, is not dangerous, and not likely to do mischief, and if the class is dealt with by mankind on that footing, a person may safely keep such an animal, unless he knows that the particular animal that he keeps is likely to do mischief. It cannot be doubted that elephants as a class have not been reduced to a state of subjection; they still remain wild and untamed, though individuals are brought to a degree of tameness which amounts to domestication. A person, therefore, who keeps an elephant, does so at his own risk, and an action can be maintained for any injury done by it, although the owner had no knowledge of its mischievous propensities. I agree, therefore, that the appeal must be dismissed.

(C) Extra-Hazardous Use

RYLANDS et al. v. FLETCHER.

(House of Lords, 1868. L. R. 3 H. L. 330.)

This was a proceeding in error against a judgment of the Exchequer Chamber, which had reversed a previous judgment of the Court of Exchequer.

In November, 1861, Fletcher brought an action against Rylands & Horrocks, to recover damages for an injury caused to his mines by water overflowing into them from a reservoir which the defendants

[85] For Rylands v. Fletcher (1868) see infra, p. 776, in text.
[86] See Mason v. Keeling (1699) 12 Mod. 332, in text, ante, p. 770.

had constructed. The declaration contained three counts, and each count alleged negligence on the part of the defendants, but in this House the case was ultimately treated upon the principle of determining the relative rights of the parties independently of any question of personal negligence by the defendants in the exercise of them.

The cause came on for trial at the Liverpool Summer Assizes of 1862, when it was referred to an arbitrator, who was afterwards directed, instead of making an award, to prepare a special case for the consideration of the Judges. This was done, and the case was argued in the Court of Exchequer in Trinity Term, 1865. The material facts of the case were these:

The plaintiff was the lessee of certain coal mines known as the Red House Colliery, under the Earl of Wilton. He had also obtained from two other persons, Mr. Hulton and Mr. Whitehead, leave to work for coal under their lands. The positions of the various properties were these: There was a turnpike road leading from Bury to Bolton, which formed a southern boundary to the properties of these different persons. A parish road, called the Old Wood Lane, formed their northern boundary. These roads might be described as forming two sides of a square, of which the other two sides were formed by the lands of Mr. Whitehead on the east and Lord Wilton on the west. The defendants' grounds lay along the turnpike road, or southern boundary, stretching from its centre westward. On these grounds were a mill and a small old reservoir. The proper grounds of the Red House Colliery also lay, in part, along the southern boundary, stretching from its centre eastward. Immediately north of the defendants' land lay the land of Mr. Hulton, and still farther north that of Lord Wilton. On this land of Lord Wilton the defendants, in 1860, constructed (with his Lordship's permission) a new reservoir, the water from which would pass almost in a southerly direction across a part of the land of Lord Wilton and the land of Mr. Hulton, and so reach the defendant's mill. The line of direction from this new reservoir to the Red Colliery mine was nearly southeast.

The plaintiff, under his lease from Lord Wilton, and under his agreements with Messrs. Hulton and Whitehead, worked the mines under their respective lands. In the course of doing so, he came upon old shafts and passages of mines formerly worked, but of which the workings had long ceased; the origin and the existence of these shafts and passages were unknown. The shafts were vertical, the passages horizontal, and the former especially seemed filled with marl and rubbish.

Defendants employed for the purpose of constructing their new reservoir persons who were admitted to be competent as engineers and contractors to perform the work, and there was no charge of negligence made against the defendants personally. But in the course of excavating the bed of the new reservoir, five old shafts, running vertically downwards, were met with in the portion of the land selected for its site. The case found that "on the part of the defendants there was no personal negligence or default whatever in or about, or in relation to, the selection of the said site, or in or about the planning or construction of the said reservoir; but, in point of fact, reasonable and proper care and skill were not exercised by, or on the part of, the persons so employed by them, with reference to the shafts so met with as aforesaid, to provide for the sufficiency of the said reservoir to bear the pressure of water which, when filled to the height proposed, it would have to bear."

The reservoir was completed at the beginning of December, 1860, and on the morning of the 11th of that month the reservoir, being then partially filled with water, one of the aforesaid vertical shafts gave way, and burst downwards, in consequence of which the water of the reservoir flowed into the old passages and coalworkings underneath, and by means of the underground communications then existing between them and the plaintiff's workings in the Red House Colliery, the colliery was flooded and the workings thereof stopped.

The question for the opinion of the Court was whether the plaintiff was entitled to recover damages by reason of the matters hereinbefore stated. The Court of Exchequer, Mr. Baron Bramwell dissenting, gave judgment for the defendants.[87] That judgment was afterwards reversed in the Court of Exchequer Chamber.[88] The case was then brought on error to this House.[89]

THE LORD CHANCELLOR (LORD CAIRNS). My Lords, in this case the plaintiff (I may use the description of the parties in the action) is the occupier of a mine and works under a close of land. The defendants are the owners of a mill in his neighbourhood, and they propose to make a reservoir for the purpose of keeping and storing water to be used about their mill upon another close of land, which, for the purposes of this case, may be taken as being adjoining to the close of the plaintiff, although, in point of fact, some intervening land lay between the two. Underneath the close of land of the defendants on which they proposed to construct their reservoir there were certain old and disused mining passages and works. There were five vertical shafts, and some horizontal shafts communicating with them. The vertical shafts had been filled up with soil and rubbish, and it does not appear that any person was aware of the existence either of the vertical shafts or of the horizontal works communicating with them. In the course of the working by the plaintiff of his mine, he had gradually worked through the seams of coal underneath the close, and had come into contact with the old and disused works underneath the close of the defendants.

In that state of things the reservoir of the defendants was constructed. It was constructed by them through the agency and inspection of an engineer and contractor. Personally, the defendants appear to have taken no part in the works, or to have been aware of any want of security connected with them. As regards the engineer and the contractor, we must take it from the case that they did not exercise, as far as they were concerned, that reasonable care and caution which they might have exercised, taking notice, as they appear to have taken notice, of the vertical shafts filled up in the manner which I have mentioned. However, my Lords, when the reservoir was constructed and filled, or partly filled, with water, the weight of the water bearing upon the disused and imperfectly filled-up vertical shafts, broke through those shafts. The water passed down them and into the horizontal workings, and from the horizontal workings under the close of the defendants it passed on into the workings under the close of the plaintiff, and flooded his mine, causing considerable damage, for which this action was brought.

[87] Fletcher v. Rylands (1865) 3 H. & C. 774, 140 R. R. 733, 143 R. R. 612.

[88] Fletcher v. Rylands (1866) 4 H. & C. 263, 143 R. R. 611.

[89] The argument of counsel is omitted.

The Court of Exchequer, when the special case stating the facts to which I have referred was argued, was of opinion that the plaintiff had established no cause of action. The Court of Exchequer Chamber, before which an appeal from this judgment was argued, was of a contrary opinion, and the judges there unanimously arrived at the conclusion that there was a cause of action, and that the plaintiff was entitled to damages.

My Lords, the principles 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 underground, 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 defendants 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, 7 C. B. 515.

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 consequence 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, 15 C. B. N. S. 317, 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, 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,[90] 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 prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing 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 neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour 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 neighbour'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 peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this

[90] In his judgment in the Exchequer Chamber, Mr. Justice Blackburn introduced his statement of this "true rule of law" with these remarks:

"The plaintiff, though free from all blame on his part, must bear the loss, unless he can establish that it was the consequence of some default for which the defendants are responsible. 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. If the first be the law, the person who has brought on his land and kept there something dangerous, and failed to keep it in, is responsible for all the natural consequences of its escape. If the second be the limit of his duty, he would not be answerable except on proof of negligence, and consequently would not be answerable for escape arising from any latent defect which ordinary prudence and skill could not detect.

"Supposing the second to be the correct view of the law, a further question arises subsidiary to the first, viz., whether the defendants are not so far identified with the contractors whom they employed as to be responsible for the consequences of their want of care and skill in making the reservoir in fact insufficient with reference to the old shafts, of the existence of which they were aware, though they had not ascertained where the shafts went to."

we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches." [91]

My Lords, in that opinion I must say I entirely concur. Therefore, I have to move your Lordships that the judgment of the Court of Exchequer Chamber be affirmed, and that the present appeal be dismissed with costs.

[91] Having thus stated his "true rule of law," Mr. Justice Blackburn, in the Exchequer Chamber, remarked as follows:

"The case that has most commonly occurred and which is most frequently to be found in the books is as to the obligation of the owner of cattle which he has brought on his land to prevent their escaping and doing mischief. The law as to them seems to be perfectly settled from early times; the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape; that is, with regard to tame beasts, for the grass they eat and trample upon, though not for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore; but if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too.

"As early as the Year Book, 20 Ed. 4, 11, placitum 10, Brian, C. J., lays down the doctrine in terms very much resembling those used by Lord Holt in Tenant v. Goldwin [1703] 2 Ld. Raym. 1089, 1 Salk. 360, which will be referred to afterwards. It was trespass with cattle. Plea, that the defendant's land adjoined a place where defendant had common, that the cattle strayed from the common, and defendant drove them back as soon as he could. It was held a bad plea. Brian, C. J., says: 'It behoves him to use his common so that he shall do no hurt to another man, and if the land in which he has common be not enclosed, it behoves him to keep the beasts in the common and out of the land of any other.' He adds, when it was proposed to amend by pleading that they were driven out of the common by dogs, that although that might give a right of action against the master of the dogs, it was no defence to the action of trespass by the person on whose land the cattle went. In the recent case of Cox v. Burbidge [1863] 13 C. B. N. S. 438, 134 R. R. 586, 32 L. J. C. P. 89, Williams, J., says: 'I apprehend the law to be perfectly plain. If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbor, and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial.' So in May v. Burdett (1846) 9 Q. B. 112, 72 R. R. 189, the Court, after an elaborate examination of the old precedents and authorities, came to the conclusion that 'a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril.' * * *

"As has been already said, there does not appear to be any difference in principle between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land water, filth, or stenches, or any other thing which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbor; and the case of Tenant v. Goldwin, supra, is an express authority that the duty is the same, and is, to keep them in at his peril."

On the historical bearings of Mr. Justice Blackburn's statement of the principle, see Professor Wigmore's remarks in "Tortious Responsibility," 7 Harv. Law Rev. 454, 3 Select Essays, 518.

See also Sir Frederick Pollock's comment on Rylands v. Fletcher, in 143 R. R. v, vi, and his reminder "that in many common law jurisdictions the rule of unqualified liability declared by the House of Lords is not approved. The latest important text-writer, Mr. Salmond, now Solicitor-General of New Zealand, states the rule with evident reluctance and seems to regard it as an illegitimate extension of the medieval doctrine as to damage done by escaping cattle." The Law of Torts (3d Ed.) 1912, p. 203, note.

LORD CRANWORTH. My Lords, I concur with my noble and learned friend in thinking that the rule of law was correctly stated by Mr. Justice Blackburn in delivering the opinion of the Exchequer Chamber. If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.

In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. This is all well explained in the old case of Lambert v. Bessey, reported by Sir Thomas Raymond. And the doctrine is founded on good sense. For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound sic uti suo ut non lædat alienum. This is the principle of law applicable to cases like the present, and I do not discover in the authorities which were cited anything conflicting with it.

The doctrine appears to me to be well illustrated by the two modern cases in the Court of Common Pleas referred to by my noble and learned friend. I allude to the two cases of Smith v. Kenrick, 7 C. B. 564, and Baird v. Williamson, 15 C. B. N. S. 376. In the former the owner of a coal mine on the higher level worked out the whole of his coal, leaving no barrier between 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 ground 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 as that it should not impede him in his workings. The water in that case was only left by the defendant to flow in its natural course.

But in the later case of Baird v. Williamson, the defendant, 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 which passed into the plaintiff's mine 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 so occasioned. It was in consequence of his act, whether

skillfully or unskillfully 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.

Applying the principle of these decisions to the case now before the House, I come without hesitation to the conclusion that the judgment of the Exchequer Chamber was right. The plaintiff had a right to work his coal through the lands of Mr. Whitehead and up to the old workings. If water naturally rising in the defendants' land (we may treat the land as the land of the defendants for the purpose of this case) had by percolation found its way down to the plaintiff's mine through the old workings, and so had impeded his operations, that would not have afforded him any ground of complaint. Even if all the old workings had been made by the plaintiff, he would have done no more than he was entitled to do; for, according to the principle acted on in Smith v. Kenrick, the person working the mine under the close in which the reservoir was made had a right to win and carry away all the coal without leaving any wall or barrier against Whitehead's land. But that is not the real state of the case. The defendants, in order to effect an object of their own, brought on to their land, or on to land which for this purpose may be treated as being theirs, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the plaintiff, and for that damage, however skillfully and carefully the accumulation was made, the defendants, according to the principles and authorities to which I have adverted, were certainly responsible.

I concur, therefore, with my noble and learned friend in thinking that the judgment below must be affirmed, and that there must be judgment for the defendant in error.

Judgment of the Court of Exchequer Chamber affirmed.

CHARING CROSS ELECTRICITY SUPPLY CO. v. HYDRAULIC POWER CO.

(In the Court of Appeal. [1914] 3 K. B. 772.)

Appeal from a decision by Scrutton, J., reported [1913] 3 K. B. 442.

The plaintiffs were a company supplying electricity in the city of London under a provisional order by authority of which they had placed their cables in certain public streets. The defendants were the owners of hydraulic mains containing water at a high pressure used to supply hydraulic power. These mains had been laid in the same streets, also under statutory authority. The action was brought for damage to the plaintiffs' cables in four different streets, Water Lane, Upper Thames Street, Cannon Street, and St. Swithin's Lane, caused by the bursting of the defendants' mains. Two of the mains

which so burst had been laid under a private Act which did not contain the usual clause providing that nothing in the Act should exempt the company from liability for nuisance. The other two had been laid under a later Act which did contain such a clause. This later Act provided also that the two Acts should be "read and construed together." The judge, in an elaborate finding of facts, found:

> That the defendants were not guilty of any negligence either in the manner of laying their mains or in respect of the materials of which the mains were constructed, and that they could not by any reasonable care have detected the subsidences [which caused the breaks] before the bursts occurred.

Scrutton, J., held: (1) that the doctrine of Rylands v. Fletcher applied not only to cases in which the dangerous thing had escaped from the defendant's land on to the plaintiff's land and done damage there, but also to cases in which the site of the plaintiff's injury was occupied by him only under a licence and not under any right of property in the soil, and that in the absence of statutory authorization of the nuisance the defendants were liable for the damage caused by the bursts in their mains, notwithstanding that they had been guilty of no negligence; and (2) that the effect of the two Acts being read together as one Act was to take away the privilege which, down to the passing of the later Act, the defendants had enjoyed, in respect of the two first-mentioned mains, for not being liable for damage done by their bursting in the absence of negligence, and that consequently in the case of all four of the mains the defendants were liable as for a nuisance.

The defendants appealed.

Bray, J. I am of the same opinion.[92] Treating this case, first of all, without regard to the statutory authority which the defendants have, it seems to me quite clear that it comes within the principles of Rylands v. Fletcher. It was said that it was not within those principles because Rylands v. Fletcher, is the case of the owners of adjoining closes of land, but, in my opinion, that is not so. The headnote of Rylands v. Fletcher, L. R. 3 H. L. 330, as reported in the House of Lords, is this, and I may say that I have looked through the speeches of the Lord Chancellor and the other learned Lords and it is abundantly justified by what is said there:

> "Where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages. But if he brings upon his land anything which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned."

"For any mischief thereby occasioned," that is to say, not mischief necessarily occasioned to the owner of the adjoining land, but any

[92] The opinions of Lord Sumner and Kennedy, L. J., with whom Bray, J., concurred, are omitted. The statement of the case is somewhat abridged, and the argument of counsel for the defendants is omitted.

mischief thereby occasioned. Now in the earlier part of that, it deals with the case where he brings it upon his land. It seems to me it does not matter whether it is upon his land; if he has a right, as the defendants have here, to occupy this land for a certain purpose, namely, for these pipes, it is equally his for the purpose of testing this principle. Therefore I think that Rylands v. Fletcher applies, and, if it applies, then the defendants undoubtedly have brought upon their land, or land which they are permitted to occupy, something which would not have naturally come upon it and which is in itself dangerous and probably mischievous if not kept under proper control. * * *[93]

Appeal dismissed.

NICHOLS v. MARSLAND.

(Court of Exchequer, 1875. L. R. 10 Exch. 255. Court of Appeal, 1876. 2 Exch. Div. 1.)

The plaintiff sued as the surveyor for the County of Chester of bridges repairable at the expense of the county.

The first count of the declaration alleged that the defendant was possessed of lands and of artificial pools constructed thereon for receiving and holding, and wherein were kept, large quantities of water, yet the defendant took so little and such bad care of the pools and the water therein that large quantities of water escaped from the pools and destroyed four county bridges, whereby the inhabitants of the county incurred expense in repairing and rebuilding them. The second count alleged that the defendant was possessed of large quantities of water collected and contained in three artificial pools of the defendant near to four county bridges, and stated the breach as in the first count. Plea, not guilty, and issue thereon.

At the trial before Cockburn, C. J., at the Chester Summer Assizes, 1874, the plaintiff's witnesses gave evidence to the following effect:

The defendant occupied a mansion-house and grounds at Henbury, in the County of Chester. A natural stream called Bagbrook, which rose in higher lands, ran through the defendant's grounds, and after leaving them flowed under the four county bridges in question. After entering the defendant's grounds the stream was diverted and dammed up by an artificial embankment into a pool of three acres in area called "the upper pool," from which it escaped over a weir in the embankment, and was again similarly dammed up by an artificial embankment into the "middle pool," which was between one and two acres in area. Escaping over a weir in the embankment, it was again dammed up into "the lower pool," which was between eight and nine acres in area, and from which the stream escaped into its natural and original course.

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[93] On this point of the case, also, the view of Scrutton, J., was upheld. "When the Legislature gave them [the defendants] these authorities, they did not take away from the right of the owner of that surrounding land any of the rights which he otherwise had." Per Bray, J.

About five o'clock p. m. on the 18th of June, 1872, occurred a terrible thunder storm, accompanied by heavy rain, which continued till about three o'clock a. m. on the 19th. The rainfall was greater and more violent than any within the memory of the witnesses, and swelled the stream both above and in the defendant's grounds. On the morning of the 19th it was found that during the night the violence and volume of the water had carried away the artificial embankments of the three pools, the accumulated water in which, being thus suddenly let loose, had swelled the stream below the pools so that it carried away and destroyed the county bridges mentioned in the declaration. At the pools were paddles for letting off the water, but for several years they had been out of working order.

Some engineers and other witnesses gave evidence that in their opinion the weir in the upper pool was far too small for a pool of that size, and that the mischief happened through the insufficiency of the means for carrying off the water. It was not proved when these ornamental pools were constructed, but it appeared that they had existed before the defendant began to occupy the property, and that no similar accident had ever occurred within the knowledge of the witnesses.

After hearing the address of the defendant's counsel, the jury said they did not wish to hear his witnesses, and that in their opinion the accident was caused by vis major. In answer to Cockburn, C. J., they found that there was no negligence in the construction or maintenance of the works, and that the rain was most excessive. Cockburn, C. J., being of opinion that the rainfall, though extraordinary and unprecedented, did not amount to vis major or excuse the defendant from liability, entered the verdict for the plaintiff for £4092, the agreed amount, reserving leave to the defendant to move to enter it for her if the Court (who were to draw inferences of fact) should be of opinion that the rainfall amounted to vis major, and so distinguished the case from Rylands v. Fletcher, L. R. 3 H. L. 330.

A rule nisi having been accordingly obtained to enter the verdict for the defendant on the ground that there was no proof of liability, the plaintiff on showing cause to be at liberty to contend that a new trial should be granted on the ground that the finding of the jury was against the weight of evidence.

McIntyre, Q. C., for the plaintiff, showed cause. The defendant, having for her own purposes and advantage stored a dangerous element on her premises, is liable if that element escapes and injures the property of another, even though the escape be caused by an earthquake or any form of vis major. [CLEASBY, B. Was not the flood brought on to the defendant's land by vis major?] The pools were made by those through whom the defendant claims, and if there had been no pools the water of the natural stream would have escaped without doing injury. The case falls within the rule laid down by the judgment in Fletcher v. Rylands, L. R. 1 Ex. 265, 279, delivered by Blackburn, J.: "We think that the true rule of law is, that the person who for his own purposes brings on his lands, 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 prima 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." This passage was cited with approval by Lord Cairns, C., and Lord Cranworth on appeal. L. R. 3 H. L. 330, 339, 340. [CLEASBY, B. There the defendant brought the water on to his own land. Not so here.] The intimation that vis major would perhaps be an excuse is not confirmed by any decision or any other dictum. But the facts here do not amount to vis major. If the weirs had been larger, or the banks stronger, the mischief would not have happened. Vis major means something which cannot be foreseen or resisted, as an earthquake or an act of the Queen's enemies.[94]

June 12. The judgment of the Court (KELLY, C. B., and BRAMWELL, and CLEASBY, BB.) was read by

BRAMWELL, B. In this case I understand the jury to have found that all reasonable care had been taken by the defendant, that the banks were fit for all events to be anticipated, and the weirs broad enough; that the storm was of such violence as to be properly called the act of God, or vis major. No doubt, as was said by Mr. McIntyre, a shower is the act of God as much as a storm; so is an earthquake in this country: yet every one understands that a storm, supernatural in one sense, may properly, like an earthquake in this country, be called the act of God, or vis major. No doubt not the act of God or a vis major in the sense that it was physically impossible to resist it, but in the sense that it was practically impossible to do so. Had the banks been twice as strong, or if that would not do, ten times, and ten times as high, and the weir ten times as wide, the mischief might not have happened. But those are not practical conditions, they are such that to enforce them would prevent the reasonable use of property in the way most beneficial to the community.

So understanding the finding of the jury, I am of opinion the defendant is not liable. What has the defendant done wrong? What right of the plaintiff has she infringed? She has done nothing wrong, she has infringed no right. It is not the defendant who let loose the water and sent it to destroy the bridges. She did indeed store it, and store it in such quantities that, if it was let loose, it would do, as it did, mischief. But suppose a stranger let it loose, would the defendant be liable? If so, then if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbor, the occupier of the house would be liable. That cannot be. Then why is the defendant liable if some agent over which she has no control lets the water out? Mr. McIntyre contended that she would be in all cases of the water being let out, whether by a stranger or the Queen's enemies, or by natural causes, as lightning or an earthquake. Why? What is the difference between a reservoir and a stack of chimneys for such a question as this? Here the defendant stored a

[94] The argument of counsel is omitted.

lot of water for her own purposes; in the case of the chimneys some one has put a ton of bricks fifty feet high for his own purposes; both equally harmless if they stay where placed, and equally mischievous if they do not. The water is no more a wild or savage animal than the bricks while at rest, nor more so when in motion: both have the same property of obeying the law of gravitation. Could it be said that no one could have a stack of chimneys except on the terms of being liable for any damage done by their being overthrown by a hurricane or an earthquake? If so, it would be dangerous to have a tree, for a wind might come so strong as to blow it out of the ground into a neighbor's land and cause it to do damage; or a field of ripe wheat, which might be fired by lightning and do mischief.

I admit that it is not a question of negligence. A man may use all care to keep the water in, or the stack of chimneys standing, but would be liable if through any defect, though latent, the water escaped or the bricks fell. But here the act is that of an agent he cannot control.

This case differs wholly from Fletcher v. Rylands, L. R. 1 Ex. 265, 279. There the defendant poured the water into the plaintiff's mine. He did not know he was doing so; but he did it as much as though he had poured it into an open channel which led to the mine without his knowing it. Here the defendant merely brought it to a place whence another agent let it loose. I am by no means sure that the likeness of a wild animal is exact. I am by no means sure that if a man kept a tiger, and lightning broke his chain, and he got loose and did mischief, that the man who kept him would not be liable. But this case and the case I put of the chimneys, are not cases of keeping a dangerous beast for amusement, but of a reasonable use of property in a way beneficial to the community. I think this analogy has made some of the difficulty in this case. Water stored in a reservoir may be the only practical mode of supplying a district and so adapting it for habitation. I refer to my judgment in Fletcher v. Rylands,[95] and I repeat that here the plaintiff had no right that has been infringed, and the defendant has done no wrong. The plaintiff's right is to say to the defendant, Sic utere tuo ut alienum non lædas, and that the defendant has done, and no more.

The Chief Baron and my Brother Cleasby agree in this judgment. * * *

Rule absolute.

[In the Court of Appeal.]

Appeal from a judgment of the Court of Exchequer (Kelly, C. B., and Bramwell and Cleasby, BB.) making absolute a rule to enter the verdict for the defendant.

The judgment of the Court (Cockburn, C. J., James and Mellish, L. JJ., and Baggallay, J. A.) was read by

[95] See (1865) 3 Hurl. & C. 788, 34 L. J. Exch. 181.

MELLISH, L. J. * * * The appellant relied upon the decision in the case of Rylands v. Fletcher. In that case the rule of law on which the case was decided was thus laid down by Mr. Justice Blackburn in the Exchequer Chamber: "We think the true rule of law is that the person who for his own purposes brings on his lands 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 prima 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 the sort exists here it is unnecessary to inquire what excuse would be sufficient." It appears to us that we have two questions to consider: First, the question of law, which was left undecided in Rylands v. Fletcher,—Can the defendant excuse herself by showing that the escape of the water was owing to vis major, or, as it is termed in the law books, the "act of God?" And, secondly, if she can, did she in fact make out that the escape was so occasioned?

Now, with respect to the first question, the ordinary rule of law is that when the law creates a duty and the party is disabled from performing it without any default of his own, by the act of God, or the King's enemies, the law will excuse him; but when a party by his own contract creates a duty, he is bound to make it good notwithstanding any accident by inevitable necessity. We can see no good reason why that rule should not be applied to the case before us. The duty of keeping the water in and preventing its escape is a duty imposed by the law, and not one created by contract. If, indeed, the making a reservoir was a wrongful act in itself, it might be right to hold that a person could not escape from the consequences of his own wrongful act. But it seems to us absurd to hold that the making or the keeping a reservoir is a wrongful act in itself. The wrongful act is not the making or keeping the reservoir, but the allowing or causing the water to escape. If, indeed, the damages were occasioned by the act of the party without more—as where a man accumulates water on his own land, but, owing to the peculiar nature or condition of the soil, the water escapes and does damage to his neighbor—the case of Rylands v. Fletcher, establishes that he must be held liable. The accumulation of water in a reservoir is not in itself wrongful; but the making it and suffering the water to escape, if damage ensue, constitute a wrong. But the present case is distinguished from that of Rylands v. Fletcher, in this, that it is not the act of the defendant in keeping this reservoir, an act in itself lawful, which alone leads to the escape of the water, and so renders wrongful that which but for such escape would have been lawful. It is the supervening vis major of the water caused by the flood, which, superadded to the water in the reservoir (which of itself would have been innocuous), causes the dis-

aster. A defendant cannot, in our opinion, be properly said to have caused or allowed the water to escape, if the act of God or the Queen's enemies was the real cause of its escaping without any fault on the part of the defendant. If a reservoir was destroyed by an earthquake, or the Queen's enemies destroyed it in conducting some warlike operation, it would be contrary to all reason and justice to hold the owner of the reservoir liable for any damage that might be done by the escape of the water. We are of opinion, therefore, that the defendant was entitled to excuse herself by proving that the water escaped through the act of God.

The remaining question is, did the defendant make out that the escape of the water was owing to the act of God? Now the jury have distinctly found, not only that there was no negligence in the construction or the maintenance of the reservoirs, but that the flood was so great that it could not reasonably have been anticipated, although, if it had been anticipated, the effect might have been prevented; and this seems to us in substance a finding that the escape of the water was owing to the act of God. However great the flood had been, if it had not been greater than floods that had happened before and might be expected to occur again, the defendant might not have made out that she was free from fault; but we think she ought not to be held liable because she did not prevent the effect of an extraordinary act of nature, which she could not anticipate. In the late case of Nugent v. Smith, 1 C. P. D. 423, we held that a carrier might be protected from liability for a loss occasioned by the act of God, if the loss by no reasonable precaution could be prevented, although it was not absolutely impossible to prevent it.

It was indeed ingeniously argued for the appellant that at any rate the escape of the water was not owing solely to the act of God, because the weight of the water originally in the reservoirs must have contributed to break down the dams, as well as the extraordinary water brought in by the flood. We think, however, that the extraordinary quantity of water brought in by the flood is in point of law the sole proximate cause of the escape of the water. It is the last drop which makes the cup overflow.

On the whole we are of opinion that the judgment of the Court of Exchequer ought to be affirmed.

Judgment affirmed.[96]

[96] Part of the opinion is omitted.

BOX v. JUBB et al.

(High Court of Justice, Exchequer Division, 1879. 4 Exch. Div. 76.)

Case stated in an action brought in the county court of Yorkshire, to recover damages by reason of the overflowing of the defendants' reservoir. The case as stated, but slightly abridged, was as follows:

1. The defendants are the owners of a mill, and for its necessary supply of water have a reservoir, which has been so used for many years. 2. The plaintiff is the tenant of premises adjoining the reservoir. 3. The reservoir is supplied with water from, and discharges its surplus water into, a main drain or watercourse. The inlet and the outlet have proper doors or sluices, so as (when required) to close the communication between the reservoir and the water course. 4. The defendants have the right to use this water course by obtaining a supply of water from it and discharging their surplus water into it, but have otherwise no control over the watercourse, which does not belong to them. 5. In December, 1877, the plaintiff's premises were flooded by reason of the overflowing of the defendants' reservoir. 6. This overflowing was caused by the emptying of a large quantity of water from a reservoir, the property of a third party, into the main drain or watercourse at a point considerably above the defendants' premises, and by an obstruction in the watercourse below the outlet of the defendants' reservoir, whereby the water from the watercourse was forced through the doors or sluices (which were closed at the time) into the defendants' reservoir. 7. This obstruction was caused by circumstances over which the defendants had no control, and without their knowledge; and had it not been for such obstruction the overflowing of the reservoir would not have happened. 8. The defendants' reservoir, and the communications between it and the main drain or watercourse, and the doors or sluices, are constructed and maintained in a proper manner, so as to prevent the overflowing of the reservoir under all ordinary circumstances. 9. No negligence or wrongful act is attributable to either party.

Under the circumstances the judge of the county court was of opinion that the defendants were liable for the damage sustained by the plaintiff, and accordingly gave judgment for the plaintiff.

The question for the opinion of the Court, having regard to the facts set out in the case, was whether the defendants were liable for the damage sustained by the plaintiff by reason of the flooding of his premises, such flooding being caused by water from a reservoir belonging to a third party, over which the defendants had no control, and without any knowledge or negligence on defendants' part, the overflowing of the defendants' reservoir being occasioned by the act of a third party, over whom the defendants had no control, and no wrongful act or negligence being attributable to the defendants, and the direct cause of the damage being the obstruction in the main drain or watercourse, which was caused by circumstances over which the defendants had no control and without their knowledge.

KELLY, C. B. I think this judgment must be reversed. * * * The case is abundantly clear on this, proving beyond a doubt that the defendants had no control over the causes of the overflow, and no knowledge of the existence of the obstruction. The matters complained of took place through no default or breach of duty of the de-

fendants, but were caused by a stranger over whom and at a spot where they had no control. It seems to me to be immaterial whether this is called vis major or the unlawful act of a stranger; it is sufficient to say that the defendants had no means of preventing the occurrence. I think the defendants could not possibly have been expected to anticipate that which happened here, and the law does not require them to construct their reservoir and the sluices and gates leading to it to meet any amount of pressure which the wrongful act of a third person may impose. The judgment must be entered for the defendants.

POLLOCK, B. I also think the defendants are entitled to judgment. Looking at the facts stated, that the defendants had no control over the main drain, and no knowledge of or control over the obstruction, apart from the cases, what wrong have the defendants done for which they should be held liable? The case of Rylands v. Fletcher, L. R. 3 H. L. 330, is quite distinguishable. The case of Nichols v. Marsland, L. R. 10 Ex. 255, 14 Eng. R. 538, is more in point. The illustrations put in that case clearly go to show that if the person who has collected the water has done all that skill and judgment can do he is not liable for damage by acts over which he has no control. In the judgment of the Court of Appeal, 2 Ex. D. 1, at p. 5, Mellish, L. J., adopts the principle laid down by this Court. He says: "If indeed the damages were occasioned by the act of the party without more—as where a man accumulates water on his own land, but owing to the peculiar nature or condition of the soil the water escapes and does damage to his neighbor —the case of Rylands v. Fletcher, establishes that he must be held liable." Here this water has not been accumulated by the defendants, but has come from elsewhere and added to that which was properly and safely there. For this the defendants, in my opinion, both on principle and authority, cannot be held liable.

Judgment for the defendants.[97]

BAKER v. SNELL.

(In the Court of Appeal. [1908] 2 K. B. 825.)

The plaintiff was a housemaid in the employment of the defendant, a licensed victualler. The defendant kept upon his premises a dog which was known by him to be savage. It was the duty of the defendant's potman to let the dog out early in the morning, and then chain it up again before the plaintiff and the barmaids came downstairs. On the occasion in question the potman brought the dog into the kitchen where the plaintiff and the barmaids were at breakfast, and said, "I

[97] The statement of facts is abridged and part of the opinion of Kelly, C. B., is omitted.

will bet the dog will not bite any one in the room." He then let the dog go and said, "Go it, Bob." The dog then flew at the plaintiff and bit her. It had previously bitten the plaintiff and other persons to the defendant's knowledge. The plaintiff thereupon commenced this action for damages in the Bow County Court. The county court judge held that the act of the potman was in fact an assault, for which the defendant was not liable, and he accordingly nonsuited the plaintiff. The plaintiff appealed, and the Divisional Court ordered a new trial; Channell, J., on the ground that it was a question for the jury whether the potman was acting within the scope of his employment, and Sutton, J., on the ground that the owner of an animal known to him to be savage keeps it at his peril and is liable for any injury done by it, even though the injury is directly brought about by the wilful act of a third person.[98]

The defendant appealed.

FARWELL, L. J. I take the same view as Channell, J., did as regards the potman's authority, but I do not agree with him in thinking that the liability of the keeper of a savage animal does not extend to damage directly brought about by the intervening voluntary act of a third party. Sutton, J., also did not agree with him, because he bases his judgment upon May v. Burdett, 9 Q. B. 101. The cases, in my opinion, establish that the law recognizes two classes of animals—animals feræ naturæ and animals mansuetæ naturæ. Any animal of the latter class when known to its owner to be dangerous falls within the former class, and any one who keeps an animal of that nature does a wrongful act and is liable for the consequences under whatever circumstances arising, except where the plaintiff by his own conduct has brought the injury upon himself. That is laid down in Jackson v. Smithson, 15 L. J. (Ex.) 311. The exact point of that decision was that an action for injury caused by a ram known to its owner to be dangerous would lie without any averment of negligence, because the wrongful act was keeping a savage beast. The same principle was laid down by Lord Denman in May v. Burdett, 9 Q. B. 101. Lord Denman in his judgment refers with approval to a passage in Hale's Pleas of the Crown, vol. 1, p. 430b, which concludes as follows: "And therefore in case of such a wild beast, or in case of a bull or cow, that doth damage, where the owner knows of it, he must at his peril keep him safe from doing hurt, for though he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer damages." It appears to me to be absolutely immaterial if the keeper of a dangerous animal keeps it at his own peril in all circumstances whether the injury arises from the actual negligence of the

[98] For the case in the Divisional Court, see [1908] 2 K. B. 352. In the Court of Appeal the opinion of Cozens-Hardy, M. R., with whom Farwell, L. J., concurred, is omitted.

owner or from the act of a third person. The wrong is in keeping the fierce beast, and the person who keeps it is prima facie responsible for the injury arising from his wrongful act, and such prima facie responsibility can be got rid of only in the manner pointed out by Blackburn, J., namely, by shewing that the escape was due to the plaintiff's own default, or perhaps was caused by vis major or the act of God. The wrongful act of a third person is no defence.

KENNEDY, L. J. This case I agree should go down for a new trial. But I desire to add, in regard to certain other points which have been dealt with both here and in the Court below, that, as at present advised, I agree with the view of Channell, J., which I think is in accordance with the authorities. There is no doubt that the keeper of a ferocious dog, if he knows it to be ferocious, is in exactly the same category as the keeper of a naturally wild animal. That appears from the judgment of Bowen, L. J., in Filburn v. People's Palace and Aquarium Co., 25 Q. B. D. 258. He says: "If from the experience of mankind a particular class of animals is dangerous, though individuals may be tamed, a person who keeps one of the class takes the risk of any damage it may do. If, on the other hand, the animal kept belongs to a class which according to the experience of mankind, is not dangerous, and not likely to do mischief, and if the class is dealt with by mankind on that footing, a person may safely keep such an animal, unless he knows that the particular animal that he keeps is likely to do mischief." I infer from that that a dog known by its owner to be dangerous is exactly in the same position as an animal feræ naturæ. But there is nothing culpable or wrong in keeping an animal feræ naturæ. That appears from Jackson v. Smithson, 15 L. J. (Ex.) 311. Platt, B., there says: "No doubt a man has a right to keep an animal which is feræ naturæ and no one has a right to interfere with him until some mischief happens." But then it is said that directly the animal does do mischief the person who keeps him is liable, and I do not doubt that that is true in this sense, that it does not lie on the injured party to allege and prove affirmatively any want of care on the part of the keeper. The gist of the action is the scienter, and in Jackson v. Smithson it was held a good declaration that an animal known by the defendant to be ferocious was kept by him and did damage. The same thing was decided in May v. Burdett. There also the declaration was held good although there was no allegation of negligence. But the very language of Lord Denman which has been referred to by the Master of the Rolls appears to me to be in favour of the view of the law expressed by my Brother Channell, because he (Lord Denman) states the result of the authorities to be "that whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is prima facie liable in an action on the case at the suit of any person attacked and injured by the animal without any averment of negligence or default in the securing

or taking care of it." The very introduction of the term "prima facie" shews that, in the opinion of Lord Denman, there may be an answer to the action; that the keeping of such an animal with knowledge of its propensities is not conclusive, although the keeper is prima facie liable. Those words could not, in my opinion, be properly used if the view is correct that whatever happens the owner is liable—if, for example, to use Channell, J.'s, illustration, the animal was set on by a thief to bite a policeman who was following him. That being so, upon the whole, as at present advised, I am inclined to agree with my Brother Channell in declining to accept the view intimated by Bramwell, B., in Nichols v. Marsland, L. R. 10 Ex. 255, that the liability of the keeper of a savage animal extends to damage directly brought about through the intervening voluntary act of a third person. * * * [99]

Granted that it is not unlawful for a man to keep an animal feræ naturæ, but, if it injures his neighbour, the keeper of the animal is prima facie liable for the result, the question here is whether the intervening criminal act of a third person is one of those things which, if proved by the defendant to have been the direct cause of the injury, would absolve the owner from his prima facie liability. The inclination of my own opinion is that it would. It is not necessary to decide the point in this case, but speaking for myself, with great deference to the other members of the Court, I should have thought that not only on grounds of justice, but according to the law as stated by Lord Denman and Blackburn, J., if it could be shewn that it was the criminal act of a third party which made the animal dangerous, and the injury, to the plaintiff was the direct result of that act, the keeper of the animal would have a good defence to an action such as the present.

Appeal dismissed.[100]

RICKARDS v. LOTHIAN.

(Judicial Committee of the Privy Council. [1913] A. C. 263.)

The judgment of their Lordships was delivered by

LORD MOULTON (after stating the facts and delivering the judgment of their Lordships on the plaintiff's contention that the defendant ought to have foreseen the probability of the malicious act and taken precautions against it).[1] * * * The principal contention,

[99] Kennedy, L. J., here quoted the rule of law announced by Blackburn, J., in Fletcher v. Rylands and adopted by Lord Cairns when that case was before the House of Lords ([1868] L. R. 3 H. L. 339, 340), given in the text infra.

[100] For comments on Baker v. Snell, see the article by Mr. Beven in 22 Harvard Law Rev. 465 (1909), the remarks of Sir Frederick Pollock in 25 Law Quarterly Rev. 317 (1909), "The Dog and the Potman: or 'Go it, Bob,'" and of Mr. Salmond, Torts (2d Ed.) 388, note (1910).

[1] The facts and the judgment of the Judicial Committee of the Privy Council are set forth in the report of this case in its relation to the doctrine of legal cause. See p. 877, infra.

however, on behalf of the plaintiff was based on the doctrine customarily associated with the case of Fletcher v. Rylands.[2] It was contended that it was the defendant's duty to prevent an overflow from the lavatory basin, however caused, and that he was liable in damages for not having so done, whether the overflow was due to any negligent act on his part or to the malicious act of a third person.

The legal principle that underlies the decision in Fletcher v. Rylands was well known in English law from a very early period, but it was explained and formulated in a strikingly clear and authoritative manner in that case and therefore is usually referred to by that name. It is nothing other than an application of the old maxim "Sic utere tuo ut alienum non lædas."[3] * * *

The argument [in Fletcher v. Rylands] took place on a special case stated by an arbitrator setting forth the facts and the contentions of the parties. It was heard in the first instance before the Court of Exchequer, which by a majority decided in favour of the defendants, Bramwell, B., dissenting. Error was brought from this judgment, and the Court of Exchequer Chamber (consisting of Willes, Blackburn, Keating, Mellor, Montague Smith, and Lush, JJ.) reversed the decision of the Court of Exchequer by a unanimous judgment which was read by Blackburn, J. On appeal to the House of Lords the judgment of the Exchequer Chamber was affirmed; both Cairns, L. C., and Lord Cranworth (who delivered the judgments on the hearing of the appeal) expressly approving of Blackburn, J.'s, statement of the law on the subject in the judgment appealed from. The formulation of the principle which is to be found in that judgment is therefore of the highest authority as well from the fact that it received the express approval of the ultimate tribunal as from the eminence to the judges who took part in the decision.

So far as is necessary for the present case the law on the point is thus laid down by Blackburn, J.:

"We think that the true rule of the 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 prima 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."

It will be seen that Blackburn, J., with characteristic carefulness, indicates that exceptions to the general rule may arise where the escape is in consequence of vis major, or the act of God, but declines to deal further with that question because it was unnecessary for the decision of the case then before him. A few years later the question

[2] (1866) L. R. 1 Ex. 265; (1868) L. R. 3 H. L. 330. See ante, p. 777.

[3] Lord Moulton here stated the facts of Fletcher v. Rylands.

of law thus left undecided in Fletcher v. Rylands came up for decision in a case arising out of somewhat similar circumstances.[4] * * *

Their Lordships agree with the law as laid down in the judgments above cited,[5] and are of opinion that a defendant is not liable on the principle of Fletcher v. Rylands for the damage caused by the wrongful acts of third persons.

But there is another ground upon which their Lordships are of opinion that the present case does not come within the principle laid down in Fletcher v. Rylands. It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community. To use the language of Lord Robertson in Eastern and South African Telegraph Co. v. Cape Town Tramways Companies, [1902] A. C. 393, the principle of Fletcher v. Rylands "subjects to a high liability the owner who uses his property for purposes other than those which are natural." This is more fully expressed by Wright, J., in his judgment in Blake v. Woolf, [1898] 2 Q. B. 426. In that case the plaintiff was the occupier of the lower floors of the defendant's house, the upper floors being occupied by the defendant himself. A leak occurred in the cistern at the top of the house which without any negligence on the part of the defendant caused the plaintiff's premises to be flooded. In giving judgment for the defendant Wright, J., says: "The general rule as laid down in Rylands v. Fletcher is that prima facie a person occupying land has an absolute right not to have his premises invaded by injurious matter, such as large quantities of water which his neighbour keeps upon his land. That general rule is, however, qualified by some exceptions, one of which is that, where a person is using his land in the ordinary way and damage happens to the adjoining property without any default or negligence on his part, no liability attaches to him. The bringing of water on to such premises as these and the maintaining a cistern in the usual way seems to me to be an ordinary and reasonable user of such premises as these were; and, therefore, if the water escapes without any negligence or default on the part of the person bringing the water in and owning the cistern, I do not think that he is liable for any damage that may ensue." *

[4] His Lordship here stated, first, the case of Nichols v. Marsland (1876) 2 Ex. D. 1, and then Box v. Jubb (1879) 4 Ex. D. 76, and quoted at some length from their judgments.

[5] The reference is to Nichols v. Marsland and Box v. Jubb. See ante.

*In Blake v. Woolf, [1898] 2 Q. B. 426, the defendant was the landlord of premises which were let out in flats, and had a cistern on the fourth floor; the plaintiff became tenant of the ground floor and took his supply of water from the defendant. A leakage from this cistern was noticed by the plaintiff, who informed the defendant. The latter sent an independent plumber to put the cistern to rights. The plumber was competent, but through his negligence there was an escape of water from the cistern which damaged plaintiff's goods on the ground floor.

This is entirely in agreement with the judgment of Blackburn, J., in Ross v. Fedden (1872) L. R. 7 Q. B. 661. In that case the defendants were the occupiers of the upper floor of a house of which the plaintiff occupied the lower floor. The supply and overflow pipes of a water-closet which was situated in the defendants' premises and was for their use and convenience got out of order and caused the plaintiff's premises to be flooded. Negligence was negatived. In giving judgment in favour of the defendants Blackburn, J., says: "I think it is impossible to say that defendants as occupiers of the upper story of a house were liable to the plaintiff under the circumstances in the case. The water-closet and the supply pipe are for their convenience and use, but I cannot think there is any obligation on them at all hazards to keep the pipe from bursting or otherwise getting out of order. The cause of the overflow was the valve of the supply pipe getting out of order and the escape pipe being choked with paper, and the judge has expressly found that there was no negligence; and the only ground taken by the plaintiff is that the plaintiff and defendants being occupiers under the same landlord, the defendants being the occupiers of the upper story contracted an obligation binding them in favour of the plaintiff, the occupier of the lower story, to keep the water in at their peril. I do not agree to that; I do not think the maxim, 'Sic utere tuo ut alienum non lædas' applies. Negligence is negatived; and probably, if the defendants had got notice of the state of the pipe and valve and had done nothing, there might have been ground for the argument that they were liable for the consequences; but I do not think the law casts on the defendants any such obligation as the plaintiff contends for."

Their Lordships are in entire sympathy with these views. The provision of a proper supply of water to the various parts of a house is not only reasonable, but has become, in accordance with modern sanitary views, an almost necessary feature of town life. It is recognized as being so desirable in the interests of the community that in some form or other it is usually made obligatory in civilized countries. Such a supply cannot be installed without causing some concurrent danger of leakage or overflow. It would be unreasonable for the law to regard those who install or maintain such a system of supply as doing so at their own peril, with an absolute liability for any damage resulting from its presence even when there has been no negligence.

It would be still more unreasonable if, as the respondent contends, such liability were to be held to extend to the consequences of malicious acts on the part of third persons. In such matters as the domestic supply of water or gas it is essential that the mode of supply should be such as to permit ready access for the purpose of use, and hence it is impossible to guard against wilful mischief. Taps may be turned on, ball-cocks fastened open, supply pipes cut, and waste-pipes blocked. Against such acts no precaution can prevail. It would be wholly unreasonable to hold an occupier responsible for the consequences of

such acts which he is powerless to prevent, when the provision of the supply is not only a reasonable act on his part, but probably a duty. Such a doctrine would, for example, make a householder liable for the consequences of an explosion caused by a burglar breaking into his house during the night and leaving a gas tap open. There is, in their Lordships' opinion, no support either in reason or authority for any such view of the liability of a landlord or occupier. In having on his premises such means of supply he is only using those premises in an ordinary and proper manner, and, although he is bound to exercise all reasonable care, he is not responsible for damage not due to his own default, whether that damage be caused by inevitable accident or the wrongful acts of third persons.[6]

[6] For the conclusion of this judgment, see the report of this case in connection with the doctrine of legal cause, infra, p. 883.

PART II

CAUSAL RELATION

CHAPTER I

THE EXISTENCE OF A CAUSAL RELATION, AND ITS AFFIRMATIVE SHOWING AS PART OF THE PLAINTIFF'S PRIMA FACIE CASE

It would be obviously opposed to any possible conception of justice that any one should be required to answer for a harm unless he had actually caused it. It is therefore always a vital prerequisite to recovery to establish that the plaintiff's harm was caused by the defendant's alleged misconduct.

Francis H. Bohlen, "Contributory Negligence," 21 Harv. Law Rev. 234 (1907)

When the wrongful act of the defendant is actionable per se, the rule of remoteness determines the measure of liability, though not the existence of it. When, on the other hand, the wrong is not actionable without proof of actual damage, the rule of remoteness determines not merely the measure of damages, but also the existence of the cause of action. If all the damage proved is too remote, the defendant is under no liability at all.

John W. Salmond, Law of Torts (2d Ed.) 105 (1910).

Now, the word "cause" has various meanings, and shades of meaning. Philosophically speaking, the sum of all the antecedents of any event, constitutes its cause. Ordinarily however, we consider each separate antecedent of an event as a cause for such event, provided however that the event could not have happened except for such antecedent. Taking this view of cause and effect, there may be many causes conjointly and consecutively contributing to produce one and the same final result. And these causes may differ vastly in their proximity or remoteness to or from such final result. But still, any

one of them may, as we think, be selected as the responsible cause for such final result, provided it be selected in accordance with the rules of law settled and established by the numerous adjudications of the courts. * * *

In the burning of prairie grass, like the case at bar, the number of causes and effects that may intervene between the first cause and the final result is illimitable. Each blade of grass is a separate and distinct entity, and the burning of each blade is both an effect and a cause. It is the effect of the burning of the blades immediately preceding it, and the cause, along with other blades, of the burning of the blades immediately succeeding it. And yet all these causes and effects are so intimately interlinked and blended with each other that we look upon the whole of them as constituting but one grand, united, continuous and single whole. We look upon the whole fire as only one fire, and the whole of these separate causes as merely one cause.

Valentine, J., in Atchison, T. & S. F. R. Co. v. Bales (1876) 16 Kan. 252, 256, 258.

FOGG v. INHABITANTS OF NAHANT.
MAY v. SAME.

(Supreme Judicial Court of Massachusetts, 1868. 98 Mass. 578.)

Two actions of tort; for personal injuries sustained by the plaintiff Fogg, and for injury of a carriage owned by the plaintiff May, alleged to have been caused by a defect in a highway which the defendants were bound to keep in repair. These actions were tried together in the superior court, before Putnam, J., who refused a request for a ruling that the evidence was not sufficient to support them, and, after verdicts for the plaintiffs, reported the cases, with all the evidence, to this court, new trials to be granted if the ruling requested should have been given.

HOAR, J. * * * The place where the accident happened was at the foot of a hill, where the road, which was narrow, made a sharp curve, and with a gutter and stones near to the travelled path. Whether the road, by reason of its steepness, narrowness, and the turn which it made, and the position and depth of the gutter, was reasonably safe and convenient for travellers, or whether persons using due care would be exposed to danger in passing over it, we think was properly left to the jury as a question of fact, and that their finding upon it is not open for revision upon this report. There was certainly some evidence, proper for the consideration of the jury, which tended to support the plaintiffs' case.

But, upon another point in the case, after mature and careful consideration, and with all the aid which the very able arguments of counsel have afforded us, we are unable to satisfy ourselves that the verdict is consistent with the law applicable to the evidence.

The liability of the town for an injury to a traveller, occasioned by a defect or want of repair in a highway, depends upon proof that the defect caused the injury. If a want of due care on the part of the person injured contribute to cause the injury, he cannot recover. And if, without fault or negligence on his part, his horses have escaped from his control, and have run away or become wholly unmanageable, so that no care can be exercised by him in respect to them; and this condition of things is not produced by a defect in the way; the town is not responsible for what may happen in consequence, even if the carriage upsets at a place where the way is defective.

By the uncontradicted evidence offered by the plaintiffs, it appeared that, at the time the accident happened, which it is alleged was caused by the defect in the way, the horses were, and for some time had been, out of the control of their driver; and there was nothing in the evidence to show that, but for this fact, the accident would have happened.

The plaintiffs' first witness testified that one of the horses driven at the time of the accident had the habit of throwing his tail over the rein, and, when doing it, would make a little start and quicken his pace a short distance, and then slacken off and relieve the rein. The plaintiff Fogg, who was also examined as a witness, made the same statement in substance, and said that he usually let the horse take his own course when he threw his tail over the rein. Both of these witnesses testified, in effect, that at the time of the accident the horse threw his tail over the rein as they were approaching the top of the hill; that the driver stooped forward and took hold of the tail, and tried to lift it and extricate the rein, but in so doing bent down the dasher of the carriage so that he was obliged to desist, and did not get the rein out; that the horses quickened their pace, the one with the rein under his tail galloping; that they went over the top of the hill, and about twenty rods down on the other side, to the point where the road turned to the right, the driver and the plaintiff Fogg both pulling on the right hand rein, in order to turn the horses round the curve; but that, in spite of their united efforts, the horses bore to the left, the wheels went into the gutter, and the carriage upset. * * *

Assuming, therefore, as the plaintiffs' counsel contends, that the horses, though spirited, were safe and proper horses to drive, it appears that by misfortune they were, at the time when the accident happened, entirely freed from any efficient control or guidance of their driver; that in this condition they went at a rapid rate and for a considerable distance, down a steep and narrow road; that the attempt to regain the mastery of the rein was unavailing; and that the efforts of two men were not sufficient to keep them in the path. Whether, at the moment of the upset, the rein had become freed from the horse's tail, was immaterial. There was no proof or pretence that the driver had regained his control of it in season to obtain any control of the horses, or to have any power to guide them.

These facts bring the case within the rule laid down in Davis v. Dudley, 4 Allen, 557, which we have had recently occasion to reconsider and apply in Titus v. Northbridge, 97 Mass. 258, 93 Am. Dec. 91, and Horton v. Taunton, 97 Mass. 266, note.

New trials granted.[1]

SOWLES v. MOORE et al.

(Supreme Court of Vermont, 1893. 65 Vt. 322, 26 Atl. 629, 21 L. R. A. 723.)

TYLER, J. This was an action of trespass on the case, brought to recover the value of a pair of horses which were drowned in Lake Champlain through the alleged negligence of the defendants in not properly guarding an opening in the lake, where they had been taking ice, near a line of public travel. The plaintiff's evidence tended to show that his son had occasion to drive onto the lake on the day of the accident; that the wind was blowing, and the ice was glare; that in turning the team around the sled slewed, and brought the pole against the horses' legs, frightening them; that they escaped from the driver, and ran rapidly from 40 to 60 rods, and into the opening, which was 20 or 30 feet long by 40 to 60 feet wide, and but little guarded. The statute (R. L. § 4321) does not prescribe the manner in which such openings shall be guarded. It imposes a fine upon persons who, in localities where people are accustomed to travel, make openings, and do not place suitable guards around them. The jury found, by special verdicts, that the opening was not properly guarded, and that the plaintiff's servant was in the exercise of due care in respect to the team, and the management of it.

The errors assigned were in the court's submitting to the jury to find whether the horses would not have run into the opening if it had been properly guarded; whether the guards would have stopped them, considering their fright, and the speed with which they were running; and in the instructions that the plaintiff must make out that the horses were drowned by reason of the failure of the defendants to properly guard the opening; that if the guards would not have prevented the casualty the plaintiff could not recover, although he was in the exercise of due care, and the defendants were negligent; that if the jury were satisfied, by a fair balance of evidence, that the horses would have been turned away by a suitable guard, then the defendants' negligence caused the damage.

These instructions did not contain a new proposition of law. It is a general rule that negligence must not only be alleged and proved, but it must also be shown that it caused the injury complained of. When injury on the part of the plaintiff and negligence on the part of the defendant concur, the plaintiff cannot, nevertheless, recover, if the

[1] The statement of facts is slightly abridged and parts of the opinion are omitted.

defendant could not, by the exercise of due care, have prevented the accident from occurring. Shear. & R. Neg. § 8. In cases that arose under our former statute, rendering towns liable for injuries caused by defective highways, it was not sufficient to prove the existence of defects. It must also have been shown that the defects caused the injuries alleged. Lester v. Pittsford, 7 Vt. 158. Were the horses in such fright, and running at such speed, that they would have been turned from their course by such guards as reasonably prudent men would have erected? This was a material question of fact for the jury to decide before they could say whether or not the defendants' negligence in respect to a guard was the cause of the casualty. Both questions were involved in the instruction that the plaintiff must make out "that the horses were drowned by reason of the failure of the defendants to properly guard the hole." Suppose damages were claimed of a town, caused by an alleged defective railing upon a bridge. Could the question be excluded from the consideration of a jury, upon proper evidence, whether, from the nature of the accident, a suitable railing could have prevented it? We think not. In Titcomb v. Railroad Co., 12 Allen (Mass.) 254, the negligence alleged was the want of railings to the approaches to a highway bridge which the defendant was bound to maintain over its railroad at a crossing. Among other things the court instructed the jury that, if they were satisfied that the injury to the plaintiff would not have occurred if the fence or railing had been sufficient, they must find a verdict for her. In considering this subject the supreme court said: "So far as such a fence would be effectual to guard against injury from the frightening of a horse about to enter upon the bridge, by the approach of a train of cars passing under the bridge, the plaintiff was entitled to that protection. Not that the defendant was bound to maintain a barrier that would in all cases stop the progress of a frightened horse about to enter upon the bridge, but it was bound to maintain and keep in repair a suitable and proper fence at the place; and if the discharge of this duty would have prevented the occurrence of the present injury, and the plaintiff is shown to have been without fault on her part, the railroad company may properly be charged in the present action. The fact whether such a fence would have prevented the occurrence of the injury may be a difficult one for the jury to find, but the burden is on the plaintiff to show this, and if she can establish it the defendant may be held liable for the injuries sustained. The case of a horse being frightened is one of the cases of casualty which may and often does occur, and is entirely consistent with a reasonable degree of care and prudence on the part of the traveler. Such traveler has a right, in case of such occurrence, to the protection which such a fence as the law requires the railroad company to maintain would have given. If such a fence would have been unavailing, and the injury would still have occurred, the traveler cannot say his injury was occasioned by any neglect of the railroad company, and he must bear the loss;

but, if otherwise, the liability attaches to the party bound to maintain the fence as an appendage to the bridge." In Wilson v. Atlanta, 60 Ga. 473, it was alleged that an injury was caused by the defendant's negligence in not providing a railing upon a street. An instruction was held proper, that the questions whether or not there was negligence in putting up the railing, and whether such negligence caused the injury to the plaintiff, might be tested by the inquiry whether the plaintiff would not have been injured even if the railing had been constructed. In Ilfrey v. Railway Co., 76 Tex. 63, 13 S. W. 165, the plaintiff sought to charge the defendant with liability by reason of its maintaining an embankment which, as alleged, caused the destruction of the plaintiff's house by water. It was held competent for the trial court to consider evidence tending to show that the house would have been swept away by the storm, regardless of the embankment; to find that fact from a preponderance of the evidence; and that the embankment was not the proximate cause of the destruction. In Railroad Co. v. Bailey, 11 Ohio St. 333, it was alleged that the defendant negligently ran its train so as to kill the plaintiff's horses. It was held error for the court to refuse an instruction to the jury that, though the defendant was negligent, the plaintiff must fail in his action if the jury believed from the evidence that due care, had it been used, would not have prevented the injury. A corresponding proposition was contained in Judge Steele's charge in Walker v. Westfield, 39 Vt. 246, which was construed by this court to mean that, though the plaintiffs were not in the exercise of due care, if "such want of care did not contribute to the accident, then it is of no consequence in the case, and will not prevent a recovery." We find the instructions fully sustained, both by reason and authority. * * *[2]

Judgment affirmed.

WEEKS v. McNULTY et al.

(Supreme Court of Tennessee, 1898. 101 Tenn. 495, 48 S. W. 809, 43 L. R. A. 185, 70 Am. St. Rep. 693.)

Action to recover damages for the death of plaintiff's husband, Arthur Weeks, through the alleged negligence of the defendants. The declaration alleged that the defendants were the owners and proprietors of the Hotel Knox, a public inn in the city of Knoxville, and had negligently permitted this hotel to be in an unsafe condition. More specifically, it was alleged, in a second count of the declaration, that the defendant had failed to provide fire escapes, as ordered by an ordinance of the city of Knoxville, or other reasonable means of escape from the building. The defendants pleaded not guilty. The trial resulted in a verdict and judgment for the defendants. The plaintiff appealed.

[2] Part of the opinion is omitted.

It appeared that on the evening of April 7, 1897, Arthur Weeks, a travelling salesman from Rochester, New York, reached Knoxville, registered at the Hotel Knox, and was assigned to Room 49 on the third floor. About 3 o'clock in the morning following, Hotel Knox was destroyed by fire, and Weeks perished in the flames. The fire was first discovered by the night watchman of the hotel, who immediately gave the alarm, ascended the stairway leading to the second and third floors, knocked upon the doors, and made every effort to arouse the guests. All the guests escaped, excepting Weeks and one other. One of the guests, as he passed out, heard some one in 49 pounding at the door, and noticed that he had kicked out one of the panels. It is also shown that persons occupying rooms on the same floor with Weeks, immediately contiguous, and across the hall in opposite and diagonal directions, all received the alarm, and succeeded in making their escape. The building was provided with a front and a rear stairway, but had no fire escapes. South of the Hotel Knox, and immediately adjoining, was the banking house of the Third National Bank, only one story in height; and several of the guests leaped upon its roof from the burning hotel building. This mode of escape was accessible to deceased, since his window overlooked the roof, but it was not shown that he had knowledge of it.

McALISTER, J. * * * The fourth assignment is that the court erred in excluding the ordinance of the city of Knoxville requiring the owners and keepers of hotels to erect fire escapes thereon. The objection offered to this testimony was that the ordinance in question contemplated that notice to erect fire escapes must be given to the owner of the property by the board of public works, and that no such notice was given to the owner and proprietor of Hotel Knox. The declaration, as already observed, alleged that the defendants had failed to provide fire escapes for Hotel Knox, "as ordered by an ordinance of the city of Knoxville." * * *

We do not however decide the effect of the breach of the ordinance in fixing civil liability, nor do we adjudicate the proper construction of the ordinance offered in evidence, since neither question is necessarily involved in this case, for the following reason, namely: There is no proof in the record even tending to show that the deceased lost his life in consequence of the failure to construct fire escapes as provided by the city ordinance. The principle is recognized in all the cases that a liability cannot be predicated alone upon the breach of an ordinance, but it must affirmatively appear that the injury sustained resulted proximately from said breach. * * *

After a very attentive reading of the record in this cause, we have failed to discover any causal connection between the death of plaintiff's intestate and the failure of defendants in error to erect fire escapes, as required by the ordinance. It is not shown that deceased was at a window, or in any position where a fire escape would have afforded him any benefit whatever. There is evidence tending to show that de-

ceased had locked himself in his room, and was heard beating on his door, trying to make his escape. It is shown that one of the windows of his room overlooked the Third National Bank Building, and that deceased could, and with entire safety to himself, have escaped by leaping to the roof of that building, as many others similarly situated successfully did escape. As already stated, it is not shown that deceased knew of this avenue of escape, and we cannot perceive how he would have benefited by fire escapes under the circumstances surrounding him. We are therefore of opinion that if the contention of counsel for plaintiff in error in respect of the proper construction of this ordinance were correct, and that its breach would constitute actionable negligence, these questions are mere abstractions in this case, since no causal connection between the violation of the ordinance and the injuries sustained by the plaintiff is shown. * * *

No reversible error. Affirmed.[3]

AIKEN v. CITY OF COLUMBUS.

(Supreme Court of Indiana, 1906. 167 Ind. 139, 78 N. E. 657, 12 L. R. A. [N. S.] 416.)

GILLETT, J. By appellant's complaint in this action appellee was sought to be charged with negligence in the management of its public lighting system, whereby appellant's intestate was killed, on his own premises, by coming in contact with a live wire, belonging to appellee, which had fallen from its electric light pole in the adjoining street. A demurrer was sustained to the complaint, and from the judgment which followed appellant appeals.

It is contended by counsel for appellee that, as it does not appear that the city made any use of said system other than for the purpose of lighting its streets, it was acting in a governmental capacity, and is therefore not to be held liable for the negligence of its employés and servants in the management of the property. * * *

We are satisfied that we are within the authorities in holding, as we do, that a city or town is answerable ex delicto for any direct invasion of the rights of third persons in the management of its public lighting system. While the doctrine of immunity of municipal corporations in matters purely governmental is too well established upon the authorities to be shaken, yet we are of opinion that public policy requires that the doctrine should be kept strictly within limits, to the end that so far as possible corporate liability may prompt those charged with responsibility in the government of cities and towns to be alert to prevent wrongs to third persons in the maintenance of municipal property.

[3] The statement of facts is abridged and parts of the opinion are omitted.

The point is made, however, that although it appears that the fall of the wire was the proximate cause of the death of appellant's intestate, and that said wire had become weak and rotten, in which respect appellee is charged with negligence, yet it is not alleged that the wire fell by reason of such defective condition. Although it is clear from a reading of the complaint that this was an assumed fact, yet the omission of the allegation renders the complaint insufficient, and an affirmance must follow. * * *

Judgment affirmed.[4]

WILLIAMS v. GREAT WESTERN RY. CO.

(Court of Exchequer, 1874. L. R. 9 Exch. 157.)

Action to recover damages for personal injuries suffered by the plaintiff through the defendants' negligence.

The case was tried before Keating, J., at the Denbighshire Summer Assizes, 1873, and the following facts appeared: At the place where the accident occurred the defendants' line ran for some distance on the level across a piece of open ground, and for a space of 150 yards was wholly unfenced. At a point in this unfenced part it was crossed by a public carriage road on the level, and at another point about thirty yards off, by a public foot path, also on the level, which struck off from the road some little distance before it reached the line.

On the 22d of December, 1871, the plaintiff, a child of four and a half years old, was found lying on the rails by the foot path, with one foot severed from his body. There was no evidence to show how the child had come there beyond this, that he had been sent on an errand a few minutes before from the cottage where he lived, which lay by the roadside, at about 300 yards distance from the railway, and farther from it than the point where the foot path diverged from the road. It was suggested on the part of the defendants that he had gone along the road, and then, reaching the railway, had strayed down the line; and on the part of the plaintiff, that he had gone along the open foot path, and was crossing the line when he was knocked down and injured by the passing train. The learned judge thought there was no evidence to go to the jury of liability on the defendants, and nonsuited the plaintiff, reserving leave to him to move to enter a verdict for £250, the amount at which the jury had, by consent, assessed the damages, if there was any evidence for the jury in support of the declaration.

POLLOCK, B. The question in this case is whether there was any evidence that ought to have been left with the jury. I should be sorry

[4] Only so much of the case is given as relates to the one point.

Compare: City of Crawfordsville v. Van Cleave (1906) 39 Ind. App. 574, 77 N. E. 1119, where a causal connection which counsel had assumed to be too clear for words was held to be not shown for the purpose of the demurrer.

to think that we were extending the rule on the subject of negligence which was laid down by Willes, J., in the case of Daniel v. Metropolitan Ry. Co. (Law Rep. 3 C. P. 216, at page 222), in terms which were approved of in the Exchequer Chamber and the House of Lords (Law Rep. 3 C. P. 591; Id. 5 H. L. 45), although the decision itself was reversed. "It is not enough for the plaintiff to shew that there has been an accident upon the defendants' line, and thence to argue that the company are liable even prima facie. It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to; and I go further and say that the plaintiff should also shew with reasonable certainty what particular precautions should have been taken."

Can we, consistently with the rule so laid down, hold that there was evidence which might have been submitted to the jury? Now as to there being a non-performance of what was enjoined by the Act of Parliament, there is no doubt about it; and it is not for us to speculate on what was the precise intention of the legislature when they required that there should be a gate or stile on a footpath crossing on a level. It is sufficient to say that the defendants have neglected to comply with the enactment.

Then can it be inferred with reasonable probability that the accident occurred by reason of this negligence, so as to make this a question for the jury? I was at first impressed with the view that this was like the case in which it has been held that where there is an even balance of the evidence, so that no inference can be properly drawn one way more than the other, the judge must not leave the question to the jury. The real question is, whether the negligence can reasonably be so connected with the accident as to allow of a jury saying that it did in fact give occasion to it. Upon the whole, I think that there was evidence which might be left to the jury, and the rule must therefore be made absolute.

AMPHLETT, B. My opinion has fluctuated during the argument, but I have come to a conclusion satisfactory to my own mind that the verdict should be entered for the plaintiff. We start with the fact that the defendants have failed to comply with the express provisions of the statute, and this is an act of gross negligence. I think nothing turns on the neglect at the carriage way. But the child was in fact found upon the foot way, and the proper presumption is that it met with the accident on the footway, and whilst it was crossing the line. Then the child being lawfully on the foot way, and the defendants being guilty of a breach of duty, the only question is whether there is reasonable ground for connecting this breach of duty with the accident. It is not necessary to decide this as a jury; it is enough to say that I think it was clearly a case which ought to be submitted to a jury. There are many supposable circumstances under which the accident

may have happened, and which would connect the accident with the neglect. If the child was merely wandering about, and he had met with a stile he would probably have been turned back; and one at least of the objects for which a gate or a stile is required is to warn people of what is before them, and to make them pause before reaching a dangerous place like a railroad. The rule must be made absolute.

Rule absolute.[5]

[5] In Hayes v. Michigan Cent. R. R. Co. (1884) 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410, the facts were as follows: An eight year old boy, bright and well grown, but deaf and dumb, had been run over by a train of the defendant railway company. There was no contributory negligence in the boy. The particular negligence charged against the defendant was its omission to build a fence along its right of way through a city park, as required by a city ordinance. The trial court directed a verdict for the defendant. On error, this judgment was reversed by the Supreme Court, where Mr. Justice Mathews, delivering the opinion, remarked:

"It is further argued that the direction of the court below was right, because the want of a fence could not reasonably be alleged as the cause of the injury. In the sense of an efficient cause, causa causans, this is, no doubt, strictly true; but that is not the sense in which the law uses the term in this connection. The question is, was it causa sine qua non: a cause, which if it had not existed, the injury would not have taken place, an occasional cause, and that is a question of fact, unless the causal connection is evidently not proximate. Milwaukee & St. Paul R. R. Co. v. Kellogg (1876) 94 U. S. 469, 24 L. Ed. 256. The rule laid down by Willes, J., in Daniel v. Metropolitan R. Co. (1868) L. R. 3 C. P. 216, 222, and approved by the Exchequer Chamber (1868) L. R. 3 C. P. 591, and by the House of Lords (1871) L. R. 5 H. L. 45, was this: 'It is necessary for the plaintiff to establish by evidence, circumstances from which it may be fairly inferred that there is a reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to;' and in the case of Williams v. Great Western R. Co. (1874) L. R. 9 Exch. 157, where that rule was applied to a case similar to the present, it was said, page 162: 'There are many supposable circumstances under which the accident may have happened and which would connect the accident with the neglect. If the child was merely wandering about and he had met with a stile, he would probably have been turned back; and one at least of the objects for which a gate or stile is required, is to warn people of what is before them and make them pause before reaching a dangerous place like a railroad.'

"The evidence of the circumstances, showing negligence on the part of the defendant, which may have been the legal cause of the injury to the plaintiff, according to the rule established in Railroad Co. v. Stout (1873) 17 Wall. 657 (84 U. S.) 21 L. Ed. 745, and Randall v. B. & O. R. R. Co. (1883) 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003, should have been submitted to the jury; and for the error of the Circuit Court in directing a verdict for the defendant, the judgment is reversed and a new trial awarded."

CHAPTER II

THE TESTS OF LEGAL CAUSE

SECTION 1.—THE "PROXIMATE CAUSE"

"In jure non remota causa, sed proxima, spectatur:" It were infinite for the law to judge 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 to any further degree.

Francis Bacon, The Maxims of the Law, Reg. 1 (1596).[1]

Guesswork perhaps would have taught us that barbarians will not trace the chain of causation beyond its nearest link, and that, for example, they will not impute one man's death to another unless that other has struck a blow which laid a corpse at his feet. All the evidence however points the other way: I have slain a man if but for some act of mine he might perhaps be yet alive. Very instructive is a formula which was still in use in the England of the thirteenth century; one who was accused of homicide and was going to battle was expected to swear that he had done nothing whereby the dead man was "further from life or nearer to death." Damages which the modern English lawyer would assuredly describe as "too remote"

[1] 14 Bacon's Works (Spedding Ed.) 189.

"This maxim, with its gloss, is frequently cited as 'an all-sufficient statement of the reasons for every decision upon a question of legal cause.' Indeed the expression 'proximate cause' is generally used instead of 'legal cause,' and it is often under the former head that one must look in digest for authorities on causation. This use of the maxim as a universal solvent of difficulties has been productive of infinite confusion and error. Taking the words in their natural signification, the maxim is not a correct statement of the law. Taken literally, the maxim would be understood as implying that the antecedent which is nearest in space or time is invariably to be regarded as the legal cause; and it might also be understood as putting material antecedents, forces of nature, on an equal footing with voluntary and responsible human actors. But it is a mistake to suppose that contiguity in space or nearness in time are legal tests of the existence of causal relation. No doubt these elements are often important to be considered in determining the question of fact as to the existence of such relation: but lack of contiguity or nearness would not, as matter of law, conclusively establish that the defendant's tort was not the cause of the damage. Bacon's language has repeatedly been criticized." Professor Jeremiah Smith, "Legal Cause in Actions of Tort." 25 Harv. Law Rev. 106.

were not too remote for the author of the Leges Henrici. At your request I accompany you when you are about your own affairs; my enemies fall upon and kill me; you must pay for my death. You take me to see a wild-beast show or that interesting spectacle a madman; beast or madman kills me; you must pay. You hang up your sword; some one else knocks it down so that it cuts me; you must pay. In none of these cases can you honestly swear that you did nothing that helped to bring about death or wound.

2 Pollock and Maitland, Hist. Eng. Law (2d ed.) 470.

We have, then, to deal with the primitive notion which instinctively visits liability on the visible offending source, whatever it be, of a visible evil result. The notion, as applied to persons, is that of the schaedliche Mann, a person from whom some evil result has proceeded. * * * An example showing an exceptionally late survival of these ideas, and at the same time the transition to different standards [is found in the following instance, drawn from Frisian Chronicles of 1439]:

"Owen Alwerk was brewing beer. During his absence the child of Swein Pons came in and stood by the kettle. The kettle slipped from its hook, and the liquid burned the child so that it died on the third day. The relatives of the child pursued Alwerk, who fled to the house of a friend for refuge. The master of the house opposed the entrance of the pursuers, and an affray ensued, in which the master by inadvertence killed his own nephew. The affair was laid before six men as judges; and they decided at first that Alwerk must pay the head money for the dead child and for the dead nephew, and must besides make a pilgrimage to Rome. But Alwerk opposed the judgment, and to such a good purpose that they altered it to this effect,—that he should be absolved without more from the child's death, and from the nephew's if he swore that he did not urge on the master of the house to fight."

John H. Wigmore, "Responsibility for Tortious Acts." [2]

[2] In 3 Select Essays in Anglo-American Legal History, 483, reprinted from 7 Harv. Law Rev. 319 (1894).

An instance of the "but-for" rule in legal causation, affirmatively applied in modern law, is found in Gilman v. Noyes (1876) 57 N. H. 627: The bars into P.'s pasture had been negligently left down by D. As a result, P.'s sheep got out of the pasture. They were never found. The evidence tended to show that they had been devoured by bears. The jury were instructed that if the sheep escaped in consequence of the bars being left down by D., and would not have been killed but for this act by D., he was liable. The reviewing court held this instruction erroneous. See infra, "Intervening Agency as a Test of Legal Cause." See also Professor Bohlen's remarks in 21 Harv. Law Rev. 234–235 (1908).

Although Lord Bacon, long ago, referred to this question of remoteness, it has been left in very great vagueness as to what constitutes the limitation. * * * It is a vague rule, and as Bramwell, B., said, it is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night nor day.

Blackburn, J., in Hobbs v. London & Southwestern Railway Co. (1875) L. R. 10 Q. B. 111, 121.

Lord Bacon, in interpreting this maxim, says: "It were infinite for the law to consider the causes of causes, and their impulsion of each other; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any farther degree." Maxims of Law, 1. The law indeed is not to inquire into the causes of causes, but it is anxiously to inquire for the true cause, and to distinguish between the cause and that which is ordinarily incidental to it. Some idea of what Lord Bacon means is furnished by the first case which he gives in illustration. An annuity was granted pro consilio impenso et impendendo. The grantee was committed for treason, so that the grantor could not have access to him for counsel. It was held that the annuity was not determined, the involuntary, compulsory imprisonment being a sufficient excuse, into the cause of which the law would not inquire.

So a familiar illustration may be found in an indictment for homicide, where the defence is insanity. If the insanity be shown, the law will not inquire as to the cause of the insanity, to show that it had its origin in the misconduct of the defendant.

So if a building insured were destroyed by fire resulting from the negligence of the owner's servants, it would not be competent to show that their habits of negligence were the result of the inattention and lax discipline of the master.

That is to say, a distinct substantive cause being shown, the law will not go behind it and inquire as to its cause. It does not "consider the causes of causes." And this is the meaning and the extent of meaning of this familiar maxim of causa proxima. It is certainly true, that it is not always easy to determine what is the efficient, procuring cause. But the difficulty is not in the rule, but because our conclusions are drawn always with imperfect instruments, and often from an imperfect view of the facts. It is also true that, philosophically, we know little of the relation of cause and effect. But it is equally true that, in all the highest practical affairs of life, we recognize and act upon this relation; and that, when so acting, we seek the true, efficient, procuring cause, and not that nearest in point of time or space.

Thomas, J., in Marble v. City of Worcester.[3]

[3] (1855) 4 Gray (Mass.) 395, 411. See Professor Beale's "true reading of this maxim," 9 Harv. Law Rev. 80, 81 (1895).

SECTION 2.—PROBABILITY OF RESULT AS A TEST OF LEGAL CAUSE

GREENLAND v. CHAPLIN.

(Court of Exchequer, 1850. 5 Exch. 243, 82 R. R. 655.)

Case for negligence in navigating the defendant's steam-boat, whereby it struck against another steam-boat, on which the plaintiff was a passenger, and, in consequence, his leg was broken. Plea, Not guilty.

At the trial, before Pollock, C. B., at the Middlesex sittings after last Michaelmas Term, it appeared that the plaintiff was a passenger on board a steam-boat called the "Sons of the Thames," which was going from Westminster to London Bridge. The defendant's steam-boat, called the "Bachelor," was going the same way, and as the vessels approached the Adelphi Pier, the "Bachelor" struck the "Sons of the Thames" on the bow, where the anchor was carried, and, in consequence, it fell upon and broke the plaintiff's leg. There was conflicting evidence as to the degree of negligence attributable to the respective steam-boats, and especially as to the propriety of the mode in which the anchor on board the "Sons of the Thames" was carried in the bow of the vessel. The learned Judge told the jury, that if they were of opinion that the collision was owing to the bad navigation of the "Bachelor," they should find a verdict for the plaintiff; but if they thought that there was any negligence, either in the stowage of the anchor, or in the plaintiff putting himself in the place where he was, on board the "Sons of the Thames," they should find for the defendant. The jury having found a verdict for the plaintiff, with £200 damages,

Shee, Serjt., in last Hilary Term obtained a rule nisi to set aside the verdict, as against evidence, no objection being taken as to the mode in which the question was left to the jury.[4]

POLLOCK, C. B. (after holding on other grounds that the rule should be discharged). But here I may again state,[5] that it occurs to me there is considerable doubt,—and at present I guard myself against

[4] The argument of counsel is omitted, and only so much of the opinion is given as relates to the one point.

[5] In the course of the argument Pollock, C. B., had asked this question of counsel: "Can it be said that a person guilty of negligence is responsible for all the possible consequences, which he could never have foreseen, and which no one would have anticipated? For instance, if a person chooses to walk in a crowded street with an open knife under his coat, and another person negligently runs against him, is that other person to be responsible for all the injury which the knife may inflict on the person who carries it?" The answer was a reference to Flower v. Adam (1810) 2 Taunt. 314, 11 R. R. 591.

being supposed to decide with reference to any case which may hereafter arise; but, at the same time, I am desirous that it may be understood that I entertain considerable doubt,—whether a person who is 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. Whenever that case shall arise, I shall certainly desire to hear it argued, and to consider whether the rule of law be not 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. I beg to say that, in expressing this doubt whether the responsibility for consequential damage extends to the extreme case to which I have adverted, I am expressing my own opinion only, and not that of the rest of the Court.[6]

ETEN v. LUYSTER.

(Court of Appeals of New York, 1875. 60 N. Y. 252.)

ALLEN, J.[7] The plaintiff was, at the time of the forcible entry by the defendants, and the commission of the wrongs complained of, in possession of the premises, as the tenant of one Morrison, under a hiring for a term which had not expired. Morrison was the immediate lessee of the owner (to whose title, in fee, the defendants had succeeded), under a hiring for a year, by written lease, containing a covenant, by the lessee, to vacate the premises on having two months' notice, in writing, and being paid $200, as an equivalent for moving and giving up the lease.

By an instrument under seal, * * * Morrison, in consideration of $300, canceled the lease to him, and waived any further notice to quit, and agreed to vacate the premises on or before the 1st day of July, 1868. On the first or second day of August, the defendants

[6] In Rigby v. Hewitt (1850) 5 Ex. 240, 82 R. R. 652, 653, Pollock, C. B., had remarked: "I am disposed not quite to acquiesce to the full extent in the proposition, that a person is responsible for all the possible consequences of his negligence. I wish to guard against laying down the proposition so universally; but of this I am quite clear, that every person who does a wrong, is at least responsible for all the mischievous consequences that may reasonably be expected to result, under ordinary circumstances, from such misconduct."

Referring to these two cases, Sir Frederick Pollock remarked, in 1905: "In Rigby v. Hewitt and Greenland v. Chaplin, we have, it is believed, the first clear statement of the rule as to consequential damage which is now generally accepted, namely '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.'" See Preface to 82 R. R. v–vi.

[7] The statement of the case and parts of the opinion are omitted.

entered upon the premises occupied by the plaintiff, tore down and ruined a building which the plaintiff had erected thereon, and removed his chattels and personal property. There being no prohibition against subletting in the lease to Morrison, he had a right to sublet the whole or any part of the premises. Jackson v. Silvernail, 15 Johns. 278; Same v. Harrison, 17 Johns. 66; Roosevelt v. Hopkins, 33 N. Y. 81. The plaintiff, the sublessee, by the contract of hiring, acquired a valid term in and a right to the possession of the part of the demised premises let to him for the time agreed upon, subject, only to be defeated by the expiration of the term of Morrison, or a re-entry by the owner of the fee, and supreme landlord, for some condition of the demise broken. He held the premises, subject to the conditions of the original lease to Morrison, and the conditions of his own hiring, and, with these limitations, his right to hold for the term granted to him was perfect.

As landlords, the defendants had no right of entry, and their forcible dispossession of the plaintiff was a trespass for which the plaintiff had an action; and the proceedings for his removal by summary process, under the landlord and tenant act, having been reversed, the warrant furnished no protection to them, and constituted no defence to the action. 2 R. S. 516, § 49; Hayden v. Florence Sewing Machine Co., 54 N. Y. 221. The statute expressly gives an action to the tenant in such case.

The plaintiff was only entitled to recover such damages as were the direct consequences of the acts of the defendants, and those acting under their direction and by their authority. This would exclude from the consideration of the jury all damages resulting from the acts of, or want of proper care of the property by, the plaintiff. The act complained of was the wrongful removal and destruction of the plaintiff's property in his absence, and there was no evidence that any part of the loss was caused by his act, or could have been prevented by him. The question of contributory negligence is not in the case. The plaintiff owed no duty to the defendants, and was not called upon to gather up the fragments of his scattered and broken chattels, but was at liberty to leave them where the defendants left them, and look to the latter for their value. They were out of his possession by the tortious act of the defendants, by whom, and whose acts, they were lost or destroyed. The plaintiff complains of the pulling down and destruction of his building, and the taking and conversion of his personal property, as well as the damages sustained by a loss of his business.[8] The latter claim was excluded from the consideration of the jury by the court, but evidence of the other items of loss and damage were clearly within the allegations of the complaint, and admissible.

[8] It appeared in the case that "part of this house had been used by plaintiff as a stable, and his evidence tended to show that he kept, in a tin box, inside a feed box, in the stable, a sum of money, about $2,000. This was lost in the removal." And see Eisele v. Oddie (C. C. 1904) 128 Fed. 941, 949.

For all loss occasioned by the trespass, whether in the destruction of the chattels or the loss of money that was kept upon the premises, the plaintiff was entitled to recover. That the money was kept in an unusual place did not take it out of the protection of the law, or affect the liability of the defendants for their tort. They acted at their peril, and must respond for the consequences. The loss of the money, although the defendants may not have suspected its presence, was the direct and necessary consequence of the acts of the defendants. * * *

All concur; RAPALLO, J., expresses no opinion as to the right of the plaintiff to recover for the money lost, but concurs in opinion in all other respects.

Judgment [for the plaintiff] affirmed.

SMITH v. LONDON & S. W. RY. CO.

(Court of Common Pleas, Hilary Term, 1870. L. R. 5 C. P. 98. In the Exchequer Chamber, Michaelmas Term, 1870. L. R. 6 C. P. 14.)

This was an action for negligence, and the declaration contained three counts, of which the second and only material one was as follows:

"That the time of the committing by the defendants of the grievances in this count mentioned, the plaintiff was possessed of a cottage and premises, and the defendants were possessed of and had the care and management of a railway running near the said cottage and premises, with banks belonging thereto, and part of the said railway, and were possessed of locomotive engines containing burning substances, which were used by the defendants for conveying carriages along this railway. Yet, by the negligence and improper conduct of the defendants, and the want of due care on the part of the defendants in the keeping and management of their said railway engines and banks, quantities of cut grass and hedge trimmings were heaped up on the said railway and banks, and became and were ignited, and a fire was occasioned which spread over and along a stubble-field, near the said railway unto the said cottage and premises, and set fire to the same, and thereby the same and the plaintiff's furniture, &c., then being in and near the said cottage and premises, were burnt and destroyed, and the plaintiff lost the use and enjoyment of the same."

The defendants pleaded not guilty, and issue was joined thereon.

The case was tried before Keating, J., at the Dorchester summer assizes in 1869, when it appeared that about fourteen days previous to the 3d of August, 1868, the defendants' servants, after cutting the grass and trimming the banks and hedges at the sides of the line, had raked the cut grass and hedge-trimmings into heaps near the line

and there left them, and that owing to the extreme heat of the weather these heaps had become very dry and inflammable. On the 3d of August, at about 1 p. m., two trains (an up train and a down train) belonging to the defendants, passed the spot in question, and immediately afterwards the heaps were on fire; and, in consequence of a high wind prevailing at the time, the fire consumed the adjoining hedge, and, notwithstanding the utmost efforts of the company's servants and others to subdue it, passed over a stubble-field and a public road, and communicated to the plaintiff's cottage, which was about 200 yards from the line, and destroyed it with the furniture therein. One of the witnesses for the plaintiff stated that at the time referred to there were fires all about the country; but whether he meant on the sides of the railway or not, did not clearly appear. There was no evidence to show that the company's engines were improperly constructed, or that they were negligently or improperly worked.

On the part of the plaintiff it was contended that there was evidence from which the jury might fairly assume that the fire was caused by sparks or burning cinders from one of the engines which had just before passed the spot; and that there was negligence on the part of the company's servants in allowing such inflammable material to remain on the banks of their railway for so long a time in so dry a season, and therefore they were responsible for the damage resulting from it.

For the defendants it was contended, on the authority of Vaughan v. Taff Vale Ry. Co., 3 H. & N. 743, 28 L. J. Ex. 41, in error 5 H. & N. 679, 29 L. J. Ex. 247, that the defendants were not responsible for damage resulting from the cause suggested, in the absence of evidence to show that their engines were improperly constructed or had been negligently or improperly worked; and that there was no evidence of negligence to go to the jury.

The learned judge declined to nonsuit; and a verdict was found for the plaintiff for the sum claimed, leave being reserved to the defendants to move to enter a verdict for them, or a nonsuit, if the Court should be of opinion that there was no evidence of negligence which ought to have been submitted to the jury,—the Court to be at liberty to draw inferences, and to amend the pleadings.

Kingdon, Q. C., in Michaelmas Term last, obtained a rule nisi.

BRETT, J. I am of opinion that there was no evidence to go to the jury of negligence on the part of the defendants. I cannot help feeling that great difficulty is thrown upon the judges who are called upon to determine questions of this sort, which make them too much judges of facts. I take the rule of law in these cases to be that which is laid down by Alderson, B., in Blyth v. Birmingham Waterworks Company, 11 Ex. 784, 25 L. J. Ex. 213: "Negligence 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. The defendants might have been liable for negligence, if, unintentionally,

they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done. A reasonable man would act with reference to average circumstances in ordinary years." That being the rule, the question here is whether the defendants by their servants have done or omitted to do something which reasonable men placed under such circumstances as they were placed in would have done or omitted to do. The case of the plaintiff, as put by Mr. Cole on moving, and also in his argument to-day, is this: Conceding that there is no ground for saying that the defendants' engines were not of the best possible construction, or that there was negligence in the mode of working them, they were bound to take notice that such engines do emit sparks and burning cinders; and, as they were driving them through the country in an exceptionally dry season, they ought not to have permitted such combustible materials as rummage or hedge-trimmings to remain on the banks of their railway; they ought, as reasonable men, to have contemplated that sparks from their engines might set them on fire, and that, if they did, the fire might extend to the plaintiff's property. I quite agree that the defendants ought to have anticipated that sparks might be emitted from their engines, notwithstanding they are of the best construction, and were worked without negligence; and that they might reasonably have anticipated that the rummage and hedge-trimmings allowed to accumulate might be thereby set on fire. But I am of opinion that no reasonable man could have foreseen that the fire would consume the hedge and pass across a stubblefield, and so get to the plaintiff's cottage at the distance of 200 yards from the railway, crossing a road in its passage. It seems to me that no duty was cast upon the defendants, in relation to the plaintiff's property, because it was not shown that that property was of such a nature and so situate that the defendants ought to have known that by permitting the rummage and hedge-trimmings to remain on the banks of the railway they placed it in undue peril. If that had been shown, I should have thought that the case fell within the principle laid down by Cockburn, C. J., in Vaughan v. Taff Vale Ry. Co., 5 H. & N. 679, 685, 29 L. J. Ex. 247, for then the defendants must have been taken to have known that the course which was pursued by their servants was calculated to endanger the adjoining property. But, bringing one's knowledge of ordinary English country life to bear upon the subject, I am of opinion, as matter of fact, that no reasonable man could suppose,—or at least eight out of ten would fail to suppose,—that, if by any means the rummage and hedge-trimmings on the side of the railway were set on fire, the fire would extend to a stubble-field adjoining, and so proceed to a cottage at the distance before mentioned. We read of such fires in the American prairies; but it would never occur, as it seems to me, to the mind of the most prudent person that such an extraordinary conflagration could be caused in this country in the manner here spoken of by the witnesses. I think the defendants cannot

reasonably be held responsible for not having contemplated such an extraordinary combination of circumstances, or such a result. For these reasons I am of opinion that there was no such evidence of negligence on their part as could properly be left to the jury.

The Common Pleas having discharged the rule to enter a verdict for the defendant or a non-suit, an appeal was brought.

[In the Exchequer Chamber]

KELLY, C. B. I certainly entertained some doubts during the argument as to whether the judgment of the Court below could be sustained; but when I consider the facts, I cannot but feel that it is a case in which there was some evidence of negligence on the part of the defendants, and negligence which caused the injury complained of. It appears that about the time that the spot in question was passed by an engine which, as we know, would emit sparks which would fall on the adjoining ground, a fire was discovered on the defendants' ground adjoining the line. It appears that it had been a dry summer and the hot weather had continued for many weeks before the occurrence: and probably with a view to prevent mischief, the defendants had caused the grass that grew by the line and the fence to be cut, and the cuttings of the grass and hedge were placed in small heaps on the ground between the rails and the hedge. On the other side of the hedge was a stubble-field of a considerable extent which would be extremely dry, and at a distance of two hundred yards across a road was the cottage belonging to the plaintiff. This was the state of facts. The trimmings caught fire, there was a strong south-east wind blowing; and though we have no proof of the exact progress of the fire, because the company's servants who had seen it were not called, it appears to have extended to and through the hedge and across the field to the plaintiff's cottage which was burnt. The question for us is, how all this occurred. There is some doubt how the fire originated, but there was ample evidence for the jury, which would have been rightly left to them, that it originated from sparks from the engine falling on the dry heaps of trimmings, and thence extending to the hedge and stubblefield. If that was so, the question arises whether there was any negligence in the defendants.

Now it can scarcely be doubted that the defendants were bound in such a summer, knowing that trains were passing from which sparks might fall upon them, to remove these heaps of trimmings; and, at any rate, it was a question for the jury whether it was not negligent of them not to do so. I think, therefore, there was a case for the jury on which they might reasonably have found that the defendants were negligent in not removing the trimmings as soon as possible, and that this was the cause of the injury. Then comes the question raised by Brett, J., to which at first I was inclined to give some weight. He puts it thus: "I quite agree that the defendants ought to have anticipated that sparks might be emitted from their engines, notwithstanding that

they were of the best construction, and were worked without negligence, and that they might reasonably have anticipated that the rummage and hedge-trimmings allowed to accumulate might be thereby set on fire. But I am of opinion that no reasonable man would have foreseen that the fire would consume the hedge and pass across a stubble-field, and so get to the plaintiff's cottage at the distance of 200 yards from the railway, crossing a road in its passage." It is because I thought, and still think, 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 burnt 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 which might result from this, and were responsible for all the natural consequences of it. I think, then, there was negligence in the defendants in not removing these trimmings, and that they thus became responsible for all the consequences of their conduct, and that the mere fact of the distance of this cottage from the point where the fire broke out does not affect their liability, and that the judgment of the court below must be affirmed.

CHANNELL, B. I am of the same opinion. I quite agree that where there is no direct evidence of negligence, 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 Waterworks Co., 11 Ex. 781; 25 L. J. (Ex.) 212, referred to by Mr. Kingdon; but when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not.

BLACKBURN, J. I also agree that what the defendants might reasonably anticipate is, as my Brother CHANNELL has said, only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence. I have still some doubts whether there was any evidence that they were negligent, but as all the other judges are of opinion that there was evidence that they were, I am quite content that the judgment of the Court below should be affirmed. I do not dissent, but I have some doubt * * * if there was evidence of negligence; if the negligence were once established, it would be no answer that it did much more damage than was expected. If a man fires a gun across a road where he may reasonably anticipate that persons will be passing, and hits some one, he is guilty of negligence, and liable for the injury he has caused; but if he fires in his own wood, where he cannot reason-

ably anticipate that any one will be, he is not liable to any one whom he shoots, which shows that what a person may reasonably anticipate is important in considering whether he has been negligent; but if a person fires across a road when it is dangerous to do so and kills a man who is in receipt of a large income, he will be liable for the whole damage, however great, that may have resulted to his family, and cannot set up that he could not have reasonably expected to have injured any one but a laborer.*

Judgment affirmed.

MILWAUKEE & ST. P. RY. CO. v. KELLOGG.

(Supreme Court of the United States, 1876. 94 U. S. 469, 24 L. Ed. 256.)

Error to the Circuit Court of the United States for the District of Iowa.

MR. JUSTICE STRONG delivered the opinion of the court.

This was an action to recover compensation for the destruction by fire of the plaintiff's saw-mill and a quantity of lumber, situated and lying in the State of Iowa, and on the banks of the river Mississippi. That the property was destroyed by fire was uncontroverted. From the bill of exceptions, it appears:

> That the "plaintiff alleged the fire was negligently communicated from the defendants' steamboat 'Jennie Brown' to an elevator built of pine lumber, and one hundred and twenty feet high, owned by the defendants, and standing on the bank of the river, and from the elevator to the plaintiff's saw-mill and lumber piles, while an unusually strong wind was blowing from the elevator towards the mill and lumber. On the trial, it was admitted that the defendants owned the steamboat and elevator: that the mill was five hundred and thirty-eight feet from the elevator, and that the nearest of the plaintiff's piles of lumber was three hundred and eighty-eight feet distant from it. * * *"

The verdict of the jury was:

> 1st, that the elevator was burned from the steamer "Jennie Brown"; 2d, that such burning was caused by not using ordinary care and prudence in landing at the elevator, under circumstances existing at that particular time; and, 3d, that the burning of the mill and lumber was the unavoidable consequence of the burning of the elevator.

The only reasonable construction of the verdict is, that the fault of the defendants—in other words, their want of ordinary care and prudence—consisted in landing the steamer at the elevator in the circumstances then existing, when a gale of wind was blowing towards it, when the elevator was so combustible and so tall. If this is not the meaning of the verdict, no act of negligence, of want of care, or of fault has been found. And this is one of the faults charged in the declaration. It averred, that, while the wind was blowing a gale from

*The concurring opinion of Martin, B., Pigott, B., and Lush, J., are omitted. Bramwell, B., concurred, without opinion.

the steamboat towards and in the direction of the elevator, the defendants carelessly and negligently allowed, permitted, and counselled (or, as stated in another count, "directed") the steamboat to approach and lie alongside of or in close proximity to the said elevator. This is something more than nonfeasance: it is positive action, the result, consequence, or outworking, as the jury have found it, of the want of such care as should have been exercised. * * *

The next exception is to the refusal of the Court to instruct the jury as requested, that "if they believed the sparks from the 'Jennie Brown' set fire to the elevator through the negligence of the defendants, and the distance of the elevator from the nearest lumber pile was three hundred and eighty-eight feet, and from the mill five hundred and twenty-eight feet, then the proximate cause of the burning of the mill and lumber was the burning of the elevator, and the injury was too remote from the negligence to afford a ground for a recovery." This proposition the Court declined to affirm, and in lieu thereof submitted to the jury to find whether the burning of the mill and lumber was the result naturally and reasonably to be expected from the burning of the elevator; whether it was a result which, under the circumstances, would naturally follow from the burning of the elevator; and whether it was the result of the continued effect of the sparks from the steamboat, without the aid of other causes not reasonably to be expected. All this is alleged to have been erroneous. The assignment presents the oft-embarrassing question, what is and what is not the proximate cause of an injury. The point propounded to the Court assumed that it was a question of law in this case; and in its support the two cases of Ryan v. New York Central Railroad Co., 35 N. Y. 210, 91 Am. Dec. 49, and Pennsylvania Railroad Co. v. Kerr, 62 Pa. 353, 1 Am. Rep. 431, are relied upon. Those cases have been the subject of much criticism since they were decided; and it may, perhaps, be doubted whether they have always been quite understood. If they were intended to assert the doctrine that when a building has been set on fire through the negligence of a party, and a second building has been fired from the first, it is a conclusion of law that the owner of the second has no recourse to the negligent wrong-doer, they have not been accepted as authority for such a doctrine, even in the States where the decisions were made. Webb v. Rome, Watertown & Ogdensburg Railroad Co., 49 N. Y. 420, 10 Am. Rep. 389 and Pennsylvania Railroad Co. v. Hope, 80 Pa. 373, 21 Am. Rep. 100. And certainly they are in conflict with numerous other decided cases. Kellogg v. Chicago & Northwestern Railroad Co., 26 Wis. 224, 7 Am. Rep. 69; Perley v. Eastern Railroad Co., 98 Mass. 414, 96 Am. Dec. 645; Higgins v. Dewey, 107 Mass. 494, 9 Am. Rep. 63; Fent v. Toledo, Peoria & Warsaw Railroad Co., 59 Ill. 349, 14 Am. Rep. 13.

The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the

circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market-place, 2 Bl. Rep. 892. The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. These circumstances, in a case like the present, are the strength and direction of the wind, the combustible character of the elevator, its great height, and the proximity and combustible nature of the saw-mill and the piles of lumber.

Most of these circumstances were ignored in the request for instruction to the jury. Yet it is obvious that the immediate and inseparable consequences of negligently firing the elevator would have been very different if the wind had been less, if the elevator had been a low building constructed of stone, if the season had been wet, or if the lumber and the mill had been less combustible. And the defendants might well have anticipated or regarded the probable consequences of their negligence as much more far-reaching than would have been natural or probable in other circumstances. We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. Here lies the difficulty. But the inquiry must be answered in accordance with common understanding. In a succession of dependent events an interval may always be seen by an acute mind between a cause and its effect, though it may be so imperceptible as to be overlooked by a common mind. Thus, if a building be set on fire by negligence, and an adjoining building be destroyed without any negligence of the occupants of the first, no one would doubt that the destruction of the second was due to the negligence that caused the burning of the first. Yet in truth, in a very legiti-

mate sense, the immediate cause of the burning of the second was the burning of the first. The same might be said of the burning of the furniture in the first. Such refinements are too minute for rules of social conduct. In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time.

If we are not mistaken in these opinions, the Circuit Court was correct in refusing to affirm the defendants' proposition, and in submitting to the jury to find whether the burning of the mill and lumber was a result naturally and reasonably to be expected from the burning of the elevator, under the circumstances, and whether it was the result of the continued influence or effect of the sparks from the boat, without the aid or concurrence of other causes not reasonably to have been expected. The jury found, in substance, that the burning of the mill and lumber was caused by the negligent burning of the elevator, and that it was the unavoidable consequence of that burning. This, in effect, was finding that there was no intervening and independent cause between the negligent conduct of the defendants and the injury to the plaintiff. The judgment must, therefore, be affirmed.

Judgment affirmed.[9]

WOOD v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, 1896. 177 Pa. 306, 35 Atl. 699, 35 L. R. A. 199, 55 Am. St. Rep. 728.)

The action was against the Pennsylvania Railroad Company. The facts as stated by the court below were as follows:

On the 26th of October, 1893, the plaintiff, having bought a return ticket, went as a passenger upon the railroad of the defendant company from Frankford to Holmesburg. After spending the day there, attending to some matters of business, he concluded to come back upon a way train, due at Holmesburg at 5 minutes after 6 in the evening. While waiting for this train, the plaintiff stood on the platform of the station, which was on the north side of the tracks, at the eastern end of the platform, with his back against the wall at the corner. To the eastward of the station, a street crosses the railroad at grade. How far this crossing is from the station does not appear from the evidence. It was not so far away, however, but that persons on the platform could see objects at the crossing. For at least 150 yards to the eastward of the crossing the railroad is straight, and then curves to

[9] Parts of the opinion are omitted.

the right. About 6 o'clock an express train coming from the east upon the north track passed the station, and the plaintiff, while standing in the position described, was struck upon the leg by what proved to be the dead body of a woman, and was injured. The headlight of the approaching locomotive disclosed to one of the witnesses who stood on the platform two women in front of the train at the street crossing, going from the south to the north side of the tracks. One succeeded in getting across in safety, and the other was struck just as she reached the north rail. How the woman came to be upon the track there is nothing in the evidence to show. There was evidence that no bell was rung or whistle blown upon the train which struck the woman before it came to the crossing, and some evidence that it was running at the rate of from 50 to 60 miles an hour.

Upon this state of facts, the trial judge entered a nonsuit. The court in banc having afterwards refused to take off the nonsuit, the case was appealed from the Common Pleas of Philadelphia County.

DEAN, J. (after stating the facts). Was the negligence of defendant the proximate cause of plaintiff's injury? Judge Pennypacker, delivering the opinion of a majority of the court below, concluded it was not, and refused to take off the nonsuit. Applying the rule in Hoag v. Railroad Co., 85 Pa. 293, 27 Am. Rep. 653, to these facts, the question on which the case turns is: "Was the injury the natural and probable consequence of the negligence,—such a consequence as, under the surrounding circumstances, might and ought to have been foreseen by the wrongdoer as likely to flow from his act?" As concerns the situation of plaintiff at the time of his injury, and the relation of that fact to the cause, whether near or remote, we do not consider it important. He was where he had a right to be,—on the platform of the station. That he had purchased a ticket for passage on defendant's road, and was waiting on its platform for his train, has no particular bearing on the question. The duty of defendant to him at that time was to provide a platform and station, safe structures, for him and others who desired to travel. In this particular its duty was performed. The injury is not in the remotest degree attributable to the platform or the station. It is sufficient to say, when there, he was not a trespasser on defendant's property, and therefore his action does not fall for that reason; but he is in no more favorable situation as a suitor than if he had been walking alongside the railroad, on the public highway, or at any other place where he had a right to be.

The rule quoted in Hoag v. Railroad Co., supra, is, in substance, the conclusion of Lord Bacon, and the one given in Broom's Legal Maxims. It is not only the well-settled rule of this state, but is, generally, that of the United States. Prof. Jaggard, in his valuable work on Torts, after a reference to very many of the cases decided in a large number of the states, among them Hoag v. Railroad Co., comes to this conclusion: "It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence,

or an act not amounting to wanton wrong, is a proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." Jag. Torts, c. 5. Judge Cooley states the rule thus: "If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some others, and result, and does actually result, in injury, through the intervention of other causes not wrongful, the injury shall be referred to the wrongful cause, passing through those which were innocent." Cooley, Torts, 69. This, also, is in substance the rule of Hoag v. Railroad Co. All the speculations and refinements of the philosophers on the exact relation of cause and effect help us very little in the determination of rules of social conduct. The juridical cause, in such a case, as we have held over and over, is best ascertained in the practical affairs of life by the application to the facts of the rule in Hoag v. Railroad Co.

Adopting that rule as the test of defendant's liability, how do we determine the natural and probable consequences, which must be foreseen, of this act? We answer in this and all like cases: from common experience and observation. The probable consequence of crossing a railroad in front of a near and approaching train is death, or serious injury. Therefore, acting from an impulse to self-preservation, or on the reflection that prompts to self-preservation, we are deterred from crossing. Our conduct is controlled by the natural and probable consequence of what our experience enables us to foresee. True, a small number of those who have occasion to cross railroads are reckless, and, either blind to or disregardful of consequences, cross, and are injured, killed, or barely escape. But this recklessness of the very few in no degree disproves the foreseeableness of the consequences by mankind generally. Again, the competent railroad engineer knows from his own experience and that of others in like employment that to approach a grade highway crossing with a rapidly moving train without warning is dangerous to the lives and limbs of the public using the crossing. He knows death and injury are the probable consequences of his neglect of duty; therefore he gives warning. But does any one believe the natural and probable consequence of standing 50 feet from a crossing, to the one side of a railroad, when a train is approaching, either with or without warning, is death or injury? Do not the most prudent, as well as the public generally, all over the land, do just this thing every day, without fear of danger? The crowded platforms and grounds of railroad stations, generally located at crossings, alongside of approaching, departing, and swiftly passing trains, prove that the public, from experience and observation, do not, in that situation, foresee any danger from trains. They are there because, in their judgment, although it is possible a train may strike an object, animate or inanimate, on the track, and hurl it against them, such a consequence is so highly improbable that it suggests no sense of dan-

ger. They feel as secure as if in their homes. To them it is no more probable than that a train at that point will jump the track and run over them. If such a consequence as here resulted was not natural, probable, or foreseeable to anybody else, should defendant, under the rule laid down in Hoag v. Railroad Co., be chargeable with the consequence? Clearly, it was not the natural and probable consequence of its neglect to give warning, and therefore was not one which it was bound to foresee. The injury, at most, was remotely possible, as distinguished from the natural and probable consequences of the neglect to give warning. As is said in Railroad Co. v. Trich, 117 Pa. 399, 11 Atl. 627, 2 Am. St. Rep. 672: "Responsibility does not extend to every consequence which may possibly result from negligence."

What we have said thus far is on the assumption the accident was caused solely by the negligence of defendant, or by the concurring negligence of defendant and the one killed going upon the track with a locomotive in full view. This being an action by an innocent third person, he cannot be deprived of his remedy because his injury resulted from the concurrent negligence of two others. He fails because his injury was a consequence so remote that defendant could not reasonably foresee it. * * *

Judgment affirmed.[10]

[10] Part of the opinion is omitted.

Accord: Evansville & T. H. R. Co. v. Welch (1900) 25 Ind. App. 308, 58 N. E. 88, 81 Am. St. Rep. 102: (A locomotive, negligently run by D. at a dangerous speed over public grade crossings in a town, struck S. on one of these crossings. The impact of the locomotive hurled the body of S. through the air and against P., who was standing on the platform of the station waiting for a train. Said Henley, J., delivering the opinion: "It is possible that persons may be injured in the manner in which appellee received his injury. Sufficient proof of this is the fact that appellee was so injured. But such an injury cannot be said to be one which the most prudent man would have anticipated. The manner in which appellee was injured was unusual and extraordinary and contrary to common experience. It was such an injury as could not have been foreseen or reasonably anticipated as the probable result of appellant's negligent acts. Under such circumstances there is no liability.) Richards v. Rough (1884) 53 Mich. 212, 18 N. W. 785; Hoag v. Lake Shore, etc., R. Co. (1877) 85 Pa. St. 293, 27 Am. Rep. 653; Sjogren v. Hall (1884) 53 Mich. 274, 18 N. W. 812; Mitchell v. Chicago, etc., R. Co. (1883) 51 Mich. 236, 16 N. W. 388, 47 Am. Rep. 566; Wabash, etc., R. Co. v. Locke (1887) 112 Ind. 404, 14 N. E. 391, 2 Am. St. Rep. 193; City of Allegheny v. Zimmerman (1880) 95 Pa. 287, 40 Am. Rep. 649; Stewart v. Strong (1897) 20 Ind. App. 44, 50 N. E. 95."

But see Alabama G. S. R. Co. v. Chapman (1887) 80 Ala. 615, 2 South. 738: (The defendant's train, running through a town too fast to be stopped promptly, struck a cow on an embankment. The body of the cow was hurled off the track by the impact of the locomotive, hit the ground, bounced, and hit the plaintiff, who was walking along a footpath at the bottom of the embankment. Said Clopton, J., delivering the opinion: It is insisted that the act of the defendant was only the remote cause of the injury. When the cow was thrown by the engine, it struck the ground, bounced, and fell against plaintiff. The bounce and fall of the cow was the immediate cause, but it was merely incidental, and was not an independent agency, which had no connection with the act of the defendant. The direct cause was put in operation by the force of the engine, which continued until the injury; and injuries, directly produced by instrumentalities thus put in operation and continued, are

CHRISTIANSON v. CHICAGO, ST. P., M. & O. RY. CO.

(Supreme Court of Minnesota, 1896. 67 Minn. 94, 69 N. W. 640.)

The action was by Christianson against the railway company, to recover for personal injuries caused by the alleged negligence of the defendant's servants. There was a verdict for the plaintiff. From an order refusing a new trial the defendant appealed.

MITCHELL, J. * * * [11] The plaintiff was in defendant's employ as a section hand. On the day in question, he and two other sectionmen started easterly on a hand car, to meet their section foreman. In the meantime, another section crew, with plaintiff's section foreman, had started westerly from another point, on another hand car. When the two cars came within a short distance of each other, those on the westbound signaled those on the east-bound car to go back. Thereupon those on the latter car turned back, and both cars proceeded westerly, the car on which plaintiff was going ahead, and the other car following. It appears from the evidence that those on the rear car had, before starting out that morning, imbibed several drinks of whisky; and that, while both cars were going westerly, some of them once or twice signaled to those on the forward car as if wanting them to go faster. The only significance of this is that it may in part, at least, account for the conduct of those on the rear car. This part of the railroad was a downgrade of from 52 to 58 feet to the mile, and the track was wet and somewhat slippery. The cars were running down this grade at a rate of speed variously estimated at from 10 to 20 miles an hour. The front car, on which plaintiff was, was of old style, not capable of as great a rate of speed as the rear car; and, owing to the nature of its gearing, the handles attached to the lever moved very rapidly; so much so that it was difficult for one standing on the car to hold on to them. Plaintiff was standing on the rear end of the car, with nothing to hold on to except these handles. The other two men were on the front end of the car where the brake was. The usual distance at which hand cars kept apart, according to the rules of the company, was "three telegraph poles," which would be 540 feet. At the rate of speed at which it was going, the rear car could not have been brought to a stop by the application of the brake in less than 100 feet. The cars had traveled in this way about a mile and a quarter, the rear

proximate consequences of the primary act, though they may not have been contemplated or foreseen. The relation of cause and effect between the primary cause and the injury is established by the connection and succession of the intervening circumstances. If the cow was thrown from the track by the negligence of defendant, the injury cannot be regarded as a purely accidental occurrence for which no action lies.) East Tennessee, V. & G. R. Co. v. Lockhart (1885) 79 Ala. 315; Alabama G. S. R. Co. v. Arnold (1887) 80 Ala. 615, 2 South. 337."

See also Columbus R. Co. v. Newsome (1914) 142 Ga. 674, 83 S. E. 506, L. R. A. 1915B, 1111.

[11] Parts of the opinion, on other matters, are omitted.

car gaining on the forward one, until it got within 60 feet of it. The plaintiff testified that at this point he looked back, and, seeing the other car so near, and going so fast, became dizzy, lost his balance, and fell off. It is perhaps unimportant whether his fall was the result of fright caused by seeing the other rapidly moving car so near, or whether he accidentally lost his hold on the handle of the lever, and lost his balance. The fact is undisputed that he did fall off. We think the evidence shows that, after the men on the rear car saw him fall, they did all they could to stop their car; but going, as they were, at so great a rate of speed, and being within 60 feet of the front car, it was impossible for them to avoid colliding with the plaintiff. The result was that the car ran upon him while lying on the track, and inflicted very severe injuries. * * *

That, under the evidence, the question of the negligence of those on the rear car was for the jury, we have no doubt. The usual practice, in accordance with the rules of the company, for hand cars, when going in the same direction, to maintain a distance between them of "three telegraph poles," was founded upon the plainest dictates of common prudence. The faster the cars were going, and the greater the distance required to stop the rear car, the greater was the necessity for the observance of this rule, so as to avoid injury in case of accident to the front car or those riding upon it. But in this case, although the cars were going at a high rate of speed on the downgrade and a slippery track, those on the rear car allowed it to come within only a little over half the distance of the front car in which they could have stopped had any accident befallen the front car or its occupants. The jury were amply justified in finding that, in so doing, the occupants of the rear car were guilty of negligence.

The main contention, however, of defendant's counsel, is that, conceding that those on the rear car were negligent, yet plaintiff's injuries were not the proximate result of such negligence; or, perhaps to state their position more accurately, that it is not enough to entitle plaintiff to recover that his injuries were the natural consequence of this negligence, but that it must also appear that, under all the circumstances, it might have been reasonably anticipated that such injury would result. With this legal premise assumed, counsel argues that those on the rear car could not have reasonably anticipated that plaintiff would fall from the car. It is laid down in many cases and by some text-writers that, in order to warrant a finding that negligence (not wanton) is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent act, and that it (the injury) was such as might or ought, in the light of attending circumstances, to have been anticipated. Such or similar statements of law have been inadvertently borrowed and repeated in some of the decisions of this court, but never, we think, where the precise point now under consideration was involved. Hence such statements are mere obiter. The doctrine contended for by counsel

would establish practically the same rule of damages resulting from tort as is applied to damages resulting from breach of contract, under the familiar doctrine of Hadley v. Baxendale, 9 Exch. 341. This mode of stating the law is misleading, if not positively inaccurate. It confounds and mixes the definition of "negligence" with that of "proximate cause." What a man may reasonably anticipate is important, and may be decisive, in determining whether an act is negligent, but is not at all decisive in determining whether that act is the proximate cause of an injury which ensues. If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then, of course, the act would not be negligent at all; but, if the act itself is negligent, then the person guilty of it is equally liable for all its natural and proximate consequences, whether he could have foreseen them or not. Otherwise expressed, the law is that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen. Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow. Bevan, Neg. p. 97; Hill v. Winsor, 118 Mass. 251; Smith v. Railway Co., L. R. 6 C. P. 14. For citation of cases on this question, see 16 Am. & Eng. Enc. Law, p. 436 et seq.; also, Shear. & R. Neg. § 28 et seq. Tested by this rule, we think that it is clear that the negligence of those on the rear car was the proximate cause of plaintiff's injuries; at least, that the evidence justified the jury in so finding. Counsel admitted on the argument that if, by derailment or other accident, the front car had been suddenly stopped, and a collision and consequent injuries to plaintiff had resulted, the negligence of those on the rear car would have been the proximate cause. But we can see no difference in principle between the case supposed and the present case. The causal connection between the negligent act and the resulting injury would be the same in both cases. The only possible difference is that it might be anticipated that the sudden stoppage of the car was more likely to happen than the falling of one of its occupants upon the track.† * * *

Order affirmed.

†Compare Wilson v. Northern Pac. Ry. Co. (1915, N. D.) 153 N. W. 429: (A prairie fire negligently started by the railway company, threatened the destruction of Wilson's homestead. His wife, acting in his absence, and using reasonable efforts to save the property, overexerted herself and thereby suffered a serious injury.)

McCAHILL v. NEW YORK TRANSP. CO.

(Court of Appeals of New York, 1911. 201 N. Y. 221, 94 N. E. 616, 48 L. R. A. [N. S.] 131, Ann. Cas. 1912A, 961.)

The administratrix of John McCahill, deceased, sued the New York Transportation Company for his death, and obtained judgment in the trial court. The judgment was affirmed in the Appellate Division, and the defendant appeals to this court.

HISCOCK, J. One of the appellant's taxicabs struck respondent's intestate on Broadway, in the city of New York, in the nighttime under circumstances which, as detailed by the most favorable evidence, permitted the jury to find that the former was guilty of negligence and the latter free from contributory negligence. As a result of the accident the intestate was thrown about 20 feet, his thigh broken and his knee injured. He immediately became unconscious, and was shortly removed to a hospital, where he died on the second day thereafter of delirium tremens. A physician testified that the patient when brought to the hospital "was unconscious or irrational rather than unconscious. * * * He rapidly developed delirium tremens. * * * I should say with reasonable certainty the injury precipitated his attack of delirium tremens, and understand I mean precipitated, not induced." And, again, that in his opinion "the injury to the leg and the knee hurried up the delirium tremens." He also stated: "He might have had it (delirium tremens) anyway. Nobody can tell that." Of course it is undisputed that the injuries could not have led to delirium tremens except for the pre-existing alcoholic condition of the intestate, and under these circumstances the debatable question in the case has been whether appellant's negligence was, legally speaking, the proximate cause of intestate's death. It seems to me that it was, and that the judgment should be affirmed.

In determining this question, it will be unnecessary to quote definitions of proximate cause which might be useful in testing an obscure, involved, or apparently distant relationship between an act and its alleged results, for the relationship here is perfectly simple and obvious. The appellant's automobile struck and injured the traveler. The injuries precipitated, hastened, and developed delirium tremens, and these caused death. There can be no doubt that the negligent act directly set in motion the sequence of events which caused death at the time it occurred. Closer analysis shows that the real proposition urged by the appellant is that it should not be held liable for the results which followed its negligence, either, first, because those results would not have occurred if intestate had been in a normal condition; or, secondly, because his alcoholism might have caused delirium tremens and death at a later date even though appellant had not injured him. This proposition cannot be maintained in either of its branches which are somewhat akin.

The principle has become familiar in many phases that a negligent person is responsible for the direct effects of his acts, even if more serious, in cases of the sick and infirm as well as in those of healthy and robust people, and its application to the present case is not made less certain because the facts are somewhat unusual and the intestate's prior disorder of a discreditable character. Tice v. Munn, 94 N. Y. 621; Crank v. Forty-Second Street, M. & St. N. Ave. Ry. Co., 53 Hun, 425, 6 N. Y. Supp. 229, affirmed 127 N. Y. 648, 27 N. E. 856; Allison v. C. & N. W. R. R. Co., 42 Iowa, 274; Owens v. K. C. & C. Ry. Co., 95 Mo. 169, 182, 8 S. W. 350, 6 Am. St. Rep. 39. The principle is also true, although less familiar, that one who has negligently forwarded a diseased condition, and thereby hastened and prematurely caused death, cannot escape responsibility, even though the disease probably would have resulted in death at a later time without his agency. It is easily seen that the probability of later death from existing causes for which a defendant was not responsible would probably be an important element in fixing damages, but it is not a defense.

Turner v. Nassau Electric R. R. Co., 41 App. Div. 213, 58 N. Y. Supp. 490, was a case singularly similar to this one, except that there the physician ventured the opinion that delirium tremens would not have ensued except for the accident resulting from defendant's negligence, whereas in the present case there is no opinion on this point. I think, however, that no presumption can be indulged in for the benefit of the present appellant that delirium tremens would have occurred without its agency. In that case a judgment in favor of the intestate's representative was sustained on the ground that the accident precipitated the delirium tremens which resulted in the death.

In Louisville, etc., R. R. Co. v. Jones, 83 Ala. 376, 382, 3 South. 902, 904, it was said that if an intestate "had pneumonia or incipient pneumonia at the time she received the injury, and it could be known that she would ultimately die of that disease, this would not necessarily, and as a matter of law, relieve the railroad of all responsibility. If the injury was caused by the negligence of the railroad company, * * * and if it contributed to and hastened her death, then the corporation would not be guiltless."

In Jeffersonville, etc., R. R. Co. v. Riley, 39 Ind. 568, it was said with reference to a request to charge made by the defendant and denied: "If it was intended to have the court say to the jury that when a person has a tendency to insanity or disease, and receives an injury which produces death, but which would not have produced death in a well person (the plaintiff cannot recover), the charge was rightly refused. If death was the result of the pre-existing circumstances, and the injury had nothing to do with producing or accelerating the result, then the injury would not be the cause of death." See, also, Owens v. K. C. & C. Ry. Co., 95 Mo. 169, 182, 8 S. W. 350, 6 Am. St. Rep. 39; Foley v. Pioneer, etc., Co., 144 Ala. 178, 183, 40 South. 273.

The responsibility of a person accelerating the death of another already suffering from a disorder which at a later period of itself might have caused death has been considered in criminal cases and determined in a manner which is adverse to the contention of the appellant here. * * *[12]

I think the judgment should be affirmed, with costs.

VANN, J.[13] I concur because so far as appears the decedent might be living yet if he had not been injured by the negligence of the defendant. * * *

The injuries were of a very serious nature, and he died on the third day after he was hurt, but still the physicians who saw him at the hospital were of the opinion that he would have recovered if delirium tremens had not set in on the day following the accident. They testified, in substance, that he died from that disease, precipitated or hastened by the injuries he had sustained. One of them swore that he might have died from delirium tremens even if he had not been injured, and the jury could have found from the evidence that he would not have had that disease at all but for the injuries. Hence they could properly find, as they are presumed to have found, that the injuries were a proximate cause of his death, because otherwise he would not have died when he did, but might have lived for months or for years. Non constat, he might be living still. Even if he had the seeds of a fatal disease in his system, yet would have continued to live for a longer or shorter period if he had not been injured, and the injuries caused the disease to develop prematurely and result in death sooner than it otherwise would, his death was caused by the accident within the meaning of the statute. The acceleration of death causes death according to both the civil and the criminal law. Clover, Clayton & Co. v. Hughes, L. R. (App. Cas. 1910) 242; Hopkins v. Commonwealth, 117 Ky. 941, 80 S. W. 156, 4 Ann. Cas. 957; Powell v. State, 13 Tex. App. 244, 254; Winter v. State, 123 Ala. 1, 11, 26 South. 949; Rogers v. State, 60 Ark. 76, 79, 29 S. W. 894, 31 L. R. A. 465, 46 Am. St. Rep. 154; Baker v. State, 30 Fla. 41, 71, 11 South. 492; Rex v. Martin, 5 C. & P. 128, 130; Rex v. Webb, 1 M. & Rob. 405; People v. Moan, 65 Cal. 532, 537, 4 Pac. 545; State v. Morea, 2 Ala. 275, 279.

In Clover, Clayton & Co. v. Hughes, recently decided by the House of Lords, a workman suffering from serious aneurism, or abnormal dilitation of an artery, was engaged in tightening a nut when he fell dead from rupture of the aneurism, and it was held a death resulting from accident, because it was caused by a strain operating upon a condition of body which was such as to make the strain fatal.

[12] Hiscock, J., here referred to Hale's Pleas of the Crown, page 428; Bishop's Criminal Law (5th Ed.) § 637; Commonwealth v. Fox (1856) 73 Mass. (7 Gray) 585; State v. Smith (1887) 73 Iowa, 32, 41, 34 N. W. 597, 601; Rex v. Martin (1832) 5 C. & P. 128, 130; Regina v. Plummer (1844) 1 C. & K. 600, 607.

[13] Parts of the opinion of Vann, J., are omitted.

In People v. Moan the court said: "If a patient is lying in the last stages of consumption, with a tenure upon life that cannot possibly continue for a day, it is homicide to administer a poison to him by which his life is ended almost immediately. So in the case we are now considering, if Finck, by excessive indulgence in intoxicating drinks, had reduced himself to a wreck and brought his life to the brink of the grave, it was a wrongful act for the defendant to accelerate his death by violence. Perhaps blows delivered with equal force on the head of a strong man in the enjoyment of robust health would not have been attended by any serious consequences; but upon a life impaired as Finck's was by self-abuse they may have accelerated his death; and but for the blows the man would not have died, at least not at the time he did. This makes the defendant criminally responsible." * * *

A person with an incurable disease may be so injured as to aggravate the trouble and hasten it to a fatal result. In such a case death is owing to two concurring causes, disease and violence, neither of which would have caused death when it occurred without aid from the other. One cause may be more efficient than the other, yet, unless acting alone, it would have resulted in death, not in the future, but, when death actually came, it is not of itself the proximate cause. While in this case delirium tremens was not caused by the accident, it was set in motion by the accident and thus became an effective agency of death, the same as if the decedent had had heart disease, but would have continued to live a while longer had it not been set in motion and hurried to a fatal end by violence.

The judgment should be affirmed.[14]

Judgment affirmed.

SCHEFFER v. RAILROAD CO.

(Supreme Court of the United States, 1881. 105 U. S. 249, 26 L. Ed. 1070.)

Error to the Circuit Court of the United States for the Eastern District of Virginia.

MR. JUSTICE MILLER delivered the opinion of the court.

The plaintiffs, executors of Charles Scheffer, deceased, brought this action to recover of the Washington City, Virginia Midland, and Great Southern Railroad Company damages for his death, which they allege resulted from the negligence of the company while carrying him on its road. The defendant's demurrer to their declaration was sustained, and to reverse the judgment rendered thereon they sued out this writ of error.

The statute of Virginia under which the action was brought is, as to the question raised on the demurrer, identical with those of all the

[14] Gray and Collin, JJ., concurred with Hiscock, J.; Cullen, C. J., and Werner, J., concurred with Hiscock and Vann, JJ. Haight, J., was absent.

other States, giving the right of recovery when the death is caused by such default or neglect as would have entitled the party injured to recover damages if death had not ensued.

The declaration, after alleging the carelessness of the officers of the company, by which a collision occurred between the train on which Scheffer was and another train, on the seventh day of December, 1874, proceeds as follows:

"Whereby said sleeping-car was rent, broken, torn, and shattered, and by means whereof the said Charles Scheffer was cut, bruised, maimed, and disfigured, wounded, lamed, and injured about his head, face, neck, back, and spine, and by reason whereof the said Charles Scheffer became and was sick, sore, lame, and disordered in mind and body, and in his brain and spine, and by means whereof phantasms, illusions, and forebodings of unendurable evils to come upon him, the said Charles Scheffer, were produced and caused upon the brain and mind of him, the said Charles Scheffer, which disease, so produced as aforesaid, baffled all medical skill, and continued constantly to disturb, harass, annoy, and prostrate the nervous system of him, the said Charles Scheffer, to wit, from the seventh day of December, A. D. 1874, to the eighth day of August, 1875, when said phantasms, illusions, and forebodings, produced as aforesaid, overcame and prostrated all his reasoning powers, and induced him, the said Charles Scheffer, to take his life in an effort to avoid said phantasms, illusions, and forebodings, which he then and there did, whereby and by means of the careless, unskilful, and negligent acts of the said defendant aforesaid, the said Charles Scheffer, to wit, on the eighth day of August, 1875, lost his life and died, leaving him surviving a wife and children."

The Circuit Court sustained the demurrer on the ground that the death of Scheffer was not due to the negligence of the company in the judicial sense which made it liable under the statute. That the relation of such negligence was too remote as a cause of the death to justify recovery, the proximate cause being the suicide of the decedent,—his death by his own immediate act. In this opinion we concur.

Two cases are cited by counsel, decided in this Court, on the subject of the remote and proximate causes of acts where the liability of the party sued depends on whether the act is held to be the one or the other; and, though relied on by plaintiffs, we think they both sustain the judgment of the Circuit Court.

The first of these is Insurance Company v. Tweed, 7 Wall. 44, 19 L. Ed. 65. In that case a policy of fire insurance contained the usual clause of exception from liability for any loss which might occur "by means of any invasion, insurrection, riot, or civil commotion, or any military or usurped power, explosion, earthquake, or hurricane." An explosion took place in the Marshall warehouse, which threw down the walls of the Alabama warehouse,—the one insured, situated across the street from Marshall warehouse,—and by this means, and by the sparks from the Eagle Mill, also fired by the explosion, facilitated by the direction of the wind, the Alabama warehouse was burned. This Court held that the explosion was the proximate cause of the loss of the Alabama warehouse, because the fire extended at once from the Marshall warehouse, where the explosion occurred. The

Court said that no new or intervening cause occurred between the explosion and the burning of the Alabama warehouse. That if a new force or power had intervened, sufficient of itself to stand as the cause of the misfortune, the other must be considered as too remote.

This case went to the verge of the sound doctrine in holding the explosion to be the proximate cause of the loss of the Alabama warehouse; but it rested on the ground that no other proximate cause was found.

In Milwaukee & St. Paul Railway Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256, the sparks from a steam ferryboat had, through the negligence of its owner, the defendant, set fire to an elevator. * * *[15]

Bringing the case before us to the test of these principles, it presents no difficulty. The proximate cause of the death of Scheffer was his own act of self-destruction. It was within the rule in both these cases a new cause, and a sufficient cause of death.

The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering, and eight months' disease and medical treatment to the original accident on the railroad. Such a course of possible or even logical argument would lead back to that "great first cause least understood," in which the train of all causation ends.

The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train.

His insanity, as a cause of his final destruction, was as little the natural or probable result of the negligence of the railway officials, as his suicide, and each of these are casual or unexpected causes, intervening between the act which injured him, and his death.[16]

Judgment affirmed.

[15] Mr. Justice Miller here stated the facts in Milwaukee & St. Paul Ry. Co. v. Kellogg and quoted part of the opinion. Reference was made also to McDonald v. Snelling (1867) 14 Allen (Mass.) 290, 92 Am. Dec. 768, as being to the same effect.

[16] Compare Daniels v. New York, N. H. & H. R. Co. (1903) 183 Mass. 393, 67 N. E. 424, 62 L. R. A. 751: (The succession was as follows: August 12, a blow on the head in a railway accident caused by the negligence of the defendant railway company; some weeks later, insomnia, melancholy, and delirium; on October 3d, suicide through a planned act. The testimony tended to establish insanity resulting from the blow on the head. A recovery was denied. Said Knowlton, C. J.: "All agree that death self caused in an uncontrollable frenzy, without knowledge or appreciation of the physical nature of the act, would not be death by suicide, or by one's own hand, within the meaning of such a provision in a policy (of insurance). * * * An act of suicide resulting from a moderately intelligent power of choice, even though the choice is determined by a disordered mind, should be deemed a new and independent, efficient cause of the death that immediately ensues. We are of opinion that the term 'rational volition,' used in the charge, was understood by the jury to mean volition attended by the powers of reason, to

BROWN v. AMERICAN STEEL & WIRE CO.

(Appellate Court of Indiana, 1909. 43 Ind. App. 560, 88 N. E. 80.)

MYERS, J. Appellant brought this action against appellee to recover damages for the alleged negligent killing of William Cruse, appellant's intestate. From the amended complaint, which was in one paragraph, it appears that on January 27, 1903, appellee was engaged in the manufacture of nails, and other metal goods, at Anderson, Ind., and on that day said decedent was in its employ as a helper in and about one of its nail machines, the cogs, gearing, belting, etc., of which machine appellee had negligently and carelessly failed and omitted to guard; that while said machine was being operated, said decedent was caught by said unguarded cogs, etc., and thereby greatly and seriously injured; "that such described injuries so received by said decedent through and by the carelessness and negligence of the defendant in the manner aforesaid did cause and produce the death of the said William Cruse, decedent, on or about October 30, 1903." The sufficiency of the complaint is not before us. Appellee answered the complaint in two paragraphs; one in denial; the other averring a compromise and settlement with the decedent for all claims by reason of the injuries so sustained by him. * * * [17]

In the case at bar the facts are undisputed. * * * While the decedent was working about said machine, he was caught in said unguarded cogs. His right arm from near his wrist up to a little below his shoulder was severely cut and mashed. He received a cut about three inches long, triangular shaped, on top of his head, a cut on the side of his head near his temple, and a cut on his back just below the right shoulder, about three inches wide and four inches long, and deep enough to expose a rib and his spinal column. His hips were severely bruised and injured. Immediately after the accident he was taken to a hospital, where his wounds were dressed by surgeons, and

consider and judge of the act in all its relations,—moral as well as physical,—and that the charge was in this respect too favorable to the plaintiff. The burden of proof was on the plaintiff to show that the death was caused by the collision. All the evidence tended to show that the deceased, with deliberate purpose, planned to take his own life; that he closed the door, and locked it, with a view to exclude others and prevent interruption; and that he then took the napkin, and used it effectively to strangle himself. All this points to an understanding of the physical nature and effect of his act, and to a willful and intelligent purpose to accomplish it. That he was insane, so as to be free from moral responsibility, is not enough to make the defendant liable. We are unable to discover any evidence that he was acting without volition, under an uncontrollable impulse, or that he did not understand the physical nature of his act. In the absence of any affirmative evidence for the plaintiff on this point, the jury should have been instructed to render a verdict for the defendant.")

[17] Part of the opinion, giving the history of the action, and discussing certain questions in procedure, is omitted. The case was tried twice. The first trial resulted in a verdict for the plaintiff; the second, in a verdict for the defendant.

where he remained until the latter part of August. From the hospital he went to a private boarding house in Anderson, and about the middle of September he went to the home of his father at Nora, Ind., and remained there until the day of his death, October 31st. For five years continuously and immediately prior to said accident the decedent was strong and healthy, and from the time of the accident until his death was physically weak and unable to do any work. It appears that on the same day, and shortly after the accident, he became unconscious, and remained in that condition for several hours; that at times during the two weeks next following the day of the injury he would become insensible, and did not recognize his son. At intervals thereafter, until he died, he was unable to recognize members of his own family. After the accident, and after he had gained consciousness, and when in his best physical and mental condition, he would continually complain of pain in his head; that the side of his head was heavy, and at times complained of being dizzy. At times he complained about not knowing what he was doing. He was melancholy. His talk was incoherent. Occasionally he would start a sentence directed to one subject and close it with reference to some other subject. He was constantly rubbing his head. He frequently could not remember the names of his children. The undisputed evidence is that at the time of his death he was a person of unsound mind. It was agreed by the parties:

"That on the 31st day of October, 1903, in the evening of that day, Mr. Cruse, the decedent in this case, left his father's home in Nora, situated in Marion county, Ind., and was not heard of or seen for three weeks from that date, at which time he was found near Nora in a corn field, lying between two corn rows, with his coat and vest removed and lying close to him, with his own pocket knife open in or near to his hand, and with his throat cut, severing the jugular vein, with some three cuts in the throat, and that his property, a watch and some money, was intact in his pocket, and that he was dead. It is further agreed that he took his own life, and died from the effects of the knife wounds, self-inflicted."

Appellant's authority to bring and maintain this action rests solely upon the statute (section 285, Burns' Ann. St. 1908), which provides that: "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he or she (as the case may be) lived, against the latter for an injury for the same act or omission." Under this statute the death must have been "caused by the wrongful act or omission of another." * * *[18]

From the cases bearing upon the subject now being considered the rule seems to be that an action under the statute may be maintained

[18] The court here stated the facts of Scheffer v. Railroad Co. (1881) 105 U. S. 249, 26 L. Ed. 1070, and of Daniels v. N. Y. R. Co. (1903) 183 Mass. 393, 67 N. E. 424, 62 L. R. A. 751, and quoted parts of these opinions.

when the death is self-inflicted, only where it is the result of an uncontrollable influence, or is accomplished in delirium or frenzy, caused by the defendant's negligent act or omission, and without conscious volition of a purpose to take life; for then the act would be that of an irresponsible agent. Daniels v. New York, etc., R. Co., 183 Mass. 393, 67 N. E. 424, 62 L. R. A. 751; Scheffer v. Railroad Company, 105 U. S. 249, 26 L. Ed. 1070; Goodlander Mill Co. v. Standard Oil Co., 63 Fed. 400, 405, 11 C. C. A. 253, 27 L. R. A. 583; Chicago, etc., Ry. Co. v. Elliott, 55 Fed. 949, 951, 5 C. C. A. 347, 20 L. R. A. 582; Ronker v. St. John, 21 Ohio Cir. Ct. R. 39; Maguire v. Sheehan, 117 Fed. 819, 54 C. C. A. 642, 59 L. R. A. 496. While the rule is general that an intervening responsible agent cuts off the line of causation from the original negligence, yet we are not unmindful of "the qualification that, if the intervening act is such as might reasonably have been foreseen or anticipated as the natural and probable result of the original negligence, the original negligence will, notwithstanding such intervening act, be regarded as the proximate cause of the injury." Nickey v. Steuder, 164 Ind. 189, 73 N. E. 117. The burden was on appellant to prove that decedent's death was caused by the neglect of appellee to guard the cogwheels. It is not enough to show negligence and the injury, but in addition appellant must also show that appellee's negligence proximately caused Cruse's death. The decedent's right to damages, had he lived, was a common-law right, limited to the damage sustained, attributable to the negligence of appellee. Appellant's right to recover, being statutory, depends upon whether her decedent could have maintained an action, had he lived, against appellee for a self-inflicted injury, as the active, operative, continuing, and the probable and natural sequence of the original injury.

In actions of this character the evidence must be such as to warrant the jury in finding that the decedent in taking his life acted "without volition, under an uncontrollable impulse, or that he did not understand the physical nature of his act." Daniels v. New York, etc., R. Co., 183 Mass. 393, 67 N. E. 424, 62 L. R. A. 751. Turning again to the record in this case, we find no evidence as to the decedent's strength of mind during a few weeks immediately prior to his death, but, assuming that his improved condition in that respect a few weeks before the day of the suicide continued, taken in connection with the agreed facts heretofore set out in this opinion, instead of showing a want of conscious volition, strongly indicates that the decedent had a mind capable of conceiving a purpose of taking his life, as well as a knowledge of the means which would certainly carry his purpose into effect. This conclusion from the evidence leaves an essential fact to support a verdict for plaintiff unsustained by the evidence; and, this being true, the trial court did not err in directing a verdict for the defendant. Louisville, etc., Ry. Co. v. Nitsche, 126

Ind. 229, 26 N. E. 51, 9 L. R. A. 750, 22 Am. St. Rep. 582; Cole v. German Savings & Loan Society, 124 Fed. 113, 122, 59 C. C. A. 593, 63 L. R. A. 416.

Judgment affirmed.

SECTION 3.—INTERVENING AGENCY AS A TEST OF LEGAL CAUSE

WOOLLEY v. SCOVELL.

(Court of King's Bench, 1828. 3 Man. & R. 105, 32 R. R. 716.)

Case for negligence in throwing a bag of wool from a lofty warehouse into a yard, whereby the wool fell upon the plaintiff, who was in the yard, and injured him. Plea, not guilty. At the trial before Lord Tenterden, C. J., at the sittings at Guildhall after last Term, the following facts appeared:

The defendant was the occupier of a warehouse the windows of which opened into a yard. Having occasion to remove a bag of wool from an upper floor of the warehouse, the defendant, for the purpose of saving time and expense, directed his servants to throw the wool out of the window of the warehouse. Before the bag was dropped from the window, one of the defendant's servants called out to warn passengers. The plaintiff, who happened to be in the yard, looked up and saw the wool as it was thrust out of the window; he then ran across the yard, thinking, as he afterwards said, that he should have time to escape. The wool, however, fell upon him, and he sustained a considerable injury. The learned Judge told the jury, that if they were of opinion that the plaintiff ran wantonly or carelessly into danger, they ought to find a verdict for the defendant; but that if they thought the plaintiff had lost his presence of mind by the act of the defendant, and in the confusion produced by the situation in which he found himself, had run into the danger, they ought to give their verdict for the plaintiff.

The jury found a verdict for the plaintiff, damages £150.

Sir J. Scarlett now moved to set aside the verdict, on the ground of misdirection: The rule laid down by the learned Judge was very humane, but it is submitted that it was not founded in law. The law should not vary according to the nerves of parties. It is true that with respect to ships, the loss must be borne by the party who was first in the wrong; but there the other party has not the entire control over the motions of his vessel, which depend upon the winds and waves. (BAYLEY, J. You complain of that part of the direction in which the jury were told, that if the plaintiff was deprived of his presence of mind by the wrongful act of the defendant, he was entitled to their verdict; not that the facts of the case did not warrant such an inference.)

LORD TENTERDEN, C. J. The first fault was the throwing of the wool from the window instead of lowering it by the usual mode, by a crane. This, the defendant admitted, he did to save time.

BAYLEY, J. I think the direction was right. Whether the plaintiff was deprived of his presence of mind by the act of the defendant, was a question for the jury.

LITTLEDALE, J. I have no doubt whatever that the direction was right. It is not surprising that the plaintiff should have been alarmed, and should thereby have lost his self-possession; and this alarm was occasioned by the wrongful act of the defendant.

Rule refused.

MUNSEY v. WEBB.

(Supreme Court of the United States, 1913. 231 U. S. 150, 34 Sup. Ct. 44, 58 L. Ed. 162.)

MR. JUSTICE HOLMES delivered the opinion of the court:

This is an action brought against the owner of a building for causing the death of the plaintiff's intestate in an elevator in which the deceased was being carried to his place of employment. Negligent construction and negligent management of the elevator are alleged. The plaintiff had a verdict against a request by the defendant that one be directed for him, the judgment was affirmed by the court of appeals (37 App. D. C. 185), and the defendant brought the case here.

The elevator car did not quite fill the well, or shaft, and the bottom of the floor that it was approaching projected at right angles into the well about 3½ inches. The car was equipped with a collapsible door, which was open at the time of the accident, and the boy in charge did not have his arm across the space as he had been instructed to do. Between the fourth and fifth floors the deceased fell, and his head was caught between the projecting bottom of the fifth floor and the floor of the car and was crushed. The negligence relied upon is the leaving of the door open and failure to guard the space; the not having a flange or piece of metal inclining from the projecting floor to the shaft wall, and the failure to use an emergency switch, the quickest means of stopping the car, the boy in charge not having been instructed in the use of it.

The plaintiff in error argued at some length that there was no negligence, because the fall of deceased was something wholly out of the ordinary course, and not to be foreseen; or that, if there was negligence in any sense, it was not the proximate cause of the death, but merely a passive condition made harmful by the fall. Neither argument can be maintained. It is true that it was not to be anticipated specifically that a man should drop from internal causes into the open door of the car. But the possibility and the danger that in some way one in the car should get some part of his person outside the car while it was in motion was obvious, and was shown to have been anticipated by the door being there. In some circumstances, at

least, it was a danger that ought to be and was guarded against. It is said that the danger was manifest only when the car was crowded, and that the door was needed only for that. If the duty to have the car shut on all sides had been created with reference only to conditions different in kind from those of the accident, it may be that the plaintiff could not avail himself of a requirement imposed alio intuitu. The Eugene F. Moran, 212 U. S. 466, 476, 53 L. Ed. 600, 604, 29 Sup. Ct. 339. But the accident was similar in kind to those against which the door was provided, and we are not prepared to say, contrary to the finding of the jury, that the duty to keep it shut or to guard the space with the arm did not exist in favor of all travelers in an elevator having the structure that we have described. It was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye. Washington & G. R. Co. v. Hickey, 166 U. S. 521, 526, 527, 41 L. Ed. 1101–1103, 17 Sup. Ct. 661, 1 Am. Neg. Rep. 758.

If there was negligence, it very properly could be found to have been the proximate cause of the death. See Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256. Even if it were true that the neglect was merely a passive omission, the deceased was invited into the elevator, and the principle of the trap cases would apply. Corby v. Hill, 4 C. B. N. S. 556, 563, 27 L. J. C. P. N. S. 318, 4 Jur. N. S. 512, 6 Week. Rep. 575; Sweeny v. Old Colony & N. R. Co., 10 Allen (Mass.) 368, 374, 87 Am. Dec. 644. But that is not the case. The defendant is sued for having crushed the head of the deceased by forces that he put in motion. He replies that it would not have happened but for the unforeseen fall of the deceased without the defendant's fault, and to this the plaintiff rejoins and the jury has found that the defendant was bound to take the easy precaution which he had provided against any and all ways by which a passenger's body could get outside the car while it was going up. Hayes v. Michigan C. R. Co., 111 U. S. 228, 241, 28 L. Ed. 410, 415, 4 Sup. Ct. 369; Choctaw, O. & G. R. Co. v. Holloway, 191 U. S. 334, 339, 48 L. Ed. 207, 210, 24 Sup. Ct. 102. The whole question comes down to whether we are prepared to say as matter of law, against the finding of the jury, that, in an elevator constructed as this was, with a special source of danger in the shaft outside the car, to require the defendant to guard the door space in transitu, at his peril, is too strict a rule. We cannot go so far. McDonald v. Toledo Consol. Street R. Co., 20 C. C. A. 322, 43 U. S. App. 79, 74 Fed. 104, 109.

There was, perhaps, evidence sufficient to warrant a finding that there was negligence in not stopping the car after the fall and before the harm was done, and a finding on that ground would not open the questions that have been discussed; but we have preferred to deal with the case on the matters principally argued, as they seem

to offer the most obvious reasons for the verdict, and therefore have assumed that the jury found the facts and standard of conduct to be as we have supposed.

Judgment affirmed.

TUTTLE et ux. v. ATLANTIC CITY R. CO.

(Court of Errors and Appeals of New Jersey, 1901. 66 N. J. Law, 327, 49 Atl. 450, 54 L. R. A. 582, 88 Am. St. Rep. 491.)

This action was by Samuel Tuttle and his wife against the Atlantic City Railroad Company to recover damages because of a personal injury sustained by Mrs. Tuttle through the alleged negligence of the defendant. The judgment below was for the plaintiff, and the defendant brings error. The facts were as follows:

The defendant maintained a freight yard on the south side of Mechanic Street, in the city of Camden. A flying drill was being made in this yard, and a car was derailed and dashed across Mechanic Street, and broke through the front of the house opposite, belonging to a Mrs. Brennan. At this time, Mrs. Tuttle was on the sidewalk near the Brennan house, and saw the car coming across the street at full speed. Becoming frightened, she started to run, and when three or four doors below, fell and injured her left knee.[19]

At the close of the plaintiff's case, a motion for a nonsuit was made, upon the ground that if any negligent conduct had been proved on the part of the defendant, by reason of this car getting away from where it belonged, the plaintiff was guilty of contributory negligence in going away from a place of safety to a place of insecurity; that she was at a safe distance from the car, and there was no occasion for her to remove from it. This motion was denied.

VROOM, J. (after stating the facts). The testimony of the plaintiff was that she was in front of Mrs. Brennan's door, or had just passed it, when she saw the car coming over; and it was further disclosed by the testimony that this car, in coming across the street, was not running on any track. Is it reasonable, even, to suppose that the plaintiff could have had any means of knowing the direction the car would take? She was rightfully on the street, and the unusual sight of a car crashing across the street at full speed precluded any possibility of reflection as to the best thing to do. Acting under the impulse of fear, she ran, and, just as the car crashed into the Brennan house, she fell.

The real question in issue in the case and to be determined by the jury was whether the plaintiff (Mrs. Tuttle), seeing the car approaching at great speed across this street, was justified in running to escape from what she supposed was an imminent danger.

In the case of Stokes v. Saltonstall, 13 Pet. 181, 10 L. Ed. 115, which was an action brought to recover damages sustained by the wife of the plaintiff by the upsetting of a stage coach in which she

[19] The statement of the case is abridged.

was a passenger, the question was whether the stage was upset by the negligence of the driver or by the act of the plaintiff and his wife in rashly and improperly springing from it. The court held that "if the want of proper skill or care of the driver placed the passengers in a state of peril, and they had at that time a reasonable ground for supposing that the stage would upset, or that the driver was incapable of managing his horses, the plaintiff was entitled to recover; although the jury may believe, from the position in which the stage was placed from the negligence of the driver, the attempt of the plaintiff and his wife to escape may have increased the peril or even caused the stage to upset, and although they also find that the plaintiff and his wife would probably have sustained little or no injury if they had remained in the stage."

And in the case of Jones v. Boyce, 1 Stark. 493, which was an action against a coach proprietor for so negligently conducting the coach that the plaintiff, an outside passenger, was obliged to jump off the coach, in consequence of which his leg was broken, Lord Ellenborough held: "To enable the plaintiff to sustain the action it is not necessary that he should have been thrown off the coach; it is sufficient if he was placed, by the misconduct of the defendant, in such a situation as obliged him to adopt the alternative of a dangerous leap, or to remain at a certain peril. On the other hand, if the plaintiff's act resulted from a rash apprehension of danger, which did not exist, and the injury he sustained is to be attributed to rashness and imprudence, he is not entitled to recover."

The doctrine is concisely stated in 1 Shearm. & R. Negl. *89: "If one is placed, by the negligence of another, in such a position that he is compelled to choose instantly, in the face of grave and apparent peril, between two hazards, and he makes such a choice as a person of ordinary prudence placed in such a position might make, the fact that if he had chosen the other hazard he would have escaped injury, is of no importance."

The contention of the defendant company was that the plaintiff was in a safe place, and that, while it was true that the sight of a car coming as this one did was unusual, still that there was nothing attendant upon it which should lead one in a safe position precipitately to leave it. The counsel for the defendant at the trial requested the judge to charge that, "if the jury believe that Mrs. Tuttle was at a safe location before the injury complained of, and was afterwards injured by removing from such safe place, she cannot recover"; but this matter was correctly disposed of in the charge that "safe place" is a term which is not easy to define. To charge that in this case she was "in a safe place" would be to charge that the circumstances which brought about this fright and terror under which she seems to have acted were not sufficient to warrant her in removing from that spot, and seeking another, which, in her judgment,—and perhaps a mistaken judgment,—she might have deemed safer. There is hardly

enough evidence in this case to know whether it was exactly safe where she stood. It turned out afterwards to have been a safe place. But who could tell beforehand how many splinters from this car would fly in all directions, how many cobblestones or other things would fly around? You do not know, when you see a car coming, just what the end will be, and would naturally seek, possibly, a safer place than you think you occupy, although, after it is all over, you may find that where you stood was a safe place." This is not a case involving the question whether an action can be sustained for mental anguish or injury unaccompanied by injury to the person. That this would not afford a ground of action is well settled.[20]

In the case under consideration the negligence of the defendant in permitting the derailing and escape of the car is too plain for argument, and it was such negligence as caused the plaintiff in terror to attempt to escape the peril by running, and in so doing she fell, and was injured. The true rule governing cases of this character may be stated as follows: That if a defendant, by negligence, puts the plaintiff under a reasonable apprehension of personal physical injury, and plaintiff, in a reasonable effort to escape, sustains physical injury, a right of action arises to recover for the physical injury and the mental disorder naturally incident to its occurrence. The case below was properly submitted to the jury, and the judgment below should be affirmed.

JACKSON v. WISCONSIN TELEPHONE CO.

(Supreme Court of Wisconsin, 1894. 88 Wis. 243, 60 N. W. 430, 26 L. R. A. 101.)

Action against the telephone company to recover damages for a barn and its contents, burned, as plaintiff claims, by reason of defendant's negligence.

Near the city of Eau Claire there is a plateau about eighty feet above the level of the surrounding country. In August, 1889, two large frame buildings, about 325 feet distant from each other, stood upon this plateau, one being a county fair building known as Floral Hall, and the other being the barn of the plaintiff. These buildings were about the same height, and upon the top or ridge of each there stood a flagpole or mast twenty to thirty feet in height. Prior to the year 1888 the defendant had constructed a telephone line from the highway running past the fair grounds. In September, 1888, the defendant placed a telephone in Floral Hall, and connected it with No. 12 wire with its telephone line on the highway. This connecting wire ran from the highway first to the flagpole upon the plaintiff's barn, and was there tied to the pole; from thence it ran directly to Floral

[20] The opinion on this point is omitted.

Hall. The plaintiff gave no permission to attach the wire to his barn, and testified that he had no knowledge that it was so attached. A ground wire from the telephone in the interior of Floral Hall ran up to the flagstaff, and thence a distance of about 376 feet to the ground, where it was attached to an iron water pipe. Some time in the fall of 1888 the defendant took out the telephone from Floral Hall, together with the insulated wire in the interior of the building. The ground wire was left intact, and so was the wire from Floral Hall to the barn. The wire from the highway to Jackson's barn was taken down, but it was claimed by the plaintiff's witnesses that a considerable piece of said wire at the barn end thereof was left resting upon the roof of the barn.

On the night of August 20th, 1889, there was considerable rain. At about 4 o'clock in the morning there was a flash of lightning, which was described by the witnesses as a blinding flash, and which was thought by them to have descended upon Floral Hall. In a few minutes the roof of plaintiff's barn was in flames, and the barn and its contents were destroyed. The plaintiff's claim is that the lightning struck Floral Hall, and was conducted by the wire to plaintiff's barn, and set it on fire, and that the defendant was negligent in leaving the wire thus attached to the barn. Much expert evidence was adduced on both sides as to the probability of lightning passing over such a wire and destroying the barn. A motion for a nonsuit was overruled, as was also a motion to direct a verdict for defendant.

The jury returned a special verdict, finding:

(1) That the defendant connected the plaintiff's barn with Floral Hall by means of a telephone wire attached to the flagstaff of the barn and to the flagstaff on Floral Hall, without any intermediate attachment; (2) that the defendant left the wire so located on the plaintiff's barn that a portion of the same rested on the roof; (3) that the barn was thereby subjected to danger of being destroyed by fire caused by lightning electricity passing over such wire from Floral Hall to the barn; (4) that the fire was caused by lightning electricity so passing over said wire; (5) that in so leaving the barn connected with Floral Hall the defendant's servants were guilty of want of ordinary care; (6) that such want of ordinary care was the proximate cause of the fire; (7) that this result was one which a person reasonably well skilled in the defendant's business might reasonably have expected would probably occur; (8) that the plaintiff did not give defendant permission to attach the wire to his barn; (9) that plaintiff did not know, before the fire, that his barn was connected with Floral Hall by the wire; (10) that he did not know of the danger before the fire; (11) that the plaintiff's damages were $9,258. [21]

From a judgment for the plaintiff upon this verdict the defendant appeals.

WINSLOW, J. It was strenuously and ably argued by the appellant's counsel that the evidence did not show that the negligent act of defendant was the proximate cause of the burning of plaintiff's barn. The rule is well settled in this state that, in order to render a negligent act the proximate cause of an injury, it must appear

[21] The statement of the case is slightly abridged, and a part of Mr. Justice Winslow's opinion is omitted.

"that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." Atkinson v. Goodrich Transp. Co., 60 Wis. 141, 156, 18 N. W. 764, 50 Am. Rep. 352; Marvin v. C., M. & St. P. R. Co., 79 Wis. 140, 47 N. W. 1123, 11 L. R. A. 506. The jury found all the elements necessary to constitute the negligent act of the defendant the proximate cause of the burning of the barn within this rule, and the question is whether the evidence justifies such finding.

It is said that the striking of a building by lightning is a very infrequent occurrence, and that it could not be reasonably anticipated by any one. It is true that the number of buildings which are struck by lightning, as compared with the whole number of buildings in any given locality, is very small; but this fact by no means seems to us to be the final or controlling test of the question of probability. In this case there was a building situated upon a high plateau from eighty to ninety feet above the level of the surrounding country, with a flagpole upon the roof about twenty-five feet in height. Now, there are some facts of common knowledge known to every reasonable person who has passed the age of childhood. Among these facts are that in this latitude there are at certain seasons of the year frequent and violent thunderstorms; that at such times the clouds are heavily charged with electricity, which constantly finds its way to the earth in what we call strokes of lightning; that these lightning strokes, in the great majority of cases, strike prominent objects, such as trees, poles, and high buildings, and follow them to the ground; that fire is frequently the result of such strokes. These facts are well known to all persons, and no proof of them by expert evidence is necessary. Can we say, as matter of law, in view of these well-known facts, that it was entirely improbable that a building situated, as Floral Hall was, upon the highest ground in the vicinity, with a flagpole upon it, should be struck by a discharge of lightning, simply because many buildings in such situations escape the stroke for years? We think not.

But it is said that it was simply a matter of conjecture whether the bolt which struck Floral Hall and shattered the flagpole was the bolt which set the fire, or whether the barn was fired by an independent stroke of lightning descending upon the barn at or about the same time that Floral Hall was struck. In considering this question, reference to the evidence is necessary. The evidence seems very conclusive that the barn was fired by a stroke of lightning, and that Floral Hall was struck by lightning and its flagpole shattered a very few minutes—perhaps only seconds—before the blaze broke out on the roof of the barn. These two facts are not open to doubt under the evidence. There were two witnesses sleeping in buildings on the fair grounds within a few hundred feet of the hall. Both testify that they were awake and saw the flash of lightning, and that it was

right in the direction of Floral Hall. They immediately went out, found the barn burning and the flagpole on Floral Hall shattered, while the flagpole on the barn was uninjured. These witnesses, as well as several others who claim to have seen the flash, say that there was but one flash, one report, one "straight streak of lightning," "like a streak of hot iron." There was also evidence that the flagpole was only shattered down to about the place where the wire leading to the barn was fastened, and that the ground wire, which seems to have been attached to the flagpole just below the barn wire, was burned for a distance of four or five feet from the pole. No damage was done to Floral Hall beyond the shattering of the pole. If these facts were all true, it would seem that they pointed pretty satisfactorily to the conclusion that the bolt which struck Floral Hall was the same bolt which fired the barn. Certainly a verdict to that effect, based on the evidence establishing these facts, could not be said to be based on conjecture.

It is, however, argued that it is entirely improbable, if not well-nigh impossible, that a bolt of lightning striking one building could be conducted by a telephone wire over a span of 300 feet to another building, at least in sufficient quantity to fire the second building. This raises a scientific question, necessarily depending largely upon the opinions of expert witnesses. A considerable number of such witnesses were examined on both sides. The experts called by the plaintiff testified that if the loose end of the wire was left resting on the roof of the barn, and the roof and sides were wet with rain, the wire and wet barn would form a relatively good conductor of electricity; that such a wire would carry sufficient electricity to start a fire, and would form, under the circumstances, a good path to the ground; that a part, at least, of the bolt would probably follow this path to the ground; and that all these facts have been known for years, and the danger to the barn resulting therefrom was reasonably to be anticipated. On the other hand, an equal number of experts upon the other side were of opinion that it would be very improbable, if not impossible, for such a wire, under the circumstances, to carry sufficient lightning to set the barn on fire, and that the lightning would undoubtedly seek some shorter path to the earth. We cannot undertake to compare and decide which class of experts were the best qualified to speak authoritatively upon this scientific question. They all qualified themselves so as to make their testimony admissible as expert evidence. Nor can we undertake to decide this question of science ourselves. It was properly a question for the jury after having heard the circumstances of the case and the opinions of the experts, and we cannot say that the jury have decided wrongly upon the question.

The further argument is made that the stroke of lightning was the "act of God," for which no one is responsible. Certainly a stroke

of lightning is an "act of God;" but that is not the question here presented, or rather another element—i. e. the negligence of man—is added to the question, which materially alters its scope. If I, owning a high mast or building, which I know is so situated as to be very likely to be struck by lightning, construct an attractive path for the lightning to my neighbor's roof, so that his house is destroyed by a bolt which strikes my mast or building, shall I escape liability for my negligent or wrongful act by pleading that the lightning was the act of God? Certainly not. I invited the stroke of one of the most destructive powers of nature, and negligently turned its course to my neighbor's property. The principle is the same as that involved in the case of Borchardt v. Wausau Boom Co., 54 Wis. 107, 11 N. W. 440, 41 Am. Rep. 12. The lightning stroke is in no greater degree the act of God than the usual freshets occurring in a river.

Our conclusion is that the court properly refused to grant a nonsuit, and also properly refused to direct a verdict for the defendant. * * *

BY THE COURT. Judgment affirmed.

NEWMAN, J. The cause of damages is proximate only when it might reasonably have been expected by a man of ordinary intelligence and prudence that such damages would result from that cause. Atkinson v. Goodrich Transp. Co., 60 Wis. 141, 18 N. W. 764, 50 Am. Rep. 352. The damages, as a consequence of the negligent act or omission, must be both natural and probable. Barton v. Pepin Co. Agr. Society, 83 Wis. 19, 52 N. W. 1129. It cannot be said of any particular building that it is probable that it will be struck by lightning. The chances are very largely against it. It could not have been foreseen as likely to happen that either Floral Hall or the plaintiff's barn would be struck by lightning. That might be, in the course of nature, but could not be anticipated as probable. The neglect of the defendant to remove the wire did not increase the danger or probability that either building would be struck. At most, it only rendered it possible that, in case either was struck, fire might be communicated to the other. It could not be the cause of either building being struck. It was a condition, rather than the cause, of the damages. If a cause at all, it was a remote cause.

PINNEY, J. I concur in the foregoing opinion by Mr. Justice NEWMAN.

E. T. & H. K. IDE v. BOSTON & M. R. CO.

(Supreme Court of Vermont, 1909. 83 Vt. 66, 74 Atl. 401.)

Action to recover damages for the destruction by fire of a gristmill and outbuildings. The verdict and judgment were for the plaintiff. The fire was alleged to have been communicated by a locomotive engine on a railroad operated by the defendant as lessee. The statute

which governs reads as follows: "A person or corporation owning or operating a railroad shall be responsible in damages for a building or other property injured by fire communicated by a locomotive engine on such road, unless due caution and diligence are used and suitable expedients employed to prevent such injury. Said person or corporation shall have an insurable interest in the property along its route, and may procure insurance thereon."

HASELTON, J. * * * Under the statute, the burden was on the plaintiff to show by a fair balance of proof that the fire was "communicated" by one of the defendant's engines, and, if that fact was established, the plaintiff was entitled to recover unless the defendant showed affirmatively by the same measure of proof that it used "due caution and diligence" and employed "suitable expedients" to prevent the injury. Cleaveland v. Grand Trunk Ry. Co., 42 Vt. 449; Farrington v. Rutland R. Co., 72 Vt. 24, 47 Atl. 171. * * *

The fire was first seen on the roof of an old blacksmith shop owned by the plaintiff standing on the easterly side of the railroad track and, to about one-third of its extent, on the right of way of the railroad. * * *

After this fire was so far overcome that, as some of the evidence tended to show, it was thought to have been put out, it started up again, and the wind, which had been blowing towards the east, changed its course and blew strongly towards the west, carrying fire to a shed on the west side of the track, and thence to a storehouse and factory of the Cushman & Rankin Company, and thence to the gristmill and outbuildings of the plaintiff above referred to. The plaintiff's evidence tended to show that the fire on the roof of the blacksmith shop was communicated to it from one of the defendant's locomotives, and, all questions of negligence on the part of both parties and of intervening causes being for the time left out of consideration, the entire conflagration stands as an integral effect of the cause which started the fire on the roof of the blacksmith shop. Isham v. Dow's Estate, 70 Vt. 588, 41 Atl. 585, 45 L. R. A. 87, 67 Am. St. Rep. 691. The defendant quotes from Ryan v. New York Central R. Co., 35 N. Y. 210, 91 Am. Dec. 49, and also cites Pennsylvania R. R. v. Kerr, 62 Pa. 353, 1 Am. Rep. 431. These cases, however, are pretty generally discredited. See with regard to them Milwaukee, etc., Ry. Co. v. Kellogg, 94 U. S. 469, 474, 24 L. Ed. 256, and what is said of them in Isham v. Dow's Estate, 70 Vt. 588, 41 Atl. 585, 45 L. R. A. 87, 67 Am. St. Rep. 691. As appears from the Isham Case, these cases are not followed here.

We do not understand, considering the argument of the defendant as a whole, that the doctrine of these cases is relied on. The defendant's real claim in this regard, as appears from the brief in its behalf, is that there were intervening causes in view of which the fire which started the blaze on the blacksmith shop cannot be regarded as the proximate cause of the loss for which recovery is sought. The claim

is that there were two intervening causes: One, the conduct of the plaintiff in its doings and omissions in respect to the blacksmith shop after the fire had been practically subdued; and the other the change of the wind and the increase in its velocity. The sudden change in the force and direction of the wind cannot be regarded as an intervening agency. On the question of whether or not one's conduct in setting a fire is or is not negligent, the condition of the grounds and premises, as to dryness or wetness, the time of starting the fire, whether in the evening or morning, the condition of the air, whether still or windy, and, if there is a wind, the direction in which it is blowing, may sometimes be proper matters for consideration. But when negligence in setting out a fire is established, as in the discussion of this point we are to assume it to have been here, changes in the direction and force of the wind and in other conditions may carry the result of the negligence further than it would otherwise have gone, and yet liability attach for the consequent injuries, although entirely unforeseen. The distinction is clearly made in Isham v. Dow's Estate, 70 Vt. 588, 591, 41 Atl. 585, 586, 45 L. R. A. 87, 67 Am. St. Rep. 691. It is there said: "On the question of what is negligence, it is material to consider what a prudent man might reasonably anticipate; but, when negligence is once established, that consideration is entirely immaterial on the question of how far that negligence imposes liability." Gilson v. Canal Co., 65 Vt. 213, 26 Atl. 70, 36 Am. St. Rep. 802, is to the same effect. So is Stevens v. Dudley, 56 Vt. 158.

Among the cases cited in Gilson v. Canal Co., 65 Vt. 213, 26 Atl. 70, 36 Am. St. Rep. 802, is the case of Smith v. London & Southwestern Ry. Co., L. R. 6 C. P. 14. That was a case of fire communicated from a locomotive engine. The fire broke out between the rails and a hedge, from thence spread to a stubble field beyond, and from the stubble field was carried by a high wind over a road to the plaintiff's cottage, which was burned. The cottage was 200 yards from the place where the fire started. Notwithstanding a concurrence of circumstances which, as the court recognized, no one could have been expected to foresee, the court held that, since the fire was negligently set, the railway company was liable, since, after all, the injury proceeded from the original fire through the operation of natural causes. Doubtless such an extraordinary phenomenon in nature as in legal acceptation is an act of God would be an intervening cause. Stevens v. Dudley, 56 Vt. 158, 167. But in this latitude we know no winds which can be counted on to blow for any length of time with a force and direction practically unvaried except for some extraordinary violence of nature. Such winds as we ordinarily know, such winds as the evidence here relates to, are not intervening agents. Milwaukee, etc., Ry. Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256; Chicago, etc., R. Co. v. Lesh, 158 Ind. 423, 63 N. E. 794; Union Pacific Ry. Co. v. McCollum, 2 Kan. App. 319, 43 Pac. 97; Chicago, etc., R. Co. v.

Williams, 131 Ind. 30, 30 N. E. 696; Perley v. Eastern R. Co., 98 Mass. 414, 96 Am. Dec. 645; Florida, etc., Ry. Co. v. Welch, 53 Fla. 145, 44 South. 250, 12 Ann. Cas. 210. * * *[22]

ISHAM v. DOW'S ESTATE.

(Supreme Court of Vermont, 1898. 70 Vt. 588, 41 Atl. 585, 45 L. R. A. 87, 67 Am. St. Rep. 691.)

Action by Charity Isham against the estate of Isaiah Dow. On request, the plaintiff stated what her evidence would tend to prove; and the court ruled that such facts, if established, would not entitle plaintiff to recover and excluded the evidence, and directed a verdict for the defendant.

ROWELL, J. Dow, the intestate, a poor gunner, as he knew, with eyesight much impaired, knowing that the plaintiff and her children were alone in her husband's house, unlawfully, wantonly, and maliciously shot at and wounded her husband's dog, lying peaceably in close proximity to the house, on the land of a third person, whereupon the dog sprang up, rushed wildly and rapidly towards the house, entered it through an open door into the room where the plaintiff was, ran violently and forcibly against her, knocking her down and injuring her; and the question is whether the estate is liable for it.

The defendant says that, in order to recover, the plaintiff must establish two things, namely, negligence on the part of Dow, and that her injury resulted proximately therefrom, and that the case shows neither, as it does not show that Dow owed her any legal duty, nor that his act was the proximate cause of her injury.

But we cannot adopt this view. The intestate unlawfully, wantonly, and maliciously shot at the dog, intending, we will assume, to kill it, but not knowing whether he would or not, and not knowing what would happen if he did not; and by his wanton act the dog was set wildly in motion, and that motion, thus caused, continued, without the intervention of any other agency, and without power on his part to control it, until the plaintiff's injury resulted therefrom. In these circumstances the law treats the act of intestate as the proximate cause of the injury, whether the injury was, or could have been foreseen, or not, or was or not the probable consequence of the act; for the necessary relation of cause and effect between the act and the injury is established by the continuous and connected succession of the intervening events. This is the universal rule when the injurious act is wanton. In 16 Am. & Eng. Enc. Law, 434, the true principle is said to be that he who does such an act is liable for all the consequences, however remote, because the act is quasi criminal in its

[22] Parts of the opinion are omitted.

character, and the law conclusively presumes that all the consequences were foreseen and intended.

But it is not necessary, in this state, certainly, that the act should be wanton, in order to impose liability for all the injurious consequences. If it is voluntary, and not obligatory, it is enough. In Vincent v. Stinehour, 7 Vt. 66, 29 Am. Dec. 145, it is said that for such an act the doer is answerable for any injury that may happen by reason thereof, whether by accident or carelessness. In Wright v. Clark, 50 Vt. 130, 28 Am. Rep. 496, the defendant shot at a fox that the plaintiff's dog had driven to cover, and accidentally hit the dog; and he was held liable, because the shooting at the fox was voluntary, and furnished no excuse for hitting the dog, though he did not intend to hit him. The same rule was applied at nisi prius, without exception, in Taylor v. Hayes, 63 Vt. 475, 21 Atl. 610, where the defendant shot at a partridge, and accidentally hit a cow. So, in Bradley v. Andrews, 51 Vt. 530, the defendant voluntarily discharged an explosive missile into a crowd, and hurt the plaintiff; and it was held that, as the act was voluntary and wrongful, the defendant was liable, and that his youth and inexperience did not excuse him. The rule is the same here in negligence cases, and may be formulated thus: When negligence is established, it imposes liability for all the injurious consequences that flow therefrom, whatever they are, until the intervention of some diverting force that makes the injury its own, or until the force set in motion by the negligent act has so far spent itself as to be too small for the law's notice. But, in administering this rule, care must be taken to distinguish between what is negligence, and what the liability for its injurious consequences. On the question of what is negligence, it is material to consider what a prudent man might reasonably have anticipated; but, when negligence is once established, that consideration is entirely immaterial on the question of how far that negligence imposes liability.

This is all well shown by Stevens v. Dudley, 56 Vt. 158, and Gilson v. Canal Co., 65 Vt. 213, 26 Atl. 70, 36 Am. St. Rep. 802. The rule is the same in England, as will be seen by referring to the leading case of Smith v. Railway Co., L. R. 6 C. P. 14, in the Exchequer Chamber. In Sneesby v. Railway Co., 1 Q. B. Div. 42, a herd of plaintiff's cattle were being driven along an occupation road to some fields. The road crosses a siding of the defendant's railway on a level, and when the cattle were crossing the siding the defendant's servants negligently sent some trucks down the siding among them, which separated them from the drovers, and so frightened them that a few rushed away from the control of the drovers, fled along the occupation road to a garden some distance off, got into the garden through a defective fence, and thence on to another track of the defendant's railway, and were killed; and the question was whether their death was not too remote from the negligence to impose liability. The court said: That the result of the negligence was twofold: First, that the

trucks separated the cattle; and, second, that the cattle were frightened, and became infuriated, and were driven to act as they would not have done in their natural state. That everything that occurred or was done after that must be taken to have occurred or been done continuously. And that it was no answer to say that the fence was imperfect, for the question would have been the same, had there been no fence there. There liability was made to depend, not on the nearness of the wrongful act, but on the want of power to divert or avert its consequences, and it continued until the first impulse spent itself in the death of the cattle. See Ricker v. Freeman, 50 N. H. 420, 9 Am. Rep. 267; Railroad Co. v. Chapman, 80 Ala. 615, 2 South. 738.

Ellis v. Cleveland, 55 Vt. 358, is not in conflict with the Vermont cases above cited, as is supposed; for there there was no causal connection between the wrongful act and the injury complained of, and so there could be no recovery. As illustrative of nonliability for damage flowing from an intermediate and independent cause operating between the wrongful act and the injury, see Holmes v. Fuller, 68 Vt. 207, 34 Atl. 699.

Ryan v. Railroad Co., 35 N. Y. 210, 91 Am. Dec. 49, is relied on by the defendant. Railroad Co. v. Kerr, 62 Pa. 353, 1 Am. Rep. 431, is a similar case. It is said in Railroad Co. v. Kellogg, 94 U. S. 474, 24 L. Ed. 256, that these cases have been much criticised; that if they were intended to hold that when a building has been negligently set on fire and a second building is fired from the first, it is a conclusion of law that the owner of the second has no remedy against the negligent wrongdoer, they have not been accepted as authority for such a doctrine even in the states where they were made, and are in conflict with numerous cases in other jurisdictions. * * *

Judgment reversed and cause remanded.[23]

SCOTT v. SHEPHERD.

(Court of Common Pleas, 1772. 2 W. Bl. 892, 3 Wils. 403.)

[See ante, p. 56, for a report of the case.]

VANDENBURGH v. TRUAX.

(Supreme Court of New York, 1847. 4 Denio, 464, 47 Am. Dec. 268.)

A negro boy, about 16 or 18 years old, was the plaintiff's ostler; the boy was seen in the street at Schenectady, near the plaintiff's store, approaching the defendant with a stone in his hand, and appearing, as the witness said, to be very angry; the defendant not appearing,

[23] A part of the opinion, referring to other authorities on the doctrine of Ryan v. Railroad Co. (1866) 35 N. Y. 210, 91 Am. Dec. 49, is omitted.

to the witness, to be angry. The negro did not attempt to throw, or strike with the stone. The defendant took hold of the negro, and told him to throw the stone down; and it may be inferred from the case that he did throw it down, though the fact is not expressly stated. The boy got loose from the defendant and ran away. The defendant took up a pick-axe and followed the boy, who fled into the plaintiff's store, and the defendant pursued him there, with the pick-axe in his hand. The back door of the store was shut, so that the boy could not get out there without being overtaken; and he ran behind the counter, as the witness believed, to save himself from being struck with the pick-axe. In fleeing behind the counter, the boy knocked out the cock, or faucet, from a cask of wine, and about two gallons of the liquor, of the value of $4, were spilt and lost. For that injury the action was brought. The justice gave judgment for the plaintiff for $4 damages, which was affirmed by the Common Pleas. The defendant brings error.

BRONSON, C. J. * * * In the case of the lighted squib which was thrown into the market house, the debate was upon the form of the remedy. The question was whether the plaintiff could maintain trespass vi et armis, or whether he should not have brought an action on the case. His right to recover in some form, seems not to have been disputed. Scott v. Shepherd, 2 W. Bl. 892; s. c., 3 Wils. 403. In that case, the impulse was given to inanimate matter; while here, a living and rational being was moved by fear. But still, there is in some respects a striking analogy between the two cases. There the force which the defendant gave to the squib was spent when it fell upon the standing of Yates; and it was afterwards twice put in motion and in new directions, first by Willis and then by Ryall, before it struck the plaintiff and put out his eye. But as the throwing of the squib was a mischievous act, which was likely to do harm to some one; and as the two men who gave the new impulses to the missile acted from terror and in self-defense, the defendant was held answerable as a trespasser for the injury which resulted to the plaintiff. Now here, although the negro boy may have been wrong at the first, yet when he had thrown down the stone, and was endeavoring to get away from the difficulty into which he had brought himself, the defendant was clearly wrong in following up the quarrel. When the boy ran upon the cask of wine, he was moved with terror produced by the illegal act of the defendant; he was fleeing for his life, from a man in hot pursuit, armed with a deadly weapon. The injury which the plaintiff sustained was not the necessary consequence of the wrong done by the defendant; nor was it so in the case of the lighted squib. But, in both instances, the wrong was of such a nature that it might very naturally result in an injury to some third person. It is true that the boy might have gone elsewhere, instead of entering the plaintiff's store; and it is equally true that Willis and Ryall might have thrown the squib out of the market house, which was open on both

sides and at one end, instead of tossing it across the market house among the people there assembled. But in the one case as well as in the other, the innocent agents were moved by fear, and had no time to reflect upon the most prudent course of conduct. It was quite natural, however, that the boy should flee to his employer for protection. And finally, the proximate cause of the injury was, in both cases, an intelligent agent.

In Guille v. Swan, 19 Johns. 381, 10 Am. Dec. 234, the immediate actors in the wrong which was done to the plaintiff, were moved by their sympathy for the defendant, who had brought himself into a perilous condition by ascending in a balloon. The balloon descended into the plaintiff's garden, which was near where it had gone up, and a crowd of the people, seeing the defendant hanging out of the car in great peril, rushed into the garden to relieve him, and in doing so trod down the plaintiff's vegetables and flowers. For the wrong done by the crowd, as well as for the injury done by himself, the defendant was held answerable as a trespasser. Although the ascent was not an illegal it was a foolish act, and the defendant ought to have foreseen that injurious consequences might follow. The case seems not to have been put upon the ground of a concert of action between the defendant and the multitude; but on the ground that the defendant's descent, under such circumstances, would ordinarily and naturally draw a crowd of people about him, either from curiosity, or for the purpose of rescuing him from a perilous situation. It was added, however, that if the defendant had beckoned to the crowd to come to his assistance, they would all have been cotrespassers; and the situation in which the defendant had voluntarily and designedly placed himself was equivalent to a direct request to the crowd to follow him.

If the cases of the squib and the balloon have not gone beyond the limits of the law, the defendant is answerable for the injury which he has brought upon the plaintiff. And there is nearly as much reason for holding him liable for driving the boy against the wine cask, and thus destroying the plaintiff's property, as there would be if he had produced the same result by throwing the boy upon the cask, in which case his liability could not have been questioned. * * *

Judgment affirmed.[24]

GIBNEY v. STATE.

(Court of Appeals of New York, 1893. 137 N. Y. 1, 33 N. E. 142, 19 L. R. A. 365, 33 Am. St. Rep. 690.)

The plaintiff with her husband and child were crossing a bridge over the Erie Canal. They met an acquaintance on the bridge, and the parents stopped to talk with him. The child remained within a few feet of them and suddenly fell through an opening in the railing of the

[24] Parts of the opinion are omitted.

bridge into the canal below. The father plunged into the canal to recover the child, and both father and son were drowned. A claim was presented to the Board of Claims for damages for the death of the husband, and a judgment in favor of the claimant was entered. There was an appeal by the State.[25]

ANDREWS, C. J. We have decided on the appeal brought for award of damages for the death of the infant son of the plaintiff, that the evidence authorized a finding of negligence on the part of the state authorities in permitting the opening in the bridge, through which the boy fell into the canal, to remain unguarded, and also the further finding that there was no contributory negligence on the part of the parents of the child, and we therefore affirmed the award. The present appeal is from an award made for damages sustained by the widow and next of kin, arising from the drowning of the plaintiff's husband and the father of the child, in an attempt to rescue the child from the canal, into which the child had fallen. * * *

It is contended by the attorney-general that the negligence of the state in permitting the bridge to remain in an unsafe condition, while it may have been the cause of the death of the boy, cannot be regarded as the cause of the death of the father, although it occurred in an attempt to save the life of the child. It is doubtless true that except for the peril of the child, occasioned by his falling through the bridge into the canal, there would have been no connection between the negligence of the state and the drowning of the father. But the peril to which the child was exposed was, as has been found, the result of the negligence of the state, and the peril to which the father exposed himself was the natural consequence of the situation. It would have been in contradiction of the most common facts in human experience if the father had not plunged into the canal to save his child. But while the immediate cause of the peril to which the father exposed himself was the peril of the child, for the purpose of administering legal remedies, the cause of the peril in both cases may be attributed to the culpable negligence of the state in leaving the bridge in a dangerous condition.

There is great difficulty in many cases in fixing the responsible cause of an injury. When there is a break in the chain of causes by the intervention of a new agency, and then an injury happens, is it to be attributed to the new element, and is this to be treated as the originating cause to the exclusion of the antecedent one, without which no occasion would have arisen for the introduction of a new element? It is impossible to formulate a rule on the subject capable of definite and easy application.

The general rule is that only the natural and proximate results of a wrong are those of which the law can take notice. But where a consequence is to be deemed proximate within the rule is the point of diffi-

[25] The statement of the facts is abridged.

culty. In this case these elements are present: Culpable negligence on the part of the state; the falling of the child into the canal through the opening which the state negligently left in the bridge; the natural and instinctive act of the father in plunging into the canal to rescue the child; the drowning of both; the fact that such an accident as that which befell the child might reasonably have been anticipated as the result of the condition of the bridge, and the further consideration that a parent or other person on seeing the child in the water would incur every reasonable hazard for its rescue. We think it may be justly said that the death both of the child and parent was the consequence of the negligence of the state, and that the unsafe bridge was in a legal and juridical sense the cause of the drowning of both.

We can see no sound distinction between this case and the Eckert Case, 43 N. Y. 502, 3 Am. Rep. 721. In that case a railroad train was being propelled at a dangerous speed. The negligence was active. In this case it consisted of an omission; that is, in the failure to originally construct the bridge properly, or permitting it to become dangerous. We do not perceive how the difference in the circumstances of the negligence affects the question of proximateness between the cause and the result so as to distinguish in this respect the two cases.

The Balloon Case, 19 Johns. 381, 10 Am. Dec. 234, and the case of Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455, give support to our conclusion.

The judgment should be affirmed.[26]

BINFORD v. JOHNSTON.

(Supreme Court of Indiana, 1882. 82 Ind. 426, 42 Am. Rep. 508.)

ELLIOTT, J. The case made by the appellee's complaint, briefly stated, is this:

Two sons of appellee, Allen and Todd, aged twelve and ten years respectively, bought of the appellant, a dealer in such articles, pistol cartridges loaded with powder and ball. The boys purchased the cartridges for use in a toy pistol, and were instructed by appellant how to make use of them in this pistol; the appellant knew the dangerous character of the cartridges, knew the hazard of using them as the boys proposed, and that the lads were unfit to be entrusted with articles of such a character; shortly after the sale, the toy pistol, loaded with one of the cartridges, was left by Allen and Todd lying on the floor of their home. It was picked up by their brother Bertie, who was six years of age, and discharged, the ball striking Todd and inflicting a wound from which he died.

A man who places in the hands of a child an article of a dangerous character and one likely to cause injury to the child itself or to others, is guilty of an actionable wrong. If a dealer should sell to a child

[26] Accord: Eckert v. Long Island Ry. Co. (1878) 43 N. Y. 502, 3 Am. Rep. 721; Perpich v. Leetonia Mining Co. (1912) 118 Minn. 508, 137 N. W. 12.

dynamite, or other explosives of a similar character, nobody would doubt that he had committed a wrong for which he should answer, in case injury resulted. So, if a druggist should sell to a child a deadly drug, likely to cause harm to the child or injury to others, he would certainly be liable to an action.

The more difficult question is whether the result is so remote from the original wrong as to bring the case within the operation of the maxim "Causa proxima, et non remota, spectatur." It is not easy to assign limits to this rule, nor to lay down any general test which will enable the courts to determine when a case is within or without the rule. It is true that general formulas have been frequently stated, but these have carried us but little, if any, beyond the meaning conveyed by the words of the maxim itself.

The fact that some agency intervenes between the original wrong and the injury does not necessarily bring the case within the rule; on the contrary, it is firmly settled that the intervention of a third person or of other and new direct causes does not preclude a recovery if the injury was the natural or probable result of the original wrong. Billman v. Indianapolis, &c., R. R. Co., 76 Ind. 166, 40 Am. Rep. 230. This doctrine remounts to the famous case of Scott v. Shepherd, 2 W. Black. 892, commonly known as the "Squib case." The rule goes so far as to hold that the original wrong-doer is responsible, even though the agency of a second wrong-doer intervened. This doctrine is enforced with great power by Cockburn, C. J., in Clark v. Chambers, 7 Cent. L. J. 11 [3 Q. B. D. 327 (1878)]; and is approved by the text-writers. Cooley, Torts, 70; Addison, Torts, § 12.

Although the act of the lad Bertie intervened between the original wrong and the injury, we cannot deny a recovery if we find that the injury was the natural or probable result of appellant's original wrong. In Henry v. Southern Pacific R. R. Co., 50 Cal. 176, it was said: "A long series of judicial decisions has defined proximate, or immediate and direct damages to be the ordinary and natural results of the negligence; such as are usual, and as therefore might have been expected." Lord Ellenborough said in Townsend v. Wathen, 9 East, 277, that "Every man must be taken to contemplate the probable consequences of the act he does." In Billman v. Indianapolis, &c., R. R. Co., supra, very many cases are cited declaring and enforcing this doctrine, and we deem it unnecessary to here repeat the citations. Under the rule declared in the cases referred to, it is clear that one who sells dangerous explosives to a child, knowing that they are to be used in such a manner as to put in jeopardy the lives of others, must be taken to contemplate the probable consequences of his wrongful act. It is a probable consequence of such a sale as that charged against appellant, that the explosives may be so used by children, among whom it is natural to expect that they will be taken, as to injure the buyers or their associates. A strong illustration of the principle here affirmed is afforded by the case of Dixon v. Bell, 5 M. & S. 198. In that case the defendant

sent a child for a loaded gun, desiring that the person who was to deliver it should take out the priming. This was done; but the gun was discharged by the imprudent act of the child, the plaintiff injured, and it was held that the defendant was liable. In Lynch v. Nurdin, 1 Q. B. 29, the doctrine of the case cited was approved, and the same judgment has been pronounced upon it by other courts as well as by the text-writers. Carter v. Towne, 98 Mass. 567, 96 Am. Dec. 682; Wharton, Neg. 851; Shearman & Redf. Neg. (3d Ed.) 596. * * *

Judgment [for the plaintiff] affirmed.[27]

CLARK v. WALLACE.

(Supreme Court of Colorado, 1911. 51 Colo. 437, 118 Pac. 973, Ann. Cas. 1913B, 349.)

MUSSER, J. This writ of error was sued out to review a judgment in favor of Wallace, who was defendant below. Clark owned 160 acres of standing peas, upon which he was feeding and fattening about 1,200 sheep. The sheep and peas were in charge of a herder, in the employ of Clark. The herder lived there with his wife and two children. On a certain day, Wallace, who had a ranch nearby, was engaged in dipping sheep, and it became necessary for him to have more help. He caused Clark's herder to be asked to come over and help in dipping the sheep, and stated that he would pay the herder. After a time, the herder came over. While he was at Wallace's, a fire started in or near Clark's field of peas. It was evidently started by the herder's wife, or boy, or both. There was a high wind blowing, and the fire soon got beyond control, and extended to the field of peas, and destroyed them. Clark brought an action to recover from Wallace the damages sustained by him on account of the loss of the peas. After the evidence was in, the court instructed the jury to render a verdict in favor of Wallace, which was done, and upon this verdict judgment was entered against Clark.

We will not stop to consider whether or not Wallace would be liable for any damage that might have resulted to Clark in consequence of the herder being induced to leave his work. If Wallace was liable for any damage at all, which we do not determine, it was only for such damage as was "the actual, natural, and approximate result of the wrong committed." Clifford v. D., S. P. & P. R. R., 9 Colo. 333, 12 Pac. 219. "The rule is general that a person is not to be held responsible in damages for the remote consequences of his act, or indeed for any but those which are proximate or natural." 8 Am. & Eng. Ency. of Law, 561. In D. & R. G. R. R. Co. v. Sipes, 26 Colo. 17, 55 Pac. 1093, it is said that proximate cause is "that cause which, in natural and continued se-

[27] Part of the opinion is omitted.

quence, unbroken by any efficient, intervening cause, produced the result complained of, and without which that result would not have occurred;" or "that cause which immediately precedes and directly produces an effect, as distinguished from a remote, mediate, or predisposing cause."

Whether an act was the proximate cause of damage is ordinarily a question for the jury; but, when the facts are undisputed, and are susceptible of but one inference, the question is one of law for the court. D. & R. G. R. R. Co. v. Sipes, supra. The only damage that Clark sought to recover, and of which there was any evidence, was that which he had sustained by reason of the burning of the peas. It cannot be said that the natural result of the herder's absence was that some member of his family would start a fire and that the wind would be high, and would fan that fire, so that it would extend to and destroy the peas. It cannot be said that the herder's absence, in natural and continued sequence, unbroken by any efficient, intervening cause, produced the result complained of; for the setting out of the fire by his family was not a natural and continued sequence of the herder's absence; but it was an efficient, intervening cause, coming in after the absence of the herder, and could not have been anticipated as a natural result of the absence. It cannot be said that, if the herder had been present, the fire would not have been started, or the wind not have been high. The cause of the fire was not the absence of the herder, but it was plainly the action of his family, and this action was not the natural and legitimate sequence of his absence. The fire might have been started just as well with him present, on some portion of the 160 acres of peas, and the wind would have blown just as hard.

The substantial facts in this case are undisputed; but if the evidence on the part of the plaintiff be alone considered, there is but one inference to be drawn from it, and that is that the absence of the herder was not the proximate cause of the destruction of the peas. The judgment is therefore affirmed.

Judgment affirmed.

FERGUS LANE v. ATLANTIC WORKS. [c]

(Supreme Judicial Court of Massachusetts, 1872. 111 Mass. 136.)

Tort. The declaration was as follows:

"And the plaintiff says that the defendants carelessly left a truck, loaded with iron, in Marion Street, a public highway in Boston, for the space of twenty minutes and more; and the iron on said truck was so carelessly and negligently placed that it would easily fall off; and that the plaintiff was walking in said highway, and was lawfully in said highway, and lawfully using said highway, and in the exercise of due care; and said iron upon said truck was thrown and fell therefrom upon the plaintiff in consequence of the defendants' carelessness, and the plaintiff was severely bruised and crippled," &c.

The plaintiff introduced evidence,[28] under a general denial, that the defendants left a truck with a bar of iron on it standing in front of their works on Marion Street, which was a public highway in Boston; that the iron was not fastened, but would easily roll off the truck; that the plaintiff, then seven years old, and a boy about the same age named James Conners, were walking, between six and seven in the evening, on the side of Marion Street opposite the truck and the defendants' works; that Horace Lane, a boy 12 years old, being near the truck, called to them to come over and see him move it; that the plaintiff and Conners said they would go over and watch him do it; that they went over accordingly; that the plaintiff stood near the truck to see the wheels move, as Horace Lane took hold of the tongue of the truck; that Horace Lane moved the tongue somewhat; that the iron rolled off and injured the plaintiff's leg; and that neither the plaintiff nor Conners touched the iron or truck at all.

The defendants introduced evidence tending to show that the iron was fastened securely on the truck, which was drawn from the defendants' works into the street at four o'clock in the afternoon; that the boys removed the fastenings; that Horace Lane placed the boys one on each side of the truck; that he turned the tongue of the truck round; that he and Conners then took hold of the iron and rolled it off; that the plaintiff had his hands on the iron or on the truck when the iron rolled off on him; and that the boys were engaged in the common enterprise of rolling off the iron and moving the truck. There was no evidence that Horace Lane had any lawful purpose or object in moving the truck, or any right to meddle with it.

The defendants requested the judge to give, besides other rulings, the following:

"2. In order to make the plaintiff a participator or joint actor with Horace Lane, in his conduct in meddling with the truck for an unlawful purpose, it was not necessary for him to have actually taken hold of the tongue, or the iron, or the truck, to help or aid in moving it. It is enough if he joined with him in a common object and purpose voluntarily, went across the street on his invitation for that avowed purpose, and stood by the truck to encourage and aid, by his presence, word or act, the accomplishment of that purpose.

"3. While it is true that negligence alone on the part of Horace Lane, which contributed to the injury combining with the defendants' negligence, would not prevent a recovery, unless the plaintiff's negligence also concurred as one of the contributory causes also; yet, if the fault of Horace Lane was not negligence, but a voluntary meddling with the truck or iron, for an unlawful purpose, and wholly as a sheer trespass, and this culpable conduct was the direct cause of the injury which would not have happened otherwise, the plaintiff cannot recover."

[28] The statement of facts is abridged and the opinion of Colt, J., is omitted.

The judge did not give the ruling requested, but gave rulings, which, so far as they are now material, were as follows:

"The city ordinance is proper to be put in evidence and to be considered by the jury upon the question of negligence, although it is not conclusive proof that the defendants were in point of fact negligent in the act of leaving the truck there. It is a matter of evidence, to be weighed with all the other evidence in the case.

"If the sole or the direct cause of the accident was the act of Horace Lane, the defendants are not responsible. If he was the culpable cause of the accident, that is to say, if the accident resulted from the fault of Horace Lane, they are not responsible. But if Horace Lane merely contributed to the accident, and if the accident resulted from the joint negligence of Horace Lane in his conduct in regard to moving the truck and the negligence of the defendants in leaving it there, where it was thus exposed, or leaving it so insecurely fastened that this particular danger might be reasonably apprehended therefrom, then the intermediate act of Horace Lane will not prevent the plaintiff from recovering, provided he himself was in the exercise of due and reasonable care. If the plaintiff himself participated in the act of Horace Lane no further than to go there and be a witness to this transaction which Horace Lane proposed to perform, crossing over the street by his invitation, and witnessing him move this truck, that would not make him such a participator in the wrongful act of Horace Lane as to prevent his recovery, provided he himself was in the exercise of reasonable care.

"If, however, he was actually engaged in the wrongful act of Horace Lane, if he was actually engaged in disturbing this truck, and moving the fastenings which had been put upon it in order to prevent it from being disturbed, and was actively participating in the act of Horace Lane, then he cannot recover. But if the act of the plaintiff was limited to crossing the street for the purpose of witnessing the act done by Horace Lane, in answer to his invitation, and no active participation was taken by the plaintiff other than that, it would not prevent his recovery, provided he himself was in the exercise of due and reasonable care."

At the close of his charge to the jury the judge read the second ruling prayed for by the defendants, and said:

"If the plaintiff took an active participation in it, as I before instructed you, or went there as a joint actor, for the purpose of encouraging Horace Lane in it, he cannot recover. If he went there attracted by curiosity only, at the invitation of the party who was about to move the truck, Horace Lane, then he may recover; provided, you are further satisfied that, in what he did, he was in the exercise of the due and reasonable care that should be expected of a person of his age."

The jury returned a verdict for the plaintiff for $6,000, and the defendants alleged exceptions.

COLT, J. In actions of this description, the defendant is liable for the natural and probable consequences of his negligent act or omission. The injury must be the direct result of the misconduct charged; but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended.

The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrong-doer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise.

Whether in any given case the act charged was negligent, and whether the injury suffered was, within the relation of cause and effect, legally attributable to it, are questions for the jury. They present oftentimes difficult questions of fact, requiring practical knowledge and experience for their settlement, and where there is evidence to justify the verdict it cannot be set aside as matter of law. The only question for the Court is, whether the instructions given upon these points stated the true tests of liability. * * *†

3. The last instruction asked was rightly refused. Under the law as laid down by the Court the jury must have found the defendants guilty of negligence in doing that from which injury might reasonably have been expected, and from which injury resulted; that the plaintiff was in the exercise of due care; that Horace Lane's act was not the sole, direct, or culpable cause of the injury; that he did not purposely roll the iron upon the plaintiff; and that the plaintiff was not a joint actor with him in the transaction, but only a spectator. This supports the verdict. It is immaterial whether the act of Horace Lane was mere negligence or a voluntary intermeddling. It was an act which the jury have found the defendants ought to have apprehended and provided against. McDonald v. Snelling, 14 Allen, 290, 295; Powell v. Deveney, 3 Cush. 300; Barnes v. Chapin, 4 Allen, 444; Tutein v. Hurley, 98 Mass. 211; Dixon v. Bell, 5 M. & S. 198; Mangan v. Atterton, L. R. 1 Ex. 239; Illidge v. Goodwin, 5 C. & P. 190; Burrows v. March Gas Co., L. R. 5 Ex. 67, 71; Hughes v. Macfie, 2 H. & C. 744.

Exceptions overruled.

†Part of the opinion, on other points, is omitted. On the principle in the last instruction compare the remark of Gibson, J., in Murphy v. Great Northern Ry. Co., [1897] 2 I. R. 301, 312: "The defendants might be liable if the [baggage] truck was set in motion either accidentally or by that occasional negligence which, as Lord Halsbury has remarked, is one of the ordinary incidents of human life, and which under the circumstances they ought to have anticipated." And see Norton v. Chandler & Co. (1915) 221 Mass. 99, 108 N. E. 897: (A defective revolving door to D.'s store is spun so fast by the hurry of S. that P., another customer passing through, is hurt.)

McDOWALL v. GREAT WESTERN RY. CO.

(High Court of Justice, King's Bench Division. [1902] 1 K. B. 618. Court of Appeal. [1903] 2 K. B. 331.)

The action was brought by an infant, suing by her next friend, to recover damages in respect of injuries sustained by her through the alleged negligence of the defendants. It was tried before Kennedy, J., and a jury, and, the jury having answered specific questions put to them by the judge and assessed the damages at £175, the case was adjourned for further consideration.

The following statement of facts is taken from the written judgment of Kennedy, J.:

"The claim is for damages for serious injuries inflicted on the plaintiff, a girl of nineteen years of age, in July, 1900, by a brake van belonging to the defendants and under the management of their servants at Pembroke.

"The defendants, as part of their railway system at Pembroke, have a branch called the Hobbs Point Branch, which is an offshoot of the main line and is chiefly used as a siding. The Hobbs Point Branch line crosses on a level a highway with a gate on either side across the line of railway. For some distance from the highway to the eastward there is a steepish gradient in the railway line of about one in fifty-five, descending to a point where the line crosses the highway. In the course of the gradient is what is termed a 'catch-point,' which would arrest and divert any railway trucks and carriages which from any cause happened to run down the incline towards the highway and would prevent them, as the defendants' witness phrased it, from 'running wild.' On the day before the accident a servant of the company had taken an engine with five trucks and a brake-van along the Hobbs Point Branch from the railway station, intending to leave them there as on a siding until they were required. He drew them beyond and to the westward of the catch-point, that is to say, to a position on the incline between the catch-point and the highway, and there left them, after putting on the brake in the van and properly spragging, as the operation is called, that is, securing by means of pieces of wood, the wheels of the trucks. The van was attached to the trucks by the screw coupling, which was not screwed up tight, but sufficiently tight, if not interfered with, to hold the van in connection with the trucks. The position would not have been a safe one in regard to the highway if these precautions had not been taken, but with the spraggs on the trucks and the brake on the van it would have been safe, as the jury have found by their verdict, if things had remained as they were when the trucks and the van were left in this condition. The defendants' evidence shewed that the reason why the trucks and the van were not left to the eastward of the catch-point was that they wished by going further to the

westward to have an extra space of line for shunting other carriages to be brought afterwards on to the branch from the mainline The Hobbs Point Branch was separated on the one side from some open ground belonging to the defendants by a wire fence, and on the other it was bounded by a field which was separated from the high road by a garden. For years the defendants had been troubled by boys trespassing on this part of the line and playing in and about the vehicles left standing upon it.

"The day after the shunting operations some boys appear to have come on the line where the trucks and van were and to have amused themselves by playing with the vehicles and their fastenings. They were seen doing this or, at all events, they were seen on and close to the van, and they seem carelessly to have unfastened the screw coupling of the van, and partially to have released the brake. In consequence of this the van, loosed from the trucks, ran down the incline, smashed the gate which separated the railway from the highway, as well as a gate higher up, and knocked down and seriously injured the plaintiff who was passing along the highway.

"It was to recover damages for the negligence of the defendants, which, as the plaintiff alleged, caused these injuries, that the action was brought. It was tried before me sitting with a jury at the last assizes at Haverfordwest. The jury assessed the damages at £175, and returned answers to specific questions which I left to them. The questions and the answers were as follows:

"(1) 'Was the van, in regard to the persons using the highway where the plaintiff was, in a safe position, as and where it was left by the defendants' servants on the 20th of July, unless interfered with afterwards?' The jury said, 'Yes.' (2) 'Would the accident to the plaintiff have happened if the van had not been interfered with?' Answer, 'No.' (3) 'Was the interference the act of trespassers, and, if so was the interference with the wilful intent of causing the van to descend the incline, or merely negligent?' Answer, 'Yes; the act of trespassers with negligence.' (4) 'Was the danger of such interference causing injury to persons using the highway known to the defendants at the time the van was left and kept where it was, and might it have been sufficiently guarded against by the exercise of reasonable care and skill on the part of the defendants?' Answer, 'Yes; it was known and could have been guarded against by the exercise of reasonable care on the part of the defendants.' (5) 'Was the occurrence of the injury to the plaintiff materially and effectively caused by want of reasonable care and skill on the part of the defendants' servants in placing and keeping the van as and where it was placed by them, either (a) in regard to its position, apart from interference by trespassers; or (b) in regard to its danger if interfered with; or (c) in any other way?' To that the jury answer, 'Yes; the company were negligent in not placing the van to the east of the catch-point;' and then they assess the damages as I have stated."

KENNEDY, J., read the following judgment: In this case the material facts may be shortly stated. [The learned judge stated the facts as above set out, and continued:]

I did not give judgment at the time, but reserved the case, which is in some respects peculiar, for further consideration; and the questions of law arising upon the case have been fully argued before me. * * * The finding of the jury in answer to the fourth question,

namely, that the defendants, at the time of placing and keeping the van where they did, knew of the danger to those on the highway of such interference as caused the plaintiff's hurt, appears to me to be conclusive. The position in which, with this knowledge, they placed and kept the van was one of danger because, if the interference happened so as to set the vehicles in motion, there was nothing there to stop the van running down the incline and crashing through the intervening gates and over the highway. There was a catch-point which had been placed to prevent and which would in fact have prevented, such a disaster. With a knowledge of the danger the defendants, for the convenience of their traffic arrangements, preferred not to use this obvious and effective safeguard. There was, I think, quite sufficient evidence to justify the finding of the jury of defendants' knowledge of the existence of the danger which the defendants' servants thus needlessly imposed upon persons using the highway.

For years, according to the defendants' witnesses, they had been troubled by boys playing with and on the trucks and carriages left stationary at this part of the line. This portion of the branch is bounded on one side by a wire fence, which separated it from some open ground of the defendants, and on the other side by a field, which was separated from the highroad by a garden. To the knowledge of the defendants boys used to get into the trucks, and even to unlock the doors of the vans on the siding, for the purpose either of theft or amusement. If the defendants knew of this systematic, or at any rate, very frequent interference, it does not appear to me to be otherwise than reasonable for the jury to say that they must be taken to have known, as one of the risks involved, that the trucks and vans kept in position on the down grade only by temporary means, which apparently were easily movable, might, if uncontrolled by the catch-point, cause mischief to the users of the highway. If, as the jury have found, the risk of interference by trespassers with the trucks and vans in this locality was a risk known to the defendants, and if the consequent danger of their movement down the incline to the highway was also a known risk, and if, further, this danger might have been guarded against by the exercise by the defendants of reasonable care, as the jury have also found, I can see no legal reasons upon which the defendants can claim immunity merely because the boys were trespassers. I may point out that in Engelhart v. Ferrant (1897) 1 Q. B. 240, the act which immediately caused the plaintiff's hurt was an unauthorized and improper act on the part of the person who did it; and in Lynch v. Nurdin, 1 Q. B. 29, Lord Denman said (1 Q. B. at p. 35): "If I am 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 so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first." In this case the

van as placed was not a cause of danger, but the defendants knew in effect that it might become a cause of danger, for they knew the risk of the interference which would create danger, and yet they omitted to take a reasonable precaution to prevent its consequences. Therefore, as it seems to me, the principle of liability as stated in the passage which I have read from Lord Denman's judgment, applies.

I give judgment for the plaintiff for the amount found by the jury in their verdict.

From this judgment the defendant appealed.[29]

[In the Court of Appeal]

ROMER, L. J. Clearly, as found by the jury when this train was left where it was by the railway company, with the precautions taken by them, it was perfectly safe. It was not left in any condition in which it could be said that there was any negligence on the part of the railway company under the circumstances, unless you can find some evidence of negligence by reason of the evidence relating to the mischievous boys; in other words, unless it is plain that the evidence relating to the mischievous boys turned that act which was otherwise a proper act on the part of the company into a negligent one. Upon that, having considered that evidence, it does not appear to me that upon it the jury could reasonably find that the railway company ought, under the circumstances in which they left this train, reasonably to have anticipated that the boys would do or might have done what they in fact did, or that there was at the time, known to the company, any such risk of the particular acts of the boys which caused the accident as called upon the railway company to take further precautions against those particular acts; and that being so, it appears to me that the findings upon which the learned judge below acted cannot be relied upon on behalf of the plaintiff, and that the appeal ought to succeed.

STIRLING, L. J. I am of the same opinion. The real question in this case is whether the findings of the jury in answer to the fourth and fifth questions which were put to them by the learned judge can be supported. In answer to the first three questions the jury have found that the van was in a safe position as and where it was left by the defendants' servants, unless interfered with afterwards, and that the accident would not have happened if the van had not been interfered with, and that the interference was the act of trespassers, who acted negligently. Then what really happened was that some boys got into or on the van and undid the brake and couplings, and that this led to the accident.

Now, was there any evidence to shew that the company ought reasonably to have anticipated such an occurrence? The learned judge, twice in the course of his judgment, states what the facts are. He

[29] Part of the opinion of Kennedy, J., is omitted.

says that for years the defendants had been troubled by boys trespassing on this part of the line and playing in and about vehicles standing upon it, and later he says that, to the knowledge of the defendants, the boys used to get into trucks and vans and unlock the doors of the vans on the siding. That is the whole length the evidence went. Nothing further has been called to our attention. That had gone on for years, and no accident of any kind had occurred. In these circumstances it does not seem to me a fair inference to draw that the company ought to have reasonably anticipated any such act as was actually done by the boys in this case, or the result which came from it. Upon that ground I think the appeal ought to be allowed.[30]

ALEXANDER v. TOWN OF NEW CASTLE.

(Supreme Court of Indiana, 1888. 115 Ind. 51, 17 N. E. 200.)

This action was brought by Alexander to recover for personal injuries sustained by him through the alleged negligence of the defendant. The complaint charged that the town allowed an excavation to be made in the side of one of the streets, and negligently suffered this excavation to remain open and uninclosed, whereby the plaintiff, without fault on his part, fell into this excavation and was injured. The town answered: First, in denial; secondly, that the plaintiff had a warrant for the arrest of one Heavenridge, and as special constable was taking Heavenridge to jail, under an order from a justice of the peace, and in doing so attempted to pass the excavation in question, that when opposite the same Heavenridge seized the plaintiff and threw him into the excavation, whereby he was injured as charged in the complaint, and Heavenridge was enabled to escape.[31]

A demurrer to this answer, on the ground of insufficiency of facts to constitute a defense, was overruled.

NIBLACK, C. J. (after stating the facts). Complaint is first made of the overruling the demurrer to the second paragraph of the answer, and this complaint is based upon the claim that, as the pit or excavation so wrongfully and negligently permitted to remain open and uninclosed afforded Heavenridge the opportunity of throwing the plaintiff into it as a means of escape, it was, in legal contemplation, the proximate cause of the injuries which the plaintiff received.

However negligent a person, or a corporation, may have been in some particular respect, he, or it, is only liable to those who may have been injured by reason of such negligence, and the negligence must have been the proximate cause of the injury sued for.

[30] The opinion of Vaughan Williams, L. J., with whom Romer and Stirling, L. JJ., concurred, is omitted.

[31] The statement of the case is abridged, and only so much of the opinion is given as relates to the one point.

Where some independent agency has intervened and been the immediate cause of the injury, the party guilty of negligence in the first instance is not responsible. On that subject Wharton, in his work on the Law of Negligence, at section 134, says: "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 as to which I am not contractually bound. 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 non-conductor, 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."

So, if a house has been negligently set on fire, and the fire has spread beyond its natural limits by means of a new agency; for example, if a high wind arose after its ignition, and carried burning brands to a great distance, thus causing a fire and a loss of property at a place which would have been safe but for the wind, the loss so caused by the wind will be set down as a remote consequence, for which the person setting the fire should not be held responsible. 1 Thompson, Negligence, 144. * * *[32]

Heavenridge was clearly an intervening, as well as an independent, human agency in the infliction of the injuries of which the plaintiff complained. The circuit court, consequently, did not err in overruling the demurrer to the second paragraph of the answer. * * *

Judgment [for the defendant] affirmed.

[32] Niblack, C. J., here referred to the following cases, with the remark, "Our cases are in harmony with the general principles herein announced:" Smith v. Thomas (1864) 23 Ind. 69; Pennsylvania Co. v. Hensil (1880) 70 Ind. 569, 36 Am. Rep. 188; City of Greencastle v. Martin (1881) 74 Ind. 449, 39 Am. Rep. 93; Billman v. Indianapolis, etc., R. R. Co. (1881) 76 Ind. 166, 40 Am. Rep. 230; City of Crawfordsville v. Smith (1881) 79 Ind. 308, 41 Am. Rep. 612; Terre Haute, etc., R. R. Co. v. Buck (1884) 96 Ind. 346, 49 Am. Rep. 168; Bloom v. Franklin Life Ins. Co. (1884) 97 Ind. 478, 49 Am. Rep. 469; Pennsylvania Co. v. Whitlock (1884) 99 Ind. 16, 50 Am. Rep. 71.

ANDREWS v. KINSEL.

(Supreme Court of Georgia, 1901. 114 Ga. 390, 40 S. E. 300, 88 Am. St. Rep. 25.)

LEWIS, J. Andrews & Co. sued Kinsel for $500 damages, making by their petition substantially the following case: The plaintiffs rented from the defendant a storehouse in the city of Columbus, in which they transacted a mercantile business; and it was the duty of the defendant, as the landlord of the plaintiffs, to keep the premises in good repair. The defendant also owned the storehouse adjoining that rented by the plaintiffs, a partition wall dividing the two stores. On a named day the defendant, by his agents and servants, entered his storehouse adjoining the plaintiffs' place of business for the purpose of making certain repairs thereon, and in making the repairs the partition between the two storehouses was removed, or partly removed, leaving the store of the plaintiffs exposed and unprotected; and upon leaving the place at night the defendant's agents and servants negligently and carelessly left open two rear windows in the store next to that of the plaintiffs, thereby rendering it easy to effect an entrance into the plaintiffs' store through the rear windows and the opening in the partition. On the night in question a burglar or burglars did gain entrance to the plaintiffs' store in the manner described, and steal from the plaintiffs a large quantity of merchandise, to their damage as aforesaid. No notice was given to the plaintiffs that the partition had been removed or that the windows had been left open, and this, also, is alleged to have been negligence. The defendant filed a demurrer to the petition, which was overruled, and he also filed an answer, in which he denied liability, and denied that he had been negligent as alleged. The case went to trial, and, at the conclusion of the evidence for the plaintiffs, the court, on motion of defendant's counsel, granted a nonsuit. To this ruling the plaintiffs excepted, and the defendant filed a cross-bill of exceptions in which he assigned error upon the overruling of his demurrer.

1. As, in our opinion, the court below should have sustained the demurrer filed by the defendant, and the refusal to do so was reversible, the writ of error issued upon the main bill of exceptions will, under the ruling of this court in Rives v. Rives, 113 Ga. 392, 39 S. E. 79, be dismissed.

2. It is unnecessary to argue, or to cite authorities to sustain, the well-settled legal principle that, to enable one to recover for damages resulting from the negligent conduct of another, it must appear that the negligence of the defendant was the proximate cause of the injury sustained. It is also a well-recognized principle that where there has intervened between the defendant's negligent act and the injury an independent illegal act of a third person, producing the injury, and without which it would not have happened, the latter is

properly held the proximate cause of the injury, and the defendant is excused. 8 Am. & Eng. Enc. Law (2d Ed.) 580. As is stated in 1 Shear. & R. Neg. (5th Ed.) § 25, "The defendant's negligence may put a temptation in the way of another person to commit a wrongful act by which the plaintiff is injured, and yet the defendant's negligence may be in no sense a cause of the injury." Thus, in Tennessee, a defendant was held not liable for the negligent failure to keep a night watch on guard over the property of the plaintiff, as a result of which an incendiary set fire to the property. State v. Ward, 9 Heisk. 133. In New York it is held that the relation of cause and effect between the negligence of the defendant and the injury to the plaintiff cannot be made out by including the independent illegal acts of third persons, and that the defendant cannot be made accountable for the unauthorized illegal acts of other persons, although his own conduct may have indirectly induced or incited the commission of the acts. Olmsted v. Brown, 12 Barb. 662. And in Crain v. Petrie, 6 Hill, 524, 41 Am. Dec. 765, the following language is used: "To maintain a claim for special damages, they must appear to be the legal and natural consequences arising from the tort, and not from the wrongful act of a third party remotely induced thereby." See, also, Shugart v. Egan, 83 Ill. 56, 25 Am. Rep. 359; Bosworth v. Brand, 1 Dana (Ky.) 377; Carpenter v. Railroad Co., 13 App. Div. 328, 43 N. Y. Supp. 203.

This principle is also well established in Georgia by the cases of Belding v. Johnson, 86 Ga. 177, 12 S. E. 304, 11 L. R. A. 53, and Henderson v. Coal Co., 100 Ga. 568, 28 S. E. 251, 40 L. R. A. 95. In the former case it was held that a widow could not recover damages of a barkeeper for the homicide of her husband, who was killed in an encounter with a third person; the quarrel leading up to the encounter having been the result of intoxication produced by liquor illegally sold to the slayer of plaintiff's husband by the barkeeper. In the Henderson Case the lessee of a convict was held not liable for the criminal act of the convict, by which a third party suffered damage, although the lessee negligently placed it in the power of the convict to commit the crime. These cases, it will be seen, are closely in point. The rule is aptly and rather quaintly stated in Whart. Neg. (2d Ed.) § 134, in the following language: "I am negligent on a particular subject-matter as to which I am not contractually bound. 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."

Applying these principles to the case now before us, it is manifest that the plaintiffs did not make out a cause of action by their petition. Granting as true all of their allegations as to the negligence of the

defendant, it is also true, upon the face of their pleadings, that there intervened as a direct cause between the negligence of the defendant and the damage sustained by themselves the independent criminal act of a responsible human agency. The demurrer to the petition should have been sustained.

Writ of error on main bill of exceptions dismissed. Judgment on cross bill reversed. All the justices concurring.

WATSON v. KENTUCKY & INDIANA BRIDGE & R. CO. et al.

(Court of Appeals of Kentucky, 1910. 137 Ky. 619, 126 S. W. 146.)

SETTLE, J. This action was instituted by the appellant, John Watson, in the court below against the appellees, Kentucky & Indiana Bridge & Railroad Company, hereinafter called the Bridge & Railroad Company, the Southern Railway Company, the Southern Railway Company in Kentucky, and the Union Tank Line Company, to recover $20,000 damages for injuries sustained to his person on the night of June 14, 1907, from an explosion of gas caused, as alleged, by the negligence of the appellees. It was, in substance, alleged in the petition as amended—

that while a tank car, owned by the appellee Union Tank Line Company, and filled with a highly explosive substance known as gasoline, was being transported through a populous section of the city of Louisville over the roadbed of the appellee Bridge & Railroad Company, it was derailed and its valve broken, thereby causing all the gasoline to escape and flow in large quantities on the street and into the gutters; that from the gasoline thus flowing and standing in pools upon the street and gutters there arose and spread over the neighborhood of the place of derailment and into the houses of the residents thereof, great quantities of highly explosive and combustible gas which, three hours after the derailment of the tank car, exploded with force from contact with a lighted match thrown on the street by one Chas. Duerr, who claimed to have used it in igniting a cigar; that the explosion threw appellant from his bed and almost demolished his house, from the ruins of which he was taken unconscious and bleeding with a fractured jaw and one cheek nearly torn from his face. It was further charged in the petition that the explosion and appellant's consequent injuries resulted from the negligence of all the appellees; the negligence of the Union Tank Line Company lying, as alleged, in its failure to provide the tank car with proper trucks and main valve; that of the Bridge & Railroad Company in failing to maintain in a safe condition the roadbed and track at the point of derailment; in permitting the tank car to remain at the place of derailment in its wrecked condition an unreasonable time, and in allowing ignorant and careless meddling on the part of their servants with the main valve of the tank after it was broken, whereby the flow of the gasoline from the tank was increased instead of diminished.

All the material averments of the petition were specifically denied by the answer of the appellees.

As on the trial the proof failed to show that either the Southern Railway Company, or the Southern Railway Company in Kentucky, was charged with the duty of maintaining the roadbed or tracks at the place of derailment or that they had handled or had anything to

do with the tank car in question, appellant, at the conclusion of all the evidence, dismissed the action without prejudice as to those two appellees. At the conclusion of appellant's evidence, the appellees Bridge & Railroad Company and Union Tank Line Company moved the court peremptorily to instruct the jury to find for them. The motion was overruled, but being renewed by appellees after the introduction of all the evidence, it was sustained, and the jury, in obedience to the peremptory instruction then given by the court, returned a verdict in behalf of appellees, upon which judgment was entered in their favor for costs. Appellant, being dissatisfied with that judgment and the refusal of the Circuit Court to grant him a new trial, has appealed. * * *

The lighting of the match by Duerr having resulted in the explosion, the question is, was that act merely a contributing cause, or the efficient and, therefore, proximate cause of appellant's injuries? The question of proximate cause is a question for the jury. In holding that Duerr in lighting or throwing the match acted maliciously or with intent to cause the explosion, the trial court invaded the province of the jury. There was, it is true, evidence tending to prove that the act was wanton or malicious, but also evidence conducing to prove that it was inadvertently or negligently done by Duerr. It was therefore for the jury and not the court to determine from all the evidence whether the lighting of the match was done by Duerr inadvertently or negligently, or whether it was a wanton and malicious act. As said in Milwaukee Railroad Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256: "The true rule is that what is the proximate cause of the injury is ordinarily a question for the jury. It is not a question of science or legal knowledge. It is to be determined as a fact in view of the circumstances of fact attending it." Sydnor v. Arnold, 122 Ky. 557, 92 S. W. 289, 28 Ky. Law Rep. 1252. In Thompson on Negligence, § 161, it is said: "On principle, the rule must be here, as in other cases, that, before the judge can take the question away from the jury and determine it himself, the facts must not only be undisputed, but the inference to be drawn from those facts must be such that fair-minded men ought not to differ about them. It must be concluded that this is so, when it is considered that proximate cause is a cause which would probably, according to the experience of mankind, lead to the event which happened, and that remote cause is a cause which would not, according to such experience, lead to such an event. Now, whether a given cause will probably lead to a given result is plainly to be determined by the average experience of mankind; that is, by a jury rather than by a legal scholar on the bench."

No better statement of the law of proximate cause can be given than is found in 21 Am. & Eng. Ency. of Law (2d Ed.) 490, quoted with approval in Louisville Home Telephone Company v. Gasper, 123 Ky. 128, 93 S. W. 1057, 29 Ky. Law Rep. 578, 9 L. R. A. (N.

S.) 548: "It is well settled that the mere fact that there have been intervening causes between the defendant's negligence and the plaintiff's injuries is not sufficient in law to relieve the former from liability; that is to say, the plaintiff's injuries may yet be natural and proximate in law, although between the defendant's negligence and the injuries other causes or conditions, or agencies, may have operated, and, when this is the case, the defendant is liable. So the defendant is clearly responsible where the intervening causes, acts, or conditions were set in motion by his earlier negligence, or naturally induced by such wrongful act or omission, or even, it is generally held, if the intervening acts or conditions were of a nature the happening of which was reasonably to have been anticipated, though they may have been acts of the plaintiff himself. An act or omission may yet be negligent and of a nature to charge a defendant with liability, although no injuries would have been sustained but for some intervening cause, if the occurrence of the latter might have been anticipated. * * * A proximate cause is that cause which naturally led to and which might have been expected to produce the result. * * * The connection of cause and effect must be established. It is also a principle well settled that when an injury is caused by two causes concurring to produce the result, for one of which the defendant is responsible, and not for the other, the defendant cannot escape responsibility. One is liable for an injury caused by the concurring negligence of himself and another to the same extent as for one caused entirely by his own negligence." Black's Law & Practice, § 21; Thompson on Negligence, §§ 47–52; Whitaker's Smith on Negligence, 27; 29 Cyc. 488–502.

If the presence on Madison street in the city of Louisville of the great volume of loose gas that arose from the escaping gasoline was caused by the negligence of the appellee Bridge & Railroad Company, it seems to us that the probable consequences of its coming in contact with fire and causing an explosion was too plain a proposition to admit of doubt. Indeed, it was most probable that some one would strike a match to light a cigar or for other purposes in the midst of the gas. In our opinion, therefore, the act of one lighting and throwing a match under such circumstances cannot be said to be the efficient cause of the explosion. It did not of itself produce the explosion, nor could it have done so without the assistance and contribution resulting from the primary negligence, if there was such negligence, on the part of the appellee Bridge & Railroad Company in furnishing the presence of the gas in the street. This conclusion, however, rests upon the theory that Duerr inadvertently or negligently lighted and threw the match in the gas. This view of the case is sustained by the following leading cases, all decided by this court: Sydnor v. Arnold, 122 Ky. 557, 92 S. W. 289, 28 Ky. Law Rep. 1252; Louisville Gas Co. v. Gutenkuntz, 82 Ky. 432; Whitman-McNamara Tobacco Co. v. Warren, 66 S. W. 609, 23 Ky. Law Rep. 2120; Louis-

ville Home Telephone Co. v. Gasper, 123 Ky. 128, 93 S. W. 1057, 29 Ky. Law Rep. 578, 9 L. R. A. (N. S.) 548. The cases supra are, indeed, in point of fact and principle so analogous to the case under consideration as to completely control its determination, and to render further discussion of it unnecessary.

If, however, the act of Duerr in lighting the match and throwing it into the vapor or gas arising from the gasoline was malicious, and done for the purpose of causing the explosion, we do not think appellees would be responsible, for while the appellee Bridge & Railroad Company's negligence may have been the efficient cause of the presence of the gas in the street, and it should have understood enough of the consequences thereof to have foreseen that an explosion was likely to result from the inadvertent or negligent lighting of a match by some person who was ignorant of the presence of the gas or of the effect of lighting or throwing a match in it, it could not have foreseen or deemed it probable that one would maliciously or wantonly do such an act for the evil purpose of producing the explosion. Therefore, if the act of Duerr was malicious, we quite agree with the trial court that it was one which the appellees could not reasonably have anticipated or guarded against, and in such case the act of Duerr, and not the primary negligence of the appellee Bridge & Railroad Company, in any of the particulars charged, was the efficient or proximate cause of appellant's injuries. The mere fact that the concurrent cause or intervening act was unforeseen will not relieve the defendant guilty of the primary negligence from liability, but if the intervening agency is something so unexpected or extraordinary as that he could not or ought not to have anticipated it, he will not be liable, and certainly he is not bound to anticipate the criminal acts of others by which damage is inflicted and hence is not liable therefor. 29 Cyc. 501–512; Sofield v. Sommers, 9 Ben. 526, 22 Fed. Cas. 769, Cas. No. 13,157; Andrews v. Kinsel, 114 Ga. 390, 40 S. E. 300, 88 Am. St. Rep. 25. * * *

For the reasons indicated, the judgment is affirmed as to the Union Tank Line Company, but reversed as to the Bridge & Railroad Company, and cause remanded for a new trial consistent with the opinion.[33]

RICKARDS v. LOTHIAN.

(Judicial Committee of the Privy Council. [1913] App. Cas. 263.)

Appeal from an order of the High Court of Australia (May 22, 1911), reversing a judgment of the Supreme Court of Victoria (August 7, 1910), and restoring a judgment of the County Court at Melbourne (April 29, 1910).[34]

[33] Parts of the opinion are omitted.

[34] The statement of the case is abridged, and the arguments of counsel and parts of the opinion are omitted.

The judgment of their Lordships was delivered by

Lord Moulton. The appellants in this case are the personal representatives of Harry Rickards, who was the defendant in an action for damages brought by the respondent against him in the Melbourne County Court for damages occasioned to the stock in trade of the plaintiff, who was the tenant of the second floor of certain premises belonging to the defendant, by an overflow from a lavatory basin situated on an upper floor of the same premises. Though the sum involved is not large, the legal questions raised by the case are of considerable importance, and the litigation has been characterized by remarkable differences of judicial opinion upon them. Upon the findings of the jury, the judge at the trial directed judgment to be entered for the plaintiff for £156, the amount of the damages found by the jury. On appeal to the Supreme Court of Victoria that judgment was set aside and judgment entered for the defendant, in accordance with the views of a majority of that Court. This decision was reversed on appeal by the High Court of Australia in accordance with the views of a majority of that Court, and the present appeal is brought by leave from that decision of the High Court of Australia. The circumstances out of which the action arose were as follows:

The defendant was the lessee under a long building lease of a building in Melbourne used for business purposes, and the plaintiff was tenant under him of part of the second floor of such building. On the fourth floor there was a room used as a men's lavatory in which was fixed a wash-hand basin supplied with water by a screw-down tap situated immediately over it and connected by a pipe with the mains of the Metropolitan Water Supply System. The basin had the usual arrangements for getting rid of the water, namely, a vent-hole provided with a plug at the bottom of the basin and holes situated near its upper edge to act as an overflow. Through these holes the overflowing water passed down a pipe which connected with the wastepipe from the hole at the bottom of the basin, some little distance below its upper end. It was common ground that the basin and fittings above described were of ordinary construction and such as are in common use, and it was proved that on their erection they had been inspected and passed by the officials of the Metropolitan Board of Works in the regular way. The lavatory was intended for the use of the tenants of the upper floors and persons in their employment.

The defendant employed one Smith as a caretaker of the building, and part of his business was to see that the lavatory was in good working order. On August 18, 1909, he was on duty until 10:20 p. m. He gave evidence that at that hour he went to the lavatory and found it in proper order. On the plaintiff arriving on the premises the following morning he found that his stock in trade there (which consisted mainly of school-books) was seriously damaged by water, and on examination it was discovered that the water tap of the basin had been

turned full on and the waste-pipe plugged so that there had been an overflow from the basin to the extent of the full supply which the tap was capable of giving, and that this overflow had flooded the rooms below. There was no direct evidence as to the length of time that the water had been running in this way, but the extent of the overflow was so great that it seems to have been accepted by all parties at the trial that it must have continued for some hours. It was for the damage thus caused to the plaintiff's stock in trade that the action was brought.

On examining the basin it was found that the waste-pipe had been plugged up with various articles, such as nails, penholders, string, and soap, and that the obstruction was situated so far down the pipe that it covered its junction with the waste-pipe from the overflow holes. It therefore blocked both waste-pipes. The manner in which the plugging was effected furnished strong evidence that it had been intentionally done; indeed, the materials had been so tightly rammed together that it was difficult to clear the pipe. For the purposes of the trial the capacity of the waste-pipes for carrying off the water which the tap was capable of supplying was tested after the pipe had been cleared. It was found that at the ordinary pressure of the system during the daytime the waste-pipes were able to carry off all the water which the tap could supply even when fully open, but that during the night the pressure rose somewhat and that at the night pressure the waste-pipes were not sufficient to take off the whole of the water which the tap could supply. The plaintiff gave no evidence to shew what fraction of the water which the tap was capable of so supplying during the night would fail to pass away by the waste-pipes if they were clear and unobstructed, but it would seem probable that the amount of the overflow in such circumstances would only be a comparatively small fraction of the water issuing out of the tap and that the major portion would pass off by the waste-pipes.

In his plaint the plaintiff claimed to recover the damage done to his stock in trade as injury caused by water through the carelessness of the defendant, his servants or agents, in the construction, maintenance, management, and control of the lavatory basin and its pipes, &c., and alternatively as injury arising from a breach by the defendant of an implied covenant for quiet enjoyment. At the trial he was permitted to add a third alternative whereby he claimed to recover such damage as injury caused by the defendant wrongfully permitting large quantities of water to escape from the said basin and to flow into the premises occupied by the plaintiff. By his defence the defendant denied the allegations of negligence, covenant, and duty, and further denied that if any such covenant existed there had been any breach of it.

At the trial evidence was called on both sides and the above facts were proved. The claim upon implied covenant was obviously unsustainable and was apparently abandoned. The substantial case sought to be made on behalf of the plaintiff was twofold—first, that Smith

(for whose actions the defendant was responsible) was guilty of negligence in leaving the tap turned on and in omitting to discover that the waste-pipe was choked; and, secondly, that the defendant was guilty of negligence in not placing a lead safe with an outlet pipe on the floor of the lavatory underneath the basin. Smith was called as witness on behalf of the defendant and gave evidence that the basin was in proper condition when he left it on the evening before, and the tap turned off, and, as will presently be seen, the jury accepted his evidence. With regard to the second point, namely, whether it was necessary or usual to put a lead safe in such a lavatory, the evidence was very conflicting, the views of the various expert witnesses called for the parties differing widely.

The learned judge summed up very carefully and at considerable length, calling the attention of the jury to the whole of the evidence given. In the course of his summing up he directed them that "if this" (i. e., the plugging up) "were a deliberately mischievous act of some outsider, unless it were instigated by the defendant himself, the defendant would not be responsible. He would not be responsible for a malicious act under those circumstances, because he could not guard against malice." This direction was in substance repeated in that part of the summing up which dealt with the question of the necessity of placing a lead safe in the lavatory. Referring to the contention of the defendant that the damage was caused not by the absence of a safe but by deliberate mischief, he said: "If it was, then the defendant would not be responsible because the person who deliberately tried to flood the place could overcome the precautions. He could stop the plug of the basin, he could stop the overflow, and could very easily stop the escape from the lead floors. Nobody is expected to guard against deliberate malice or mischief."

At the end of the summing up the judge handed the following written paper to the jury:

"Questions for the jury. To be taken in reference to the evidence and the judge's direction.

"(1) Was the defendant, or any of his servants or agents guilty of negligence? (a) In not providing a reasonably sufficient escape for water in case of an overflow resulting from accident or negligence having regard to the nature of the use of the rooms beneath? (b) In leaving the tap turned on on the night of the 18th August, 1909, or in omitting to discover on that night that the waste-pipe was choked?

"(2) Was such negligence (if any) the cause of the injury to the plaintiff's goods?

"(3) Damages in any case?"

And the jury returned the following written answers:

"(1) Yes. (a) We are of opinion that a lead safe was necessary on the floor of this particular lavatory, and that same would minimize risk. (b) No. We believe the evidence of Smith (caretaker), who asserts that the lavatory was in thorough order when he ceased duties.

"(2) Yes, it was.

"(3) We assess the damage done to Lothian's property at £156.

"We are of opinion that this was the malicious act of some person."

* * * These questions were not happily framed. For example the word "negligence" in 1 (a) is used twice, and evidently refers to two different things in the two places where it occurs. In the earlier part of the question it must refer to negligence in the construction of the apparatus, but in the latter part it must refer to negligence in user. But this is not the most serious defect in these questions. There is also a fatal omission. The judge had directed the jury that if the act was malicious the defendant would not be liable unless he instigated it, which was not even suggested. Yet this issue was not put to them, nor, indeed, was any question asked bearing upon it. It is evident that this omission puzzled the jury. The course they took was, on the whole, one directed by common sense. They found a verdict upon that vital issue, although it had not been separately left to them, and they then proceeded to answer the questions specifically put to them. As their language shews, these questions related solely to the issue of negligence—the first asking as to its existence, the second as to the damage being a consequence of it, and the third as to the amount of that damage. It is difficult to understand the answer of the jury to the second question, in view of the finding that the act was malicious, because if the act was malicious the negligence in not providing the lead safe could not be legally speaking, the cause of the damage. But there can be no doubt of the meaning of the finding as to the act having been malicious, and therefore their Lordships consider that the only reasonable interpretation to be put upon the answer to the second question is that the jury thought that the negligence in omitting to provide a lead safe was physically the cause of the damage in the sense that the provision of a lead safe would have prevented the damage if the overflow had been due to negligence or accident.

Their Lordships are of opinion that there was abundant evidence to support the finding of the jury that the plugging of the pipes was the malicious act of some person and indeed it is difficult to see how upon the evidence any other conclusion could reasonably have been arrived at. The answers to the question 1 (a) and (b) were also answers which the jury were competent to give upon the evidence, and no objection can be taken to them. * * * They found that it was negligent to omit to provide a lead safe on the floor of this particular lavatory. Their Lordships are satisfied that a finding so express and so carefully limited cannot be impugned.

It is clear that on these findings the plaintiff did not make good his claim as a claim in an ordinary action of negligence. To sustain such a cause of action it must be shewn that the negligence is the proximate cause of the damage. The proximate cause of the damage here was the malicious act of a third person. The only negligence which the jury found in this case was the omission to provide against accident by placing a lead safe under the lavatory. Such automatic devices are security against accident or negligent user, but they are inoperative

against intentional and mischievous acts. The person who did the malicious act in this case was obliged to do three distinct things to secure the success of his plan, namely, to open the screw tap to its utmost limit, to block the waste-pipe from the bottom of the basin, and to block the waste-pipe from the overflow holes. It cannot be doubted that the presence of a lead safe would have formed no obstacle to his plan, because the outlet from that safe could have been blocked up as easily as the two waste-pipes. The arguments on behalf of the plaintiff in the Courts of Appeal were therefore mainly directed to bringing the case under one of two other well-known types of action, namely:

(1) It was contended that the defendant ought to have foreseen the probability of such a malicious act and to have taken precautions against it, and that he was liable in damages for not having done so.

(2) It was contended that the defendant was liable apart from negligence on the principles which are usually associated with the well-known case of Fletcher v. Rylands, L. R. 1 Ex. 265, and L. R. 3 H. L. 330.

In the argument on the first of these points, Lynch v. Nurdin (1841) 1 Q. B. 29, Cooke v. Midland Great Western Railway of Ireland, [1909] A. C. 229, and other decisions of the same type were relied upon. There is, however, a short and conclusive answer to this contention. To make good such a cause of action the plaintiff must shew that the defendant ought to have reasonably anticipated the likelihood of a deliberate choking of the pipe so that it became his duty to take precautions to prevent such an act causing damage to others. This is an issue of fact in which the burden is upon the plaintiff, and he has obtained no finding from the jury in support of it. It is perhaps irrelevant to consider who is responsible for this omission, because it is for the plaintiff to see that the questions necessary to enable him to support his case are asked of the jury. But in this case the defendant specifically requested the judge to put the question whether the defendant ought reasonably to have anticipated the deliberate choking of the pipe, and the plaintiff's counsel did not support the request, but accepted the questions framed by the judge. The absence of this finding is fatal to this part of the plaintiff's case, and it is not necessary, therefore, to inquire into it further. But it must be pointed out that there was no evidence which could have supported such a finding, and moreover, that the only duty incumbent upon the defendant in such a case would have been to take reasonable precautions to prevent such an act causing damage, and throughout the whole of the case there was no suggestion of any precaution which would have had that effect; nor was there any finding by the jury that the defendant had in this respect omitted to do anything which he should have done. The only omission found against him was of something wholly irrelevant from this point of view. It is impossible, therefore, to sup-

port the plaintiff's claim so far as it is based upon the legal principles illustrated by the above class of cases. * * *[35]

On the above grounds their Lordships are of opinion that the direction of the learned judge at the trial to the effect that "if the plugging up were a deliberately mischievous act by some outsider unless it were instigated by the defendant himself, the defendant would not be responsible," was correct in law, and that upon the finding of the jury that the plugging up was the malicious act of some person the judge ought to have directed the judgment to be entered for the defendant.

The appeal must therefore be allowed and judgment entered for the defendant in the action with costs in all the Courts, and the plaintiff must pay the costs of this appeal and their Lordships will humbly advise His Majesty accordingly.

SECTION 4.—CO-OPERATIVE AGENCIES AND LEGAL CAUSE

COREY v. HAVENER.

SAME v. ADAMS.

(Supreme Judicial Court of Massachusetts, 1902. 182 Mass. 250, 65 N. E. 69.)

Corey brought two actions of tort against different defendants for injuries to the plaintiff caused by the alleged negligence of both defendants, each operating a separate gasoline motor tricycle at an illegal and dangerous rate of speed and thus causing the horse which plaintiff was driving to take fright, so that plaintiff lost control of the horse and was injured in consequence.

At the time of the accident causing the injuries complained of, the plaintiff was driving slowly along a public street in Worcester. The defendants came up from behind, on motor tricycles, which emitted smoke and made a loud noise, frightening the plaintiff's horse. The defendants passed at a high rate of speed, one on each side of the plaintiff's wagon.

The two cases were tried together. On cross-examination the plaintiff and each of his witnesses were asked if he could tell which defendant or which motor cycle caused the plaintiff's horse to take fright, and each witness was unable to tell.

[35] Lord Moulton here reviewed the facts and the decision of Fletcher v. Rylands (1866) L. R. 1 Ex. 265, and (1868) L. R. 3 H. L. 330, and held that its principle did not apply in the present case. For this part of the judgment see ante, p. 795.

The defendants requested the judge to instruct the jury that the evidence showing that they were on two separate vehicles entirely independent of each other, and there being two different suits for the same injury, the burden was on the plaintiff to show which one, if either, was to blame; and that if it was not clearly shown which one of the defendants caused the accident, the plaintiff could not recover. This instruction the judge refused to give.

The jury found for the plaintiff in each case, and in each assessed the damages at $700. The defendants alleged exceptions.

LATHROP, J. * * * The verdict of the jury has established the fact that both of the defendants were wrongdoers. It makes no difference that there was no concert between them, or that it is impossible to determine what portion of the injury was caused by each. If each contributed to the injury, that is enough to bind both. Whether each contributed was a question for the jury. Railroad Co. v. Shanly, 107 Mass. 568, 578, and cases cited.

It makes no difference that the defendants were sued severally, and not jointly. If two or more wrongdoers contribute to the injury, they may be sued either jointly or severally. McAvoy v. Wright, 137 Mass. 207. The first request for instructions was, therefore, rightly refused.

Nor was there any error in refusing to give the second request. If both defendants contributed to the accident, the jury could not single out one as the person to blame. There being two actions, the plaintiff was entitled to judgment against each for the full amount. There is no injustice in this, for a satisfaction of one judgment is all that the plaintiff is entitled to. Elliott v. Hayden, 104 Mass. 180; Savage v. Stevens, 128 Mass. 254; Luce v. Dexter, 135 Mass. 23, 26; McAvoy v. Wright, 137 Mass. 207; Galvin v. Parker, 154 Mass. 346, 28 N. E. 244; Worcester Co. v. Ashworth, 160 Mass. 186, 189, 35 N. E. 773.

Exceptions overruled.[36]

SALISBURY et al. v. HERCHENRODER.

(Supreme Judicial Court of Massachusetts, 1871. 106 Mass. 458, 8 Am. Rep. 354.)

Tort for injuries to a building owned and occupied by the plaintiffs on the north side of Avon Street in Boston. The parties stated the following case for the judgment of the superior court:

The defendant was lessee and occupant of an adjoining building on the same street, and suspended what was called a banner-sign, bearing his name upon the banner, across the street, upon a wire rope, one end of which was fastened by an iron bolt to his building, and the other end in like manner to a building on the south side of the street. The sign was made of net-work

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[36] The statement of the case is abridged, and part of the opinion is omitted.

for the purpose of diminishing its resistance of the wind, and due care was used in its construction and fastening. The lowest part of it was at least twenty feet above the pavement of the street; and it did not interfere with the ordinary enjoyment of the neighboring estates; but it was hung there in violation of an ordinance of the city of Boston, which rendered the defendant liable to a penalty for each day during which it remained suspended. On September 8, 1869, in what was commonly known as the "great gale" of that year, which was a gale of extraordinary violence, the wind blew the sign away, and the movement of the sign, which remained attached to the rope, jerked the iron bolt out of the building on the south side of the street, and hurled it across the street and through the glass of a window in the plaintiffs' building, thus doing the injuries for which they sought to recover. The plaintiffs' window was properly constructed, and they were in no way chargeable with negligence.

CHAPMAN, C. J. If the defendant's sign had been rightfully placed where it was, the question would have been presented whether he had used reasonable care in securing it. If he had done so, the injury would have been caused, without his fault, by the extraordinary and unusual gale of wind which hurled it across the street and against the plaintiffs' window. The party injured has no remedy for an injury of this character, because it is produced by the vis major. For example, a chimney or roof, properly constructed and secured with reasonable care, may be blown off by an extraordinary gale, and injure a neighboring building; but this is no ground of action.

But the defendant's sign was suspended over the street in violation of a public ordinance of the city of Boston, by which he was subject to a penalty. Laws & Ordinances of Boston (ed. 1863), 712. He placed and kept it there illegally, and this illegal act of his has contributed to the plaintiffs' injury. The gale would not of itself have caused the injury, if the defendant had not wrongfully placed this substance in its way.

It is contended 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, 28 Am. Dec. 281. 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 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. See, also, Woodward v. Aborn, 35 Me. 271, 58 Am. Dec. 699, where the defendant wrongfully placed a deleterious substance near the plaintiffs' well, and an extraordinary freshet caused it to spoil the water; also Barnard v. Poor, 21 Pick. 378, where the plaintiffs' property was consumed by a fire carelessly set by the defendant on an adjoining lot; also Pittsburgh City v. Grier, 22 Pa. 54, 60 Am. Dec. 65; Scott v. Hunter, 46 Pa. 192, 84 Am. Dec. 542; Polack v. Pioche, 35 Cal. 416, 423, 95 Am. Dec. 115.

Judgment for the plaintiffs affirmed.

DAVIS v. GARRETT.

(Court of Common Pleas, 1830. 6 Bing. 716, 130 Reprint, 1456, 31 R. R. 524.)

The plaintiff delivered to the defendant on board his barge 114 tons of lime to be conveyed from the Medway to London. The master of the barge deviated unnecessarily from the usual course. Afterwards, and while the barge was thus out of her course, a tempest wetted the lime, and the barge took fire in consequence. The master was compelled, for the preservation of himself and the crew, to run the barge ashore, where both the lime and the vessel were utterly destroyed.

In an action to recover the value of the lime, there was a verdict for the plaintiff.

Taddy, Serjt., obtained a rule nisi for a new trial, or to arrest the judgment, on the ground, first, that the deviation by the master of the barge was not a cause of the loss of the lime sufficiently proximate to entitle the plaintiff to recover, inasmuch as the loss might have been occasioned by the same tempest if the barge had proceeded in her direct course; and secondly, that the declaration contained no allegation of any undertaking on the part of the defendant to carry the lime directly to London; an allegation which, it was contended, on the authority of Max v. Roberts, 12 East, 89, was essential to the plaintiff's recovery.*

TINDAL, C. J. There are two points for the determination of the Court upon this rule; first, whether the damage sustained by the plaintiff was so proximate to the wrongful act of the defendant as to form the subject of an action; and, secondly whether the declaration is sufficient to support the judgment of the Court for the plaintiff.

As to the first point, it appeared upon the evidence that the master of the defendant's barge had deviated from the usual and customary course of the voyage mentioned in the declaration without any justifiable cause; and that afterwards, and whilst such barge was out of her course, in consequence of stormy and tempestuous weather, the

*The statement of the case is abridged.

sea communicated with the lime, which thereby became heated, and the barge caught fire, and the master was compelled for the preservation of himself and the crew to run the barge on shore, where both the lime and the barge were entirely lost.

Now the first objection on the part of the defendant is not rested, as indeed it could not be rested, on the particular circumstances which accompanied the destruction of the barge; for it is obvious, that the legal consequences must be the same, whether the loss was immediately, by the sinking of the barge at once by a heavy sea, when she was out of her direct and usual course, or whether it happened at the same place, not in consequence of an immediate death's wound, but by a connected chain of causes producing the same ultimate event. It is only a variation in the precise mode by which the vessel was destroyed, which variation will necessarily occur in each individual case.

But the objection taken is, that there is no natural or necessary connection between the wrong of the master in taking the barge out of its proper course, and the loss itself; for that the same loss might have been occasioned by the very same tempest, if the barge had proceeded in her direct course.

But if this argument were to prevail, the deviation of the master, which is undoubtedly a ground of action against the owner, would never, or only under very peculiar circumstances, entitle the plaintiff to recover. For if a ship is captured in the course of deviation, no one can be certain that she might not have been captured if in her proper course. And yet, in Parker v. James, 4 Camp. 112, where the ship was captured whilst in the act of deviation, no such ground of defence was even suggested. Or, again, if the ship strikes against a rock, or perishes by storm in the one course, no one can predicate that she might not equally have struck upon another rock, or met with the same or another storm, if pursuing her right and ordinary voyage.

The same answer might be attempted to an action against a defendant who had, by mistake, forwarded a parcel by the wrong conveyance, and a loss had thereby ensued; and yet the defendant in that case would undoubtedly be liable.

But we think the real answer to the objection is, that no wrongdoer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done. It might admit of a different construction if he could shew, not only that the same loss might have happened, but that it must have happened if the act complained of had not been done; but there is no evidence to that extent in the present case.

Rule discharged.

WALD v. PITTSBURGH, C., C. & ST. L. R. CO.

(Supreme Court of Illinois, 1896. 162 Ill. 545, 44 N. E. 888, 35 L. R. A. 356, 53 Am. St. Rep. 332.)

This was an action by Wald against the railway company to recover the value of the plaintiff's trunk and its contents, constituting his personal baggage, which had been lost in the great Johnstown flood in 1889, while in the possession of the defendant as a common carrier. The facts were as follows:

On May 30, 1889, the plaintiff bought a ticket at Cincinnati for passage by the so-called "Limited Express Train" over defendant's road to New York City. The limited express was a fast train, arriving in New York City two hours sooner than the regular day express. The tickets for this limited train consisted of two printed slips,—one, the railroad ticket, being green; the other, the special limited sleeping-car ticket, being purple. No passenger could travel by the limited without having both of these tickets. It was necessary to present these tickets at Cincinnati to some agent of the railroad company, in order to have a trunk checked to New York. Plaintiff did so present his tickets, and had his trunk checked at Cincinnati for New York. From Cincinnati to Pittsburgh passengers and their baggage for both the limited and day express traveled on the same train. This was the case with plaintiff and his baggage. Both left Cincinnati at the same time. At Pittsburgh the Cincinnati sleeper, carrying passengers for the limited train, was attached to the regular limited express, which had come from Chicago, and the Cincinnati baggage for the limited train was transferred at Pittsburgh from the baggage car of the Cincinnati express to the baggage car of the limited train. In order to have baggage intended for the limited express so transferred at Pittsburgh, it was the practice of the railroad company to attach to each trunk at Cincinnati a white pasteboard tag in addition to the regular brass check, and, unless such a white tag had been so attached, a trunk remained on the baggage car from Cincinnati, and went through by the day express from Pittsburgh to New York. In the present case no such white tag had been attached to plaintiff's trunk at Cincinnati, and as a result, while plaintiff's car was transferred at Pittsburgh to the limited express, his trunk remained on the day express, which followed along some time after the limited. This day express, carrying plaintiff's baggage, was overtaken by the flood at Johnstown, Pa., and the baggage car, with the entire contents, including plaintiff's trunk, was lost. The limited express on which plaintiff traveled passed beyond the point of danger before the flood came, and was uninjured. There was some conflict in the testimony as to whether or not it was defendant's fault that the white tag was not placed on plaintiff's trunk at Cincinnati. It is agreed "that there was no negligence in the management of the train, or in the care of the baggage while on the train."

On the trial of the case before a jury, at the close of all the evidence the court instructed the jury, as requested by defendant, that plaintiff was not entitled to recover, and that a verdict should be returned for defendant. On the verdict so returned judgment was entered, and this judgment was affirmed by the appellate court. The case is brought to this court under a certificate of importance.[37]

MAGRUDER, C. J. (after stating the facts). Appellee's contention is that the flood by reason of which appellant's baggage was lost was an act of God, and that it is not liable for such loss under the well-

[37] The opinion of the Appellate Court will be found in Wald v. Pittsburg, C., C. & St. L. R. Co. (1895) 60 Ill. App. 460.

established rule that "a common carrier, liable as an insurer for the property intrusted to him for the purpose of transportation, is, nevertheless, excused from responsibility for losses which are caused by an act of God." 1 Am. & Eng. Enc. Law (2d Ed.) p. 592. It is appellant's contention that the railroad company should, by placing a white tag on his trunk at Cincinnati, or by some other means, have provided that it should travel with him by the same train throughout the journey; that it did not do so; that, as a result of its negligence in so failing properly to check his trunk, it was separated from him during the journey, and was lost; and that, even if this flood was an act of God, yet the appellee's negligence in failing properly to check the trunk concurred with the act of God, and thereby made appellee liable for the resulting loss or damage.

1. The Johnstown flood, as it is called, by reason of which appellant's baggage was lost, was an act of God. In Long v. Railroad Co., 147 Pa. 343, 23 Atl. 459, 14 L. R. A. 741, 30 Am. St. Rep. 732, which was an action brought to recover the value of two trunks and their contents delivered to the Pennsylvania Railroad Company in Cincinnati for transportation to Washington, and where it appears that the trunks lost were contained in the baggage car of the day express which was destroyed by the Johnstown flood, so called, on May 31, 1889, the supreme court of Pennsylvania held, upon substantially the same evidence which is found in the record in the case at bar, that said flood was "an inevitable accident, properly described as actus Dei." In the Long Case, however, there was no question as to whether or not the goods lost were upon the right train; that is to say, the point was not there made that the personal baggage of the passenger had been shipped upon a different train from that on which the passenger took passage.

2. There is some conflict among the authorities as to the liability of a common carrier where the loss of goods in its or his possession is due, not solely and only to an act of God, but to an act of God combined with the negligence of the carrier. Many cases hold—and such seems to be the tendency of the decisions in this state—that a common carrier is not exempt from liability for a loss which takes place because of an act of God, if such carrier has been guilty of any previous negligence or misconduct which brings the property in contact with the destructive force of the actus Dei, or unnecessarily exposes it thereto. A loss or injury is due to the act of God when it is occasioned exclusively by natural causes, such as could not be prevented by human care, skill, and foresight; and where property committed to a common carrier is brought by the negligence of the carrier under the operation of natural causes that work its destruction, or is, by the negligence of the carrier, exposed to such cause of loss, the carrier is responsible. "It is universally agreed that, if the damage is caused by the concurring force of the defendant's negligence and some other cause for which he is not responsible, including the act of God, * * * the defendant

is nevertheless responsible if his negligence is one of the proximate causes of the damage." 1 Shear. & R. Neg. (4th Ed.) § 39. The doctrine is thus clearly stated by the supreme court of Missouri in Wolf v. Express Co., 43 Mo. 421, 97 Am. Dec. 406: "The act of God which excuses the carrier must not only be the proximate cause of the loss, but the better opinion is that it must be the sole cause. And where the loss is caused by the act of God, if the negligence of the carrier mingles with it as an active and cooperative cause, he is still responsible."

In line with this principle, many authorities hold that, where the unnecessary delay of the carrier subjects the goods in his possession to a loss by an act of God which they would not otherwise have met with, the delay is of itself such negligence as will make him liable for the loss. Railroad Co. v. Curtis, 80 Ill. 324; Michaels v. Railroad Co., 30 N. Y. 564, 86 Am. Dec. 415; Read v. Spaulding, 30 N. Y. 630, 86 Am. Dec. 426; McGraw v. Railroad Co., 18 W. Va. 361, 41 Am. Rep. 696; Deming v. Railroad Co., 48 N. H. 455, 2 Am. Rep. 267; Read v. Railroad Co., 60 Mo. 199; Davis v. Garrett, 6 Bing. 716; Williams v. Grant, 1 Conn. 487, 7 Am. Dec. 235; Crosby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745; Rodgers v. Railroad Co., 67 Cal. 607, 8 Pac. 377; Salisbury v. Herchenroder, 106 Mass. 458, 8 Am. Rep. 354; Higgins v. Dewey, 107 Mass. 494, 9 Am. Rep. 63; Railroad Co. v. Anderson, 94 Pa. 360, 39 Am. Rep. 787; Baltimore & O. R. Co. v. Sulphur Springs Independent School Dist., 96 Pa. 65, 42 Am. Rep. 529. We are inclined to think that this is the correct doctrine. There are cases which hold to the contrary, among which are the leading cases of Denny v. Railroad Co., 13 Gray (Mass.) 481, 74 Am. Dec. 645 and Morrison v. Davis, 20 Pa. 171, 57 Am. Dec. 695, upon the ground that such delay, whether justifiable or not, should not be regarded as the proximate, but only as the remote, cause of the loss. It will be found, however, upon examination, that most of these cases are cases where mere delay, without other negligence, brings the property lost within the operation of the natural cause defined to be an act of God. 1 Am. & Eng. Enc. Law (2d Ed.) p. 596.

In the case at bar, when the appellant bought his tickets for a passage upon the limited express train, and applied to have his baggage checked, there was an implied undertaking on the part of appellee that his baggage should go on the same train on which he took passage; and appellee was bound to send his baggage on the same train on which he went, unless the appellant gave some direction, or did something, or omitted to do something, which authorized appellee to send his baggage by some other train. "The implied undertaking of the passenger carrier as to transporting baggage is that passenger and baggage shall go together, since all baggage is taken with reference to the wants of a particular journey. * * * Nor ought the carrier, without permission, to send the baggage by later trains or a different route, unless in a strong case of necessity. We need hardly add that if, through the

carrier's own action, passenger and baggage become separated, the carrier bears the risk." Schouler, Bailm. & Car. (2d Ed.) § 675; Wilson v. Railroad Co., 56 Me. 60, 96 Am. Dec. 435; Fairfax v. Railroad Co., 73 N. Y. 167, 29 Am. Rep. 119; Railroad Co. v. Tapp, 6 Ind. App. 304, 33 N. E. 462.

It was a question of fact in this case whether or not appellee was guilty of a violation of its implied undertaking or contract to send the baggage on the same train with appellant; in other words, whether or not appellee was guilty of negligence in not taking proper steps to have the baggage carried by the train on which appellant traveled, and to have it so carried throughout the whole length of the journey; or whether the failure to have the baggage transferred to the baggage car of the limited express train at Pittsburg was in any way the fault of the appellant. We think that the court erred in not submitting this question of fact to the jury, and in directing a verdict for the defendant without permitting the jury to pass upon such question. If appellant's trunk had been transferred at Pittsburg to the baggage car attached to the limited express train from Chicago, as was done with the sleeping car in which appellant was traveling, the trunk would have passed through the place of danger before the flood occurred, and would not have been destroyed or lost by reason of the flood. If the appellee was guilty of negligence in failing to put the trunk upon the right train,—upon the train where its implied contract with appellant required it to put the trunk,—it was guilty of negligence which brought the trunk in direct contact with the force known as an act of God. "If the superior force would have produced the same damage whether the defendant had been negligent or not, his negligence is not deemed the cause of the injury." Shear. & R. Neg. (4th Ed.) § 39. But here it cannot be said that the flood would have caused the loss if the trunk had been transferred to the limited express train at Pittsburg.

It is said, however, that the contract of transportation was made at Cincinnati, Ohio; that such a contract, and the liabilities of the parties under it, are governed by the law of the place where the contract is made; that the contract to transport appellant's trunk, having been made in Ohio, must be governed by the law of Ohio; that, by the law of that state, loss of goods in the possession of a common carrier, occurring by reason of an act of God, even though such loss would not have been met with but for unnecessary delay on the part of the carrier, relieves the carrier of liability for the loss; and that the case of Daniels v. Ballantine, 23 Ohio St. 532, 13 Am. Rep. 264, which was introduced in evidence, shows what the law of Ohio is upon this subject. If the doctrine of lex loci contractus is applicable to this case, and if the case referred to is the law of Ohio, we do not think that the contention set up can be maintained, because the doctrine of the Daniels Case is not applicable here. In that case the action was brought to recover the value of a barge, which defendant contracted to tow by means of a steam tug from Bay City, Mich., to Buffalo, N. Y., and

which was lost in a storm on Lake Erie. It appears that after the voyage was begun the defendants delayed on the route three days, and then began the voyage again, and while on such delayed voyage the barge and tug were overtaken by the storm and lost. The court expressly states that the defendants in that case were not common carriers, and that, although they had such control of the barge as was necessary to enable them to move it, yet the plaintiffs had possession of it, "and for most purposes it remained in their custody and care."

The case, however, presents an instance of mere delay without other negligence. If, in the case at bar, the trunk had been placed upon the right train, and that train had been delayed on the way, and by reason of such delay had come in contact with the flood, then, perhaps, there would be a resemblance between this case and the Ohio case. But here the delay did not result simply from a halting or stopping in the movement of a train which was carrying the trunk in pursuance of the contract of carriage, but it resulted from negligence in failing to keep an implied contract to carry the trunk upon a particular train, and in violating that contract by carrying the trunk upon a different train from the one agreed upon; that is, upon the assumption that the facts would show no excuse for not keeping the contract. It is like a deviation from the usual course by the master of a vessel, during which a cargo is injured by a storm at sea. In such case the deviation is regarded as a sufficiently proximate cause of the loss to entitle the freighter to recover, as it brings the vessel in contact with the storm, in itself the act of God. Davis v. Garrett, 6 Bing. 716. Here was a deviation from the contract by the use of one agency of transportation not agreed upon, instead of the use of another agency of transportation which was agreed upon, thereby bringing the property in transit in contact with the flood, in itself the act of God. In Davis v. Garrett, supra, it was urged that there was no natural or necessary connection between the wrong of the master in taking the barge out of its proper course and the loss itself, "for that the same loss might have been occasioned by the very same transit if the barge had proceeded in her direct course"; but the court held the objection untenable, and Tindall, C. J., there said: "The same answer might be attempted to an action against a defendant who had by mistake forwarded a parcel by the wrong conveyance, and a loss had thereby ensued; and yet the defendant in that case would undoubtedly be liable."

The language last quoted is precisely applicable to the case at bar, which is not a case of delay in the transportation of goods being carried by the right conveyance, as in Daniels v. Ballantine, supra, but a case of neglect in forwarding a trunk by the wrong conveyance, to wit, by the day express, instead of the limited express. Of course, in all that is here said it is not intended to express any opinion as to whether the failure to ship the trunk by the right train at Pittsburg was or was not the fault of the appellee, in view of the conflict in the testimony as to the circumstances attending the checking and shipment of the trunk.

But, if there was nothing in such circumstances which excused appellee from its implied obligation to ship the trunk from Pittsburg upon the train carrying appellant eastward from that point, then we think that the property was unnecessarily exposed to the destructive power of the flood in question through the previous negligence or misconduct of appellee, and consequently that appellee is not excused. Williams v. Grant, 1 Conn. 487, 7 Am. Dec. 235. Hence the case should have been allowed to go to the jury under the instructions asked by appellant upon this question.

For the reason thus indicated, the judgments of the appellate court and of the superior court of Cook county are reversed, and the cause is remanded to said superior court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

FOTTLER v. MOSELEY.

(Supreme Judicial Court of Massachusetts, 1904. 185 Mass. 563, 70 N. E. 1040.)

Fottler brought this action in tort for deceit, alleging that, in reliance upon certain false representations by the defendant, a broker, as to the stock of the Franklin Park Land Improvement Company, the plaintiff had revoked an order for the sale of his shares in that company, by the defendant, whereby, through a subsequent diminution in the selling price of this stock, the plaintiff had suffered loss. There was a verdict for the defendant, and the plaintiff alleged exceptions.

KNOWLTON, C. J. The parties and the court seem to have assumed that the evidence was such as to warrant a verdict for the plaintiff, under the law stated at the previous decision of this case, reported in 179 Mass. 295, 60 N. E. 788, if the diminution in the selling price of the stock came from common causes. The defendant's contention is that the embezzlement of an officer of a corporation, being an unlawful act of a third person, should be treated as a new and independent cause of the loss, not contemplated by the defendant, for which he is not liable. To create a liability, it is never necessary that a wrongdoer should contemplate the particulars of the injury from his wrongful act, nor the precise way in which the damages will be inflicted. He need not expect even that damage will result at all, if he does that which is unlawful, and which involves a risk of injury. An embezzler is criminally liable, notwithstanding that he expects to return the money appropriated after having used it. If the defendant fraudulently induced the plaintiff to refrain from selling his stock when he was about to sell it, he did him a wrong; and a natural consequence of the wrong, for which he was liable, was the possibility of loss from diminution in the value of the stock from any one of numerous causes. Most, if not all, of the causes which would be likely to affect the value of the stock, would be acts of third persons, or at least conditions for which

neither the plaintiff nor the defendant would be primarily responsible. Acts of the officers, honest or dishonest, in the management of the corporation, would be among the most common causes of a change in value. The defendant, if he fraudulently induced the plaintiff to keep his stock, took the risk of all such changes. The loss to the plaintiff from the fraud is as direct and proximate, if he was induced to hold his stock until an embezzlement was discovered, as if the value had been diminished by a fire which destroyed a large part of the property of the corporation, or by the unexpected bankruptcy of a debtor who owed the corporation a large sum. Neither the plaintiff nor the defendant would be presumed to have contemplated all the particulars of the risk of diminution in value for which the defendant made himself liable by his fraudulent representations. It would be unjust to the plaintiff in such a case, and impracticable, to enter upon an inquiry as to the cause of the fall in value, if the plaintiff suffered from the fall wholly by reason of the defendant's fraud. The risk of a fall, from whatever cause, is presumed to have been contemplated by the defendant when he falsely and fraudulently induced the plaintiff to retain his stock.

We do not intimate that these circumstances, as well as others, may not properly be considered in determining whether the plaintiff was acting under the inducement of the fraudulent representations in continuing to hold the stock up to the time of the discovery of the embezzlement. The false representations may or may not have ceased to operate as an inducement as to the disposition of his stock before that time. Of course, there can be no recovery except for the direct results of the fraud. But if the case is so far established that the plaintiff, immediately upon the discovery of the embezzlement, was entitled to recover on the ground that he was then holding the stock in reliance upon the fraudulent statements, and if the great diminution in value came while he was so holding it, the fact that this diminution was brought about by the embezzlement of an officer leaves the plaintiff's right no less than if it had come from an ordinary loss.

Exceptions sustained.

GREEN-WHEELER SHOE CO. v. CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Iowa, 1906. 130 Iowa, 123, 106 N. W. 498, 5 L. R. A. [N. S.] 882, 8 Ann. Cas. 45.)

This action was brought against the railway company to recover the value of two parcels of goods delivered by plaintiff to defendant at Ft. Dodge, Iowa, one parcel to go to Booneville, Mo., and the other to Chanute, Kan., one of which it is alleged was lost and the other damaged by defendant's negligence. The case was tried on an agreed statement of facts and judgment was rendered for defendant. Plaintiff appeals.

McCLAIN, C. J. In the agreed statement on which the case was tried without other evidence being introduced it is stipulated that the defendant was guilty of negligent delay in the forwarding of the goods of plaintiff from Ft. Dodge to Kansas City, where they were lost or injured on May 30, 1903, by a flood which was so unusual and extraordinary as to constitute an act of God, and that if there had been no such negligent delay the goods would not have been caught in the flood referred to or damaged thereby.

We have presented for our consideration, therefore, the simple question whether a carrier who by a negligent delay in transporting goods has subjected them, in the course of transportation, to a peril which has caused their damage or destruction, and for the consequence of which the carrier would not have been liable had there been no negligent delay intervening, is liable for the loss. On this question there is a well-recognized conflict in the authorities. In several well-considered cases decided by courts of high authority it was decided, while the question was still new, that the negligent delay of the carrier in transportation could not be regarded as the proximate cause of an ultimate loss by a casualty which in itself constituted an act of God, as that term is used in defining the carrier's exemption from liability, although had the goods been transported with reasonable diligence they would not have been subjected to such casualty, and these cases are very similar to the one before us inasmuch as the loss in each instance was due to the goods being overtaken by an unprecedented flood for the consequence of which the carrier would not be responsible. Morrison v. Davis, 20 Pa. 171, 57 Am. Dec. 695; Denny v. New York Cent. R. Co., 13 Gray (Mass.) 481, 74 Am. Dec. 645; Railroad Co. v. Reeves, 10 Wall. 176, 19 L. Ed. 909; Daniels v. Ballantine, 23 Ohio St. 532, 13 Am. Rep. 264; Hunt v. Missouri, K. & T. R. Co. (Tex. Civ. App.) 74 S. W. 69; Gleeson v. Virginia Midland R. Co., 5 Mackey (D. C.) 356. These cases are predicated upon the view that if the carrier could not reasonably have foreseen or anticipated that the goods would be overtaken by such a casualty as a natural and probable result of the delay, then the negligent delay was not the proximate cause of the loss, and should be disregarded in determining the liability for such loss. A similar course of reasoning has been applied in other cases, where the loss has been due immediately to some cause such as accidental fire involving no negligence on the part of the carrier and within a valid exception in the bill of lading, but the goods have been brought within the peril stipulated against by negligent delay in transportation. Hoadley v. Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106; Yazoo & M. V. R. Co. v. Millsaps, 76 Miss. 855, 25 South. 672, 71 Am. St. Rep. 543; General Fire Extinguisher Co. v. Carolina & N. W. R. Co., 137 N. C. 278, 47 S. E. 208. For similar reasons it has been held that loss of or injury to the goods by reason of their inherent nature, as by freezing or the like, will not render the carrier liable, even after negligent delay in transportation, if such casualty could not have been fore-

seen or anticipated as the natural and probable consequence of such delay. Michigan Cent. R. Co. v. Burrows, 33 Mich. 6; Herring v. Chesapeake & W. R. Co., 101 Va. 778, 45 S. E. 322.

On the other hand, it was held by the Court of Appeals of New York in a case arising out of the same flood which caused the destruction of the goods involved in Denny v. New York Cent. R. Co., 13 Gray (Mass.) 481, 74 Am. Dec. 645, supra, that the preceding negligent delay on the part of the carrier, in consequence of which the goods were overtaken by the flood, was sufficient ground for holding the carrier to be liable for the loss. Michaels v. New York Cent. R. Co., 30 N. Y. 564, 86 Am. Dec. 415; Read v. Spaulding, 30 N. Y. 630, 86 Am. Dec. 426. And the same court has adhered to this view in case of a loss by fire covered by valid exception in the bill of lading. Condict v. Grand Trunk R. Co., 54 N. Y. 500. The Illinois Supreme Court has consistently followed the rule of the New York cases in holding that negligent delay subjecting the goods to loss by the Johnstown flood rendered the carrier liable (Wald v. Pittsburg, C., C. & St. L. R. Co., 162 Ill. 545, 44 N. E. 888, 35 L. R. A. 356, 53 Am. St. Rep. 332) and likewise that similar delay rendered the carrier liable for damage to the goods by freezing. Michigan Cent. R. Co. v. Curtis, 80 Ill. 324. The Alabama and Kentucky courts have held that a destruction by fire within a valid exception in the bill of lading would not excuse the carrier if by negligent delay in transportation the goods had been subjected to such casualty. Louisville & N. R. Co. v. Gidley, 119 Ala. 523, 24 South. 753; Hernsheim v. Newport News & M. V. Co., 35 S. W. 1115, 18 Ky. Law Rep. 227. In Missouri the Supreme Court has followed or approved of what may be designated as the New York rule, under a variety of circumstances. Davis v. Wabash, St. L. & P. R. Co., 89 Mo. 340, 1 S. W. 327; Pruitt v. Hannibal & St. J. R. Co., 62 Mo. 527; Read v. St. Louis, K. C. & N. R. Co., 60 Mo. 199. And the St. Louis Court of Appeals in that state has applied the same rule in case of a loss by freezing. Armentrout v. St. Louis, K. C. & N. R. Co., 1 Mo. App. 158. But the Kansas City Court of Appeals in a case of loss by flood has followed the Massachusetts and Pennsylvania cases. Moffatt Com. Co. v. Union Pac. R. Co., 113 Mo. App. 544, 88 S. W. 117. And the St. Louis Court of Appeals seems to have recently recognized the same rule. Grier v. St. Louis Merchants' Bridge Terminal R. Co., 108 Mo. App. 565, 84 S. W. 158. In West Virginia the Supreme Court has held that negligent delay renders the carrier liable for a subsequent loss by freezing. McGraw v. Baltimore & O. R. Co., 18 W. Va. 361, 41 Am. Rep. 696. In Minnesota the court has recently reviewed the whole question in a case involving the loss of goods by the same flood which caused the loss for which the present suit is brought and has reached the conclusion that the previous negligent delay of the carrier which caused the goods to be subjected to the peril of the flood "concurred and mingled with the act of God" to such an extent that the carrier was precluded from relying upon the act of

God as a defense. Bibb Broom Corn Co. v. Atchison, T. & S. F. R. Co., 94 Minn. 269, 102 N. W. 709, 69 L. R. A. 509, 110 Am. St. Rep. 361, 3 Ann. Cas. 450.

The irreconcilable conflict in the authorities is recognized by text-writers, and while the weight of general authority has in many cases been said to support the rule announced in Massachusetts and Pennsylvania cases (1 Thompson, Negligence, § 74; Schouler, Bailments [Ed. 1905] § 348; Hale, Bailments and Carriers, 361; 6 Cyc. 382; notes in 36 Am. St. Rep. 838), other authorities prefer the New York rule (Hutchinson, Carriers [2d Ed.] § 200; Ray, Negligence of Imposed Duties, 177). In the absence of any express declaration of this court on the very point, and in view of the fact that in most recent cases the conflict of authority is still recognized (see 5 Cur. Law, 517) it seems necessary that the reasons on which the two lines of cases are supported shall be considered in order that we may now reach a conclusion which shall be satisfactory to us. Mere negligence will not render one person liable to another for a loss which the latter would not have sustained had there been no such negligence, unless the negligence consists in some violation of a duty which the one person owes to the other. Dubuque Wood & Coal Ass'n v. City and County of Dubuque, 30 Iowa, 176; St. Louis, I. M. & S. R. Co. v. Commercial Ins. Co., 139 U. S. 223, 11 Sup. Ct. 554, 35 L. Ed. 154. And, on the other hand, it is well settled that if the negligence of one person with reference to the duty owed to another concurs with an accidental cause resulting in injury to another to whom such duty is owed the negligent person must answer for the consequences as though his negligence were the sole cause of the loss. Savannah, F. & W. R. Co. v. Commercial Guano Co., 103 Ga. 590, 30 S. E. 555; Thomas v. Lancaster Mills, 71 Fed. 481, 19 C. C. A. 88; New Brunswick Steamboat Co. v. Tieres, 24 N. J. Law, 697, 64 Am. Dec. 394; Tierney v. New York Cent. & H. R. R. Co., 76 N. Y. 305; Williams v. Grant, 1 Conn. 487, 7 Am. Dec. 235; 1 Thompson, Negligence, §§ 68, 73.

The real difficulty seems to be in determining to what extent, if at all, it is necessary that the negligent party must have been able to foresee and anticipate the result of his negligent act in order to render him liable for the consequences thereof resulting from a concurrence of his negligence and another cause for which he is not responsible. In an action on contract the party who is at fault is only liable for such consequences as arise according to the usual course of things from his breach, or such as may reasonably be supposed to have been in the contemplation of both parties at the time the contract was made as the probable result of the breach. Hadley v. Baxendale, 9 Exch. 341; Sedgwick, Elements of Damage, 17. But in an action for tort, and the present action is of that character, recovery is not limited to the consequences within the contemplation of the parties or either of them, but includes all the consequences "resulting by ordinary natural se-

quence, whether foreseen by the wrongdoer or not, provided that the operation of the cause of action is not interrupted by the intervention of an independent agent or overpowering force, and that but for the operation of the cause of action the consequence would not have ensued." Sedgwick, Elements of Damage, § 54. It is true that for the purpose of determining whether the injury suffered by the party complaining was the natural and probable result of the wrong complained of a convenient test is to consider whether in general such a result might have been foreseen as the consequence of the wrong, but it is not necessary "that the injury in the precise form in which it in fact resulted should have been foreseen. It is enough that it now appears to have been the natural and probable consequence." Hill v. Winsor, 118 Mass. 251; Schumaker v. St. Paul & D. R. Co., 46 Minn. 39, 42, 48 N. W. 559, 12 L. R. A. 257. And see Railroad Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256; McPeek v. Western Union Tel. Co., 107 Iowa, 356, 78 N. W. 63, 43 L. R. A. 214, 70 Am. St. Rep. 205; Hoag v. Railroad Co., 85 Pa. 293, 27 Am. Rep. 653; Empire State Cattle Co. v. Atchison, T. & S. F. R. Co. (C. C.) 135 Fed. 135; Chicago, St. P., M. & O. R. Co. v. Elliott, 55 Fed. 949, 5 C. C. A. 347, 20 L. R. A. 582; Miller v. St. Louis, I. M. & S. R. Co., 90 Mo. 389, 2 S. W. 439; Smith v. Railroad, L. R. 6 C. P. 21; 1 Thompson, Negligence, § 59.

Now, while it is true that defendant could not have anticipated this particular flood and could not have foreseen that its negligent delay in transportation would subject the goods to such a danger, yet it is now apparent that such delay did subject the goods to the danger, and that but for the delay they would not have been destroyed; and defendant should have foreseen, as any reasonable person could foresee, that the negligent delay would extend the time during which the goods would be liable in the hands of the carrier to be overtaken by some such casualty, and would therefore increase the peril that the goods should be thus lost to the shipper. This consideration that the peril of accidental destruction is enhanced by the negligent extension of time during which the goods must remain in the carrier's control and out of the control of the owner, and during which some casualty may overtake them, has not, we think, been given sufficient consideration in the cases in which the carrier has been held not responsible for a loss for which he is not primarily liable, but which has overtaken the goods as a consequence of the preceding delay in their transportation.

It is not sufficient for the carrier to say by way of excuse that while a proper and diligent transportation of the goods would have kept them free from the peril by which they were in fact lost it might have subjected them to some other peril just as great. He cannot speculate on mere possibilities. A pertinent illustration is furnished by the well-settled rule with reference to deviation which is that if the carrier transports the goods over some other route than that specified in the contract or reasonably within the contemplation of the parties, he must answer for any loss or damage occurring during such deviation,

although it is from a cause which would not in itself render him liable. In such a case it is said "that no wrongdoer can be allowed to apportion or qualify his own wrong, and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done. It might admit of a different construction if he could show, not only that the same loss might have happened, but that it must have happened if the act complained of had not been done." Davis v. Garrett, 6 Bing. 716. And see Merchants' D. Transp. Co. v. Kahn, 76 Ill. 520; Crosby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745; U. S. Exp. Co. v. Kountze, 8 Wall. 342, 19 L. Ed. 457, 6 Cyc. 383. It is true that the analogy to the case of a deviation is denied in the case which announce the rule of the Pennsylvania and Massachusetts cases but the distinction attempted to be made that a deviation amounts to a conversion rendering the carrier absolutely liable is too technical to be considered as persuasive. The analogy between the two classes of cases has been recognized in Constable v. National Steamship Co., 154 U. S. 51, 14 Sup. Ct. 1062, 38 L. Ed. 903, and in Hutchinson, Carriers (2d Ed.) § 200. This court has expressed itself in favor of the liability of the carrier in classes of cases very analogous to that of deviation. Where goods were shipped with the agreement that they should be carried to their destination without change of cars, and in violation of this contract the goods were unloaded at Chicago which was not their destination, for the purpose of transporting them in other cars, and they were destroyed by the Chicago fire, it was held that the carriers were liable although the loss by fire was within a valid exemption from liability contained in the bill of lading. Robinson v. Merchants' Dispatch Transp. Co., 45 Iowa, 470; Stewart v. Merchants' Dispatch Transp. Co., 47 Iowa, 229, 29 Am. Rep. 476.

Certainly the act of the carrier in unloading the goods at Chicago, instead of carrying them through to their destination in the cars in which they were originally loaded, would not amount even to a technical conversion, nor could it have been anticipated that the result of such an act would be the destruction of the goods; nevertheless this court reached the conclusion that such a departure from the terms of the contract rendered the carrier liable for a loss for which it would not have been liable had it resulted without such departure. We think that in principle these cases support the general proposition that the wrongful act of the carrier which in fact subjects the goods to loss renders him liable for such loss although the circumstances under which it occurred could not have been anticipated. This is plainly right, for the detention due to the transfer of the goods to the other cars did increase the hazard of fire; but it is equally true in the case before us that the negligent delay increased the hazard of the loss by flood. As supporting the same view we may also refer to Hewett v. Chicago, B. & Q. R. Co., 63 Iowa, 611, 19 N. W. 790, in which it was

held that negligent delay in forwarding goods which were liable to damage by freezing rendered the carrier accountable for the loss thus resulting. In that case it is said that while the carrier is responsible for such damages only as are the proximate consequence of his own acts and is not accountable for such loss as is occasioned by the intervention of the vis major, yet "one of the undertakings of the common carrier is that he will not expose the property entrusted to his care to any improper hazards or extraordinary perils, and if, by his act or omission, it is exposed to perils or hazards which ordinary foresight could have apprehended and provided against, he is accountable for such injury as may be occasioned by such exposure." See, also, Whicher v. Steam Boat Ewing, 21 Iowa, 240.

We are satisfied that the sounder reasons, supported by good authority, require us to hold that in this case the carrier is liable for the loss of and damage to plaintiff's goods, and the judgment of the trial court is therefore reversed.*

*Accord, among later cases: Alabama G. S. R. Co. v. Quarles & Couturie (1906) 145 Ala. 436, 40 South. 120, 5 L. R. A. (N. S.) 867, 117 Am. St. Rep. 54, 8 Ann. Cas. 308; Wabash R. Co. v. Sharpe (1906) 76 Neb. 424, 107 N. W. 758, 124 Am. St. Rep. 823; Alabama G. S. R. Co. v. J. A. Elliott & Son (1907) 150 Ala. 381, 43 South. 738, 9 L. R. A. (N. S.) 1264, 124 Am. St. Rep. 72; Central of Georgia R. Co. v. Sigma Lumber Co. (1910) 170 Ala. 627, 54 South. 205, Ann. Cas. 1912D, 965; Tate v. Missouri Pac. Ry. Co. (1910) 157 Ill. App. 105; Sunderland Bros. Co. v. Chicago, B. & Q. R. Co. (1911) 89 Neb. 660, 131 N. W. 1047; Jonesboro, L. C. & E. R. Co. v. Dunnavant (1915, Ark.) 174 S. W. 1187.

Contra, among later cases: Rodgers v. Missouri Pac. R. Co. (1907) 75 Kan. 222, 88 Pac. 885, 10 L. R. A. (N. S.) 658, 121 Am. St. Rep. 416, 12 Ann. Cas. 441: (P. delivered to D. a railway company, at Frankfort, Mo., on May 22, 1903, a carload of corn, for transportation and delivery to P.'s agent at Kansas City, Mo. Through D.'s negligence this loaded car remained at Frankfort until May 28, when it was hauled to its destination. It was there destroyed by "the unprecedented flood of May 30, 1903." The court reviews the authorities and holds the defendant not liable. The cases permitting a recovery are disapproved as ignoring "the justice and policy" of the proximate cause principle.) And see the comment on this case in Henry v. Atchison, T. & S. F. R. Co. (1910) 83 Kan. 104, 109 Pac. 1005, 28 L. R. A. (N. S.) 1088.

PART III

TORTS THROUGH ACTS OF CONDITIONAL LIABILITY

CHAPTER I

NEGLIGENCE

SECTION 1.—THE PLACE OF NEGLIGENCE IN THE FIELD OF TORTS

I. Origin of Our Doctrine of Negligence

The original notion of a tort to one's person or property was an injury caused by an act of a stranger, in which the plaintiff did not in any way participate. A battery, an asportation of a chattel, an entry upon land were the typical torts. If, on the other hand, one saw fit to authorize another to come into contact with his person or property, and damage ensued, there was, without more, no tort. The person injured took the risk of all injurious consequences, unless the other expressly assumed the risk himself, or unless the peculiar nature of one's calling, as in the case of a smith, imposed a customary duty to act with reasonable skill. * * *

It is believed that the view here suggested will explain the following passage in Blackstone, which has puzzled many of his readers: "If a smith's servant lames a horse while he is shoeing him, an action lies against the master, but not against the servant." [1] This is, of course, not law to-day, and probably was not law when written. Blackstone simply repeated the doctrine of the Year-Books. The servant had not expressly assumed to shoe carefully; he was, therefore, no more liable than the surgeon, the barber, and the carpenter, who had not undertaken, in the cases already mentioned. This primitive notion of legal liability has, of course, entirely disappeared from the law. An as-

[1] 1 Bl. Com. 431.

sumpsit [2] is no longer an essential allegation in these actions of tort, and there is, therefore, little or no semblance of analogy between these actions and actions of contract.

James Barr Ames, "History of Assumpsit," 2 Harv. Law Rev. 3, 4 (1888).[3]

In later days, slowly and with difficulty, the court gave an action against the clumsy smith who lames the horse that he is shoeing, against the stupid surgeon who poisons the wound that he should cure. Such persons could not be charged with breaking the king's peace by force and arms. We may well doubt whether Bracton or any contemporary lawyer would have told them that they had committed no tort; we may perhaps doubt whether they could not have successfully sued in some of the local courts; but the king's justices were not as yet busied with these questions, and such records of the lowlier tribunals as are in print do not hold out much encouragement to the investigator who is in search of a medieval law of negligence, though he might find some rules, probably severe rules, about damage done by straying cattle, goring oxen, biting dogs and fire. Hardly a germ is to be found of any idea which will answer to the Roman culpa or become our modern negligence.

Pollock and Maitland, "History of English Law," vol. 2, 527 (1899).

The word "negligentia" as used in earlier times, meant apparently (as has been seen in the action for fire) [4] merely "failure to do" a duty already determined to exist; thus, though the Courts constantly said that "a man is bound to keep his cattle in at his peril," he is sometimes said to be held for "defaut de bon garde"—meaning, not careless keeping, but merely failure to keep as bound; and the misappre-

[2] "The earliest cases in which an 'assumpsit' was laid in the declaration were cases against a ferryman who undertook to carry the plaintiff's horse over the river, but who overloaded the boat, whereby the horse was drowned; against surgeons who undertook to cure the plaintiff or his animals, but who administered contrary medicines or otherwise unskillfully treated their patient; against a smith for laming a horse while shoeing it; against a barber who undertook to shave the beard of the plaintiff with a clean and wholesome razor, but who performed his work negligently or unskillfully to the great injury of the plaintiff's face; against a carpenter who undertook to build well and faithfully, but who built unskillfully. In all these cases, it will be observed, the plaintiff sought to recover damages for a physical injury to his person or property caused by the active misconduct of the defendant. The statement of the 'assumpsit' of the defendant was for centuries, it is true, deemed essential in the count. But the actions were not originally, and are not to-day, regarded as actions of contract. They have always sounded in tort." James Barr Ames, 2 Harv. Law Rev. 2, 3 Anglo-Am. Leg. Essays, 260.

[3] Reprinted in 3 Anglo-American Legal Essays, 261, 262.

[4] See ante, "Other Acts at Peril."

hension of this was probably the source of Blackstone's well known misstatement that the action was for "negligently keeping" his cattle. It seems, then, that the action on the case based on a mere negligent doing was of little or no consequence until the 1800's, and that it then came about, partly through the principle of consequential damage noted above, and partly through the growing application of the test of negligence in Trespass.

John H. Wigmore, "Tortious Responsibility," 7 Harv. Law Rev. 453 (1894).[5]

The action on the case was stretched to cover a large number of offences. It thus, in common speech, became the parent of many special actions; though these differed from the older actions in this important point, that, as they were all commenced by the same writ, the plaintiff could not, even before the abolition of forms of action, be nonsuited for confusing one with the other. Thus we get the so-called actions of Trover, Nuisance, Assumpsit, Malicious Prosecution, Seduction, Defamation and Deceit; some of which, (e. g. Nuisance, Malicious Prosecution, and Deceit) have to be rather carefully distinguished from older remedies for similar offences, which had, for one reason or another, become obsolete or inconvenient. But it is worth remarking that no variation of the Action on the Case acquired the title of "Negligence"; and the reason is substantial and interesting. For if we look at those early examples of writs or declarations in Case which contain allegations of negligence, we shall find that, with scarcely an exception, they are confined to cases in which the ground of the action was an undertaking by the defendant and a failure to perform that undertaking. It is familiar knowledge, to all who have studied the history of Contract in English Law, that the grafting of the doctrine of Consideration onto this form of action gave us our law of simple contract. In other words, as the late Professor Ames has so brilliantly demonstrated,[6] the institution of the simple contract grew out of the action of Assumpsit, which alleged negligence on the part of the defendant. But what is this but to say that, so far as we can see, the Common Law refused to recognize negligence, i. e. omission of a positive duty, as the ground of legal liability; except where the defendant had expressly taken upon himself such duty, or where (as in the case of surgeons, common

[5] Reprinted in 3 Anglo-American Legal Essays, 517.

[6] Harvard Law Review, ii, pp. 1, etc.; Select Essays in A.-A. L. H. iii, 259. "Professor Ames seems to think that charges of deceit and malice were more common than charges of negligence in this direction. But charges of negligence are not uncommon (see Fitzherbert, Natura Brevium, 94b; Rastell, Entries, ff. 3b, 3d, 8a, 9a, 13a, 463b, 463c, 463d; Aston, pp. 13, 16, 56, etc.) And the point is, that charges of negligence were only made in actions really contractual. Actions for breach of a prescriptive duty would fall under this description; for prescription at the common law was based on a lost grant. But here, again, the allegation was usually of malice and deceit." 26 Law Quarterly Rev. 162, note.

carriers, innkeepers, &c.) his profession or calling was deemed a "holding out" to that effect? * * *

The substantial result appears to be that, until the end of the eighteenth century, no one, apart from statute and the possible case of Nuisance, could be held civilly liable for the mere omission to perform any positive duty; unless he had, expressly or by implication, undertaken to perform that duty. The well known decision in Ashby v. White, 2 Ld. Raym. 938, 1 Sm. L. C. (11th Ed.) 240, 92 Reprint, 126, forbids us to say that a wilful refusal to perform a common law duty was not actionable; but Ashby v. White occupied a somewhat solitary position until the end of the eighteenth century. With the appearance of changed industrial conditions in the early nineteenth century, the Law of Negligence began to expand; but, with all allowance for this recent expansion, the legal scope of non-contractual negligence is still far narrower than is commonly supposed. * * *[7]

Edward Jenks, "On Negligence and Deceit in the Law of Torts," 26 Law Quarterly Review, 160, 165 (1910).

So far from being a specific tort, Negligence in itself is not a tort at all, but is merely one of the commonest grounds of liability in specific torts. Putting aside the few cases, such as Malicious Prosecution and Deceit, where there is no liability without intentional wrong doing, there is no class of tort that cannot be committed negligently as well as intentionally, e. g. trespass to the person. Conversely, every act which is a tort if committed negligently, will be equally a tort if committed intentionally.[8] It would seem, then, that to classify Negligence among specific torts, is like a classification which would put contracts for valuable consideration among specific contracts, such as Sale, Hire, and Insurance.[9]

It is true that in some of the cases we read of an "action for negligence." This is due to the fact that, excluding Trespass, and a few of the actions (originally Actions on the Case) which received distinctive names, e. g. Libel, Trover, Deceit, &c., no systematic classification of torts was attempted by the Common Law. There was no ne-

[7] "In all probability it was the general introduction of industrial machinery, and especially of mechanical transit, which, for the first time in the History of the English Law of Tort, produced the purely non-contractual and non-trespassory action founded on negligence." Edward Jenks, 26 Law Quarterly Review, 165 (1910). And see the remarks of the same author in his "Short History of English Law," 311, 312 (1912).

[8] But the effect of the historic forms of action in creating causes of action which still endure is to be kept in mind in considering the present doctrine of torts in many American States. See the cases given infra, "Negligence Distinguished from Other Torts."—*Ed.*

[9] However, "nearly all writers in Tort treat negligence as a specific ground of action."

Compare Sir Frederick Pollock's Classification of Torts, in Law of Torts (7th Ed.) pp. 7, 20.—*Ed.*

cessity to specify in pleading whether a special Action on the Case was an action for damage to the person, or to the property, or to some other interest affected by the wrong. All fell equally under the heading "Actions on the Case." But when it was recognized that (in the absence of intention) damage to the plaintiff was not a ground of liability, unless there was negligence on the part of the defendant, negligence came to be spoken of as the "gist of the action"; and an action for negligence became a common type of Action on the Case.

The treatment of negligence as a special kind of tort is therefore a survival of a classification of torts based on the forms of action.

J. C. Miles "On the Treatment of Negligence," Digest Eng. Civil Law, 545 (1910).

II. Negligence Distinguished from Other Forms of Tort

MITCHIL v. ALESTREE.

(Court of King's Bench, 1676. 1 Vent. 295, 86 Reprint, 190.)

In an action upon the case brought against the defendant, for that he did ride an horse into a place called Lincoln's Inn Fields (a place much frequented by the King's subjects, and unapt for such purposes) for the breaking and taming of him, and that the horse was so unruly, that he broke from the defendant, and ran over the plaintiff, and grievously hurt him, to his damages, &c.

Upon not guilty pleaded, and a verdict for the plaintiff, it was moved by Simpson in arrest of judgment, that here is no cause of action: for it appears by the declaration, that the mischief which happened was against the defendant's will, and so damnum absque injuria; and then not shewn what right the King's subjects had to walk there; and if a man digs a pit in a common into which one that has no right to come there, falls in, no action lies in such case.

Curia, contra. It was the defendant's fault, to bring a wild horse into such a place where mischief might probably be done, by reason of the concourse of people. Lately, in this court an action was brought against a butcher, who had made an ox run from his stall and gored the plaintiff; and this was alleged in the declaration to be in default of penning him.

Wylde said, If a man hath an unruly horse in his stable, and leaves open the stable door, whereby the horse goes forth and does mischief; an action lies against the master.

Twisden. If one hath kept a tame fox, which gets loose and goes wild, he that hath kept him before shall not answer for the damage the fox doth after he hath lost him, and he hath resumed his wild nature. Vide Hobart's Reports, 134, the case of Weaver and Ward.

Judgment for the plaintiff.

DAY v. EDWARDS.

(Court of King's Bench, 1794. 5 Term R. 648, 101 Reprint, 361.)

This was an action on the case, wherein the plaintiff declared, that whereas on a certain day he was possessed of a certain four-wheeled carriage called a landaulet, and of a horse drawing the same along the King's highway, called, &c. and the defendant on the same day, &c. was possessed of a certain cart and horse drawing the same along the highway aforesaid, and which were then and there under the direction of the said defendant, nevertheless the said defendant then and there so furiously, negligently and improperly drove the said cart and horse of him the said defendant, that by and through the furious, negligent, and improper conduct of the said defendant in that behalf, the said cart was then and there, to wit, &c. driven and struck with great force and violence upon and against the said carriage of the plaintiff, and thereby, then and there overturned and damaged the same, to the loss of the plaintiff, &c.

To this there was a special demurrer, assigning for causes, that the plaintiff, by his said declaration, complained against the defendant as if the supposed cause of action in the declaration mentioned had been a mere consequential injury, whereas it appeared to have been an immediate and direct trespass committed by the defendant on the property of the plaintiff; that the plaintiff complained against the defendant, as in a plea of trespass on the case, whereas the declaration ought to have been in a plea of trespass vi et armis: that the defendant was not, by the said declaration, positively charged with any of the facts therein contained, and the same were only charged by way of recital, whereas they ought to have been positively averred upon him; and also, that it was not alleged that the supposed trespass was committed with force and arms nor against the peace, &c. Joinder in demurrer.

Baldwin in support of the demurrer was stopped by the Court.

Wood contra. The action on the case for consequential damage is properly conceived, because the act of driving along the highway, in consequence of which the injury arose, was a legal one in itself, although negligently exercised. And where the act itself is legal, and an injury happens from an improper exercise of it, an action on the case is the proper remedy. If the declaration indeed had alleged that the defendant had driven against the plaintiff, there might have been some ground for contending that trespass should have been brought: but all that is here stated is, that he drove furiously along the highway, in consequence of which the mischief ensued. Vide Slater v. Baker, 2 Wils. 359, and Scott v. Shepherd, 2 Black. Rep. 892, and 3 Wils. 403.

Lord Kenyon, C. J. The distinction between the actions of trespass vi et armis and on the case is perfectly clear. If the injury be committed by the immediate act complained of, the action must be tres-

pass; if the injury be merely consequential upon that act, an action upon the case is the proper remedy. In 1 Str. 636, it is said, "If a man throw a log into the highway, and in that act it hits me, I may maintain the trespass, because it is an immediate wrong: but if, as it lies there, I tumble over it, and receive an injury, I must bring an action upon the case." In the present case the plaintiff complains of the immediate act, therefore he should have brought trespass.

PER CURIAM. Judgment for the defendant.

LEAME v. BRAY.

(Court of King's Bench, 1803. 3 East, 593, 102 Reprint, 724.)

This was an action of trespass, in which the plaintiff declared that the defendant with force and arms drove and struck a single-horse chaise which the defendant was then driving along the king's highway with such great force and violence upon and against the plaintiff's curricle drawn by two horses, and upon and against the said horses so drawing, &c., and in which said curricle the plaintiff was then and there riding with his servant, which servant was then driving the said curricle and horses along the king's highway aforesaid, that by means thereof the plaintiff's servant was thrown out of the curricle upon the ground, and the horses ran away with the curricle, and while the horses were so running away with the curricle the plaintiff, for the preservation of his life, jumped and fell from the curricle upon the ground and fractured his collar bone, &c. Plea, not guilty.

It appeared in evidence at the trial before Lord Ellenborough, C. J., at the last sittings at Westminster, that the accident described in the declaration happened in a dark night, owing to the defendant driving his carriage on the wrong side of the road, and the parties not being able to see each other; and that if the defendant had kept his right side there was ample room for the carriages to have passed without injury. But it did not appear that blame was imputable to the defendant in any other respect as to the manner of his driving. It was therefore objected for the defendant, that the injury having happened from negligence, and not wilfully, the proper remedy was by an action on the case and not of trespass vi et armis; and the plaintiff was thereupon nonsuited.

Gibbs and Park shewed cause against a rule for setting aside the non-suit. * * *

LORD ELLENBOROUGH, C. J. The true criterion seems to be according to what Lord C. J. de Grey says in Scott v. Shepherd, whether the plaintiff received an injury by force from the defendant. If the injurious act be the immediate result of the force originally applied by

the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass vi et armis by all the cases both ancient and modern. It is immaterial whether the injury be wilful or not. As in the case alluded to by my Brother GROSE, where one shooting at butts for a trial of skill with the bow and arrow, the weapon then in use, in itself a lawful act, and no unlawful purpose in view; yet having accidentally wounded a man, it was holden to be a trespass, being an immediate injury from an act of force by another. Such also was the case of Weaver v. Ward, in Hob. 134, where a like unfortunate accident happened whilst persons were lawfully exercising themselves in arms. So in none of the cases mentioned in Scott v. Shepherd, 2 Black. 895, did wilfulness make any difference. If the injury were received from the personal act of another, it was deemed sufficient to make it trespass. In the case of Day v. Edwards, 5 Term Rep. 649, the allegation of the act having been done furiously was understood to imply an act of force immediately proceeding from the defendant. As to the case of Ogle v. Barnes, 8 Term Rep. 188, I incline to think it was rightly decided; and yet there are words there which imply force by the act of another; but, as was observed, it does not appear that it must have been the personal act of the defendants; it is not even alleged that they were on board the ship at the time: it is said indeed that they had the care, direction, and management of it; but that might be through the medium of other persons in their employ on board. That therefore might be sustained as an action on the case, because there were no words in the declaration which necessarily implied that the damage happened from an act of force done by the defendants themselves. I am not aware of any case of that sort where the party himself sued having been on board this question has been raised. But here the defendant himself was present, and used the ordinary means of impelling the horse forward, and from that the injury happened. And therefore there being an immediate injury from an immediate act of force by the defendant, the proper remedy is trespass; and wilfulness is not necessary to constitute trespass.

LAWRENCE, J. I am of the same opinion. It is more convenient that the action should be trespass, than case; because if it be laid in trespass, no nice points can arise upon the evidence by which the plaintiff may be turned round upon the form of the action, as there may in many instances if case be brought; for there if any of the witnesses should say that in his belief the defendant did the injury wilfully, the plaintiff will run the risk of being nonsuited. But in actions of trespass the distinction has not turned either on the lawfulness of the act from whence the injury happened, or the design of the party doing it to commit the injury: but, as mentioned by Mr. Justice Blackstone in the case of Scott v. Shepherd, 2 Black. Rep. 895, on the difference between injuries direct and immediate, or mediate

and consequential; in the one instance the remedy is by trespass, in the other by case. The same principle is laid down in Reynolds v. Clarke, 2 Ld. Raym. 1402. * * *

LE BLANC, J. * * * If the defendant had simply placed his chaise in the road, and the plaintiff had run against it in the dark, the injury would not have been direct, but in consequence only of the defendant's previous improper act. Here however the defendant was driving the carriage at the time with the force necessary to move it along, and the injury to the plaintiff happened from that immediate act: therefore the remedy must be trespass: and all the cases will support that principle. It is chiefly in actions for running down vessels at sea that difficulties may occur; because certainly the force which occasions the injury is not so immediate from the act of the person steering. The immediate agents of the force are the wind and waves, and the personal act of the party rather consists in putting the vessel in the way to be so acted upon: and whether that may make any difference in that case I will not now take upon me to determine. But here, where the personal force is immediately applied to the horse and carriage, the things acted upon and causing the damage, like a finger to the trigger of a gun, the injury is immediate from the act of driving, and trespass is the proper remedy for an immediate injury done by one to another: but where the injury is only consequential from the act done, there it is case.

Rule absolute.[10]

MORETON v. HARDERN et al.

(Court of King's Bench, 1825. 4 Barn. & C. 223, 107 Reprint. 1042.)

Case. Plea, general issue. At the trial, it appeared that the defendants were the proprietors of a stage coach travelling from Congleton to Manchester. The plaintiff, at the time when the accident happened, was driving a cart along the highroad. The coach was driven by the defendant Hardern, and the coachman employed by the proprietors to drive was sitting by his side. The coach ran against the plaintiff, and thereby caused the injury stated in the declaration. It did not appear that Hardern saw the plaintiff at the time. The jury found a verdict for the plaintiff, damages £200, and that the accident was occasioned by the negligence of the defendant Hardern. A nonsuit was thereupon entered and the plaintiff had leave to move to enter a verdict in his favor for £200. A rule nisi for that purpose was obtained.

BAYLEY, J. I am of opinion that this rule must be made absolute. The second count of the declaration alleges that the defendants were possessed of a certain coach and horses, which were under

[10] The opinion of Grose, J., and part of the opinions of Lawrence and Le Blanc, JJ., are omitted.

their care and management, and that they so carelessly and improperly governed and directed the said horses and coach, that through their carelessness, negligence, and improper conduct the coach ran against the plaintiff, and injured him. The objection made to that count was that as one of the defendants was driving, the injury was immediate, and that, consequently, the action should have been trespass, and not case. It is sufficient answer to say that the plaintiff had a right to sue all the defendants, and that trespass clearly would not lie against them all. Such an action might, perhaps, have been maintained against Hardern, but not against the other defendants. It was long vexata quæstio whether an action on the case could be brought when the defendant was personally present and acting in that which occasioned the mischief. Early in my professional experience, case was the form of action usually adopted for such injuries. In Lord Kenyon's time a doubt was raised upon the point, and he thought that where the act was immediately injurious, trespass was the only action that could be maintained for that injury. Leame v. Bray [3 East, 593] was an action of trespass. At the trial Lord Ellenborough thought it should have been case, but on further consideration this court was of opinion that trespass was maintainable, but they did not decide that an action on the case would have been improper. Looking at the other cases on the subject it is difficult to say that an action on the case will not lie for an injury sustained through the negligent driving of a coach, although one of the proprietors was the person guilty of that negligence. In Ogle v. Barnes, 8 T. R. 188, which was a case for negligently steering a ship, the declaration alleged that the ship was under the care of Barnes, one of the defendants, and of certain servants of the defendants, and that through their negligence the injury was sustained, and it was never urged that the action should have been trespass and not case, because one of the defendants was on board, but on the ground of the injury being immediate. In Rogers v. Imbleton, 2 N. R. 117, (which was decided after Leame v. Bray,) it was alleged that the defendant was driving a cart, and took such bad care of the cart and horse, that it ran with great force against the plaintiff's horse. To that there was a demurrer, upon the authority of Leame v. Bray, the action being in case, but the court was clearly of the opinion that case would lie, and the demurrer was overruled. In Huggett v. Montgomery, 2 N. R. 446, although the defendant was on board, yet the ship was not under his immediate care and management, but under that of a pilot, and on that ground, case was held to be the proper form of action. It is not necessary to say that trespass could not, in this case, have been sustained against Hardern. No doubt that action lies when the injury is inflicted by the wilful act of the defendant, but is also clear that case will lie where the act is negligent, and not wilful. Here the report says, that the injury was occasioned by the negligent driving of the defendant Hardern. I think, therefore, that as

the plaintiff had a right to sue all the proprietors of the coach, and as trespass would not lie against them all, case was the proper form of action to be adopted.

Rule absolute.[11]

SIMON et al. v. HENRY et al.

(Supreme Court of New Jersey, 1898. 62 N. J. Law, 486, 41 Atl. 692.)

In this action there was a judgment for defendants. Rule to show cause why a new trial should not be granted.

DIXON, J. The plaintiffs were the owners of a factory on the corner of Gardner street and the boulevard in the town of Union, Hudson county; and the defendants contracted with the authorities of the town to construct a public sewer in the boulevard. To make the necessary trench, the removal of trap rock was required, and the defendants removed it by blasting with dynamite. The plaintiffs claimed that the concussion resulting from the blasts cracked the walls of their factory, and they brought this suit to recover compensation for the damage. The court charged the jury, in substance, that if, in the prosecution of the work, the defendants had exercised reasonable care and skill, they could not be held responsible. On this topic the learned judge said to the jury:

"Reasonable care * * * is that care which reasonably prudent men acquainted with this character of work, * * * acting cautiously and prudently, with a desire to avoid injury to others, would exercise in the performance of it. * * * You can take into consideration all the circumstances, as bearing on the question whether the defendants have exercised that care or not,—the character of the soil, the character of the rock, what they used in blasting the rock, how they blasted it, the manner of doing it, whether too much of explosives was used, whether the drill holes were too far apart, whether they endeavored to take out too much rock at one time, in length or in depth, the proximity to the building, and the injury. All of the conditions there are for you to determine, as bearing upon the question of the exercise of reasonable care. Blasting close by a building necessarily would require a high degree of care—perhaps the highest degree of care—to protect the building from injury. It all comes under the term 'reasonable,' after all, depending upon all the circumstances surrounding it."

Under this charge the jury found for the defendants, and the plaintiffs now seek to set aside the verdict, on the ground, mainly, that the defendants are responsible even though they did exercise reasonable care and skill. To support this position, they rely chiefly on the case of McAndrews v. Collerd, 42 N. J. Law, 189, 36 Am. Rep. 508, where the court of errors held that one who maintains a public nuisance is liable for the damage thereby caused, notwithstanding his exercise of all possible skill and care to prevent harm. To come within the range of this decision, the plaintiffs must make out that the

[11] The statement of facts is abridged. The arguments of counsel and the opinions of Holroyd and Littledale, JJ., concurring with Bayley, J., are omitted.

blasting of rock by dynamite in the construction of a public sewer through a highway is per se a nuisance. The evidence in this case by no means tended to establish such a proposition. On the contrary, it was to the effect that blasting was the only practicable mode of removing the rock; that dynamite was an explosive often used in such work; and that, if used with reasonable care and skill, it was as safe as other explosives. The proposition therefore would fall, unless it should be held that the building of public sewers in streets laid over rock would necessarily create a nuisance; and for this the plaintiffs do not contend. Nor do we think it accords with common experience that the careful and skillful use of these explosives involves more danger to person or property than such use of various other forces which science has discovered, and which, in their general effect, promote the convenience and progress of society, and are therefore recognized as lawful agencies. In McAndrews v. Collerd, ubi supra, the nuisance consisted, not in the use of explosives, but in the maintenance of a magazine where a large quantity was stored. In Booth v. Railroad Co., 140 N. Y. 267, 35 N. E. 592, 24 L. R. A. 105, 37 Am. St. Rep. 552, and in French v. Vix., 143 N. Y. 90, 37 N. E. 612, it was held that the temporary use of explosives in the blasting of rock, provided reasonable care be exercised, is lawful, and damage resulting from concussion thereby produced is damnum absque injuria. We find no contrary decision. On this point, therefore, the plaintiffs have no cause of complaint.[12] * * *

The rule to show cause is discharged.

O'BRIEN v. LOOMIS.

(St. Louis Court of Appeals, Missouri, 1890. 43 Mo. App. 29.)

This was a joint action against father and son, the latter an infant of about ten years, to recover damages, for an injury to the plaintiff, caused by a gunshot wound, inflicted by the son. A demurrer by the father having been sustained, final judgment was rendered upon it in his favor, and the case proceeded against the son alone. The answer contained a general denial. There was a verdict, with judgment for $2,500, from which the defendant prosecutes this appeal. Errors were assigned in the following instructions, among others:

"If the jury find from the evidence in this case that the act of the boy in shooting plaintiff was either intentional or done without the exercise of ordinary care on the part of the defendant, and was a negligent act, considering his age and discretion, then plaintiff is entitled to recover."

"If the jury find from the evidence that the defendant Henry Loomis shot plaintiff with a bullet fired from the gun mentioned in the evidence; and if the jury further find from the evidence that the said Henry Loomis intentionally fired said gun at the plaintiff, intending to wound or injure the

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[12] Parts of the opinion are omitted.

plaintiff, then plaintiff is entitled to recover such damages as the jury may believe from the evidence will be a fair compensation to her for the injury received." [13]

THOMPSON, J. We are of opinion that there is a fundamental error running through these instructions, in that they authorize a recovery on the hypothesis of the injury having been "intentional," or that the gun was fired "intentionally" at the plaintiff, the defendant "intending to wound and injure her"; whereas the petition does not allege that the injury was wilful or intentional, but alleges that it was negligent. Recurring to the petition, it will be seen that it is unfortunate in having been drawn to charge both the father and the son, and in being the petition on which the case proceeded after final judgment had been rendered for the father on demurrer. It charges that the defendant, Henry, was "reckless," and that he "had little or no discretion," and it also charges that the injury happened "through his said reckless habit and want of discretion"; and it does not charge that it happened in any other manner. Webster defines the word "reckless," as "rashly or indifferently negligent; careless; heedless; mindless." The petition, therefore, claims damages for an injury the result of negligence, and the instruction authorizes the jury to give damages on the hypothesis of wilfulness, and an intent to injure. We are of opinion that this case falls within the well-settled rule that the issues made by the pleadings cannot be broadened by the instructions.

It is true that, under our system, as at common law, the plaintiff may bring an action for a direct injury, such as shooting and wounding, by a petition in the form of a declaration in the common-law action of trespass, charging in the barest terms that the defendant unlawfully and wrongfully inflicted the injury upon the plaintiff, and that he can then recover on proof that the injury—provided it be the direct injury alleged—was the result of negligence merely. Conway v. Reed, 66 Mo. 346, 27 Am. Rep. 354. The reason was that in the case of a direct injury proceeding from the plaintiff to the defendant, nothing excused it short of proof that the injury was unavoidable. Weaver v. Ward, Hobart, 134. That a plaintiff could sue in trespass and recover for a direct injury, either on proof that the injury was intentional or negligent has been familiar learning to the profession ever since the celebrated "Squib Case." Scott v. Sheppard, 2 W. Bl. 892. See Morgan v. Cox, 22 Mo. 373, 66 Am. Dec 623; Castle v. Duryee, *41 N. Y. (2 Keyes) 169.

But the policy of our code of procedure is to require the party to state in his pleadings his real ground of action or defense; and, if he chooses one ground, he cannot so enlarge it as to recover on another. This is in accordance with what is said on one of the opening pages of a standard work in respect of actions for damages for negligence:

[13] The statement of the facts is abridged.

"It is clear that a plaintiff may elect between suing upon a charge of wilful injury, or a mere charge of negligence, wherever the facts are susceptible of a double construction. It does not lie with the defendant to insist that he has been criminal instead of merely careless. In making his election, however, the plaintiff must remember that he will be bound by it. If the complaint sets up a case of wilful injury, it cannot be sustained by evidence of mere negligence, however gross; while, on the other hand, if it charges negligence only, the plaintiff cannot put in evidence, the only relevancy of which consists in proving intentional injury, such as would sustain an entirely different action." Shearman and Redfield on Negligence (4th Ed.) § 7.

We have been able to find no case, decided in this state, in which a party sued on the theory of negligence and recovered on the theory of wilfulness or malice, nor indeed any case where such a thing was attempted. But this is probably evidence of an understanding on the part of the profession that such a thing cannot be done. We have, however, been referred to several decisions of the supreme court of Indiana, which proceed on the distinction between actions grounded on negligence and actions grounded on wilfulness, which is stated by the above-named authors. Pennsylvania Co. v. Sinclair, 62 Ind. 301, 30 Am. Rep. 185; Pennsylvania Co. v. Smith, 98 Ind. 42; Cincinnati, etc., R. Co. v. Eaton, 53 Ind. 307; Terre Haute, etc., R. Co. v. Graham, 95 Ind. 286, 48 Am. Rep. 719. In Pennsylvania Co. v. Smith, supra, it is held that under an averment of negligence there can be no recovery for a wilful injury.

The decisions in this state present many analogous rulings, which go to show that such a recovery cannot be had. Thus Hubbard v. Railroad, 63 Mo. 68, is to the effect that a plaintiff cannot sue in trespass for a wrongful entering and recovery on proof that possession was obtained by fraud. In Martin v. Miller, 20 Mo. 391 (which was an action commenced before the code), it was held that the plaintiff could not set out in his declaration that, on a certain day of the month, in a certain year, the defendant, "wrongfully, negligently and unjustly," set out a certain fire which did damage to the plaintiff, and then recover by merely proving that that day was Sunday, and that the defendant, in setting the fire, was at work on Sunday in violation of the statute. And cases in this state are numerous, where it has been held that a plaintiff cannot sue for damages for negligence consisting of a particular thing, and then recover for negligence consisting in something else. That the action for negligence is essentially different from the action for a wilful and intentional injury, is suggested by the last of the above instructions, where the learned judge correctly told the jury that contributory negligence was a defense in the former case, but not in the latter.

If, then, the issues made by the pleadings were not large enough to embrace the hypothesis of a wilful or intentional injury, it was error for the court to instruct the jury on such a theory, although

the evidence, in a proper state of the pleadings, might have warranted such an instruction; for our procedure is very strict to the effect that it is error to submit to the jury an issue of fact not made by the pleadings. Melvin v. Railroad, 89 Mo. 106, 1 S. W. 286; Kenney v. Railroad, 70 Mo. 252; Benson v. Railroad, 78 Mo. 504, 513; Fulkerson v. Thornton, 68 Mo. 468.

BARRETT v. CLEVELAND, C., C. & ST. L. RY. CO.

(Appellate Court of Indiana, 1911. 48 Ind. App. 668, 96 N. E. 490.)

Action against the railway company to recover damages for breaking down a tile drain on the right of way and under the tracks of the defendant. From a judgment for the defendant, the plaintiff appeals.

ADAMS, J. * * * The sufficiency of the complaint, therefore, is the only question to be determined upon this appeal. Preliminary to the consideration of the main question, however, the nature of the action set forth in the complaint must be determined. It will be noted that the act complained of is that the tile in the ditch was negligently, willfully, and purposely broken by the appellee at a point under its main track and on its right of way. It is clear that an act could not be done both willfully and negligently. Willfulness and negligence are diametrically opposite to each other. One imports inattention, inadvertence, and indifference, while the other imports intention, purpose, and design. There can be no negligence with intent, and no willfulness without intent. It does not strengthen a pleading to allege both negligence and willfulness. The action must be predicated upon one theory or the other. Miller v. Miller, 17 Ind. App. 608, 609, 47 N. E. 338; Louisville, etc., R. Co. v. Bryan, 107 Ind. 51, 54, 7 N. E. 807. "'The pleader is not at liberty to leave his pleading open to different constructions, and then take his choice between them.' [Van Etten v. Hurst (1844), 6 Hill (N. Y.) 311, 41 Am. Dec. 748.] Facts must be stated directly and positively, and not indirectly nor in the alternative." Langsdale v. Woollen, Adm'r, 120 Ind. 78, 80, 21 N. E. 541. * * * In Gregory, Adm'r, v. C., C., C. & I. Ry. Co., 112 Ind. 387, 14 N. E. 229, it is said: "There is a clear distinction between the cases which count upon negligence as a ground of action and those which are founded upon acts of aggressive wrong or willfulness, and a pleading should not be tolerated which proceeds upon the idea that it may be good either for a willful injury or as a complaint for an injury occasioned by negligence. It should proceed upon one theory or the other, and is to be judged from its general tenor and scope." In the same case, at page 387, of 112 Ind., at page 229 of 14 N. E., it is said: "It is only necessary to charge in a complaint which seeks redress for a willful injury that the injurious act was purposely and intentionally

committed with the intent willfully and purposely to inflict the injury complained of." * * *

To constitute a willful injury, the act which produced it must have been intentional, or must have been done under such circumstances as evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of. It involves conduct which is quasi criminal. Louisville, etc., R. Co. v. Bryan, 107 Ind. 51, 7 N. E. 807. The breaking of the tile is declared in the complaint before us to have been done negligently and willfully. As we have seen, the injury could not have resulted from both negligence and willfulness, and it is for the court to determine the theory of the complaint from its tenor and scope, without reference to the characterization of the act complained of. In this we are not greatly aided by the averments of the complaint. It is not shown in what manner the tile was broken, nor the means employed in the breaking, but it is averred that the same was broken under the main track, and upon the appellee's right of way. This, as well as the fact that the word "negligently" is given precedence, would seem to negative the idea of willfulness. It is highly improbable that appellee would seek to injure the appellant at a place and in a manner involving danger and inconvenience to it, when the same thing might have been done more easily elsewhere on the right of way. We are, therefore, constrained to hold that the words "willfully and purposely" do not control, but that the complaint is one for injury occasioned by negligence. Miller v. Miller, supra; Chicago, etc., Ry. Co. v. Hedges, Adm'x, 105 Ind. 398, 7 N. E. 801; Cleveland, etc., Ry. Co. v. Asbury, 120 Ind. 289, 22 N. E. 140; Louisville, etc., Ry. Co. v. Schmidt, 106 Ind. 73, 5 N. E. 684; Sherfey, Adm'r, v. Evansville, etc., R. Co., 121 Ind. 427, 23 N. E. 273.[14]

SECTION 2.—ELEMENTS OF A PRIMA FACIE CASE IN NEGLIGENCE

I. The Defendant's Duty to Use Care

(A) In General

GILES v. WALKER.

(Queen's Bench Division, 1890. 24 Q. B. Div. 656.)

Appeal from the Leicester County Court.

The defendant, a farmer, occupied land which had originally been forest land, but which had some years prior to 1883, when the defendant's occupation of it commenced, been brought into cultivation by the

[14] Parts of the opinion are omitted.

then occupier. The forest land prior to cultivation did not bear thistles; but immediately upon its being cultivated thistles sprang up all over it. The defendant neglected to mow the thistles periodically so as to prevent them from seeding, and in the years 1887 and 1888 there were thousands of thistles on his land in full seed. The consequence was that the thistle seeds were blown by the wind in large quantities on to the adjoining land of the plaintiff, where they took root and did damage. The plaintiff sued the defendant for such damage in the county court. The judge left to the jury the question whether the defendant in not cutting the thistles had been guilty of negligence. The jury found that he was negligent, and judgment was accordingly entered for the plaintiff. The defendant appealed.

Toller, for the defendant. The facts of this case do not establish any cause of action. The judge was wrong in leaving the question of negligence to the jury. Before a person can be charged with negligence, it must be shewn that there is a duty on him to take care. But here there is no such duty. The defendant did not bring the thistles on to his land; they grew there naturally. (He was stopped by the Court.)

R. Bray, for the plaintiff. * * * The case resembles that of Crowhurst v. Amesham Burial Board, 4 Ex. D. 5, where the defendants were held responsible for allowing the branches of their yew trees to grow over their boundary, whereby a horse of the plaintiff, being placed at pasture in the adjoining field, ate some of the yew twigs and died.

LORD COLERIDGE, C. J. I never heard of such an action as this. There can be no duty as between adjoining occupiers to cut the thistles, which are the natural growth of the soil. The appeal must be allowed.

LORD ESHER, M. R. I am of the same opinion.

Appeal allowed.[15]

[15] Accord: Harndon v. Stultz (1904) 124 Iowa, 734, 100 N. W. 851: (P. complains that D. has allowed noxious weeds to grow in large quantities upon his land in close proximity to the division line between the farms of P. and D., and that the wind has carried the seeds over P.'s land, to his damage.)

Langer v. Goode (1911) 21 N. D. 462, 131 N. W. 258, Ann. Cas. 1913D, 429: (P. sued to recover his damage because D. had neglected to destroy wild mustard seed growing in his farm. A statute required that every person destroy upon all lands owned or occupied by him all wild mustard there growing, when the board of county commissioners had prescribed the time and manner of destruction. "Therefore," said Burr, J., delivering the opinion, "no duty devolves upon any one to destroy these noxious weeds until the board of county commissioners prescribes the time and manner of destruction. It being conceded that such action was never taken by the board, then no duty devolved upon the defendant.")

HADWELL v. RIGHTON.

(King's Bench Division. [1907] 2 K. B. 345.)

Appeal from the Birmingham County Court.

The plaintiff was riding a bicycle at the rate of about six miles an hour down a highway called Bordesley Park Road, when he saw in front of him, on the footpath three fowls. When he got abreast of the fowls all three suddenly fluttered up, and one of them flew into the spokes of his bicycle and he was upset, with the result that he suffered personal injuries and his bicycle was damaged. The fowls were the property of the defendant, who occupied premises on the side of the road opposite to the footpath on which the fowls were immediately before the accident. The cause of the fowls starting to fly across the road was that they were frightened by a dog which came out of the premises adjoining those of the defendant on which the fowls were kept, and either ran at or barked at them. The plaintiff was riding carefully, and the accident happened through no fault of his. The defendant knew that the fowls were in the habit of straying out into the road. The county court judge held that the damage was too remote a consequence of their being allowed to stray there, and gave judgment for the defendant. The plaintiff appealed.

Avory, K. C., and Simey, for the plaintiff. The owner of an animal is liable for its trespasses. He keeps it at his peril, and if it escapes from his premises he is responsible for any damage that naturally results from its escape. * * * The case of Lee v. Riley (1865) 18 C. B. (N. S.) 722, supports the plaintiff's contention. There the defendant's mare strayed into a field of the plaintiff in which was a horse. From some unexplained cause the animals quarrelled, and the defendant's mare kicked the plaintiff's horse and damaged it. It was held that the damage was not too remote. And the case of Ellis v. Loftus Iron Co. (1874) L. R. 10 C. P. 10, where the facts were very similar, was decided in the same way. * * *

BRAY, J. I am of the same opinion. We cannot decide this case in the plaintiff's favor without overruling Cox v. Burbidge, 13 C. B. (N. S.) 430. We have no power to overrule it, nor should I be inclined to exercise that power if we could. It is said that the fowl was trespassing. But the cases which were relied upon as shewing that that would give a cause of action were cases in which the plaintiff was the owner of the soil on which the trespass was committed, and are consequently not in point, for here the cyclist had no interest in the soil of the highway. The plaintiff's case could only be rested on the ground of negligence, as in the case of Harris v. Mobbs, 3 Ex. D. 268, where the defendant left a house van on the grassy side of the highway for the night, and a horse being driven along the road was frightened by it and bolted. Denman, J., there

held the defendant responsible for the consequences, but he did so on the ground that the jury had in effect found "that there was an unreasonable and dangerous occupation of a part of the highway amounting to an obstruction and preventing of its free user by the public to an extent which was unreasonable." Where is there anything dangerous in letting fowls stray on a highway? The business of farming could not be conveniently carried on if such an act were not permissible. Homesteads are usually near a road, and it is practically impossible to keep fowls in. I should not hesitate to find that there was no danger at all in allowing them so to stray. Such an accident as this I have never heard of before. And, in the absence of anticipated danger, there is no room for the suggestion of negligence.

Appeal dismissed.[16]

PITTSBURG, FT. W. & C. RY. CO. et al. v. BINGHAM.

(Supreme Court of Ohio, 1876. 29 Ohio St. 364.)

The original action was brought by the defendant in error, as the personal representative of her deceased husband, against the railway company, under the act requiring compensation to be made for causing death by a wrongful act, neglect or default. The deceased was at the defendant's station-house in Massillon, on December 5, 1870, and while there was struck by a portion of its roof, torn off by the wind, and blown, during a violent storm, from the building, with such force against him as to cause his death. The defendants were charged with negligence in the construction and maintenance of the station-house.

Issue was joined upon the question of negligence. The evidence tended to show that the deceased, at the time of receiving the injury resulting in his death, was at this passenger station, not for the purpose of transacting any business with the company, its agents or servants, or with any one rightfully there, nor on business in any wise connected with the operation of the road; but being out of employment was there for pastime or pleasure, or as a place of safety during the continuance of a violent storm. After the testimony was concluded, the court instructed the jury:

That if the deceased was at, in or near the said depot, not on any business, but "was there by the tacit permission of, and without objection from," the company operating the road, "its agents and servants, and there peaceably and innocently, relying upon such station-house as a place of security," and was free from negligence contributing to his injury and consequent death, and ordinary care and skill was not employed in the construction and maintenance of the station-house, but from want of such care and skill it was defectively and insufficiently constructed, and imprudently and negligently maintained and used, and by reason thereof the deceased lost his life, the company was liable.

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[16] The opinion of Phillimore, J., is omitted.

The defendant excepted to that part of the charge that held it to be the duty of the company to have exercised due care in the construction and maintenance of the building, if the deceased entered and was there by "mere permission and without objection"; and from a judgment against it, carried the cause to the district court, where the judgment of the common pleas was affirmed. A petition in error is now prosecuted to reverse both judgments.[17]

BOYNTON, J. We find in the record of the present case among the questions argued, but one deserving consideration; and that one may be stated as follows: "Is a railroad company bound to exercise ordinary care and skill in the erection, structure, or maintenance of its station-house or houses, as to persons who enter or are at the same, not on any business with the company or its agents, nor on any business connected with the operation of its road; but are there without objection by the company, and therefore by its mere sufferance or permission?" * * *

Actional negligence exists only where the one whose act causes or occasions the injury owes to the injured person a duty, created either by contract or by operation of law, which he has failed to discharge. In Burdick v. Cheadle, 26 Ohio St. 393, 20 Am. Rep. 767, the owner of a store building had leased it to a tenant, who was in occupancy of the same, selling goods therein. Certain shelvings and fixtures not properly secured, fell, and injured the plaintiff, a customer of the tenant, for which injury the customer brought action against the landlord. It was said by McIlvaine, J., that there was no privity between the owner of the property and the plaintiff, and that the former owed no duty to the latter which was violated by a careless construction or fastenings of the fixtures; and that the fact that the room was kept open for the customers of the tenant did not affect the question.

But the question naturally arises, to what extent does the right of a railroad company to the control and use of its real property differ from that of a general owner of land not burdened or encumbered with a public charge? What restrictions and limitations are imposed upon the use and enjoyment of the real property of the company that do not exist in the case of ownership of property not employed for public purposes? These questions are not difficult to answer. The right to the possession and control of the property of a railroad corporation for all purposes contemplated by its charter, and to enable it to accomplish the objects for which it was created, is indispensable to the proper discharge of the duties it owes to the public. By accepting a grant of corporate power from the state, it bound itself to do and perform certain things conducive to the public welfare. And these things consist principally in the duty to carry and transport persons and property from one point on its road to another, under such reasonable rules and

[17] The statement of the facts is abridged and parts of the opinion are omitted.

regulations as it may prescribe to itself, or as may be prescribed by more general law. The obligation to carry, thus assumed, can not be disregarded or rejected at pleasure. It is an indispensable condition to the right to exercise corporate functions. The duty to carry is correlative to the existence of the corporate power of the company, and ceases only with the surrender of its corporate privileges. It is, therefore, a right that the public have to enter upon the premises of the company at points designed or designated for receiving passengers, and upon compliance with the rules governing the transportation of persons to be carried over its road to such points thereon as they may desire. The right of the public to enter is coextensive with the duty of the company to receive and carry. It, however, cannot be extended beyond this. For all purposes not connected with the operation of its road, the right of the company to the exclusive use and enjoyment of the corporate property is as perfect and absolute as is that of an owner of real property not burdened with public or private easements or servitudes. * * *

His [the deceased's] presence at the depot was uninvited, and the company did not owe him the duty to keep its station-house in a safe and secure condition. Its negligence, if any, was necessarily negligence of omission, negligence in having omitted the exercise of ordinary care to ascertain the dangerous character of the building. If the question was between the company and its employés, whose duty it was to occupy the building, or if it arose between the company and those who came to take passage on its cars, or to accompany a friend about to depart, or to await the arrival of one expected, or to engage in any business connected with the operation of the road, or business with those engaged in its service and having a legal right to be and remain there; or, if the company had possessed knowledge, in fact, of the dangerous character or condition of the building, and gave no notice thereof to those it permitted to enter or occupy, other considerations would arise. It, however, is not charged with intentional wrong, nor with that gross or reckless misconduct that is difficult to distinguish from it, and therefore is equivalent to it. All it could have done, when the storm approached, to save the deceased from harm, was to see that he left the building and thereby escaped the danger. This was not a legal duty. He was injured by no act of the company, or its servants or agents, occurring at the time. The fault was of past origin and negative in character, consisting in not previously overhauling the building, ascertaining its defects and weaknesses, and supplying the needed strength and support. For this omission, or its resulting consequences, a stranger has no right to call it to account.

Judgment of the district court and of the common pleas reversed, and cause remanded.

LANE v. COX.

(In the Court of Appeal. [1897] 1 Q. B. 415.)

The defendant was owner of a house which he let unfurnished to a weekly tenant. There were no covenants to repair on the part of either the landlord or the tenant. The plaintiff was a workman, who came upon the premises at the request of the tenant for the purpose of moving some furniture. While so employed the plaintiff was injured owing to the defective state of the staircase in the house. There was evidence that at the time the house was let the staircase was in an unsafe condition. The plaintiff brought this action to recover damages for the injuries he had sustained, and it was tried before the Lord Chief Justice, who entered a nonsuit. The plaintiff appealed.

LORD ESHER, M. R. * * * There was evidence that the defendant was owner of the house, but that it was let at the time of the accident to a tenant who was in possession of it. There was evidence that at the time the house was let it was in an unsafe condition. The plaintiff was in the house to remove furniture of the tenant's, and he sustained an injury owing to the defect in the staircase. The question is raised whether the defendant under these circumstances is liable to the plaintiff. There was no contractual relation between the plaintiff and the defendant, and it was not like the case of a person who keeps a shop to which he intends people to come.

It is said however that the defendant was guilty of negligence which led to the accident because he left the house in a defective condition. It has been often pointed out that a person cannot be held liable for negligence unless he owed some duty to the plaintiff and that duty was neglected. There are many circumstances that give rise to such a duty, as, for instance, in the case of two persons using a highway, where proximity imposes a duty on each to take reasonable care not to interfere with the other. So if a person has a house near a highway, a duty is imposed on him towards persons using the highway; and similarly there is a duty to an adjoining owner or occupier, and if by the negligent management of his house he causes injury, in either of these cases he is liable. In this case the negligence alleged is letting the house in an unsafe condition. It has been held that there is no duty imposed on a landlord, by his relation to the tenant, not to let an unfurnished house in a dilapidated condition, because the condition of the house is the subject of contract between them. If there is no duty in such a case to the tenant, there cannot be a duty to a stranger. There was, therefore, no duty on the part of the defendant to the plaintiff, and there could be no liability for negligence, and the nonsuit was right.

LOPES, L. J. I am of the same opinion. What is complained of in this case is a defect in a staircase of a house let by the defendant to a tenant. It is said that the lessor is liable for an injury sustained by a workman employed by the tenant. There is no liability either on the

landlord or the tenant to put or keep the demised premises in repair, unless such liability is created between them by contract. No contractual relation in this respect is implied on the letting of an unfurnished house. A landlord who lets a house in a dangerous or unsafe state incurs no liability to his tenant, or to the customers or guests of the tenant, for any accident which may happen to them during the term, unless he has contracted to keep the house in repair. That disposes of this case so far as any liability of the landlord arising out of contract is concerned. But then it is said that the claim of the plaintiff may be grounded on the negligence of the defendant. There cannot be a liability for negligence unless there is a breach of some duty; and no duty exists in this case to the tenant, and none can be alleged to strangers. The case differs entirely from those in which property is in a dangerous state by reason of which an injury happens to one of the public on a highway, or to the occupier of an adjoining house. I think the appeal should be dismissed.

RIGBY, L. J., concurred.

Appeal dismissed.[18]

[18] Part of opinion of Lord Esher, M. R., is omitted.

Compare: Cavalier v. Pope, [1906] A. C. 428: (D., the owner of a dilapidated house, rented it furnished, on an oral agreement, to H. The floor of the kitchen being out of repair, H. and his wife, W., threatened to leave, but remained after D. had promised H. to repair it. No repairs were made and as a result W. fell through the kitchen floor and was hurt. An action by H. and W. against D. resulted in a verdict of £25 for H. and £75 for W. The trial judge entered judgment accordingly, holding that, although W. could not recover against D. in contract, she could recover in tort. The Court of Appeal [one judge dissenting] reversed this decision as to the £75 and entered judgment for D. on W.'s claim, and against D. on H.'s claim. There was an appeal to the House of Lords.

Lord James of Hereford. "My Lords, I have with regret arrived at the conclusion that this appeal must fail. In my opinion, the verdict for the appellant cannot be maintained. There was but one contract and that was made with the husband. The wife cannot sue upon it. Then, is there any other form in which her claim can be maintained? It was ably argued at the Bar that, as the premises belonged to the defendant, he must be taken to be in possession of them, and that, therefore, a duty arose to maintain them in a condition that would not cause injury to anyone who came upon them. But there seems to be a fallacy in this argument. The defendant was not in actual possession of the house in question and did not occupy it. The plaintiffs were the occupiers and the statement of claim so alleges. No duty is cast upon a landlord to effect internal repairs unless he contracts to do so. Then all that remains on which to found liability is the contract, and it was urged that the contract to repair placed the premises constructively in the possession of the defendant and under his control. But the actual possession by the plaintiffs seems to negative this constructive control. The case so presented also does not come within the claim on the contract under which the husband has recovered. I therefore feel that the judgment of the majority of the Court of Appeal must be maintained. I regret this result, because the female plaintiff was injured entirely through the failure of the defendant's agent to fulfill the contract he made. But moral responsibility, however clearly established, is not identical with legal liability." The order of the Court of Appeal was affirmed, and the appeal dismissed.)

RICHARDSON v. BABCOCK & WILCOX CO.

(Circuit Court of Appeals of the United States, First Circuit, 1910. 175 Fed. 897, 99 C. C. A. 353.)

ALDRICH, District Judge. The records before us present two cases of Mrs. Richardson, administratrix, against the Babcock & Wilcox Company, one for the death of her husband and the other for conscious suffering. Both cases are controlled by the conclusion which we reach, that of nonliability. The liability in personal injury cases speaking generally, springs either from relationship or duty, as, for instance, in one class of cases, the obligation grows out of the relationship between employer and employé. The obligation of the employer is to furnish a reasonably safe place and reasonably safe appliances, and the obligation of the employé is to exercise reasonable care. And the rule of care is that which a person, similarly situated, would exercise, and this means ordinary care and prudence. These obligations result from the relationship through implication of law. The same is true of the liability of the carrier for hire. And as to one who, in the exercise of his right or business, injures a member of the public, who is in the exercise of his right, or while in the line of duty, it is the duty in respect to the relative rights which creates or implies the obligation to exercise reasonable care. If, in view of relationship or duty, a given party fails to discharge his obligation, the liability results in tort.

There are several counts in each writ. Some of them allege that the plaintiff was in the employ of the New York, New Haven & Hartford Railroad Company, and was in the line of duty, and that he was injured through the defendant's negligence; and some of the counts expressly allege that he was not in the employ or service of the defendant. Therefore we assume that the plaintiff's case is not within the rules which govern where the existing relationship is that of employer and employé, and this assumption is made because the relationship from which the ordinary implied obligations arise is wholly wanting.

The evidence shows that at the time of the accident the defendant was installing heavy boilers in the power house of the New York, New Haven & Hartford Railroad Company in Readville, Mass., under special contract. Mr. Richardson was a stationary engineer in the employ of the railroad company in its railroad shops at Readville, and on the day in question had occasion to pass from one part of the shops to another part, on business connected with his duty to the railroad, his employer. When he came to a doorway, through which he would ordinarily pass on such a journey, he found that the defendants were lowering a section of tubing, some eighteen feet in length, which had entered the doorway some three or four feet. When Mr. Richardson reached this point he stepped on stringers and passed safely over or by the tubing into the yard beyond. There was some lack of harmony

in the evidence as to just how far the tubing had entered the doorway, and just how much of an obstruction it was; but we pass over the details of such controversy as of no controlling consequence, because Mr. Richardson had passed safely beyond the obstruction, into an open yard between the buildings, and because we think the case is controlled by what followed.

Those in the employ of the defendant were having some difficulty in passing the tubing through the doorway, and, without any request from the defendant's servants for him to do so, and without any duty by reason of the relationship between him and the defendant as their employé, or as the employé of the railroad, because the defendants were doing the work under special contract, Mr. Richardson volunteered to lend a helping hand, and, while lifting, as the tubing was beginning to pass through the doorway, it started down an incline and a rope parted, and Mr. Richardson was jammed between the tubing and the doorway and fatally injured. Thus it appears that Mr. Richardson was not injured while in the line of duty. He had passed the place of hazard in safety, and, departing from his duty, returned to help another.

The law does not furnish redress in damages for every misfortune. In order to create liability for personal injury, the plaintiff must not only show that he was in the exercise of due care, but that the defendant was lacking in some duty which it owed to him, either as an employé or as a member of the public. This case, as already observed, is not within the class governed by the rules of ordinary care, because there was no contractual relationship between Mr. Richardson and the defendant. Nor is it the case of invitation, where a member of the public by invitation comes to help. The facts plainly show, and there was no dispute about it, that he took hold to help, as men oftentimes give a lift at the wheel when they find a neighbor stuck in the mud; and under such circumstances there is no liability on the part of the neighbor for an injury received, unless the injured party establishes gross negligence, willfulness, or wantonness in respect to his safety. In a legal sense the plaintiff's intestate was a volunteer, a stranger to the operations involved in moving the heavy articles in question, and so far as the relationship and the duties between the parties are concerned, this case is within the principle of Currier v. Trustees of Dartmouth College, 117 Fed. 44, 54 C. C. A. 430, and, while that case had some strong suggestions of invitation, it was said by Judge Putnam, speaking for the Court of Appeals, that the plaintiff was "of the class of those who must take care of themselves, except as against wantonness or willfulness, or except under peculiar conditions of some undiscovered danger." We think it very plain, and so plain that we need not cite authorities, that if a plaintiff recovers at all under the circumstances of this case, it must be on the ground that the defendant was grossly negligent in the selection of appliances, or that there was some wanton or willful conduct which caused the hurt. It is apparent that

counsel drawing the writs were aware of the distinction between a case like this and the case of an injured employé, because in several of the counts they alleged that Richardson was not in the employ of the defendants, and that the defendants were grossly negligent.

The Circuit Court directed a verdict upon the ground of contributory negligence; but it is a familiar rule that an order for a verdict may be sustained, not only upon the reason expressed but upon any ground which warrants the result. We think there was no evidence of gross negligence in this case in respect to appliances, and there was no suggestion of wanton or wilful conduct on the part of the defendant. Therefore the plaintiff was not entitled to go to the jury, and the situation justifies the order directing a verdict for the defendant. Having reached this conclusion, there is no occasion for dealing with the question of contributory negligence.

In each case: The judgment of the Circuit Court is affirmed, with costs.

CARLISLE & CUMBERLAND BANKING CO. v. BRAGG.

(In the Court of Appeal. [1911] 1 K. B. 489.)

Application by plaintiffs for judgment or a new trial in an action tried before Pickford, J., with a jury.

The action was upon a document which purported to be a continuing guarantee by the defendant, up to the amount of £150, of the payment by one Rigg to the plaintiffs of any sum which might, at any time thereafter, be or become due from him to the plaintiffs on the general balance of his banking account with them. The defendant in his defence denied that he signed the guarantee upon which the action was brought, and alleged that if he did, his signature to the same was fraudulently obtained by Rigg, who falsely represented to him that the said guarantee was an insurance paper. The evidence, so far as material to this report, appeared to be in substance as follows.

The signature to the document was in fact the defendant's. Before the document was signed, the plaintiffs had required from Rigg a guarantee of his overdraft with them. On the occasion when the document was signed the defendant and Rigg had been drinking together. Rigg produced a paper, and asked the defendant to sign it; he did not read it to the defendant, or tell him it was a guarantee. He told the defendant that the paper which the defendant had signed on a previous day had got wet and blurred in the rain. The defendant did not read the paper which he was asked to sign, and stated in evidence that he did not know that it was a guarantee; that he thought that Rigg was referring to a paper which he, the defendant, had previously signed concerning some insurance matter, and that the paper which he was asked by Rigg to sign was to the same effect as that paper. Rigg, having procured the defendant's signature to the document, subsequently forged

the signature of an attesting witness to it, and handed it to the plaintiffs. It was not disputed that Rigg was indebted to the plaintiffs on his banking account to the amount claimed in the action. The questions left by the learned judge to the jury and their answers thereto were as follows:

(1) Was the defendant induced to sign the guarantee by the fraud of Rigg? —Yes. (2) Did the defendant know that the document which he signed was a guarantee?—No. (3) Was the defendant negligent in signing the guarantee? —Yes. (4) Was Rigg the agent of the bank?—No.

Upon these findings, the learned judge, on the authority of Swan v. North British Australasian Co. (1862) 7 H. & N. 603, (1863) 2 H. & C. 175, gave judgment for the defendant.

VAUGHAN WILLIAMS, L. J. In my opinion the judgment of Pickford, J., in this case was quite right. He held that the finding of negligence by the jury was immaterial, and he did so after discussing the case of Foster v. Mackinnon, L. R. 4 C. P. 704, and coming to the conclusion that the doctrine there laid down as regards negligence really has reference to the particular case of a negotiable instrument, to an action on which the defence that the defendant was induced to sign the instrument by fraud and misrepresentation as to its nature is set up as against a bona fide holder for value. As I understand it, that doctrine is limited to negotiable instruments, and that was really the judgment of Pickford, J., in this case.

Now let me deal with the matter apart from any question of negotiable instruments. In this case the finding of the jury is that the signature of the defendant to this document was obtained by fraud. The jury was asked "Was the defendant induced to sign the guarantee by the fraud of Rigg?" They answered that he was. They then were asked: "Did the defendant know that the document he signed was a guarantee?" They answered in the negative. It seems to me that on these findings alone the defendant would be entitled to say in respect of this guarantee that it was not in contemplation of the law signed by him. His signature was obtained by fraud, and it is manifest on the evidence and the findings of the jury, that he was not intending to sign any such document. What he was intending to sign was some document with reference to insurance. It appears to me that under the circumstances of this case the mere fact that the jury have found that there was negligence on the part of the defendant does not raise such an estoppel as prevents the defendant from setting up the defence that he never signed the guarantee and that his signature to the document was obtained from him by fraud; that he did not know of its nature, or intend to sign a document of that description. If the document in question had not been a guarantee, but a bill of exchange, and the question had arisen what was the position of a holder for value without notice of the fraud, the matter might have been different, because the law merchant, and now the statute law, puts persons who in such circumstances take bills of exchange and such like instruments in the

position that they have to prove that they gave value for the bill or other like instrument honestly, but, if they prove that, it does not matter that it was originally procured by fraud.

The only other thing which I wish to say is on the question of negligence. I do not know whether the jury understood that there could be no material negligence unless there was a duty on the defendant towards the plaintiff. Even if they did understand that, in my opinion in the case of this instrument, the signature to which was obtained by fraud, and which was not a negotiable instrument, Pickford, J., was right in saying that the finding of negligence was immaterial. I wish to add for myself that in my judgment there is no evidence whatsoever to shew that the proximate cause of the plaintiffs' advancing money on this document was the mere signature of it by the defendant. In my opinion the proximate cause of the plaintiffs' making the advance was that Rigg fraudulently took the document to the bank, having fraudulently altered it by adding the forged signature of an attesting witness, and but for Rigg having done those things, the plaintiffs would never have advanced the money at all. Under these circumstances I think the appeal fails and must be dismissed.

Buckley, L. J. * * * There remains the question whether the defendant is estopped. On that question I agree that the existence of negligence may be relevant. I do not wish to add anything to what Vaughan Williams, L. J., has said on the subject. I do not think that there was in this case proof of any such negligence as would avail the plaintiffs as between themselves and the defendant. The defendant did not owe any duty to the plaintiffs, and the act of the defendant was not the act which involved the plaintiffs in loss. What involved the plaintiffs in loss was the act of Rigg, a rogue, who obtained from the defendant his signature to an instrument which he never intended to sign, and having thus defrauded the defendant, proceeded to do another act, which was what caused the plaintiffs loss. He took the document thus fraudulently obtained, and pretended to the plaintiffs that it was a genuine guarantee given by the defendant. In point of fact it was not. He knew how he had procured it and that he had forged the signature of an attesting witness. It was that act which involved the plaintiffs in loss. Upon these grounds I think the appeal fails and should be dismissed.

Application dismissed.[19]

[19] Part of the opinion of Buckley, L. J., and the opinion of Kennedy, L. J., are omitted.

BARRETT v. CLEVELAND, C., C. & ST. L. RY. CO.

(Appellate Court of Indiana, 1911. 48 Ind. App. 668, 96 N. E. 490.)

Barrett brought this action against the railway company to recover damages for the breaking down of a tile drain on the right of way and under the tracks of the defendant. After alleging that the defendant was a corporation operating a line of railway over and through the lands of the plaintiff in Rush county, the complaint averred:

"That before said railway was constructed there was a good and sufficient tile drain across the lands of plaintiff, running from a westerly to an easterly direction to the lands of Frederick Leisure, and thence to Blue river; that said drain was ample and sufficient properly to drain said lands of plaintiff, but that said defendant constructed its said railway across said lands from a northeasterly to a southwesterly direction over and across said tile drain; that on or about April 1, 1906, said railway company negligently, willfully and purposely broke the tile in said drain at a point under its main track, on its right of way on said lands, thereby causing said drain to cave in and obstruct the free flow of water therethrough; that, as a further obstruction to the flow of water through said drain, said railway company, by its officers, agents and employés, filled said drain with dirt and gravel, so as wholly to obstruct the flow of water through said drain, and thereby caused the water that should flow through said drain to back and overflow the lands of plaintiff, so as to render said lands unfit for farming or for any purpose whatever; that before said drain was so broken and filled by defendant, said lands were fertile, dry and very productive, and in fit and proper condition to raise all kinds of farm products, but by the action of defendant, aforesaid, said lands were rendered wet and unfit for farming or for any other purpose; that by reason of the action of defendant, its agents and employés, said plaintiff's lands and all growing crops thereon were overflowed each and every year since the obstruction was made, and a large tract of land, to wit, twenty-five acres, was rendered useless and of no value, to the injury and damage of the plaintiff in the sum of $1,000."

A demurrer to this complaint, for want of facts sufficient to constitute a cause of action, being overruled, the defendant answered in two paragraphs. The first was in denial; the second set out certain affirmative facts. A demurrer to this second paragraph of the answer was carried back by the court, and sustained to the complaint. The plaintiff thereupon refused to plead further and elected to stand by his exception to carrying the demurrer back, and sustaining it to the complaint. Judgment was rendered against the plaintiff for costs.

ADAMS, J.[20] * * * The error relied on for reversal in this court relates to the overruling of appellant's demurrer to the second paragraph of answer, and the action of the court in carrying said demurrer back, and sustaining it to the complaint.

If there was no error in sustaining the demurrer to the complaint, then the action of the court in overruling the demurrer to the second

[20] The statement of facts is abridged, and only so much of the opinion is given as relates to the one point.

paragraph of answer would not be error, even if said paragraph were bad, under the well-recognized rule that a bad answer is good enough for a bad complaint. Alexander v. Spaulding (1903) 160 Ind. 176, 66 N. E. 694; Grace v. Cox (1896) 16 Ind. App. 150, 44 N. E. 813. * * * [21]

The question then for determination is, Does the complaint state a cause of action for negligence? * * * The complaint only states that, before the construction of appellee's railroad, there was a good and sufficient tile drain from the lands of appellant through the lands of another, and thence to the outlet; that at a subsequent date the appellee broke down the tile under its main track, and on its right of way, and also filled up the ditch. It is not shown how or from whom the right of way was obtained. It is not shown that the appellee had any knowledge of the existence or the location of the tile ditch. No contractual or prescriptive right is claimed by the appellant, and it does not appear that the ditch was a natural water course or a public drain.

The evident theory of the complaint is that appellee, having come into possession of a right of way across which a private tile drain extended, and through which appellant secured an outlet for the surface water accumulating upon his lands, was bound to keep such tile drain open and in working order for the benefit of appellant. The law does not impose such a burden upon the appellee. This subject was fully discussed in the well-considered case of Cleveland, etc., R. Co. v. Huddleston, 21 Ind. App. 621, 52 N. E. 1008, 69 Am. St. Rep. 385, and the principle stated as follows: "An artificial waterway may not be constructed or maintained, except by authority of law, or under a contract, in any case where it imposes a burden upon the property of an adjacent owner." In the same case, 21 Ind. App. 625, 52 N. E. 1010, 69 Am. St. Rep. 385, the court quoted with approval the following from O'Connor v. Fond du Lac, etc., Ry. Co., 52 Wis. 526, 9 N. W. 287, 38 Am. Rep. 753: "The company has only obstructed a ditch which drained or carried off surface water from the plaintiff's premises. We do not think the defendant was bound to keep that ditch open on its own land for the convenience of the plaintiff; in other words, the owner of the land is under no legal obligation to provide a way for the escape of mere surface water coming onto his land from the land of his neighbor, but has the right to change the surface of the ground so as to interfere with or obstruct the flow of such water." See, also, Jean v. Pennsy. Co., 9 Ind. App. 56, 36 N. E. 159; New York, etc., R. Co. v. Speelman, 12 Ind.

[21] In the omitted portion of the opinion the court considers the question whether the complaint shows a cause in negligence or a cause for intentional injury, and reached the conclusion that the cause alleged is for negligence. On the principle involved, see ante, "The Place of Negligence in the Field of Torts."

App. 372, 40 N. E. 541; Cairo, etc., R. Co. v. Stevens, 73 Ind. 278, 38 Am. Rep. 139; Clay v. Pittsburg, etc., Ry. Co., 164 Ind. 443, 73 N. E. 904; Atchison, etc., R. Co. v. Hammer, 22 Kan. 763, 31 Am. Rep. 216.

The complaint does not state a cause of action, and there was no error in carrying back and sustaining a demurrer thereto. Judgment affirmed.

HURLEY v. EDDINGFIELD.

(Supreme Court of Indiana, 1901. 156 Ind. 416, 59 N. E. 1058, 53 L. R. A. 135, 83 Am. St. Rep. 198.)

Action by Hurley, as administrator, against Eddingfield. From a judgment in favor of the defendant, the plaintiff appeals.

BAKER, J. The appellant sued appellee for $10,000 damages for wrongfully causing the death of his intestate. The court sustained appellee's demurrer to the complaint, and this ruling is assigned as error.

The material facts alleged may be summarized thus: At and for years before decedent's death appellee was a practicing physician at Mace, in Montgomery county, duly licensed under the laws of the state. He held himself out to the public as a general practitioner of medicine. He had been decedent's family physician. Decedent became dangerously ill, and sent for appellee. The messenger informed appellee of decedent's violent sickness, tendered him his fee for his services, and stated to him that no other physician was procurable in time, and that decedent relied on him for attention. No other physician was procurable in time to be of any use, and decedent did rely on appellee for medical assistance. Without any reason whatever, appellee refused to render aid to decedent. No other patients were requiring appellee's immediate service, and he could have gone to the relief of decedent if he had been willing to do so. Death ensued, without decedent's fault, and wholly from appellee's wrongful act. The alleged wrongful act was appellee's refusal to enter into a contract of employment.

Counsel do not contend that, before the enactment of the law regulating the practice of medicine, physicians were bound to render professional service to every one who applied. Whart. Neg. § 731. The act regulating the practice of medicine provides for a board of examiners, standards of qualification, examinations, licenses to those found qualified, and penalties for practicing without license. Acts 1897, p. 255; Acts 1899, p. 247. The act is a preventive, not a compulsive, measure. In obtaining the state's license (permission) to practice medicine, the state does not require, and the licensee does not engage, that he will practice at all or on other terms than he may choose

to accept. Counsel's analogies, drawn from the obligations to the public on the part of innkeepers, common carriers, and the like, are beside the mark.*

Judgment affirmed.

*Hurley v. Eddingfield, although not a negligence case, indicates the scope of the principle in negligence which is under examination here.

See also: Union Pacific R. Co. v. Cappier (1903) 66 Kan. 649, 72 Pac. 281, 69 L. R. A. 513: While trespassing on defendant's railway track C. was struck by a freight car pushed by a locomotive; a leg and an arm were cut off by the wheels. The engine was stopped and the wounded man was moved to the side of the right of way, when the engine and the crew left, without immediately binding up C.'s wounds or trying to stop the blood. But they telephoned from the railway yards for an ambulance, which reached C. about 30 minutes later. He died a few hours after reaching the hospital. In an action to recover damages for C.'s death, Smith, J., delivering the opinion, remarks as follows: "We are unable, however, to approve the doctrine that when the acts of a trespasser himself result in his injury, where his own negligent conduct is alone the cause, those in charge of the instrument which inflicted the hurt, being innocent of wrongdoing, are nevertheless blamable in law if they neglect to administer to the sufferings of him whose wounds we might say were self-imposed. With the humane side of the question courts are not concerned. It is the omission or negligent discharge of legal duties only which come within the sphere of judicial cognizance. For withholding relief from the suffering, for failure to respond to the calls of worthy charity, or for faltering in the bestowment of brotherly love on the unfortunate, penalties are found not in the laws of men, but in that higher law, the violation of which is condemned by the voice of conscience, whose sentence of punishment for the recreant act is swift and sure. In the law of contracts it is now well understood that a promise founded on a moral obligation will not be enforced in the courts. Bishop states that some of the older authorities recognize a moral obligation as valid, and says: 'Such a doctrine, carried to its legitimate results, would release the tribunals from the duty to administer the law of the land, and put in the place of law the varying ideas of morals which the changing incumbents of the bench might from time to time entertain.' Bishop on Contracts, § 44. Ezelle's injuries were inflicted, as the court below held, without the fault of the yardmaster, engineer, or fireman in charge of the car and locomotive. The railway company was no more responsible than it would have been had the deceased been run down by the cars of another railroad company on a track parallel with that of plaintiff in error. If no duty was imposed on the servants of defendant below to take charge of and care for the wounded man in such a case, how could a duty arise under the circumstances of the case at bar?"

For limitations, see Bradshaw v. Frazier (1901) 113 Iowa 579, 85 N. W. 752, 55 L. R. A. 258, 86 Am. St. Rep. 394 (involving an abuse of legal process), and Depue v. Flatau (1907) 100 Minn. 299, 111 N. W. 1, 8 L. R. A. (N. S.) 485 (P., on a very cold night, was invited by D. to remain at his house for supper. While there P. was taken suddenly ill and fell to the floor. He asked permission to remain over night, but D. refused. D. assisted P. to get into his sleigh, and, as he could not hold the reins, D. threw them over P.'s shoulders. He was found the next morning, about a mile from D.'s house, nearly frozen to death, having been again attacked by his ailment and fallen from the sleigh).

Compare the remark of Prof. James Barr Ames in 22 Harv. Law Review, 112 (1908): "As I am walking over a bridge a man falls into the water. He cannot swim and calls for help. I am strong and a good swimmer, or, if you please, there is a rope on the bridge, and I might easily throw him an end and pull him ashore. I neither jump in nor throw him the rope, but see him drown. Or, again, I see a child on the railroad track too young to appreciate the danger of the approaching train. I might easily save the child, but do nothing, and the child, though it lives, loses both legs. Am I guilty of a crime, and must I make compensation to the widow and children of the man drowned and to the wounded child? Macaulay, in commenting upon his In-

(B) Legal Degrees of Care

WILSON v. BRETT.

(Court of Exchequer, 1843. 11 Mees. & W. 113, 63 R. R. 528.)

Case. Plea, not guilty. At the trial, before Rolfe, B., it appeared that the plaintiff had entrusted his horse to the defendant, requesting him to ride it to Peckham, for the purpose of showing it for sale to a Mr. Margetson. The defendant accordingly rode the horse to Peckham, and for the purpose of showing it, took it into the East Surrey Race Ground, where Mr. Margetson was engaged with others playing the game of cricket: and there, in consequence of the slippery nature of the ground, the horse slipped and fell several times, and in falling broke one of his knees. It was proved that the defendant was a person conversant with and skilled in horses. The learned Judge in summing up, left it to the jury to say whether the nature of the ground was such as to render it a matter of culpable negligence in the defendant to ride the horse there; and told them, that under the circumstances, the defendant, being shown to be a person skilled in the management of horses, was bound to take as much care of the horse as if he had borrowed it; and that, if they thought the defendant had been negligent in going upon the ground where the injury was done, or had ridden the horse carelessly there, they ought to find for the plaintiff. The jury found for the plaintiff, damages £5. 10s.

Byles, Serjt., now moved for a new trial, on the ground of misdirection: There was no evidence here that the horse was ridden in an unreasonable or improper manner, except as to the place where he was ridden. The defendant was admitted to be a mere gratuitous bailee; and there being no evidence of gross or culpable negligence,

dian Criminal Code, puts the case of a surgeon refusing to go from Calcutta to Meerut to perform an operation, although it should be absolutely certain that this surgeon was the only person in India who could perform it and that, if it were not performed, the person who required it would die. We may suppose again that the situation of imminent danger of death was created by the act, but the innocent act, of the person who refuses to prevent the death. The man, for example, whose eye was penetrated by the glancing shot of the careful pheasant hunter, stunned by the shot, fell face downward into a shallow pool by which he was standing. The hunter might easily save him, but lets him drown. In the first three illustrations, however revolting the conduct of the man who declined to interfere, he was in no way responsible for the perilous situation, he did not increase the peril, he took away nothing from the person in jeopardy, he simply failed to confer a benefit upon a stranger. As the law stands to-day there would be no legal liability, either civilly or criminally, in any of these cases. The law does not compel active benevolence between man and man. It is left to one's conscience whether he shall be the good Samaritan or not."

And see the remarks of Carpenter, C. J., in Buch v. Amory Mfg. Co. (1898) 69 N. H. 257, 44 Atl. 809, 811, 76 Am. St. Rep. 163.

the learned Judge misdirected the jury, in stating to them that there was no difference between his responsibility and that of a borrower.[22]

PARKE, B. I think the case was left quite correctly to the jury. The defendant was shown to be a person conversant with horses, and was therefore bound to use such care and skill as a person conversant with horses might reasonably be expected to use: if he did not, he was guilty of negligence. The whole effect of what was said by the learned Judge as to the distinction between this case and that of a borrower, was this; that this particular defendant, being in fact a person of competent skill, was in effect in the same situation as that of a borrower, who in point of law represents to the lender that he is a person of competent skill. In the case of a gratuitous bailee, where his profession or situation is such as to imply the possession of competent skill, he is equally liable for the neglect to use it.

ROLFE, B. The distinction I intended to make was, that a gratuitous bailee is only bound to exercise such skill as he possesses, whereas a hirer or borrower may reasonably be taken to represent to the party who lets, or from whom he borrows, that he is a person of competent skill. If a person more skilled knows that to be dangerous which another not so skilled as he does not, surely that makes a difference in the liability. I said I could see no difference between negligence and gross negligence—that it was the same thing, with the addition of a vituperative epithet, and I intended to leave it to the jury to say whether the defendant, being, as appeared by the evidence, a person accustomed to the management of horses, was guilty of culpable negligence.

Rule refused.[23]

[22] The statement is abridged. The opinions of Lord Abinger, C. B., and Alderson, B., are omitted.

[23] "It is further complained that the Lord Chief Justice misdirected the jury because he made no distinction in this case between gross and ordinary negligence. No information, however, has been given us as to the meaning to be attached to gross negligence in this case; and I quite agree with the dictum of Lord Cranworth in Wilson v. Brett (1843) 11 M. & W. 113, that gross negligence is ordinary negligence with a vituperative epithet,—a view held by the Exchequer Chamber. Beal v. South Devon Railway Company (1864) 3 H. & C. 337. Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use. A bailee is only bound to use the ordinary care of a man, and so the absence of it is called gross negligence. A person who undertakes to do some work for reward to an article must exercise the care of a skilled workman, and the absence of such care in him is negligence. 'Gross,' therefore, is a word of description, and not a definition, and it would have been only introducing a source of confusion to use the expression, 'gross negligence,' instead of the equivalent, a want of due care and skill in navigating the vessel, which was again and again used by the Lord Chief Justice in his summing up." Willes, J., in Grill v. Iron Screw Collier Co. (1866) L. R. 1 C. P. 600, 612.

"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

MEREDITH v. REED.

(Supreme Court of Indiana, 1866. 26 Ind. 334.)

Action to recover damages due to the alleged negligence of the defendant. The jury returned a verdict for the defendant, on which judgment was entered.

GREGORY, C. J. * * * In May, 1865, the defendant owned a stallion, which had previously been let to mares, but, owing to the sickness of the owner, was not so let during the spring of 1865. He was a gentle stallion, and had never been known by the owner to be guilty of any vicious acts. Not being in use, he had been kept up in a stable for four or five months. He was secured in the stable by a strong halter and chain fastened through an iron ring in the manger. The stable door was securely fastened on the inside by a strong iron hasp, passed over a staple, and a piece of chain passed two or three times through the staple over the hasp, and the ends firmly tied together with a strong cord. It was also fastened on the

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. In Storer v. Gowen (1841) 18 Me. 177, the Supreme Court of Maine say: 'How much care will, in a given case, relieve a party from the imputation of gross negligence, or what omission will amount to the charge, is necessarily a question of fact, depending on a great variety of circumstances which the law cannot exactly define.' Mr. Justice Story (Bailments, § 11) says: 'Indeed, what is common or ordinary diligence is more a matter of fact than of law.' If the law furnishes no definition of the terms gross negligence, or ordinary negligence, which can be applied in practice, but leaves it to the jury to determine, in each case, what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty had better be abandoned. Recently the judges of several courts have expressed their disapprobation of these attempts to fix the degrees of diligence by legal definitions, and have complained of the impracticability of applying them. Wilson v. Brett (1843) 11 Mees. & Wels. 113; Wylde v. Pickford (1841) 8 Mees. & Wels. 443, 461, 462; Hinton v. Dibbin (1842) 2 Q. B. 646, 651. It must be confessed that the difficulty in defining gross negligence, which is apparent in perusing such cases as Tracy et al. v. Wood (1822) 3 Mason, 132, Fed. Cas. No. 14,130, and Foster v. Essex Bank (1821) 17 Mass. 479, 9 Am. Dec. 168, would alone be sufficient to justify these complaints. It may be added that some of the ablest commentators on the Roman law, and on the Civil Code of France, have wholly repudiated this theory of three degrees of diligence, as unfounded in principles of natural justice, useless in practice, and presenting inextricable embarrassments and difficulties. See Toullier's Droit Civil, 6th vol., p. 239, &c.; 11th vol., p. 203, &c.; Makeldey, Man. Du Droit Romain, 191, &c." Per Mr. Justice Curtis, in The New World v. King (1853) 16 How. (U. S.) 469, 474, 14 L. Ed. 1019.

"Counsel make frequent use of the phrase 'gross negligence' in their discussion of this case. In this state, as is well known, the actionable character of negligence is not dependent upon its 'degree,' and the ancient differentiation into 'gross,' 'ordinary,' and 'slight' has come to mean little more than a matter of comparative emphasis in the discussion of testimony." Weaver, J., in Denny v. Chicago, etc., Ry. Co. (1911) 150 Iowa, 460, 130 N. W. 363, 364.

outside by a piece of timber, one end of which was planted in the ground, while the other rested against the door. The horse was thus secured on the day and night the injury occurred. The gate of the inclosure surrounding the stable was shut and fastened as usual. About 11 o'clock that night the horse was found loose on the highway, and did the injury complained of. Early the following morning the outside gate was found open; the stable door was found open, with the log prop lying some distance to one side, and the chain which had been passed through the staple was gone, and the cord with which it had been tied was found cut and the pieces lying on the floor. * * *

It is contended, on the one hand, that ordinary care was all the law required of the defendant in this case. On the other it is claimed that the utmost care was necessary to free him from liability. Ordinary care is all that the law required in the case in judgment. What is ordinary care in some cases, would be carelessness in others. The law regards the circumstances surrounding each case, and the nature of the animal or machinery under control. Greater care is required to be taken of a stallion than of a mare; so in the management of a steam engine, greater care is necessary than in the use of a plow. Yet it is all ordinary care; such care as a prudent, careful man would take under like circumstances. The degree of care is always in proportion to the danger to be apprehended. The case at bar was properly sent to the jury, and the verdict is fully sustained by the evidence.

The judgment is affirmed, with costs.[24]

HILL v. CITY OF GLENWOOD.

(Supreme Court of Iowa, 1904. 124 Iowa, 479, 100 N. W. 522.)

Action to recover damages due to the negligence of the defendant, the city of Glenwood. Judgment for plaintiff and defendant appeals.

WEAVER, J. The plaintiff claims to have been injured upon one of the public walks of the city of Glenwood, and that such injury was occasioned by reason of the negligence of the city in the maintenance of the walk at the place of the accident, and without fault on his own part contributing thereto. From verdict and judgment in his favor for $665, the city appeals. In this court the appellant makes no claim that the city was not negligent, but a reversal is sought on other grounds. * * *

It was shown without dispute that plaintiff had been blind for many years, and this fact is the basis of the criticism upon the charge given

[24] Parts of the opinion are omitted.

to the jury. In the third paragraph of the charge, the court, defining negligence, said:

"(3) Negligence is defined to be the want of ordinary care; that is, such care as an ordinary prudent person would exercise under like circumstances. There is no precise definition of ordinary care, but it may be said that it is such care as an ordinarily prudent person would exercise under like circumstances, and should be proportioned to the danger and peril reasonable to be apprehended from a lack of proper prudence. This rule applies alike to both parties to this action, and may be used in determining whether either was negligent."

In the eighth paragraph, referring to the plaintiff's duty to exercise care for his own safety, the following language is used:

"(8) It must also appear from the evidence that the plaintiff did not in any way contribute to the happening of the accident in question by any negligence on his part; that is, by his own want of ordinary care. The plaintiff, on his part, was under obligation to use ordinary care to prevent injury when passing over any sidewalk, and if he failed so to do, and his failure in any way contributed to the happening of the accident in question, then he cannot recover herein. The evidence shows without dispute that he was blind, and this fact should be considered by you in determining what ordinary care on his part would require when he was attempting to pass over one of the sidewalks of this city."

Counsel for appellant does not deny that the rules here laid down would be a correct statement of the law of negligence and contributory negligence as applied to the ordinary case of sidewalk accident, but it is urged that the conceded fact of plaintiff's blindness made it the duty of the court to say to the jury that a blind person who attempts to use the public street "must exercise a higher degree of care and caution than a person ordinarily would be expected or required to use had he full possession of his sense of sight."

We cannot give this proposition our assent. It is too well established to require argument or citation of authority that the care which the city is bound to exercise in the maintenance of its streets is ordinary and reasonable care, the care which ordinarily marks the conduct of a person of average prudence and foresight. So, too, it is equally well settled that the care which a person using the street is bound to exercise on his own part to discover danger and avoid accident and injury is of precisely the same character, the ordinary and reasonable care of a person of average prudence and foresight. The streets are for the use of the general public without discrimination; for the weak, the lame, the halt and the blind, as well as for those possessing perfect health, strength and vision. The law casts upon one no greater burden of care than upon the other. It is true, however, that in determining what is reasonable or ordinary care we must look to the circumstances and surroundings of each particular case. As said by us in Graham v. Oxford, 105 Iowa, 708, 75 N. W. 474: "There is no fixed rule for determining what is ordinary care applicable to all cases, but each case must be determined according to its own facts."

In the case before us the plaintiff's blindness is simply one of the facts which the jury must give consideration in finding whether he did or did not act with the care which a reasonably prudent man would ordinarily exercise when burdened by such infirmity. In other words, the measures which a traveler upon the street must employ for his own protection depend upon the nature and extent of the peril to which he knows, or in the exercise of reasonable prudence ought to know, he is exposed. The greater and more imminent the risk, the more he is required to look out for and guard against injury to himself; but the care thus exercised is neither more nor less than ordinary care—the care which men of ordinary prudence and experience may reasonably be expected to exercise under like circumstances. See cases cited in 21 A. & E. Enc. Law (2d Ed.) 465, note 1. In the case at bar the plaintiff was rightfully upon the street, and if he was injured by reason of the negligence of the city, and without contributory negligence on his part, he was entitled to a verdict. In determining whether he did exercise due care it was proper for the jury, as we have already indicated, to consider his blindness, and in view of that condition, and all the surrounding facts and circumstances, find whether he exercised ordinary care and prudence. If he did, he was not guilty of contributory negligence. This view of the law seems to be fairly embodied in the instructions to which exception is taken. If the appellant believed, as it now argues, that the charge should have been more specific, and dwelt with greater emphasis upon the fact of plaintiff's blindness as an element for the consideration of the jury in finding whether he exercised reasonable care, it had the right to ask an instruction framed to meet its views in that respect. No such request was made, and the omission of the court to so amplify the charge on its own motion was not error.[25]

DIMAURO v. LINWOOD ST. RY. CO.

(Supreme Judicial Court of Massachusetts, 1908. 200 Mass. 147, 85 N. E. 894.)

Action by Dimauro, brought under Revised Laws Mass. c. 111, § 267,[26] to recover for the alleged wrongful death of the plaintiff's intestate. Verdict ordered for the defendant, and the plaintiff appeals.

[25] A portion of the opinion, on other points, is omitted.

[26] This statute provided that "if a corporation which operates a railroad or a street railway, by reason of its negligence or by reason of the unfitness or gross negligence of its agents or servants while engaged in its business, causes the death of a passenger, or of a person who is in the exercise of due care and who is not a passenger or in the employ of such corporation, it shall be punished by a fine of not less than $500 nor more than $5,000. * * * Such corporation shall also be liable in damages in the sum of not less than $500 nor more than $5,000, which shall be assessed with reference to the degree of culpability of the corporation or of its servants or agents, and shall be recovered in an action of tort commenced within one year after the injury which caused the death, by executor or administrator of the deceased," etc. Rev. Laws Mass. (1902) c. 111, § 267.

LORING, J. We are of opinion that the evidence did not warrant a finding of gross negligence on the part of the defendant's servants.

In view of the argument made in the case at bar we repeat what has been decided: (1) It was decided in Banks v. Braman, 188 Mass. 367, 74 N. E. 594, that gross negligence under Rev. Laws, c. 111, § 267, is not the same thing as a wanton act which dispenses with proof by a plaintiff of the fact that his negligence was not a contributory cause of the accident. See in this connection Lanci v. Boston Elevated Ry. Co., 197 Mass. 32, 83 N. E. 1, a note to Dolphin v. Worcester Consolidated St. Ry., 189 Mass. 270, 272, 75 N. E. 635, and a note to Fitzmaurice v. N. Y., N. H. & H. R. R., 192 Mass. 159, 162, 78 N. E. 418, 6 L. R. A. (N. S.) 1146, 116 Am. St. Rep. 236, 7 Ann. Cas. 586. (2) Gross negligence, as distinguished from ordinary negligence, was created by the act under which this action was brought (Rev. Laws, c. 111, § 267), and exists by force of the provisions of that statute. See Dolphin v. Worcester Consolidated St. Ry., 189 Mass. 270, 273, 75 N. E. 635. (3) In Dolphin v. Worcester Consolidated St. Ry., ubi supra, where the degree of care due was the highest degree of care, the defendant being a carrier and the plaintiff one of its passengers, it was held by the court that gross negligence means a gross failure to exercise the highest degree of care. Where the duty owed by the defendant is to exercise ordinary care, gross negligence has been defined to be "a materially greater degree of negligence than the lack of ordinary care." See Lanci v. Boston Elevated Ry. Co., supra; Brennan v. Standard Oil Co., 187 Mass. 376, 378, 73 N. E. 472; Manning v. Conway, 192 Mass. 122, 125, 78 N. E. 401. In such a case gross negligence may also be defined to be a failure to exercise a slight degree of care.

The evidence introduced by the plaintiff showed that one Paciello, his intestate, was killed by a car of the defendant railway under the following circumstances. He was a member of a gang of some 25 to 30 Italians engaged in digging a trench for sewer pipes. This trench was in a public way between Linwood, a station on a steam railroad, and the town of Whitinsville. In this same public way the tracks of the defendant railway were laid. On the day in question a heap of gravel and cobblestones, some three feet high in the middle of the heap, had been made by the dumping of material which came from the digging of the trench. Several teams had dumped loads at this point before the team in question came there to dump its load. The method of dumping had been for the successive teams to drive up on to the gravel previously dumped, and then dump its load. The plaintiff's intestate and another Italian, Delgrosso by name, were digging in the trench when the team in question drove up on to the heap of gravel. It was a four-wheel dump cart. Paciello and Delgrosso left the trench to help dump this load of gravel. The horses and cart had come to a stop parallel to the defendant's track, with the tracks on the left of the team as the team stood facing Linwood.

Rosetti, the foreman of the gang, stood at the front of the team, prying up the forward end of the dump cart with an iron bar. Paciello and Delgrosso were at the back of the cart, one on each side of it, bearing down on that end to help dump the gravel.

The evidence put the hub of the rear wheel of the dump cart "about 3 to 4 feet from the track," and the overhang of the defendant's car at 10 to 12 inches. This left a clearance of 2 to 3 feet between the hub of the wheel and the defendant's car. Paciello was on the side of the dump cart facing toward Linwood, that is to say, with his back toward Whitinsville, where the car in question was coming from. He was bending over, bearing down on the end of the car (as we have said), when Rosetti the foreman called out to him, "Guarda tevo per carro," or "Guarda tevo del carro," which being translated means "Look out for the car" or "Look out for the cart." Thereupon Paciello straightened up, looked round over his right shoulder, and in doing so brought his body over the line of the outside of the defendant's car, was struck on the hip, rolled over and was killed by the rear wheels. Rosetti's exact words were: "He moved his body or the car would not have touched him." The distance from the place where Paciello was struck to the place where he lay dead was 8 to 10 feet, and the back end of the car, when it came to a stop, was 10 to 12 feet from the body of Paciello where it lay dead. The car was 28 feet long, so that from the place where Paciello was struck to the place where the car stopped was about 50 feet.

Rosetti testified that he saw the defendant's car when it was 100 feet away, and that he then called out for it to stop. Seeing that there was no change in its speed he signaled it to stop by raising his hand, but the car continued to come on at the same rate of speed. He also testified that the motorman was looking in his direction all the time.

It was proved that the defendant had issued an order, properly posted, that cars "should not run exceeding 4 miles an hour by the sewer construction."

In addition there was evidence from an expert as to a hypothetical case, covering what the jury were warranted in finding to be the facts in the case at bar, that a motorman with a slack brake chain ought to have been able to stop the car running 4 miles an hour within 20 feet, and at 5 miles an hour within 27 feet.

The only testimony as to the speed at which the defendant's car was running, in addition to what has been stated, came from Delgrosso, who said that the car was coming all the time at the same rate of speed; "in a hurry; fast."

This warranted a finding that the defendant's car was going faster than 5 miles an hour. That fact in connection with the defendant's rule that its cars should not run over 4 miles an hour while going by sewer construction, would have warranted a finding that the motorman was negligent within the rule established in Stevens v. Boston Elevated R., 184 Mass. 476, 69 N. E. 338.

But the question here is whether the evidence warranted a finding of gross negligence on the part of the motorman, and we are of opinion that it did not. It is true that the jury were warranted in finding that the motorman saw or ought to have seen Paciello. But it is also true that there was a clearance of 2 to 3 feet between the hub of the wheel and the motorman's car, and that Paciello would not have been hurt if he had stayed where he was and not swung himself out into the line of the side of the car just as the car reached him. To run a car at something over 5 miles an hour under these circumstances is not, in our opinion, evidence of gross negligence.

The plaintiff's counsel contended that the evidence in the case at bar was stronger than that in the following cases: Com. v. Vermont & Massachusetts Ry., 108 Mass. 9, 11 Am. Rep. 301; Tilton v. Boston & Albany R. R., 169 Mass. 253, 47 N. E. 998; Young v. N. Y., N. H. & H. R. R., 171 Mass. 33, 50 N. E. 455, 41 L. R. A. 193; Walsh v. Boston & Maine R. R., 171 Mass. 52–56, 50 N. E. 453; Lutolf v. United Electric Light Co., 184 Mass. 53–58, 67 N. E. 1025; Hartford v. N. Y., N. H. & H. R. R., 184 Mass. 365, 68 N. E. 835; Hale v. N. Y., N. H. & H. R. R., 190 Mass. 85, 76 N. E. 656. We have examined these cases and find that they do not support that contention.

Exceptions overruled.

WALTHER v. SOUTHERN PAC. CO.

(Supreme Court of California, 1911. 159 Cal. 769, 116 Pac. 51, 37 L. R. A. [N. S.] 769.)

The plaintiff's intestate was killed, on March 28, 1907, in the derailment of a Southern Pacific passenger train. The accident occurred in the defendant's yard, and was caused by the train running from the main track into an open switch at a speed of some 45 miles an hour. The switch had been left open by the switch foreman, who, with his crew, were working on the siding at the time, and who had neglected to keep himself advised of the whereabouts of the train, which was long overdue, and had left the switch open in violation of the rules of the defendant. Deceased was an employé of defendant, but at the time of the accident and for some months next preceding the same was absent on leave. At the time of the accident he was returning from a journey to an Eastern state to his home in California. He was riding on a pass, good until March 31, 1907, which had been issued to him by defendant for the purposes of his journey. It was found by the trial court, in accord with a stipulation of the parties, that the pass was issued to him as an employé, "in accordance with the long established practice of the company, and one well known to its employés, to furnish passes from time to time to its employés." There was no other consideration for such pass. It contained the following statements, subscribed by the deceased: "This is a free pass based

upon no consideration whatever. The person accepting and using this pass, in consideration of receiving the same, agrees that the Southern Pacific Company shall not be liable under any circumstances, whether of negligence—criminal or otherwise—of its agents or others, for any injury to the person, or for any loss or damage to the property of the individual using this pass; and that as to such person the company shall not be considered as a common carrier, or liable as such."

This action was brought by plaintiff to recover the damage caused her by the death of her husband, being based upon section 377, Code of Civil Procedure, which provides that, when the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or, if such person be employed by another person who is responsible for his conduct, then also against such person. In her complaint she alleged that the accident and the consequent death of deceased were caused by the "gross negligence" of defendant, and these allegations were found by the trial court, which tried the case without a jury, to be true. Damages were assessed at the sum of $8,000, and judgment was given in favor of plaintiff for that amount. This is an appeal by defendant from such judgment.

ANGELLOTTI, J. * * * The ultimate question presented by this appeal is whether the provision in the pass purporting to exempt defendant from liability for the negligence of its agents precluded a recovery under the circumstances of this case. * * *

We think that the question of public policy in regard to such contracts of exemption, even as to passengers carried gratuitously, has been settled in this state by legislative enactment. Section 2175, Civil Code, provides: "A common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for the gross negligence, fraud, or wilful wrong of himself or his servants." Aside from the question of the meaning of the term "gross negligence" as used in this section, it is earnestly contended that the section has no application in the case of one carried without consideration of any kind, and that as to such a passenger the carrier is not a common carrier at all. We are of the opinion that the question of consideration cuts no figure in determining the applicability of the section. Section 2168, Civil Code, contained in the same chapter, which is entitled "Common Carriers in General," declares that "every one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry," and, of course, the defendant was under this definition a common carrier of persons. As such, under other provisions of the same chapter and other chapters, it was entitled to refuse to carry any person except upon compliance with certain requirements, including the payment of a prescribed reasonable compensation, but at the time of this accident at least it could legally waive any of these

requirements on the part of the passenger, and could receive and carry him for a reduced or different consideration, or altogether without consideration.

But, on whatever terms a common carrier of persons voluntarily receives and carries a person, the relation of common carrier and passenger exists. This is recognized by some of the authorities upholding the exemption from liability for negligence provision in the case of a passenger carried gratuitously. See Rogers v. Kennebec Steamboat Co., supra [86 Me. 261, 29 Atl. 1069, 25 L. R. A. 491]. The sole inquiry in this regard is, as has been said, whether the person was lawfully on the vehicle (see Ohio & Miss. R. Co. v. Muhling, 30 Ill. 9, 81 Am. Dec. 336), has been voluntarily received by the common carrier on any terms for the purpose of carriage, and is not, as was the case in Sessions v. Southern Pacific Co., 159 Cal. 599, 114 Pac. 982, a mere trespasser on the vehicle.

The voluntary waiver of all claim for compensation for carriage of a person does not take away from the status of the carrier as a common carrier so far as the person carried is concerned, any more than would a special reduction in the amount of compensation charged or a special concession as to some other authorized requirement accomplish such effect. The carrier is still a common carrier as to such person, with all the obligations of a common carrier, except in so far as those obligations are limited by contract provisions which are not inhibited by law. Other sections of our Civil Code permit such limitations as to certain matters not here involved, but section 2175 expressly prohibits limitations of liability for gross negligence on the part of the common carrier or his servants, whatever, as we read the various sections bearing upon this matter, may be the terms upon which it receives and undertakes to carry a passenger.

This brings us to a consideration of the question of the meaning of the term "gross negligence," as used in section 2175, Civil Code, for under the views already stated the exemption provision in the pass of deceased was not effectual to free defendant from liability for damages resulting from "gross negligence" of the defendant or its servants, within the meaning of the term "gross negligence," as used in said section. The contention of learned counsel for defendant is that these words, in the connection in which they are used, imply something in the nature of willful wrong, and do not include anything in the nature of a mere omission to exercise care without knowledge that such omission will probably result in injury to others. Section 2175 was, as it now stands, a part of the original Civil Code adopted in the year 1872. This Code contained two sections declaring that there are three degrees of care and diligence, "slight," "ordinary," and "great," and three degrees of negligence, "slight," "ordinary," and "gross." "Slight care" was defined as that "which is such as persons of ordinary prudence usually exercise about their own affairs of slight importance," and "gross negligence" was defined as

that "which consists in the want of slight care and diligence." Sections 16 and 17. These sections were repealed outright in 1874, but such repeal cannot affect the question of the construction of the words "gross negligence" in section 2175, Civil Code, as it is the intention of the Legislature at the time of the adoption of the latter section that must control.

We see no warrant for holding that the term "gross negligence" as used therein was intended to mean other than the "gross negligence" defined in section 17 of the same act "to establish a Civil Code," which was simply "the want of slight care and diligence." This must necessarily have been the view of this court in Donlon Bros. v. Southern Pacific Co., 151 Cal. 763, 766, 91 Pac. 603, 11 L. R. A. (N. S.) 811, 12 Ann. Cas. 1118, for an examination of the record shows that there could have been no other ground for the expression of opinion "that there was sufficient evidence in the case warranting the jury in finding that the defendant was guilty of gross negligence occasioning the loss and injury complained of." It was also recognized in Merrill v. Pacific Transfer Co., 131 Cal. 582, 589, 63 Pac. 915, upon evidence that was utterly destitute of anything in the nature of a showing of willful or wanton wrong, that the question whether or not the common carrier was guilty of gross negligence was one for the jury to pass upon under proper instructions. But regardless of these expressions of opinion, both of which were made under such circumstances that they may reasonably be claimed not to constitute binding authority on the question, we are satisfied that the definition of the "gross negligence" of section 2175, Civil Code, must be found in sections 16 and 17 of the Civil Code, as the same were adopted in 1872.

Accepting this definition of gross negligence, it cannot reasonably be contended that the evidence was not legally sufficient to support the finding of the trial court that the deceased was killed by the gross negligence of defendant's servants. The question of the existence of such gross negligence was one for the trial court, and, the facts being legally sufficient to warrant the inference drawn, an appellate court cannot properly disturb the conclusion reached by that tribunal.

The conclusion we have arrived at upon the points already discussed renders it unnecessary to consider other questions argued in the briefs, and compels an affirmance of the judgment.

The judgment is affirmed.[27]

[27] The statement is abridged and parts of the opinion are omitted. Sloss and Shaw, JJ., concurred. Beatty, C. J., dissented on the ground that the opinion lays down too broad a rule, because "the issuance of a free pass to a railway employé rests upon a valuable consideration."

GEORGE N. PIERCE CO. v. WELLS FARGO & CO.

(Circuit Court of Appeals of the United States, Second Circuit, 1911. 189 Fed. 561, 110 C. C. A. 645.)

WARD, Circuit Judge. The plaintiff, a manufacturer, brought this action at law to recover of the defendant, an express company, the value of a car load of automobiles and appurtenances which it had delivered to the defendant to be carried from Buffalo to San Francisco. The defendant admitted its liability, and the trial judge directed the jury to find a verdict in favor of the plaintiff for $50, the agreed value of the shipment, with interest and costs. The plaintiff took out this writ of error to the judgment entered on the verdict on the ground that the jury should have been directed to find a verdict for the actual value of the shipment, which was over the sum of $15,000.

The bill of lading under which the goods were carried provided: "* * * Nor shall said company be liable for any loss of or damage to said property in any event or for any cause whatever unless said loss or damage shall be proved to have been caused by or to have resulted from the fraud or gross negligence of said company or its servants; nor in any event shall said company be held liable beyond the sum of fifty dollars, at not exceeding which sum the said property is hereby valued, unless a different value is hereinabove stated. * * *"

There is nothing against public policy in the first clause above quoted. The federal courts recognize no difference between gross and ordinary negligence. Railway Co. v. Arms, 91 U. S. 489, 23 L. Ed. 374. In all cases negligence is failure to exercise the care appropriate to the circumstances of the particular case. Greater care is called for in transporting eggs than in transporting pig iron. Therefore the clause, though it exempts the defendant from its liability as insurer, which is lawful, does not exempt it from the consequences of its own fraud or negligence, which would be unlawful as against public policy. It remained liable for its negligence to the full amount agreed upon. Such a contract is valid in the federal courts. * * *

The judgment is affirmed.[28]

[28] Only so much of the case is given as relates to the one point.

Noyes, Circuit Judge, dissented, on the ground that the weight of authority in this country is to the effect that the same principles of public policy which condemn total exemptions from liability for negligence condemn partial exemptions, and that such limitations, as distinguished from agreed valuations, are invalid.

II. Defendant's Failure to Use Care

SHERMAN v. WESTERN TRANSP. CO.

(Supreme Court of New York, 1861. 62 Barb. 150.)

This action, on the issues raised by a general denial, was referred to a referee, who found:

That the plaintiff and the defendant, in the boating season of 1859 were each lawfully navigating the Erie Canal, the plaintiff with the canal boat Sarah, the defendant with the Rosebud; that while these boats were passing each other, the tow-line of the plaintiff's boat Sarah caught underneath the defendant's boat Rosebud, without any fault on the part of the plaintiff, and in consequence the horses of the plaintiff were drawn into the canal and one of them was drowned and the other injured; that the plaintiff's tow-line caught on some part of the bottom of the defendant's boat as the boats were passing; and that the defendant was careless and negligent in not having the bottom of his boat in such condition at all times while navigating the canal as to permit tow-lines to pass underneath it without catching; and that the injury in question occurred in consequence of this negligence.

Upon this report judgment was entered for the plaintiff; the defendant appealed.

Mullin, J.[29] * * * It is of the essence of negligence that the party charged should have knowledge that there was a duty for him to perform, or he must have omitted to inform himself as to what his duty was, in a given case. Knowledge is presumed in a great number of cases, and the party will not be permitted to prove that he had not knowledge of his duty. Every man is presumed to know the law; and hence, when the law imposes a duty on a man, it presumes that he knew of it; and it will not permit him to prove that he did not. When the specific duty is not imposed, by either the statute or the common law, the party alleging negligence must show that the accused was cognizant of the duty he is charged with having neglected. It is not necessary that this should be established by direct evidence; it may be, and almost universally is, inferred from the nature of the duty, or the facts and circumstances of the case.

I am not aware of any statute requiring those navigating boats on the canals to have the bottoms of such boats so made as to permit tow-lines to pass under them without obstruction. But the duty is most obvious the moment a person becomes acquainted with the manner in which canal boats pass each other in the canal. And the person omitting to keep the bottom of his boat in the condition required to permit the free passage of the tow-line of another boat under her is responsible for whatever damages naturally and necessarily flow from his neglect.

To perfect his liability several things must concur: 1. He must be the owner, lessee, or captain of the boat. 2. The bottom of his boat

[29] Parts of the opinion are omitted. The statement of facts has been abridged.

must be such as not to permit the free passage of the towing line. 3. He must have known of it before the accident a sufficient length of time to enable him to avoid the injury; or, 4. The defect must have continued so long as to satisfy a court or jury that if he had paid proper attention to his boat he must have discovered it. 5. Damage must have been sustained by reason of the defect.

There is no question made, in this case, but that the defendant is the proper party defendant, if the action can be maintained. The towing line of the plaintiff's boat was caught on the bottom of the defendant's boat, and damages have been sustained by the plaintiff by reason of the catching of said line. Three of the four conditions necessary to be proved in order to maintain the suit have been established, in this case, and it only remains to inquire whether the referee was justified in finding the fourth.

When did the catch attach to said boat? There is no proof that it was put on by the defendant, or anyone in its employ. It is not proved that it was on an hour before the accident happened; nor that it was known to be there by the defendant, or any of its agents, until the moment it occurred.

I admit it was the duty of the defendant to so construct the boat as that towing lines could pass freely under it, and that it should cause examination to be made, from time to time, to see that the bottom of the boat continued in such condition. The boat, in passing through a lock, or over a stone or other hard substance in the bottom of the canal, might tear up the planking on the bottom so as to catch and retain a rope passing along it. The end of a plank might have become loosened and sprung off—a spike or bolt might become loose and be projected beyond the surface of the plank and catch and retain a towing line—and the defect not have existed ten minutes before the accident.

It is not shown, in this case, but that the injury was occasioned in one of the ways suggested, and from a cause originating within the period named.

Nor can we presume that the bottom of this boat was known to the defendant to be in a condition not to allow the free passage of towing lines, for such a length of time as to have made it their duty to put it in proper order. If they had such knowledge, they were guilty of negligence in not putting the boat in good order. But negligence is never presumed. 1 Cowen & Hill's Notes, 298, 478.

In the case of Olmsted v. The Watertown and Rome Railroad Company, decided at the general term in this district in October, 1855, the plaintiff sued the defendant for damages for negligence in killing his horse. The negligence charged consisted in the company's not maintaining a fence of the requisite height along the side of their road, whereby the horse strayed on to the railroad track and was killed by an engine. The only evidence of a defect in the fence was that one of the stakes which supported the upper rail was split, and one

of the rails had fallen down, so that it was as low as the rail next below it, thus leaving the fence, at that point, below the required height of a sufficient fence. It was further proved that there were marks of the horse's foot on the top of the upper rail, showing, as the plaintiff's counsel argued, that the horse had gone over at that place. It was insisted on the part of the defendant, that there was no evidence of negligence; that it did not appear that the fence had been defective an instant before the horse had passed over; but on the contrary, the marks of the horse's foot being left on the rail demonstrated that he had struck in passing over, and thus splitting the stake, and letting down the bar. The court so held, and reversed the judgment of the county court affirming that of the justice, which was in favor of the plaintiff, for the value of the horse.

The principle decided in that case is decisive of this. The defective condition of the bottom of the boat may not have existed sufficiently long to have imposed any duty, in reference to it, on the defendant. And if its condition was not known, or had not existed long enough to charge the defendant with notice of the defect, it was not guilty of neglect. And there is no evidence in this case from which any such inference can be drawn. * * *

The judgment must therefore be reversed, and a new trial ordered; costs to abide the event.

New trial granted.

INDIANAPOLIS TRACTION CO. v. PRESSELL.

(Appellate Court of Indiana, 1906. 39 Ind. App. 472, 77 N. E. 357.)

Action against the traction company for damages sustained by a passenger in alighting from the defendant's open car. The complaint in its first paragraph alleged that the only exit from the car was at its side, by means of a single step extending the full length of the car; that this step was two feet above the top of the rail; that at a certain point plaintiff informed the conductor that she wished to alight; that the conductor accordingly stopped the car to enable her to alight, but that

"Owing to the condition of the streets, and the surface of the earth at said point, said step stood at a point three feet above the level of the earth, upon which plaintiff was compelled to step in disembarking; that the defendant, notwithstanding its duty to furnish and provide a safe place of exit, * * * negligently, carelessly, and wrongfully failed and refused to furnish and provide any additional step or steps, or any contrivance other than said single step, whereby the egress of plaintiff from said car might be made in safety; that the plaintiff, in the due and proper exercise of care, attempted to disembark from said car at said point, but because of said negligence of the defendant, and its failure and refusal to do and perform its said duties, this plaintiff was thrown, and fell heavily upon the earth."

A demurrer to each paragraph of the complaint was overruled by the court, and a trial by jury resulted in a verdict and judgment for the plaintiff for $1000. The defendant appealed.

WILEY, J. * * * [30] By section 5454, Burns' 1901 (section 4147, R. S. 1881), it is required that a street railway track within city limits "shall conform exactly to the established grade of such street." There is no allegation in the complaint that appellant's track at the place of injury did not conform to the established grade. We may assume, therefore, as against the pleading, that it did. There is no fact averred which shows a negligent construction or operation of the car, and neither is there any negligence charged as to the construction of the track. As appellee approached the point where she desired to alight, she gave the signal for the car to stop. She avers that it did stop, and that she immediately undertook to get off. It is not averred that the car stopped at any improper or dangerous place, or that there was a safer or more convenient place for it to stop. There are no facts pleaded from which it can be said that appellant could have anticipated, or with reasonable care have prevented, the accident. It appears from the complaint that the cause of the accident was the distance from the step of the car to the surface of the street, and that that distance was so great that appellee fell, etc. The surface of the street at that point was lower than the top of the rail. Assuming that the track was laid to conform to the established grade of the street, it appears that the surface of the street had not been maintained in that condition. Appellant is not charged with the maintenance of streets occupied by its tracks, outside of that part of the street actually occupied by it. It is not averred that appellant was old or infirm, or that she required any assistance in alighting from the car. Ordinarily it is not the duty of those in charge of a street car to aid passengers to get on and off, but such duty would only arise where there is an apparent necessity for such assistance, and such necessity is brought to the attention of the servants. If there is any negligence charged in the first paragraph, it is the failure of appellant to furnish an extra step to enable appellee to alight safely. The facts exhibited do not justify us in holding that such a legal duty devolved upon appellant. In Young v. Missouri Pac. R. Co. (1902) 93 Mo. App. 267, it was said: "We know of no law, nor has our attention been called to any, which required the defendant to furnish portable steps for the use of its passengers in entering or leaving any of its cars." See, also, Barney v. Hannibal, etc., R. Co. (1895) 126 Mo. 372, 28 S. W. 1069, 26 L. R. A. 847; Texas, etc., R. Co. v. Frey (1901) 25 Tex. Civ. App. 386, 61 S. W. 442. In this paragraph there are no facts pleaded which show that there was any necessity existing

[30] The statement is abridged. Only so much of the opinion is given as relates to the one point. The court expressed an opinion also that the plaintiff was guilty of contributory negligence, on the ground that the plaintiff "is deemed actually to have seen what she could have seen, if she had looked; and also, if she did not look, or if she did look, but did not heed what she saw, such conduct was negligent on her part."

which would require appellant to furnish an extra step at the place of the accident. * * *

The judgment is reversed, and the trial court is directed to sustain the demurrer to each paragraph of the complaint.

SCOTT v. LONDON & ST. KATHERINE DOCKS CO.

(Court of Exchequer Chamber, 1865. 3 Hurl. & C. 596, 140 R. R. 627.)

This was an appeal against the decision of the Court of Exchequer in making absolute a rule to set aside the verdict for the defendants and for a new trial.

The declaration stated that the defendants were possessed of a warehouse, and of a certain crane or machine for lowering goods therefrom, and at the time of the grievances committed by them as hereinafter mentioned, they, by their servants in that behalf, were lowering by the said crane or machine from the said warehouse certain bags of sugar on to the ground and stone pavement in the docks of the said company, and on and along which the plaintiff was then lawfully passing; and the defendants, by their servants, so negligently, carelessly and improperly lowered the said bags of sugar and conducted themselves in that behalf that the same came and fell upon and against the plaintiff: Whereby the plaintiff was greatly wounded, bruised, hurt and permanently injured, &c. Plea. Not guilty, and issue thereon.

At the trial, before Martin, B., at the London sittings after Trinity Term, 1864, the plaintiff deposed as follows:

"I am an officer of the customs. I am an auxiliary examiner. I superintend weighing goods. On the 19th of January I had performed duty at the East Quay of the London Docks. I was directed to go from the East Quay to the Spirit Quay by Mr. Lilley, the surveyor. I went to the Spirit Quay in order to do duty. I proceeded on my way. There are warehouses on the Spirit Quay. I went to the entrance of one of the warehouses, and could not find Mr. Lilley. I was told he was in another warehouse. I was proceeding to where I was told he was at the time of the accident. I proceeded to the first door I met upon the quay. I went into the warehouse of which it was the door. I met a labouring man about two yards within the warehouse. I asked him if Mr. Lilley was there. He said, 'No, sir; you will find him in the next doorway.' In passing from one doorway to the other I was felled to the ground by six bags of sugar falling on me. (He then described the injuries he had received.) No one but myself was at the place. I had no warning. There was no fence or barrier. No one called out. I heard the rattling of a chain."

At the conclusion of the plaintiff's examination in chief the learned Judge expressed his opinion that, even assuming that the bags of sugar were being dealt with by the servants of the defendants in the course of their employment, and that the plaintiff was lawfully passing through the docks, there was not sufficient evidence of negligence on the part of the defendants to entitle him to leave the case to the

jury; and his Lordship then directed the jury to find a verdict for the defendants.

The Solicitor-General, in the following Michaelmas Term, obtained a rule nisi to set aside the verdict and for a new trial, on the ground that there was evidence for the jury of negligence by the defendants' servants; which rule was made absolute in the same Term: whereupon the defendants brought this appeal.

Field (Murphy with him) argued for the defendants: There was no evidence of negligence which ought to have been submitted to the jury. This case is distinguishable from Byrne v. Boadle, 2 H. & C. 722, because the place in which the accident occurred was not, as there, a public highway, but a dock the property of a company, and the public had no right to walk in front of the warehouses. If, upon the evidence, the facts are as consistent with the absence of negligence as with negligence, there is no evidence for the jury. * * * The accident may be accounted for in many ways consistent with the absence of negligence. If a custom-house officer, in the performance of his duty, boarded a ship and fell down an open hatchway, the fact of the accident would be no evidence of negligence. (BLACKBURN, J. There is an old pleading rule, that less particularity is required when the facts lie more in the knowledge of the opposite party than of the party pleading. Applying that here, is not the fact of the accident sufficient evidence to call upon the defendants to prove that there was no negligence?)

The Solicitor-General, for the plaintiff: It is conceded that where the evidence is as equally consistent with due care as with negligence, there is no case for the jury. It is also conceded that it is not enough to show a mere scintilla of evidence. No rule can be laid down that the mere fact of an accident is evidence of negligence; for each case must depend on its own circumstances. In determining what evidence a plaintiff must give, regard must be had to what a person in his position may be reasonably expected to give. Assuming that there was negligence on the part of the defendants in hiring incompetent servants, what more evidence could the plaintiff have given unless he called adverse witnesses to prove facts peculiarly within the knowledge of the defendants? * * * The true test is, whether the case is more consistent with negligence than care. Looking at the simple fact that the bags of sugar fell violently upon the plaintiff, this case is more consistent with negligence than care.[31]

ERLE, C. J. The majority of the Court have come to the following conclusions:

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,

[31] The arguments of counsel are slightly abridged.

it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

We all assent to the principles laid down in the cases cited for the defendants; but the judgment turns on the construction to be put on the Judge's notes. As my Brother MELLOR and myself read them we cannot find that reasonable evidence of negligence which has been apparent to the rest of the Court.

The judgment of the Court below must be affirmed, and the case must go down to a new trial, when the effect of the evidence will in all probability be more correctly ascertained.

Judgment affirmed.[32]

[32] "In Scott v. London Dock Co., the rule now known by the catch-word 'res ipsa loquitur' was clearly laid down, it is thought for the first time, by the Exchequer Chamber. The two judges who did not agree in the result do not appear to have dissented from the general statement of the law: they can hardly have thought, on the facts, that the falling of six bags of sugar on a customs officer did not call for some explanation; but the dissent is indicated with seemingly studious obscurity, and may well be left in that condition." Sir Frederick Pollock, 140 R. R. vi.

Compare: Byrne v. Boadle (1863) 2 H. & C. 722, 133 R. R. 761: (P. was walking in a public street past the shop of D., a dealer in flour, when a barrel of flour fell upon P. from a window in D.'s premises, above his shop. Pollock, C. B., remarked: "The learned counsel was quite right in saying that there are many accidents from which no presumption of negligence can arise, but I think it would be wrong to lay down as a rule that in no case can presumption of negligence arise from the fact of an accident. Suppose in this case the barrel had rolled out of the warehouse and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford prima facie evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. * * * A man is passing in front of the premises of a dealer in flour, and there falls down upon him a barrel of flour. I think it apparent that the barrel was in the custody of the defendant who occupied the premises, and who is responsible for the acts of his servants who had the control of it: and in my opinion the fact of its falling is prima facie evidence of negligence, and the plaintiff who was injured by it is not bound to show that it could not fall without negligence, but if there are any facts inconsistent with negligence it is for the defendant to prove them.")

Kearney v. London, etc., Ry. Co. (1871) L. R. 6 Q. B. 760: (As P. was passing along a highway under D.'s railway bridge—a girder bridge resting on a perpendicular brick wall with pilasters—a brick fell from the top of the wall and struck him. There was no assignable cause except the slight vibration caused by a passing train. The bridge had been built and in use for three years.)

Cincinnati, etc., Ry. Co. v. South Fork Coal Co. (1905) 71 C. C. A. 316, 139 Fed. 528, 1 L. R. A. (N. S.) 533: (Defendant's train, following another of defendant's trains, ran into it with such force that the engine of the rear train telescoped several oil cars in the forward train. The oil escaped and sparks from the engine fell on it and started a fire which spread to and destroyed the plaintiff's property 50 feet away. Said Lurton, J., delivering the opinion of the Circuit Court of Appeals: "According to all human experience such a collision cannot occur without something abnormal. It may be that that abnormal cause may be one for which the defendant may not be legally liable, but the question is whether the burden of showing this to be the fact is not legally shifted to the defendant by evidence showing a state of things most unlikely to occur unless caused by the absence of due care. It cannot be un-

MULLEN v. ST. JOHN.

(Commission of Appeals of New York, 1874. 57 N. Y. 567, 15 Am. Rep. 530.)

This was an action to recover damages for injuries sustained by the plaintiff, by the falling of a building in Brooklyn.

The defendants were the owners of a building called the Hamilton Market, standing on the corner of Hamilton avenue and Van Brunt street, in the city of Brooklyn. It was built in 1854, of brick, was leased to the defendants in 1863, and purchased by them in 1866. On the 26th of June, 1870, the building being then unoccupied, a part of its walls fell outward into Van Brunt street, and the plaintiff, who was on the sidewalk, about twenty-five feet from the rear of the building, was knocked down by the bricks and mortar, and received injuries for which this action was brought. There was a verdict in favor of the plaintiff, with a judgment thereon. The defendant appealed.

DWIGHT, C. The question in the present case arises upon the charge of the judge, which is in the following terms, as far as an exception was taken, to wit:

"When the plaintiff proved that the building fell into the street and injured her, she had made out a case, in the absence of any explanation on the part of the defendants, as buildings do not usually or necessarily fall, and it is for the jury to say, under all the evidence, whether that explanation, on the part of the defendants, is reasonably made."

This passage is an extract from the charge, and was preceded by a statement, that when the cause of an accident is under the management of a person, and the accident is one which does not happen in the ordinary course of things if those who have this management use ordinary care, it is a reasonable presumption, in the absence of any explanation, that the accident resulted from a want of such care. It was followed by words to this effect: If the defendant by the exercise of ordinary care—the care a prudent person exercises in his own affairs—could have discovered and remedied this defect so as

reasonable to ascribe to negligence the happening of a catastrophe, which was not likely to occur if due care had been exercised, until the cause is explained by other evidence. If, therefore, the nature of the accident is such as to make it altogether probable that it was caused by negligence, it makes a case which falls within the maxim res ipsa loquitur. Manifestly, a presumption of negligence does not arise upon mere evidence of an injury sustained. The inference logically as well as legally deducible is necessarily dependent upon the nature of the accident, the surrounding circumstances which characterize it and the relation of the parties. 21 Am. & Eng. Ency. of Law, 521. Many accidents do not speak for themselves. The maxim res ipsa loquitur does not, therefore, apply when the circumstances in evidence are of doubtful solution. That there should not be uniformity of opinion as to the applicability of the maxim is due not only to the infinite variety of circumstances under which injuries are inflicted, but to differences in respect of the standard of diligence applicable in different situations. In cases between passengers and carriers it has been most often applied, and sometimes in such sweeping terms as suggest application only to an action for breach of contract, rather than one grounded upon tort."

to have prevented this accident, then he is liable. If he could not, by such ordinary care, then he is not liable. The whole of the charge must be considered, and the question is, whether any erroneous rule was announced to the jury.

The solution of this question will depend upon the fact, whether there was any duty imposed upon the owners of the building in respect to persons passing along the highway, and whether a presumption of negligence can be raised from the circumstances under which its fall occurred. In regard to the question of duty there can be no reasonable doubt. If a person erects a building upon a city street, or an ordinary highway, he is under a legal obligation to take reasonable care that it shall not fall into the street and injure persons lawfully there. It cannot be affirmed that he is liable for any injury that may occur, whether by inevitable accident or the wrongful act of others. It is not to be disputed however that he is liable for want of reasonable care. * * *

Assuming the foregoing propositions to be true, it may be further insisted that the question, whether an owner has used reasonable care or not, will depend on all the circumstances of the case. Buildings properly constructed do not fall without adequate cause. If there be no tempest prevailing or no external violence of any kind, the fair presumption is, that the fall occurred through adequate causes, such as the ruinous condition of the building, which could scarcely have escaped the observation of the owner. The mind is thus led to a presumption of negligence on his part, which may, of course, be rebutted. In the absence of explanatory evidence, negligence may be presumed. * * *[33]

In the case at bar the walls of the building, without any special circumstances of storm or violence, fell into the street. There was some evidence tending to show that it was out of repair. Without laying any stress upon the affirmative testimony, it is as impossible to conceive of this building so falling unless it was badly constructed or in bad repair, as it is to suppose that a seaworthy ship would go to the bottom in a tranquil sea and without collision. The mind, necessarily, seeks for a cause for the fall. That is, apparently, the bad condition of the structure. This, again, leads to the inference of negligence which the defendant should rebut.

The same principle prevails in the Roman law. Thus, it is laid down in 1 Domat on Civil Law (1557): "If tiles fall from the roof of a house, which was in good case, and by the bare effect of a storm, the damage which may happen by such fall is an accident, for which the proprietor or tenant of the house cannot be made accountable. But, if the roof was in a bad condition, he who was bound

[33] In an omitted portion of the opinion, the Court referred to and quoted from Kearney v. London, etc., Ry. (1871) L. R. 6 Q. B. 760; Byrne v. Boadle (1863) 2 H. & C. 722; Scott v. London Dock Company (1865) 3 H. & C. 596, the facts of which appear ante.

to keep it in repair may be liable to make good the damage that has happened, according to the circumstances."

The case of Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623, is not opposed to these views. There the question was, whether one was liable for the explosion of a steamboiler which he had operated with care and skill; or, in other words, whether he was bound, at all events, to prevent the effects of an explosion from injuring another. The present question is one simply of presumptions in the law of evidence, which was not at all involved in Losee v. Buchanan, supra; while that case holds that there must be evidence of negligence, it does not at all prescribe the mode of proving it, which, as has been abundantly shown, may in such cases as the present be by presumption. The cases concerning the management of railroads concur with this view; holding that where the company has the control of the car and the track, and the car leaves the track, the presumption of negligence may arise. Edgerton v. New York & Harlem Railroad Co., 39 N. Y. 227; Curtis v. Rochester & Syracuse Railroad Co., 18 N. Y. 534, 75 Am. Dec. 258.

There was no error in the charge of the judge, and the judgment of the court below should be affirmed.

Judgment affirmed.

PIEHL v. ALBANY RY.

(Supreme Court of New York, Appellate Division, 1898. 30 App. Div. 166, 51 N. Y. Supp. 755.)

The action was against the Albany Railway, to recover damages for the death of the plaintiff's intestate, caused, as alleged, by the defendant's negligence. The defendant operated a street railway by means of electrical power, and had a power house in which five steam engines were used to generate this power. On November 12, 1895, the fly wheel, 18 feet in diameter and weighing 50,000 pounds, attached to one of these engines, burst, while in operation, and one of its fragments was thrown across a public street into a saloon, and there struck and killed the plaintiff's intestate.

LANDON, J. Upon the former appeal from a judgment in favor of the plaintiff entered upon the verdict of a jury, the single question presented by the record was whether the evidence supported the finding that the bursting of the fly wheel was due to the negligence or incompetency of the defendant's servant in charge of the engine, and we held that it did not. 19 App. Div. 471, 46 N. Y. Supp. 257. Upon the trial now under review the plaintiff was nonsuited at the close of her case. She asked to go to the jury, upon all the facts in the case, upon the questions whether the defendant was negligent, or was maintaining and operating a nuisance, and her request was denied. The question whether the explosion was due to the negligence

or incompetency of the defendant's servant in charge is not now urged. The learned counsel for the plaintiff insists (1) that the fact that the fly wheel burst is of itself presumptive evidence of negligence; (2) that its maintenance and operation in the midst of a densely inhabited part of the city was a nuisance; (3) that the evidence tended to show that the engine was out of order at the time of the explosion, and some time prior to it, and that defendant knew it.

The general rule is that proof of an accident is not of itself proof of negligence. There are some exceptions to the rule. Thus, in Hogan v. Railway Co., 149 N. Y. 23, 43 N. E. 403, it is said that, "if a person erects a building, bridge, or other structure upon a city street or an ordinary highway, he is under a legal obligation to take reasonable care that nothing shall fall into the street and injure persons lawfully there. This being so, it is further assumed that buildings, bridges, and other structures properly constructed do not ordinarily fall upon the wayfarer. So, also, if anything falls from them upon a person lawfully passing along the street or highway, the accident is prima facie evidence of negligence,"—citing Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530; Volkmar v. Railway Co., 134 N. Y. 418, 31 N. E. 870, 30 Am. St. Rep. 678, and cases there cited. It is also presumed in favor of a passenger that a well constructed and managed railway train will not leave the track. Edgerton v. Railroad Co., 39 N. Y. 227; Curtis v. Railway Co., 18 N. Y. 534, 75 Am. Dec. 258; Guldseth v. Carlin, 19 App. Div. 588, 46 N. Y. Supp. 357; Gerlach v. Edelmeyer, 47 N. Y. Super. Ct. 292, affirmed 88 N. Y. 645. Also, if a passenger is injured by some unusual action or defect in the appliances of conveyance, that the carrier is negligent. Poulsen v. Railroad Co., 18 App. Div. 221, 45 N. Y. Supp. 941; Gilmore v. Railroad Co., 6 App. Div. 119, 39 N. Y. Supp. 417. The traveler upon the highway ought to be reasonably free from the infliction by others of injuries by external violence, and hence, when a span wire supporting defendant's trolley broke and injured plaintiff, the defendant should be put to an explanation. Jones v. Railway Co., 18 App. Div. 267, 46 N. Y. Supp. 321; Clarke v. Railroad Co., 9 App. Div. 51, 41 N. Y. Supp. 78; Gall v. Railway Co. (Super. N. Y.) 5 N. Y. Supp. 185; Cole v. Bottling Co., 23 App. Div. 177, 48 N. Y. Supp. 893. Some injuries are of such a nature that the first thought that occurs to the mind is that nothing but carelessness or willfulness could have produced them. The law adopts the same idea. "Res ipsa loquitur." Stallman v. Steam Co., 17 App. Div. 397, 45 N. Y. Supp. 161. Sometimes the situation is such as to suggest negligence, and the defendant alone is able, or is presumed to be able, to furnish the facts. Wintringham v. Hayes, 144 N. Y. 1, 38 N. E. 999, 43 Am. St. Rep. 725; Collins v. Bennett, 46 N. Y. 490.

Now, in all these cases, although the burden rests upon the plaintiff to prove negligence, he does prove it, prima facie, by proving what happened, not what caused it to happen. This fly wheel burst.

There is no affirmative proof of negligence, other than the explosion. There is evidence showing the situation of the power house, and a general description of the fly wheel and engine, and of their uses. The engine with its fly wheel, was used in generating the electrical power by which the defendant operated its street cars, and had been so used for two years before the explosion. It was purchased from the manufacturers. In such case the authorities are to the effect that the mere fact of the explosion is not prima facie evidence of negligence. Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623; Cosulich v. Oil Co., 122 N. Y. 118, 25 N. E. 259, 19 Am. St. Rep. 475; Reiss v. Steam Co., 128 N. Y. 103, 28 N. E. 24. Why distinguish this class of cases from the others? The better question is, why make it an exception to the general rule? I assume it is not excepted, because such are the limitations upon human foresight that every reasonable care does not always prevent accidents, and that such is the nature of steam and electricity, and of the engines by or upon which they operate, that, when such an explosion as this occurs, our experience, or even expert experience, is not sufficiently uniform to justify us in presuming that negligence is the cause. The explosion does not, in fact, speak for itself and tell us its cause. * * *

Judgment affirmed.[34]

[34] Compare: Griffen v. Manice (1901) 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630, where Cullen, J., discussing the principle, remarked:

"In Mullen v. St. John [1874] 57 N. Y. 567 [15 Am. Rep. 530], it was held that the falling of an adjacent building into the street whereby the plaintiff traveling on the street was injured, was prima facie evidence of negligence. In Piehl v. Albany Railway Co. [1898] 30 App. Div. 166 [51 N. Y. Supp. 755], affirmed [1900] 162 N. Y. 617 [57 N. E. 1122], a fly wheel was disrupted and a portion of it cast across the street into a saloon, killing the plaintiff's intestate. It was held that the mere bursting of the fly wheel was not sufficient to warrant an inference of negligence. These two cases proceeded on the differing views that this court took as to the nature of the respective accidents, not on the situation of the parties. I think it may be safely said that we would not have held the defendant liable in the latter case had Piehl been killed in the street, or in the earlier case, the defendant exempt, had the plaintiff been injured while in a neighboring building. To put it tersely, the court thought that in the absence of tempest or external violence a building does not ordinarily fall without negligence; while it also thought that the disruption of a fly wheel proceeds so often from causes which science has been unable to discover or against which art cannot guard, that negligence cannot be inferred from the occurrence alone. Authority is not wanting on the point. In Green v. Banta [1882] 48 N. Y. Super. Ct. 156, a workman was injured by the breaking down of a scaffold. In a suit against his master, the court charged: 'The fact that the scaffold gave way is some evidence—it is what might be called prima facie evidence—of negligence on the part of the person or persons who were bound to provide a safe and proper scaffold.' This charge was held correct by the General Term of the Superior Court of the city of New York and the decision affirmed by this court, 97 N. Y. 627. In Mulcairns v. City of Janesville (1886) 67 Wis. 24, 29 N. W. 565, the fall of a wall was held presumptive evidence of negligence in a suit by a servant against his master. In Smith v. Boston Gaslight Co., 129 Mass. 318, it was held that the escape of gas from the pipes of a gas company was prima facie evidence of negligence. In that case there seems to have been no contractual relations whatever between the parties. In Peck v. N. Y. Central

PATTON v. TEXAS & P. RY. CO.

(Supreme Court of the United States, 1901. 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361.)

Patton brought this action against the railway company to recover for injuries sustained by him while in its employment as fireman. A judgment in his favor was reversed by the Circuit Court of Appeals. 9 C. C. A. 487, 23 U. S. App. 319, 61 Fed. 259. On a second trial in the Circuit Court the judge directed a verdict for the defendant, upon which judgment was rendered. This judgment was affirmed by the Circuit Court of Appeals. 37 C. C. A. 56, 95 Fed. 244. Thereupon the plaintiff brought error.

The facts were that the plaintiff was a fireman on a passenger train of the defendant, running from El Paso to Toyah and return. Some three or four hours after one of those trips had been made,

R. R. Co. (1901) 165 N. Y. 347, 59 N. E. 206, which was an action for injury to plaintiff's property by fire, it was said: 'But while it was necessary for the plaintiff to affirmatively establish negligence on the part of the defendant, either in the condition or in the operation of its engine, for which the mere occurrence of the fire was not sufficient, it was not necessary that he should prove either the specific defect in the engine or the particular act of misconduct in its management or operation constituting the negligence causing the injury complained of. It was sufficient if he proved facts and circumstances from which the jury might fairly infer that the engine was either defective in its condition or negligently operated.' This is the principle which underlies the maxim of "res ipsa loquitur." When the facts and circumstances from which the jury is asked to infer negligence are those immediately attendant on the occurrence, we speak of it as a case of 'res ipsa loquitur'; when not immediately connected with the occurrence, then it is an ordinary case of circumstantial evidence. In Benedick v. Potts (1898) 88 Md. 52, 40 Atl. 1067, 41 L. R. A. 478, it is said: 'In no instance can the bare fact that an injury has happened, of itself and divorced from all the surrounding circumstances, justify the inference that the injury was caused by negligence. It is true that direct proof of negligence is not necessary. Like any other fact, negligence may be established by the proof of circumstances from which its existence may be inferred. * * * This phrase (res ipsa loquitur), which literally translated means that 'the thing speaks for itself,' is merely a short way of saying that the circumstances attendant upon an accident are themselves of such a character as to justify a jury in inferring negligence as the cause of that accident.'

"Returning now to the case before us, it appears that the deceased was present by the implied invitation of the defendant, extended to him and all others who might have lawful business on the premises, to use the elevator as a means of proceeding from one story to another. The defendant, therefore, owed the plaintiff the duty of using at least reasonable care in seeing that the premises were safe. The death of the plaintiff's intestate was caused by the fall of the counterbalance weights. These weights were held in a frame, to which was attached a rope or cable passing around a drum. The weights fell down from the frame and the rope was thrown off the drum. That no such accident could ordinarily have occurred had the elevator machinery been in proper condition and properly operated seems to me very plain. The court was, therefore, justified in permitting the jury to infer negligence from the accident, construing, as I do, the term accident to include not only the injury but the attendant circumstances."

See also 29 Cyc. 590, the notes to Mullen v. St. John (1874) 57 N. Y. 567, 15 Am. Rep. 530, in 6 N. Y. Ann. Dig. 289, and Key No. "Negligence," §§ 121 (2), 136 (6).

and while the engine of which he was fireman was being moved in the railroad yards at El Paso, plaintiff attempted to step off the engine, and in doing so the step turned, and he fell so far under the engine that the wheels passed over his right foot. Plaintiff alleged that the step turned because the nut which held it was not securely fastened; that the omission to have it so fastened was negligence on the part of the company, for which it was liable.

MR. JUSTICE BREWER. The plaintiff's contention is that the trial court erred in directing a verdict for the defendant, and in failing to leave the question of negligence to the jury. * * *

Upon these facts we make these observations: First. That while in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against him, for there is prima facie a breach of his contract to carry safely (Stokes v. Saltonstall, 13 Pet. 181, 10 L. Ed. 115; New Jersey R. & Transp. Co. v. Pollard, 22 Wall. 341, 22 L. Ed. 877; Gleeson v. Virginia Midland R. Co., 140 U. S. 435, 443, 35 L. Ed. 458, 463, 11 Sup. Ct. 859), a different rule obtains as to an employé. The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence (Texas & P. R. Co. v. Barrett, 166 U. S. 617, 41 L. Ed. 1136, 17 Sup. Ct. 707). Second. That in the latter case it is not sufficient for the employé to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause when there is no satisfactory foundation in the testimony for that conclusion. If the employé is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs. Third. That while the employer is bound to provide a safe place and safe machinery in which and with which the employé is to work, and while this is a positive duty resting upon him, and one which he may not avoid by turning it over to some employé, it is also true that there is no guaranty by the employer that place and machinery shall be absolutely safe. Hough v. Texas & P. R. Co., 100 U. S. 213, 218, 25 L. Ed. 612, 615; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 386, 37 L. Ed. 772, 780, 13 Sup. Ct. 914; Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 87, 39 L. Ed. 624, 630, 15 Sup. Ct. 491; Texas & P. R. Co. v.

Archibald, 170 U. S. 665, 669, 42 L. Ed. 1188, 1190, 18 Sup. Ct. 777. He is bound to take reasonable care and make reasonable effort; and the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him. Reasonable care becomes, then, a demand of higher supremacy; and yet, in all cases, it is a question of the reasonableness of the care; reasonableness depending upon the danger attending the place or the machinery.

The rule in respect to machinery, which is the same as that in respect to place, was thus accurately stated by Mr. Justice Lamar, for this court, in Washington & Georgetown Railroad v. McDade, 135 U. S. 554, 570, 34 L. Ed. 235, 241, 10 Sup. Ct. 1044:

"Neither individuals nor corporations are bound, as employers, to insure the absolute safety of machinery or mechanical appliances which they provide for the use of their employés. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was, or ought to have been, known to him, and was unknown to the employé or servant."

Tested by these rules we do not feel justified in disturbing the judgment, approved as it was by the trial judge and the several judges of the Circuit Court of Appeals. Admittedly, the step, the rod, the nut, were suitable and in good condition. Admittedly, the inspectors at El Paso and Toyah were competent. Admittedly, when the engine started on its trip from El Paso the step was securely fastened, the plaintiff himself being a witness thereto. The engineer used it in safety up to the time of the engine's return to El Paso. The plaintiff was not there called upon to have anything to do with the engine until after it had been inspected and repaired. He chose, for his own convenience, to go upon the engine and do his work prior to such inspection. No one can say from the testimony how it happened that the step became loose. Under those circumstances it would be trifling with the rights of parties for a jury to find that the plaintiff had proved that the injury was caused by the negligence of the employer.

The judgment is affirmed.[35]

[35] The statement of the facts is slightly abridged and part of the opinion is omitted.

CARNEY v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, 1912. 212 Mass. 179, 98 N. E. 605, 42 L. R. A. [N. S.] 90, Ann. Cas. 1913C, 302.)

Action against the Elevated Railway for damages because of a personal injury through the defendant's alleged negligence. There was a judgment for defendant; the plaintiff brings exceptions.

SHELDON, J. The plaintiff was injured while she was riding in an open surface car beneath the defendant's elevated structure. She heard the rumble of an elevated train over her car, "saw the sparks flying," looked up and was struck in the eye by a spark, which could be found to have been a minute piece of hot iron, about as large as the fine end of a pin, coming from the elevated road, and, as we assume, from the contact shoe of the train which was passing thereon. The structure was properly in the street and the defendant was authorized to operate its road by electricity. There was no evidence that it was a frequent occurrence for sparks to fall from its passing trains into the street, or indeed that this had ever before happened. There was nothing to indicate that the defendant ought to have foreseen this danger and to have guarded against it or given warning of its existence. There was no evidence that there was any practicable method or device for checking the emission of sparks from its trains or its electrical apparatus, or preventing their fall to the street, which the defendant had failed to adopt. There was nothing to show any lack of proper care on the part of the defendant in the operation of its trains or cars. Under these circumstances it is manifest that the cases of Woodall v. Boston Elev. St. Ry., 192 Mass. 308, 78 N. E. 446, and Walsh v. Boston Elev., 192 Mass. 423, 78 N. E. 451, cannot help the plaintiff. The ground on which those cases were decided, that there was evidence of an existing danger and of negligence on the part of the defendant in not providing an appliance to prevent the falling of sparks into the street, and in not applying to the railroad commissioners for the approval of a plan to accomplish that object, is lacking here. Either she has chosen, or the facts of the case have compelled her, to rest her claim simply upon the ground that she has been injured by a spark falling on her eye and that this spark came from a train of the defendant lawfully operated upon its elevated railroad.

She contends accordingly that these facts present a case for the application of the doctrine res ipsa loquitur—that negligence of the defendant may be inferred from the bare fact that she has been injured in the manner stated. It is true no doubt that the cause of her injury could be found to have come from the operation of apparatus which had been furnished and applied by the defendant and was wholly under its management and control. McDonough v. Boston Elevated Ry., 208 Mass. 436, 94 N. E. 809; Le Barron v. East Boston Ferry Co., 11

Allen, 312, 317, 87 Am. Dec. 717; Miller v. Ocean Steamship Co., 118 N. Y. 199, 23 N. E. 462; Gleeson v. Virginia Midland R. R., 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458; Scott v. London Dock Co., 3 H. & C. 596; Kearney v. London, Brighton & South Coast Ry., L. R. 5 Q. B. 411. But this single circumstance is not always enough. Where as here the cause of the accident has come from the lawful operation by lawful means of an authorized instrumentality, and where any damage or injury that has resulted may have come without any negligence of the defendant, but may have arisen merely as an unavoidable accident from the careful and skillful exercise of its lawful rights in spite of the observance of all proper precautions, there no liability can arise without some affirmative evidence of negligence. In such a case the happening of the accident with the resulting injury is as likely to have come without the fault of the defendant as to have been due to its negligence, and the presumption of fact upon which the doctrine res ipsa loquitur is based does not arise; the inference of negligence cannot be drawn without some evidence to support it. Beattie v. Boston Elev. St. Ry., 201 Mass. 3, 6, 86 N. E. 920; Minihan v. Boston Elev. St. Ry., 197 Mass. 367, 373, 83 N. E. 871; Thomas v. Boston Elev. St. Ry., 193 Mass. 438, 79 N. E. 749; Wadsworth v. Boston Elev. St. Ry., 182 Mass. 572, 574, 66 N. E. 421; Clare v. New York & New England R. R., 167 Mass. 39, 44 N. E. 1054; Graham v. Badger, 164 Mass. 42, 47, 41 N. E. 61. For this reason we recently have held that in the absence of a statutory liability a railroad company is not liable, without evidence of negligence on its part, for damage done by fire caused by sparks from its locomotive engines. Wallace v. N. Y., N. H. & H. R. R., 208 Mass. 16, 94 N. E. 306.

For the same reasons, in two cases closely resembling that which is here presented, it was held that no inference of negligence could be drawn from the happening of the accident, and the plaintiff was not allowed to recover. Searles v. Manhattan Ry., 101 N. Y. 661, 5 N. E. 66; Wiedmer v. New York Elev. R. R., 114 N. Y. 462, 21 N. E. 1041. In the last cited case, the court said that the evidence disclosed a single colorless fact, the emission of a coal smaller than a pinhead, and that the rule res ipsa loquitur has not been extended for enough to authorize from this fact an inference of actionable negligence.

It is perfectly consistent with the evidence that the defendant has taken all the precautions that were suggested in Woodall v. Boston Elev. St. Ry., 192 Mass. 308, 78 N. E. 446, or which since have been discovered to be possible. If so, it has not been guilty of negligence. It follows that the judge at the trial acted rightly in ordering a verdict in its favor.

Exceptions overruled.

III. Plaintiff's Actual Damage

ASHBY v. WHITE.

(Court of King's Bench, 1703. Holt, 524, 2 Ld. Raym. 938, 90 Reprint, 1188, 92 Reprint, 126.)

In an action upon the case against the constables of Ailesbury, the plaintiff declared, that such a day the late King's writ issued and was delivered to the Sheriff of B. for election of members of Parliament in his county; whereupon the said sheriff made out his precept or warrant to the defendants, being constables of A., to chuse two burgesses for that borough, which precept was delivered to the said constables; and that in pursuance thereof, the burgesses were duly assembled, etc., and the plaintiff, being then duly qualified to vote for the election of two burgesses, offered to give his voice to Sir T. L. and S. M. Esq.; to be burgesses of Parliament for the said borough; but the defendants knowing the premisses, with malice, etc., obstructed him from voting, and refused and would not receive his vote, nor allow it; and that two burgesses were chose, without allowing or receiving his voice.

After a verdict for the plaintiff on not guilty pleaded, it was moved in arrest of judgment by Serjeant Whitacre, that this action was not maintainable. And for the difficulty it was ordered to stand in the paper, and was argued Trin. 1 Q. Anne by Mr. Weld and Mr. Mountague for the defendants, and this term judgment was given against the plaintiff, by the opinion of Powell, Powys, and Gould, Justices, Holt, Chief Justice being of opinion for the plaintiff. * * *

Holt, Chief Justice. The single question in this case is, whether, if a free burgess of a corporation, who has an undoubted right to give his vote in the election of a burgess to serve in Parliament, be refused and hindered to give it by the officer, if an action on the case will lie against such officer. * * *

And I am of opinion, that this action on the case is a proper action. My brother Powell indeed thinks, that an action upon the case is not maintainable because there is no hurt or damage to the plaintiff; but surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little diachylon, yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage; for it is an invasion of his property, and the other has no right to come there.

And in these cases the action is brought vi et armis. But for invasion of another's franchise, trespass vi et armis does not lie, but an action of trespass on the case; as where a man has retorna brevium, he shall have an action against any one who enters and invades his franchise, though he lose nothing by it. So here in the principal case, the plaintiff is obstructed of his right, and shall therefore have his action. And it is no objection to say, that it will occasion multiplicity of actions; for if men will multiply injuries, actions must be multiplied too; for every man that is injured ought to have his recompence. * * * So the case of Hunt and Dowman, 2 Cro. 478, where an action on the case is brought by him in reversion against lessee for years, for refusing to let him enter into the house, to see whether any waste was committed. In that case the action is not founded on the damage, for it did not appear that any waste was done, but because the plaintiff was hindered in the enjoyment of his right, and surely no other reason for the action can be supposed. * * *†

†The statement of facts is from Holt, 524; the rest of the case is from Lord Raymond.

The opinions of Gould and Powell, JJ., reported in Lord Raymond, are omitted; only a portion of Chief Justice Holt's opinion is given.

The judgment of the King's Bench, for the defendant, "was reversed in the House of Lords and judgment given for the plaintiff by fifty Lords against sixteen." See 2 Ld. Raym. 958, 92 Reprint, 138.

The principle of Ashby v. White has a wider range than negligence case. For its application in a negligence case, see Clifton v. Hooper (1844) 6 Q. B. 468, 115 Reprint, 175.

See the remarks of Mr. Justice Story, in Webb v. Portland Mfg. Co. (1838) 3 Sumn. 189, Fed Cas. No. 17,322: "I can very well understand that no action lies in a case where there is a damnum absque injuria, that is, where there is a damage done without any wrong or violation of any right of the plaintiff. But I am not able to understand how it can correctly be said, in a legal sense, that an action will not lie, even in case of a wrong or violation of a right, unless it is followed by some perceptible damage, which can be established, as a matter of fact; in other words, that injuria sine damno is not actionable. See Mayor of Lynn v. Mayor of London, 4 Term R. 130, 141, 143, 144; Com. Dig. 'Action on the Case,' B, 1, 2. On the contrary, from my earliest reading, I have considered it laid up among the very elements of the common law that, wherever there is a wrong, there is a remedy to redress it; and that every injury imports damage in the nature of it; and, if no other damage is established, the party injured is entitled to a verdict for nominal damages. A fortiori this doctrine applies where there is not only a violation of a right of the plaintiff, but the act of the defendant, if continued, may become the foundation, by lapse of time, of an adverse right in the defendant; for then it assumes the character, not merely of a violation of a right tending to diminish its value, but it goes to the absolute destruction and extinguishment of it. Under such circumstances, unless the party injured can protect his right from such a violation by an action, it is plain that it may be lost or destroyed, without any possible remedial redress. In my judgment, the common law countenances no such inconsistency, not to call it by a stronger name. Actual, perceptible damage is not indispensable as the foundation of an action. The law tolerates no farther inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages, in vindication of his right, if no other damages are fit and proper to remunerate him."

But see the reasoning of Baron Parke in Embrey v. Owen (1851) 6 Ex. 353, 368, 86 R. R. 331, 343: "It was very ably argued before us by the learned

HOBSON et al. v. THELLUSON.

(Court of Queen's Bench, 1867. L. R. 2 Q. B. 642.)

Declaration against the defendant as sheriff of Yorkshire for not duly executing a writ of fi. fa. at the suit of the plaintiffs against the goods of John Bower, and for falsely returning that Bower had no goods in the defendant's bailiwick whereon the defendant could levy. Pleas: (1) Not guilty; (2) that there were not at the time, or after the delivery of the writ, any goods of Bower in the defendant's bailiwick whereon the defendant could have levied; (3) that the plaintiffs sustained no damage by reason of the matters alleged in the declaration. Issue joined.

At the trial, it appeared that the plaintiffs obtained judgment for £284 against John Bower, a cloth merchant at Huddersfield, and a trader within the bankruptcy laws; and a writ of fi. fa. was issued and lodged in London with the undersheriff for Yorkshire on the 23d of May, 1866; and a warrant was sent down to Mr. Thornton, an officer of the sheriff at Huddersfield, by the evening post of that day, and was delivered at his office there at half past seven in the morning of the 24th of May. Jaggar, the assistant to Mr. Thornton, went to the office about a quarter past nine. Jaggar opened the warrants, and on coming to the warrant against Bower's goods, which he had reason the day before to expect, he at once sent off one Sizer to watch Bower's warehouse, which was 400 or 500 yards off; and on Mr. Thornton coming in about five minutes afterwards Jaggar went off himself to the warehouse with the warrant. He got to the warehouse at twenty-five minutes past nine, and found the outer door fastened with two locks. Sizer was left, and remained on the watch till just before ten o'clock, when he withdrew in consequence of a message from Thornton, the door being still locked. Bower, it appeared, had had notice of the writ,

counsel for the plaintiffs, that the plaintiffs had a right to the full flow of the water in its natural course and abundance, as an incident to their property in the land through which it flowed; and that any abstraction of the water, however inconsiderable, by another riparian proprietor, and though productive of no actual damage, would be actionable, because it was an injury to a right, and, if continued, would be the foundation for a claim of adverse right in that proprietor. We by no means dispute the truth of this proposition, with respect to every description of right. Actual perceptible damage is not indispensable as the foundation of an action; it is sufficient to show a violation of a right, in which case the law will presume damage; injuria sine damno is actionable, as was laid down in the case of Ashby v. White, 2 Ld. Ray. 938, by Lord Holt, and in many subsequent cases, which are all referred to, and the truth of the proposition powerfully enforced, in a very able judgment of the late Mr. Justice Story in Webb v. Portland Mfg. Co., 3 Sumn. Rep. 189, Fed. Cas. No. 17,322. But in applying this admitted rule to the case of rights to running water, and the analogous cases of rights to air and light, it must be considered what the nature of those rights is, and what is a violation of them." In this case it was held that, as no actual damage had been caused to the plaintiff by the defendant's act, there had been "no injury in fact or in law in this case, and consequently that the verdict for the defendant ought not to be disturbed."

and had had the warehouse kept closed in consequence; and he went to the office of Mr. Learoyd, his attorney, on the morning of the 24th of May, and told him that an execution was out against his, Bower's goods; and at Mr. Learoyd's suggestion a deed of assignment was drawn up, in form schedule D to the Bankruptcy Act, 1861, and executed by Bower at a few minutes before ten, by which Bower conveyed all his goods to Robert Wood and Thomas Hirst, two of his creditors, to be applied for the benefit of themselves and all the other creditors. Thornton, the sheriff's officer, was at once informed of the deed, and took possession of the goods in the warehouse by Learoyd's direction on behalf of the trustees under the deed. Learoyd was not at this time employed by the trustees, but he became their attorney soon afterwards. Neither of the trustees assented to the deed at the time of execution, but Wood executed it on the afternoon of the 24th of May, and Hirst a few days afterwards. A meeting of Bower's creditors was held on the 4th of June as to what was the best course to pursue, and most of the requisite assents to the deed were given on that day, but the plaintiffs refused theirs; and it was determined that no preference of any kind should be allowed to any creditor, and bankruptcy was suggested as the alternative if some arrangement was not come to. Meetings were again held on the 12th and 19th of June, and on the last occasion the plaintiffs agreed to suspend their proceedings, and it was determined to wind up under the deed; and the requisite assents having been obtained, the deed was registered on the 21st of June.

The learned judge told the jury that a sheriff's officer might break open the door of a warehouse, but was not bound in law to do so at once; and he left it to them to say whether the sheriff had used due diligence in executing the warrant, that is, could the officer, with due diligence, have made the levy before ten o'clock? If they thought the officer ought to have broken the locks at once they would find for the plaintiffs, otherwise for the defendant. The jury found for the defendant, leave being reserved to move to enter a verdict for the plaintiffs, for such sum (if any) as the Court should think them entitled to, the Court to have power to draw any inference of fact not inconsistent with the finding of the jury as to the breaking of the locks.

A rule was obtained to enter the verdict for the amount of the judgment, or for the costs of action and execution, or for nominal damages.

BLACKBURN, J. * * *[36] Notwithstanding the execution of the deed, the sheriff might and ought to have levied on the goods during any part of the 24th of May. Next comes the question, what damage have the plaintiffs sustained? Prima facie, the damage is measured by the whole value of the goods which might have been seized. But at ten o'clock, before the sheriff might and ought to have levied,

[36] The argument of counsel, a portion of the opinion of Blackburn, J., and the concurring opinion of Mellor, J., are omitted.

Bower executed the deed of assignment of all his goods, and this was for the very purpose of defeating and delaying the execution creditors, and it was therefore an act of bankruptcy. * * * Therefore, at ten in the morning of the 24th of May, before the sheriff was in default, that had happened which would have been available as an act of bankruptcy, and if the officer had proceeded afterwards to levy, instead of taking possession under the deed, by section 74 of the Bankruptcy Act, 1861, he could not have sold till after three days, and then only by public auction; so that I cannot doubt, when drawing inferences of fact, that if the sheriff had proceeded with the execution and had levied and had then advertised the sale, as he was bound to do under section 74, the very first thing that would have happened would have been that the execution would have been brought to the notice of the trustees, or some other of the creditors, and they would infallibly have made the present plaintiffs and their attorney fully aware of the deed, setting it up in all probability, as in fact they did, as a valid transfer. What, then, would have been the consequence of this state of facts? Why, that by section 133 of the Bankruptcy Act of 1849 the plaintiffs would have got no benefit at all from their execution; for if they had proceeded with it there would have been an adjudication of bankruptcy, and then there would have been execution levied, but not completed by sale until after notice of the previous act of bankruptcy.

Mr. Manisty says that these probable facts ought not to be taken into consideration, and that we ought not to speculate on probabilities, or whether or not the creditors would have made Bower a bankrupt. If that position were followed out to its consequences, the damages would in every case be the value of the goods which ought to have been seized. But if you may take any facts into consideration which go to show that the execution creditor would not have reaped the full advantage of his execution, I do not see why you may not take all the facts that would probably occur as against the execution creditor's prima facie presumption that the damages are the full value of the goods. It appears to me, as a juryman, an absolute certainty that notice of the act of bankruptcy would have been brought home to the plaintiffs before sale; and balancing the weight of probabilities, I think there is the strongest probability that had the defendant levied there would have been an adjudication of bankruptcy; and I accordingly draw the inference that the plaintiffs would have derived no benefit from their execution had it been proceeded with. Consequently they have suffered no damage from the defendant's breach of duty.

The question remains, are they entitled to a verdict for nominal damages? I think not. The one case is anomalous and exceptional, that a creditor may maintain an action for nominal damages for an escape on a ca. sa., although the custody of the debtor would have been of no value to him, and the ground seems to be that the creditor has a right to have the body of his debtor. Whether the reasoning is satis-

factory or not, it has no application to the case of not levying on goods. On the whole, therefore, it appears to me that the verdict for the defendant must stand, and the rule be discharged.

Rule discharged.

SULLIVAN v. OLD COLONY ST. RY. CO.

(Supreme Judicial Court of Massachusetts, 1908. 200 Mass. 303, 86 N. E. 511.)

Tort. The first count in the declaration alleged that while the plaintiff was a passenger on an electric car of the defendant the car was derailed owing to the defendant's negligence "whereby the plaintiff was jolted and in many ways injured externally and internally." * * * The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

SHELDON, J. No question was made at the trial but that the defendant was liable for an injury done to the plaintiff by reason of its car having left the track. But if no injury was caused by this to the plaintiff, if he suffered no damage whatever from the defendant's negligence, then he would not be entitled to recover. Although there has been negligence in the performance of a legal duty, yet it is only those who have suffered damage therefrom that may maintain an action therefor. Heaven v. Pender, 11 Q. B. D. 503, 507; Farrell v. Waterbury Horse R. Co., 60 Conn. 239, 246, 21 Atl. 675, 22 Atl. 544; Salmon v. Delaware, etc., R. Co., 38 N. J. Law, 5, 11, 20 Am. Rep. 356; 2 Cooley on Torts (3d Ed.) 791; Wharton on Negligence (2d Ed.) § 3. In cases of negligence, there is no such invasion of rights as to entitle a plaintiff to recover at least nominal damages, as in Hooten v. Barnard, 137 Mass. 36, and McAneany v. Jewett, 10 Allen, 151. * * *[37]

[37] The statement of facts is abridged and part of the opinion is omitted.

Compare the remark of Bowen, L. J., in Brunsden v. Humphrey (1884) 14 Q. B. D. 141, 149: "Actions for the negligent management of any animal, or any personal or movable chattel, such as a ship or machine, or instrument, all are based upon the same principle, viz., that a person, who, contrary to his duty, conducts himself negligently in the management of that which contains in itself an element of danger to others is liable for all injury caused by his want of care or skill. Such an action is based upon the union of the negligence and the injuries caused thereby, which in such an instance will as a rule involve and have been accompanied by specific damage. Without remounting to the Roman law, or discussing the refinements of scholastic jurisprudence and the various uses that have been made, either by judges or juridical writers, of the terms 'injuria' and 'damnum,' it is sufficient to say that the gist of an action for negligence seems to me to be the harm to person or property negligently perpetrated. In a certain class of cases the mere violation of a legal right imports a damage. 'Actual perceptible damage,' says Parke, B., in Embrey v. Owen [1851] 6 Exch. 353, 368, 'is not indispensable, as the foundation of an action; it is sufficient to shew the violation of a right, in which case the law will presume damage.' But this principle is not as a rule applicable to actions for negligence, which are not brought to establish a bare right, but to recover compensation for substantial injury. 'Generally speaking,' says Littledale, J., in Williams v. Morland [1824] 2 B. & C. 916, 'there must be temporal loss or damage accruing from the wrongful

IV. Whether Freedom from Contributory Fault is Part of the Prima Facie Case in Negligence

LANE v. CROMBIE.

(Supreme Judicial Court of Massachusetts, 1831. 12 Pick. 177.)

Action on the case, alleging negligence on the part of the defendants' servant when driving a four-horse sleigh in the highway, whereby the plaintiff was run over and injured. A verdict being found in favor of the plaintiff, a motion was made to set it aside, for a misdirection.[38]

Per Curiam. We consider the rule to be well settled, that to enable a plaintiff to recover under such circumstances, he must not only show some negligence and misconduct on the part of the defendant, but ordinary care and diligence on his own part. Butterfield v. Forrester, 11 East, 61; Harlow v. Humiston, 6 Cow. (N. Y.) 191; Smith v. Smith, 2 Pick. 621, 13 Am. Dec. 464.

The judge who tried the cause so instructed the jury; but in the course of the charge, he further stated to the jury, that the burden of proof was upon the plaintiff to prove negligence in the defendants, that being the gist of the case; but that when the defendants relied upon the fact, that the plaintiff conducted herself carelessly, the burden of proof was upon the defendants to show that the plaintiff had not used ordinary care.

The latter part of this direction, we think, was incorrect in point of law, and that the burden of proof was upon the plaintiff to show that the accident was not occasioned by her own negligence, in placing herself in a hazardous position, without due precaution. In the actual state of the evidence, it is extremely probable that this direction made no difference in regard to the result; still, if the evidence was such that the jury might have decided the other way upon this point, without going decidedly against the weight of the evidence, or in other words,

act of another in order to entitle a party to maintain an action on the case.' See Fay v. Prentice (1845) 1 C. B. 835" [where Maule, J., in an action on the case remarks: "I think there is no doubt that trespass woud lie here; but can the plaintiff maintain case without showing some consequential damage?"]

Accord: Commercial Bank v. Ten Eyck (1872) 48 N. Y. 305: (Action against the cashier of a bank for neglect of duty. The neglect was proved, but there was no evidence that the plaintiff had suffered damage.)

Lalaurie v. Southern Bank (1873) 25 La. Ann. 330: (A note for $60 made by Lalaurie was deposited in the Southern Bank for collection. The employés of the bank were not able to decipher the maker's signature, and guessing at it entered the name in the bank book kept for the purpose as Labalos. As a result, when the clerk of the maker called to pay the note, he was informed by the cashier that no such note was deposited with the bank. A few days later the note was protested. Early the next day the note was paid. The maker sued to recover damages because of the protest due to the defendant's negligence. The jury awarded him $500 damages and judgment was entered for this by the trial court. "But," said the reviewing court, "no actual injury or damage to the plaintiff has been proved.")

[38] The statement of the case is slightly abridged.

if the evidence was doubtful and balanced, such a direction may have had an influence to mislead the jury; and therefore the Court are now all of opinion, that the verdict must be set aside and a new trial granted.[39]

[39] "The first error assigned, on which the plaintiff in error, the defendant below, relies, is that the county court omitted to charge the jury that the burden was on the plaintiff below of proving that, when the injury complained of was committed, he was in the exercise of reasonable care and prudence. We accord, entirely, with the decisions, cited by him to show that, in this suit, the burden of showing that the injury was not attributable to the want of reasonable care on his part, rested on the plaintiff. The reason of this rule is, that the plaintiff must prove all the facts which are necessary to entitle him to recover, and this is one of those facts. It was necessary for the plaintiff to prove, first, negligence on the part of the defendant, in respect to the collision alleged, and, secondly, that the injury to the plaintiff occurred in consequence of that negligence. But in order to prove this latter part, the plaintiff must show that such injury was not caused, in whole, or in part, by his own negligence; for, although the defendant was guilty of negligence, if the plaintiff's negligence contributed essentially to the injury, it is obvious that it did not occur by reason of the defendant's negligence. Therefore the plaintiff would not prove enough to entitle him to recover, by merely showing negligence on the part of the defendant; but he must go further and also prove the injury to have been caused by such negligence by showing a want of concurring negligence on his own part, contributing materially to the injury. Hence, to say that the plaintiff must show the latter, is only saying that he must show that the injury was owing to the negligence of the defendant. And as the defendant had a right to have the jury informed, as to what facts the plaintiff must prove in order to recover, he had a right to require the court to instruct them, that it was incumbent on the plaintiff to prove a want of such concurring negligence on his part." Per Storrs, J., in Park v. O'Brien (1854) 23 Conn. 339, 345.

The decisions cited by the plaintiff in error were Lane v. Crombie (1831) 12 Pick. (Mass.) 177; Adams v. Carlisle (1838) 21 Pick. (Mass.) 146; Parker v. Adams (1847) 12 Metc. (Mass.) 415, 46 Am. Dec. 694; Bosworth v. Swansey (1845) 10 Metc. (Mass.) 363, 43 Am. Dec. 441.

Compare O'Connor v. Connecticut, etc., Co. (1909) 82 Conn. 120, 72 Atl. 934: (P. sued for injuries sustained by him from a collision between his cart and D.'s street car. The Supreme Court sustained a judgment in favor of P. under the application of this principle: "We held in Fay v. Hartford St. Ry. Co. [1908] 81 Conn. 330, 71 Atl. 361, that under an answer denying the averments of the complaint, in an action of this character, the jury were never at liberty to guess or surmise the existence of the claimed negligence of the defendant, or due care of the plaintiff, but that the burden rested upon the plaintiff to prove them either by direct evidence, or by the proof of facts or circumstances from which they could fairly and reasonably be inferred, and that, when upon the trial there was no evidence from which the jury could reasonably conclude that there was a preponderance of proof of the alleged negligence of the defendant, or of the due care of the injured person, the court, if a nonsuit was not granted, should either direct a verdict for the defendant upon his request, or, if a verdict should be returned for the plaintiff, should upon motion set it aside as against the evidence.")

The doctrine that it is part of the plaintiff's prima facie case to show that his damage was not caused by his own negligence is recognized in a number of states. See 29 Cyc. 576, 577, and the cases cited there, and in the subsequent Annotation volumes, for the following jurisdictions: Connecticut, Idaho, Illinois, Indiana (until 1899, when a statute excepted actions for negligence causing personal injury or death), Iowa, Maine, Massachusetts, Michigan, New York, North Carolina (until the statute of 1887, applicable to all actions for negligence; Revisal of 1905, § 483), Oklahoma, and Vermont. The cases, however, even in the same state, are not always in accord. See also Cent. Dig. "Negligence," §§ 186–189, 229–232; Key-No. "Negligence," §§ 113, 122.

WAKELIN v. LONDON & S. W. RY. CO.

(House of Lords, 1886. L. R. 12 App. Cas. 41.)

Appeal from a decision of the Court of Appeal.

The action was brought by the administratrix of Henry Wakelin on behalf of herself and her children under Lord Campbell's Act, 9 & 10 Vict. c. 93.

The statement of claim alleged that the defendant's line between Chiswich Station and Chiswich Junction crossed a public footway, and that on the 1st of May, 1882, the defendants so negligently and unskilfully drove a train on the line across the footpath and so neglected to take precautions in respect of the train and the crossing that the train struck and killed one Henry Wakelin, the plaintiff's husband, whilst lawfully on the footpath.

The statement of defence admitted that on that day the plaintiff's husband whilst on or near the footpath was struck by a train of the defendants, and so injured that he died, but denied the alleged negligence; did not admit that the deceased was lawfully crossing the line at the time in question; and alleged that his death was caused by his own negligence and that he might by the exercise of reasonable caution have seen the train approaching and avoided the accident.

At the trial before Manisty, J., and a special jury in Middlesex in December, 1883, the following evidence was given on behalf of the plaintiff. It appeared from defendants' answers to interrogatories that the crossing was a level crossing open to all foot passengers: that the approaches to the crossing on each side of the line were guarded by hand gates: that there was a slight curve at the crossing: that assuming the deceased to have been crossing the line from the down side and standing inside the hand gates but not on the line he could have seen a train approaching on the down side at a distance of nearly if not quite half a mile, but that when standing in the centre of the line he could have seen a train approaching on the down side at a distance of more than one mile: that the body of the deceased was found on the down side of the line and that he was run upon and killed by a down train: that the engine carried the usual and proper headlights which were visible at the distances above mentioned: that the company did not give any special signal or take any extraordinary precautions while their trains were travelling over the crossing: that a watchman in the company's employ was on duty from 8 a. m. to 8 p. m. to take charge of the gates and crossing and amongst other duties to provide for the safety of foot passengers.

Oral evidence was given that from the cottage where the deceased lived it would take about ten minutes to walk to the crossing; that he left his cottage on the evening of the 1st of May after tea, and that he

was never seen again till his body was found the same night on the down line near the crossing. There was no evidence as to the circumstances under which he got on to the line.

The defendants called no witnesses, and submitted that there was no case. Manisty, J., left the case to the jury who returned a verdict for the plaintiff for £800. The Divisional Court (Grove, J., Huddleston, B., and Hawkins, J.) set aside the verdict and entered judgment for the defendants. The Court of Appeal (Brett, M. R., and Bowen and Fry, L. JJ.) on the 16th of May, 1884, affirmed this decision. In the course of his judgment Brett, M. R., said that in his opinion the plaintiff in this case was not only bound to give evidence of negligence on the part of the defendants which was a cause of the death of the deceased, but was also bound to give prima facie evidence that the deceased was not guilty of negligence contributing to the accident; and that by reason of the plaintiff having been unable to give any evidence of the circumstances of the accident she had failed in giving evidence of that necessary part of her prima facie case.

From this decision the plaintiff appealed.

Lord Watson. My Lords, in the view which I take of the evidence adduced at the trial before Manisty, J., it may not be absolutely necessary to say anything in regard to the onus which attaches to the plaintiff in this and similar cases. I shall nevertheless express my opinion upon the point, because it was discussed in the judgments delivered in the Court of Appeal, and has been fully and ably argued at your Lordships' bar.

It appears to me that in all such cases the liability of the defendant company must rest upon these facts,—in the first place that there was some negligent act or omission on the part of the company or their servants which materially contributed to the injury or death complained of, and, in the second place, that there was no contributory negligence on the part of the injured or deceased person. But it does not, in my opinion, necessarily follow that the whole burden of proof is cast upon the plaintiff. That it lies with the plaintiff to prove the first of these propositions does not admit of dispute. Mere allegation or proof that the company were guilty of negligence is altogether irrelevant; they might be guilty of many negligent acts or omissions, which might possibly have occasioned injury to somebody, but had no connection whatever with the injury for which redress is sought, and therefore the plaintiff must allege and prove, not merely that they were negligent, but that their negligence caused or materially contributed to the injury.

I am of opinion that the onus of proving affirmatively that there was contributory negligence on the part of the person injured rests, in the first instance, upon the defendants, and that in the absence of evidence tending to that conclusion, the plaintiff is not bound to prove the negative in order to entitle her to a verdict in her favor. That opin-

ion was expressed by Lord Hatherley and Lord Penzance in the Dublin, Wicklow, and Wexford Railway Company v. Slattery, 3 App. Cas. 1169, 1180. I agree with these noble Lords in thinking that, whether the question of such contributory negligence arises on the plea of "not guilty," or is made the subject of a counter issue, it is substantially a matter of defence, and I do not find that the other noble Lords, who took part in the decision of Slattery's Case, said anything to the contrary. In expressing my own opinion, I have added the words "in the first instance," because in the course of the trial the onus may be shifted to the plaintiff so as to justify a finding in the defendants' favour to which they would not otherwise have been entitled.

The difficulty of dealing with the question of onus in cases like the present arises from the fact that in most cases it is well nigh impossible for the plaintiff to lay his evidence before a jury or the Court without disclosing circumstances which either point to or tend to rebut the conclusion that the injured party was guilty of contributory negligence. If the plaintiff's evidence were sufficient to shew that the negligence of the defendants did materially contribute to the injury, and threw no light upon the question of the injured party's negligence, then I should be of opinion that, in the absence of any counter-evidence from the defendants, it ought to be presumed that, in point of fact, there was no such contributory negligence. Even if the plaintiff's evidence did disclose facts and circumstances bearing upon that question, which were neither sufficient per se to prove such contributory negligence, nor to cast the onus of disproving it on the plaintiff, I should remain of the same opinion. Of course a plaintiff who comes into Court with an unfounded action may have to submit to the inconvenience of having his adversary's defence proved by his own witnesses; but that cannot affect the question upon whom the onus lies in the first instance. As Lord Hatherley said in Dublin, Wicklow & Wexford Railway Company v. Slatterly, 3 App. Cas. 1169: "If such contributory negligence be admitted by the plaintiff, or be proved by the plaintiff's witnesses while establishing negligence against the defendants, I do not think there is anything left for the jury to decide, there being no contest of fact."

In the present case, I think the appellant must fail, because no attempt has been made to bring evidence in support of her allegations up to the point at which the question of contributory negligence becomes material. The evidence appears to me to shew that the injuries which caused the death of Henry Wakelin were occasioned by contact with an engine or a train belonging to the respondents, and I am willing to assume, although I am by no means satisfied, that it has also been proved that they were in certain respects negligent. The evidence goes no further. It affords ample materials for conjecturing that the death may possibly have been occasioned by that negligence, but it furnishes no data from which an inference can be reasonably drawn that as a matter of fact it was so occasioned.

I am accordingly of opinion that the order appealed from must be affirmed.[40]

LORD BLACKBURN. My Lords, I have had the advantage of perusing in print the opinion just delivered by my noble and learned friend. In it I perfectly agree.

Order appealed from affirmed, and appeal dismissed.

WASHINGTON & G. R. CO. v. GLADMON.

(Supreme Court of the United States, 1872. 15 Wall. 401, 21 L. Ed. 114.)

Oliver Gladmon, by his next friend, brought an action in the Supreme Court of the District of Columbia against the railroad company to recover for personal injuries alleged to have been caused by the defendant's negligence. Judgment for the plaintiff; the defendant sued out a writ of error.

MR. JUSTICE HUNT. Oliver Gladmon, a child of the age of seven years, while crossing a street in Georgetown, was injured by the cars of the Company, the original defendant in this suit. Sufficient proof was given to establish the negligence of the driver of the car, and no point is raised on that branch of the case. The alleged errors arise from refusals to give certain instructions upon the effect of the conduct of the child, and of the charge as actually made on that subject. The first prayer for instructions is stated in the record in the words following:

"After the close of the testimony the defendants by their counsel asked the court to give the following instructions to the jury: if the jury find from the evidence that the plaintiff's injuries resulted from his attempting to cross a street in front of an approaching car, driven by an agent of defendants, the burden of proof is on the plaintiff to show affirmatively, not only the want of ordinary care and caution on the part of the driver, but the exercise of due care and caution on his own part; and if the jury find from the evidence that the negligence or want of due care or caution of the plaintiff caused the accident, or even contributed to it, or that it could have been avoided by the exercise of due care on his own part, then the plaintiff is not entitled to recover, whether the driver of the car was guilty of negligence or not, but the jury must find for defendant."

As applied to adult parties, the first branch of this proposition is not correct. While it is true that the absence of reasonable care and caution, on the part of one seeking to recover for an injury so received, will prevent a recovery, it is not correct to say that it is incumbent upon him to prove such care and caution. The want of

[40] The opinions of Lord Halsbury, L. C., and Lord FitzGerald are omitted. On the position taken by Brett, M. R., in the Court of Appeal, see the remark in Clerk & Lindsell's Law of Torts (4th Ed.) 510, text and note: "Upon the issue of contributory negligence the burden of proof at the commencement of the trial is upon the defendant, and the plaintiff is not bound in the first instance to give any evidence to negative the existence of it. * * * Lord Esher has indeed uniformly held the contrary, but he seems to be the only judge in this country who has supported that doctrine."

such care, or contributory negligence as it is termed, is a defense to be proved by the other side.

The plaintiff may establish the negligence of the defendant, his own injury in consequence thereof, and his case is made out. If there are circumstances which convict him of concurring negligence, the defendant must prove them, and thus defeat the action. Irrespective of statute law on the subject, the burden of proof on that point does not rest upon the plaintiff. Oldfield v. N. Y. & Har. R. R. Co., 3 E. D. Smith (N. Y.) 103, affirmed 14 N. Y. 310; Johnson v. Hud. Riv. R. R. Co., 20 N. Y. 65, 75 Am. Dec. 375; Button v. Same, 18 N. Y. 248; Wilds v. Same, 24 N. Y. 430. In the case first cited Denio, J., says:

"I am of opinion that it is not a rule of law of universal application that the plaintiff must prove affirmatively that his own conduct, on the occasion of the injury, was cautious and prudent. The onus probandi, in this as in most other cases, depends upon the position of the affair as it stands upon the undisputed facts. Thus, if a carriage be driven furiously through a crowded thoroughfare, and a person is run over, he would not be obliged to prove that he was cautious and attentive, and he might recover, though there were no witness of his actual conduct. The natural instinct of self-preservation would stand in the place of positive evidence, and the dangerous tendency of the defendant's conduct would create so strong a probability that the injury happened through his fault that no other evidence would be required. * * * The culpability of the defendant must be affirmatively proved before the case can go to the jury, but the absence of any fault on the part of the plaintiff may be inferred from circumstances: and the disposition of men to take care of themselves and keep out of difficulty may properly be taken into consideration."

The later cases in the New York Court of Appeals I think will show that the trials have almost uniformly proceeded upon the theory that the plaintiff is not bound to prove affirmatively that he was himself free from negligence, and this theory has been accepted as the true one. Generally, as here, the proof which shows the defendant's negligence, shows also the negligence or the caution of the plaintiff. The question of the burden of proof is, therefore, not usually presented with prominence. In some of the States it has been held that the plaintiff was bound to make affirmative proof of his freedom from negligence. In many cases it is so held by virtue of local statutes. Shear. & Red. Neg. §§ 43 and 44, and note, where the cases are collected. * * * [41]

Upon the case, as it comes before us, the judgment must be affirmed.[42]

[41] In the omitted portion of the opinion, the court held that the charge requested was properly refused because it ignored the difference in the rule in regard to the negligence of an adult and the negligence of a child of tender years.

[42] "By the settled law of this court, not controverted at the bar, contributory negligence on the part of the plaintiff need not be negatived or disproved

by him, but the burden of proving it is upon the defendant." Mr. Justice Gray, delivering the opinion in Texas, etc., Ry. Co. v. Volk (1894) 151 U. S. 73, 74, 14 Sup. Ct. 239, 38 L. Ed. 78.

See, also, O'Hara v. Central R. Co. of New Jersey (1910) 183 Fed. 739, 106 C. C. A. 177: (Plaintiff's decedent was struck by defendant's train at a crossing in New Jersey. The defendant's liability turned on the question of contributory negligence in the decedent. Said Lacombe, J., delivering the opinion of the Circuit Court of Appeals: "In the state courts it is incumbent on the plaintiff, in actions of this kind, to satisfy the jury as part of his case that the person injured was free from contributory negligence. Evidence to establish this proposition is not always direct. The exercise of proper care may be inferred from facts showing what occurred, even though death or other cause may prevent the introduction of any proof as to the mental processes of the person injured. . In the federal courts contributory negligence is an affirmative defense. The burden of establishing it rests on the defendant. This rule does not require defendant to establish contributory negligence by witnesses whom defendant calls to the stand. If the plaintiff's own witnesses testify to undisputed facts from which that inference must be drawn, defendant may rest on their testimony and ask for a dismissal; but if the undisputed facts might reasonably support an inference as to the injured person's conduct which would leave it doubtful whether he was or was not negligent, the question whether or not the defense is proved will be one for the jury to determine.")

The doctrine of the principal case, treating contributory negligence as regularly matter of defense, is the rule in the federal courts, and in most of the state courts. See 29 Cyc. 575, 576, and the cases cited there, and in the subsequent Annotation volumes, for the following jurisdictions: Alabama, Arizona, Arkansas, California, Colorado, Delaware, District of Columbia, Florida, Georgia, Indiana (since 1899, by statute, if the action is for negligence causing personal injury or death; Act Feb. 17, 1899, Burns' Rev. Stats. Ind. [1914] § 362), Kansas, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina (since 1887, by statute, applicable to all actions for negligence; Revisal of 1905, § 483), North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, United States. The cases, however even in the same state, are not always in accord.

See, also, Cent. Dig. "Negligence," §§ 186–189, 229–232; Key-No. "Negligence," §§ 113, 122.

Compare: Smith v. Delaware River Amusement Co. (1908), 76 N. J. Law, 46, 69 Atl. 970: (Minturn, J.: "The declaration alleges that * * * the plaintiff purchased a ticket of admission to a grand stand in an amusement park maintained by defendant * * * and that while leaving the stand with other people she, without notice of the existence of any danger, walked into a hole in the flooring and severely injured herself. * * * We cannot say from an inspection of this declaration that it shows the plaintiff to have contributed to her own injury; nor will the law presume that she was negligent in that respect. * * * The requirement in some jurisdictions that the declaration shall allege that due care was exercised by the plaintiff, or, in other words, that contributory negligence shall be negatived by an allegation of due care [Cooley on Torts, 673], has never been the rule in this state; but, on the contrary, it has been determined that a declaration is good if it contains all that is necessary for the plaintiff to prove under a plea of the general issue in order to entitle him to recover. Beardsley v. Southmayd, 14 N. J. Law, 534. The plaintiff, therefore, is entitled to judgment on the demurrer.")

WHALEN v. CITIZENS' GASLIGHT CO.

(Court of Appeals of New York, 1896. 151 N. Y. 70, 45 N. E. 363.)

Appeal from a judgment of the General Term of the City Court of Brooklyn, which affirmed a judgment in favor of the plaintiff, entered upon a verdict.

HAIGHT, J. This action was brought to recover damages for a personal injury.

On the 12th day of September, 1893, the defendant was engaged in laying a gas pipe across the sidewalk in Court street in the city of Brooklyn, connecting its gas main in that street with the premises on the northeast corner of Court and Sackett streets. For this purpose it had obtained the consent of the city authorities for the removal of the flagstones of the sidewalk in order to dig a trench in which to lay the pipe. At the time of the accident complained of it had caused a flagstone next to the building to be removed, and another flagstone, four feet two inches in length by three feet four inches in breadth and between three and four inches in thickness in the center of the walk, to be taken up and placed upon an adjoining flagstone upon the walk, and its employees were engaged in digging a pit next to the house, intending to tunnel through the intervening space so as not to necessitate the removal of any more of the sidewalk. The space between the two openings undisturbed was about five feet. Whilst the walk was in this condition the plaintiff approached, tripped her foot upon the flagstone that had been removed, fell upon it and sustained the injury for which this action was brought. It was about a quarter before eleven o'clock in the forenoon, and was a nice day. She was about seventy years of age, and had been engaged in doing general housework and sewing, and used to go out to wash, iron and clean house. She testified that her eyesight was very good and that she did not notice the flagstone or the excavation beside it as she came near the place where she fell; that she was looking along the street as she walked.

It is the well-settled law of this state that, in actions of this character, the absence of negligence on the part of the plaintiff contributing to the injury must be affirmatively shown by the plaintiff, and that no presumption of freedom from such negligence arises from the mere happening of an injury. Reynolds v. N. Y. C. & H. R. R. R. Co., 58 N. Y. 248; Weston v. City of Troy, 139 N. Y. 281, 34 N. E. 780. If this law is to be recognized and followed we are unable to see how this judgment can be sustained; for to hold otherwise would practically overrule and annul the rule of contributory negligence. As we have seen, it was a bright day and about eleven o'clock in the forenoon. The obstacle over which the plaintiff fell was a large flagstone over four feet in length and three in breadth. There was nothing to

obscure her vision; her eyesight was good and she could see as she was walking along the walk. It is not pretended that anything occurred that momentarily obstructed her vision, and it is difficult to conceive how she could have avoided seeing the obstacle unless she was heedlessly proceeding in utter disregard of the precautions usually taken by careful and prudent people.

To our minds the negligence here is greater than that of the plaintiff in the Weston Case, supra. In that case the plaintiff stepped upon a ridge of ice which was partially covered with snow. Andrews, C. J., in delivering the opinion, says: "Whether the plaintiff saw the ridge before stepping upon it does not appear. Nor was it shown whether she was walking fast or slow, or what attention she was paying, if any, to the condition of the sidewalk. If she discovered the ridge she was not required to leave the sidewalk, but she might, without being subject to the charge of negligence, using due care and prudence, have kept on her way. But she could not heedlessly disregard the precautions which the obvious situation suggests and proceed as if the sidewalk was free and unobstructed. The presumption which a wayfarer may indulge, that the streets of a city are safe and which excuses him from maintaining a vigilant outlook for dangers and defects, has no application where the danger is known and obvious." See, also, Beltz v. City of Yonkers, 148 N. Y. 67, 42 N. E. 401, and cases there cited. * * *[43]

Judgment reversed.[44]

[43] Part of the opinion, on the question of assumption of risk, is omitted.

[44] See the remark of Gray, J., in Specht v. Waterbury Co. (1913) 208 N. Y. 374, 380, 102 N. E. 569, 570: "Notwithstanding that she [plaintiff's intestate, a child six years of age, whose death had been caused by the alleged negligence of the defendant in starting a fire on a vacant lot] may have been non sui juris, the defendant was entitled to have it appear that she had acted with such care as was commensurate with a child of her age. According to the plaintiff his daughter was a bright, intelligent child and while, in the case of the death of an injured person, less evidence is required upon the question of freedom from contributory negligence, nevertheless, evidence of facts cannot be wholly dispensed with, upon which an inference might rest that the deceased was fairly free from fault. Wendell v. N. Y. C. & H. R. R. R. Co. [1883] 91 N. Y. 420."

Compare the remark of Strong, J, in Button v. Hudson River R. Co. (1858) 18 N. Y. 248, 251: "The other point presents the question upon whom was the burden of proof, in reference to negligence of the intestate conducing to the injury—whether it belonged to the plaintiff to prove affirmatively the absence, or to the defendants to prove affirmatively the presence, of such negligence. In regard to all the circumstances essential to the cause of action the plaintiff held and was required to sustain the affirmative. Among those circumstances were, that the defendants were negligent, and that the injury resulted from that negligence. If the intestate was negligent, and his negligence concurred with that of the defendants in producing the injury, the plaintiff had no cause of action. The reason why no right of action would exist is that, both the intestate and the defendants being guilty of negligence, they were the common authors of what immediately flowed from it, and it was not a consequence of the negligence of either. The court cannot accurately, and will not undertake to, discriminate between them as to the extent of the negligence of each and the share of the result produced by each; nei-

HUDSON v. WABASH WESTERN RY. CO.

(Supreme Court of Missouri, 1890. 101 Mo. 13, 14 S. W. 15.)

This action was against the railway company for damages for a personal injury alleged to have been caused by the defendant's negligence. It appeared that the defendant's freight train had been negligently left standing across a public street without a watchman to warn persons using the crossing, that plaintiff tried to cross by climbing on to the cars and stepping on the coupling pins, that as plaintiff was thus crossing, the defendant suddenly and negligently started the train, whereby plaintiff's foot was caught and crushed. The petition alleged that "the plaintiff, without any fault on his part, was caught between two of said cars, then and there, and had his foot smashed, torn and

ther, therefore, could allege against the other any wrong, and without a wrong there can be no legal injury. In this view, the exercise of due care by the intestate was an element of the cause of action. Without proof of it, it would not appear that the negligence of the defendants caused the injury. * * * It must not be understood that it was incumbent on the plaintiff, in the first instance, to give evidence for the direct and special object of establishing the observance of due care by the intestate; it would be enough if the proof introduced of the negligence of the defendants and the circumstances of the injury, prima facie, established that the injury was occasioned by the negligence of the defendants; as such evidence would exclude the idea of a want of due care by the intestate aiding to the result. Ordinarily, in similar actions, when there has been no fault on the part of the plaintiff, it will sufficiently appear in showing the fault of the defendant, and that it was a cause of the injury and when it does so, no further evidence on the subject is necessary."

See also the reporter's note on the foregoing case (page 259): "Selden, J., objected to an implication which he conceived to lurk in the opinion of Strong, J. (but which Strong, J., disclaimed), that, in the absence of proof of any circumstances importing negligence on the part of the plaintiff, there might be a presumption thereof which he is required to repel; whereas his negligence must be inferred from evidence, and is not to be presumed."

In Lee v. Troy Gaslight Co. (1885) 98 N. Y. 115, the complaint alleged that the plaintiff's horse had been killed by gas escaping from a leak in the gas pipe under plaintiff's barn, and that the leak was occasioned by the negligence of defendant's employés in twisting the pipe while engaged in changing its position. The defendant contended that the complaint was insufficient because it nowhere alleged the absence of contributory negligence in the plaintiff. Said Finch, J., delivering the opinion: "Such separate and direct averment in the pleading was unnecessary. Hackford v. N. Y. C. R. R. Co. [1871] 6 Lans. [N. Y.] 381, affirmed [1873] 53 N. Y. 654. Substantially that allegation is always involved in the averment that the injury set out was occasioned by the defendant's negligence. To prove that, it is necessary for the plaintiff to show, and the burden is upon him to establish, that his own negligence did not cause or contribute to the injury. Hale v. Smith [1879] 78 N. Y. 480. In the multitude of cases of this general character we know of none which requires of the pleader any independent or explicit allegation that the plaintiff himself was without fault."

For the application of this rule of pleading see, also, Bogardus v. Metropolitan St. Ry. Co. (1901) 62 App. Div. 376, 70 N. Y. Supp. 1094; Klein v. Burleson (1910) 138 App. Div. 407, 122 N. Y. Supp. 752.

broken." The answer denied each and every allegation in the petition. The following instruction was given:

"The court instructs the jury that defendant has not pleaded as a defense in this case contributory negligence on the part of plaintiff; and therefore the question whether plaintiff himself was negligent or not is not before the jury, and must not be considered by it."

To this instruction the defendant excepted. The trial resulted in a verdict for the plaintiff for $2,500 and judgment thereon.[45]

SHERWOOD, J. It is the unquestioned law of this state that contributory negligence, strictly, is an affirmative defense, and, in order to avail a defendant as a matter of pleading, it must be affirmatively pleaded. O'Connor v. Railway Co., 94 Mo. 155, 7 S. W. 106, 4 Am. St. Rep. 364, and cases cited; Donovan v. Railroad Co., 89 Mo. 147, 1 S. W. 232; Schlereth v. Railway Co., 96 Mo. 509, 10 S. W. 66. The contention is, however, made by the defendant that, as the petition, among other things, alleged concerning plaintiff "that by said negligent acts, and without any fault on his part, he was then and there caught between two of said cars," etc., and the answer denied this averment, that therefore the defense of contributory negligence was raised. This is a mistake. True, the case of Karle v. Railroad Co., 55 Mo. 482, apparently supports this contention; but the utterance there was only obiter, and should not be regarded as possessing any authoritative value. * * *

But, while contributory negligence as a matter of defense has to be pleaded in order for a defendant to avail himself of it by the introduction of evidence to sustain that issue, yet it does not thence follow that, if the plaintiff's own testimony shows circumstances of contributory negligence which absolutely defeat his right of action, and disprove his own case, that the defendant is not at liberty to take advantage of such testimony, though produced by the adversary. On the contrary, it is well settled in this state, as well as elsewhere, that such advantage may be taken of the plaintiff's testimony, regardless of whether the special defense be pleaded or not. Milburn v. Railroad Co., 86 Mo. 104, and cases cited; Schlereth v. Railway Co., 96 Mo. 509, 10 S. W. 66. When this occurs it is the duty of the trial court to declare this result to the jury as a matter of law. 1 Shear. & R. Neg. (4th Ed.) 56, 112, note; 2 Ror. R. R. 1054, 1055.

This duty, it is claimed, the court should have performed, and that the first instruction of the defendant, in the nature of a demurrer to the evidence, should have been given. The text-books lay it down as undoubted law that the act of climbing over stationary cars, without looking to see whether they were attached to an engine or not, has been held so grossly negligent as to preclude a recovery for

[45] The statement of the case is abridged. Parts of the opinion, on other points, are omitted.

injuries received while making such attempt. 1 Thomp. Neg. 429; 2 Ror. R. R. 1055; Beach, Contrib. Neg. § 72. And the reported cases take the same view of the matter. * * *[46]

In the light of these authorities there seems no room to question that the judgment should be reversed, and it is so ordered.

[46] Accord: Orient Ins. Co. v. Northern Pac. Ry. Co. (1905) 31 Mont. 502, 78 Pac. 1036.

And see Fitchburg R. Co. v. Nichols (1898) 29 C. C. A. 500, 85 Fed. 945, 947, where Putnam, Circuit Judge, remarks: "The defendant below excepted to a refusal of the court to rule that the burden was on the plaintiff below to prove that he was not guilty of contributory negligence, claiming that the case is excepted from the general rule of the federal courts, because the plaintiff below alleges in his declaration that he was 'in the exercise of due care.' None of the numerous rulings of the Supreme Court to the effect that, on this question, the burden is on the defendant, commencing with Railroad Co. v. Gladmon [1872] 15 Wall. 401, 42 L. Ed. 114, have ever deemed it necessary to notice the state of the pleadings in this particular; and the rule has been constantly applied in this circuit to cases removed from the state courts, where this allegation frequently appears. The rule has more relation to the orderly trial of a case than to the state of the pleadings, and to shift from and to it from time to time would cause a great judicial inconvenience, wholly unnecessary, as the allegation referred to may better be regarded as surplusage than as leading to a variance."

Compare: Lake Erie & W. R. Co. v. Mackey (1895), 53 Ohio St. 370, 41 N. E. 980, 29 L. R. A. 757, 53 Am. St. Rep. 641. It was contended that the complaint was not good, as against a general demurrer, because "the presumption of contributory negligence arising from the facts stated is not overcome by proper averments." The petition alleged in substance: That the plaintiff was a minor of the age of nine years. That defendant's track through the village of Coldwater intersects and crosses Main street at grade. That Main street is a common thoroughfare and highway, the principal street of said village, and the point of junction of both a public highway and street crossing, necessarily much used and frequented by the public. On June 5, 1890, the defendant did negligently and unlawfully, and without due care on the part of the servants of said defendant in charge thereof, leave a long train of freight cars, attached to a locomotive, standing upon and over, obstructing and blocking, said crossing, for a period of more than five minutes without any attention to said crossing or the consequences to the convenience or life and limb of persons having occasion to pass such obstruction. That at the time aforesaid, during the hour of noon of said day, while said train was so unlawfully standing on said crossing, the plaintiff, a child of tender years and immature experience and judgment, was lawfully passing along said street, going to a point beyond said crossing on Main street. When arriving at said crossing, and in full view of the engineer's position, and in full view of any servant being on the lookout or keeping watch over said train, he found said crossing so obstructed and blocked by said defendant's train. That after remaining at said crossing for more than five minutes, and receiving no warning, plaintiff, in full view of the engineer's proper position, and within the knowledge of ordinary prudence of defendant's servants, attempted to pass over and cross such obstruction. While so passing over said cars, defendant's servants, without any care or attention to said crossing, or the consequence to any one attempting to pass such unlawful obstruction, without due care, without signal, without notice, without warning, did then and there imprudently, carelessly negligently, and wrongfully start said cars suddenly and violently backward, whereby said plaintiff's right foot was caught between the couplings of two cars, and the injury followed. Held a sufficient statement as against a demurrer for lack of facts.

SECTION 3.—THE SCOPE OF THE DUTY TO USE CARE

I. In Relation to the Ownership or Possession of Property

(A) Duty of Care Towards a Trespasser

(a) In General

BLYTH v. TOPHAM.

(Court of King's Bench, 1607. Cro. Jac. 158, 79 Reprint, 139.)

Action on the case; for that he digged a pit in such a common, by occasion whereof his mare, being straying there, fell into said pit and perished. The defendant pleaded not guilty; and it was found for him.

The plaintiff, to save costs, now moved in arrest of judgment upon the verdict, that the declaration was not good; for when the mare was straying, and he shews 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 injuria: wherefore an action lies not by him.

The whole Court was of that opinion. It was therefore judged upon the declaration that the bill should abate, and not upon the verdict.

PONTING v. NOAKES et al.

(Queen's Bench Division. [1894] 2 Q. B. 281.)

Appeal against the verdict and judgment for the plaintiff in an action, tried before the deputy judge of Andover County Court and a jury, to recover as damages the value of the plaintiff's horse, which was alleged to have died through eating of the defendant's yew tree.

The following statement of the facts proved or admitted at the trial is taken from the judgment of Charles, J.:

The plaintiff was a farmer and occupied a field separated from the premises of the defendants by a fence. On the side of the fence next the plaintiff's field was a ditch belonging to the defendants. On the defendants' land near the fence grew a yew tree, the branches of which projected over the ditch, but not beyond it. They did not overhang the plaintiff's field. At the distance of about 120 yards grew another yew tree in the garden of one Hunt, which overhung the plaintiff's field, and in the hedge of the plaintiff's field, about fifty yards from the defendants' yew tree, there was a small yew bush. On June 25, 1893, the colt and several other horses were in the plaintiff's field. On the 26th the colt was found dead five yards from the defendants' yew, and there was no doubt from the examination made of the body that it had died from

eating yew leaves. All the three trees, the defendants', Hunt's, and the plaintiff's yew bush, presented appearances of having been recently eaten. A veterinary surgeon stated that it was a fact within his knowledge that horses have been known to walk a mile after eating yew leaves before dying, and then to drop down dead. Such a case, however, he said, would be exceptional: the animal most often drops down dead directly after the eating, or after walking a short distance.

On the above evidence the deputy judge left the case to the jury, who gave a verdict for damages claimed, and judgment for the plaintiff was given accordingly. The defendants appealed.

Horace Browne, for the defendants. * * * No duty on their part to fence against their neighbour's cattle was shewn, nor was there any duty to protect such cattle from having access to the tree. The deputy judge, therefore, ought to have given judgment for the defendants.

CHARLES, J. * * * Can it be said that there is any duty on a man, either not to grow a poisonous tree so near the boundary of his property as to be accessible to the stock of his neighbour, or, if he does so, to take precautions to prevent any danger to the stock arising? Now here it must be remembered that no liability on the part of the defendants to fence against the cattle of their neighbour was proved. Had any such liability been shown to exist, and had the fence been defective, it might well have been found by the jury that the colt had obtained access to the defendants' land through breach of his obligation to fence, and the poisonous tree being immediately within the fence that the eating of its leaves by the colt was the natural consequence of the defendants' breach of duty. But, there being no liability on the part of the defendants to repair the fence, I do not see that they can be made responsible for the eating of those yew leaves by an animal which, in order to reach them, had come upon their land. The hurt which the animal received was due to its wrongful intrusion. It had no right to be there, and its owner, therefore, had no right to complain. The true test in such a case is pointed out by Gibbs, C. J., in Deane v. Clayton, 7 Taunt. 489, at p. 533, in a judgment which was emphatically approved by the Court of Exchequer in Jordin v. Crump, 8 M. & W. 782, though on the facts proved in Deane v. Clayton, 7 Taunt. 489, at p. 533, the Court were equally divided as to what judgment should be entered. We must ask, he says, "in each case whether the man or the animal which suffered had, or had not, a right to be where he was when he received the hurt." If he had not, then (unless, indeed, the element of intention to injure, as in Bird v. Holbrook, 4 Bing. 628, or of nuisance, as in Barnes v. Ward, 9 C. B. 392, is present) no action is maintainable. It was, however, urged that there was here something in the nature of nuisance, and that the growing of this yew tree so near to the boundary was actionable, in case damage was caused by it, on the same ground as that on which Townsend v. Wathen, 9 East, 277, was decided. It was there held that if a man places traps

baited with flesh on his own ground so near to the premises of another that dogs kept on his neighbour's premises must probably be attracted by their instinct into the traps, and if in consequence his neighbour's dogs are so attracted and are injured, an action lies. But no evidence whatever was offered in this case that the yew tree could be regarded as a trap in this sense to the plaintiff's horses, and in the absence of any such evidence it was, I think, the plaintiff's business to keep his horses from going too near the tree, and not the defendants' duty to take any precautions against their doing so. In the result, therefore, I think, that this appeal must be allowed, and judgment entered for the defendant.

Judgment for the defendant.[47]

BAKER v. BYRNE.

(Supreme Court of New York, 1871. 58 Barb. 438.)

Appeal by the plaintiff from a judgment dismissing the complaint, and from an order denying a motion for a new trial.

This action was brought by the plaintiff to recover damages for an injury suffered by him from falling down a hatchway of the barge Pilgrim. It was admitted by the defence that the barge was owned by the defendant George C. Byrne. The accident occurred at Jersey City, New Jersey, in August, 1863. The plaintiff was then mate, and in charge of the steamer Oriel. At the time of the injury, there was next to the dock, in Jersey City, a steamer named Carnac. The barge Pilgrim was lying next to the Carnac, and the Oriel was lying outside of and next to the Pilgrim. The evidence showed that there was no way of getting aboard the Oriel except by going over the Carnac and Pilgrim, unless it was by means of a small boat.

The plaintiff had been going over the Carnac and the Pilgrim to get to his own boat for a day or two previous to the accident. The accident occurred at about nine o'clock in the evening of August 23. That evening was dark and the upper deck of the Pilgrim a little wet and slippery, and the plaintiff went from the upper deck to the main deck of the Pilgrim to pass over to his own boat. The hatchways on board the Pilgrim were on the main deck. The plaintiff had usually gone over the upper deck of the Pilgrim, and in doing so would not have observed the hatchways. On the evening in question, the hatchways of the Pilgrim had been left open, and the plaintiff fell through one of them, and thereby had his hip dislocated or very much injured.

[47] Only so much of the opinion is given as relates to the one point. In an omitted portion, the question was raised whether Fletcher v. Rylands (1866) L. R. 1 Exch. 265 (1868) 3 H. L. 330, applies to the facts of this case. It was answered in the negative.

The defense was a general denial, and a specific denial of any negligence in respect to the hatchways or any other part of the Pilgrim.

By the Court, INGRAHAM, P. J. The plaintiff, when crossing the defendant's vessel, had no right or license to be there, and the defendants owed him no duty which threw on them the obligation to close the hatches of their vessel at night, so as to protect a trespasser from injury.

The principle on which persons are held liable for such acts, is that they are in duty bound to keep their property in such a condition that persons who are lawfully there shall not be injured; but it does not extend to persons on the defendant's premises without right, or without permission.

The cases of Roulston v. Clark, 3 E. D. Smith, 366, Bush v. Brainard, 1 Cow. 78, 13 Am. Dec. 513, and Mentges v. New York & H. R. Co., 1 Hilt. 425, are cases exemplifying this rule.

Judgment affirmed.

DUDLEY v. NORTHAMPTON ST. RY. CO.

(Supreme Judicial Court of Massachusetts, 1906. 202 Mass. 443, 89 N. E. 25, 23 L. R. A. [N. S.] 561.)

In this action a verdict was directed for the defendant, the Northampton Street Railway Company. The plaintiff excepts.

SHELDON, J. It was provided by the statutes in force at the time of this accident that no person should operate an automobile or motor cycle upon any public highway or private way laid out under authority of statute unless he had been licensed to do so and unless his automobile or motor cycle had been registered as prescribed. St. 1903, p. 507, c. 473; St. 1905, p. 227, c. 311. But it was also provided by section 2 of the act last cited that "any automobile or motor cycle owned by a nonresident of this state who has complied with the laws relative to motor vehicles and the operation thereof of the state in which he resides may be operated by such owner on the roads and highways of this state for a period not exceeding fifteen days without the license," etc., required in other cases. The first question presented in this case is whether the plaintiff in operating his machine in this state on the day of the accident was acting in violation of law.

He was a resident of Connecticut. He had complied with all the laws of that state, and had a right to operate his machine on the highways of this state for a period not exceeding 15 days. He came into this state in his automobile on Wednesday, September 13th, and remained here until the day of the accident, September 29th, except that on September 14th he drove to West Suffield, Conn., returning to Massachusetts the same evening, and that he went to Brattleboro, Vt., on one day to attend a fair, staying there that day, but not overnight. Each of these absences was merely a temporary visit to the other

state, made with no intention of a permanent stay, and followed by a speedy return; and on each of these days he did actually operate his machine in this state. After his return from Vermont and before the accident, his machine needed repairs, and was kept in a repair garage a day and a half for that purpose.

It is not necessary to determine whether the statute before us should be interpreted as giving to nonresident owners of motor cars who have complied with the laws of their own state merely one period of 15 days after once coming into the state before being forbidden to operate their machines on the roads of this state without a license under its authority, and allowing only one total period of grace during the whole of the license year, or whether it should be construed more liberally by allowing nonresident owners to operate their cars without a license for a period of not more than 15 days upon any and every occasion when they shall come into this commonwealth. In either event, this plaintiff had exceeded his privilege. He made one visit here; and the running of his 15 days was not interrupted by his temporary calls into other states. Nor can the period be extended by not counting the days on which his machine was laid up for repairs or on which for any other reason he did not actually operate it. He had driven it into this commonwealth; within the meaning of the statute he was operating it during the whole of his stay. By no process of computation can it be claimed that his stay had lasted for less than 16 days. It follows that he was acting unlawfully, in violation of the statutes referred to, at the time of the collision between his machine and the defendant's trolley car; and it must be determined whether his violation of law is necessarily fatal to his right of action. * * *

The legislature, in the opinion of a majority of the court, intended to outlaw unregistered machines, and to give them, as to persons lawfully using the highways, no other right than that of being exempt from wanton or willful injury. They were to be no more travelers than is a runaway horse. Richards v. Enfield, 13 Gray, 344; Higgins v. Boston, 148 Mass. 484, 20 N. E. 105. The plaintiff as a mere trespasser upon the highway was there not only against the right of the owner of the soil and so liable to an action by him, but also against the rights of all other persons who were lawfully using the highway. He was violating a law made for their protection against him; accordingly, he was a trespasser as to them. It follows that the defendant, which was lawfully using the highway with its cars, owed to the plaintiff no other or further duty than that which it would owe to any trespasser upon its property, that is, not the duty of ordinary care, as those words are commonly used, but merely the duty to abstain from injuring him by wantonness or gross negligence. Sullivan v. Boston Elevated Ry., 199 Mass. 73, 76, 84 N. E. 844, 21 L. R. A. (N. S.) 36; Fitzmaurice v. N. Y., N. H. & H. R. R., 192 Mass. 159, 162, 78 N. E. 418, 6 L. R. A. (N. S.) 1146, 116 Am. St. Rep. 236, 7 Ann. Cas. 586; Massell v. Boston Elevated Ry., 191 Mass. 491, 493, 78 N. E. 108. * * *

Of course the defendant would have had no right to run its car into the plaintiff's machine wantonly or recklessly; and that is the point of such cases as Welch v. Wesson, 6 Gray, 505, and McKeon v. N. Y., N. H. & H. R. R., 183 Mass. 271, 67 N. E. 329, 97 Am. St. Rep. 437. But there was no evidence in the case at bar to warrant a finding for the plaintiff upon this ground.

Accordingly, the verdict for the defendant was rightly ordered; and we need not consider the somewhat doubtful question whether upon the evidence it could have been found that the plaintiff's conduct at the time of the collision was in other respects consistent with the exercise of due care on his part.

Exceptions overruled.[48]

(b) MODIFICATIONS OF THE RULE

McVOY v. OAKES et al.

(Supreme Court of Wisconsin, 1895. 91 Wis. 214, 64 N. W. 748.)

The action was by McVoy, to recover damages for personal injuries sustained by the plaintiff's ward, through the negligence of the defendants. A demurrer to the complaint was overruled, and the defendants appealed. The complaint, in addition to appropriate allegations to show the liability of the defendants, if plaintiff is entitled to recover at all, alleges, in substance, that on the 4th day of October, 1893, plaintiff's ward, a little boy seven years of age, while on his way home from school, had traveled out of the public way, along the railway track, for some distance, on account of such way being obstructed by defendants' train of cars, when he climbed upon one of the cars by invitation of the conductor, and was induced by such conductor to remain on such car while the train moved several hundred feet; that the cars stopped, and the boy then jumped off on the side furthest from his home, and, as the cars moved back, he walked along the side of the train, on a path commonly used and traveled by the public, by consent of the defendants; that, while so walking, he took hold of one of the brake rods and proceeded in that way for a distance of 500 feet; that defendants' servants saw him as he was walking with the moving train, with one hand hold of the brake rod, and recklessly and wantonly caused the train to be propelled at a rapid and increasing rate of speed, in such a way as to violently jerk him from his feet, and throw him under the cars, and injure him.

MARSHALL, J. (after stating the facts). According to the allegation of the complaint, defendants' servants, with knowledge that the plaintiff's ward, a boy of such tender years that he could not be held to a very high degree of care, too young certainly to be held guilty of contributory negligence as a matter of law, was in a dangerous situa-

[48] Parts of the opinion are omitted.

tion, recklessly and wantonly gave speed to the moving train, and suddenly jerked the child from his feet, and threw him under the cars. It needs no argument or citation of authority to support the proposition that such conduct, under the circumstances alleged, constitutes actionable negligence. We do not deem it necessary to consider how the boy happened to be in the position he was at the time of the injury. Without any reference as to how he came to be in such situation, defendants' servants at least owed to him the duty not to knowingly, recklessly, and wantonly injure him. The order of the superior court is affirmed, and the cause remanded for further proceedings according to law.

PALMER v. GORDON.

(Supreme Judicial Court of Massachusetts, 1899. 173 Mass. 410, 53 N. E. 909, 73 Am. St. Rep. 302.)

In this action, the jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

HOLMES, J. This is an action of tort for personal injuries. We are to take it that the plaintiff, a boy, was a trespasser, with some other boys, in the kitchen attached to the defendant's restaurant, and that the defendant spilled water upon the stove for the purpose of frightening the boys away. He did not intend to scald them, but the water flew from the stove upon the legs of the boys. The question raised by the exceptions is whether the jury were warranted in finding the defendant liable.

It will be seen that this case falls between the cases of spring guns and the like, where the defendant is or may be in the same position as if he had been personally present, and had shot the plaintiff, and the cases where, as against trespassers or licensees, railroads are held entitled to run trains in their usual way without special precautions. Chenery v. Railroad Co., 160 Mass. 211, 213, 35 N. E. 554, 22 L. R. A. 575. In the case at bar the defendant, although not contemplating or intending actual damage, did an act specifically contemplating the plaintiff's presence, and directed against him. He left the safe position of a landowner, simply pursuing his own convenience, and assuming that no one would break the law, and thereby bring himself into danger.

Just as a man may make himself liable to a negligent plaintiff by a later negligence (Pierce v. Steamship Co., 153 Mass. 87, 89, 26 N. E. 415), he may make himself liable to a trespasser by an act that is done with reference to the trespasser's presence, and that sufficiently clearly threatens the danger which it brings to pass. A trespasser is not caput lupinum. In the present case the only element of doubt was whether the danger to the plaintiff was sufficiently obvious under the circumstances. That question properly was left to the jury.

Exceptions overruled.

HERRICK v. WIXOM.

(Supreme Court of Michigan, 1899. 121 Mich. 384, 80 N. W. 117.)

This was an action of trespass on the case. The defendant was possessed of and managed a tent circus. On the afternoon of September 18, 1897, when the defendant was exhibiting his circus the plaintiff went to the circus, and entered the tent, the entertainment being in progress, and took a seat on the lower tier of seats. There was testimony that the plaintiff entered without right. One feature of the entertainment consisted in the ignition and explosion of a giant firecracker attached to a pipe set in an upright position in one of the show rings. This was done by one of the clowns. There is testimony to show that plaintiff sat 30 or 40 feet from the place where the cracker was exploded, but, when the same was exploded, a part of the firecracker flew and struck plaintiff in the eye, putting it out, whereby he lost the sight and use of the eye. For this injury action was brought against defendant for damages as a result of defendant's negligence in permitting a dangerous explosive to be used in a dangerous manner, which subjected those present to hazard and risk of injury. Upon the trial a verdict was rendered for the defendant, and judgment was entered accordingly. Plaintiff brings error. * * *

The circuit judge charged the jury as follows:

"The negligence charged in this case, gentlemen, is that Mr. Wixom exploded a firecracker, of the dimensions that the plaintiff claims this firecracker was, in the inside of this tent, and in the presence of his audience. They claim that was negligence. And that is the question for you to determine, under the evidence, and under the rules of law that I have given you and that I shall give you hereafter. Now, you must further find, in order that the plaintiff recover, that the plaintiff was in the tent, where he was injured, by the invitation of some person having authority to allow him to go in there. If he was a mere trespasser, who forced his way in, then the defendant owed him no duty that would enable him to recover under the declaration and proofs in this case. * * *[49]

MONTGOMERY, J. (after stating the facts). We think this instruction faulty in so far as it was intended to preclude recovery in any event if the plaintiff was found to be a trespasser. It is true that a trespasser who suffers an injury because of a dangerous condition of premises is without remedy. But, where a trespasser is discovered upon the premises by the owner or occupant, he is not beyond the pale of the law, and any negligence resulting in injury will render the person guilty of negligence liable to respond in damages. Beach, Contrib. Neg. § 50; Whart. Neg. § 346; Marble v. Ross, 124 Mass. 44; Houston, etc., R. Co. v. Sympkins, 54 Tex. 615, 38 Am. Rep. 632; Brown v. Lynn, 31 Pa. 510, 72 Am. Dec. 768; Needham v. Railroad Co., 37 Cal. 409; Davies v. Mann, 10 Mees. & W. 546; 1 Shear. & R. Neg. § 99. In this case the negligent act of the defendant's servant was committed after the audience was made up. The presence of plaintiff was

[49] The statement of the case is abridged.

known, and the danger to him from a negligent act was also known. The question of whether a dangerous experiment should be attempted in his presence, or whether an experiment should be conducted with due care and regard to his safety, cannot be made to depend upon whether he had forced himself into the tent. Every instinct of humanity revolts at such a suggestion.

For this error the judgment will be reversed, and a new trial ordered.

DAVIS' ADM'R v. OHIO VALLEY BANKING & TRUST CO.

(Court of Appeals of Kentucky, 1908. 127 Ky. 800, 106 S. W. 843, 15 L. R. A. [N. S.] 402.)

CARROLL, J. Alleging that his intestate, Johnnie Davis, a boy about 12 years of age, was killed by the negligence of the servants of appellee in operating an elevator in its building, this suit was brought by the administrator to recover damages for his death. The petition charged that decedent lost his life "by the gross negligence of the defendant, its agents, servants, and employés while conducting and managing the said elevator." In amended petitions it was alleged that the decedent at the time of his death was, by the consent, knowledge, and permission of the agents and servants of defendant, riding on top of the elevator, and was there for the purpose of carrying dinner to his sister, who was employed in one of the office rooms of the building in which the elevator was located, and while in this dangerous position was carried to the fourth floor of the building, and brought back to the first floor, when the elevator was stopped, and while it was standing, and decedent was in the act of getting off, the employés of defendant suddenly started the elevator, with the result before stated. The answer, after controverting generally the affirmative matter in the petition, pleaded contributory negligence on the part of the decedent. * *

The elevator is situated on the ground floor of the building. The elevator cage is constructed of iron openwork, through which any person might be seen, and the top of the elevator was also made of openwork, with probably a solid piece in the center of the top. A person in the elevator could plainly see through the openwork a person riding on the top of it. Immediately by the side of the elevator is a stairway leading to the upper stories of the building, and when the elevator is standing at the ground floor a person on top of the elevator can crawl through an open space in the net work surrounding the elevator shaft onto the stairway. The elevator was in charge of a boy, but the record does not show his age. In the elevator with the operator was another boy. Johnnie Davis, who had been riding on top of the elevator, was in the act of crawling out, feet foremost, to the stairway, when the elevator, which at this moment was stationary on the ground floor, was suddenly started. His head was caught by the elevator in its up-

ward movement, and almost severed from his body, death resulting instantly. The proof showed that Johnnie Davis was 12 years of age; that his sister was working in a telephone office in the building in which the elevator was located; and that he had gone there on the day of his death for the purpose of taking dinner to her, she being employed in one of the top stories of the building that could be conveniently reached by taking the elevator. The proof of one witness was that Johnnie Davis was in the act of getting off of the elevator, which was standing at the ground floor, through the opening in the shaft, when it suddenly started; by another witness, who had been looking at the elevator for a few minutes, that there were two boys in the elevator, and one on top of the elevator; that it went up to about the fourth story, and came down and stopped, and the boy on top of the elevator was in the act of getting out when the elevator boy started it and killed him. This witness said the boys in the elevator were laughing and talking to the boy on top of the elevator, that he heard them as the elevator went up and when it came down, that the boy on top did not try to get out until the elevator stopped. Another witness, who came in the building just as the accident happened, said he asked what was the matter, and the elevator boy said: "I have killed little Johnnie Davis, and didn't go to do it. We were just playing with the elevator, and he went to get off and got killed." The boy who was in the elevator when the accident happened said that John Gillum was the operator and that Johnnie Davis was on top; that he went up to the second floor and got on; that he could have seen him if he had been looking, and heard him talking at the fifth floor. He didn't know whether the boy operating the elevator saw him when he started the elevator or not. It will thus be seen that there was evidence conducing to establish two propositions, first, that the operator was a boy; second, that he knew Johnnie Davis was riding on top of the elevator just before he was killed, and could have seen him in the act of getting off if he had looked before starting it on its upward journey.

Counsel for appellee insist that the little boy who was killed was a trespasser, and that the operator owed him no duty except to prevent injury to him after his peril was actually discovered. The correctness of this principle, as applied to trespassers, will be conceded. It has been so adjudged in a number of cases by this court (C. & O. Ry. Co. v. Barbour's Adm'r, 93 S. W. 24, 29 Ky. Law Rep. 339; Davis v. L. H. & St. L. Ry. Co., 97 S. W. 1122, 30 Ky. Law Rep. 172), and we have no disposition to modify it. But, under the evidence, Johnnie Davis, although riding in a dangerous place not intended or set apart for passengers, was not a trespasser when he was killed, or while riding on the top of the elevator. He was there with the knowledge, and at least implied permission and consent, of the operator. The operator may not have known that he was in the act of escaping from the top of the elevator at the very time it was started, but he did know he was there a few moments before, and, knowing his perilous position, it

was his duty under the circumstances to have exercised ordinary care for his safety. It would be a cruel and inhuman doctrine to announce that a person operating a dangerous instrumentality like an elevator might have actual knowledge of the fact that some person was riding on it in an unsafe place, where he was likely to be injured at any time, and yet not be responsible for his injury or death, on the theory that at the very moment of the accident, caused by his sudden starting of the machine, he did not actually know the person was yet in his perilous position, although he could have known it merely by looking in the direction. McVoy v. Oakes, 91 Wis. 214, 64 N. W. 748. Indeed we might with propriety say that, although Davis be treated as a trespasser, and the rule of nonliability be applied to him that was laid down in the Barbour and Davis Cases, yet, under the facts, this case should have gone to the jury. A trespasser is not an outlaw, nor are persons upon whose premises he intrudes at liberty to kill or cripple him at pleasure. The same care must be taken to avoid injury to him after his peril is discovered as is exercised towards other persons. The peril of Davis was discovered when the operator knew he was riding on top of the elevator. With this knowledge, it was his duty to have exercised ordinary care to prevent injury to him. We may safely add that, when an employé in charge of a dangerous agency permits persons to take places or positions in or about it that are hazardous, and that he knows or should know may result in their injury or death, if they remain where they are, the master will be responsible if the servant fails to exercise ordinary care to prevent injury to them.

Our attention is called by counsel for appellee to the case of Dalton's Adm'r v. L. & N. R. Co., 56 S. W. 657, 22 Ky. Law Rep. 97. Dalton, while riding on a freight train with the consent of the persons in charge of it, was killed in a collision between the train he was riding on and another train. In the course of the opinion, denying a recovery, the court said: "The only obligation appellant owed to him was not to injure him after knowledge of his danger. There is no allegation that anything was omitted which might have been done for the intestate's safety after the danger was discovered." The material distinction between the cases is that in the Dalton Case, as well as in L. & N. R. Co. v. Thornton, 58 S. W. 796, 22 Ky. Law Rep. 778, and in Thornton v. L. & N. R. Co., 70 S. W. 53, 24 Ky. Law Rep. 854, nothing was omitted which might have been done in the exercise of ordinary care to prevent the injury after the danger was discovered. In the case at bar the liability of appellee company grows out of the failure of its servant to exercise ordinary care to prevent injury to Johnnie Davis after his peril was discovered. Whether it did or not exercise this degree of care was a question for the jury. * * *[50]

Wherefore the case is reversed, with directions for a new trial in conformity with this opinion.

[50] Parts of the opinion are omitted.

LYNCH v. NURDIN.

(Court of Queen's Bench, 1841. 1 Q. B. 29, 113 Reprint, 1041, 55 R. R. 191.)

Case. The declaration stated that defendant, on &c., was possessed of a cart, and of a horse then harnessed to the same. That defendant carelessly behaved and conducted himself in and about the management of said cart and horse, and carelessly, negligently, and improperly left the said cart and horse in a certain common highway without anybody to look after the same; and the said cart and horse of defendant, by and through his carelessness, negligence, and improper conduct in that behalf, then ran and struck with great force and violence against plaintiff, then lawfully being in the said highway, and with great force &c.: various injuries were then stated, by means of which plaintiff became and was sick, lame &c. Pleas, Not guilty, and that defendant was not possessed of the cart and the horse. Issues thereon. Verdict for the plaintiff. A rule nisi for a new trial was obtained and argued.[51]

Lord Denman, C. J.[52] This case was tried before my brother Williams at the sittings in the Easter Term, 1839. It was an action of tort for negligence by the defendant's servant, in leaving his cart and horse for half an hour in the open street at the door of a house where the servant remained during that period. The evidence for the plaintiff proved that, at the end of the first half hour, he, a child of very tender age, being between six and seven years old, was heard crying, and, on the approach of the witnesses, was found on the ground and a wheel of the defendant's cart going over his leg, which was thereby fractured. The defendant's counsel first applied for a nonsuit. The learned judge refused the application; and no question was made before us that these facts afforded prima facie evidence of the mischief having been occasioned by the negligence of the defendant's servant in leaving the horse and cart. Witnesses were then called to establish a defence by a fuller explanation of the facts that had occurred. They proved that, after the servant had been about a quarter of an hour in the house, the plaintiff, and several other children came up, and began to play with the horse, and climb into the cart and out of it. While the plaintiff was getting down from it, another boy made the horse move, in consequence of which, the plaintiff fell and his leg was broken as before mentioned. On this undisputed evidence, (for there was no cross examination of the witnesses), the defendant's counsel claimed the Judge's direction in his favor, contending that, as the plaintiff had obviously contributed to the calamity, it could not be said in point of law to have been caused by the negligence of the defendant's servant.

[51] The reporter's statement of the facts and the arguments of counsel are omitted.

[52] Part of the opinion, dealing with other questions, is omitted.

My learned brother, however, thought himself bound to lay all the facts before the jury, and take their opinion on that general point. They found a verdict for the plaintiff. It is now complained that such direction was not given; and at all events the jury are said to have given a verdict contrary to the evidence. The case came on in the new trial paper last Term, and has been fully argued before us. * * *

A distinction may here be taken between the wilful act done by the defendant in those cases, in deliberately planting a dangerous weapon in his ground with the design of deterring trespassers, and the mere negligence of the defendant's servant in leaving his cart in the open street. But between wilful mischief and gross negligence the boundary line is hard to trace: I should rather say, impossible. The law runs them into each other, considering such a degree of negligence as some proof of malice. It is then a matter strictly within the province of a jury deciding on circumstances of each case. They would naturally enquire whether the horse was vicious or steady: whether the occasion required the servant to be so long absent from his charge, and whether in that case no assistance could have been procured to watch the horse: whether at that hour the street was likely to be clear or thronged with a noisy multitude (it appeared in the present case that Compton street was more thronged than usual, in consequence of a neighbouring street being stopped): especially whether large parties of young children might be reasonably expected to resort to the spot. If this last mentioned fact were probable, it would be hard to say that a case of gross negligence was not fully established.

But the question remains, can the plaintiff then, consistently with the authorities, maintain his action, having been at least equally in fault. The answer is that, supposing that fact ascertained by the jury, but to this extent, that he merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care: the child, acting without prudence, or thought, has, however, shown these qualities in as great a degree as he could be expected to possess them. His misconduct bears no proportion to that of the defendant which produced it.

For these reasons, we think that nothing appears in the case which can prevent the action from being maintained. It was properly left to the jury, with whose opinion we fully concur.

Rule discharged.[53]

[53] See the comment on this case by Collins, J., in Ponting v. Noakes (1894) 2 Q. B. 281, 290, and by Pollock, C. B., in Lygo v. Newbold (1853) 9 Exch. 303, 96 R. R. 727.

STOUT v. SIOUX CITY & P. R. CO.

(Circuit Court of the United States, D. Nebraska, 1872. 23 Fed. Cas. 180, 2 Dill. 294, 23 Fed. Cas. 183.)

SIOUX CITY & P. R. CO. v. STOUT.

(Supreme Court of the United States, 1874. 17 Wall. 657, 21 L. Ed. 745.)

This was an action brought in the name of an infant, by his father as next friend, to recover $15,000 damages from the railroad company for an injury to the foot of the child, received while playing upon the turntable of the defendant. The action was begun in a state court in Nebraska, but was removed by the railroad company into the United States Circuit Court.

The plaintiff's petition alleged that the defendant, at the time when the injuries complained of were received, was operating a railroad through the town of Blair, in Nebraska, and in connection with this railroad used and operated a turntable which was

"so constructed and arranged as to be easily turned around and revolved in a horizontal direction; that across the upper surface thereof there were fastened two large and heavy bars of iron corresponding with the iron rails of the railroad track used in connection with said turntable, and so placed and arranged that when the turntable revolved, the ends of the iron bars running across the face of the same passed by the ends of the rails on the railroad track; that said turntable was situated in a public place, and in immediate proximity to a passenger depot of the defendant"; that many children were in the habit of going upon said turntable to play; that the turntable was unfastened and in no way protected to prevent it being turned around at the pleasure of small children; that the defendant had notice of these facts; that the plaintiff was a child of tender years without judgment or discretion, and that in consequence of the carelessness and negligence of the defendant in not locking said turntable, it was revolved, and while it was being so revolved by other children, "the plaintiff had his right foot caught between the ends of one of the iron bars on said turntable and the end of one of said rails upon the railroad track" and his foot was crushed and the plaintiff permanently injured.

The defendant's answer denied all the averments of the petition and alleged that the plaintiff had no right upon the turntable, that he was a trespasser, and that neither law, nor usage, nor reasonable prudence required the defendant to keep its turntable locked or guarded.

A jury trial upon the issue thus arising resulted in a disagreement. At a second trial the following charge was given by John F. Dillon, Circuit Judge:

This is both a novel and important case. The injury for which this action is brought happened in the town of Blair, in this state, on the 29th day of March, 1869. The plaintiff was then a boy of the tender age of six years and two or three months. The undisputed testimony shows that the town of Blair was, at that time, a new place, had been recently laid off, and contained a population of about one hundred people. On the plat of the town of Blair is a tract of land of variable width, extending almost the entire length of the plat, owned and used by the defendants for their road-bed and depot grounds, and which divides the town into two portions. The cross streets of the town run up to this railroad ground and there stop, with the exception of one or two streets, which were laid out across it. On this ground, which

was not enclosed, was situated the defendant's depot house, and, about one-quarter of a mile distant from the depot house, was located the turntable, on which the plaintiff was injured. There were but few houses in the immediate neighborhood of the turntable, and the plaintiff's parents lived in another portion of the town, and about three-fourths of a mile distant from the turntable.

The circumstances under which the accident to the plaintiff occurred are not in the main, if in any respect, in dispute. The plaintiff, without, as it appears, the knowledge of his parents, started with one or two other boys to go to the defendant's depot, about half a mile away, with no definite purpose in view. When the boys had arrived at the depot, it was proposed by some of them to go to the turntable to play; and the boys proceeded to the turntable, about a quarter of a mile distant, traveling along the defendant's roadbed or track. When the boys had reached the turntable, which was not attended or guarded by any employé of the company, and which was not then fastened or locked, and which revolved easily on its axis, two of them commenced to turn it, and the plaintiff, in attempting to get upon it (being at the time upon the railroad track), had the misfortune to get his foot caught between the end of the rail on the turntable, as it was revolving, and the end of the iron rail on the main track of the defendant's road, and his foot was badly cut and crushed, resulting in a serious and permanent injury.

There is the evidence of one witness (Quimby) then an employé of the company, that he had previously seen boys playing at the turntable, and had forbidden his children to play there. But this witness had no charge of the turntable, as he says, and did not, as he testified, communicate the fact to any of the officers or employés of the company having charge of the turntable. It appears, from the plaintiff's testimony, that he had not before that day been engaged in playing at the turntable. The turntable was constructed on the defendant's own land, and the testimony tends to show that it was constructed in the usual and ordinary manner.

Now the ground of complaint against the defendant, as set out in the petition, is that the turntable, as it was constructed, was of a dangerous nature and character, when unlocked or unguarded, and that being, as it is alleged, in a place much resorted to by the public, and where children were wont to go and play, it was the duty of the defendant to keep the same securely locked or fastened, so as to prevent it from being turned or played with by children, or to keep the same guarded, so as to prevent injuries such as befell the plaintiff.

The basis of this action, therefore, is that the defendant owed the plaintiff a duty of this kind; that, in failing to discharge this duty, the defendant was guilty of negligence; that this neglect caused the injury to the plaintiff, and that, therefore, the defendant is liable in damages therefor.

Now, if this action had been brought, under the circumstances disclosed in the evidence, by an adult, who, himself, meddled with and set in motion the turntable which caused the injury, we should have no hesitation in saying that the law would not allow it to be maintained. And we confess that we have had serious doubts whether, under the circumstances, the action was any more maintainable, being brought by an infant of tender years.

On reflection it is our judgment, and we so instruct you, that this action may be maintained, if certain facts be established by the evidence.

In the first place, it is alleged in the petition, and it must appear by the evidence, that this turntable, in the condition, situation, and place where it then was, was a dangerous machine, one which, if left unguarded or unlocked, would be likely to cause injury to children. You have heard described the manner in which this turntable was constructed and left, and very much evidence has been adduced to show that turntables are constructed and left in this manner elsewhere; and the evidence is quite undisputed that it is not the practice of railroads to guard or lock them. The circumstance that other roads throughout the country do not guard or fasten turntables (if you find such to be the fact), is not conclusive in the defendant's favor that there was or could be no negligence on its part as respects the turntable in question, but, while not conclusive, it is still a very important fact or circumstance to be considered by the jury in determining the question of the defendant's negligence.

This action rests, and rests alone, upon the alleged negligence of the defendant, and this negligence consists, as alleged, in not keeping the turntable guarded or locked. Negligence is the omission to do something which a reasonable, prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent or reasonable man would not do, under all the circumstances surrounding the particular transaction under judicial investigation.

If the turntable, in the manner it was constructed and left, was not dangerous in its nature, then of course the defendants would not be guilty of any negligence in not locking or guarding it. But even if it was dangerous in its nature in some situations, you are further to consider whether, situated as it was on the defendant's property, in a small town, and distant or somewhat remote from habitations, the defendants are guilty of negligence in not anticipating or foreseeing, if left unlocked or unguarded, that injuries to the children of the place would be likely to or would probably ensue.

The machine in question is part of the defendant's road, and was lawfully constructed where it was. If the railroad company did not know, and had no good reason to suppose, that children would resort to the turntable to play, or did not know, or had no good reason to suppose, that if they resorted there, they would be likely to get injured thereby, then you cannot find a verdict against them.

But if the defendant did know, or had good reason to believe, under the circumstances of the case, that children of the place would resort to the turntable to play, and that if they did they would or might be injured, then, if they took no means to keep the children away, and no means to prevent accidents, they would be guilty of negligence, and would be answerable for damages caused to children by such negligence. Counsel for the defendant disclaim resting their defense on the ground that the plaintiff's parents were negligent, or that the plaintiff (considering his tender age) was negligent, but rest their defense upon the ground that the company was not negligent, and claim that the injury to the plaintiff was accidental, or brought upon himself. The defendants are not insurers of the limbs of those, whether adults or children, who may resort to their grounds; and there are many injuries continually happening which involve no pecuniary liability to any one.

To find against the defendant you must find that it has been guilty of neglect, of a wrong, of a want of due and proper care in the construction of machinery of a dangerous character, and, so leaving it exposed as before explained, that, as reasonable men, the officers of the road ought to have foreseen that an accident, happening as this happened, would probably occur, or be likely to happen.

The second trial resulted in a verdict for the plaintiff for $7,500. The court signed a bill of exceptions, a writ of error was sued out, and the case was carried to the Supreme Court of the United States. Here the opinion was delivered by

MR. JUSTICE HUNT. * * * Was there negligence on the part of the railway company in the management or condition of its turntable?

On this point the judge charged the jury that to maintain the action it must appear by the evidence that the turntable, 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 defendant was not liable for negligence; that it was further to consider whether, situated as was the defendant's 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

it 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.

The charge was an impartial and intelligent one. Unless the defendant was entitled to an order that the plaintiff be nonsuited, or, as it is expressed in the practice of the United States courts, to an order directing a verdict in its favor, the submission was right. If, upon any construction which the jury was authorized to put upon the evidence, or by any inferences they were authorized to draw from it, the conclusion of negligence can be justified, the defendant was not entitled to this order, and the judgment cannot be disturbed. To express it affirmatively, if from the evidence given it might justly be inferred by the jury that the defendant, in the construction, location, management or condition of its machine had omitted that care and attention to prevent the occurrence of accidents which prudent and careful men ordinarily bestow, the jury was at liberty to find for the plaintiff.

That the turntable was a dangerous machine, which would be likely to cause injury to the 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 turntable on other occasions, and within the observation and to the knowledge of the employés 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 turntable 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 turntables 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. * * *[54]

Upon the whole case, the judgment must be affirmed.

FROST v. EASTERN R. R.

(Supreme Court of New Hampshire, 1886. 64 N. H. 220, 9 Atl. 790, 10 Am. St. Rep. 396.)

Case, for personal injuries from the alleged negligence of the defendants in not properly guarding and securing a turn-table. The plaintiff, who sues by his father and next friend, was seven years old when the accident occurred. Plea, the general issue. A motion for a nonsuit was denied, and the defendants excepted. Verdict for the plaintiff.[55]

CLARK J. * * * The ground of the action is, that the defendants were guilty of negligence in maintaining a turn-table insecurely

[54] Parts of the opinion of Justice Hunt are omitted.

"Ownership of property may carry with it the right of the owner to use, and to exclude others from the use of, the property; but, however exclusive may be the owner's rights, he is subject always to the maxim, 'Sic utere tuo ut alienum non lædas.' Common prudence forbids that one may arrange, even on his own premises, that which he knows, or in the exercise of common judgment and prudence ought to know, will naturally attract others into unsuspected danger of great bodily harm. It is the apparent probability of danger, rather than rights of property, that determines the duty and measure of care required of the author of such a contrivance; for ordinarily the duty of avoiding known danger to others may, under some circumstances, operate to require care for persons who may be at the place of danger without right.

"The averments of this complaint bring the case within the influence of Railroad Co. v. Stout (1873) 17 Wall. 657, 21 L. Ed. 745, which is a leading authority in affirmation of the possible liability of railroad companies for negligence in cases of injury to infants trespassing on turntables. As appears from cases cited in briefs of counsel, there has been a parting of the ways of judicial opinion concerning the soundness of the decision in Stout's Case. Some courts have repudiated, though numerous others have followed, it. We adopt as sound the doctrine there announced concerning both the duty of railroad companies towards infants, and the mode in which the question of negligence should be tried." Per Sharpe, J., in Alabama G. S. R. Co. v. Crocker (1901) 131 Ala. 584, 31 South. 561, 563.

[55] Only so much of the case is given as relates to the one point.

guarded, which, being wrongfully set in motion by older boys, caused an injury to the plaintiff, who was at that time seven years old, and was attracted to the turn-table by the noise of the older and larger boys turning and playing upon it. The turn-table was situated on the defendants' land, about sixty feet from the public street, in a cut with high, steep embankments on each side; and the land on each side was private property and fenced. It was fastened by a toggle, which prevented its being set in motion unless the toggle was drawn by a lever, to which was attached a switch padlock, which being locked prevented the lever from being used unless the staple was drawn. At the time of the accident the turn-table was fastened by the toggle, but it was a controverted point whether the padlock was then locked. When secured by the toggle and not locked with the padlock, the turn-table could not be set in motion by boys of the age and strength of the plaintiff.

Upon these facts we think the action cannot be maintained. The alleged negligence complained of relates to the construction and condition of the turn-table, and it is not claimed that the defendants were guilty of any active misconduct towards the plaintiff. The right of a landowner in the use of his own land is not limited or qualified like the enjoyment of a right or privilege in which others have an interest, as the use of a street for highway purposes under the general law, or for other purposes under special license (Moynihan v. Whidden, 143 Mass. 287, 9 N. E. 645), where care must be taken not to infringe upon the lawful rights of others. At the time of his injury the plaintiff was using the defendants' premises as a playground without right. The turn-table was required in operating the defendants' railroad. It was located on its own land so far removed from the highway as not to interfere with the convenience and safety of the public travel, and it was not a trap set for the purpose of injuring trespassers. Aldrich v. Wright, 53 N. H. 404, 16 Am. Rep. 339. Under these circumstances, the defendants owed no duty to the plaintiff; and there can be no negligence or breach of duty where there is no act or service which the party is bound to perform or fulfil. A landowner is not required to take active measures to insure the safety of intruders, nor is he liable for an injury resulting from the lawful use of his premises to one entering upon them without right. A trespasser ordinarily assumes all risk of danger from the condition of the premises; and to recover for an injury happening to him he must show that it was wantonly inflicted, or that the owner or occupant, being present and acting, might have prevented the injury by the exercise of reasonable care after discovering the danger. Clark v. Manchester, 62 N. H. 577; State v. Railroad, 52 N. H. 528; Sweeny v. Railroad, 10 Allen, 368, 87 Am. Dec. 644; Morrissey v. Railroad, 126 Mass. 377, 30 Am. Rep. 686; Severy v. Nickerson, 120 Mass. 306, 21 Am. Rep. 514; Morgan v. Hallowell, 57 Me. 375; Pierce v. Whitcomb, 48 Vt. 127, 21 Am. Rep. 120; McAlpin v. Powell, 70 N.

Y. 126, 26 Am. Rep. 555; St. L., V. & T. H. R. R. Co. v. Bell, 81 Ill. 76, 25 Am. Rep. 269; Gavin v. Chicago, 97 Ill. 66, 37 Am. Rep. 99; Wood v. School District, 44 Iowa, 27; Gramlich v. Wurst, 86 Pa. 74, 27 Am. Rep. 684; Cauley v. P. C. & St. Louis Railway Co., 95 Pa. 398, 40 Am. Rep. 664; Gillespie v. McGowan, 100 Pa. 144, 45 Am. Rep. 365; Mangan v. Atterton, L. R. 1 Ex. 239. The maxim that a man must use his property so as not to incommode his neighbor, only applies to neighbors who do not interfere with it or enter upon it. Knight v. Abert, 6 Pa. 472, 47 Am. Dec. 478. To hold the owner liable for consequential damages happening to trespassers from the lawful and beneficial use of his own land would be an unreasonable restriction of his enjoyment of it.

We are not prepared to adopt the doctrine of Railroad Co. v. Stout, 17 Wall. 657, 21 L. Ed. 745, and cases following it, that the owner of machinery or other property attractive to children is liable for injuries happening to children wrongfully interfering with it on his own premises.[56] The owner is not an insurer of the safety of infant

[56] On the diversity of doctrine here see 29 Cyc. 447, 448, and the cases there cited.

The "turntable" doctrine was elaborately considered in Ryan v. Towar (1901) 128 Mich. 463, 87 N. W. 644, 55 L. R. A. 310, 92 Am. St. Rep. 481. The court, by a majority of one, ruled against the new doctrine. Said Hooker, J., speaking for the majority: "Mere toleration of a trespass does not alone constitute a license even, certainly not an invitation. 1 Thomp. Neg. (2d Ed.) § 1050, and note. The pedestrians who insist upon risking their lives by making a footpath of a railroad track, and others who habitually shorten distances by making footpaths across the corners of village lots, are none the less trespassers because the owners do not choose to resent such intrusion, and be to the expense and trouble of taking effective measures to prevent it. There is no more lawless class than children, and none more annoyingly resent an attempt to prevent their trespasses. The average citizen has learned that the surest way to be overrun by children is to give them to understand that their presence is distasteful. The consequence is that they roam at will over private premises, and, as a rule, this is tolerated so long as no damage is done. The remedy which the law affords for the trifling trespasses of children is inadequate. No one ever thinks of suing them, and to attempt to remove a crowd of boys from private premises by gently laying on of hands, and using no more force than necessary to put them off, would be a roaring farce, with all honors to the juveniles. For a corporation with an empty treasury, and overwhelmed with debt, to be required to be to the expense of preventing children from going across its lots to school, lest it be said that it invited and licensed them to do so, is to our minds an unreasonable proposition. As to this question of license or invitation, there is no difference between children and adults. * * * May a man keep a ladder, or a grindstone, or a scythe, or a plow, or a reaper, without danger of being called upon to reward trespassing children, whose parents owe and may be presumed to perform the duty of restraint? Does the new rule go still further, and make it necessary for a man to fence his gravel pit or quarry? And, if so, will an ordinary fence do, in view of the known propensity and ability of boys to climb fences? Can a man nowadays safely own a small lake or fishpond? and must he guard ravines and precipices upon his land? Such is the evolution of the law, less than 20 years after the decision of Railroad Co. v. Stout (1873) 17 Wall. 657, 21 L. Ed. 745, when, with due deference, we think some of the courts left the solid ground of the rule that trespassers cannot recover for injuries received, and due merely to negligence of the persons trespassed upon. * * *"

trespassers. One having in his possession agricultural or mechanical tools is not responsible for injuries caused to trespassers by careless handling, nor is the owner of a fruit tree bound to cut it down or enclose it, or to exercise care in securing the staple and lock with which his ladder is fastened, for the protection of trespassing boys who may be attracted by the fruit. Neither is the owner or occupant of premises upon which there is a natural or artificial pond, or a blueberry pasture, legally required to exercise care in securing his gates and bars to guard against accidents to straying and trespassing children. The owner is under no duty to a mere trespasser to keep his premises safe; and the fact that the trespasser is an infant cannot have the effect to raise a duty where none otherwise exists. "The supposed duty has regard to the public at large, and cannot well exist as to one portion of the public and not to another, under the same circumstances. In this respect children, women, and men are upon the same footing. In cases where certain duties exist, infants may require greater care than adults, or a different care; but precautionary measures having for their object the protection of the public must as a rule have reference to all classes alike." Nolan v. N. Y. & N. H. & H. Railroad Co., 53 Conn. 461, 4 Atl. 106.

There being no evidence to charge the defendants with negligence, the motion for a nonsuit should have been granted.

COOKE v. MIDLAND GREAT WESTERN RY. OF IRELAND.

(House of Lords. [1909] A. C. 229.)

A railway company kept a turntable unlocked on their land close to a public road. The company's servants knew that children were in the habit of trespassing and playing with the turntable, to which they obtained easy access through a well-worn gap in a fence which the railway company were bound by statute to maintain. A four year old boy playing with other children on the turntable was seriously hurt under circumstances disclosed in the opinions which follow. The child by his father brought an action against the railway company for the injury thus sustained.

At the trial before Lord O'Brien, C. J., the jury found a verdict for the plaintiff for £550, and judgment was entered accordingly. The jury found that the fence was in a defective condition through the negligence of the defendants; that the plaintiff was allured through the hedge and up to the turntable by the negligence of the defendants; and that it was by reason of the defendants' negligence that the misfortune occurred. This judgment was affirmed by the King's Bench Division in Ireland (Palles, C. B., and Johnson, J.; Kenny, J., dissenting), but was set aside by the Court of Appeal in Ireland (Sir S.

Walker, L. C., and Fitz Gibbon and Holmes, L. JJ.). Hence this appeal by the plaintiff.[57]

LORD MACNAGHTEN. My Lords, the only question before your Lordships is this: Was there evidence of negligence on the part of the company fit to be submitted to the jury? If there was, the verdict must stand, although your Lordships might have come to a different conclusion on the same materials.

I cannot help thinking that the issue has been somewhat obscured by the extravagant importance attached to the gap in the hedge, both in the arguments of counsel and in the judgments of some of the learned judges who have had the case under consideration. That there was a gap there, that it was a good broad gap some three feet wide, is, I think, proved beyond question. But of all the circumstances attending the case it seems to me that this gap taken by itself is the least important. I have some difficulty in believing that a gap in a roadside fence is a strange and unusual spectacle in any part of Ireland. But however that may be, I quite agree that the insufficiency of the fence, though the company was bound by Act of Parliament to maintain it, cannot be regarded as the effective cause of the accident.

The question for the consideration of the jury may, I think, be stated thus: Would not a private individual of common sense and ordinary intelligence, placed in the position in which the company were placed, and possessing the knowledge which must be attributed to them, have seen that there was a likelihood of some injury happening to children resorting to the place and playing with the turntable, and would he not have thought it his plain duty either to put a stop to the practice altogether, or at least to take ordinary precautions to prevent such an accident as that which occurred?

This I think was substantially the question which the Lord Chief Justice presented to the jury. It seems to me to be in accordance with the view of the Court of Queen's Bench in Lynch v. Nurdin, 1 Q. B. 29, and the opinion expressed by Romer and Stirling, L. JJ., in McDowall v. Great Western Ry. Co., [1903] 2 K. B. 331.

The Lord Chancellor of Ireland puts Lynch v. Nurdin aside. He holds that it bears no analogy to the present case, because the thing that did the mischief there was a "cart in the public street—a nuisance." But no question of nuisance was considered in Lynch v. Nurdin. That point was not suggested. The ground of the decision is a very simple proposition. "If," says Lord Denman, "I am 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 so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably

[57] The statement of the facts is abridged and the arguments of counsel and parts of the opinions of Lord Macnaghten and Lord Loreburn, L. C., are omitted.

against the first." If that proposition be sound, surely the character of the place, though, of course, an element proper to be considered, is not a matter of vital importance. It cannot make very much difference whether the place is dedicated to the use of the public or left open by a careless owner to the invasion of children who make it their playground.

I think the jury were entitled and bound to take into consideration all the circumstances of the case,—the mode in which the turntable was constructed; its close proximity to the wall by which the plaintiff's leg was crushed; the way in which it was left, unfenced, unlocked, and unfastened; the history of this bit of ground and its position, shut off as it was by an embankment from the view of the company's servants at the station, and lying half derelict. After the construction of the embankment it served no purpose in connection with the company's undertaking, except that at one time a corner of it was used as a receptacle for some timber belonging to the company, and afterwards as a site for this turntable. In other respects, and apart from these uses, it seems to have been devoted or abandoned to the sustenance of the railway inspector's goat and the diversion of the youth of Navan. It is proved that in spite of a notice board idly forbidding trespass it was a place of habitual resort for children, and that children were frequently playing with the timber, and afterwards with the turntable. At the date of the trial, twelve months after the accident, a beaten path leading from the gap bore witness both to the numbers that flocked to the spot and to the special attraction that drew children to it. It is remarkable that not a single word of cross examination as to either of these points was addressed to the principal witnesses for the plaintiff, Tully, the herd, and Gertrude Cooke, the plaintiff's sister; nor was any explanation or evidence offered on the part of the company. Now the company knew, or must be deemed to have known, all the circumstances of the case and what was going on. Yet no precaution was taken to prevent an accident of a sort that might well have been foreseen and very easily prevented. They did not close up the gap until after the accident. Then it was the first thing thought of. But it was too late. They did not summon any of the children who played there, or bring them before the magistrates, as a warning to trespassers and a proof that they were really in earnest in desiring to stop an objectional practice which had gone on so long and so openly. They did not have their turntable locked automatically in the way in which Mr. Barnes, C. E., whose evidence is uncontradicted, says it is usual to lock such machines. The table, it seems, was not even fastened. There was a bolt; but if Cooke, the father of the plaintiff is to be believed, the bolt was rusty and unworkable. * * *

It seems to me that the Chief Justice would have been wrong if he had withdrawn the case from the jury. I think the jury were entitled, in view of all the circumstances, on the evidence before them, uncon-

tradicted as it was, to find that the company were guilty of negligence. I am therefore of the opinion that the finding of the jury should be upheld, and judgment under appeal reversed, with pauper costs here, and costs below; and I move your Lordships accordingly.

I will only add that I do not think that this verdict will be followed by the disastrous consequences to railway companies and landowners which the Lord Chancellor of Ireland seems to apprehend. Persons may not think it worth their while to take ordinary care of their own property, and may not be compellable to do so; but it does not seem unreasonable to hold that, if they allow their property to be open to all comers, infants as well as children of maturer age, and place upon it a machine, attractive to children and dangerous as a plaything, they may be responsible in damages to those who resort to it with their tacit permission, and who are unable, in consequence of their tender age, to take care of themselves.

Lord Collins. My Lords, this case has given rise to much difference of view, the Lord Chief Justice, who tried the case, the Lord Chief Baron, and Johnson, J., being in favour of the plaintiff, and three judges of the Court of Appeal and Kenny, J., in the Divisional Court, in favour of the defendants. I am of opinion that there was evidence of actionable negligence fit for the consideration of a jury. I think there was evidence that the turntable, fastened as it was only by a bolt so easily withdrawn, was a dangerous thing for young children to play with, and that the defendants, as reasonable men, ought to have known it; and that, situate as it was in such a conspicuous place, and frequented so largely by young people without remonstrance by the defendants, with easy access from the Bridge Road through a gap in the hedge and along a well-trodden path down the embankment, it could hardly fail to present an irresistible attraction to young persons. I think all these facts in combination were evidence from which the jury might well infer not merely a license, but an invitation, which fixed the defendants with a high responsibility towards those people to whom such an invitation would mainly appeal, namely, those who from their tender age would be deemed incapable of caution and therefore of contributory negligence. I have not forgotten the evidence that on one occasion persons playing on the spot were warned off, or that there was a notice board near the gate leading from the high road which may have contained a caution, but the bearing of these facts was for the jury. I am aware of the mischief, so much dwelt upon by Mr. Ronan in his brilliant argument, of making it difficult for landowners to admit the public to enjoy the amenities of their private domains. But every case of this kind must be dealt with on its special facts, and the line of legal immunity will, I think, be found to coincide with the line of common sense, of which juries are very capable judges. Tempting or even allowing children to make a plaything of a dangerous machine without taking adequate, or indeed any precautions, against the probable danger of mischief through their

imprudence is a form of benevolence which ought not to be encouraged. The Supreme Court of America has affirmed the liability of the railway company in a case as nearly as possible identical in its facts with that under appeal: Railway Co. v. Stout (1873) 17 Wall. 657, 21 L. Ed. 745, and the principle of allurement in the case of children has been recognized in our own Court of Appeal: Jewson v. Gatti, 2 Times L. R. 441.

With unfeigned respect to the Court of Appeal, I think they have hardly given sufficient weight to the special considerations applicable in the case of young children as distinguished from adults.

LORD LOREBURN, L. C. My Lords, I am content to act upon the opinion of my learned and noble friend LORD MACNAGHTEN, having regard to the peculiar circumstances, namely that this place, on which the defendants had a machine, dangerous unless protected, was to the defendants' knowledge an habitual resort of children, accessible from the high road near thereto, as well as attractive to the youthful mind; and that the defendants took no steps either to prevent the children's presence or to prevent their playing on the machine, or to lock the machine so as to avoid accidents, though such locking was usual. I must add that I think this case is near the line. The evidence is very weak, though I cannot say there was none. It is the combination of the circumstances to which I have referred which alone enables me to acquiesce in the judgment proposed by my noble and learned friend LORD MACNAGHTEN. * * *[58]

Order of the Irish Court of Appeal reversed, and the verdict and judgment entered for the plaintiff by the Lord Chief Justice of Ireland restored, with pauper costs here and costs below.

ANDERSON v. FT. DODGE, D. M. & S. R. CO.

(Supreme Court of Iowa, 1911. 150 Iowa, 465, 130 N. W. 391.)

WEAVER, J. The defendant operates an electric railway through the city of Boone. At or near its station in that city and by the side of one of its tracks the company maintains or uses a storage house or building, the roof of which is about on a level with the roof of an ordinary box car standing on the adjacent track. At the height of four feet above the top of this building there are strung some of the company's electric wires which do not appear to have been protected by insulation. The injury of which plaintiff complains occurred May 22, 1909. He was then a lad of 12 years and 3 months. On the evening in question a box car was standing near the storage building, and plaintiff, with three other boys, was idling or playing in that vicinity. Climbing to the top of the box car, one of his companions dared or "stumped" plaintiff to follow him, and jumped across the

[58] Lord Atkinson's opinion, concurring in the result, is omitted.

intervening space to the roof of the building. Plaintiff performed the feat, and in turning to jump back again came into contact with a wire, receiving a severe shock, and, as he claims, resulting injury. Recovery of damages from the defendant is demanded on the theory that it was negligent in the construction and maintenance of the building and track and in its manner of caring for and managing its said premises; that it was also negligent, in that with knowledge of the danger to be apprehended from said wires it placed and left its cars in such manner as to invite children to play thereon, and expose them to injury; and that it was further negligent in leaving the wires uncovered without notice or warning to put the plaintiff or other persons passing that way upon their guard to avoid injury. These allegations are stated with many repetitions, but to the same substantial effect.

The plaintiff, who seems to be a boy of average intelligence and quickness of perception, says he and other boys had frequently been at or about this railway station, and had there indulged in more or less of youthful sport and play. They had at times jumped back and forth between the station platform and standing cars, but, so far as the record shows, had never before attempted the jump from a car top to the roof of the storage building. He says he did not play there thinking he had any right to do so, and knew the railway men would drive him off if they saw him. It does not appear that he was aware of the wires strung above the roof, and either from heedlessness or from the darkness of the evening failed to discover them before his injury, though he says he knew there was danger in electric wires. The testimony of the boys who were playing with plaintiff at the time of his injury corroborates his story in most respects. The evidence tends to show that the wires were not insulated, and were not guarded to prevent contact with them by any person crossing the roof, and no warning notice was posted there. There was also expert testimony that the defendant's wires were strung lower than is usually done in building such systems, and that they are "too low to be safe."

The motion for a directed verdict which the trial court sustained was based on the grounds: (1) That the evidence did not tend to show negligence on the part of the defendant. (2) That the evidence did show plaintiff to have contributed to his injury by his own recklessness and negligence. (3) That plaintiff at the time of his injury was a trespasser and upon defendant's premises without license, and that defendant owed him no duty or care under the circumstances as shown and admitted by his own testimony.

Giving plaintiff the benefit of the most favorable construction which can be placed upon the testimony, we are compelled to hold that he failed to make a case upon which a verdict in his favor could be sustained. It is true that the courts of the several states are arrayed in apparently irreconcilable conflict upon the question how far, if at all, the ancient doctrine which exonerates a property owner from the duty of considering or caring for the safety of a trespasser upon his

premises is applicable where the injured person is a young child who has been attracted to the place of danger by conditions and circumstances created or permitted by the owner, and especially where the owner knows, or as a reasonable person ought to apprehend, the danger of resultant injury to children too young and inexperienced to understand the fact or meaning of trespass or to exercise judgment or care for their own safety. This court has definitely committed itself to the doctrine first clearly affirmed in this country by Dillon, J., in Stout v. Railroad Co., 2 Dill. 294, Fed. Cas. No. 13,504, and affirmed on appeal in 17 Wall. 657, 21 L. Ed. 745. That under some circumstances the rule as to injury to trespassers will not be applied to young children who are led or attracted to the premises of another by the act or omission of the owner. See Edgington v. Railroad Co., 116 Iowa, 410, 90 N. W. 95, 57 L. R. A. 561; Fishburn v. Railroad Co., 127 Iowa, 483, 103 N. W. 481. But the rule of these cases has never been so far extended as to cover injuries received in the manner disclosed by this record. The plaintiff in this case was in his thirteenth year, and, while it would perhaps be too much to say that we can assume as a matter of law that a boy of such age is sufficiently mature to be chargeable with contributory negligence, his evidence clearly discloses that he appreciated the fact that he was a trespasser, and that he would be ordered away if discovered. It shows, also, that he knew the railroad was operated by electric power, and knew the dangerous character of wires charged with electricity. So far as appears, this roof had never been used by him or any of his companions as a resort for play or frolic. There was nothing to suggest to the railway company any necessity for guarding the roof of its building against such visitors or to indicate the propriety of placarding its property with notices or warning against injury from wires stretched far above the ground where contact was possible only by climbing to the top of its storehouse.

To say that a property owner must guard against such injury to a trespassing boy simply because it is possible for him in a venturesome spirit to climb into the zone of danger would be intolerable. In every dooryard and on every street side are shade and ornamental trees. To climb trees is as natural to the average boy as to a squirrel. Such sport is always attended with danger that the climber may lose his hold or break a branch and fall to his severe injury. Not infrequently it may bring him to an elevation where he is exposed to contact with wires carrying electric currents of greater or less intensity. If he falls and breaks his bones, or if he receives a stunning shock of electricity, ought the owner of the tree to be held liable in damages because he did not guard it against the approach of the lad, or because he did not give notice or warning in some way of the dangers to be apprehended in climbing it? No court has ever gone to such an extent, and the establishment of such rule would render the ownership of real estate a very undesirable investment. See Merryman v. Railroad Co.,

85 Iowa, 634, 52 N. W. 545; Masser v. Railroad Co., 68 Iowa, 602, 27 N. W. 776; Carson v. Railroad Co., 96 Iowa, 583, 65 N. W. 831; Brown v. Canning Co., 132 Iowa, 634, 110 N. W. 12; Keefe v. Electric Co., 21 R. I. 575, 43 Atl. 542; Sullivan v. Railroad Co., 156 Mass. 378, 31 N. E. 128.

As the plaintiff's own case reveals him as a conscious trespasser upon defendant's premises, and there is an utter absence of testimony that defendant kept or maintained anything on the roof of its building to attract or draw children thereto, or that it in any manner encouraged, invited, or permitted such use of the roof, he was not entitled to go to the jury, and the court did not err in directing a verdict against him. The same result would have to be reached on the ground of contributory negligence had there been anything in the record tending to show negligence on the part of the defendant.

Affirmed.

BJORK v. CITY OF TACOMA.

(Supreme Court of Washington, 1913. 76 Wash. 225, 135 Pac. 1005, 48 L. R. A. [N. S.] 331.)

ELLIS, J. In this action, the plaintiff seeks to recover damages on account of the death of his minor son, alleged to have been caused through the negligence of the defendant. It is admitted that the city of Tacoma was, at the time of the accident in question, and for years had been, the owner of and operating a water system for supplying water to its inhabitants and, as a part of its system, maintained a wooden flume carrying water from the sources of supply to its reservoir. This flume runs along the middle of an uninclosed right of way between Clement and Alder streets in the city. The flume was in the form of a box about 24 inches square, and the top, at the place of the accident, was level with or a little above the surface of the ground. Prior to 1908, before the city water pipes had been laid along Clement avenue, residents of that district were accustomed, with the city's permission and for pay, to obtain water from the flume through a hole 24 inches square cut in the top of the flume. The wooden cover over this hole was on hinges and furnished with a padlock, and the people so supplied with water were provided with keys and required by the city to keep the cover at all times locked. When the city water was piped to the various residences in this section, this use of the flume was abandoned and the cover of the opening was nailed down. At the time of the accident, the hinges had rusted off, there was no padlock, and the nails which had held the cover in place had rusted and were, as one witness testified, "stubs of nails." One witness, a boy of ten, testified that this cover had been off and the hole open continuously for two or three weeks. Other

witnesses contradicted this, and the plaintiff and his wife testified that they had never seen it open at any time before the accident. The water running in the flume was about 18 inches in depth. The right of way was open so that any one who desired had access to it, and it had become, prior to the accident, a regular playground for the children of the neighborhood. The plaintiff lived with his family on the east side of Clement avenue in sight of the flume, and there was no fence or obstruction of any kind between his residence and the flume right of way which ran parallel with and contiguous to the avenue on the west.

On the morning of June 23, 1911, the deceased, a child a little under three years old, and another boy of about the same age, were playing along the flume. A witness who was working on the roof of a house about 300 feet from the scene of the accident saw the boys running along the flume, and, when they came to the spot where the witness supposed the cover to be, they "took a jump," as he said, and then ran back, repeating the performance. Finally he saw only one of the boys running toward the Bjork house, evidently seeking assistance, and Mrs. Bjork, the boy's mother, came out screaming and ran toward the hole. Several persons, attracted by her cries, ran to the place where the boy had fallen in, and one of them, surmising what had happened, ran down to another opening in the flume near the power house, where, with the assistance of one of the employés of the power plant, he lifted the cover from that opening and found the child lying face downward, drowned.

At the conclusion of the testimony on behalf of the plaintiff, the defendant moved for a nonsuit on the ground that the evidence failed to establish actionable negligence on the city's part. The motion was granted. From the judgment of nonsuit the plaintiff prosecutes this appeal.

Eliminating the questions of notice to the city and contributory negligence of the parents of the child, which, under the evidence, were clearly for the jury, there is but one question presented for our consideration: Was the opening in the flume, exposing a constantly flowing stream of water beneath, in an unfenced right of way contiguous for a long distance to a public street in the city and permitted to be used as a common playground by the children of the neighborhood, a thing of such location and character as to be attractive and alluring to small children so that danger therefrom should have been reasonably anticipated and guarded against by the city?

The city, in the maintenance and operation of its waterworks, was acting in a proprietary and not a governmental capacity. Its liability must therefore be the same as that of a private owner under the same circumstances.

That the child, a mere baby, was a technical trespasser, or at most a mere licensee, is an immaterial circumstance. A child attracted to premises open and unguarded in a populous neighborhood by things

maintained thereon enticing to the childish curiosity and instincts is not a culpable trespasser in any sound sense. This is against the weight of authority when measured in mere numbers, which holds the child to the rule applied to the adult who, when injured while trespassing upon the premises of a defendant, can recover damages only when the injury was wanton or was due to recklessly careless conduct on the defendant's part. But, as said by a candid text-writer: "This cruel and wicked doctrine, unworthy of a civilized jurisprudence, puts property above humanity, leaves entirely out of view the tender years and infirmity of understanding of the child, indeed his inability to be a trespasser in sound legal theory, and visits upon him the consequences of his trespass just as though he were an adult, and exonerates the person or corporation upon whose property he is a trespasser from any measure of duty towards him which they would not owe under the same circumstances towards an adult." 1 Thompson on Negligence (2d Ed.) § 1026. The same writer, after admitting the fact that in many jurisdictions the doctrine of trespass as a defense, even as applied to small children, must be regarded as established law, scathingly reprobating the doctrine as barbarous, says: "Nevertheless, a few decisions of enlightened and humane courts are found, more or less tending to the conclusion that the owner of any machine or other thing which, from its nature, is especially attractive to children, who are likely to play with it in obedience to their childish instincts, and yet which is especially dangerous to them, is under the duty of exercising reasonable care to the end of keeping it fastened, guarded, or protected so as to prevent them from injuring themselves while playing or coming in contact with it." 1 Thompson on Negligence (2d Ed.) § 1031.

The more humane rule, as expressed in another text, has met with our unqualified approval: "The owner of land where children are allowed or accustomed to play, particularly if it is unfenced, must use ordinary care to keep it in a safe condition, for they, being without judgment and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers, and mere licensees." Shearman & Redfield on Negligence (6th Ed.) § 705. "A child of tender years, who meets with an injury upon the streets or upon the premises of a private owner, though a technical trespasser, may recover for such injury if the thing causing it has been left exposed and unguarded near the playgrounds or haunts of children and is of such a character as to be alluring or attractive to them, or such as to appeal to childish curiosity and instincts; this on the principle that children of tender years, 'being without judgment and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers, and mere licensees.'" Haynes v. Seattle, 69 Wash. 419, 125 Pac. 147.

The above quotation and the sustaining citations show that the fact that the accident there involved happened in a public street was

not regarded as a controlling or even material circumstance. Ilwaco Ry. & Nav. Co. v. Hedrick, 1 Wash. 446, 25 Pac. 335, 22 Am. St. Rep. 169; McAllister v. Seattle Brewing & Malting Co., 44 Wash. 179, 87 Pac. 68.

We intentionally refrain from citing Nelson v. McLellan, 31 Wash. 208, 71 Pac. 747, 60 L. R. A. 793, 96 Am. St. Rep. 902, Akin v. Bradley Eng. & Mach. Co., 48 Wash. 97, 92 Pac. 903, 14 L. R. A. (N. S.) 586, and Olson v. Gill Home Invest. Co., 58 Wash. 151, 108 Pac. 140, 27 L. R. A. (N. S.) 884, the dynamite cases, as sustaining this rule, because, though they do sustain it in principle, the agency there involved was so inherently dangerous as to render those cases in any event soundly sustainable upon the ground of reckless conduct on the defendants' part.

The turntable and machinery cases, however, are in no just sense sui generis. They rest, as it seems to us, upon the one broad principle common to all cases of injury from dangerous premises and all cases of so-called "attractive nuisances"—that there is always a duty due to society upon the owner of premises to take reasonable care to so use his own as not to injure another, a failure to observe which is negligence. 1 Thompson, Negligence (2d Ed.) §§ 1033 and 1036; Hydraulic Works v. Orr, 83 Pa. 332; Bransom's Adm'r v. Labrot, 81 Ky. 638, 50 Am. Rep. 193; Union Pac. Ry. Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434; Biggs v. Consolidated Barb-Wire Co., 60 Kan. 217, 56 Pac. 4, 44 L. R. A. 655.

We cannot say, as a matter of law, that the opening in the flume was not in its nature a thing reasonably to be anticipated as enticing to young children. Whether it was or not is a question for the jury. This case is closely analogous to that of Pekin v. McMahon, Adm'r, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. Rep. 114. That case arose from the drowning of a child of tender years in a pond on uninclosed premises owned by the city. The pond was in a populous part of the city near a driveway where children were accustomed to play. The city was held liable upon the doctrine of the turntable cases, and the question whether the attractiveness of the dangerous premises was such as to entice children and such as to suggest to the defendant the probability of such an occurrence was held one for the jury. See, also, Price v. Atchison Water Co., 58 Kan. 551, 50 Pac. 450, 62 Am. St. Rep. 625.

We are not impressed with the argument based upon Salladay v. Old Dominion Copper Mining & Smelting Co., 12 Ariz. 124, 100 Pac. 441, in which it was held that maintaining an open flume on private premises did not render the owner liable for the drowning therein of a small child. The court seems to have been influenced by the fact that there are many open flumes and ditches in Arizona necessary to irrigation and mining, and held that it would be against public policy to extend the doctrine of the turntable cases to such flumes

and ditches. But, assuming the soundness of that decision, it seems to us that a distinction between an open flume carrying a stream of shallow water or an irrigating ditch, and an inclosed box with an opening such as is here maintained on premises used as a common playground in a populous city, may be soundly made, both by reason of its location and its greater danger. A child falling into such a hole obviously had no chance either of rescue or escape

The case of Gordon v. Snoqualmie Lumber & Shingle Co., 59 Wash. 272, 109 Pac. 1044, 29 L. R. A. (N. S.) 88, chiefly relied upon by the respondent, though carrying the doctrine of immunity as a matter of law to a considerable extent, by no means goes as far as we are asked to extend it in this case. It was there held that the safeguards were such and the location of the barrel of hot water was such that the defendant could not reasonably be expected to anticipate the danger. In fact, there was no danger if the plug in the barrel had been secure, and there was no evidence imputing notice to the defendant that the plug was not secure. That this was the determinative factor in that case is shown by the following language there used: "It is not shown what caused the plug to come out, and there is no showing of notice or opportunity of notice to respondent of a defective condition of the barrel or plug."

In the case before us, there was evidence that the hole had been open continuously for two or three weeks before the accident—a time amply sufficient to warrant a jury in imputing notice. While there was evidence to the contrary, the credibility of the witnesses and the weight of the evidence were for the jury.

The case of Curtis v Tenino Stone Quarries, 37 Wash. 355, 79 Pac. 955, is also distinguishable. The quarry was not in a city and was 200 feet from any highway or public ground. It was not permitted to be used as a common playground, nor was it near one. The child had been driven away a short time before the accident. The distinction is plain.

We will not attempt a review of the many authorities cited from other jurisdictions. As we have seen, the rule in many jurisdictions is contrary to that adopted here, and the decisions cannot be harmonized We are constrained to hold that a cause of action was stated and supported by sufficient proof to put the respondent to its defense.

The judgment is reversed.

(B) Duty of Care Towards a Licensee

CORBY v. HILL.

(Court of Common Pleas, 1858. 4 C. B. [N. S.] 556, 114 R. R. 849, 140 Reprint, 1209.)

This was an action against the defendant for negligently leaving certain slates upon a certain road, whereby the plaintiff's horse was injured. The declaration stated

that before and at the time when &c., the plaintiff was lawfully possessed of a certain carriage, and of a certain horse drawing the said carriage which said horse and carriage were under the government and direction of a servant of the plaintiff, and which said horse and carriage were then, with the consent of the owners and occupiers of the land and road and carriage line thereinafter mentioned, during the night time, under such care and government as aforesaid, lawfully in and lawfully being driven along certain land and along a certain road or carriage line, part of and crossing the said land then belonging to and occupied by certain persons other than the plaintiff and the defendant, and leading to a certain public building known as the Hanwell Lunatic Asylum, for the purpose of proceeding to the said building, that the defendant then, negligently, carelessly, and improperly kept and continued upon and across the said road or carriage line, part of the said land, a stack of slates, and divers other things and materials, without placing or keeping any light or signal near them, or adopting any means whatever to show that the said slates and other material were upon or across the said land, road or carriage line; by reason whereof it was then impossible for the servant of the plaintiff to see or avoid the said slates, materials or other things; and that, by reason thereof, the said horse, drawing the said carriage, while being driven by the said servant as aforesaid, ran into, upon, and against the said stack of slates or other materials and things, and was greatly bruised, wounded, and injured: special damage.

The fourth plea stated that the defendant had lawfully placed, kept and continued the said slates, and other things and materials across the said land and road or carriage line, by the license of the owners and occupiers of said land, road or carriage line, before the consent of the owners and occupiers of the said land, road, or carriage line as in the declaration alleged; and that the said consent so given to the defendants was in full force at the time when &c.; and that the alleged damage was not sustained by any breach of duty of the defendant. Issue thereon.

The cause was tried before Byles, J., at the sittings in London after the last Term. The facts which appeared in evidence were as follows: The carriage road or way in question was a private road leading from the turnpike road to the Hanwell Lunatic Asylum and to the residence of the superintendent, Dr. Saunders. The defendant, a builder, was employed to do certain work at the asylum, and, with the consent of the owners of the land, stacked certain slates and other materials upon a portion of the road, without taking the precaution of placing a light near them at night, in consequence of which, the plaintiff's servant, who was driving a horse and carriage along the

private road to the residence of Dr. Saunders, not seeing the slates, drove against them, and seriously injured the horse.

In answer to the questions put to them by the learned Judge, the jury found that the defendant had the consent of the owners of the property for placing the slates and materials where he placed them, but upon the usual terms of properly providing for the safety of the public, or of such of the public as had permission to use the way; that there was negligence in leaving the stack without a proper light; and that negligence was chargeable upon the defendant, in conjunction with the owners of the soil.

It was insisted on the part of the defendant that the fourth plea was an answer to the action.

The learned judge directed a verdict to be entered for the plaintiff, reserving leave to the defendant to move to enter a verdict for him upon the fourth plea, if the court should be of opinion that the action would not lie under the circumstances.

Huddleston, Q. C., now moved to enter a verdict for the defendant pursuant to the leave reserved, or to arrest the judgment.

WILLES, J. I am of the same opinion. In substance the case is this: There was a road leading to a certain building, along which road persons having occasion to go to the building were accustomed to pass by leave of the owners of the soil, and were likely to pass; and the defendant, being engaged in some work upon the adjoining land, obtained leave to place slates and other materials there, either absolutely or modified in the way found by the jury, so as not to endanger persons using the road. Under that leave, the defendant placed certain slates across the road in such a way as to be likely to occasion injury to persons using the road. It is not suggested that the defendant did not know that the road was likely to be used in the way mentioned, or that he gave any notice or warning to the persons, including the plaintiff, who were accustomed and likely to use the road. The question is, whether there is any legal remedy for a person lawfully using the road, to whom injury results from the act of a third person in negligently placing an obstruction upon the road.

I should have thought that bare statement of the proposition was enough. The defendant had no right to set a trap for the plaintiff. One who comes upon another's land by the owner's permission or invitation has a right to expect that the owner will not dig a pit thereon, or permit another to dig a pit thereon, so that persons lawfully coming there may receive injury. That is so obvious that it is needless to dwell upon it. The form of declaration which I should have drawn upon such a state of facts, would have been something like this,—that there was a certain road over which the plaintiff and others having occasion to go to a certain building by license of the owners were accustomed and likely to pass, and that the defendant, knowing that, wrongfully and negligently placed certain slates and materials across the road in such a manner as to be likely to prove

dangerous to persons driving along the road, and that the plaintiff, being lawfully on the road on his way to the building, ran against the obstruction and was injured. The objections urged by Mr. Huddleston assume that the present declaration does in substance state all these facts. As to the fourth plea, it seems to me that the defendant failed to prove that he had leave and license of the owners of the soil to place the slates across the road in the way he did. I also think there is no ground for arresting the judgment. The declaration, as I read it, discloses a perfectly good cause of action, and it is not open to any of the objections urged against it. It is true it does not allege that the defendant had knowledge of the way in which the road was used. But it is perfectly clear that he did know it, and therefore the declaration would at once be amended if it were necessary. But after the remarks of my Brother WILLIAMS, the absence of that allegation would not I think make the declaration bad.

Rule refused.[59]

GAUTRET v. EGERTON et al.

JONES v. EGERTON et al.

(Court of Common Pleas, 1867. L. R. 2 C. P. 371.)

The declaration in the first of these actions stated

that the defendants were possessed of a close of land, and of a certain canal and cuttings intersecting the same, and of certain bridges across the said canal and cuttings, communicating with and leading to certain docks of the defendants, which said land and bridges had been and were from time to time used with the consent and permission of the defendants by persons proceeding towards and coming from the said docks; that the defendants, well knowing the premises, wrongfully, negligently and improperly kept and maintained the said land, canal, cuttings and bridges, and suffered them to continue and be in so improper a state and condition as to render them dangerous and unsafe for persons lawfully passing along and over said land and bridges, towards the said docks, and using the same as aforesaid; and that Leon Gautret, whilst he was lawfully in and passing and walking along the said close and over the said bridge, and using the same in the manner and for the purpose aforesaid, by and through the said wrongful, negligent and improper conduct of the defendants as aforesaid, fell into one of the said cuttings of the defendants, intersecting the said close as aforesaid, and thereby lost his life within twelve calendar months next before the suit: and the plaintiff, as administratrix, for the benefit of herself, the widow of the said Leon Gautret, and A. Gautret, &c., according to the statute in such case made and provided, claimed £2500.

The defendants demurred to the declaration, on the ground that "it does not appear that there was any legal duty or obligation on the part of the defendants to take means for preventing the said land, &c., being dangerous and unsafe." Joinder.

The declaration in Jones v. Egerton was the same as the above, and there was a like demurrer.

[59] The opinions of Cockburn, C. J., and Williams and Byles, JJ., are omitted.

Herschell, for the plaintiff Gautret: The question raised upon this declaration is, whether there is any duty on the part of the defendants towards persons using their land as the deceased here did. That may be negligence in the case of a license, which would not be negligence as against a mere trespasser: and if there can be any case in which the law would imply a duty, it is sufficiently alleged here. * * *

Potter, for the plaintiff Jones, submitted that the implied request on the part of the defendants to persons having occasion to go to the docks to pass by the way in question, raised a duty in them to keep it in a safe condition.

WILLES, J. I am of opinion that our judgment must be for the defendants in each of these cases. The argument urged on behalf of the plaintiffs, when analyzed, amounts to this, that we ought to construe the general words of the declaration as describing whatever sort of negligence the plaintiffs can prove at the trial. The authorities, however, and reason and good sense, are the other way. The plaintiff must, in his declaration, give the defendant notice of what his complaint is. He must recover secundum allegata et probata. What is it that a declaration of this sort should state in order to fulfill these conditions? It ought to state the facts upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged. It is not enough to show that the defendant has been guilty of negligence, without showing in what respect he was negligent, and how he became bound to use care to prevent injury to others. All that these declarations allege is, that the defendants were possessed of land, and of a canal and cuttings intersecting the same, and of certain bridges across the canal and cuttings, communicating with and leading to certain docks of theirs; that they allowed persons going to and from the docks, whether upon the business or for the profit of the defendants or not, to pass over the land; and that the deceased persons, in pursuance of and using that permission, fell into one of the cuttings and so met their deaths. The consequences of these accidents are sought to be visited upon the defendants, because they have allowed persons to go over their land, not alleging it to have been upon the business or for the benefit of the defendants, or as the servants or agents of the defendants; nor alleging that the defendants have been guilty of any wrongful act, such as digging a trench on the land, or misrepresenting its condition, or anything equivalent to laying a trap for the unwary passengers; but simply because they permitted these persons to use a way with the condition of which, for anything that appears, those who suffered the injury were perfectly well acquainted. That is the whole sum and substance of these declarations.

If the docks to which the way in question led were public docks, the way would be a public way, and the township or parish would be bound to repair it, and no such liability as this could be cast upon the defendants merely by reason of the soil of the way being theirs. That is so not only in reason but also upon authority. It was so held in Robbins

v. Jones, 15 C. B. N. S. 221, where a way having been for a number of years dedicated to the public, we held that the owner of an adjoining house was not responsible for death resulting to a person through the giving way of the pavement, partly in consequence of its being over-weighted by a number of persons crowding upon it, and partly from its having been weakened by user.

Assuming that these were private docks, the private property of the defendants, and that they permitted persons going to or coming from the docks, whether for their own benefit or that of the defendants, to use the way, the dedication of a permission to use the way must be taken to be in the character of a gift. The principle of law as to gifts is, that the giver is not responsible for damage resulting from the insecurity of the thing, unless he knew of its evil character at the time, and omitted to caution the donee. There must be something like fraud on the part of the giver before he can be made answerable. It is quite consistent with the declarations in these cases that this land was in the same state at the time of the accident that it was at the time the permission to use it was originally given. To create a cause of action, something like fraud must be shown. No action will lie against a spiteful man, who seeing another running into a position of danger, merely omits to warn him. To bring the case within the category of actional negligence, some wrongful act must be shown, or a breach of some positive duty; otherwise, a man who allows strangers to roam over his property would be held to be answerable for not protecting them against any danger which they might encounter whilst using the license. Every man is bound not wilfully to deceive others, or to do any act which may place them in danger. It may be, as in Corby v. Hill, 4 C. B. N. S. 556, that he is responsible if he puts an obstruction in the way which is likely to cause injury to those who by his permission use the way: but I cannot conceive that he would incur any responsibility merely by reason of his allowing the way to be out of repair. For these reasons I think these declarations disclose no cause of action against the defendants, and that the latter are therefore entitled to judgment.

KEATING, J. I am of the same opinion. It is not denied that a declaration of this sort must show a duty and a breach of that duty. But it is said that these declarations are so framed that it would be necessary for the plaintiffs at the trial to prove a duty. I am, however, utterly unable to discover any duty which the defendants have contracted towards the persons whom the plaintiffs represent, or what particular breach of duty is charged. It is said that the condition of the land and bridges was such as to constitute them a kind of trap. I cannot accede to that. The persons who used the way took it with all its imperfections.

Herschell asked and obtained leave to amend within ten days, on payment of costs; otherwise judgment for the defendants.

Judgment accordingly.

BRINILSON v. CHICAGO & N. W. RY. CO.

(Supreme Court of Wisconsin, 1911. 144 Wis. 614, 129 N. W. 664, 32 L. R. A. [N. S.] 359.)

The plaintiff's intestate, a boy of the age of five and a half years, on February 22, 1906, fell into a steam and hot water pit, constructed by the defendant in a breakwater which it maintained to protect its property along the shore of Lake Michigan in the city of Milwaukee. The boy was so badly scalded by the steam and hot water discharged into this pit from the roundhouse of the defendant near by that he died on March 5, 1906. The pit into which the boy fell was in the center of a crib in the breakwater, was about three feet in diameter at the bottom, possibly five feet in diameter at the top, and six or seven feet deep. In the previous October the defendant had removed the stone from the crib so as to form the pit above described and had laid an underground conduit from the roundhouse to the center of the pit. The pit was covered by planks which were a part of the planking covering the breakwater. The child fell into the pit through an opening about a foot wide and from six to seven feet long made by the removal of part of a plank of that size in the breakwater covering. The boy and an older brother were walking over part of the breakwater and into the railroad yards, where they looked for tin plates and some colored glass thrown from the dining cars of the defendant. The complaint alleges that the breakwater was made a pleasant promenade by being covered with planking, that no obstructions were so placed as to prevent its use by the public, and that the people were not excluded from walking upon it. It is alleged that the death of the boy was due to the negligence of the defendant in permitting a dangerous hole to exist in the covering of the pit in the manner stated, and damages are asked for the death of the boy, thus caused, and for the pain and suffering endured by him in consequence of his injuries during his lifetime.

The evidence tends to show that the defendant's agents and servants knew that the public were using the breakwater and the adjacent grounds for walking, fishing, and swimming, but that notices of "No thoroughfare" were posted to warn people off the tracks, and people, boys particularly, were expelled from the tracks. There was evidence that the hole in the planking on the breakwater had existed for some weeks before and up to the time of the accident, and that it was a dangerous trap to persons walking on the breakwater. There was evidence tending to show that this opening was difficult to see because of the steam arising from the hole and from the cracks between the other planks, and because of the conditions surrounding it. The jury found that the defendant was negligent and that it caused the injury, and awarded damages. This is an appeal from the judgment on the verdict in plaintiff's favor.

SIEBECKER, J. * * * It is undisputed that the appellant maintained a breakwater at the place designated to protect its grounds from the action of the waters of the lake; that it had filled with earth the area between the breakwater and the dry land; and that it used and occupied this area for railroad purposes. As appears in the above statement of facts, the appellant had covered the surface of the breakwater with planking, which formed a firm and even walk or pathway along and above the waters of the lake, which was used by the public as a footpath to pass and repass over these grounds and for walking along the edge of the lake. Boys had made a practice of so using it and as a place for boating, fishing, and swimming. The evidence fully justified the jury in finding that appellant's agents and servants knew that the premises were being so used. It appears that there was a fence along the south line of appellant's grounds abutting on Polk street, but the evidence is in conflict as to whether or not the fence extended onto the breakwater, and the jury may well have found that this end of the breakwater was unobstructed and open so that people could pass without interference in going to and from the street onto the railroad grounds, and that an open passageway over the breakwater was thus afforded them.

In the light of such facts and circumstances, it cannot be said that persons who passed onto the breakwater and adjacent grounds were there under such forbidding circumstances as to make them trespassers. It seems reasonably clear that people customarily used this place as a footpath, and that boys especially used it as a place for the purposes of boating and swimming. These uses of the premises must be held to have been within the knowledge of the railroad's agents and servants, and that an implied permission existed which justified persons in so using the breakwater and adjacent grounds. Under these circumstances, the persons so passing over this place on these premises cannot be considered trespassers. They must be considered as having entered onto the premises with the implied permission of the railroad company for the customary purposes. The license to so use the premises implies permission to so use them, and the railroad company cannot now be heard to charge that such use constitutes a trespass. Under these circumstances, persons making such customary use of the premises are licensees. The evidence sustains the claim that the decedent at the time of injury was using this place in the customary way, namely, as a footpath in passing over the breakwater, and his relation to the railroad company was that of its licensee. See Hupfer v. National D. Co., 114 Wis. 279, 90 N. W 191; Gorr v Mittlestaedt, 96 Wis. 296, 71 N. W. 656; Muench v. Heinemann, 119 Wis. 441, 96 N. W. 800. With this relation existing between the appellant and the decedent, the legal duty devolving on the company is as recognized and declared in the Muench Case that a licensee must be deemed to take the premises as he finds them, "and the licensor owes him no duty, save to

refrain from acts of active negligence rendering the premises dangerous."

The case of Klix, Adm'r, etc., v. Nieman, 68 Wis. 271, 32 N. W. 223, 60 Am. Rep. 854, is not at variance with this rule. The facts of that case show that the danger complained of was one connected with an unfenced natural pond on a private lot, but so remote from the street and sidewalk as not to make their use dangerous; nor was it shown that the owner had done anything to this pond to create a pitfall or snare liable to injure persons going onto the lot. In the instant case the facts are different, in that the alleged dangerous condition was created by the company, and the question is whether or not, in view of the fact that the company knew or ought to have known that both adults and children were resorting to and using the place for travel and amusement, the omission to keep the pit covered created a danger likely to cause injury to persons so using the premises with ordinary care. That the opening or hole in the cover of the steam pit as described in the evidence was dangerous seems self-evident from its very nature and condition. It is also clear that the hole in the planking that covered the excavation was not readily observed, and was obscured by the steam rising therefrom through this hole and the cracks between the planks covering the pit. This condition of the place made the pit a dangerous trap or pitfall to persons on the premises, and the omission to observe and repair the planking constitutes active negligence on the part of the railroad toward them.

It is contended that it is not shown that the company was negligent in permitting this hole to exist, because it had no notice or knowledge thereof prior to the day of the accident. The evidence discloses that a hole had been observed by various persons two or three months, one month, two weeks, and on the day before the accident. These evidentiary facts furnish a sufficient basis for the conclusion of the jury that the railroad company was guilty of a want of ordinary care in failing to discover the hole in the plank covering over the steam pit and in neglecting to repair it before the time of the accident.

It is probable that the decedent had not observed the hole. His conduct in this respect must be viewed in the light of his age and the surrounding conditions, and of the danger, and, when so considered, it cannot be held as matter of law to show that he was guilty of contributory negligence in producing the injuries complained of. Cases illustrating the principles and grounds of liability under the circumstances disclosed here are: Kinchlow v. Midland Elevator Co., 57 Kan. 374, 46 Pac. 703; Penso v. McCormick, 125 Ind. 116, 25 N. E. 156, 9 L. R. A. 313, 21 Am. St. Rep. 211; Railway Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434. We find no reversible error in the record.

Judgment affirmed.[60]

[60] The statement of facts is abridged and part of the opinion is omitted.

HARRIS v. PERRY & CO.

(In the Court of Appeal. [1903] 2 K. B. 219.)

The action was brought to recover damages for personal injuries alleged to be due to the defendant's negligence. The trial resulted in a verdict of £150, and judgment for that amount was entered for the plaintiff. The defendant appealed.

COLLINS, M. R., read the following judgment:

This is a motion by the defendant for judgment or a new trial in a case tried before Wills, J., and a special jury. The action was brought for personal injuries occasioned by the negligence of the defendant. The jury answered certain questions submitted to them by the learned judge, and upon their answers he entered judgment for the plaintiff with damages.

The plaintiff was one of the inspectors appointed by the engineer for the tube railway which is now in course of construction from Waterloo to Baker Street. At the time in question the tube had been completed from Waterloo up to the neighbourhood of Baker Street, where the work of excavation was still going on. The defendant, who trades under the name of Perry & Co., was the contractor for the making of a portion of the tube and railway, and was engaged in carrying out the work of excavation at Baker Street. For the purpose of the works he had laid a temporary contractor's railway from Waterloo up to the point where the work of excavation was going on, and he employed in the works a small electric locomotive, whose function was to draw the excavated material from the works down to a shaft in the neighbourhood of Charing Cross, through which the excavated matter had to be passed up to the surface. This locomotive was not fitted or intended for the carriage of passengers. It was worked by a driver, accompanied by a person whose name was Thacker, and who filled the function of a guard, or "rope-runner," as he is described in the evidence. For the purpose of enabling the work of inspection to be carried on the contractors had placed a wooden platform all along one side of the tunnel, and on the day in question the plaintiff, who had been engaged in inspecting, was proceeding along this platform in the direction of Waterloo. In the neighbourhood of Charing Cross he was overtaken by the locomotive; and one Shaw, a timekeeper in the defendant's service, who was riding thereon, inquired where he was going, and proposed that he should ride with him on the locomotive to his destination. There was on the locomotive, in addition to the driver, the guard Thacker, and Shaw, one other person, so that the plaintiff made the fifth person on an engine which, as I have said, was designed for the purpose of traction of materials only. The plaintiff got upon the engine, which proceeded in the direction of Waterloo. After it had gone about one hundred yards it came in contact with a truck which was stand-

ing on the rails, and had upon it rails which had been taken up for the purpose of repairs on the line between Charing Cross and Waterloo, and the plaintiff sustained serious injuries, for which he has brought this action. There were lights along the tunnel at intervals of about twenty-five yards.

The defendant contended that he was under no liability to the plaintiff, on the ground that the plaintiff had got upon the engine without any permission from him, and that he was there at his own risk only and could not hold the defendant responsible for damage, the risk of which he must be taken to have accepted himself. It was proved that the proper business of the engine at the time of the accident was to draw the material and trucks between Baker Street and Charing Cross only, and that it should not have been used at all upon the part of the line between Charing Cross and Waterloo, which was, in fact, at that time undergoing repairs. There was evidence that the defendant had only visited the line himself on one or two occasions, and that he had expressly forbidden any person, other than the driver and guard, to travel upon the locomotive; but it was proved that the defendant's workmen and others were in the habit, notwithstanding this prohibition, of frequently riding upon it. The defendant had a representative called Rowell, whose business it was to supervise generally the underground works which were being carried out by the defendant. There was evidence, from which an inference might be drawn, that Rowell sanctioned the use of the locomotive by the superior officers of the contractor, of whom Shaw was one, for the purpose of transit along the line, and further, that he knew that those officers invited the officers of the company to travel with them.

The learned judge left to the jury three questions:

(1) Was the plaintiff on the engine with the permission of Rowell? (2) Was he there for his own convenience or for the benefit of the defendant? (3) Was the accident due to the negligence of the defendant's servants? The jury answered the first and third questions in the affirmative, and to the second they answered, "For his own convenience."

Without admitting that the finding that the plaintiff was a licensee was supported by the evidence, Mr. Bray, for the defendant, insisted that inasmuch as the plaintiff was at most a bare licensee, there was no evidence that the defendant had in any way fallen short of his duty to him as such so as to justify a finding of negligence causing the accident. I was very much impressed by this argument at the hearing, and was at one time disposed to think that the plaintiff, for whom a platform had been provided as the proper means of locomotion for purposes of inspection in the tunnel, in riding on the engine merely for his own convenience must be taken to have accepted all risks incident thereto. I must deal with the case, however, on the footings of the findings of the jury, unless there was no reasonable

evidence upon which they could be supported. It was urged that, the plaintiff being a bare licensee, there was no higher duty imposed upon the defendant than that he should not set a trap for the plaintiff, as laid down by the late Willes, J., in his memorable judgment in Gautret v. Egerton, L. R. 2 C. P. 371; that there was in this case no evidence of anything of the kind; that the plaintiff himself ought to have known that the line was subject to repair, and that in leaving the truck and rails where they were the defendant's servants had acted quite reasonably, inasmuch as they had no reason to anticipate that the engine which they knew was employed elsewhere on that day would travel over that part of the line, and that they were in fact merely availing themselves of a proper opportunity of carrying out repairs which were necessarily frequent on a temporary line of the nature described. Wills, J., in his summing-up, gave the defendant the benefit of this latter contention, and pointed the attention of the jury to the circumstances under which the engine was allowed by those on it to proceed, as it had done, to the place where the accident occurred. I am unable to discover any flaw whatever in the summing-up. I think the learned judge, in his analysis of the evidence, put the facts quite as favourably for the defendant as they were capable of being put; and his exposition of the law leaves nothing to be desired. He suggested that the measure of duty towards a bare licensee is different, where the licensor accepts the duty of carrying him, from what it is where he merely permits him to pass through his premises; and I think the cases support this view. But there is evidence in this case that Thacker was the person from whom the driver of the locomotive was bound to take his orders, and that Thacker was aware of the fact that the line had been taken up and was under repair between Charing Cross and Waterloo, and that he did not impart this fact to the plaintiff or the other occupants of the engine, probably having forgotten it for the moment himself. I think, therefore, that, even if the standard of liability were the same as it would have been to a bare licensee merely walking across the defendant's land, there was evidence upon which the jury might have found that a trap within the meaning of the authorities had been set for the plaintiff. See Corby v. Hill, 4 C. B. (N. S.) 556. At all events, I think it was competent for the jury to find, as they must be taken to have found, a failure of that ordinary care which is due from a person who undertakes the carriage of another gratuitously. The principle in all cases of this class is that the care exercised must be reasonable; and the standard of reasonableness naturally must vary according to the circumstances of the case, the trust reposed, and the skill and appliances at the disposal of the person to whom another confides a duty. There is an obvious difference between the measure of confidence reposed and responsibility accepted in the case of a person who merely receives permission to traverse

the premises of another, and in the case where a person or his property is received into the custody of another for transportation. See in the case of goods, Southcote's Case, (1601) 4 Rep. 83 b, cited in Coggs v. Bernard, 1 Sm. L. C. (11th Ed.) p. 173, and the notes thereto. In the case of persons received for carriage, Parke, B., says in Lygo v. Newbold, (1854) 9 Ex. 302, at p. 305: "A person who undertakes to provide for the conveyance of another, although he does so gratuitously, is bound to exercise due and reasonable care." In Austin v. Great Western Ry. Co., (1867) L. R. 2 Q. B. 442, at p. 445, Blackburn, J., says: "I think that what was said in the case of Marshall v. York, Newcastle and Berwick Ry. Co., (1851) 11 C. B. 655, 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." It seems to me that these authorities imply a larger obligation than that of merely not setting a trap: see also, per Baggallay, L. J., Foulkes v. Metropolitan District Ry. Co., (1880) 5 C. P. D. 157, at p. 165. The whole subject will be found exhaustively treated with reference to the English and American authorities in Mr. Beven's valuable work on Negligence in Law (2d Ed.) vol. 2, pp. 1154 et seq. The defendant, therefore, through Rowell, must be taken to have constructively permitted the plaintiff to travel on the engine. There was certainly evidence fit for the consideration of the jury on this point. And there was evidence of such a failure of due care on the part of the defendant's servants as to render the defendant responsible to the plaintiff for the damage arising therefrom.

I am of opinion that the appeal must be dismissed.

I have to add that STIRLING, L. J., and MATHEW, L. J., concur in the judgment that I have read.

Appeal dismissed.[61]

[61] Compare: Grimshaw v. Lake Shore Ry. Co. (1912) 205 N. Y. 371, 98 N. E. 762, 40 L. R. A. (N. S.) 563, Ann. Cas. 1913E, 571: (P. was riding upon the locomotive of a Wabash freight train, with the consent of those in charge but against a rule of the Wabash Company, of which rule, however, P. had no knowledge. At an intersecting track a Lake Shore freight train negligently struck the Wabash train and P. was killed in the collision. Held, that P. was a licensee on the train and as such had a right, as against the Wabash Company, and therefore as against the Lake Shore Company, to the exercise of ordinary care on its part not to injure him.)

(C) Duty of Care Towards an Invitee

INDERMAUR v. DAMES.

(Court of Common Pleas, H. T. 1866. L. R. 1 C. P. 274. In the Exchequer Chamber, H. T. 1867. L. R. 2 C. P. 311.)

The judgment of the Court [of Common Pleas] [62] was delivered by WILLES, J. This was an action to recover damages for hurt sustained by the plaintiff's falling down a shaft at the defendant's place of business, through the actionable negligence, as it was alleged, of the defendant and his servants.

At the trial before the Lord Chief Justice [63] at the sittings here after Michaelmas Term, the plaintiff had a verdict for 400*l.* damages, subject to leave reserved.

A rule was obtained by the defendant in last term to enter a nonsuit, or to arrest the judgment, or for a new trial because of the verdict being against the evidence. The rule was argued during the last term, before Erle, C. J., Keating and Montague Smith, JJ., and myself, when we took time to consider. We are now of opinion that the rule ought to be discharged.

It appears that the defendant was a sugar-refiner, at whose place of business there was a shaft four feet three inches square, and twenty-nine feet three inches deep, used for moving sugar. The shaft was necessary, usual, and proper in the way of the defendant's business. Whilst it was in use, it was necessary and proper that it should be open and unfenced. When it was not in use, it was sometimes necessary, with reference to ventilation, that it should be open. It was not necessary that it should, when not in use, be unfenced; and it might then without injury to the business have been fenced by a rail. Whether it was usual to fence similar shafts when not in use did not distinctly appear; nor is it very material, because such protection was unquestionably proper, in the sense of reasonable, with reference to the safety of persons having a right to move about upon the floor

[62] Erle, C. J., and Willes, Keating, and Montague Smith, JJ.

[63] That is, Lord Chief Justice Erle, at the sittings in Middlesex. In his summing up, Erle, C. J., had remarked as follows: "The plaintiff has to establish that there was negligence on the part of the defendant; that the premises of the defendant, to which he was sent in the course of his business as a gas-fitter, were in a dangerous state; and that, as between himself and the defendant, there was a want of due and proper precaution in respect to the hole in the floor. To my mind, there would not be the least symptom of want of due care as between the defendant and a person [permanently] employed on his premises, because the sugar baking business requires a lift on the premises, which must be as well known to the persons employed there as the top of a staircase in every dwelling house. But that which may be no negligence towards men ordinarily employed upon the premises, may be negligence towards strangers lawfully coming upon the premises, in the course of their business."

where the shaft in fact was, because in its nature it formed a pitfall there. At the time of the accident it was not in use, and it was open and unfenced.

The plaintiff was a journeyman gas-fitter in the employ of a patentee who had supplied the defendant with his patent gas-regulator, to be paid for upon the terms that it effected a certain saving: and, for the purpose of ascertaining whether such a saving had been effected, the plaintiff's employer was required to test the action of the regulator. He accordingly sent the plaintiff to the defendant's place of business for that purpose; and, whilst the plaintiff was engaged upon the floor where the shaft was, he (under circumstances as to which the evidence was conflicting, but) accidentally, and, as the jury found, without any fault or negligence on his part, fell down the shaft, and was seriously hurt.

It was argued, that, as the defendant had objected to the plaintiff's working at the place upon a former occasion, he (the plaintiff) could not be considered as having been in the place with the defendant's leave at the time of the accident: but the evidence did not establish a peremptory or absolute objection to the plaintiff's being employed, so as to make the sending of him upon the occasion of the accident any more against the defendant's will than the sending of any other workman: and the employment, and the implied authority resulting therefrom to test the apparatus, were not of a character involving personal preference (dilectus personæ), so as to make it necessary that the patentee should himself attend. It was not suggested that the work was not journeyman's work.

It was also argued that the plaintiff was at best in the condition of a bare licensee or guest who, it was urged, is only entitled to use the place as he finds it, and whose complaint may be said to wear the colour of ingratitude, so long as there is no design to injure him. See Hounsell v. Smyth, 7 C. B. N. S. 371.

We think this argument fails, because the capacity in which the plaintiff was there was that of a person on lawful business, in the course of fulfilling a contract in which both the plaintiff and the defendant had an interest, and not upon bare permission. No sound distinction was suggested between the case of the servant and the case of the employer, if the latter had thought proper to go in person; nor between the case of a person engaged in doing the work for the defendant pursuant to his employment, and that of a person testing the work which he had stipulated with the defendant to be paid for if it stood the test; whereby impliedly the workman was to be allowed an onstand to apply that test, and a reasonable opportunity of doing so. Any duty to enable the workman to do the work in safety, seems equally to exist during the accessory employment of testing: and any duty to provide for the safety of the master workman, seems equally owing to the servant workman whom he may lawfully send in his place.

It is observable that in the case of Southcote v. Stanley, 1 H. & N. 247, upon which much reliance was properly placed for the defendant, Alderson, B., drew the distinction between a bare licensee and a person coming on business, and Bramwell, B., between active negligence in respect of unusual danger known to the host and not to the guest, and a bare defect of construction or repair, which the host was only negligent in not finding out or anticipating the consequence of.

There is a considerable resemblance, though not a strict analogy, between this class of cases and those founded upon the rule as to voluntary loans and gifts, that there is no remedy against the lender or giver, for damage sustained from the loan or gift, except in case of unusual danger known to and concealed by the lender or giver: Macarthy v. Younge, 6 H. & N. 329. The case of the carboy of vitriol [64] was one in which this court held answerable the bailor of an unusually dangerous chattel, the quality of which he knew, but did not tell the bailee, who did not know it, and who, as a proximate consequence of his not knowing, and without any fault on his part, suffered damage.

The cases referred to as to the liability for accidents to servants and persons employed in other capacities in a business or profession which necessarily and obviously exposes them to danger, as in Seymour v. Maddox, 16 Q. B. 326, also have their special reasons. The servant or other person so employed is supposed to undertake not only all the ordinary risks of the employment into which he enters, but also all extraordinary risks which he knows of and thinks proper to incur, including those caused by the misconduct of his fellow-servants, not however including those which can be traced to mere breach of duty on the part of the master. In the case of a statutory duty to fence, even the knowledge and reluctant submission of the servant who has sustained an injury, are held to be only elements in determining whether there has been contributory negligence: how far this is the law between master and servant, where there is danger known to the servant, and no statute for his protection, we need not now consider, because the plaintiff in this case was not a servant of the defendant, but the servant of the patentee. The question was adverted to, but not decided, in Clarke v. Holmes, 7 H. & N. 937.

The authorities respecting guests and other bare licensees, and those respecting servants and others who consent to incur a risk, being therefore inapplicable, we are to consider what is the law as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business, upon his invitation, express or implied. The common case is that of a customer in a shop: but it is obvious that this is only one of a class; for, whether the customer is actually chaffering at the time, or actually buys or not, he is, according to an undoubted

[64] Farrant v. Barnes (1862) 11 C. B. N. S. 553, 142 Reprint 912, 132 R. R. 667: (The defendant delivered to a carrier a carboy of nitric acid, without informing him of the dangerous nature of its contents. For the bearings of the doctrine see Salmond on Torts (2d Ed.) pp. 375, 376.)

course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, of which the occupier knows or ought to know, such as a trap-door left open, unfenced, and unlighted: Lancaster Canal Company v. Parnaby, 11 Ad. & E. 223; per cur. Chapman v. Rothwell, E. B. & E. 168, where Southcote v. Stanley,[65] was cited, and the Lord Chief Justice, then Erle, J., said: "The distinction is between the case of a visitor (as the plaintiff was in Southcote v. Stanley), who must take care of himself, and a customer, who, as one of the public, is invited for the purposes of business carried on by the defendant." This protection does not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper, with a view to business which concerns himself. And, if a customer were, after buying goods, to go back to the shop in order to complain of the quality, or that the change was not right, he would be just as much there upon business which concerned the shopkeeper, and as much entitled to protection during this accessory visit, though it might not be for the shopkeeper's benefit, as during the principal visit, which was. And if, instead of going himself, the customer were to send his servant, the servant would be entitled to the same consideration as the master.

The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargined for, but who go upon business which concerns the occupier, and upon his invitation, express or implied.

And, 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, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.

In the case of Wilkinson v. Fairrie, 1 H. & C. 633, relied upon for the defendant, the distinction was pointed out between ordinary accidents, such as falling down stairs, which ought to be imputed to the carelessness or misfortune of the sufferer, and accidents from unusual, covert danger, such as that of falling down into a pit.

[65] 1 H. & N. 247 (1856) 108 R. R. 549. "Whether the invited private guest is to be classed with licensees or with invited persons is a question upon which judicial opinion is somewhat at variance. In England it is well settled that he is a licensee (Southcote v. Stanley). This, it is submitted is the true doctrine, whenever he is enjoying gratuitous hospitality. In some of our jurisdictions, however, there is a disposition to work out a species of estoppel against even a private host." Francis M. Burdick, Law of Torts (3d Ed.) 517, 518, and cases there cited.

It was ably insisted for the defendant that he could only be bound to keep his place of business in the same condition as other places of business of the like kind, according to the best known mode of construction. And this argument seems conclusive to prove that there was no absolute duty to prevent danger, but only a duty to make the place as little dangerous as such a place could reasonably be, having regard to the contrivances necessarily used in carrying on the business. But we think the argument is inapplicable to the facts of this case; first, because it was not shown, and probably could not be, that there was any usage never to fence shafts; secondly, because it was proved, that, when the shaft was not in use, a fence might be resorted to without inconvenience: and no usage could establish, that what was in fact unnecessarily dangerous was in law reasonably safe, as against persons towards whom there was a duty to be careful.

Having fully considered the notes of the Lord Chief Justice, we think there was evidence for the jury that the plaintiff was in the place by the tacit invitation of the defendant, upon business in which he was concerned; that there was by reason of the shaft unusual danger, known to the defendant; and that the plaintiff sustained damage by reason of that danger, and of the neglect of the defendant and his servants to use reasonably sufficient means to avert or warn him of it; and we cannot say that the proof of contributory negligence was so clear that we ought on this ground to set aside the verdict of the jury.

As for the argument that the plaintiff contributed to the accident by not following his guide, the answer may be that the guide, knowing the place, ought rather to have waited for him; and this point, as matter of fact, is set at rest by the verdict.

For these reasons, we think there was evidence of a cause of action in respect of which the jury were properly directed; and, as every reservation of leave to enter a nonsuit carries with it an implied condition that the Court may amend, if necessary, in such a manner as to raise the real question, leave ought to be given to the plaintiff, in the event of the defendant desiring to appeal or to bring a writ of error, to amend the declaration by stating the facts as proved,—in effect, that the defendant was the occupier of and carried on business at the place; that there was a shaft, very dangerous to persons in the place, which the defendant knew and the plaintiff did not know; that the plaintiff, by invitation and permission of the defendant, was near the shaft, upon business of the defendant, in the way of his own craft as a gas-fitter, for hire, &c., stating the circumstances, the negligence, and that by reason thereof the plaintiff was injured. The details of the amendment can, if necessary, be settled at chambers. * * * Rule discharged.

Against this decision of the Court of Common Pleas, the defendant appealed.

[In the Exchequer Chamber.]

KELLY, C. B. * * * The question has been raised whether the plaintiff at the time of the accident and under the special circumstances of the case, was more than a mere volunteer. Let us see what the case really was. The work had been done on Saturday, and at the conclusion of it an appointment was made for the plaintiff's employer or some other workman to come on the following Tuesday to see if the work was in proper order, and all the parts of it acting rightly. The plaintiff by his master's directions went for that purpose, and I own I do not see any distinction between the case of a workman going upon the premises to perform his employer's contract, and that of his going after the contract is completed, but for a purpose incidental to the contract, and so intimately connected with it, that few contracts are completed without a similar act being done. The plaintiff went under circumstances such as those last mentioned, and he comes, therefore, strictly within the language used by Willes, J., "a person on lawful business in the course of fulfilling a contract, in which both the plaintiff and defendant have an interest."

What then is the duty imposed by law on the owner of these premises? They were used for the purpose of a sugar refinery, and it may very likely be true that such premises usually have holes in the floors of the different stories, and that they are left without any fence or safeguard during the day while the workpeople, who it may well be supposed are acquainted with the dangerous character of the premises, are about; but if a person occupying such premises 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: "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 neglect, the question whether such reasonable care has been taken by notice, lighting, guarding, or otherwise, and whether there was such contributory negligence in the sufferer, must be determined by a jury as a matter of fact."

It was so determined in this case, and though I am far from saying that there was not evidence that the plaintiff largely contributed to the accident by his own negligence, yet that was for the jury; and I think there was clearly some evidence for them that the defendant

had not used reasonable precautions, and that the judge therefore would have been wrong if he had nonsuited the plaintiff.

CHANNELL, B., BLACKBURN, J., MELLOR, J., and PIGOTT, B., concurred.

Judgment affirmed.[66]

PLUMMER v. DILL.

(Supreme Judicial Court of Massachusetts, 1892. 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463.)

Tort, for personal injuries occasioned to the plaintiff by striking her head upon a projecting sign placed against a post at the outside corner of the landing of the defendant's building. A verdict was directed for the defendant; and the plaintiff alleged exceptions.

KNOWLTON, J. If we assume that it was the duty of the defendant to keep the entrance, stairway, and halls of his building reasonably safe for persons using them on an invitation express or implied, and if we further assume that he negligently permitted them to be unsafe, and that his negligence caused the injury to the plaintiff, and that she was in the exercise of due care,—some of which propositions are at least questionable,—we come to the inquiry whether the plaintiff was a mere licensee in the building, or was there by the defendant's implied invitation.

She did not go there to transact with any occupant of the building any kind of business in which he was engaged, or in the transaction of which the building was used or designed to be used. She was in search of a servant; and for her own convenience she went there to inquire about a matter which concerned herself alone.

It has often been held that the owner of land or a building, who has it in charge, is bound to be careful and diligent in keeping it safe for those who come there by his invitation express or implied, but that he owes no such duty to those who come there for their own convenience, or as mere licensees. Sweeny v. Old Colony & Newport Railroad, 10 Allen, 368, 87 Am. Dec. 644; Metcalfe v. Cunard Steamship Co., 147 Mass. 66, 16 N. E. 701; Gordon v. Cummings, 152 Mass. 513, 25 N. E. 978, 9 L. R. A. 640, 23 Am. St. Rep. 846. One who puts a building or a part of a building to use in a business, and fits it up so as to show the use to which it is adapted, impliedly invites all persons to come there whose coming is naturally incident to the prosecution of the business. If the place is open, and there is nothing to indicate that strangers are not wanted, he impliedly permits and licenses persons to come there for their own convenience, or to gratify their curiosity. The mere fact that premises are fitted conveniently for use by the owner or his tenants, and by those who come to transact such business as is

[66] The statement of facts and part of the opinions of WILLES, J., and KELLY, C. B., are omitted.

carried on there, does not constitute an implied invitation to strangers to come and use the place for purposes of their own. To such persons it gives no more than an implied license to come for any proper purpose.

It is held in England that one who comes on an express invitation to enjoy hospitality as a guest must take the house as he finds it; and that his right to recover for an injury growing out of dangers on the premises is no greater than that of a mere licensee. Southcote v. Stanley, 1 H. & N. 247. The principle of the decision seems to be that a guest, who is receiving the gratuitous favors of another, has no such relation to him as to create a duty to make the place where hospitality is tendered safer or better than it is. It is well settled there that to come under an implied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the object of the visit may not be for the benefit of the occupant. Pollock on Torts, 417; Holmes v. North Eastern Railway, L. R. 4 Ex. 254; S. C. L. R. 6 Ex. 123; White v. France, 2 C. P. D. 308; Burchell v. Hickisson, 50 L. J. Q. B. 101.

The rule in regard to an implied invitation to places of business is held with equal strictness in New York. In Larmore v. Crown Point Iron Co., 101 N. Y. 301, 4 N. E. 752, 54 Am. St. Rep. 718, it was decided that a person, who entered on the defendant's premises to see if the defendant would give him employment, was a mere licensee, and that the defendant was not liable to him for an injury caused by the unsafe condition of the place. The diligence of counsel and an extended examination of the authorities have failed to bring to our attention any case in which the owner or occupant of a place fitted up for ordinary use in business has been held by the condition of his premises impliedly to invite persons to come there for a purpose in which the occupant had no interest, and which had no connection with the business actually or apparently carried on there. Precisely how far, under all circumstances, an implied invitation extends, in reference to the persons to be included in it, has not been the subject of very full consideration in this Commonwealth, and is hardly capable of exact statement. But in many cases there is language indicating that the invitation extends only to those who come on business connected with that carried on at the place, and for the transaction of which the place is apparently intended. In Severy v. Nickerson, 120 Mass. 306, 21 Am. Rep. 514, Mr. Justice Devens says: "There is no duty imposed upon an owner or occupant of premises to keep them in a suitable condition for those who come there for their own convenience merely, without any invitation, either express or which may fairly be implied from the preparation and adaptation of the premises for the purposes for which they are appropriated." In

Marwedel v. Cook, 154 Mass. 235, 236, 28 N. E. 140, we find this language: "The general duty which the defendants owed to third persons, in respect to the passages of the building, is well expressed in the instructions to the jury at the trial: 'If the defendants leased rooms in the building to different tenants, reserving to themselves the control of the halls, stairways, and elevator, by and through which access was to be had to these rooms, and the general lighting arrangements of those passages, then the defendants were bound to take reasonable care that such approaches were safe and suitable at all times, and for all persons who were lawfully using the premises, and using due care, so far as they ought to have reasonably anticipated such use as involved in and necessarily arising out of the purposes and business for which said rooms were leased.'" In Learoyd v. Godfrey, 138 Mass. 315, 323, the plaintiff, a police officer, was expressly invited to the premises by a daughter of the occupant to arrest an intoxicated person who was making disturbance in the house. In Curtis v. Kiley, 153 Mass. 123, 26 N. E. 421, no question was considered or clearly raised about the invitation to the plaintiff. In Davis v. Central Congregational Society, 129 Mass. 367, 37 Am. Rep. 368, the plaintiff went to the defendant's church under an express invitation authorized by the defendant, and the object of her visit was among those contemplated by the defendant when the building was erected. The language used in the cases in this Commonwealth and in other States indicates that the rule in regard to the extent of the invitation implied from the preparation of property for use in business is the same here as laid down in the cases above cited from the courts of New York and of England. Sweeny v. Old Colony & Newport Railroad, 10 Allen, 368, 87 Am. Dec. 644; Elliott v. Pray, 10 Allen, 378, 87 Am. Dec. 653; Carleton v. Franconia Iron & Steel Co., 99 Mass. 216; Metcalfe v. Cunard Steamship Co., 147 Mass. 66, 16 N. E. 701; Heinlein v. Boston & Providence Railroad, 147 Mass. 136, 16 N. E. 698, 9 Am. St. Rep. 676; Reardon v. Thompson, 149 Mass. 267, 21 N. E. 369; Gordon v. Cummings, 152 Mass. 513, 25 N. E. 978, 9 L. R. A. 640, 23 Am. St. Rep. 846; Curtis v. Kiley, 153 Mass. 123, 26 N. E. 421; Stevens v. Nichols, 155 Mass. 472, 29 N. E. 1150, 15 L. R. A. 459; Campbell v. Portland Sugar Co., 62 Me. 552, 16 Am. Rep. 503; Parker v. Portland Publishing Co., 69 Me. 173, 31 Am. Rep. 262.

In Low v. Grand Trunk Railway, 72 Me. 313, 24 Am. Rep. 331, it was held that the owner of a wharf was liable to a customhouse officer, who was upon it in the performance of his duty to prevent smuggling in the nighttime, for an injury resulting from a defective condition of the wharf. The officer was there to prevent unlawful conduct in connection with the business carried on at the wharf with the consent of the owner, and the owner might fairly be supposed to anticipate and desire, and impliedly to invite, his presence there to protect the defendant's property from those who would unlawfully use it. Nei-

ther the decision nor the cases cited in the opinion, when carefully examined, will be found to give any countenance to the view that one who visits a building for a purpose not connected with the use for which the building was fitted, or to which it is put, is impliedly invited to come there. * * *[67]

On the facts of the case before us, we are of opinion that the plaintiff was a mere licensee in the defendant's building, and that the rulings at the trial were correct.

Exceptions overruled.

STEISKAL v. MARSHALL FIELD & CO.

(Supreme Court of Illinois, 1908. 238 Ill. 92, 87 N. E. 117.)

Action on the case against Marshall Field & Company for a personal injury sustained by the plaintiff through the alleged negligence of the defendant. The jury returned a verdict in favor of the plaintiff for the sum of $10,000, upon which the trial court rendered judgment. This judgment was affirmed by the Appellate Court, and a further appeal is prosecuted in this court.

HAND, J. The declaration contained one count which alleged:

That the appellant carried on a retail dry goods and general store in its store building in the city of Chicago, and used and operated, in connection with its business therein, a certain passenger elevator to carry passengers from floor to floor in said building; that the plaintiff was rightfully in said store and a passenger in said elevator; that he entered said elevator at the ninth floor for the purpose of being carried to the first or main floor of the building; that it was the duty of the defendant to carry him safely from said ninth floor to his destination, but in this the defendant failed and was guilty of negligence, in that while the plaintiff was in the exercise of due care for his own safety and was in said elevator as a passenger, the said elevator, and the machinery by which the same was operated, broke and gave way, and precipitated said elevator, with plaintiff, into the basement of said building, and he was injured, etc.

The first contention of the appellant is that the declaration is not sufficient to support the judgment, in this: That the plaintiff has not averred facts therein which show that he was rightfully in said elevator, or that the relation of passenger and carrier existed between the plaintiff and the defendant at the time of the accident. The sufficiency of the declaration is challenged by motion in arrest of judgment. The relation averred to exist between the plaintiff and the defendant at the time the plaintiff was injured was that of passenger and carrier, and we are of the opinion the declaration, after verdict, was sufficient to support the judgment. In Chicago & Alton Railroad Co. v. Clausen, 173 Ill. 100, 50 N. E. 680, where the same contention was made as is made here, the declaration averred that the plaintiff became

[67] In the omitted portion of the opinion, the learned judge comments on Sweeny v. Old Colony & Newport Railroad (1865) 10 Allen, 368, 87 Am. Dec. 644, and Holmes v. Drew (1890) 151 Mass. 578, 25 N. E. 22.

a passenger on a passenger train of the defendant at Dwight to be carried from that place to Gardner, and that while he, with due care, caution, and diligence, was about to alight from the train at Gardner, the defendant carelessly and negligently caused the train to be violently and suddenly moved forward, and thereby he was thrown from and off the train to and upon the wooden platform of defendant; and in different counts it was alleged that defendant did not stop the train at Gardner a sufficient length of time to receive and let off passengers, but suddenly started the train, whereby the plaintiff, who was attempting to alight, was thrown off. The averments of the declaration in that case were held sufficient after verdict, and, if that declaration was good after verdict, we are unable to see why the declaration in this case is not.

It is next contended that the facts proven do not establish that the relation of passenger and carrier existed between the parties at the time appellee was injured. The appellee testified: He went to the store of the appellant to obtain employment; that he inquired of an employé of the defendant on the first floor for the superintendent; that he was told the superintendent was on the ninth floor and was directed to take the elevator to that floor; that he got off the elevator at the ninth floor and inquired for the superintendent and was informed that he was not in his office; that he returned to the elevator, the door of which was open, and entered the elevator; that the operator closed the door behind him and turned on the power, and the elevator immediately dropped to the basement floor; that the elevator was wrecked, the operator killed, and he was severely injured. We think this evidence fairly tended to show that the appellee was rightfully in the elevator, and that the relation of passenger and carrier existed between the parties at the time the appellee was injured. In an establishment like that of the appellant there is a general invitation to persons to enter who have business with the appellant. The appellant employs a large number of persons, and it was clearly lawful for the appellee to enter its store for the purpose of seeking employment, and upon being directed to the office of the superintendent and invited to use the elevator in going to his office he clearly was rightfully upon the elevator, and upon finding the superintendent out of his office he had the right to return to the first or main floor in the elevator. There was, at least, evidence introduced by the plaintiff fairly tending to show that the relation of passenger and carrier existed between the parties at the time the elevator fell, and that the appellee was rightfully upon the elevator; and as those questions were questions of fact, or at most, of mixed law and fact (Springer v. Ford, 189 Ill. 430, 59 N. E. 953, 52 L. R. A. 930, 82 Am. St. Rep. 464), we think it cannot now, in view of the holding of the trial and Appellate Courts, be successfully contended in this court, as a matter of law, that such relation did not exist, or that the appellee was wrongfully upon the elevator, at the time it fell. This case is not like that of Walsh v.

Cullen, 235 Ill. 91, 85 N. E. 223, 18 L. R. A. (N. S.) 911. In that case the relation of master and servant existed between the parties, while here the appellee was a passenger, and the duty which the appellant owed the appellee was the duty growing out of the relation of carrier and passenger. This court has held (Hartford Deposit Co. v. Sollitt, 172 Ill. 222, 50 N. E. 178, 64 Am. St. Rep. 35, and Springer v. Ford, supra) that a person operating a passenger elevator, under the circumstances under which the elevator in question was being operated at the time of the accident, is a carrier of persons, and bound to exercise a high degree of care in transporting passengers, and that the fact that the elevator falls when persons are being carried thereon is evidence that the elevator was mismanaged, or was out of repair, or of faulty construction.

Judgment affirmed.

DUNN, J. (dissenting). The single count in the declaration alleged that the appellant carried on a store, and used and operated in connection therewith a passenger elevator for carrying passengers from floor to floor, and that the appellee was rightfully in said store and a passenger in said elevator. These averments amount to no more than a statement that the appellee was in the elevator for the purpose of being carried and was not a trespasser. The evidence showed that the appellee went to the store for the purpose of obtaining employment. It did not show that he went in response to any advertisement or request of the appellant, that the appellant desired to employ any help, or that the appellee had any reason to suppose it did. In response to his inquiry he was informed that the superintendent was on the ninth floor, and was directed to take the elevator to that floor. Finding that the superintendent was not in his office, he returned to the elevator, when it fell, and he was injured.

The operators of passenger elevators in buildings for the use of the occupants and those having business with or visiting them are common carriers of passengers, with the same obligations as carriers by other modes of conveyance. Hartford Deposit Co. v. Sollitt, 172 Ill. 222, 50 N. E. 178, 64 Am. St. Rep. 35; Springer v. Ford, 189 Ill. 430, 59 N. E. 953, 52 L. R. A. 930, 82 Am. St. Rep. 464; Beidler v. Branshaw, 200 Ill. 425, 65 N. E. 1086. But these obligations do not extend to the case of employés of the operator using the elevator in the course of their employment. Walsh v. Cullen, 235 Ill. 91, 85 N. E. 223, 18 L. R. A. (N. S.) 911. As to such persons and others using the elevator, not in connection with the business of the operator or the occupants of the building or by their invitation, the law does not require that high degree of care which common carriers of passengers must use. One who goes upon the premises of another to seek employment of the owner, not in response to any invitation, is not engaged in the business of the owner. He goes solely for his own benefit. There was no invitation, express or implied, for the appellee to visit the appellant's store. He went there on his own busi-

ness and for his own purposes only. The appellant was under no obligation to the appellee, under such circumstances, to exercise the high degree of care required of a common carrier. Larmore v. Crown Point Iron Co., 101 N. Y. 391, 4 N. E. 752, 54 Am. Rep. 718.

CARTWRIGHT, C. J., and SCOTT, J., concur in the foregoing dissenting opinion.

COWEN v. KIRBY et al.

(Supreme Judicial Court of Massachusetts, 1902. 180 Mass. 504, 62 N. E. 968.)

Tort for personal injuries by Cowen against Kirby and others. A verdict was directed for the defendants. The plaintiff excepts. The facts were as follows:

The defendants kept a stable situated at the corner of two streets, and as a part of their business took in for keeping and care the vehicles and horses of those persons who might come for that service. Upon the ground floor was a large room, into which teams were driven from one of the streets, and in which horses were unhitched and hitched up and vehicles were stored. Out of this room opened a number of doors, one of which led to stalls where the horses were kept, two led to harness rooms, one to a ladies' waiting room, and one to an office. The two latter doors were near the team entrance, and the waiting room and the office had outer doors, also, giving entrance from the other street. The plaintiff drove his horse and wagon into the stable, and got out of the wagon. Hostlers unhitched the horse, and backed the wagon to the wall opposite the entrance. The plaintiff followed the wagon back, and put his driving gloves into it, and upon receiving a numbered check for his team left the stable. It does not appear that while he was there anything was said by any one. After some hours he re-entered by the carriage door, and walked across the room, intending to place some packages in his wagon, which remained where he had seen it placed. Other wagons had been put in the room in the meantime, and one of these was immediately in front of his. He passed to the left of the front wagon. About two feet to the left of his wagon was a post, and, not choosing to pass between the wagon and the post, he swung himself around the post, and then leaned towards his wagon to put his packages into it. The post was in fact a part of the apparatus of a hoisting machine used to carry vehicles between the ground floor and the upper floors of the stable. While the plaintiff was leaning towards his wagon, the hoist, loaded with a vehicle, descended upon him.

BARKER, J. (after stating the facts). Whether he can recover for his injury depends upon whether at the time and place where he was when hurt, he was more than a mere licensee, and if so, whether he was in the exercise of due care. The fact that a person enters a place of business as a customer does not give him the right to expect that every part of the premises shall be so arranged and kept that he may be in safety. He knows the purpose for which they are used, and must assume that they will be prepared and adapted for that purpose, and must take notice of that preparation and adaptation, at least so far as it is obvious. It is only those parts of the premises where customers are expected to be that the owner or occupant must keep in suitable condition for them, and in such parts only has a customer a right to assume that care has been used to protect him from injury. He enters knowing that the place is not

arranged merely for his own convenience. He may expect that he will be safe in conducting himself as a customer is expected to act, but he has no right to expect that he will be safe if he oversteps that limit. The owner, without being in fault, may adapt his premises to his business, and may use them in the way for which they were designed, unless in so doing he exposes the customer to some danger which the latter has the right to expect he will not be exposed to, and the customer must expect to find such appliances and such uses of the premises as are involved in the prosecution of the business. If, without some special invitation, express or implied, a customer sees fit to pass from that part of the establishment where it is designed and expected that he shall be into other parts not designed or adapted for his use, but for the work of the place, he becomes at best a mere licensee, as to whom the owner or occupant has no duty to keep his premises safe. Severy v. Nickerson, 120 Mass. 306, 21 Am. Rep. 514; Gaffney v. Brown, 150 Mass. 479, 23 N. E. 233; Marwedel v. Cook, 154 Mass. 235, 28 N. E. 140. See Redigan v. Railroad Co., 155 Mass. 44, 28 N. E. 1133, 14 L. R. A. 276, 31 Am. St. Rep. 520; Plummer v. Dill, 156 Mass. 426, 428, 429, 31 N. E. 128, 32 Am. St. Rep. 463; McCarvell v. Sawyer, 173 Mass. 540, 54 N. E. 259, 73 Am. St. Rep. 318; Moffatt v. Kenny, 174 Mass. 311, 54 N. E. 850; Harobine v. Abbott, 177 Mass. 59, 58 N. E. 284.

When the plaintiff, having placed his driving gloves in the wagon, accepted the check for his team, and left the stable, no custom of business nor special invitation having been shown, he neither reserved nor obtained any right to use the stable for the purpose of placing other property in his wagon, nor to enter the room in which the wagon was, except for the purpose of reclaiming his property. In fact, although the plaintiff testified that he did not know it, a place for customer's parcels was provided in the office. However this may have been, there is nothing in the evidence to justify a finding that he had any right to expect, upon entering the stable the second time, that he would find it in such a condition that it would be safe for him to walk through it to his wagon and place in it other packages. In so doing he was visiting merely for his own convenience a part of the stable which obviously was not designed or intended for his use, but for the storage of vehicles. There was nothing to give him the right to infer or assume that by placing other articles of his own in his wagon he could charge the defendants with their custody, or that he had the right to use the room for the purpose of putting other articles in his wagon. His second visit being solely for that purpose, in making it he was at best but a mere licensee, and must take the place as he found it.

Besides this, he was not in the exercise of due care. The raised beam upon the floor over which he walked in going to his wagon, and the depression beyond it, in which the platform of the hoist rested when down; the grooved posts which guided the platform

in its ascent and descent, and around one of which he swung himself; the box in which the counterweight hung; the check rope, and the double hoisting hawser of heavy rope hanging next his wagon, and within two feet of the post,—were all plainly visible, and all indicated obviously that the place where he chose to stand was used by a carriage hoist. He himself testified that if he had seen the hoisting rope hanging down and going around he would have thought there was an elevator there. We are of opinion that there were so many obvious indications that he stood in the way of a hoisting machine that he could not be found to be in the exercise of due care.

Exceptions overruled.

HUPFER v. NATIONAL DISTILLING CO.

(Supreme Court of Wisconsin, 1902. 114 Wis. 279, 90 N. W. 191.)

This action was brought by Hupfer, as administrator of Simon Hupfer, against the National Distilling Company to recover damages for negligently causing the death of plaintiff's intestate. The complaint alleged, in effect:

That the deceased came to the defendant's distillery, as he had for some time been accustomed to do, for the purpose of purchasing and receiving slops for his cows, which slops were contained in a large circular tank about 16 feet in diameter, and raised about 6 feet above the ground, and drawn therefrom by a faucet at the bottom of the tank; that Simon drove his wagon under and by the side of the tank for the purpose of so filling his wagon with such slops; that without his knowledge or any warning to him, and through the carelessness and negligence of the defendant, the hoops which held the tank together had become rusted and weakened, so that the tank broke, and the contents thereof were precipitated upon Simon, scalding him in such a dangerous and shocking manner that he died about three hours afterwards.

The trial, under a denial and counter allegations, resulted in a special verdict for $1,000 in the plaintiff's favor, and judgment thereon in that amount. The defendant appealed.[68]

CASSODAY, C. J. It is contended that the deceased was, at the time and place of the injury, at most a mere licensee, to whom the defendant owed no duty. It is true that the defendant had in its employ at the time one John Dardell, whose special duty, among other things, was to stir up the slop in the vat and deliver the same to the defendant's customers. By the eighth and ninth findings the jury found that prior to the accident the deceased and the defendant's other customers knew that such were the duties of John Dardell. But by the sixth, seventh, and tenth findings, the jury also found that at the time of the accident it had long been an established custom for the defendant's customers, desiring to purchase such slops, to stir the same for themselves, if they desired to do so; and that such custom was known to and acquiesced in by the defendant; and that

[68] The statement of facts is abridged.

prior to the accident the defendant repeatedly suffered the deceased to step upon the back platform and stir up the slop, because it feared to lose his custom if he should be forbidden. John Dardell testified to the effect that he told the defendant's secretary that if some of the customers were not allowed to stir the slops themselves such customers would not take them; that the secretary told him not to drive customers away, but that he would rather he would stir the slops himself; that he had known the deceased for three years; that in the winter he came for slops almost every day, but seldom in the summer; that he often told the deceased that his duties required him to stir the slops, but that the deceased always stirred the slops himself; that by doing so he would get the thick slop, while other customers, who did not stir it themselves, would get thinner slop; that he knew that the deceased would not take the slop unless he stirred it himself, and so he let him stir the slop and fill his wagon rather than lose him as a customer; and that he regarded that as business. Upon such findings and testimony, can we hold that the deceased was a mere licensee within the authorities? * * * In Bennett v. Railroad Co., 102 U. S. 577, 584, 585, 26 L. Ed. 235, 238, it is said, quoting from an author, that "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." Similar views are expressed in Mr. Thompson's late Commentaries on the Law of Negligence (volume 1, § 968), citing numerous cases in support of the rule.

We must hold that, under the findings of the jury, the deceased cannot be regarded as a mere licensee, but that he was there on business for the mutual benefit of himself and the defendant: or in other words, by invitation. * * *[69]

The judgment of the superior court for Milwaukee county is reversed [for error in the admission of testimony], and the cause is remanded for a new trial.

[69] A part of Mr. Chief Justice Cassoday's opinion, including a numerous citation of authorities, is omitted. Bardeen and Marshall, JJ., concurred in the result: the latter in an elaborate opinion.

HOLMES v. DREW.

(Supreme Judicial Court of Massachusetts, 1890. 151 Mass. 578, 25 N. E. 22.)

Tort for personal injuries sustained by the plaintiff by falling upon a private sidewalk belonging to the defendant, and negligently suffered by her to remain in a dangerous condition. At the trial there was evidence tending to prove the following facts:

The defendant was the owner of an estate abutting on West Rutland Square, a public street in the city of Boston. The buildings fronting upon this street, including that of the defendant, had been placed by their owners sixteen feet back from the street line, and a brick sidewalk had been laid by them upon the intervening space. In front of the defendant's building, this sidewalk was nowhere less than eight feet wide, of which but eight inches were included within the limits of the street, the remainder being entirely upon the defendant's land. This entire sidewalk was so constructed by the defendant as apparently to constitute a public sidewalk, with nothing to indicate any difference or line of separation between what was public and what was private. The bricks of the sidewalk at the intersection of the street with a private way, which crossed it and formed the boundary of one side of the defendant's estate, were kept in position by a board which extended from the side of the street at right angles into the defendant's land, and projected above the bricks for a height varying from an inch and a quarter to six inches and a quarter. In front of the defendant's building and upon her land, over an irregular space covering about fifteen square feet extending from this board into the sidewalk, the bricks had become loose, misplaced, and thrown into various irregular positions, and had there remained for several months before November 4, 1887. On the evening of that day, the plaintiff, while travelling along the sidewalk upon the defendant's premises towards the private way, being in the exercise of due care and supposing that the sidewalk was a part of the street, stumbled over the loose bricks and the projecting board above described, and, falling down, was severely injured. The plaintiff did not give to the defendant the notice mentioned in the Pub. Sts. c. 52, § 19. After the accident, the loose bricks on the defendant's premises were replaced in proper position, and the sidewalk put in safe condition, but it did not appear who did it.

The judge upon the above facts directed a verdict for the defendant; and the plaintiff alleged exceptions.

W. ALLEN, J. The jury might have inferred from the facts stated that the defendant laid out and paved the sidewalk on her own land in order that it should be used by the public as the sidewalk of the street, and allowed it to remain apparently the part of the street that was intended to be used by foot passengers. This would amount to an invitation to the public to enter upon and use as a public sidewalk the land so prepared, and the plaintiff so using it would have gone upon the defendant's land by her implied invitation, and she would owe to him the duty not to expose him to a dangerous condition of the walk which reasonable care on her part would have prevented. Sweeny v. Old Colony & Newport Railroad, 10 Allen, 368, 87 Am. Dec. 644; Carleton v. Franconia Iron & Steel Co., 99 Mass. 216; Oliver v. Worcester, 102 Mass. 489, 3 Am. Rep. 485; Davis v. Central Congregational Society, 129 Mass. 367, 371, 37 Am. Rep. 368; Murphy v. Boston & Albany Railroad, 133 Mass. 121.

The place was not a way, and Pub. Sts. c. 52, § 19, do not apply.

The ground of the defendant's liability is not her obligation to keep a way in repair; but her obligation to use due care that her land should be reasonably safe for the use which she invited the plaintiff to make of it. Whether she invited the plaintiff to cross her land on a paved walk, whether the pavement was in such a condition as to render walking over it dangerous, whether it was in that condition through the negligence of the defendant, and whether the plaintiff was hurt in consequence while in the exercise of due care, were questions proper to be submitted to the jury.

Exceptions sustained.[70]

II. In Relation to Contractual Obligations: Whether a Duty of Care Towards Third Persons

WINTERBOTTOM v. WRIGHT.

(Court of Exchequer, 1842. 10 Mees. & W. 109, 62 R. R. 534.)

Case. The declaration stated:

That the defendant was a contractor for the supply of mail-coaches, and had in that character contracted for hire and reward with the Postmaster-General, to provide the mail-coach for the purpose of conveying the mail-bags from Hartford, in the county of Chester, to Holyhead: That the defendant, under and by virtue of said contract, had agreed with the said Postmaster-General that the said mail-coach should, during the said contract, be kept in a fit, proper, safe, and secure state and condition for the said purpose, and took upon himself, to wit, under and by virtue of the said contract, the sole and exclusive duty, charge, care, and burden of the repairs, state and condition of the said mail-coach: and it had become and was the sole and exclusive duty of the defendant, to wit, under and by virtue of his said contract, to keep and maintain the said mail-coach in a fit, proper, safe and secure state and condition for the purpose aforesaid: That Nathanial Atkinson and other persons, having notice of the said contract, were under contract with the Postmaster-General to convey the said mail-coach from Hartford to Holyhead, and to supply horses and coachmen for that purpose, and also not, on any pretence whatever, to use or employ any other coach or carriage whatever than such as should be so provided, directed and appointed by the Postmaster-General: That the plaintiff, being a mail-coachman, and thereby obtaining his livelihood, and whilst the said several contracts were in force, having notice thereof, and trusting to and confiding in the contract made between the defendant and the Postmaster-General, and believing that the said coach was in a fit, safe, secure and proper state and condition

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[70] "There is a class of cases to which Sweeny v. Old Colony Railroad (1865) 10 Allen, 368, 87 Am. Dec. 644, and Holmes v. Drew (1890) 151 Mass. 578, 25 N. E. 22, belong, which stand on a ground peculiar to themselves. They are where the defendant, by his conduct, has induced the public to use a way in the belief that it is a street or public way which all have a right to use, and where they suppose they will be safe. The inducement or implied invitation in these cases is not to come to a place of business fitted up by the defendant for traffic to which those only are invited who will come to do business with the occupant, nor is it to come by permission or favor or license; but it is to come as one of the public, and enjoy a public right, in the enjoyment of which one may expect to be protected. The liability in such a case should be co-extensive with the inducement or implied invitation." Per Knowlton, J., in Plummer v. Dill (1892) 156 Mass. 426, 430, 31 N. E. 128, 130, 32 Am. St. Rep. 463, 467.

for the purpose aforesaid, and not knowing and having no means of knowing to the contrary thereof, hired himself to the said Nathanial Atkinson and his co-contractors as mail-coachman, to drive and take the conduct of the said mail-coach, which but for the said contract of the defendant he would not have done. The declaration then averred, that the defendant so improperly and negligently conducted himself, and so utterly disregarded his aforesaid contract, and so wholly neglected and failed to perform his duty in this behalf, that heretofore, to wit, on the 8th of August, 1840, whilst the plaintiff, as such mail-coachman so hired, was driving the said mail-coach from Hartford to Holyhead, the same coach being a mail-coach found and provided by the defendant under his said contract, and the defendant then acting under his said contract, and having the means of knowing and then well knowing all the aforesaid premises, the said mail-coach being then in a frail, weak, infirm, and dangerous state and condition, to wit, by and through certain latent defects in the state and condition thereof, and unsafe and unfit for the use and the purpose aforesaid, and from no other cause, circumstance, matter, or thing whatsoever, gave way and broke down, whereby the plaintiff was thrown from his seat, and, in consequence of injuries then received, had become lame for life.

To this declaration the defendant pleaded several pleas, to two of which there were demurrers; but, as the court gave no opinion as to their validity, it is not necessary to state them.

Byles, for the defendant, objected that the declaration was bad in substance: This is an action brought, not against Atkinson and his co-contractors, who were the employers of the plaintiff, but against the person employed by the Postmaster-General, and totally unconnected with them or the plaintiff. Now it is a general rule, that wherever a wrong arises merely out of the breach of a contract, which is the case on the face of this declaration, whether the form in which the action be conceived be ex contractu or ex delicto, the party who made the contract alone can sue: Tollit v. Sherstone, 5 M. & W. 283. If the rule were otherwise, and privity of contract were not requisite, there would be no limit to such actions. * * * Levy v. Langridge, 4 M. & W. 337, will probably be referred to on the other side. But that case was expressly decided on the ground that the defendant, who sold the gun by which the plaintiff was injured, although he did not personally contract with the plaintiff, who was a minor, knew that it was bought to be used by him. Here there is no allegation that the defendant knew that the coach was to be driven by the plaintiff. There, moreover, fraud was alleged in the declaration, and found by the jury: and there, too, the cause of the injury was a weapon of a dangerous nature, and the defendant was alleged to have had notice of the defect in its construction. Nothing of that sort appears upon this declaration.

Peacock, contra. This case is within the principle of the decision in Levy v. Langridge. Here the defendant entered into a contract with a public officer to supply an article which, if imperfectly constructed, was necessarily dangerous, and which, from its nature and the use for which it was destined, was necessarily to be driven by a coachman. That is sufficient to bring the case within the rule established by Levy v. Langridge. In that case the contract made by

the father of the plaintiff with the defendant was made on behalf of himself and his family generally, and there was nothing to show that the defendant was aware even of the existence of the particular son who was injured. Suppose a party made a contract with government for a supply of muskets, one of which, from its misconstruction, burst and injured a soldier: there it is clear that the use of the weapon by a soldier would have been contemplated, although not by the particular individual who received the injury, and could it be said, since the decision in Levy v. Langridge, that he could not maintain an action against the contractor? So, if a coachmaker, employed to put on the wheels of a carriage, did it so negligently that one of them flew off, and a child of the owner were thereby injured, the damage being the natural and immediate consequence of his negligence, he would surely be responsible. So, if a party entered into a contract to repair a church, a workhouse, or other public building, and did it so insufficiently that a person attending the former, or a pauper in the latter were injured by the falling of a stone, he could not maintain an action against any other person than the contractor; but against him he must surely have a remedy. It is like the case of a contractor who negligently leaves open a sewer, whereby a person passing along the street is injured. It is clear that no action could be maintained against the Postmaster-General: Hall v. Smith, 2 Bing. 156; Humphreys v. Mears, 1 Man. & R. 187; Priestly v. Fowler. But here the declaration alleges the accident to have happened through the defendant's negligence and want of care. The plaintiff had no opportunity of seeing that the carriage was sound and secure. (ALDERSON, B. The decision in Levy v. Langridge proceeds upon the ground of the knowledge and fraud of the defendant.) Here also there was fraud: the defendant represented the coach to be in a proper state for use, and whether he represented that which was false within his knowledge, or a fact as true which he did not know to be so, it was equally a fraud in point of law, for which he is responsible.

LORD ABINGER, C. B. I am clearly of opinion that the defendant is entitled to our judgment. We ought not to permit a doubt to rest upon this subject, for our doing so might be the means of letting in upon us an infinity of actions. This is an action of the first impression, and it has been brought in spite of the precautions which were taken, in the judgment of this Court in the case of Levy v. Langridge, to obviate any notion that such an action could be maintained. We ought not to attempt to extend the principle of that decision, which, although it has been cited in support of this action, wholly fails as an authority in its favor; for there the gun was bought for the use of the son, the plaintiff in that action, who could not make the bargain himself, but was really and substantially the party contracting. Here the action is brought simply because the defendant was a contractor with a third person; and it is contended that there-

upon he became liable to everybody who might use the carriage. If there had been any ground for such an action, there certainly would have been some precedent of it; but with the exception of actions against inn-keepers, and some few other persons, no case of a similar nature has occurred in practice. That is a strong circumstance, and is of itself a great authority against its maintenance. It is however contended, that this contract being made on the behalf of the public by the Postmaster-General, no action could be maintained against him, and therefore the plaintiff must have a remedy against the defendant. But that is by no means a necessary consequence, —he may be remediless altogether. There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue. Where a party becomes responsible to the public, by undertaking a public duty, he is liable, though the injury may have arisen from the negligence of his servant or agent. So, in cases of public nuisances, whether the act was done by the party as a servant, or in any other capacity, you are liable to an action at the suit of any person who suffers. Those, however, are cases where the real ground of the liability is the public duty, or the commission of the public nuisance. There is also a class of cases in which the law permits a contract to be turned into a tort; but unless there has been some public duty undertaken, or public nuisance committed, they are all cases in which an action might have been maintained upon the contract. Thus, a carrier may be sued either in assumpsit or case; but there is no instance in which a party, who was not privy to the contract entered into with him, can maintain any such action. The plaintiff in this case could not have brought an action on the contract; if he could have done so, what would have been his situation, supposing the Postmaster-General had released the defendant? That would, at all events, have defeated his claim altogether. By permitting this action, we should be working this injustice, that after the defendant had done everything to the satisfaction of his employer, and after all matters between them had been adjusted, and all accounts settled on the footing of their contract, we should subject them to be ripped open by this action of tort being brought against him.

ALDERSON, B. I am of the same opinion. 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. The only real argument in favor of this action is, that this is a case of hardship; but that might have been obviated if the plaintiff had made himself a party to the contract. Then it is urged that it falls within the principle of the case of Levy v. Langridge. But the principle of that case is simply this, that the father having bought the gun for the very purpose of being used by the plaintiff, the defendant made representations by which he was induced to use it. There, a distinct fraud was committed on the plaintiff; the falsehood of the representation was also alleged to have been within the knowledge of the defendant who made it, and he was properly held liable for the consequences. How are the facts of that case applicable to those of the present? Where is the allegation of fraud or misrepresentation in this declaration? It shows nothing of the kind. Our judgment must therefore be for the defendant.

ROLFE, B. The breach of the defendant's duty, stated in the declaration, is his omission to keep the carriage in a safe condition; and when we examine the mode in which that duty is alleged to have arisen, we find a statement that the defendant took upon himself, to wit, under and by virtue of the said contract, the sole and exclusive duty, charge, care, and burden of the repairs, state, and condition of the said mail coach, and, during all the time aforesaid, it had become, and was the sole and exclusive duty of the defendant, to wit, under and by virtue of his said contract, to keep and maintain the said mail coach in a fit, proper, safe, and secure condition. The duty, therefore, is shown to have arisen solely from the contract; and the fallacy consists in the use of the 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. This is one of those unfortunate cases in which there certainly has been damnum, but it is damnum absque injuria; it is, no doubt, a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced. Hard cases, it has been frequently observed, are apt to introduce bad law.

Judgment for the defendant.

GALBRAITH v. ILLINOIS STEEL CO.

(Circuit Court of Appeals of the United States, Seventh Circuit. 1904. 66 C. C. A. 359, 133 Fed. 485, 2 L. R. A. [N. S.] 799.)

This was an action on the case against the Illinois Steel Company. At the conclusion of the plaintiff's evidence, the court, on defendant's motion, directed a verdict for the defendant, and entered judgment thereon. The plaintiff brings error to reverse this judgment. The facts in the case were as follows:

The plaintiff, owner of a six-story business block in Chicago, contracted with the Manufacturers' Automatic Sprinkler Company to install in her

building a complete sprinkler system. Among other things, the sprinkler company agreed to construct on top of the building, according to plans of Ritter & Mott, engineers, a steel framework on which to stand a wooden tank of 20,000 gallons capacity. The sprinkler company contracted with the defendant to erect the steel support. Defendant was given the drawings and specifications prepared by Ritter & Mott, and in making therefrom its shop plans, and in putting up the steel support, omitted a tie member—one side of the triangular top. Ritter & Mott's plans informed defendant that a tank 16 feet in diameter would rest upon the steel support, but did not disclose the height and capacity of the tank. Defendant did its work in the manner above stated, and left the building. Thereafter a tank company employed by the sprinkler company came upon the building and made and placed the tank. Then the sprinkler company connected the tank with the system of pipes and sprinkler heads throughout the building. The tank was filled and the system was maintained by plaintiff for 30 days before the accident occurred which gave rise to this controversy. The steel support weighed 5 tons; the tank and water, 85. The wind, blowing at 40 miles an hour against the tank surface, caused the structure to collapse. The evidence tends to prove that the collapse would not have happened, except for the absence of the tie member. Plaintiff paid out large sums in repairing the building and sprinkler system, in reimbursing tenants for damage to goods, and in settling personal injury claims. To recover these, she brought this action.

BAKER, Circuit Judge (after stating the facts). Plaintiff contends that defendant, outside and independently of its contract with the sprinkler company, owed her a duty to use reasonable care in constructing the steel support; that the evidence shows that defendant failed to exercise such care; that such failure was the proximate cause of her losses; and therefore that she has made out a good cause of action against defendant. And in support of her contention plaintiff cites numerous authorities.[71]

On the other hand, defendant insists that this case falls within the rule that a contractor, manufacturer, or vender is not liable to persons who have no contractual relations with him for negligence in the construction, manufacture, or sale of the article he handles, and illustrates its argument by comparison with many cases.[72]

[71] Sibley on the Right to and Cause for Action, p. 44; Enc. of Law & Procedure (section on "Actions"); Whitaker's Smith on Negligence (2d Ed.) p. 111; also page 32; Pollock on Torts (Ed. 1887) pp. 347, 350; Bickford v. Richards (1891) 154 Mass. 163, 27 N. E. 1014, 26 Am. St. Rep. 224; Bishop on Noncontract Law, § 79; Thompson's Commentaries on the Law of Negligence, vol. 1, p. 626; Addison on Torts (Dudley & B. Ed.) p. 17; Shearman & Redfield on Negligence (4th Ed.) vol. 1, p. 23, § 22; Huset v. J. I. Case Threshing Machine Company (1903) 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303.

[72] Winterbottom v. Wright (1842) 10 M. & W. 109; Collis v. Selden (1868) 3 C. P. 495; Mayor of Albany v. Cunliff (1849) 2 N. Y. 165; Loop v. Litchfield (1870) 42 N. Y. 351, 1 Am. Rep. 513; Losee v. Clute (1873) 51 N. Y. 494, 10 Am. Rep. 638; Necker v. Harvey (1883) 49 Mich. 517, 14 N. W. 503; Daugherty v. Herzog (1896) 145 Ind. 255, 44 N. E. 457, 32 L. R. A. 837, 57 Am. St. Rep. 204; Curtin v. Somerset (1891) 140 Pa. 70, 21 Atl. 244, 12 L. R. A. 322, 23 Am. St. Rep. 220; Fitzmaurice v. Fabian (1892) 147 Pa. 199, 23 Atl. 444; Heizer v. Kingsland & Douglass Mfg. Co. (1892) 110 Mo. 605, 19 S. W. 630, 15 L. R. A. 821, 33 Am. St. Rep. 482; Bailey v. Northwestern, etc., Gas Co. (1890) 4 Ohio Cir. Ct. R. 471; Burdick v. Cheadle (1875) 26 Ohio St. 393, 20 Am. Rep. 767; Davidson v. Nichols (1866) 93 Mass. (11 Allen) 514; Carter v. Harden (1886) 78 Me. 528, 7 Atl. 392; McCaffrey v. Mossberg & Granville Mfg. Co. (1901) 23 R. I. 381, 50 Atl. 651, 55 L. R. A. 822, 91 Am.

If the sprinkler company had suffered from defendant's omission of the tie member, that company could have maintained against defendant an action ex contractu, for defendant had engaged to put in the tie member, or an action ex delicto, for defendant failed to discharge a duty it had assumed to the sprinkler company. In both cases the measure of right and duty would be the same, because it would be intolerable that an action ex delicto should be maintained by one contracting party against the other on account of the complete and exact performance of the contract. If defendant owed to the sprinkler company any duty to exercise care that the completed structure should withstand the wind, then, if the contract had called for the very steel support that defendant erected, full performance of the contract would be no defense to an action ex delicto for breach of the supposititious duty. It follows that the only duty owing by defendant to the sprinkler company was to perform the contract as it was made, and that the only party who could sue defendant for a breach of the duty that was created and measured by the contract was defendant's contractee, the sprinkler company.

Plaintiff cannot recover from defendant simply by showing defendant's breach of its contract with the sprinkler company, nor simply by showing defendant's breach of its duty to the sprinkler company. There was no contract relation between the parties to this case. What duty arose from the fact that defendant went upon plaintiff's building to execute its contract with the sprinkler company? There is the general maxim of the law of negligence that one, in following his business or pleasure, shall use reasonable care to avoid injury to others. That is a duty owing from everybody to everybody. And in this case, if defendant's workmen, during the erection of the steel support, had negligently dropped a girder on a passer-by in the street, or down through the roof and floors of plaintiff's building, Bickford v. Richards, 154 Mass. 163, 27 N. E. 1014, 26 Am. St. Rep. 224, and other decisions, would be good precedents for applying the maxim. In such a case there would be a breach of a duty that was not created and measured by the contract, and the inquiry whether defendant, on finally leaving the premises, had fully completed its contract, or had negligently failed in its duty in that regard, would be utterly irrelevant.

But plaintiff's case requires her to assert that defendant owed her the duty to use reasonable care to see to it, before leaving the job of

St. Rep. 637; Burke v. De Castro (1877) 11 Hun (N. Y.) 354; Swan v. Jackson (1889) 55 Hun, 194, 7 N. Y. Supp. 821; Savings Bank v. Ward (1879) 100 U. S. 195, 25 L. Ed. 621; Goodlander Mill Co. v. Standard Oil Co. (1894) 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. 583; Bragdon v. Perkins-Campbell Co. (1898) 87 Fed. 109, 30 C. C. A. 567, 66 L. R. A. 924; Huset v. J. I. Case Threshing Machine Co. (1903) 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303; Salliotte v. King Bridge Co. (1903) 122 Fed. 378, 58 C. C. A. 466, 65 L. R. A. 620; Blakemore v. B. & E. Ry. Co. (1858) 8 El. & Bl. 1035; Barrett v. Singer Mfg. Co. (1869) 31 N. Y. Super. Ct. 545; Marvin Safe Co. v. Ward (1884) 46 N. J. Law, 19; Marquardt v. Ball Engine Co. (1903) 122 Fed. 374, 58 C. C. A. 462; Wharton on Negligence (2d Ed.) 438.

erecting the steel support, that the final structure would not be apt to be blown over on account of the lack of the proper number of steel girders to make it safe. If such a duty existed, it would be one owing equally to the passer-by in the street, it would have being separate and apart from the duty that was created and measured by the contract between defendant and the sprinkler company, and it might or might not be coextensive with defendant's duty to the sprinkler company. If it were coextensive, it would be for the reason that defendant's contract with the sprinkler company called for such a steel support that the final structure would be reasonably safe. And since a duty cannot be shifted, defendant could not rely on the proposal of its customer, but would have to determine for itself, and at its own peril, whether or not the steel support shown in the proposed contract would in fact be sufficient to co-operate properly with the other parts of the system to make a reasonably safe final structure. If defendant's alleged duty to plaintiff were of different dimensions from those of its duty to the sprinkler company, it would be for the reason that defendant's contract with the sprinkler company did not call for such a steel support that the final structure would be reasonably safe. And in such a case defendant would be confronted with the situation that its performance of its duty to the sprinkler company would be a breach of its duty to the rest of the world.

Defendant's supposed duty to plaintiff being created by law, if at all, and therefore being absolute, and defendant's duty to the sprinkler company being of a size determinable by the contracting parties, the question of the two duties' coextensiveness is irrelevant, for, if defendant owed plaintiff the supposed duty, that duty could not be diminished or altered by defendant's contract with another. Hence, in inquiring into the origin, nature, and extent of defendant's duty to plaintiff, the irrelevancy of the terms of defendant's contract with the sprinkler company. And since the terms of the contract are immaterial, it is obvious that the question of performance is impertinent on the part of any one but the sprinkler company.

If defendant, constructor of one part, was bound to use reasonable care that the entirety, when turned over to the possession and use of a stranger, should withstand the winds, so were the builders of other parts. Take the tank company for example. It came upon the premises after defendant had gone. The fact was obvious that one side of a triangle was missing. The final effect of putting upon that support 85 tons' weight in the form of a sail was the blowing over of the structure. If defendant were required to look beyond its contract, and to ascertain the weight of the tank that was to be furnished by another, its capacity, the weight of the water, the sail area, and the speed of the winds, in order to determine whether the final and completed structure would be safe, it would be equally just to require the tank company to figure (and with reasonable accuracy, at its peril) on the tensile and torsional strength of steel, and the adequacy of the

designs for the support on which it engaged to set its tank. If the law should hold all the builders and makers and doers in the land to a particular duty to their contractees, and at the same time to another absolute duty to use care that the thing shall be innocuous as it passes through the hands of all mankind—a duty separate and distinct from the first, which might or might not be coextensive with the first, but, whether so or not, unavailing to avoid the second—we fancy few persons would be willing to do business, in the face of the insufferable litigation that would ensue. True, the common law—that inexhaustible fount, of which the taps are in the hands of the courts—might have been turned to watering plaintiff's contention; but we think it evidence of the perception of a sound public policy that the courts, with virtual unanimity, have refrained from opening the gates.

To the rule there are exceptions. One must not, knowingly or unknowingly, fail to exercise care in the preparation or sale of an article intended to affect human life. One must not knowingly send out an instrumentality which is imminently and immediately dangerous, without notice of its nature and qualities. From the steel support, as defendant left it, no danger threatened. None came from it immediately, but only through additions and acts of the tank company, the sprinkler company, and plaintiff. This case is not within the exceptions. And furthermore the subsequent and independent intervening acts of the tank company, the sprinkler company, and plaintiff saved defendant's omission of the tie member from being the proximate cause of the accident.[73]

[73] Judge Grosscup dissented: "Now one thing seems quite sure: The plaintiff would have had, in some form, a right of action against the Sprinkler Company for the damage resulting; for the inclusion of the tie member was in the contract between them, and the Sprinkler Company was bound to see that the contract was performed. Another thing seems certain: The Sprinkler Company would have had, in some form, a right of action against the defendant for the loss to which it would thus be subjected; for the inclusion of the tie member was in the contract between the Sprinkler Company and the defendant, and the defendant was bound to perform that contract. Thus, by circumlocution at least, plaintiff's losses eventually would have reached the defendant, through a train of legal proceedings that, practically, would have made the defendant directly responsible to the plaintiff for the losses suffered. I am very much inclined to think that in such a case, where defendant is thus obligated to the Sprinkler Company, and the Sprinkler Company to the plaintiff, there exists such privity of contract as would give the plaintiff a direct right of action, ex contractu, against the defendant. But I do not rest my conclusion upon the existence of privity of contract. In matters involving, as these contracts did, the personal and property safety of others than the immediate parties to the contracts, there is, it seems to me, a duty raised to take reasonable care that the contract obligations are carried out. Public policy injects into such a relationship an obligation additional to the bare contractual obligation—an obligation running to all who are directly affected by the performance or non-performance of the contract. There is thus raised between defendant agreeing to put in an essential part of the building, according to plans and specifications, and the plaintiff affected in personal and property safety by defendant's performance of that obligation, a privity of duty that may be made the basis of an action ex delicto."

THOMAS et ux. v. WINCHESTER.

(Court of Appeals of New York, 1852. 6 N. Y. [2 Seld.] 397, 57 Am. Dec. 455.)

This action was brought by Samuel Thomas and Mary Ann, his wife, against the defendants, Winchester and Gilbert, to recover damages for negligently putting up, labelling, and selling, as and for extract of dandelion, a simple and harmless medicine, a jar of extract of belladonna, a deadly poison; by means whereof, the plaintiff, Mary Ann Thomas, to whom a dose of dandelion had been prescribed by a physician, and to whom a portion of the jar of belladonna had been administered, as for extract of dandelion, had been greatly injured.

The complaint alleged, that the defendants, from the year 1843, to the first of January 1849, were engaged in putting up and vending certain vegetable extracts, at a store in the city of New York, designated as "108 John street," and that the defendant, Gilbert, had, for a long time previously thereto, been so engaged, at the same place. That among the extracts so prepared and sold by them, were those respectively known as the "extract of dandelion," and the "extract of belladonna"; the former a mild and harmless medicine and the latter a vegetable poison, which, if taken as a medicine in such quantity as might be safely administered of the former, would destroy the life, or seriously impair the health, of the person to whom the same might be administered. That, at some time between the periods above mentioned, the defendants put up and sold to James S. Aspinwall, a druggist in the city of New York, a jar of the extract of belladonna, which had been labelled by them as the extract of dandelion, and was purchased from them as such, by Aspinwall. That Aspinwall afterwards, on the 10th May 1845, relying upon the label so affixed by the defendants, sold the said jar of belladonna to Alvin Foord, a druggist of Cazenovia, in the county of Madison, as the extract of dandelion. That afterwards, on the 27th March 1849, the plaintiff, Mrs. Thomas, being sick, a portion of the extract of dandelion was prescribed for her, by her physician, and the said Alvin Foord, relying upon the label affixed by the defendants to said jar of belladonna, and believing the same to be the extract of dandelion, did, on the application of the plaintiff, Samuel Thomas, sell and deliver to him, from the said jar of belladonna, a portion of its contents, which was administered to the plaintiff, Mrs. Thomas, under the belief that it was the extract of dandelion; by which she was greatly injured, so that her life was despaired of, &c. The plaintiffs also averred that the whole injury was occasioned by the negligence and unskilfulness of the defendants in putting up and falsely labelling the jar of belladonna as the extract of dandelion, whereby the plaintiffs, as well as the druggists, and all other persons through whose hands it passed, before being administered as aforesaid, were induced to believe and did believe that it contained the extract of dandelion.

The defendants, in their answers, severally denied the allegations of the complaint, and insisted that they were not liable for the medicines sold by Aspinwall and Foord.

It was proved, on the trial before Mason, J., that Mrs. Thomas being in ill health, her physician prescribed for her a dose of dandelion. Her husband purchased what was believed to be the medicine prescribed, at the store of Dr. Foord, a physician and druggist in Cazenovia, Madison county, where the plaintiffs resided. A small quantity of the medicine thus purchased was administered to Mrs. Thomas, on whom it produced very alarming effects; such as coldness of the surface and extremities, feebleness of circulation, spasms of the muscles, giddiness of the head, dilation of the pupils of the eyes, and derangement of the mind. She recovered, however, after some time, from its effects, although for a short time her life was thought to be in great danger.

The medicine administered was belladonna and not dandelion. The jar from which it was taken was labelled "1/2lb. dandelion, prepared by A. Gilbert, No. 108 John street, N. Y. Jar 8 oz." It was sold for, and believed by Dr. Foord to be, the extract of dandelion, as labelled. Dr. Foord purchased the article as the extract of dandelion, from James S. Aspinwall, a druggist at New York. Aspinwall bought it of the defendant, as extract of dandelion, believing it to be such.

The defendant, Winchester, was engaged at 108 John street, New York, in the manufacture and sale of certain vegetable extracts for medicinal purposes, and in the purchase and sale of others. The extracts manufactured by him were put up in jars for sale, and those which he purchased were put up by him in like manner. The jars containing extracts manufactured by himself and those containing extracts purchased by him from others, were labelled alike. Both were labelled like the jar in question, as "prepared by A. Gilbert." Gilbert was a person employed by the defendant at a salary, as an assistant in his business. The jars were labelled in Gilbert's name because he had been previously engaged in the same business, on his own account, at No. 108 John street, and, probably, because Gilbert's labels rendered the articles more salable.

The extract contained in the jar sold to Aspinwall, and by him to Foord, was not manufactured by the defendant, but was purchased by him from another manufacturer or dealer. The extract of dandelion and the extract of belladonna resemble each other in color, consistence, smell and taste; but may, on careful examination, be distinguished the one from the other by those who are well acquainted with these articles. Gilbert's labels were paid for by Winchester, and used in his business with his knowledge and assent.

At the close of the testimony, the defendant's counsel moved for a nonsuit, on the following grounds:

1. That the action could not be sustained, as the defendant was the remote vendor of the article in question; and there was no connection, transaction or privity between him and the plaintiffs, or either of them. * * *

The defendant Gilbert was acquitted by the jury, and a verdict was rendered against Winchester for $800 damages; and a motion for a new trial, made at general term, upon a bill of exceptions, having been denied, and judgment perfected on the verdict, the defendant, Winchester, took this appeal.

RUGGLES, C. J. (after stating the facts). * * * The action was properly brought in the name of the husband and wife, for the personal injury and suffering of the wife; and the case was left to the jury, with the proper direction on that point. 1 Chit. Plead. 62.

The case depends on the first point taken by the defendant, on his motion for a nonsuit; and the question is, whether the defendant, being a remote vendor of the medicine, and there being no privity or connection between him and the plaintiffs, the action can be maintained. If, in labelling a poisonous drug with the name of a harmless medicine, for public market, no duty was violated by the defendant, excepting that which he owed to Aspinwall, his immediate vendee, in virtue of his contract of sale, this action cannot be maintained.

If A. build a wagon and sell it to B., who sells it to C., and C. hires it to D. who in consequence of the gross negligence of A., in building the wagon, is overturned and injured, D. cannot recover damages against A., the builder. A.'s obligation to build the wagon faithfully, arises solely out of his contract with B.; the public have nothing to do with it. Misfortune to third persons not parties to the contract, would not be a natural and necessary consequence of the builder's negligence; and such negligence is not an act imminently dangerous to human life. So, for the same reason, if a horse be defectively shod by a smith, and a person hiring the horse from the owner, is thrown and injured, in consequence of the smith's negligence in shoeing, the smith is not liable for the injury. The smith's duty in such case grows exclusively out of his contract with the owner of the horse; it was a duty which the smith owed to him alone; and to no one else. And although the injury to the rider may have happened in consequence of the negligence of the smith, the latter was not bound, either by his contract, or by any considerations of public policy or safety, to respond for his breach of duty to any one except the person he contracted with.

This was the ground on which the case of Winterbottom v. Wright, 10 Mees. & Welsb. 109, was decided. A. contracted with the postmaster-general to provide a coach to convey the mail-bags along a certain line of road, and B. and others also contracted to horse the coach along the same line. B. and his co-contractors hired C., who was the plaintiff, to drive the coach. The coach, in consequence of some latent defect, broke down; the plaintiff was thrown from his seat and lamed. It was held, that C. could not maintain an action against A., for

the injury thus sustained. The reason of the decision is best stated by Baron Rolfe: A.'s duty to keep the coach in good condition, was a duty to the postmaster-general, with whom he made his contract, and not a duty to the driver employed by the owners of the horses.

But the case in hand stands on a different ground. The defendant was a dealer in poisonous drugs; Gilbert was his agent in preparing them for market. The death or great bodily harm of some person, was the natural, and almost inevitable, consequence of the sale of belladonna by means of the false label. Gilbert, the defendant's agent, would have been punishable for manslaughter, if Mrs. Thomas had died, in consequence of taking the falsely-labelled medicine. Every man who by his culpable negligence, causes the death of another, although without intent to kill, is guilty of manslaughter. 2 R. S. 672. A chemist who negligently sells laudanum in a phial labelled as paregoric, and thereby causes the death of the person to whom it is administered, is guilty of manslaughter. Tessymond's Case, 1 Lewin's Crown Cases, 169. "So highly does the law value human life, that it admits of no justification, wherever life has been lost and the carelessness or negligence of one person has contributed to the death of another. Regina v. Swindall, 2 Car. & Kir. 232, 233. And this rule applies not only where the death of one is occasioned by the negligent act of another, but where it is caused by the negligent omission of a duty of that other. 2 Car. & Kir. 367, 371. Although the defendant, Winchester, may not be answerable criminally for the negligence of his agent, there can be no doubt of his liability, in a civil action, in which the act of the agent is to be regarded as the act of the principal. * * *[74]

Judgment affirmed.

HEAVEN v. PENDER.

(In the Court of Appeal, 1883. 11 Q. B. Div. 503.)

Action to recover damages for injuries sustained by the plaintiff through the alleged negligence of the defendant. The action was remitted for trial before the Bow County Court, where judgment was given for the plaintiff for £20. The Queen's Bench Division, on motion by way of appeal, ordered judgment to be entered for the defendant. The plaintiff appealed.

BRETT, M. R. In this case the plaintiff was a workman in the employ of Gray, a ship painter. Gray entered into a contract with a shipowner whose ship was in the defendant's dock to paint the outside of his ship. The defendant, the dock owner, supplied, under a contract with the shipowner, an ordinary stage to be slung in the ordinary way outside the ship for the purpose of painting her. It must have been

[74] The statement of facts is abridged and parts of the opinion are omitted.

known to the defendant's servants, if they had considered the matter at all, that the stage would be put to immediate use, that it would not be used by the shipowner, but that it would be used by such a person as the plaintiff, a working ship painter. The ropes by which the stage was slung, and which were supplied as a part of the instrument by the defendant, had been scorched and were unfit for use and were supplied without a reasonably careful attention to their condition. When the plaintiff began to use the stage the ropes broke, the stage fell, and the plaintiff was injured. The Divisional Court held that the plaintiff could not recover against the defendant. The plaintiff appealed. The action is in form and substance an action for negligence. That the stage was, through want of attention of the defendant's servants, supplied in a state unsafe for use is not denied. But want of attention amounting to a want of ordinary care is not a good cause of action, although injury ensue from such want, unless the person charged with such want of ordinary care had a duty to the person complaining to use ordinary care in respect of the matter called in question. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property. The question in this case is whether the defendant owed such a duty to the plaintiff.

If a person contracts with another to use ordinary care or skill towards him or his property the obligation need not be considered in the light of a duty; it is an obligation of contract. It is undoubted, however, that there may be the obligation of such a duty from one person to another although there is no contract between them with regard to such duty. Two drivers meeting have no contract with each other, but under certain circumstances they have a reciprocal duty towards each other. So two ships navigating the sea. So a railway company which has contracted with one person to carry another has no contract with the person carried but has a duty towards that person. So the owner or occupier of house or land who permits a person or persons to come to his house or land has no contract with such person or persons, but has a duty towards him or them. It should be observed that the existence of a contract between two persons does not prevent the existence of the suggested duty between them also being raised by law independently of the contract, by the facts with regard to which the contract is made and to which it applies an exactly similar but a contract duty. We have not in this case to consider the circumstances in which an implied contract may arise to use ordinary care and skill to avoid danger to the safety of person or property. We have not in this case to consider the question of a fraudulent misrepresentation express or implied, which is a well recognized head of law. The questions which we have to solve in this case are—what is the proper definition of the relation between two persons other than the relation established by

contract, or fraud, which imposes on the one of them a duty towards the other to observe, with regard to the person or property of such other, such ordinary care or skill as may be necessary to prevent injury to his person or property; and whether the present case falls within such definition. When two drivers or two ships are approaching each other, such a relation arises between them when they are approaching each other in such a manner that, unless they use ordinary care and skill to avoid it, there will be danger of an injurious collision between them. This relation is established in such circumstances between them, not only if it be proved that they actually know and think of this danger, but whether such proof be made or not. It is established, as it seems to me, because any one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill under such circumstances there would be such danger. And every one ought by the universally recognized rules of right and wrong, to think so much with regard to the safety of others who may be jeopardized by his conduct; and if, being in such circumstances, he does not think, and in consequence neglects, or if he neglects to use ordinary care or skill, and injury ensue, the law, which takes cognizance of and enforces the rules of right and wrong, will force him to give an indemnity for the injury. In the case of a railway company carrying a passenger with whom it has not entered into the contract of carriage the law implies the duty, because it must be obvious that unless ordinary care and skill be used the personal safety of the passenger must be endangered. With regard to the condition in which an owner or occupier leaves his house or property other phraseology has been used, which it is necessary to consider. If a man opens his shop or warehouse to customers it is said that he invites them to enter, and that this invitation raises the relation between them which imposes on the inviter the duty of using reasonable care so to keep his house or warehouse that it may not endanger the person or property of the person invited. This is in a sense an accurate phrase, and as applied to the circumstances a sufficiently accurate phrase. Yet it is not accurate if the word "invitation" be used in its ordinary sense. By opening a shop you do not really invite, you do not ask A. B. to come in to buy; you intimate to him that if it pleases him to come in he will find things which you are willing to sell. So, in the case of shop, warehouse, road, or premises, the phrase has been used that if you permit a person to enter them you impose on yourself a duty not to lay a trap for him. This, again, is in a sense a true statement of the duty arising from the relation constituted by the permission to enter. It is not a statement of what causes the relation which raises the duty. What causes the relation is the permission to enter and the entry. But it is not a strictly accurate statement of the duty. To lay a trap means in ordinary language to do something with an intention. Yet it is clear that the duty extends to a danger the result of negligence without intention.

And with regard to both these phrases, though each covers the circumstances to which it is particularly applied, yet it does not cover the other set of circumstances from which an exactly similar legal liability is inferred. It follows, as it seems to me, that there must be some larger proposition which involves and covers both sets of circumstances. The logic of inductive reasoning requires that where two major propositions lead to exactly similar minor premises there must be a more remote and larger premise which embraces both of the major propositions. That, in the present consideration, is, as it seems to me, the same proposition which will cover the similar legal liability inferred in the cases of collision and carriage. The proposition which these recognized cases suggest, and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger. Without displacing the other propositions to which allusion has been made as applicable to the particular circumstances in respect of which they have been enunciated, this proposition includes, I think, all the recognised cases of liability. It is the only proposition which covers them all. It may, therefore, safely be affirmed to be a true proposition, unless some obvious case can be stated in which the liability must be admitted to exist, and which yet is not within this proposition. There is no such case. Let us apply this proposition to the case of one person supplying goods or machinery, or instruments or utensils, or the like, for the purpose of their being used by another person, but with whom there is no contract as to the supply. The proposition will stand thus: whenever one person supplies goods, or machinery, or the like, for the purpose of their being used by another person under such circumstances that every one of ordinary sense would, if he thought, recognise at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing. And for a neglect of such ordinary care or skill whereby injury happens a legal liability arises to be enforced by an action for negligence. This includes the case of goods, &c., supplied to be used immediately by a particular person or persons or one of a class of persons, where it would be obvious to the person supplying, if he thought, that the goods would in all probability be used at once by such persons before a reasonable opportunity for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or prop-

erty of the person for whose use it was supplied, and who was about to use it. It would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property. The cases of vendor and purchaser and lender and hirer under contract need not be considered, as the liability arises under the contract, and not merely as a duty imposed by law, though it may not be useless to observe that it seems difficult to import the implied obligation into the contract except in cases in which if there were no contract between the parties the law would according to the rule above stated imply the duty.

Examining the rule which has been above enunciated with the cases which have been decided with regard to goods supplied for the purpose of being used by persons with whom there is no contract, the first case to be considered is inevitably Langridge v. Levy, 2 M. & W. 519. It is not an easy case to act upon. It is not, it cannot be, accurately reported; the declaration is set out; the evidence is assumed to be reported: the questions left to the jury are stated. And then it is said that a motion was made to enter a nonsuit in pursuance of leave reserved on particular grounds. Those grounds do not raise the question of fraud at all, but only the question of remoteness. And although the question of fraud seems in a sense to have been left to the jury, yet no question was, according to the report, left to them as to whether the plaintiff acted on the faith of the fraudulent misrepresentation which is, nevertheless, a necessary question in a case of fraudulent misrepresentation. The report of the argument makes the object of the argument depend entirely upon an assumed motion to arrest the judgment, which raises always a discussion depending entirely on the form of the declaration, and the effect on it of a verdict, in respect of which it is assumed that all questions were left to the jury. If this was the point taken the report of the evidence and of the questions left to the jury is idle! The case was decided on the ground of the fraudulent misrepresentation as stated in the declaration. It is inferred that the defendant intended the representation to be communicated to the son. Why he should have such an intention in fact, it seems difficult to understand. His immediate object must have been to induce the father to buy and pay for the gun. It must have been wholly indifferent to him whether after the sale and payment the gun would be used or not by the son. I cannot hesitate to say that, in my opinion, the case is a wholly unsatisfactory case to act on as an authority. But taking the case to be decided on the ground of a fraudulent misrepresentation made hypothetically to the son, and acted upon by him, such a decision upon such a ground, in no way negatives the proposition that the action might have been supported on the ground of negligence with-

out fraud. It seems to be a case which is within the proposition enunciated in this judgment, and in which the action might have been supported without proof of actual fraud. And this seems to be the meaning of Cleasby, B., in the observations he made on Langridge v. Levy, supra, in the case of George v. Skivington, Law Rep. 5 Ex. 1, 5. In that case the proposition laid down in this judgment is clearly adopted. The ground of the decision is that the article was, to the knowledge of the defendant, supplied for the use of the wife and for her immediate use. And certainly, if he or any one in his position had thought at all, it must have been obvious that a want of ordinary care or skill in preparing the prescription sold, would endanger the personal safety of the wife.

In Corby v. Hill, 4 C. B. (N. S.) 556, it is stated by the Lord Chief Justice that an allurement was held out to the plaintiff. And Willes, J., stated that the defendant had no right to set a trap for the plaintiff. But in the form of declaration suggested by Willes, J., on page 567, there is no mention of allurement, or invitation, or trap. The facts suggested in that form are, "that the plaintiff had license to go on the road, that he was in consequence accustomed and likely to pass along it, that the defendant knew of that custom and probability, that the defendant negligently placed slates in such a manner as to be likely to prove dangerous to persons driving along the road, that the plaintiff drove along the road, being by reason of the license lawfully on the road, and that he was injured by the obstruction." It is impossible to state a case more exactly within the proposition laid down in this judgment. In Smith v. London and St. Katharine Docks Co., Law Rep. 3 C. P. 326, the phrase is again used of invitation to the plaintiff by the defendants. Again, let it be observed that there is no objection to the phrase as applied to the case. But the real value of the phrase may not improperly be said to be, that invitation imports knowledge by the defendant of the probable use by the plaintiff of the article supplied, and therefore carries with it the relation between the parties which establishes the duty. In Indermaur v. Dames, Law Rep. 1 C. P. 274, reliance is again placed upon a supposed invitation of the plaintiff by the defendant. But again, it is hardly possible to state facts which bring a case more completely within the definition of the present judgment. In Winterbottom v. Wright, 10 M. & W. 109, it was held that there was no duty cast upon the defendant with regard to the plaintiff. The case was decided on what was equivalent to a general demurrer to the declaration. And the declaration does not seem to shew that the defendant, if he had thought about it, must have known, or ought to have known, that the coach would be necessarily or probably driven by the plaintiff, or by any class of which he could be said to be one, or that it would be so driven within any time which would make it probable that the defect would not be observed. The declaration relied too much on contracts entered into with other persons than the plaintiff. The facts alleged did not bring the case within the proposition herein

enunciated. It was an attempt to establish a duty towards all the world. The case was decided on the ground of remoteness. And it is as to too great a remoteness that the observation of Lord Abinger is pointed, when he says that the doctrine of Langridge v. Levy, supra, is not to be extended. In Francis v. Cockrell, Law Rep. 5 Q. B. 184, at page 501, the decision is put by some of the judges on an implied contract between the plaintiff and the defendant. But Cleasby, B. (page 515), puts it upon the duty raised by the knowledge of the defendant that the stand was to be used immediately by persons of whom the plaintiff was one. In other words he acts upon the rule above laid down. In Collis v. Selden, Law Rep. 3 C. P. 495, it was held that the declaration disclosed no duty. And obviously, the declaration was too uncertain. There is nothing to shew that the defendant knew more of the probability of the plaintiff rather than any other of the public being near the chandelier. There is nothing to shew that the plaintiff was more likely to be in the public-house than any other member of the public. There is nothing to shew how soon after the hanging of the chandelier any one might be expected or permitted to enter the room in which it was. The facts stated do not bring it within the rule. There is an American case: Thomas and Wife, 6 N. Y. 397, 57 Am. Dec. 455, cited in Mr. Horace Smith's Treatise on the Law of Negligence, p. 88, note (t), which goes a very long way. I doubt whether it does not go too far. In Longmeid v. Holliday, 6 Ex. 761, a lamp was sold to the plaintiff to be used by the wife. The jury were not satisfied that the defendant knew of the defect in the lamp. If he did, there was fraud; if he did not, there seems to have been no evidence of negligence. If there was fraud, the case was more than within the rule. If there was no fraud, the case was not brought by other circumstances within the rule. In Gautret v. Egerton, Law Rep. 2 C. P. 371, at p. 374, the declaration was held by Willes, J., to be bad on demurrer, because it did not shew that the defendant had any reason to suppose that persons going to the docks would not have ample means of seeing the holes and cuttings relied on. He does not say there must be fraud in order to support the action. He says there must be something like fraud. He says: "Every man is bound not wilfully to deceive others." And then in the alternative, he says: "or to do any act which may place them in danger." There seems to be no case in conflict with the rule above deduced from well admitted cases. I am, therefore, of opinion that it is a good, safe, and just rule.

I cannot conceive that if the facts were proved which would make out the proposition I have enunciated, the law can be that there would be no liability. Unless that be true, the proposition must be true. If it be the rule the present case is clearly within it. This case is also, I agree, within that which seems to me to be a minor proposition—namely, the proposition which has been often acted upon, that there was in a sense, an invitation of the plaintiff by the defendant, to use

the stage. The appeal must, in my opinion, be allowed, and judgment must be entered for the plaintiff.

COTTON, L. J. Bowen, L. J., concurs in the judgment I am about to read.

In this case the defendant was the owner of a dock for the repair of ships, and provided for use in the dock the stages necessary to enable the outside of the ship to be painted while in the dock, and the stages which were to be used only in the dock were appliances provided by the dock owner as appurtenant to the dock and its use. After the stage was handed over to the shipowner it no longer remained under the control of the dock owner. But when ships were received into the dock for repair and provided with stages for the work on the ships which was to be executed there, all those who came to the vessels for the purpose of painting and otherwise repairing them were there for business in which the dock owner was interested, and they, in my opinion, must be considered as invited by the dock owner to use the dock and all appliances provided by the dock owner as incident to the use of the dock. To these persons, in my opinion, the dock owner was under an obligation to take reasonable care that at the time the appliances provided for immediate use in the dock were provided by him they were in a fit state to be used—that is, in such a state as not to expose those who might use them for the repair of the ship to any danger or risk not necessarily incident to the service in which they are employed. That this obligation exists as regards articles of which the control remains with the dock owner was decided in Indermaur v. Dames, supra, and in Smith v. London and St. Katharine Docks Co., supra, the same principle was acted on. I think that the same duty must exist as to things supplied by the dock owner for immediate use in the dock, of which the control is not retained by the dock owner, to the extent of using reasonable care as to the state of the articles when delivered by him to the ship under repair for immediate use in relation to the repairs. For any neglect of those having control of the ship and the appliances he would not be liable, and to establish his liability it must be proved that the defect which caused the accident existed at the time when the article was supplied by the dock owner. * * *

This decides this appeal in favour of the plaintiff, and I am unwilling to concur with the Master of the Rolls in laying down unnecessarily the larger principle which he entertains, inasmuch as there are many cases in which the principle was impliedly negatived.

Take for instance the case of Langridge v. Levy, supra, to which the principle if it existed would have applied. But the judges who decided that case based their judgment on the fraudulent representation made to the father of the plaintiff by the defendant. In other cases where the decision has been referred to judges have treated fraud as the ground of the decision, as was done by Coleridge, J., in Blackmore v. Bristol and Exeter Ry. Co., supra; and in Collis v. Selden, supra,

Willes, J., says that the judgment in Langridge v. Levy, supra, was based on the fraud of the defendant. This impliedly negatives the existence of the larger general principle which is relied on, and the decisions in Collis v. Selden, supra, and in Longmeid v. Holliday, supra (in each of which the plaintiff failed), are in my opinion at variance with the principle contended for. The case of George v. Skivington, supra, and especially what is said by Cleasby, B., in giving judgment in that case seem to support the existence of the general principle. But it is not in terms laid down that any such principle exists, and that case was decided by Cleasby, B., on the ground that the negligence of the defendant which was his own personal negligence was equivalent, for the purposes of that action, to fraud on which (as he said) the decision in Langridge v. Levy, supra, was based.

In declining to concur in laying down the principle enunciated by the Master of the Rolls, I in no way intimate any doubt as to the principle that any one who leaves a dangerous instrument, as a gun, in such a way as to cause danger, or who without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act.

For the reasons stated I agree that the plaintiff is entitled to judgment, though I do not entirely concur with the reasoning of the Master of the Rolls.

Judgment reversed.[75]

HUSET v. J. I. CASE THRESHING MACH. CO.

(Circuit Court of Appeals of the United States, Eighth Circuit, 1903. 57 C. C. A. 237, 120 Fed. 865, 61 L. R. A. 303.)

In Error to the Circuit Court of the United States for the District of Minnesota. This writ of error was sued out to reverse a judgment sustaining a demurrer to the complaint in an action against the J. I. Case Threshing Machine Company. These are the facts which the complaint discloses:

The defendant was a corporation engaged in the manufacture and sale of threshing rigs, which consisted of an engine, a separator, a band-cutter, and self-feeder. The band-cutter and self-feeder consisted of a series of fast revolving knives covered with a sheet-iron covering and a frame designed to fit into the front of the separator in which the cylinder was located. The cylinder was made of iron and steel about 48 inches in length and 20 inches in diameter, set with rows of steel teeth and spikes projecting about two inches, and so placed as to pass between similar teeth in a concave frame in front of and under the cylinder. When the machine was in operation, this cylinder revolved at a very high rate of speed with great force, and threshed the grain. The self-feeder and band-cutter was designed to be fastened to the sepa-

[75] The statement of facts is abridged and part of the opinion of Cotton, L. J., is omitted.

rator, and its sheet-iron covering fitted onto the front of the separator just above and over the front part of the cylinder so as to cover the cylinder completely. The object and design of the defendant in placing this covering over the cylinder was that it should be used by any person who might operate the machine to walk upon in passing from the top of the main part of the thresher to the self-feeder. This sheet-iron covering was made without any support, and was so pliable and easily bent that it was incapable of sustaining the least weight, and would necessarily bend and collapse when subjected to the weight of any man who might walk or step upon it. It was necessary for the operator to walk over the covering of the cylinder in operating the machine. This machine, covered in this way, was imminently and necessarily dangerous to the life and limbs of those who operated it, and it was well known to be thus dangerous by the defendant when it shipped the same and supplied it to the purchaser, J. H. Pifer; but this dangerous condition was of such a nature as not to be readily discovered by persons engaged in operating the machine or working thereon, but was concealed, and thereby rendered more dangerous still. On August 25, 1901, the defendant sold this threshing outfit to J. H. Pifer, who started to operate it on the next day, and employed the plaintiff, O. S. Huset, as a laborer to assist him in running it. It became the duty of the plaintiff to walk upon the top of the machine over the cylinder while it was in operation in order to superintend the pitching of bundles into the self-feeder, to prevent its clogging, and to oil the bearings of the parts of the cylinder and band-cutter. When he walked upon the covering of the cylinder, this covering sank so as to come in contact with the cylinder, and the plaintiff's right foot was caught thereby, and his foot and leg were drawn into it and crushed to a point above the knee joint, so that it was necessary to amputate the leg above the knee.

The demurrer to this complaint was upon the ground that the defendant owed no duty to the plaintiff, who was a stranger to the transaction between the defendant, the manufacturer and vendor of the threshing machine, and the vendee Pifer. The court sustained the demurrer and dismissed the action.

SANBORN, Circuit Judge (after stating the case). Is a manufacturer or vendor of an article or machine which he knows, when he sells it, to be imminently dangerous, by reason of a concealed defect therein, to the life and limbs of any one who shall use it for the purpose for which it was made and intended, liable to a stranger to the contract of sale for an injury which he sustains from the concealed defect while he is lawfully applying the article or machine to its intended use?

The argument of this question has traversed the whole field in which the liability of contractors, manufacturers, and vendors to strangers to their contracts for negligence in the construction or sale of their articles has been contested. The decisions which have been cited are not entirely harmonious, and it is impossible to reconcile all of them with any established rule of law. And yet the underlying principle of the law of negligence, that it is the duty of every one to so act himself and to so use his property as to do no unnecessary damage to his neighbors, leads us fairly through the maze. With this fundamental principle in mind, if we contemplate the familiar rules that every one is liable for the natural and probable effects of his acts; that negligence is a breach of a duty; that an injury that is the natural and probable consequence of an act of negligence is actionable, while one that could not have been foreseen or reasonably anticipated as the

probable effect of such an act is not actionable, because the act of negligence in such a case is the remote, and not the proximate, cause of the injury; and that, for the same reason, an injury is not actionable which would not have resulted from an act of negligence except from the interposition of an independent cause (Chicago, St. Paul, Minneapolis & Omaha R. Co. v. Elliott, 55 Fed. 949, 5 C. C. A. 347, 20 L. R. A. 582)—nearly all the decisions upon this subject range themselves along symmetrical lines, and establish rational rules of the law of negligence consistent with the basic principles upon which it rests.

Actions for negligence are for breaches of duty. Actions on contracts are for breaches of agreements. Hence the limits of liability for negligence are not the limits of liability for breaches of contracts, and actions for negligence often accrue where actions upon contracts do not arise, and vice versa. It is a rational and fair deduction from the rules to which brief reference has been made that one who makes or sells a machine, a building, a tool, or an article of merchandise designed and fitted for a specific use is liable to the person who, in the natural course of events, uses it for the purpose for which it was made or sold, for an injury which is the natural and probable consequence of the negligence of the manufacturer or vendor in its construction or sale. But when a contractor builds a house or a bridge, or a manufacturer constructs a car or a carriage, for the owner thereof, under a special contract with him, an injury to any other person than the owner for whom the article is built and to whom it is delivered cannot ordinarily be foreseen or reasonably anticipated as the probable result of the negligence in its construction. So, when a manufacturer sells articles to the wholesale or retail dealers, or to those who are to use them, injury to third persons is not generally the natural or probable effect of negligence in their manufacture, because (1) such a result cannot ordinarily be reasonably anticipated, and because (2) an independent cause—the responsible human agency of the purchaser—without which the injury to the third person would not occur, intervenes, and, as Wharton says, "insulates" the negligence of the manufacturer from the injury to the third person. Wharton on Law of Negligence (2d Ed.) § 134. For the reason that in the cases of the character which have been mentioned the natural and probable effect of the negligence of the contractor or manufacturer will generally be limited to the party for whom the article is constructed, or to whom it is sold, and, perhaps more than all this, for the reason that a wise and conservative public policy has impressed the courts with the view that there must be a fixed and definite limitation to the liability of manufacturers and vendors for negligence in the construction and sale of complicated machines and structures which are to be operated or used by the intelligent and the ignorant, the skillful and the incompetent, the watchful and the careless, parties that cannot be known to the manufacturers or vendors, and who use the articles all over the country hundreds of miles distant from the place of their manufacture or original sale,

a general rule has been adopted and has become established by repeated decisions of the courts of England and of this country that in these cases the liability of the contractor or manufacturer for negligence in the construction or sale of the articles which he makes or vends is limited to the persons to whom he is liable under his contracts of construction or sale. The limits of the liability for negligence and for breaches of contract in cases of this character are held to be identical. The general rule is that a contractor, manufacturer, or vendor is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture, or sale of the articles he handles. Winterbottom v. Wright, 10 M. & W. 109; Longmeid v. Holliday, 6 Exch. 764, 765; Blakemore v. Ry. Co., 8 El. & Bl. 1035; Collis v. Selden, L. R. 3 C. P. 495, 497; Bank v. Ward, 100 U. S. 195, 204, 25 L. Ed. 621; Bragdon v. Perkins-Campbell Co., 87 Fed. 109, 30 C. C. A. 567, 66 L. R. A. 924; Goodlander v. Standard Oil Co., 63 Fed. 400, 406, 11 C. C. A. 253, 259, 27 L. R. A. 583; Loop v. Litchfield, 42 N. Y. 351, 359, 1 Am. Rep. 513; Losee v. Clute, 51 N. Y. 494, 10 Am. Rep. 638; Curtin v. Somerset, 140 Pa. 70, 21 Atl. 244, 12 L. R. A. 322, 23 Am. St. Rep. 220; Heizer v. Kingsland & Douglass Mfg. Co., 110 Mo. 605, 615, 617, 19 S. W. 630, 15 L. R. A. 821, 33 Am. St. Rep. 482; Daugherty v. Herzog, 145 Ind. 255, 44 N. E. 457, 32 L. R. A. 837, 57 Am. St. Rep. 204; Burke v. De Castro, 11 Hun (N. Y.) 354; Swan v. Jackson, 55 Hun, 194, 7 N. Y. Supp. 821; Barrett v. Mfg. Co., 31 N. Y. Super. Ct. 545; Carter v. Harden, 78 Me. 528, 7 Atl. 392; McCaffrey v. Mfg. Co., 23 R. I. 381, 50 Atl. 651, 55 L. R. A. 822, 91 Am. St. Rep. 637; Marvin Safe Co. v. Ward, 46 N. J. Law, 19; Burdick v. Cheadle, 26 Ohio St. 393, 20 Am. Rep. 767; Davidson v. Nichols, 11 Allen (Mass.) 514; J. I. Case Plow Works v. Niles & Scott Co., 90 Wis. 590, 63 N. W. 1013.

In these cases third parties, without any fault on their part, were injured by the negligence of the manufacturer, vendor, or furnisher of the following articles, while the parties thus injured were innocently using them for the purposes for which they were made or furnished, and the courts held that there could be no recovery, because the makers, vendors, or furnishers owed no duty to strangers to their contracts of construction, sale, or furnishing: A stagecoach, Winterbottom v. Wright, 10 M. & W. 109; a leaky lamp, Longmeid v. Holliday, 6 Exch. 764, 765; a defective chain furnished one to lead stone, Blakemore v. Ry. Co., 8 El. & Bl. 1035; an improperly hung chandelier, Collis v. Selden, L. R. 3 C. P. 495, 497; an attorney's certificate of title, Bank v. Ward, 100 U. S. 195, 204, 25 L. Ed. 621; a defective valve in an oil car, Goodlander v. Standard Oil Co., 63 Fed. 401, 406, 11 C. C. A. 253, 259, 27 L. R. A. 583; a porch on a hotel, Curtin v. Somerset, 140 Pa. 70, 21 Atl. 244, 12 L. R. A. 322, 23 Am. St. Rep. 220; a defective side saddle, Bragdon v. Perkins-Campbell Co., 87 Fed. 109, 30 C. C. A. 567, 66 L. R. A. 924; a defective rim in a balance wheel, Loop v. Litchfield, 42 N. Y. 351, 359, 1 Am. Rep. 513; a

defective boiler, Losee v. Clute, 51 N. Y. 494, 10 Am. Rep. 638; a defective cylinder in a threshing machine, Heizer v. Kingsland & Douglass Mfg. Co., 110 Mo. 605, 615, 617, 19 S. W. 630, 15 L. R. A. 821, 33 Am. St. Rep. 481; a defective wall which fell on a pedestrian, Daugherty v. Herzog, 145 Ind. 255, 44 N. E. 457, 32 L. R. A. 837, 57 Am. St. Rep. 204; a defective rope on a derrick, Burke v. Refining Co., 11 Hun (N. Y.) 354; a defective shelf for a workman to stand upon in placing ice in a box, Swan v. Jackson, 55 Hun, 194, 7 N. Y. Supp. 821; a defective hoisting rope of an elevator, Barrett v. Mfg. Co., 31 N. Y. Super. Ct. 545; a runaway horse, Carter v. Harden, 78 Me. 528, 7 Atl. 392; a defective hook holding a heavy weight in a drop press, McCaffrey v. Mfg. Co., 23 R. I. 381, 50 Atl. 651, 55 L. R. A. 822; a defective bridge, Marvin Safe Co. v. Ward, 46 N. J. Law, 19; shelves in a dry goods store, whose fall injured a customer, Burdick v. Cheadle, 26 Ohio St. 393, 20 Am. Rep. 767; a staging erected by a contractor for the use of his employés, Maguire v. Magee (Pa.) 13 Atl. 551; defective wheels, J. I. Case Plow Works v. Niles & Scott Co., 90 Wis. 590, 63 N. W. 1013.

In the leading case of Winterbottom v. Wright this rule is placed upon the ground of public policy, upon the ground that there would be no end of litigation if contractors and manufacturers were to be held liable to third persons for every act of negligence in the construction of the articles or machines they make after the parties to whom they have sold them have received and accepted them. In that case the defendant had made a contract with the Postmaster General to provide and keep in repair the stagecoach used to convey the mail from Hartford to Holyhead. The coach broke down, overturned, and injured the driver, who sued the contractor for the injury resulting from his negligence. Lord Abinger, C. B., said: "There is no privity of contract between these parties; and, if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue." Baron Alderson said: "I am of the same opinion. 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."

The views expressed by the judges in this case have prevailed in England and in the United States, with the exception of two decisions which are in conflict with the leading case and with all the decisions to which reference has been made. Those cases are Devlin v. Smith,

89 N. Y. 470, 42 Am. Rep. 311, in which Smith, a painter, employed Stevenson, a contractor, to build a scaffold 90 feet in height, for the express purpose of enabling the painter's workmen to stand upon it to paint the interior of the dome of a building, and the Court of Appeals of New York held that Stevenson was liable to a workman of Smith, the painter, who was injured by a fall, caused by the negligence of Stevenson in the construction of the scaffold upon which he was working; and Schubert v. J. R. Clark Co., 49 Minn. 331, 51 N. W. 1103, 15 L. R. A. 818, 32 Am. St. Rep. 559, in which a painter purchased of a manufacturer a stepladder, and one of the painter's employés, who was injured by the breaking of a step caused by the negligence of the manufacturer, was permitted to recover of the latter for the injuries he had sustained. The decision in Devlin v. Smith may, perhaps, be sustained on the ground that the workmen of Smith were the real parties in interest in the contract, since Stevenson was employed and expressly agreed to construct the scaffold for their use. But the case of Schubert v. J. R. Clark Co. is in direct conflict with the side saddle case, Bragdon v. Perkins-Campbell Co., 87 Fed. 109, 30 C. C. A. 567, 66 L. R. A. 924; the porch case, Curtin v. Somerset, 140 Pa. 70, 21 Atl. 244, 12 L. R. A. 322, 23 Am. St. Rep. 220; the defective cylinder case, Heizer v. Kingsland & Douglass Mfg. Co., 110 Mo. 617, 19 S. W. 630, 15 L. R. A. 821, 33 Am. St. Rep. 481; the defective hook case, McCaffrey v. Mfg. Co., 23 R. I. 381, 50 Atl. 651, 55 L. R. A. 822; and with the general rule upon which all these cases stand.

It is, perhaps, more remarkable that the current of decisions throughout all the courts of England and the United States should be so uniform and conclusive in support of this rule, and that there should, in the multitude of opinions, be but one or two in conflict with it, than it is that such sporadic cases should be found. They are insufficient in themselves, or in the reasoning they contain, to overthrow or shake the established rule which prevails throughout the English speaking nations.

But while this general rule is both established and settled, there are, as is usually the case, exceptions to it as well defined and settled as the rule itself. There are three exceptions to this rule.

The first is that an act of negligence of a manufacturer or vendor which is imminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy, or affect human life, is actionable by third parties who suffer from the negligence. Dixon v. Bell, 5 Maule & Sel. 198; Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; Norton v. Sewall, 106 Mass. 143, 8 Am. Rep. 298; Elkins v. McKean, 79 Pa. 493, 502; Bishop v. Weber, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715; Peters v. Johnson, 50 W. Va. 644, 41 S. E. 190, 191, 57 L. R. A. 428, 88 Am. St. Rep. 909. The leading case upon this subject is Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455. A dealer in drugs sold to a druggist a jar of belladonna, a deadly poison, and

labeled it "Extract of Dandelion." The druggist filled a prescription of extract of dandelion, prepared by a physician for his patient. The patient took the prescription thus filled, and recovered of the wholesale dealer for the injuries she sustained. In Norton v. Sewall, 106 Mass. 143, 8 Am. Rep. 298, a recovery was had by a third party for the sale of laudanum as rhubarb; in Bishop v. Weber, for the furnishing of poisonous food for wholesome food; in Peters v. Johnson, for the sale of saltpetre for epsom salts; and in Dixon v. Bell, for placing a loaded gun in the hands of a child. In all these cases of sale the natural and probable result of the act of negligence—nay, the inevitable result of it—was not an injury to the party to whom the sales were made, but to those who, after the purchasers had disposed of the articles, should consume them. Hence these cases stand upon two well-established principles of law: (1) That every one is bound to avoid acts or omissions imminently dangerous to the lives of others, and (2) that an injury which is the natural and probable result of an act of negligence is actionable. It was the natural and probable result of the negligence in these cases that the vendees would not suffer, but that those who subsequently purchased the deleterious articles would sustain the injuries resulting from the negligence of the manufacturers or dealers who furnished them.

The second exception is that an owner's act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner's premises may form the basis of an action against the owner. Coughtry v. Globe Woolen Co., 56 N. Y. 124, 15 Am. Rep. 387; Bright v. Barnett & Record Co., 88 Wis. 299, 60 N. W. 418, 420, 26 L. R. A. 524; Heaven v. Pender, L. R. 11 Q. B. Div. 503; Roddy v. Railway Co., 104 Mo. 234, 241, 15 S. W. 1112, 12 L. R. A. 746, 24 Am. St. Rep. 333. In Coughtry v. Globe Woolen Co., 56 N. Y. 124, 15 Am. Rep. 387, the owner of a building employed Osborn & Martin to construct a cornice, and agreed with them to furnish a scaffold upon which their men could perform the work. He furnished the scaffold, and one of the employés of the contractors was injured by the negligence of the owner in constructing the scaffold. The court held that the act of the owner was an implied invitation to the employés of Osborn & Martin to use the scaffold, and imposed upon him a liability for negligence in its erection. The other cases cited to this exception are of a similar character.

The third exception to the rule is that one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities is liable to any person who suffers an injury therefrom which might have been reasonably anticipated, whether there were any contractual relations between the parties or not. Langridge v. Levy, 2 M. & W. 519, 4 M. & W. 337; Wellington v. Oil Co., 104 Mass. 64, 67; Lewis v. Terry, 111 Cal. 39, 43 Pac. 398, 31 L. R. A. 220, 52 Am. St. Rep. 146. In Langridge v. Levy, 2 M. & W. 519, a dealer sold a gun to the father for the use of the son, and

represented that it was a safe gun, and made by one Nock. It was not made by Nock, was a defective gun, and when the son discharged it, it exploded and injured him. The son was permitted to recover, because the defendant had knowingly sold the gun to the father for the purpose of being used by the plaintiff by loading and discharging it, and had knowingly made a false warranty that this might be safely done, and the plaintiff, on the faith of that warranty, and believing it to be true, had used the gun, and sustained the damages. The court said in conclusion: "We therefore think that, as there is fraud, and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured." This case was affirmed in 4 M. & W. 337, on the ground that the sale of the gun to the father for the use of the son with the knowledge that it was not as represented was a fraud, which entitled the son to recover the damages he had sustained.

In Wellington v. Oil Co., the defendants knowingly sold to one Chase, a retail dealer, to be sold by him to his customers as oil, naphtha, a dangerous and explosive liquid. Chase sold the naphtha as oil, the plaintiff used it in a lamp for illuminating purposes, it ignited and exploded, and he recovered of the wholesale dealer. Judge Gray, later Mr. Justice Gray of the Supreme Court, said: "It is well settled that a man who delivers an article, which he knows to be dangerous or noxious, to another person, without notice of its nature and qualities, is liable for an injury which may reasonably be contemplated as likely to result, and which does in fact result, therefrom, to that person or any other, who is not himself in fault. Thus a person who delivers a carboy, which he knows to contain nitric acid, to a carrier, without informing him of the nature of its contents, is liable for an injury occasioned by the leaking out of the acid upon another carrier, to whom it is delivered by the first in the ordinary course of business, to be carried to its destination. Farrant v. Barnes, 11 C. B. (N. S.) 553. So a chemist who sells a bottle of liquid, made up of ingredients known only to himself, representing it to be fit to be used for washing the hair, and knowing that it is to be used by the purchaser's wife, is liable for an injury occasioned to her by using it for washing her hair. George v. Skivington, Law Rep. 5 Ex. 1."

In Lewis v. Terry, 111 Cal. 39, 43 Pac. 398, 31 L. R. A. 220, 52 Am. St. Rep. 146, a dealer, knowing a folding bed to be defective and unsafe, sold it to a Mr. Apperson without informing him of the fact. His wife suffered a broken arm and other severe injuries from the negligence of the dealer in the sale of the bed, and recovered of him the damages she sustained.

The Supreme Court of Missouri, in Heizer v. Kingsland & Douglass Mfg. Co., in which they held that the manufacturer was not liable to a third person for negligence in the construction of the cylinder of a threshing machine, which burst and injured him, said: "Had the

defendant sold this machine to Ellis, knowing that the cyclinder was defective, and for that reason dangerous, without informing him of the defect, then the defendant would be liable even to third persons not themselves in fault. Shearman & Redfield on Negligence (4th Ed.) § 117."

Turning now to the case in hand, it is no longer difficult to dispose of it. The allegations of the complaint are that the defendant prepared a covering for the cylinder of the threshing machine, which was customarily and necessarily used by those who operated it to walk upon, and which was so incapable of sustaining the least weight that it would bend and collapse whenever any one stepped upon it; that it concealed this defective and dangerous condition of the threshing rig so that it could not be readily discovered by persons engaged in operating or working upon it; that it knew that the machine was in this imminently dangerous condition when it shipped and supplied it to the employer of the plaintiff; and that the plaintiff has sustained serious injury through this defect in its construction. The case falls fairly within the third exception. It portrays a negligence imminently dangerous to the lives and limbs of those who should use the machine, a machine imminently dangerous to the lives and limbs of all who should undertake to operate it, a concealment of this dangerous condition, a knowledge of the defendant when it was shipped and supplied to the employer of the plaintiff that the rig was imminently dangerous to all who should use it for the purpose for which it was made and sold, and consequent damage to the plaintiff. It falls directly within the rule stated by Mr. Justice Gray that when one delivers an article, which he knows to be dangerous to another person, without notice of its nature and qualities, he is liable for an injury which may be reasonably contemplated as likely to result, and which does in fact result therefrom, to that person or to any other who is not himself in fault. The natural, probable, and inevitable result of the negligence portrayed by this complaint in delivering this machine when it was known to be in a condition so imminently dangerous to the lives and limbs of those who should undertake to use it for the purpose for which it was constructed was the death, or loss of one or more of the limbs, of some of the operators. It is perhaps improbable that the defendant was possessed of the knowledge of the imminently dangerous character of this threshing machine when it delivered it, and that upon the trial of the case it will be found to fall under the general rule which has been announced in an earlier part of this opinion. But upon the facts alleged in this complaint, the act of delivering it to the purchaser with a knowledge and a concealment of its dangerous condition was so flagrant a disregard of the rule that one is bound to avoid any act imminently dangerous to the lives and health of his fellows that it forms the basis of a good cause of action in favor of any one who sustained injury therefrom.

The judgment of the Circuit Court must be reversed, and the cause must be remanded to the court below for further proceedings not inconsistent with the views expressed in this opinion.

EARL v. LUBBOCK.

(In the Court of Appeal. [1905] 1 K. B. 253.)

Appeal from the judgment of a Divisional Court affirming an order of the judge of the Lambeth County Court.

The action was brought in the county court to recover damages for personal injuries sustained by the plaintiff, and alleged to be due to the negligence of the defendant. The plaintiff was a driver in the employment of a firm who owned a number of vans. The defendant was a master wheelwright, and he entered into a contract with the firm to keep their vans in good and substantial repair. In pursuance of his contract the defendant sent his men frequently to the premises of the firm to examine into the condition of the vans and to do the necessary repairs. On one occasion, upon the complaint of the plaintiff that the van he drove ran heavily, one of the defendant's men took off the wheel and oiled and replaced it, but, being unable to replace the cap of the axle, he nailed a piece of zinc over the box of the wheel to keep the cap from falling off. A fortnight later the wheel was again attended to by one of the defendant's men. After this had been done and on the same day the plaintiff while driving the van was thrown to the ground by reason of the wheel coming off, and he sustained the injuries in respect of which he sued. The allegation in the particulars of claim was that the defendant's man negligently failed to properly inspect the wheel and repair its defective condition, and that the repairs to the wheel were done in a negligent and unskillful manner, whereby the accident to the plaintiff happened. The action was tried before the judge and a jury, and at the close of the plaintiff's case it was submitted that there was no evidence of negligence on the part of the defendant, and that even if there was evidence of negligence the defendant was not liable in the action as he owed no duty to the plaintiff, his only duty being to the firm with whom he had contracted. Upon this latter ground the county court judge entered judgment for the defendant.

The plaintiff appealed, and a Divisional Court, consisting of Lord Alverstone, C. J., Wills, J., and Kennedy, J., affirmed the decision of the county court judge.

The plaintiff appealed.

Arthur Powell, K. C., and W. M. Thompson, for the plaintiff. The case for the plaintiff does not rest upon contract or upon negligence of omission, but on the negligence of the defendant in an act done by

his servant in the course of his employment. * * * This case comes within the conditions as to liability stated by Cotton, L. J., and agreed to by Bowen, L. J., in Heaven v. Pender (1883) 11 Q. B. D. 503, and it is not necessary to rely on the broader view taken by Lord Esher, M. R., in that case, though that would certainly cover the present case. * * *

COLLINS, M. R. * * * In my opinion this case is concluded by the authority of Winterbottom v. Wright, 10 M. & W. 109, the circumstances of which are indistinguishable from those of the present case, and that decision, since the year 1842, in which it was given, has stood the test of repeated discussion. Under these circumstances it would, in my opinion, be a waste of time to go through the numerous cases that have been cited, for the principles laid down by Lord Abinger, C. B., in the case that I have mentioned appear to me to be based upon sound reasoning, and to be conclusive in this case.[76] * * * In my judgment no question arises here as to the delivery of a dangerous thing, which is one of the circumstances that can give rise to a cause of action in a person who is not a party to the contract. Such a case is dealt with by Parke, B., in delivering the judgment of the Court of Exchequer in Longmeid v. Holliday, 6 Ex. 761, at page 767, thus: "And it may be the same"—that is, responsibility may arise —"when anyone delivers to another without notice an instrument in its nature dangerous, or under particular circumstances, as a loaded gun which he himself loaded, and that other person to whom it is delivered is injured thereby, or if he places it in a situation easily accessible to a third person, who sustains damage from it. A very strong case to that effect is Dixon v. Bell (1816) 5 M. & S. 198. But it would be going too far to say that so much care is required in the ordinary intercourse of life between one individual and another, that if a machine not in its nature dangerous—a carriage, for instance—but which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care, should be lent or given by one person, even by the person who manufactured it, to another the former should be answerable to the latter for a subsequent damage accruing by the use of it." Here there is the case of a carriage which, so far as the evidence goes, was not visibly out of repair. Apparently the wheel required oiling, and for that purpose the cap was removed, and, as it was defective, a piece of zinc was nailed onto the wheel. That had nothing to do with the accident, but was done to supply a better means of oiling the wheel; and, in my opinion, the van cannot fall within the category of dangerous articles to which Parke, B., alludes.

[76] The learned Master of the Rolls here quoted the remarks of Lord Abinger, C. B., in Winterbottom v. Wright (see ante, p. 1043), as showing the view taken by the Court and laying down a principle which was conclusive in the case at bar.

One other ground was suggested upon which the defendant might be held to be liable. That is the principle affirmed in Heaven v. Pender, 11 Q. B. D. 503, that where a person having a common interest with another invites that person to use certain premises or chattels, the person so inviting incurs a responsibility with regard to the condition of the premises or of the chattels, as the case may be. Nothing of that kind can be set up in this case. It was hardly contended that such considerations were applicable to this case; but it was said that it came within the dictum enunciated by Lord Esher in his judgment, as to the duty to use ordinary care and skill to avoid a danger to another that a person of ordinary sense would recognize as likely to arise if he did not use that ordinary care and skill in his own conduct. That, however, was not a decision of the Court, and it was subsequently qualified and explained by Lord Esher himself. See Le Lievre v. Gould, [1893] 1 Q. B. 491, at page 497. I have pointed out what was the judgment of the Court, and the plaintiff has entirely failed to bring his case within the principle of that judgment, and this appeal must fail.

STIRLING, L. J. I am of the same opinion. In order to succeed in this action the plaintiff must bring his case within the proposition enunciated by Cotton, L. J., and agreed to by Bowen, L. J., in Heaven v. Pender, 11 Q. B. D. 503, at page 517, to the effect that "any one who leaves a dangerous instrument, as a gun, in such a way as to cause danger, or who without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act." That passage was cited to the county court judge, and was relied on in this Court by counsel for the plaintiff. As to the first part of that proposition, with regard to a dangerous instrument, I take it that the reference is to a thing dangerous in itself, and that is shewn by the illustration that is given, and also by what is stated in the second part of the proposition which treats of an instrument or thing in such a condition as to cause danger, not necessarily incident to its use. I think, therefore, that the van which the plaintiff was driving does not fall within the first branch of the sentence that I have quoted, and that to succeed the plaintiff must bring the case within the second part. In that case he must adduce evidence to shew that to the knowledge of the defendant the van was in such a condition as to cause danger, not necessarily incident to its use. It appears to me that the plaintiff was not in a position to do this, and consequently he failed in establishing the liability of the defendant, and this appeal must be dismissed.

MATHEW, L. J. I am of the same opinion. The argument of counsel for the plaintiff was that the defendant's servants had been negligent in the performance of the contract with the owners of the van, and that it followed as a matter of law that anyone in their em-

ployment, or, indeed, anyone else who sustained an injury traceable to that negligence, had a cause of action against the defendant. It is impossible to accept such a wide proposition, and, indeed, it is difficult to see how, if it were the law, trade could be carried on. No prudent man would contract to make or repair what the employer intended to permit others to use in the way of his trade. There was in this case no evidence before the learned county court judge that this van was in a state that made the defendant liable under any of the conditions of liability that have been laid down in the cases to which reference has been made. Further, there was no evidence that the plaintiff was invited by the defendant to use the van. I concur in thinking that the appeal must be dismissed.

Appeal dismissed.

BATES v. BATEY & CO., Limited.

(King's Bench Division. [1913] 3 K. B. 351.)

The defendants manufactured ginger beer, which they put into bottles bought from another firm. They sold this bottled ginger beer to a shopkeeper from whom the plaintiff, a twelve year old boy, bought one bottle. Because of a defect in the bottle it burst when the plaintiff was opening it, and injured him so seriously that he lost the sight of one eye.

The plaintiff claims that his injury was caused by negligence on the part of the defendants in that it was their duty to take care that the bottle of ginger beer sent out by them for sale should be fit and proper and safe to be handled by a person opening it, and that they had sent the bottle out in such a defective condition that it was not strong enough for its purpose.

The jury found (1) that there was a defect in the bottle, which defect caused the accident; (2) that the defect was not a latent defect which could not have been discovered by the exercise of reasonable care and skill; and (3) that the defect was owing to the negligence of the defendants. The damages for the injury to the boy were assessed at £275.

It was agreed that, upon further consideration, the learned judge should draw any further inferences of fact. He held that a bottle of ginger beer was not in itself a dangerous thing, and that, even if it was, the shopkeeper must have known that it was a dangerous thing; that the bottle of ginger beer, inasmuch as the bottle was defective, was a dangerous thing; but that the defendants did not know of the defect although by the exercise of reasonable care they could have discovered it.

HORRIDGE, J. * * * The law on this question is to be found in the judgment of Parke, B., in Longmeid v. Holliday (1851) 6 Ex. 761, 768, where he says: "But it would be going much too far to say

that so much care is required in the ordinary intercourse of life between one individual and another that if a machine, not in its nature dangerous, a carriage for instance, but which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care, should be lent or given by one person, even by the person who manufactured it, to another, the former should be answerable to the latter for a subsequent damage accruing by the use of it." This passage is quoted with approval by Collins, M. R., in the case of Earl v. Lubbock, [1905] 1 K. B. 253, 257. In the same case Stirling, L. J., Ibid. at p. 258, after quoting a passage from the judgment of Cotton and Bowen, L. JJ., in Heaven v. Pender (1883) 11 Q. B. D. 503, 517, to the effect "that any one who leaves a dangerous instrument, as a gun, in such a way as to cause danger, or who without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act," goes on to say with regard to these words: "As to the first part of that proposition, with regard to a dangerous instrument, I take it that the reference is to a thing dangerous in itself, and that is shewn by the illustration that is given, and also by what is stated in the second part of the proposition which treats of an instrument or thing in such a condition as to cause danger, not necessarily incident to its use. I think, therefore, that the van which the plaintiff was driving does not fall within the first branch of the sentence that I have quoted, and that to succeed the plaintiff must bring the case within the second part. In that case he must adduce evidence to shew that to the knowledge of the defendant the van was in such a condition as to cause danger, not necessarily incident to its use. It appears to me that the plaintiff was not in a position to do this, and consequently he failed in establishing the liability of the defendant."

The negligence there alleged was a failure to properly inspect the wheel and to report its defective condition. If, however, the failure to obtain knowledge which could by reasonable care have been obtained is equivalent to knowledge, it seems to me the Court of Appeal would have sent that case down to the county court judge to be heard by him on the question of whether or not the defendant must be taken to have knowledge because he failed to make proper use of the means of discovery at his disposal; and I think this case is a direct decision of the Court of Appeal, following Longmeid v. Holliday, 6 Ex. 761, that even where the defect is discoverable by the exercise of ordinary care the defendant is not liable, apart from contract, unless he in fact had actual knowledge.

My greatest difficulty has been that, in White v. Steadman, [1913] 3 K. B. 340, Lush, J., held, in the case of a vicious horse, that a person who has the means of knowledge and only does not know that the animal or chattel which he supplies is dangerous because he does not

take ordinary care to avail himself of his opportunity of knowledge is in precisely the same position as the person who knows. I do not think that Lush, J., in that case can have intended to decide that, where a thing not dangerous in itself becomes dangerous through a defect occasioned by breach of contract in its manufacture or delivery, the person handing it over must be held liable to a third party because, although he did not know, he might by the exercise of reasonable care have known its condition. I think this must be so because he was a party to the decision of Blacker v. Lake, 106 L. T. 533, 537,—and I find that in that case Hamilton, J., lays down this proposition: "In the present case all that can be said is that the defendants did not know that their lamp was not perfectly safe and had no reason to believe that it was not so, in the sense that no one had drawn their attention to the fact, but that had they been wiser men or more experienced engineers they would then have known what the plaintiff's experts say that they ought to have known."

In any case the decision in White v. Steadman, [1913] 3 K. B. 340, was not a decision with regard to a defect arising from breach of contract, but had reference to a vicious horse. I express no opinion with regard to that decision, but I think that the judgment of Parke, B., in Longmeid v. Holliday, 6 Ex. 761, of Cotton and Bowen, L. JJ., in Heaven v. Pender, 11 Q. B. D. 503, of Stirling, L. J., in Earl v. Lubbock, [1905] 1 K. B. 253, and of Hamilton, J., in Blacker v. Lake, 106 L. T. 533, 537 make it clear that in this case the plaintiff is not entitled to recover. I have not felt myself bound by George v. Skivington (1869) L. R. 5 Ex. 1, as that case was not followed by Hamilton and Lush, JJ., in Blacker v. Lake, 106 L. T. 533, 537.

I give judgment for the defendants.

Judgment for defendants.[77]

MAZETTI et al. v. ARMOUR & CO. et al.

(Supreme Court of Washington, 1913. 75 Wash. 622, 135 Pac. 633, 48 L. R. A. [N. S.] 213.)

CHADWICK, J. The complaint alleges that the plaintiffs were operating a profitable restaurant in the city of Seattle, and dealing with the general public as their patrons; that defendant Armour & Co. is engaged in the business of manufacturing and selling to the public generally meats and products to be used as food; that it maintains a place of business in Seattle, Wash., from which it sells and distributes its goods, representing and holding out to the general public that its goods are pure, wholesome, and fit food for human beings; that on June 16, 1912, plaintiffs, in the usual course and conduct of their business, purchased from the Seattle Grocery Company

[77] The statement of facts is abridged and part of the opinion is omitted.

a carton of cooked tongue, prepared and ready to be used as food without further cooking or labor; that such package had been manufactured and prepared by defendant Armour & Co., that the carton or container bore its name, and that it was purchased to be sold to plaintiffs' customers; that in making such purchase plaintiffs relied upon the representations of Armour & Co. that said food was pure and wholesome and fit for food; that Armour & Co. was guilty of negligence in manufacturing and preparing the foods purchased, in that in the center of the carton was a foul, filthy, nauseating and poisonous substance; that in the due course of trade plaintiffs served to one of their patrons a portion of the tongue; that the patron ate of it; that he then and there became sick and nauseated, and did then and there in the presence of other persons publicly expose and denounce the service to him of such foul and poisonous food; that the incident became known to the public generally; that plaintiffs had no knowledge or means of knowing the character of the food served; that its condition could not be discovered until it was served for use—all to the damage of the plaintiffs, etc., for loss of reputation, business, and lost profits during the life of their lease. Defendants demurred to the complaint. The demurrer of Armour & Co. was sustained, and plaintiffs have appealed.

It has been accepted as a general rule that a manufacturer is not liable to any person other than his immediate vendee; that the action is necessarily one upon an implied or express warranty, and that without privity of contract no suit can be maintained; that each purchaser must resort to his immediate vendor. To this rule certain exceptions have been organized: (1) Where the thing causing the injury is of a noxious or dangerous kind. (2) Where the defendant has been guilty of fraud or deceit in passing off the article. (3) Where the defendant has been negligent in some respect with reference to the sale or construction of a thing not imminently dangerous.

Within one of these exceptions is to be found the reason for holding the manufacturer of patent or proprietary medicines to answer at the suit of the ultimate consumer. Direct actions are allowed in such cases because the manufacture of medicines is generally shrouded in mystery, and sometimes, if not generally, they contain poisons which may produce injurious results. They are prepared by the manufacturer for sale and distribution to the general public, and one purchasing them has a right to rely upon the implied obligation of the manufacturer that he will not use ingredients which if taken in prescribed doses will bring harmful results. Reference may be had to the following cases which sustain, and in which many other cases are cited which sustain, this exception: Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; Blood Balm Co. v. Cooper, 83 Ga. 457, 10 S. E. 118, 5 L. R. A. 612, 20 Am. St. Rep. 324; Weiser v. Holzman, 33 Wash. 87, 73 Pac. 797, 99 Am. St. Rep. 932.

Another exception—the doctrine is comparatively recent—is refera-

ble to the modern method of preparing food for use by the consumer, and the more general and ever-increasing use of prepared food products. The following are among the more recent cases holding that the ultimate consumer may bring his action direct against the manufacturer: Meshbesher v. Channellene Oil & Mfg. Co., 107 Minn. 104, 119 N. W. 428, 131 Am. St. Rep. 441; Tomlinson v. Armour, 75 N. J. Law, 748, 70 Atl. 314, 19 L. R. A. (N. S.) 923; Salmon v. Libby, 219 Ill. 421, 76 N. E. 573; Haley v. Swift, 152 Wis. 570, 140 N. W. 292; Watson v. Augusta, 124 Ga. 121, 52 S. E. 152, 1 L. R. A. (N. S.) 1178, 110 Am. St. Rep. 157; Ketterer v. Armour (D. C.) 200 Fed. 322. The contrary is held in the case of Nelson v. Armour, 76 Ark. 352, 90 S. W. 288, 6 Ann. Cas. 237. This case, though well reasoned along the lines of those cases which hold that the rule of caveat emptor applies, is not in touch with the modern drift of authority. Some of the cases hold that the action is for breach of warranty; others that it is to be sustained upon the ground of negligence. A few courts have attributed the growth of this exception to the general public policy as declared in the pure food laws (Meshbesher v. Channellene, etc., supra), while others say that the liability for furnishing provisions which endanger human life rests upon the same grounds as the manufacturing of patent or proprietary medicine. Bishop v. Weber, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715; Haley v. Swift, supra; Tomlinson v. Armour, supra; Meshbesher v. Channellene, supra; Salmon v. Libby, supra; Watson v. Augusta, supra; Ketterer v. Armour, supra. In the case of Weiser v. Holzman, this court said: "The rule does not rest upon any principle of contract, or contractual relation existing between the person delivering the article and the person injured, for there is no contract or contractual relation between them. It rests on the principle that the original act of delivering the article is wrongful, and that every one is responsible for the natural consequences of his wrongful acts." Although the cases differ in their reasoning, all agree that there is a liability in such cases irrespective of any privity of contract in the sense of immediate contract between the parties.

Indeed, we understand that respondent does not claim that the ultimate consumer, the person who ate the unfit food, would be denied a right of recovery under modern authority; but it is strenuously contended that such actions are sustained because the consumer has been injured in health and comfort, that the exception should not be carried to the extent of allowing a retailer of the goods to sue direct and recover for injury to his business and loss of reputation, that in such cases there must still be privity of contract. It seems that the test should not rest in finding the plaintiff's damage in health or business, but in answering the question whether there has been a damage which may be justly attributed to the negligence or a breach of duty on the part of the one who had power and whose duty it was to prevent the wrong.

Counsel on either side have been zealous in searching the books, but only one case is submitted that goes directly to the right of the retailer or middleman to sue in the first instance—Neiman v. Channellene Oil & Mfg. Co., 112 Minn. 13, 127 N. W. 394, 140 Am. St. Rep. 458. The right to recover for loss of trade consequent upon the selling of impure food was sustained; the court saying, "A company which advertises itself as a manufacturer and seller of pure articles of food must be deemed to have knowledge of the contents of the articles offered for sale." The court held to the doctrine of implied warranty. The suit was brought by the retailer against his immediate vendor, so that we still have to meet the question of whether the retailer who has lost his trade can sue over the head of his immediate vendor, or join him with the manufacturer as in this case. In the light of modern conditions we see no reason why he should not. He has been damaged. He and all others who in the course of trade handled the unwholesome goods purchased them relying upon the name and reputation of the manufacturer. The goods were designed for ultimate consumption by an individual patron, and packed to facilitate and make convenient such resales as might be made pending ultimate consumption. Every tradesman, whether wholesaler or retailer, is in a sense a consumer, for he buys to resell. In a way he risks his reputation. He stakes it upon either an express warranty, as printed on the package, or an implied warranty that the goods are wholesome and fit for food. He is injured by the fault or a breach of duty of the manufacturer, for his immediate vendor, like himself, has no way to test every sealed package. "Remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales. The obligation of the manufacturer should not be based alone on privity of contract. It should rest, as was once said, upon 'the demands of social justice.'" Ketterer v. Armour, supra. "We may judicially recognize that the contents are sealed up, not open to the inspection or test, either of the retailer or of the consumer, until they are opened for use, and not then susceptible to practical test, except the test of eating. When the manufacturer puts the goods upon the market in this form for sale and consumption, he, in effect, represents to each purchaser that the contents of the can are suited to the purpose for which it is sold, the same as if an express representation to that effect were imprinted upon a label. Under these circumstances, the fundamental condition upon which the common-law doctrine of caveat emptor is based—that the buyer should 'look out for himself'—is conspicuously absent." Tomlinson v. Armour, supra, 75 N. J. Law, 748, 70 Atl. 314, 19 L. R. A. (N. S.) 923.

In Pantaze v. West, 7 Ala. App. 599, 61 South. 42, the suit was brought against the retailer. In discussing the obligations of the retailer, the court treats him as a consumer within the law, saying: "The fact was established without controversy that the defendant

was the keeper of a public eating place, engaged in the business of serving food to his customers, the public, and, being thus engaged, and holding himself out as a public purveyor, he was bound to use due care to see that the foodstuffs served at his place of business to his customers were fit for human consumption, and could be partaken of without causing sickness or endangering human life or health because of their unwholesome and deleterious condition, and, for any negligence in this particular in failing to observe this duty which proximately resulted in injury to one of the patrons of the place, the defendant would be responsible."

Now, under all authority the immediate vendor would be liable upon one theory or another to the consumer. This being so, it should not be held that the vendor could not sue the manufacturer except to recoup against a judgment. He might thus be left without remedy. In denying the right to sue an immediate vendor, Spear, J., in Bigelow v. Maine Central Ry. Co., 110 Me. 105, 85 Atl. 396, 43 L. R. A. (N. S.) 627, observed the wonderful discoveries of the past century and the amazing progress in perfecting known devices. He recalls the boast of the common law that it was able to adjust itself to the inevitable vicissitudes and changes that occur in the development of human affairs. "The principles of the common law have adapted themselves so aptly as to render almost imperceptible the radical transitions that have taken place. Of little less importance than the appearance of the great achievements referred to is the establishment and development of the canning industry in this country and in other parts of the world. It may be said that the art of canning, if not invented within the last century, has, at least, assumed the vast proportions which it has now attained within a comparatively few years. It involves a unique and peculiar method of distributing for domestic and foreign use almost every product known to the art of husbandry. The wholesaler, the retailer, and the user of these goods, whether in the capacity of caterer, seller, or host, sustain an entirely different duty, respecting a knowledge of their contents and quality, than prevails with regard to knowing the quality of those food products which are open to the inspection of the seller or victualer. With reference to these it may well be considered, as has been held, that, having an opportunity to investigate and thereby to know the quality of their merchandise, they are charged with a responsibility amounting to a practical guaranty. The early rules of law were formulated upon the theory that the provision dealer and the victualer, having an opportunity to observe and inspect the appearance and quality of the food products they offered to the public, were accordingly charged with knowledge of their imperfections. Winsor v. Lombard, 18 Pick. (Mass.) 57; Bishop v. Weber, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715. But, upon the state of facts in the case at bar, a situation arises that cannot in the prac-

tical conduct of the canning business fall within these rules. No knowledge of the original or present contents of a perfect appearing can is possible in the practical use of canned products. They cannot be chemically analyzed every time they are used. Accordingly, the reason for the rule having ceased, a new rule should be applied to the sale and use of canned goods that will more nearly harmonize with what is rational and just.

To the old rule that a manufacturer is not liable to third persons who have no contractual relations with him for negligence in the manufacture of an article should be added another exception, not one arbitrarily worked by the courts, but arising, as did the three to which we have heretofore alluded, from the changing conditions of society. An exception to a rule will be declared by courts when the case is not an isolated instance, but general in its character, and the existing rule does not square with justice. Under such circumstances a court will, if free from the restraint of some statute, declare a rule that will meet the full intendment of the law. No case has been cited that is squarely in point with the instant case; but there is enough in the adjudged cases to warrant us in our conclusion.

The facts stated in the complaint are admitted by demurrer. Plaintiffs have been injured. No other person or firm had an opportunity to check the offensive package after it was sealed and sent on its way. Right and reason demand that any party injured should have a right of recovery against the first offender without resorting to that circumlocution of action against intervening agents (a doubtful right at best, Bigelow v. Maine Central Ry. Co., supra), which is demanded where the product as well as the market is open, and the rule of caveat emptor should in justice apply.

Plaintiffs' argument is also based on the pure food law. It is contended that the negligence of defendant is presumed if a violation of the pure food law be shown. This is admitted as a general proposition by defendant; but it says that the rule applies only where the statute was intended for the benefit of the party who brings the suit; that the pure food laws are intended for the benefit of the consumer alone.

This opinion is already too long drawn out, and we are not disposed to go into this phase of the case, except to say that it seems to us that the plaintiffs would not be barred by the argument made by defendant. The consumer purchases prepared food products to sustain life and health. The retailer purchases the same products, depending upon established brands to sustain his reputation as a dealer in clean and wholesome food. We would be disposed to hold on this question that, where sealed packages are put out, and it is made to appear that the fault, if any, is that of the manufacturer, the product was intended for the use of all those who handle it in trade as well as those who consume it. Our holding is that, in the absence

of an express warranty of quality, a manufacturer of food products under modern conditions impliedly warrants his goods when dispensed in original packages, and that such warranty is available to all who may be damaged by reason of their use in the legitimate channels of trade.

We regard this case, in so far as the dealer is permitted to sue the manufacturer, as one of first impression. We think the complaint states a cause of action. If there is no authority for the remedy, "it is high time for such an authority." Ketterer v. Armour, supra.

The judgment is reversed, and the cause remanded, with instructions to overrule the demurrer.[78]

TOM v. NICHOLS-FIFIELD SHOE MACH. CO.

(Circuit Court of Appeals of the United States, 1914. 132 C. C. A. 221, 215 Fed. 881.)

In Error to the District Court of the United States for the District of Massachusetts.

This was an action by Jacob Tom against the Shoe Machinery Company, for personal injuries sustained by the plaintiff while in the employ of Habid Tom, and engaged in operating a die-cutting machine which had been sold and delivered to Habid Tom by the defendants and set up by them in his factory in contemplation of its being operated by the plaintiff. The judgment below was for the defendants, and plaintiff brings error.[79]

BINGHAM, Circuit Judge. * * * We are also of the opinion that the circumstances disclosed by the case show that the defendant owed the plaintiff a duty to exercise care in setting up the machine, and that this duty did not arise out of the contract of sale between the defendant and Tom, but out of the relation existing between the plaintiff and the defendant, and irrespective of the contract of sale. "The law governing actions for negligence has for its foundation the rule of reasonable conduct." That rule "necessarily includes two persons, or one person and some right or property of another. It has to do with one's acts in reference to the person, property, or rights of another. It is a rule of relation. If there be no relation there is nothing upon which the rule can operate." Garland v. Railroad, 76 N. H. 556, 86 Atl. 141, 46 L. R. A. (N. S.) 338, Ann. Cas. 1913E, 924. When, however, one knows or has reason to believe that his

[78] For the argument which may be based on this allegation, admitted as it is by the demurrer, see Blood Balm Company v. Cooper (1889) 83 Ga. 457, 10 S. E. 118, 5 L. R. A. 612, 20 Am. St. Rep. 324.

[79] The statement of facts is rewritten, and only so much of the opinion is given as relates to the one point.

conduct may affect injuriously the person or property or rights of another, then a duty arises requiring him to exercise reasonable care to see that his acts do not result injuriously to the person or property or rights of that other. So in this case, when the defendant set up the machine in the factory, knowing or having reason to anticipate that the plaintiff and his fellow employés were to operate it, the law imposed a duty upon the defendant, with relation to the plaintiff and these men, to exercise reasonable care in setting up the machine, and rendered it liable in damages for a breach of the duty in case one of them was injured while operating the machine and as a result of its having been negligently set up. Gill v. Middleton, 105 Mass. 477, 479, 7 Am. Rep. 548; Baird v. Daly, 57 N. Y. 236, 15 Am. Rep. 488; Devlin v. Smith, 89 N. Y. 470, 478, 42 Am. Rep. 311; Pittsfield Co. v. Shoe Co., 71 N. H. 522, 53 Atl. 807, 60 L. R. A. 116; Id., 72 N. H. 546, 58 Atl. 242; Hubbard v. Gould, 74 N. H. 25, 28, 64 Atl. 668; Dustin v. Curtis, 74 N. H. 266, 268, 269, 67 Atl. 220, 11 L. R. A. (N. S.) 504, 13 Ann. Cas. 169; Burnham v. Stillings, 76 N. H. 122, 123, 79 Atl. 987.

Whether the defendant's act in negligently setting up the machine was the proximate cause of the plaintiff's injury was a question of fact for the jury, there being evidence from which such a conclusion might reasonably be drawn. It appeared that the defendant's men went to the factory of the purchaser, saw the place where the machine was to be operated, saw that a number of men, including the plaintiff, were employed there, and knew that they were likely to be called upon to run the machine. Under these circumstances, it could not be said as a matter of law that the defendant had no reason to anticipate that the plaintiff would be set to work on the machine, or that the injury which he received was not the proximate result of its negligence in improperly setting it up. Ela v. Cable Co., 71 N. H. 1, 3, 51 Atl. 281.

The judgment is reversed, the verdict is set aside, the case is remanded to the District Court for further proceedings not inconsistent with this opinion, and the plaintiff in error recovers his costs of appeal.

III. In the Absence of Contractual and Property Obligation

It has repeatedly been proposed to amend the common law by legislation, so that certain duties hitherto regarded as merely moral obligations shall hereafter be legal duties, whose nonperformance shall be punished by criminal law. The contention is, that the law should, to a certain extent, compel active beneficence by one man towards another in cases where "the only relation between the parties is that both are human beings." While it is not usually claimed that the

law should recognize and enforce "a general duty to act as a good Samaritan," it is asserted that the law should recognize *some* humanitarian duties as legal duties.

Jeremiah Smith, Cases on Torts (2d Ed.) 165.[80]

MISSOURI, K. & T. RY. CO. OF TEXAS v. WOOD et ux.

(Supreme Court of Texas, 1902. 95 Tex. 223, 66 S. W. 449, 56 L. R. A. 592, 93 Am. St. Rep. 834. Court of Civil Appeals of Texas, 1902. 68 S. W. 802.)

Action by Wood and his wife against the railway company. The trial resulted in a judgment against the railway company, who appeal.

It appeared in the case that an employé of the company, Dickson by name, had developed smallpox; that the company took charge of him and placed him in their smallpox camp; that the company's physician, having taken charge of Dickson on behalf of the company, "negligently employed an incompetent Mexican to guard and nurse Dickson"; that at the time the Mexican was put in charge "Dickson was delirious with fever, and it was known that persons thus suffering would likely escape; that while Dickson was in this delirious condition the Mexican went to sleep, and negligently permitted him to escape from the camp, and to wander upon the premises of the plaintiffs, and communicate smallpox to them and their little child.

BROWN, J. * * * Counsel urge the proposition that the railroad company owed no duty to the appellee; therefore there was no liability for Dickson's escape. House v. Waterworks Co., 88 Tex. 233, 31 S. W. 179, 28 L. R. A. 532, is relied upon to sustain that position, but the cases are so dissimilar that the principles announced in that case are not applicable in this. In House v. Waterworks Co. the two classes of cases are distinguished upon authorities cited and discussed. Nonliability for a failure to perform a duty due to the public as such is there commented upon and contrasted with the class of duties which are intended to benefit the individuals composing the public. This case belongs to the latter class, because whatever affects the health of the community necessarily affects the individual members thereof; and, when the duty to prevent the spread of a contagious disease rests upon a private corporation or person, an obligation arises in favor of each member of the community, and a right of action exists in favor of him who suffers from its breach.

But counsel for the railroad company earnestly insist that it is not

[80] Judge Smith here refers to Professor Bohlen's article on "The Moral Duty to Aid Others as a Basis of Tort Liability," 56 Univ. of Pa. Law Rev. 217, 316, and to Professor Ames' article on "Law and Morals," 22 Harv. Law Rev. 97, 111–113, and sets forth (1) article 450 of the Dutch Penal Code; (2) Bentham's proposals for legislation; (3) article 481 in Livingston's Draft Code for Louisiana; and (4) Macaulay's elaborate statement of reasons for refusing to incorporate in the Indian Penal Code such views as Bentham's and Livingston's.

liable for the act of Dickson in going away from the camp, although he was at the time delirious to the extent of being incapable of self-control. In Board of Bisshopp, 2 C. P. Div. 192, Denman, J., stated and answered the question thus: "Can a man be said to 'expose' or to 'be in charge of' one who is of full age and a free agent? A man weakened by disease may fairly be said to be 'exposed' by the person who is attending upon him. The statute cannot be limited to legal control, or it will become a dead letter." That case proceeded before the court on the ground that the defendant had exposed one infected with a contagious disease by going with him through the streets and in public places, but the defendant was acquitted because he had used proper care in doing so. The case answers the objection made that the escape of Dickson and his going upon the premises of the appellee could not be charged to the railroad company. Whenever the duty of restraining another arises, and the power of control over him exists, liability will follow upon a failure to perform the duty. In District v. Hill, 6 App. Cas. 204, Lord Blackburn said: "When the disease is infectious there is a legal obligation on the sick person and on those who have the custody of him not to do anything that can be avoided which shall tend to spread the infection; and, if either do so,—as by bringing the infected person into a public thoroughfare,—it is an indictable offense, though it will be a defense to an indictment if it can be shown that there was sufficient cause to excuse what is prima facie wrong."

The same principle obtains in reference to animals of known vicious character which the owner is required to restrain to prevent them from inflicting injury on others; and the owners of animals known to be infected with contagious diseases must control them in such manner as to prevent them from communicating the disease to the animals of other persons. Agency Co. v. McClelland, 89 Tex. 490, 34 S. W. 98, 35 S. W. 474, 31 L. R. A. 669, 59 Am. St. Rep. 70. If the railroad company had undertaken to keep a horse known to be affected with a contagious disease at the same place and by the same means, and the horse had been permitted, through the negligence of the attendant, to escape, and had communicated the disease to a horse, the property of the appellee, there would be no doubt of the liability of the railroad company for the damages.

If there be a sound reason for denying to Wood as great a security for his wife and children against the diseased man as would have been accorded to him in favor of his beasts against a diseased horse, it has not been suggested by counsel for the appellant, and we are unable to discover any tenable basis for the distinction.

The quantum of diligence which was required of the appellant depended upon the character of the disease and the danger of communicating it to others. "If the business be hazardous to the lives of others, the care to be used must be of a nature more exacting than required when no such hazard exists. The greater the hazard the

more complete must be the exercise of care." Railroad Co. v. Hewitt, 67 Tex. 478, 3 S. W. 705, 60 Am. Rep. 32. Smallpox is commonly known to be a highly contagious disease, and very dangerous to human life, and isolation of the infected person is generally recognized as necessary to afford protection to the community in which he may be found. The Court of Civil Appeals found as a fact that it is a characteristic of smallpox, known to the appellant's agent, that the patient is liable to become delirious to the degree of irresponsibility, and to wander from the place of confinement, being thereby liable to come into contact with persons in the neighborhood. The object of placing Dickson in the tent and supplying a nurse and guard for him was not alone to care for and provide for him, but also to protect the public against infection by contact; and when the railroad company undertook to treat Dickson for the disease, and to care for him at the place designated by the Mayor of Greenville, it assumed the duty of using ordinary care to prevent Dickson from exposing himself in delirium, or from being exposed otherwise, so as to communicate the disease to other persons; and, having failed, through the negligence of its employés, to use such care, and by reason of its negligence Dickson having escaped and communicated the disease to the appellee's family, the railroad company was liable for the damage caused thereby. Rex. v. Vantandillo, 4 Maule & S. 75; Rex. v. Burnett, Id. 273; Haag v. Board, 60 Ind. 511, 28 Am. Rep. 654; Smith v. Baker (C. C.) 20 Fed. 709; District v. Hill, 6 App. Cas. 204.

To both questions we answer that under the facts stated the railroad company was liable to the appellee Wood for the damages caused to him by reason of the smallpox being communicated to him and his family by Dickson through the negligence of the agent of the railroad company.[81]

DEPUE v. FLATAU et al.

(Supreme Court of Minnesota, 1907. 100 Minn. 299, 111 N. W. 1, 8 L. R. A. [N. S.] 485.)

BROWN, J. The facts in this somewhat unusual case are as follows: Plaintiff was a cattle buyer, and accustomed to drive through the country in the pursuit of his business, buying cattle, hides, and furs from the farmers. On the evening of January 23, 1905, about 5 or 5:30 o'clock, after having been out a day or two in the country, he called at the house of the defendants, about seven miles from

[81] The statement of facts is abridged from the statement of Rainey, C. J. of the Court of Civil Appeals. The opinion is from the Supreme Court, to which the questions involved in this case were certified by the Court of Civil Appeals. Only so much of the opinion is given as relates to the one point. On the hearings of the case, see 16 Harv. Law Rev. 133–134.

Madelia, where he resided. His object was to inspect some cattle which Flatau, Sr., had for sale, and, if arrangements could be made, to purchase the same. It was dark at the time of his arrival, but he inspected the cattle in the barn, and suggested to defendant that, being unable to determine their value by reason of the darkness, he was not prepared to make an offer for the cattle, and requested the privilege of remaining overnight, to the end that a bargain might be made understandingly in the morning. His request was not granted. Plaintiff then bought some furs from other members of the defendant's family, and Flatau, Sr., invited him to remain for supper. Under this invitation plaintiff entered the house, paid for the furs and was given supper with the family. After the evening meal, plaintiff and both defendants repaired to the sitting-room of the house, and plaintiff made preparation to depart for his home. His team had not been unhitched from the cutter, but was tied to a hitching post near the house.

The testimony from this point leaves the facts in some doubt. Plaintiff testified that soon after reaching the sitting room he was taken with a fainting spell and fell to the floor. He remembers very little of what occurred after that, though he does recall that, after fainting, he again requested permission to remain at defendants' overnight, and that his request was refused. Defendants both deny that this request was made, and testified, when called for cross-examination on the trial, that plaintiff put on his overshoes and buffalo coat unaided, and that, while adjusting a shawl about his neck, he stumbled against a partition between the dining room and the sitting room, but that he did not fall to the floor. Defendant Flatau, Jr., assisted him in arranging his shawl, and the evidence tends to show that he conducted him from the house out of doors and assisted him into his cutter, adjusting the robes about him and attending to other details preparatory to starting the team on its journey. Though the evidence is somewhat in doubt as to the cause of plaintiff's condition while in defendants' home, it is clear that he was seriously ill and too weak to take care of himself. He was in this condition when Flatau, Jr., assisted him into the cutter. He was unable to hold the reins to guide his team, and young Flatau threw them over his shoulders and started the team towards home, going a short distance, as he testified, for the purpose of seeing that the horses took the right road to Madelia. Plaintiff was found early next morning by the roadside, about three-quarters of a mile from defendants' home, nearly frozen to death. He had been taken with another fainting spell soon after leaving defendants' premises, and had fallen from his cutter, where he remained the entire night. He was discovered by a passing farmer, taken to his home, and revived. The result of his experience necessitated the amputation of several of his fingers, and he was otherwise physically injured and his health impaired.

Plaintiff thereafter brought this action against defendants, father and son, on the theory that his injuries were occasioned solely by their negligent and wrongful conduct in refusing him accommodations for the night, and knowing his weak physical condition, or at least having reasonable grounds for knowing it, by reason of which he was unable to care for himself, in sending him out unattended to make his way to Madelia the best he could. At the conclusion of plaintiff's case, the trial court dismissed the action, on the ground that the evidence was insufficient to justify a recovery. Plaintiff appealed from an order denying a new trial.

Two questions are presented for consideration: (1) Whether, under the facts stated, defendants owed any duty to plaintiff which they negligently violated; and (2) whether the evidence is sufficient to take the case to the jury upon the question whether defendants knew, or under the circumstances disclosed ought to have known, of his weak physical condition, and that it would endanger his life to send him home unattended.

The case is an unusual one on its facts, and "all-four" precedents are difficult to find in the books. In fact, after considerable research, we have found no case whose facts are identical with those at bar. It is insisted by defendants that they owed plaintiff no duty to entertain him during the night in question, and were not guilty of any negligent misconduct in refusing him accommodations, or in sending him home under the circumstances disclosed. Reliance is had for support of this contention upon the general rule as stated in Union Pacific Ry. Co. v. Cappier, 66 Kan. 649, 72 Pac. 281, 69 L. R. A. 513, where the court said: "Those duties which are dictated merely by good morals or by humane considerations are not within the domain of the law. Feelings of kindness and sympathy may move the Good Samaritan to minister to the sick and wounded at the roadside, but the law imposes no such obligation; and suffering humanity has no legal complaint against those who pass by on the other side. * * * Unless a relation exists between the sick, helpless, or injured and those who witness their distress, of a nature to require and impose upon them the duty of providing the necessary relief, there is neither legal obligation to minister on the one hand, nor cause for legal complaint on the other." This is no doubt a correct statement of the general rule applicable to the Good Samaritan, but it by no means controls a case like that at bar.

The facts of this case bring it within the more comprehensive principle that whenever a person is placed in such a position with regard to another that it is obvious that, if he does not use due care in his own conduct, he will cause injury to that person, the duty at once arises to exercise care commensurate with the situation in which he thus finds himself, and with which he is confronted, to avoid such danger; and a negligent failure to perform the duty renders him lia-

ble for the consequences of his neglect. This principle applies to varied situations arising from noncontract relations. It protects the trespasser from wanton or willful injury. It extends to the licensee, and requires the exercise of reasonable care to avoid an unnecessary injury to him. It imposes upon the owner of premises, which he expressly or impliedly invites persons to visit, whether for the transaction of business or otherwise, the obligation to keep the same in reasonably safe condition for use, though it does not embrace those sentimental or social duties often prompting human action. 21 Am. & Eng. Ency. Law, 471; Barrows on Negligence, 4. Those entering the premises of another by invitation are entitled to a higher degree of care than those who are present by mere sufferance. Barrows on Negligence, 304. The rule stated is supported by a long list of authorities, both in England and this country, and is expressed in the familiar maxim, "Sic utere tuo," etc. They will be found collected in the works above cited, and also in 2 Thompson on Negligence, 1702. It is thus stated in Heaven v. Pender, 11 L. R. Q. B. Div. 496: "The proposition which these recognized cases suggest, and which is, therefore, to be deduced from them, is that, whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." It applies with greater strictness to conduct towards persons under disability, and imposes the obligation as a matter of law, not mere sentiment, at least to refrain from any affirmative action that might result in injury to them. A valuable note to Railway Co. v. Cappier, 69 L. R. A. 513, discusses at length the character of the duty and obligation of those coming into relation with sick and disabled persons, and numerous analogous cases are collected and analyzed.

In the case at bar defendants were under no contract obligation to minister to plaintiff in his distress; but humanity demanded that they do so, if they understood and appreciated his condition. And, though those acts which humanity demands are not always legal obligations, the rule to which we have adverted applied to the relation existing between these parties on this occasion and protected plaintiff from acts at their hands that would expose him to personal harm. He was not a trespasser upon their premises, but, on the contrary, was there by the express invitation of Flatau, Sr. He was taken suddenly ill while their guest, and the law, as well as humanity, required that he be not exposed in his helpless condition to the merciless elements. The case, in its substantial facts, is not unlike that of Railway Co. v. Marrs, 119 Ky. 954, 85 S. W. 188, 27 Ky. Law Rep. 388, 70 L. R. A. 291, 115 Am. St. Rep. 289. In that case it appears that one Marrs

was found asleep in the yards of the railway company in an intoxicated condition. The yard employés discovered him, aroused him from his stupor, and ordered him off the tracks. They knew that he was intoxicated, and that he had left a train recently arrived at the station, and he appeared to them dazed and lost. About 40 minutes later, while the yard employés were engaged in switching, they ran over him and killed him. He had again fallen asleep on one of the tracks. The court held the railway company liable; that, under the circumstances disclosed, it was the duty of the yard employés to see that Marrs was safely out of the yards, or, in default of that, to exercise ordinary care to avoid injuring him; and that it was reasonable to require them to anticipate his probable continued presence in the yards. The case at bar is much stronger, for here plaintiff was not intoxicated, nor a trespasser, but, on the contrary, was in defendants' house as their guest, and was there taken suddenly ill in their presence, and, if his physical condition was known and appreciated, they must have known that to compel him to leave their home unattended would expose him to serious danger.

We understand from the record that the learned trial court held in harmony with the view of the law here expressed, but dismissed the action for the reason, as stated in the memorandum denying a new trial, that there was no evidence that either of the defendants knew, or in the exercise of ordinary care should have known, plaintiff's physical condition, or that allowing him to proceed on his journey would expose him to danger. Of course, to make the act of defendants a violation of their duty in the premises, it should appear that they knew and appreciated his serious condition. The evidence on this feature of the case is not so clear as might be desired, but a majority of the court are of opinion that it is sufficient to charge both defendants with knowledge of plaintiff's condition—at least, that the question should have been submitted to the jury. Defendant Flatau, Sr., testified that he was in the room at all times while plaintiff was in the house and observed his demeanor, and, though he denied that plaintiff fell to the floor in a faint or otherwise, yet the fact that plaintiff was seriously ill cannot be questioned. Flatau, Jr., conducted him to his cutter, assisted him in, observed that he was incapable of holding the reins to guide his team, and for that reason threw them over his shoulders. If defendants knew and appreciated his condition, their act in sending him out to make his way to Madelia the best he could was wrongful and rendered them liable in damages. We do not wish to be understood as holding that defendants were under absolute duty to entertain plaintiff during the night. Whether they could conveniently do so does not appear. What they should or could have done in the premises can only be determined from a full view of the evidence disclosing their situation, and their facilities for communicating his condition to his friends, or near neighbors, if any there

were. All these facts will enable the jury to determine whether, within the rules of negligence applicable to the case, defendants neglected any duty they owed plaintiff.

Order reversed.[82]

SECTION 4.—EXCUSABLE NEGLIGENCE

I. Accident as an Excuse

CHRISTIE v. GRIGGS.

(At Nisi Prius, Adjourned Sittings in London, 1809. 2 Camp. 79.)

This was an action of assumpsit against the defendant as owner of the Blackwall stage, on which the plaintiff, a pilot, was travelling to London, when it broke down, and he was greatly bruised. The first count imputed the accident to the negligence of the driver; the second, to the insufficiency of the carriage.

The plaintiff having proved that the axle-tree snapped asunder at a place where there is a slight descent, from the kennel crossing the road; that he was, in consequence, precipitated from the top of the coach; and that the bruises he received confined him several weeks to his bed, there rested his case.

Best, Serjeant, contended strenuously that the plaintiff was bound to proceed farther, and give evidence, either of the driver being unskillful, or of the coach being insufficient.

Sir James Mansfield, C. J. I think the plaintiff has made a prima facie case by proving his going on the coach, the accident, and the damage he has suffered. It now lies on the other side to show, that the coach was as good a coach as could be made, and that the driver was as skillful a driver as could anywhere be found. What other evidence can the plaintiff give? The passengers were probably all sailors like himself; and how do they know whether the coach was well built, or whether the coachman drove skillfully? In many other cases of this sort, it must be equally impossible for the plaintiff to give the evidence required. But when the breaking down or overturning of a coach is

[82] Compare: Hunicke v. Meramec Quarry Co. (Mo. 1914) 172 S. W. 43: (Action to recover for the death of plaintiff's intestate, H., caused by the alleged negligence of D. in failing to procure a physician or surgeon to attend and treat H., who had received severe personal injuries through the act of S. while H. was acting in the employ of D. Reviewing the authorities, Woodson, P. J., remarks: "In my opinion there is no possibility of doubt but what the law is that whenever one person employs another to perform dangerous work, and that, while performing that work, he is so badly injured as to incapacitate him from caring for himself, then the duty of providing medical treatment for him is devolved upon the employer.")

proved, negligence on the part of the owner is implied. He has always the means to rebut this presumption, if it be unfounded; and it is now incumbent on the defendant to make out, that the damage in this case arose from what the law considers a mere accident.

The defendant then called several witnesses, who swore that the axle-tree had been examined a few days before it broke, without any flaw being discovered in it; and that when the accident happened, the coachman, a very skillful driver, was driving in the usual track and at a moderate pace.

Sir James Mansfield said, as the driver had been cleared of everything like negligence, the question for the jury would be as to the sufficiency of the coach. If the axle-tree was sound, as far as human eye could discover, the defendant was not liable. There was a difference between a contract to carry goods, and a contract to carry passengers. For the goods the carrier was answerable at all events. But he did not warrant the safety of the passengers. His undertaking, as to them, went no farther than this, that as far as human care and foresight could go, he would provide for their safe conveyance. Therefore, if the breaking down of the coach was purely accidental, the plaintiff had no remedy for the misfortune he had encountered.

The jury found a verdict for the defendant.

HYMAN et ux. v. NYE & SONS.

(Queen's Bench Division, 1881. L. R. 6 Q. B. Div. 685.)

Statement of Claim—that the defendant was a jobmaster, carrying on business at Brighton, and that the plaintiff was lawfully traveling in and using a carriage of the defendant in the custody and care of the defendant's servant, when, through the negligence and default, or through the want of care and skill of the defendant, the carriage was upset and the plaintiff thrown from it and injured. Defence denying the negligence. Joinder of issue.

At the trial before Hawkins, J., at the Middlesex sittings in July, 1880, there was a verdict for the defendant. A rule was obtained calling upon the defendant to shew cause why there should not be a new trial on the ground of misdirection, and that the verdict was against the weight of the evidence.

Lindley, J. The defendant in this case was a job-master at Brighton, letting out carriages and horses for hire. The plaintiff hired of him a landau, and a pair of horses, and a driver, for a drive from Brighton to Shoreham and back. After having driven some way, and whilst the carriage was going down hill and slowly over a newly mended part of the road, a bolt in the underpart of the carriage broke. The splinter-bar became displaced; the horses started off; the carriage was upset; the plaintiff was thrown out and injured, and he brought this action for compensation.

It was proved at the trial that no fault could be imputed to the horses

or to the driver; and although the plaintiff was charged with having caused the accident by pulling the reins, the jury found in the plaintiff's favor on this point, and nothing now turns upon it.

It further appeared that the carriage had been built by a good builder some eight or nine years before the accident; had been repaired by a competent person about fifteen months before it; that the defendant had no reason to suppose that there was any defect in the carriage or in any of its bolts; and that the defect, if any, in the bolt which broke could not have been discovered by any ordinary inspection. The bolt itself was not produced at the trial, and the nature of the defect, if any, in it when the carriage started was not proved.

The learned judge at the trial told the jury in substance that the plaintiff was bound to prove that the injury which he had sustained was caused by the negligence of the defendant; and if in their opinion the defendant took all reasonable care to provide a fit and proper carriage their verdict ought to be for him. Being thus directed the jury found a verdict for the defendant; and in particular they found that the carriage was reasonably fit for the purpose for which it was hired, and that the defect in the bolt could not have been discovered by the defendant by ordinary care and attention. The plaintiff complains of this direction, and the verdict founded upon it, and we have to consider whether the direction was correct. * * * A person who lets out carriages is not, in my opinion, responsible for all defects discoverable or not; he is not an insurer against all defects; nor is he bound to take more care than coach proprietors or railway companies who provide carriages for the public to travel in; but in my opinion, he is bound to take as much care as they; and although not an insurer against all defects, he is an insurer against all defects which care and skill can guard against. His duty appears to me to be to supply a carriage as fit for the purpose for which it is hired as care and skill can render it; and if whilst the carriage is being properly used for such purpose it breaks down, it becomes incumbent on the person who has let it out to shew that the breakdown was in the proper sense of the word an accident not preventable by any care or skill. If he can prove this, as the defendant did in Christie v. Griggs, 2 Camp. 80, and as the railway company did in Redhead v. Midland Ry. Co., Law Rep. 2 Q. B. 412, he will not be liable; but no proof short of this will exonerate him. Nor does it appear to me to be at all unreasonable to exact such vigilance from a person who makes it his business to let out carriages for hire. As between him and the hirer the risk of defects in the carriage, so far as care and skill can avoid them, ought to be thrown on the owner of the carriage. The hirer trusts him to supply a fit and proper carriage; the lender has it in his power not only to see that it is in a proper state, and to keep it so, and thus protect himself from risk, but also to charge his customers enough to cover his expenses.

Such being, in my opinion, the law applicable to the case, it follows that the directions given to the jury did not go far enough, and that it

was not sufficient, in order to exonerate the defendant from liability for him to prove that he did not know of any defect in the bolt; had no reason to suppose it was weak, and could not see that it was by ordinary inspection of the carriage. It further follows that, in my opinion, the evidence was not such as to warrant the finding that the carriage was in a fit and proper state when it left the defendant's yard.

In many of the cases bearing on this subject, the expression "reasonably fit and proper" is used. This is a little ambiguous and requires explanation. In a case like the present, a carriage to be reasonably fit and proper must be as fit and proper as care and skill can make it for use in a reasonable and proper manner, i. e., as fit and proper as care and skill can make it to carry a reasonable number of people, conducting themselves in a reasonable manner, and going at a reasonable pace on the journey for which the carriage was hired; or (if no journey was specified) along roads, or over ground reasonably fit for carriages. A carriage not fit and proper in this sense would not be reasonably fit and proper, and vice versâ. The expression "reasonably fit" denotes something short of absolutely fit; but in a case of this description the difference between the two expressions is not great.

It was objected on the part of the defendant that the plaintiff had in his statement of claim based his case on negligence on the part of the defendant, and not on any breach of warranty express or implied, and consequently that the plaintiff could not recover in this action, at least without amending. But the absence of such care as a person is by law bound to take is negligence; and whether the plaintiff sues the defendant in tort for negligence in not having supplied such a fit and proper carriage as he ought to have supplied, or whether the plaintiff sues him in contract for the breach of an implied warranty that the carriage was as fit and proper as it ought to have been, appears to me wholly immaterial. Upon this point I adopt the opinion of Baron Martin in Francis v. Cockrell, Law Rep. 5 Q. B. 509, which is based upon and warranted by Brown v. Boorman, 11 Cl. & Fin. 1.

The plaintiff's pleadings would have been free from all objection if he had stated in his statement of claim that he hired the carriage of the defendant, and not merely that the plaintiff was lawfully in the carriage. But the defendant knew under what circumstances the plaintiff was lawfully in it; and there was no surprise or miscarriage of justice occasioned by the omission of the statement of the fact of hiring. It appears to me, therefore, that the plaintiff ought not to be precluded from recovering in this action as the pleadings stand, if the facts come out in his favor.

For the above reasons I am of opinion that there should be a new trial, and that the costs of the first trial, and of this rule, should abide the event.

Rule absolute.[83]

[83] Part of the opinion of Lindley, J., and all of the opinion of Mathew, J., are omitted.

II. Contributory Negligence as an Excuse[84]

BUTTERFIELD v. FORRESTER.

(Court of King's Bench, 1809. 11 East, 60, 10 R. R. 433, 103 Reprint, 926.)

This was an action on the case for obstructing a highway, by means of which obstruction the plaintiff, who was riding along the road, was thrown down with his horse, and injured, &c. At the trial before Bayley, J., at Derby, it appeared that the defendant, for the purpose of making some repairs to his house, which was close by the road side at one end of the town, had put up a pole across this part of the road, a free passage being left by another branch or street in the same direction. That the plaintiff left a public house not far distant from the place in question at 8 o'clock in the evening in August, when they were just beginning to light candles, but while there was light enough left to discern the obstruction at 100 yards distance: and the witness who proved this, said that if the plaintiff had not been riding very hard he might have observed and avoided it: the plaintiff however, who was riding violently, did not observe it, but rode against it, and fell with his horse, and was much hurt in consequence of the accident; and there was no evidence of his being intoxicated at the time. On this evidence Bayley, J., directed the jury, that if a person riding with reasonable and ordinary care could have seen and avoided the obstruction; and if they were satisfied that the plaintiff was riding along the street extremely hard, and without ordinary care, they should find a verdict for the defendant: which they accordingly did.

Vaughan, Serjt., now objected to this direction, on moving for a new trial; and referred to Buller's Ni. Pri. 26, where the rule is laid down, that "if a man lay logs of wood across a highway; though a person may with care ride safely by, yet if by means thereof my horse stumble and fling me, I may bring an action."

Bayley, J. The plaintiff was proved to be riding as fast as his horse could go, and this was through the streets of Derby. If he had used ordinary care he must have seen the obstruction; so that the accident appeared to happen entirely from his own fault.

Lord Ellenborough, C. J. 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 cases of persons riding upon what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself. Two

[84] On the question whether a showing of freedom from contributory fault is a part of the plaintiff's prima facie case in negligence, see ante, p. 969.

things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.[85]

PER CURIAM. Rule refused.

GEE v. METROPOLITAN RY. CO.

(Court of Queen's Bench, 1872. In the Exchequer Chamber, 1873. L. R. 8 Q. B. 161.)

Declaration that the plaintiff was a passenger on the defendants' railway to be safely carried; that the defendants so negligently conducted themselves in carrying the plaintiff and managing the carriage in which the plaintiff traveled, that the plaintiff fell out and was injured. Plea, Not guilty; issue joined. * * *

At the conclusion of the plaintiff's case it was submitted on behalf of the defendants, that the plaintiff was not entitled to recover, and the Chief Justice reserved to the defendants leave to enter a verdict for them or a nonsuit. The defendants did not offer any evidence, and the plaintiff then had a verdict for £250.

A rule was afterwards obtained to enter the verdict for the defendants or a nonsuit pursuant to the leave reserved, on the ground that there was no evidence of liability of the defendants; or for a new trial, on the ground that the verdict was against the weight of evidence.[86]

COCKBURN, J. I am of opinion that this rule should be discharged. The facts are simple. The plaintiff and his brother were travelling as passengers on the defendants' railway. In carriages of that railway there is a bar across the window to prevent persons from putting their heads to more than a small extent out of the window. The plaintiff and his brother had been conversing as to signals used on the line, and the plaintiff was explaining the mode in which they were worked; and told his brother that he would show him how it was done; and as soon as the lights of the station were visible the plaintiff stood up and put his hand on the rod of the window, and it so happened that the door, having been left insecurely fastened, flew open, and the plaintiff was thrown out and injured. Under these circumstances are the defendants liable? We must take it that there was negligence in not securely fastening the door; but it is said that that negligence alone did not cause the accident; the proximate cause of

[85] "Butterfield v. Forrester is the first of the modern line of cases on contributory negligence." Sir Frederick Pollock, 10 R. R. v.

For "cases of persons riding upon what is considered to be the wrong side of the road," see Cruden v. Fentham (1799) 2 Esp. 685, and Clay v. Wood (1803) 5 Esp. 44.

[86] The arguments of counsel are omitted.

the accident was the plaintiff pressing against the door. It is said that the duty of the company is to carry a passenger safely as long as he sits quietly in the carriage; and if an accident happens from any act of his inconsistent with the ordinary behavior of passengers, he has only himself to thank, and the company are not liable.

I quite agree that the passenger must not do anything inconsistent with what passengers ordinarily do on a journey. Adams v. Lancashire and Yorkshire Ry. Co., Law Rep. 4 C. P. 739, was cited for the defendants. * * * There the decision turned on the passenger committing an act of imprudence which was uncalled for; that case therefore has no application to the present. Here, assuming that the company had done their duty, the passenger did nothing more than that which came within the scope of his enjoyment while travelling, without committing any imprudence; in passing through a beautiful country he certainly is at liberty to stand up and look at the view, not in a negligent but in the ordinary manner of people travelling for pleasure. Here the defendant was simply looking at the signal lights, and there was nothing in his conduct which can be imputed to him as negligence or imprudence.[87]

From this decision of the Queens Bench, discharging the rule, there was an appeal to the Exchequer Chamber.[86]

KELLY, C. B. I am of opinon that this judgment must be affirmed. The question for our consideration is, whether there is any evidence of the liability of defendants, the rule being to enter a verdict for the defendants on the sole ground that there was no evidence of the liability of the defendants. Now what is the evidence? It appears that the plaintiff was a passenger by the defendants' train, and that, as he was passing from one station to another, with a view of looking out of the window he rose from his seat and took hold of the bar of the window and pressed against it. The pressure, such as it was, of some part of his body, upon his taking hold of the bar, caused the door to open, and the motion of the train to throw him out of the carriage, whereby he sustained the injury complained of. These are all the facts, and the first question is, whether there was any evidence of negligence on the part of the defendants; and the second question which must necessarily arise from the terms of the reservation,—viz., that there was no evidence of *liability*, not merely of negligence, on the part of the defendants,—is whether there was any evidence to go to the jury that the mischief which befell the plaintiff was caused by the negligence of the defendants.

First, was there any evidence of negligence at all on the part of the defendants? I am of opinion that there was evidence for the jury to

[87] The statement of facts is abridged, part of the opinion of Cockburn, J., and the opinions of Blackburn, Mellor, and Quain, JJ., are omitted.

[86] The arguments of counsel are omitted.

consider, whether the defendants' servants had not, when this train left the station from which it started on its journey, failed to see that the door was properly fastened in the ordinary manner in which such railway carriage doors are fastened. There was evidence to go to the jury that they had failed in the performance of that duty. But the preliminary question arises, is it their duty? I am of opinion that it is—that it is the duty of the railway company, by its servants, before the train starts upon its journey, to see that the door of every carriage is properly fastened. Here was evidence that this door was not properly fastened: for if it had been, it would not have flown open upon the degree of pressure that was applied to it by the plaintiff; and therefore there was evidence to go to the jury, upon which they were justified in finding that there was negligence on the part of the defendants.

But then, I agree, we must go further, and inquire whether there was evidence of "liability": in other words, whether there was evidence also that the negligence of the company was the cause of the mischief which occurred to the plaintiff. I am of opinion that there was evidence. Certainly the mischief would not have befallen him if that door had been properly fastened. The question is, therefore, whether he did anything which it was not lawful for him to do, and which we should be satisfied, taking the whole evidence together, was the cause of the mischief which befell him. If he did, I agree that the case fails on the part of the plaintiff. But why? Because, though he has proved that the defendants were guilty of negligence, he has not proved that that negligence was the cause of the mischief which befell him. The question of what has been termed contributory negligence does not, in my opinion, arise: first, because I am clearly of opinion upon the facts that there was no evidence of contributory negligence; but even if there were evidence of contributory negligence, the rule is not for a new trial on the ground that the learned judge did not leave that question to the jury or that it was a verdict against the weight of evidence: and there was no right to entertain any such question. And, therefore, upon this case, and on the facts that are before us, no question whatever of contributory negligence arises. The question is, whether there was evidence of negligence on the part of the company which caused the accident. I have already shewn that there was evidence of negligence and that there was evidence to go to the jury that their leaving the door not properly fastened was the cause of the injury which the plaintiff sustained without any improper act on the part of the plaintiff. Because I am of opinion that any passenger in a railway carriage, who rises for the purpose either of looking out of the window, or of dealing with, and touching, and bringing his body in contact with the door for any lawful purpose whatsoever, has a right to assume, and is justified in assuming, that the door is properly fastened; and if by reason of its

not being properly fastened his lawful act causes the door to fly open, the accident is caused by the defendants' negligence.

I think, therefore, the Court of Queen's Bench were right in discharging the rule, and the judgment must be affirmed.[88]

SMITHWICK v. HALL & UPSON CO.

(Supreme Court of Errors of Connecticut, 1890. 59 Conn. 261, 21 Atl. 924, 12 L. R. A. 279, 21 Am. St. Rep. 104.)

This action, against the Hall & Upson Company, for an injury caused by the alleged negligence of the defendant, was brought in the District Court of Waterbury and appealed to the Supreme Court of New Haven County. The defendant suffered a default in that court and the case was heard in damages before Fenn, J. Facts found and damages assessed at $1,000 if on the facts the plaintiff was to be regarded as not guilty of contributory negligence, and at nominal damages if he was to be regarded as guilty of such negligence; and the case was reserved upon the facts for the advice of this court.

TORRANCE, J. The general question reserved for our advice in this case, is, whether the plaintiff upon the facts found is entitled to the substantial damages or only to the nominal damages found by the court below.

Inasmuch as that court has expressly found that the negligence of the defendant caused or contributed to the injury for which the plaintiff seeks to recover, the decision of the above general question depends upon this single point, namely, whether the acts and conduct of the plaintiff as set forth upon the record constitute or amount to such contributory negligence on his part as will bar his right to substantial damages. The facts found, so far as they bear upon the question for decision, are in substance the following:

The plaintiff was a workman in the service of the defendant, and at the time of the injury complained of was engaged in helping to store ice for the defendant in a certain brick building. In doing this work the plaintiff stood upon a platform about five feet wide and seventeen feet long, raised fifteen feet above the ground, and extending from the west side of the building easterly to a point about two feet east of the door or aperture through which the ice was taken into the building. A stout plank of suitable height and strength extended along the outer side of the platform as far as the west side of the door and served as a protective railing or guard to that portion of the platform. In front of the door and east of it the platform was without guard or railing of any kind. A short time prior to the injury the foreman

[88] The opinion of Martin, B., Keating, J., Brett, J., Cleasby, B., and Grove, J., are omitted. Each was for affirming the judgment of the Queen's Bench.

stationed the plaintiff on the platform just west of the door and inside the railing, and showed him what his duties were there, and told him "not to go upon the east end of the platform east of the slide and door, as it was not safe to stand there." He did not tell the plaintiff why it was not safe, but the danger which he had in mind was the narrowness and unrailed condition of the platform and the liability by inadvertence to misstep or fall or slip off, the latter being aggravated by the liability of the platform to become slippery from broken ice. These dangers were all manifest. The peril resulting from the accident which happened to the building was not in contemplation.

After the foreman went away the plaintiff, in spite of the orders so given to him, and for reasons of his own apparently, went over to the east end of the platform and worked there. It is found that there was no sufficient reason or excuse for the change of position. One of his fellow workmen, seeing the plaintiff in that place, told him that "it was not safe, and to stand on the other side," but the plaintiff, notwithstanding such warning, remained at work there.

While so at work the brick wall of the building above the platform, in consequence of the negligence of the defendant, gave way, the brick falling upon the platform and thence to the ground. The plaintiff was struck by portions of the descending mass and fell to the earth. He was either knocked off, or his fall, in the condition in which he stood, was inevitable; indeed, had he not fallen when he did, his injuries, which were very serious, would have been worse. Most of the injuries which he actually sustained were occasioned by the fall.

The plaintiff had no knowledge that the wall would be likely to fall or was in any way unsafe, and it is found that "no fault or negligence can be imputed to him in this regard."

In contemplation of the peril from the falling wall, it is found that "the spot where the plaintiff stood could not have been considered more dangerous than the place where he was directed to stand, though in fact most of the brick fell upon the side where he stood, and the result demonstrated therefore that the other side would have been safer in the event which occurred."

Upon these facts the defendant contends that the plaintiff, in going to and remaining on the east end of the platform, contrary to the orders and in spite of the warning given him, and in view of the obvious and manifest danger in so doing, was guilty of such contributory negligence as bars him of his right to recover more than nominal damages.

If the plaintiff's injuries had resulted from any of the perils and dangers attendant upon the mere fact of his standing and working on the east end of the platform, which were obvious and manifest to any one in his place, which were in the mind of the foreman when he told the plaintiff not to go there, and in view of which his fellow workman warned him, then this claim of the defendant would be a valid one. But upon the facts found it is without foundation.

The injury to the plaintiff was not the result of any such dangers,

but was caused through the negligence of the defendant by the falling walls. This was a source of danger of which he had no knowledge whatever. He was justified in supposing that the wall was safe and would not be likely to fall upon him, no matter where he stood on the platform. He had no reason to anticipate even the slightest danger from that source before or after he changed his position. This being so, he could be guilty of no negligence with respect to this source of danger by changing his position contrary to orders; for negligence presupposes a duty of taking care, and this in turn presupposes knowledge or its legal equivalent.

With respect to that danger the plaintiff upon the facts found must be held to have acted as any reasonably careful man would have acted under the same circumstances. In changing his position contrary to orders he voluntarily took the risk of all perils and dangers which a man of ordinary care in his place ought to have known or could reasonably have anticipated; but as to dangers arising through the defendant's negligence from other sources—dangers which he was not bound to anticipate and of whose existence he had no knowledge, he took no risk and assumed no duty of taking care. It was the duty of the defendant on the facts found to warn the plaintiff against the danger from the falling wall.

Now the act or omission of a party injured which amounts to what is called contributory negligence, must be a negligent act or omission, and in the production of the injury it must operate as a proximate cause or one of the proximate causes and not merely as a condition.

In the case at bar the conduct of the plaintiff, as we have seen, was, with respect to the danger from the falling wall, not negligent for the want of knowledge or its equivalent on the part of the plaintiff.

Nor was his conduct, legally considered, a cause of the injury. It was a condition rather.

If he had not changed his position he might not have been hurt. And so too if he had never been born, or had remained at home on the day of the injury, it would not have happened; yet no one would claim that his birth or his not remaining at home that day, can in any just or legal sense be deemed a cause of the injury.

The court below has found that the plaintiff's fall in the position in which he stood was due to the giving way of the wall, and that most of his injuries were occasioned by the fall. His position there, upon the facts found, can no more be considered as a cause of the injury, than it could be in a case where the defendant, in doing some act near the platform without the plaintiff's knowledge, had negligently knocked him to the ground, or had negligently hit him with a stone. Had the injury been occasioned by a misstep or slip from the platform by the carelessness of the plaintiff, or for the want of a railing, the causal connection between the change of position and the injury would, legally speaking, be quite obvious; but from

a legal point of view no such connection exists between the change of position and the giving way of the wall.

The plaintiff had full knowledge and was abundantly cautioned against certain particular sources of peril and danger, and he voluntarily neglected the warnings and took the risk of those perils and dangers. He was injured through the negligence of the defendant from an entirely different source of danger, of which he knew and could know nothing, and of whose existence it was the duty of the defendant to warn him. * * *

The defendant seems to claim however that, although some of the plaintiff's injuries were caused by falling bricks, yet most of them were caused by his fall; and that as he probably would not have fallen had he remained behind the railing, he contributed to the injury by placing himself where in case of such accident there was nothing to prevent his fall.

Whether this claim that he probably would not have fallen had he remained where he was stationed be true or not, must forever remain matter of conjecture. But if its truth could be demonstrated it would not, as we have seen, change the relation of the plaintiff's act to the legal cause of his injury, or make that act, from a legal standpoint, a contributing cause when it was but a condition.

And if the claim means that the plaintiff by his act increased the injury merely, then if this were true it would not be such contributory negligence as would defeat the action. To have that effect it must be an act or omission which contributes to the happening of the act or event which caused the injury. An act or omission that merely increases or adds to the extent of the loss or injury will not have that effect, though of course it may affect the amount of damages recovered in a given case. Gould v. McKenna, 86 Pa. 297, 27 Am. Rep. 705; Stebbins v. Central R. R. Co., 54 Vt. 464, 41 Am. Rep. 855. This claim however, on the facts found, is wholly without foundation.

The plaintiff is entitled to judgment in his favor for one thousand dollars, and the Superior Court is so advised.

In this opinion the other judges concurred.[89]

BLACK v. NEW YORK, N. H. & H. R. CO.

(Supreme Judicial Court of Massachusetts, 1907. 193 Mass. 448, 79 N. E. 797, 7 L. R. A. [N. S.] 148, 9 Ann. Cas. 485.)

In this action, against the railway company, there was a directed verdict for the defendant. The plaintiff excepts.

KNOWLTON, C. J. This action was brought to recover for an injury alleged to have been caused by the negligence of the defend-

[89] Part of the opinion is omitted.

ant's servants. The plaintiff was a passenger on the defendant's train which ran from Boston through Ashmont on the evening of February 7, 1903. He testified to having become so intoxicated that he had no recollection of anything that occurred after leaving a cigar store in Boston, until he awoke in the Boston City Hospital, about 4 o'clock the next day. One Thompson testified "that he took the 9:23 train on the evening of February 7, 1903, at the South Station in Boston, for Ashmont, and occupied a seat near the rear of the last car of the train; that there were about 20 passengers in the car, and he noticed Black sitting in the seat opposite, very erect, with his eyes closed. When the conductor came through Mr. Black went through his pockets as if he were looking for a ticket, and not being able to find it, tendered a 50-cent piece in payment for his fare. The conductor began to name off the stations, from Field's Corner first, and then Ashmont, and when he said Ashmont Mr. Black nodded his head. The conductor gave him his change and his rebate check. At Ashmont, where the train stops, there is a gravel walk running the whole length as a platform, then there is a flight of steps—10 or 12—that leads up to the asphalt walk around the station; so when you go up from the steps you have to walk along this walk. The conductor and brakeman took Black out of the car, one on each side. The distance from the steps of the car to the steps that lead up to the station was 25 feet. As they went along the platform the conductor and trainman were on each side of him. They tried to stand him up, but his legs would sink away from him. They sort of helped him up, and carried him to the bottom of the steps. When they went to the bottom of the steps they continued one on each side of him. Then one of the men got on one side, with his arm around him, and the other back of him, sort of pushing him, and they took him up about the fifth or sixth step, and after they got him up there they turned around and left him and went down the steps. Mr. Black sort of balanced himself there, just a minute, and then fell completely backward. He turned a complete somersault, and struck on the back of his head. The railroad men just had time to get down to the foot of the steps. There was a railing that led up those steps and the steps were about 10 feet wide. Mr. Black was upon the right-hand side, going up, and he was left right near the railing. When he fell he did not seize hold of anything. His arms were at his side."

On this testimony the jury might find that the plaintiff was so intoxicated as to be incapable of standing, or walking, or caring for himself in any way, and that the defendant's servants knowing his condition, left him near the top of the steps, where they knew, or ought to have known, that he was in great danger of falling and being seriously injured. They were under no obligation to remove him from the car, or to provide for his safety after he left the car. But they voluntarily undertook to help him from the car, and they were bound to use ordinary care in what they did that might affect

his safety. Not only in the act of removal, but in the place where they left him, it was their duty to have reasonable regard for his safety in view of his manifest condition. The jury might have found that they were negligent in leaving him on the steps where a fall would be likely to do him much harm. Moody v. Boston & Maine R. R., 189 Mass. 277, 75 N. E. 631.

The defense rests principally upon the fact that the plaintiff was intoxicated, and was incapable of caring for himself after he was taken from the train, and therefore was not in the exercise of due care. If his voluntary intoxication was a direct and proximate cause of the injury, he cannot recover. The plaintiff contends that it was not a cause, but a mere condition, well known to the defendant's servants, and that their act was the direct and proximate cause of the injury, with which no other act or omission had any causal connection. The distinction here referred to is well recognized in law. Negligence of a plaintiff at the time of an injury caused by the negligence of another is no bar to his recovery from the other, unless it was a direct, contributing cause to the injury, as distinguished from a mere condition, in the absence of which the injury would not have occurred. This is pointed out in Steele v. Burkhardt, 104 Mass. 59, 6 Am. Rep. 191, and Murphy v. Deane, 101 Mass. 455, 3 Am. Rep. 390. It is also considered at some length in Newcomb v. Boston Protective Department, 146 Mass. 596, 16 N. E. 555, 4 Am. St. Rep. 354. See, also, Marble v. Ross, 124 Mass. 44; Spofford v. Harlow, 3 Allen, 176; Hall v. Ripley, 119 Mass. 135; Stone v. Boston & Albany R. R. Co., 171 Mass. 536–544, 51 N. E. 1, 41 L. R. A. 794.

The application of this rule sometimes gives rise to difficult questions. But in this connection the doctrine has been established that, when the plaintiff's negligence or wrongdoing has placed his person or property in a dangerous situation which is beyond his immediate control, and the defendant, having full knowledge of the dangerous situation, and full opportunity, by the exercise of reasonable care, to avoid any injury, nevertheless causes an injury, he is liable for the injury. This is because the plaintiff's former negligence is only remotely connected with the accident, while the defendant's conduct is the sole, direct and proximate cause of it. The principle was recognized by Mr. Justice Wells in Murphy v. Deane, 101 Mass. 455, 3 Am. Rep. 390, in these words: "The last part of the instructions prayed for suggests another question which, in certain conditions of facts, may require care and consideration, to wit: how far the obligations and liabilities of one party are modified towards the other, after knowledge of a negligent exposure by the latter, to danger from the acts or neglect of the former. In such case, what would otherwise have been mere negligence may become willful or wanton wrong, or may take the place of the sole, direct or proximate cause, the negligence of the other party being then regarded as a remote, and not

a contributory, cause." In Hibbard v. Thompson, 109 Mass. 286, we find this language: "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. * * * In such cases the plaintiff's fault does not directly contribute to produce the injury sued for." So in Pierce v. Cunard Steamship Company, 153 Mass. 87, 26 N. E. 416, this court said: "But here the ground is not the fire, but an act done by the defendant after Pierce had got into the dangerous position. * * * The plaintiff's previous negligence is not a sufficient excuse for knowingly inflicting an injury upon him, or short of that, for omitting the use of such care as is reasonable under the circumstances, to avoid injuring him, even whether the harm is not expected in terms."

The rule applies, in like manner, where the plaintiff's act is illegal as distinguished from negligent, so that the defendant's liability is only for wanton and reckless conduct to the plaintiff's injury. McKeon v. N. Y., N. H. & H. R. R. Co., 183 Mass. 271, 67 N. E. 329, 97 Am. St. Rep. 437; Palmer v. Gordon, 173 Mass. 410, 53 N. E. 909, 73 Am. St. Rep. 302; Lovett v. Salem, etc., R. R. Co., 9 Allen, 557–563. In this latter class of cases, where the negligence is wanton and reckless to such a degree as to be in its nature a willful wrong, it is held that, although the plaintiff makes an averment of due care on his part, this means only due care in reference to the direct and proximate cause of the injury, and, such a gross wrong of the defendant being shown to be the cause, it prima facie so far excludes participation in it by the plaintiff, as to relieve him from the necessity of offering affirmative evidence of his care. Aiken v. Holyoke St. Ry. Co., 184 Mass. 269, 68 N. E. 238; Bjornquist v. Boston & Albany R. R. Co., 185 Mass. 130, 70 N. E. 53, 102 Am. St. Rep. 332; Banks v. Braman, 188 Mass. 367, 74 N. E. 594. The fundamental principle is the same in both classes of cases. It is that the plaintiff's condition, resulting from his prior negligence or wrong, is not a direct and proximate cause of the latter injury, inflicted by one who acts independently, with knowledge of this condition and in reference to it. The principle has been generally recognized, both in England and America.[90] * * *

[90] Knowlton, C. J., here referred to the following cases: Davies v. Mann, 10 M. & W. 545; Radley v. London & N. W. Railway Co., L. R. 1 App. Cas. 754; Inland & Seaboard Coasting Co. v. Tolson (1891) 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; Memphis & C. R. R. Co. v. Martin (1901) 131 Ala. 269, 30 South. 827; Green v. Los Angeles Terminal R. R. Co. (1904) 143 Cal. 31–41, 76 Pac. 719, 101 Am. St. Rep. 68; Isbell v. N. Y., N. H. & H. R. R. Co. (1858) 27 Conn. 393, 71 Am. Dec. 78; Indianapolis & Cincinnati Ry. Co. v. Wright (1864) 22 Ind. 376; Keefe v. Chicago & Northwestern Ry. Co. (1894) 92 Iowa, 182, 60 N. W. 503, 54 Am. St. Rep. 542; Atwood v. Bangor, O. & O. T. R. R. Co. (1898) 91 Me. 399, 40 Atl. 67; Baltimore & Ohio R. R. Co. v. State (1871) 33 Md. 542; Buxton v. Ainsworth (1904) 138 Mich. 532, 101 N.

We are of opinion that the jury in the present case might have found that the plaintiff was free from any negligence that was a direct and proximate cause of the injury.

Exceptions sustained.

VANDALIA R. CO. v. CLEM.

(Appellate Court of Indiana. 1911. 49 Ind. App. 94, 96 N. E. 789.)

Action against the railway company for damages caused by the defendant's train running into and killing the plaintiff's team, and destroying his wagon, while standing in defendant's freight yards. A demurrer to the complaint for lack of facts was overruled. The defendant then answered in denial. Verdict and judgment for the plaintiff.

The complaint, after setting out the circumstances attending the entry of the plaintiff's team upon the defendant's property, and the resulting accident contained these averments:

"That within a few minutes after the plaintiff's said team had so entered upon defendant's said railroad track at said place, and at about 5:30 o'clock in the evening, and while it was too dark to see said team and wagon, without light, at a sufficient distance ahead of said engine as it approached them from the west to stop said train, at the rate of speed at which it was then running—30 miles per hour—and prevent its running over said team and wagon, said defendant, without a light, and without a lookout on said engine, and without said yards being in any way lighted, recklessly, wantonly, and willfully, and without seeing or endeavoring to see said wagon and team so confined upon its tracks and switchyard, and without any care or regard for the lives or safety of persons or teams upon said yards or tracks, recklessly and willfully ran said train on, against, and over said team, wagon, and harness while it was so confined upon said defendant's main track in or adjoining to its switchyards, and thereby willfully and wantonly crushed and killed both of plaintiff's said horses, and destroyed said wagon and harness, to his damage in the sum of $350, all of which occurred through the willfulness and recklessness of said defendant in so operating its said train, without any fault or negligence whatever on the part of this plaintiff."

ADAMS, J. * * * In the complaint before us, it is averred that the defendant "recklessly and willfully ran said train against and over said team." If the train was willfully run over the team, it implies that the injury was committed not only with purpose and in-

W. 817, 5 Ann. Cas. 146; Rawitzer v. St. Paul City Ry. Co. (1904) 93 Minn. 84, 100 N. W. 664; State v. Manchester & Lawrence R. R. (1873) 52 N. H. 528; Railroad Co. v. Kassen (1892) 49 Ohio St. 230, 31 N. E. 282; Willey v. Boston & Maine R. R. (1900) 72 Vt. 120, 47 Atl. 398; Richmond Traction Co. v. Martin's Adm'x (1903) 102 Va. 209, 45 S. E. 886; Bostwick v. Minnesota & Pacific R. R. Co. (1892) 2 N. D. 440, 51 N. W. 781.

The rule has often been applied in favor of plaintiffs whose intoxication prevented them from using care to protect themselves from the consequences of a subsequent act of negligence of another person, done with knowledge of their intoxication. Wheeler v. Grand Trunk Ry. Co. (1900) 70 N. H. 607, 50 Atl. 103, 54 L. R. A. 955; Kean v. Baltimore & Ohio R. R. Co. (1884) 61 Md. 154; Fox v. Michigan Central R. R. Co. (1904) 138 Mich. 433, 101 N. W. 624, 68 L. R. A. 336, 5 Ann. Cas. 68; Cincinnati, L., St. L. & C. R. R. Co. v. Cooper (1889) 120 Ind. 469, 22 N. E. 340, 6 L. R. A. 241, 16 Am. St. Rep. 334.

tent, but with knowledge as well. Such is the meaning of "willful." 8 Words and Phrases, 7468. This charge, standing alone, we think would make the complaint good as an action for willful injury, but it does not stand alone. In the same sentence it is averred that the train was run "without seeing or endeavoring to see said wagon and team." This would be negligence. But, there are no degrees of negligence, and negligence, no matter how reprehensible, can never approximate willfulness. The two conditions have nothing in common and everything in conflict. The specific averment that defendant did not see nor try to see the team charges negligence, and must control the general averment that the injury was willfully committed.

We therefore conclude that the complaint does not state facts sufficient to constitute a cause of action for willful injury, and, as contributory negligence affirmatively appears by the complaint, it does not state a cause of action for negligence. * * *

The judgment is reversed, with instructions to grant a new trial and to sustain the demurrer to the complaint.[91]

DOHR v. WISCONSIN CENT. RY. CO.

(Supreme Court of Wisconsin, 1910. 144 Wis. 545, 129 N. W. 252.)

This was an action to recover damages for the death of the plaintiff's intestate through the alleged negligence of the defendant railway company. There was a judgment below for the plaintiff; the defendant appeals.

TIMLIN, J. In this case the jury found the decedent and the defendant each guilty of negligence contributing to cause death, and that the negligence for which the defendant was responsible was greater than that of the decedent, and contributed in a greater degree to the injury and death of decedent. The case is presented by counsel for the appellant describing the negligence of decedent as gross negligence, or a very high degree of ordinary negligence, while the counsel for respondent minimizes this and contends that the facts show gross negligence on the part of the other erring servant of the appellant.

As we look at the facts, neither of these contentions can be upheld. On a very dark, foggy morning on September 12, 1908, the decedent, section foreman for defendant, started out at 7 o'clock with another section man on his hand car, bound west from Sherwood Station to a point called High Cliff Junction about 1½ miles distant. Between Sherwood and High Cliff, and a mile west of Sherwood, there is a whistling post for that station; a quarter of a mile further west a highway crossing. The first regular train from the west was due at Sherwood at 7:42 o'clock that morning, and this would give the hand car

[91] Parts of the opinion are omitted.

time to reach High Cliff. Decedent went on the hand car at the usual hour of going to work in the discharge of his duty, and he had on the hand car some tools and implements and lunch pails, and proceeded at a moderate rate of speed without stopping until the moment of collision, but looking and listening for an approaching train. Irregular trains were liable to be sent over this road at any time. The section men were requested to look out for all passing trains and were furnished with time-tables of regular trains. The collision was with an irregular train. The verdict of the jury that the deceased was guilty of lack of ordinary care, which contributed to cause his death, is well supported on this evidence, but there was nothing of extraordinary recklessness in going out to work on a very foggy morning in this way. At 6:50 o'clock there left Menasha, or Menasha Junction, east-bound, a locomotive engine and caboose, which collided with this hand car at a point about 4,000 feet west of Sherwood. There was evidence tending to show that the locomotive engineer failed to sound his whistle at the first highway crossing west of Sherwood, or at the milepost one mile west of Sherwood, and was proceeding eastwardly at the rate of 22 miles per hour in this dense fog. There was also evidence tending to show that the headlight of this locomotive engine had been accidentally extinguished prior to the collision, and also that it was not feasible to tell, from the engineer's position in the cab on a foggy day, whether or not the headlight was burning. There was here no more than ordinary negligence. The rate of speed was not unusual, although rather high for an irregular train in such a fog; the failure to sound the whistle was to some degree explained, but not excused, by the difficulty of determining the exact location of the engine in the fog. The lack of headlight was not known to the engineer. He was running ahead of the passenger train. So that instead of measuring gross negligence, or a very high degree of ordinary negligence, against the like we are measuring ordinary negligence against ordinary negligence and the question is, Was there, as required by our statute, evidence from which the jury might say that the negligence of the decedent was slighter than that of the engineer, and the negligence of the engineer contributed in a greater degree than did that of decedent to cause the death of the latter?

Each of these employés of the defendant was, we presume, discharging his duty as such in good faith. The decedent took the chances of going against an irregular train in this fog, relying upon his ability to escape and remove his hand car after hearing the whistle or seeing the headlight. He had full information that he was expected to protect himself against any irregular train that might happen along. This lack of care had the proper causal connection with his death, recognized in the law as proximate cause. The engineer should have known that there might be travelers making the crossing, or section men working on the track, and he should have sounded his whistle at the crossing and at the milepost, and in case he could not see the crossing post or milepost,

he should have sounded his whistle quite continuously, as a warning to section men, and perhaps should also have decreased his speed to about that of an ordinary vehicle.

When there is a collision between two vehicles traveling in opposite directions on the same track and the ordinary negligence of the person in charge of each vehicle has caused the collision, and one of such persons is injured or killed, the court must, notwithstanding subdivision 5 of section 1816, St., as amended by chapter 254, Laws 1907, when the point is properly raised, search the evidence and ascertain whether anything appears from which the jury would be authorized to find that the negligence of the injurer was greater and contributed in a greater degree to cause the injury, than that of the injured servant. Kiley v. R. R. Co., 138 Wis. 215, 119 N. W. 309, 120 N. W. 756. * * *

For the instant case, it is enough to say that here each servant of the railroad company, the injured and the injurer, was of equal rank and authority in the management of the vehicle used and controlled by him. The responsibility resting on each for his safety and the safety of the group co-operating with him, and for the safety of the other negligent servant and his co-operating group, and for the safety of passenger trains, was at least equal. The opportunities for anticipating and avoiding danger were at least equal. The necessity for the injurer to continue his course without stopping was more imperative and necessary. The rules of employment required the injured servant to exercise diligence to keep out of the way of the injurer. The actionable fact, death, resulted from the collision of the two vehicles the simultaneous and indivisible result of two vehicles negligently moved in opposite directions, to a meeting point on the same track. Ordinary care on the part of the injured servant in the very particular in which the jury must have found him negligent would have avoided the injury, notwithstanding the negligence of the injurer. The culpability of the injurer in forgetting or failing to blow his locomotive whistle more frequently as a warning to the trackmen was equal to the culpability of the injured in taking out his subordinate on a hand car and proceeding along the track in the unusual fog, when a train might be expected to move down upon them. We may presume the injured relied on his ability to get out of the way after hearing the whistle and the injurer on the rule of the employment, that the injured must keep out of the way of trains. Under such circumstances, there is no evidence from which a court or a jury can say that the negligence of the injured was slighter than that of the injurer. The judgment must therefore be reversed.

This makes it unnecessary to decide whether, in the instant case, there was any evidence from which the jury might infer that the negligence of the injurer contributed in a greater degree than the negligence of the injured to cause the injury. Whether the jury could consider the greater weight and impact of the locomotive as a more potent cause of the injury and thus contributing in a greater degree, or the

failure to sound the whistle as expected, and the tendency of such failure to induce the injured servant to continue in his careless course on the track, or the more imperative duty to continue resting upon the injurer, or the rule of the railroad by which the injured was informed that he must rely on himself to keep out of the way of trains, as bearing on this second requirement of the statute, need not be decided.

Judgment reversed and the cause remanded with directions to enter judgment for defendant.

WINSLOW, C. J. As I see this case, duty compels me to dissent.

When two persons are negligent and injury to one proximately results from the combined negligence of both, it must often be a very delicate and difficult question to decide whether the negligence of one was greater than that of the other, and contributed in a greater degree to produce the injury. There is no yardstick with which to measure the two acts of negligence, nor scales with which to weigh them. However, the Legislature has determined that in certain classes of cases this delicate question shall be decided, and that upon its decision shall depend liability, and this court has sustained and applied that law. It is not inherently more difficult to decide, than many another question which courts and juries are daily compelled to decide. * * *

In the present case it seems to me there are unquestionably facts from which reasonable minds might draw different conclusions, both as to the quantum of negligence on each side and as to the degree in which such negligence proximately contributed to cause the injury.

The deceased and his comrades were going to their work as their duty required, and they were going in the way they were expected to go. The evidence tends to show that they were proceeding slowly and carefully; their car was light and could be quickly stopped and lifted from the track out of danger; they knew that no regular train was due; they also knew there were two or three highway crossings directly ahead of them, as well as the station whistling post, and that any approaching locomotive was required to whistle at all of these places. On the other hand, the engineer of the approaching engine knew that he was running wild; he knew, or should have known, that section men would probably be on their way to work; he was driving his engine through the fog at a speed of over 20 miles an hour without whistling at the road crossings; he was in charge, not of a light vehicle which could be stopped in few feet distance and taken from the track, but of a ponderous mass of steel and iron, which was hurtling over the rails at a speed which rendered it impossible of ready control, and which would probably deal death and destruction to any one rightfully on the crossings or on the track, and did not know of its approach till it emerged from the fog. Knowing all these things, he sounded no whistle and came upon the deceased and his fellow workmen with his engine of death, like a ball shot from a cannon.

Grant that it must be said that the deceased and his colleagues were guilty of negligence, is there no room upon these facts for a reasonable

mind to conclude that the negligence of the engineer was not only greater, but contributed in a greater degree, to the injury? I think there is ample room for such a conclusion, and so thinking, I cannot agree with the result reached by the court in this case.[92]

I am authorized to state that Mr. Justice SIEBECKER agrees with the views expressed in this opinion.

[92] A portion of the opinion of Timlin, J., citing and commenting on a number of cases, is omitted, as is also part of the dissenting opinion of the Chief Justice.

"The doctrine of comparative negligence has been stated as follows: '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, he should not be deprived of his action.' Galena Ry. v. Jacobs [1858] 20 Ill. 478. This doctrine was made part of the law of Wisconsin by statute in 1907, and a similar doctrine has been enunciated in the statutes of Florida and Georgia. Fla. So. Ry. Co. v. Hirst [1892] 30 Fla. 1, 11 South. 506, 16 L. R. A. 631, 32 Am. St. Rep. 17; Ala., etc., Ry. Co. v. Coggins [1898] 88 Fed. 455, 32 C. C. A. 1; Atl. Coast Line Ry. Co. v. Taylor [1906] 125 Ga. 454, 54 S. E. 622. It was adopted in Kansas in Union Pac. Ry. v. Rollins [1869] 5 Kan. 167, but repudiated in Atchison, etc., Ry. v. Henry [1896] 57 Kan. 154, 45 Pac. 576, and has been rejected in Illinois, the state of its origin, where, too, it had its greatest development. Macon v. Holcomb [1903] 205 Ill. 643, 69 N. E. 79. Except where recognized by statute it probably does not obtain now in any jurisdiction." 9 Mich. Law Rev. 444 (1911).

See also the remark of Robertson, C., in St. Louis & S. F. R. Co. v. Elsing (1913) 37 Okl. 333, 132 Pac. 483, 486: "Evidently it was not the intention of the court to instruct on either of these doctrines of negligence but on the doctrine of comparative negligence, which provides that plaintiff may recover, although he is himself guilty of contributory negligence, if that negligence is slight and if the negligence of the defendant is gross in comparison. We are forced to this conclusion by the language of the instruction itself, especially the last sentence thereof, which provides that the negligence of the plaintiff, may be considered by the jury in mitigation of damages, which in effect means that the jury may weigh and apportion the concurring acts of negligence of both plaintiff and defendant. The jury under this instruction, to say the least, were inferentially, or impliedly, given authority to determine the degree of negligence of both parties and to apportion the same between them in order to correctly estimate the amount of plaintiff's recovery, and they were thereby in effect told that the defendant was not entitled to its defense of contributory negligence which is granted to it, and to all other litigants, under our Constitution and laws. This instruction is therefore erroneous and does not state the law in this state, for here there can be no recovery by a plaintiff who is guilty of contributory negligence. The doctrine of comparative negligence has no place in the consideration of this case and should not have been given by the court in its charge to the jury as was done in this instruction. The doctrine of comparative negligence has been adopted by statutory provision in several of the states, to wit, Florida (Act June 7, 1887, c. 3744), Georgia (Civ. Code 1895, 2322), Mississippi (Laws 1910, c. 135) Texas (Acts 31st Leg. [1st Ex. Sess.] c. 10), and Wisconsin (Laws 1907, c. 254). This doctrine was recognized by the courts of Illinois until recently. It is now repudiated there. Krieger v. Railroad Co. [1909] 242 Ill. 544, 90 N. E. 266; Vittum v. Drury [1911] 161 Ill. App. 603. It has been said to have obtained in Kansas. This, however, is erroneous. See Railway Co. v. Walters [1908] 78 Kan. 39, 96 Pac. 346."

SMITH et al. v. CITY OF SHAKOPEE.

(Circuit Court of Appeals of the United States, Eighth Circuit, 1900. 44 C. C. A. 1, 103 Fed. 240.)

This was an admiralty case which originated in the state of Minnesota and grew out of damage to the steamer Daisy, caused by running into the draw of a bridge across the Minnesota river. This bridge had been constructed by the defendant, the city of Shakopee. The libelants allege in substance:

That they were the owners of the steamer Daisy, and that on June 15, 1896, at the hour of 2 o'clock a. m., as the said steamer was proceeding down the Minnesota river with an excursion party from St. Paul, which had been spending the day at Chaska, she ran into the draw of the aforesaid bridge, and carried away her smokestack and injured her pilot house and some of her upper works. It was alleged that the collision in question, and the consequent injuries to the steamer, were occasioned because the lights on said bridge were at the time insufficient to disclose the position of the draw, and because the draw was carelessly and negligently opened by the bridge tender who was in the employ of the City of Shakopee, and because the lights on the draw were so negligently displayed as to deceive the pilot and master as to the position of the draw.[93]

The District Court directed that the libel be dismissed. The libelants appealed.

THAYER, Circuit Judge. * * * In our former decision[94] we said in substance that the proximate or efficient cause of the collision with the bridge seems to have been that the pilot attempted to pass through the draw before he was assured that it was fully opened. This conclusion was induced, however, by the finding that the bridge was provided with adequate lights, considering its location and the amount of navigation on the Minnesota river, to meet the requirements of the common law. The same conclusion cannot be formed on the present occasion, since it was the duty of the city to provide such lights as are required by the regulations of the lighthouse board, and, if such lights had been provided, the position of the three green lights would have shown at a glance when the draw was fully swung. The city was at fault, therefore, in not furnishing the requisite lights.

On the other hand, we think that the pilot and the captain, one or both of them, did not exercise that degree of care and circumspection which they should have exercised, in attempting to pass through the draw before they were assured that it was fully swung. Even if the city was at fault in failing to provide the requisite lights, those in charge of the steamer had no right to attempt to pass through the bridge until they had taken the precaution to ascertain that the passage could be made in safety. The conditions were such that the steamer could have been held at a safe distance from the bridge until the men

[93] The statement of facts is slightly abridged.

[94] Part of the opinion is omitted. The "former decision" will be found in 97 Fed. 974, 38 C. C. A. 617 (1899).

who were in charge of the draw had advised the pilot that the draw was fully swung and ready for the passage of the steamer; and such action, we think, should have been taken. The case is one, in our judgment, where the accident was occasioned by the concurring negligence of both parties, and in such cases the admiralty rule is to divide the damages. The Max Morris, 137 U. S. 1, 9, 11 Sup. Ct. 29, 34 L. Ed. 536; The Britannia, 153 U. S. 130, 144, 14 Sup. Ct. 795, 38 L. Ed. 660; The Lisbonense, 53 Fed. 293, 3 C. C. A. 539.

There is some uncertainty in the proof as to the true amount of the damages that were occasioned by the collision, but we are satisfied by an investigation of the evidence on that point that they did not exceed $1,000. The decree of the district court directing that the libel be dismissed is reversed, and the case is remanded to that court with directions to vacate said decree, and in lieu thereof to enter a decree in favor of the libelants for the sum of $500 and costs.[95]

III. Assumption of Risk as an Excuse

The doctrine of volenti non fit injuria stands outside the defence of contributory negligence and is in no way limited by it. In individual instances the two ideas sometimes seem to cover the same ground, but carelessness is not the same thing as intelligent choice, and the Latin maxim often applies when there has been no carelessness at all. A confusion of ideas has frequently been created in accident cases by an assumption that negligence to the many who are ignorant may be properly treated as negligence as regards the one individual who knows and runs the risk, and by dealing with the case as if it turned only on a subsequent investigation into contributory negligence. In many instances it is immaterial to distinguish between the two defences, but the importance of the distinction was pointed out both by Erle, C. J., in his summing up to the jury in Indermaur v. Dames, Law Rep. 1 C. P. at 277, and by Cockburn, C. J., in Woodley v. Metropolitan District Ry. Co., 2 Ex. D. 384.[96]

Bowen, L. J., in Thomas v. Quartermaine (1887) 18 Q. B. D. 685, 697.

[95] Compare St. Louis & Tenn. Packet Co. v. Murray & Wathan (1911) 144 Ky. 815, 139 S. W. 1078, where the admiralty rule is followed in a state court. See also Burdick on Torts (2d Ed.) 487, 488.

[96] Compare the remark of Erle J., Id. p. 277: "To my mind, there would not be the least symptom of want of due care as between the defendant and a person (permanently) employed on his premises, because the sugar-baking business requires a lift on the premises, which must be as well known to the persons employed there as the top of a staircase in every dwelling house. But that which may be no negligence towards men ordinarily employed upon the premises, may be negligence towards strangers lawfully coming upon the premises in the course of their business."

Compare the remark of Cockburn, C. J., Id. p. 390: "That which would be negligence in a company, with reference to the state of their premises

COOK v. JOHNSTON.

(Supreme Court of Michigan, 1885. 58 Mich. 437, 25 N. W. 388, 55 Am. Rep. 703.)

Case. Defendant brings error.

CAMPBELL, J. Plaintiff recovered damages in the sum of $3,000 for personal injuries claimed to have been caused by defendant's negligence whereby it is alleged a fire was set in a shed occupied by the plaintiff. The facts as relied upon were that plaintiff's husband was a tenant of defendant, occupying a wing of her house at the corner of Sixteenth and Canfield streets in Detroit. Behind the house was a low shed divided into three parts by internal partitions from five to six feet high, of which defendant occupied the middle one, and plaintiff's husband the adjoining one at the north end. In the middle partition was a water-closet used by defendant and her tenants jointly. In this middle part, on the side furthest from Mr. Cook's, was an ash barrel, which Mr. Cook described as a stout, iron-bound cask, such as is used for liquids. Plaintiff claims that the fire was caused by ashes in this barrel. She and her husband, as they testify, were awakened by the light of the fire burning through the top of this middle part, and as soon as they could they went into their own part and undertook to get out their horse, that was lying down so that she could not easily loose the halter. While trying to do this the fire swept over the partition and burned her very severely, so as to nearly or quite disable her from doing her accustomed work.

The principal question in the case was upon the liability of the defendant if the fire took from negligence for which she may have been chargeable for the damages on which recovery was had in this case.

The plaintiff showed by her testimony that she and her husband saw the ash-barrel daily and knew all about its position. It also appears by the showing of both that the shed, which was entirely open within from end to end, above the partitions, was burning so brightly as to wake them up, and continued burning when they entered to loose the horse and get out the buggy. The danger was before their eyes, and what happened by the sweeping down of the flames was

or the manner of conducting their business, so as to give a right to compensation for an injury resulting therefrom to a stranger lawfully resorting to their premises in ignorance of the existence of the danger, will give no such right to one, who being aware of the danger, voluntarily encounters it, and fails to take the extra care necessary for avoiding it. The same observation arises as before: with full knowledge of the manner in which the traffic was carried on, and of the danger attendant on it, the plaintiff thought proper to remain in the employment. No doubt he thought that by the exercise of extra vigilance and care on his part the danger might be avoided. By a want of particular care in depositing one of his tools he exposed himself to the danger, and unfortunately suffered from it. He cannot, I think, make the company liable for injury arising from danger to which he voluntarily exposed himself."

as likely to happen as not. It is not very important by what name the action of plaintiff should be called. It was such a risk as she chose to take, to save her husband's property. But it was a plain and palpable risk nevertheless, and the injury would not have occurred unless for her voluntary act in assuming the exposure.

There is some conflict in the cases concerning what damages have been held not too remote for recovery. But it would be going beyond all reason to hold a person liable for bodily injuries suffered by another in voluntarily and deliberately entering a burning wooden shed not divided into detached parts, and reached by the flames while at work within it. The loss of presence of mind under such circumstances is one of the commonest and most likely incidents of incurring such an exposure. The act in which she was engaged may have been such as she may have thought proper and laudable, and worth some risk, but defendant's responsibility cannot be created or increased by such independent and voluntary conduct of plaintiff in putting herself in harm's way.

We think that no recovery should have been had on the facts as shown by plaintiff herself, and that the case should not have gone to the jury.

The judgment must be reversed with costs and a new trial granted.

OSBORNE v. LONDON & N. W. RY. CO.

(Queen's Bench Division, 1888. 21 Q. B. Div. 220.)

Appeal by the defendants from the judgment of the Judge of the County Court at Birmingham in an action to recover damages for personal injury alleged to have been caused by the negligence of the defendants in allowing a flight of steps to be in a dangerous condition.

The plaintiff in his evidence at the trial stated that he was a season-ticket holder on the defendants' line, that on the morning of March 21, 1887, he went down the steps to the platform of the station at Perry Barr to take the train to Birmingham, that he went down a flight of stone steps leading to the platform, which were covered with a light layer of snow which had been trodden down and frozen over, that the steps were worn and hollowed, and were slippery, that he went down carefully and not in a hurry, but slipped on the steps, and fell, and dislocated his wrist.

In cross-examination he said that there were wooden steps leading to the platform on the other side of the line, that his train started from the platform to which the wooden steps led, that sometimes he went one way and sometimes the other, that the stone steps were on the side nearest to his house, that by going down the stone steps and crossing the line he saved going round by the bridge by which the road was carried over the railway, that the steps were dangerous

without snow, that he thought it was dangerous to go down, and went down carefully, and took hold of the rail to prevent slipping, that he thought holding the rail was sufficient.

The County Court Judge was of opinion that the accident was primarily caused by the worn and defective state of the steps, which was aggravated by the frosty weather, which made them slippery in addition, that the steps had not been properly and efficiently swept and cleaned from the caked snow, which, added to the worn condition of the steps, caused the plaintiff to fall, and that there was no contributory negligence on the part of the plaintiff, and gave judgment for the plaintiff for £25, the amount being agreed.

Alfred Young, for the defendants. Notwithstanding the findings of fact as to negligence the defendants are entitled to judgment. The plaintiff's own admission that he knew there was some danger shows that he voluntarily elected to go down the stone steps with full knowledge of the risk he was incurring. The maxim "Volenti non fit injuria" therefore applies, and prevents the plaintiff from being entitled to recover: Thomas v. Quartermaine, 17 Q. B. D. 414, affirmed 18 Q. B. D. 685. It is true that the burden of proof lies upon the defendants, but they have satisfied the burden of proof by the plaintiff's own evidence, and for the purpose of establishing this defence it is unnecessary to rely on the evidence of the witnesses called for the defendants.

WILLS, J. * * * For the purposes of the present case it is enough to take the view expressed by Lord Esher, M. R., in Yarmouth v. France, 19 Q. B. D. at p. 657, where he says: "I see nothing in the decision in Thomas v. Quartermaine, 18 Q. B. D. 685, to prevent the plaintiff from recovering in this case, unless the circumstances were such as to warrant a jury in coming to the conclusion that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it."

It seems to me to follow that in such a case as the present, where the existence of negligence on the part of the defendants, and the absence of contributory negligence on the part of the plaintiff, are specifically found as matters of fact, if the defendants desire to succeed on the ground that the maxim "Volenti non fit injuria" is applicable, they must obtain a finding of fact "that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it." I agree with Mr. Wills that this is a question of fact, and, this being so, it follows that the defendants could not succeed unless either they had a finding of fact in their favour, or we had all the facts before us, so that we were in a position to decide the question. I entertain some doubt as to how far this question has been dealt with by the County Court Judge. Mr. Young says it was argued before him, but it does not appear that he gave any specific decision on it. It may be that he said nothing about the question because it seemed to him to be quite clear,

and if that were so he would not have found the fact in favour of the defendants; or he may have inadvertently omitted to refer to the point, in which case it would be open to us to deal with it. If I had had to decide this point as a question of fact I should have thought it necessary that the plaintiff should be asked more questions than he was asked in cross-examination. It is clear from his evidence that he knew there was some danger, but the contention on behalf of the defendants, that this circumstance is sufficient to entitle them to succeed, entirely gives the go-by to the observations of Lord Esher, M. R., in Yarmouth v. France, 19 Q. B. D. at p. 657, which I have already quoted, and those of Bowen, L. J., in Thomas v. Quartermaine, 18 Q. B. D. at p. 696, which were referred to in the course of the argument. Those observations go far to make it hard for a defendant to succeed on such a defence as that relied on here, for it is probable that juries would often find for plaintiffs on the ground that they had not full knowledge of the nature and extent of the risk, but that cannot be helped. These judgments introduce an important qualification of the maxim "Volenti non fit injuria."

In the present case the plaintiff may well have misapprehended the extent of the difficulty and danger which he would encounter in descending the steps; for instance, he might easily be deceived as to the condition of the snow; I know quite enough about ice and snow to know how easy it is to make such a mistake, and it is one that has cost many a man his life. In order to succeed the defendants should have gone further in cross-examination, for, unless the question of fact had been found in their favour, the application of the maxim on which they relied could not be established. The County Court Judge has not found the fact the defendants need; and upon the present materials I certainly am not prepared to supply the deficiency.

For these reasons, the onus of proof being on the defendants, I think that on the evidence as it stands their defence is not made out, and therefore their appeal must be dismissed.[97]

[97] Part of the opinion of Wills, J., and all of the opinion of Grantham, J., are omitted.

Compare the remark of Bowen, L. J., in Thomas v. Quartermaine (1887) 18 Q. B. D. 685, 696: "It is no doubt true that the knowledge on the part of the injured person which will prevent him from alleging negligence against the occupier must be a knowledge under such circumstances as leads necessarily to the conclusion that the whole risk was voluntarily incurred. The maxim, be it observed, is not 'scienti non fit injuria,' but 'volenti.' It is plain that mere knowledge may not be a conclusive defence."

And see 1 Beven's Negligence (3d Ed.) 632: "It [the maxim 'Volenti non fit injuria'] is found also in the Canon Law; where it appears in the form 'Scienti et consentienti non fit injuria neque dolus.' This is a notable testimony to Bowen, L. J.'s legal insight, according exactly with his observation that the 'maxim is not "scienti non fit injuria," but "volenti"'; that 'mere knowledge may not be a conclusive defence.'"

Accord: Ward v. Dampskibselskabet Kjoebenhaven (D. C., 1905) 136 Fed. 502: (The plaintiff's intestate, Dr. Ward, went on board the defendant's steamship, lying at quarantine, in the performance of his duty as quaran-

WRIGHT v. CITY OF ST. CLOUD.

(Supreme Court of Minnesota, 1893. 54 Minn. 94, 55 N. W. 819.)

Action against the city of St. Cloud to recover for a personal injury received by the plaintiff through the alleged negligence of the defendant. The plaintiff had judgment; the defendant appeals.

MITCHELL, J. This was an action to recover damages for personal injuries caused by the alleged negligence of the defendant, in permitting snow and ice to accumulate and remain upon a public sidewalk so as to render it unsafe for travel. The only question is whether the evidence justified the verdict. The accident occurred in the latter part of February, in the residence part of the city, about seven squares from its business center. Abutting this part of the sidewalk there was unoccupied property about 80 feet in width. On either side the occupants had kept the sidewalk in good order, but opposite this property the snow had not been removed during the entire winter, and the result was that it had gradually accumulated to the depth of from one to two feet, through which pedestrians had trodden a narrow, irregular path. As the result of successive falls and drifting of snow, and alternate thawing and freezing, in connection with the continual travel, this path had become quite rough, uneven, and icy, having gradually grown worse as the winter advanced. As different witnesses described it, "it had hollowed out, and left ridges;" "the humps, holes, and hollows were quite noticeable;" "it had hollowed

tine physician. It was at night, dark and misty. The hatches of the ship were open, for she was coaling, which was unusual at night. After performing his duties, Dr. Ward, with the master of the vessel and a Capt. Bellevou, who was superintending the coaling of the vessel, started to return from the cabin aft by the open hatch, and after walking about 12 feet were stopped to permit the workmen to pass a bucket of coal to the hatch. The open hatch was about 40 feet from the master's cabin, 3 feet wide by 5 feet long, and the passageway between it and the rail on the starboard side was 2 feet 5½ inches wide at its narrowest and 2 feet 11½ inches at the widest point. At a point 2 feet 4 inches aft the aft end of the open hatch, a smokestack guy, fastened to the deck near the rail, led off toward the port side at an angle requiring a man either to stoop or move in the direction of the open hatch to pass under it. After stopping to permit the bucket of coal to pass, Capt. Bellevou and the doctor continued their return journey, the master remaining behind. The captain was slightly in the rear of the doctor, and nearer the rail, and had his hand upon the doctor's shoulder. As they neared the hatch, Capt. Bellevou said to him, "Doctor, be careful;" he answered, "That is all right." The captain again said, "Doctor, mind the hatch;" and he responded, "That's all right, captain." They had proceeded to the aft end of the hatch, when Dr. Ward stepped into the open hatchway, and fell 35 feet to the bottom of the vessel. The hatch coverings had been placed in the passageway over which they traveled, filling the passage nearly to the top coaming of the hatch. Dr. Ward had been on the vessel before in his official capacity, but was not thoroughly acquainted with its arrangement. He had been told the hatch was open, and no doubt saw it, but under circumstances with no light shining out of the hatch to show him exactly the dimensions and extent of the opening, and only a diffused light above, the rays of which were not especially directed to the opening, and so located as to rather blind the inexperienced.)

out places sort of sidling and saucer shaped;" "was full of holes and hummocks from two to four inches deep;" "the bottom was uneven and sidling." These and similar descriptions clearly photograph in the mind of any one familiar with such things a distinct picture of the irregular and uneven path trodden by pedestrians through snow as frequently seen on neglected sidewalks, in the winter time, in the residence portions of most towns, the condition of which grows gradually worse as the winter advances. About noon on a somewhat cold, but bright and pleasant, day, the plaintiff was traveling this walk, on her way home from church. She had not traveled this side of the street that winter, and had no previous knowledge of its condition. On reaching this part of the walk she admits that she looked at it, and saw its condition before she started across. She says she "had no idea it was as bad as it was," but it is impossible, under the circumstances, that she did not see and understand its general character, and the consequent difficulty in traveling it, and the danger of slipping and falling in doing so. In fact she admits that she saw these ridges and hollows, and that it occurred to her, the minute she reached it, that it was a dangerous place to walk. She knew that the sidewalk on the opposite side of the street (on which her residence was) was in good condition, and that she could entirely avoid the danger by retracing her steps 100 feet to a street crossing, and going over to the other side of the street; but instead of doing so she proceeded, and, in going across, slipped and fell, and sustained the injuries complained of. The defendant's contentions are (1) that there was no evidence of its negligence; and (2) that the evidence conclusively showed that the plaintiff was guilty of contributory negligence. * * *

But conceding, what we think the evidence tends to show, that the city was negligent, we think it also appears clearly that the plaintiff herself was lacking in ordinary care. We have held, in common with every other court, that the mere fact that a person attempts to travel a highway after notice that it is out of repair is not necessarily negligence; that this depends on circumstances. Erd v. City of St. Paul, 22 Minn. 443; Estelle v. Village of Lake Crystal, 27 Minn. 243, 6 N. W. 775; Kelly v. Railway Co., 28 Minn. 98, 9 N. W. 588; McKenzie v. City of Northfield, 30 Minn. 456, 16 N. W. 264; Nichols v. Minneapolis, 33 Minn. 430, 23 N. W. 868, 53 Am. Rep. 56. But none of these cases were altogether analogous in their facts to the present one. In all of them it will be found either that the traveler had no other practicable road, and had either to pass over the defective way, or abandon his journey, or that, although aware that the road or walk was out of repair, he had no knowledge of the existence of the particular defect which caused the injury, or that the accident occurred in the dark, and that the traveler, although having previous knowledge of the situation, had not presently in mind the existence of the defect, or the consequent risk. But in the present

case, while plaintiff might not have known of the existence or location of any particular hollow or hole in this path, it is very clear from her own testimony that she had full and present knowledge of the precise condition of this part of the sidewalk, and of the risk incident to traveling over it. The only risk was that of slipping and falling, and that was perfectly patent to any one of ordinary intelligence. She simply overestimated her own ability to travel across it without falling. There was no necessity of her going over the defect, but she could have easily, and without appreciable inconvenience, have avoided it, by going across to the other side of the street, where the walk was perfectly safe. Under such circumstances she was not in the exercise of reasonable care, but must be presumed to have taken her chances, and having done so, and an injury having resulted, she cannot recover from the city. No different rule as to contributory negligence, or assumption of risks, whichever it is called, is to be applied from that which would be applied to any other case; and, if the plaintiff had exercised half as much care for her own safety as she exacts from the city for the safety of travelers, the accident would never have occurred. Wilson v. City of Charlestown, 8 Allen (Mass.) 137, 85 Am. Dec. 693; Schaefler v. Sandusky, 33 Ohio St. 246, 31 Am. Rep. 533; Horton v. Inhabitants of Ipswich, 12 Cush. (Mass.) 488; City of Quincy v. Barker, 81 Ill. 300, 25 Am. Rep. 278.

Judgment reversed.[98]

MALOY v. CITY OF ST. PAUL.

(Supreme Court of Minnesota, 1893. 54 Minn. 398, 56 N. W. 94.)

Action against the city of St. Paul to recover for a personal injury received by the plaintiff because of a defective sidewalk. Plaintiff had a verdict, and appeals from an order granting a new trial.

COLLINS, J. * * * The defect was in the walk in front of the lot on which plaintiff resided with her husband, and close by their dwelling. The planks in the walk at this particular point had been laid lengthwise, and one had been broken down, so that there was a hole about 18 inches long and about 6 inches in width, at the widest place. The walk had been laid 6 inches above the surface of the ground. It had been in this defective condition for more than three months, and plaintiff had known of this all of the time. She had passed by this break or hole daily for more than two months prior to the evening of this accident, carefully avoiding the dangerous place. When the accident occurred, there was a light snow upon the walk, partly filling the hole, and the snow was still falling. About dark, plaintiff, who was 50 years of age, having occasion to go to a neighbor's went out on the walk, and, stepping into the hole, was thrown

[98] Part of the opinion is omitted.

down, thus receiving the injuries complained of. She testified that the falling snow was blown into her eyes so that her vision was obstructed, and also that she did not think of the defect as she walked along. It did not appear from the testimony that there was anything to distract her attention, and, because there was nothing justifying or excusing inattention to the well-known condition of the walk, the court below ordered a new trial.

In accordance with the prevailing rule everywhere, it has again and again been held by this court that previous knowledge of the condition of a street or sidewalk is not conclusive evidence of contributory negligence, so as to bar a recovery by a person injured in consequence of its being out of repair; and the cases were collated very recently in Wright v. City of St. Cloud, 54 Minn. 94, 55 N. W. 820, in which a recovery was denied because it was apparent from plaintiff's own testimony that she had full and present knowledge of the exact condition of the walk, and the risk incident to traveling upon it, and could easily have avoided it, and simply overestimated her own ability to go across, in broad daylight, without falling. On the facts the case at bar is not analogous. The defect here was not such as would or should have turned the prudent traveler off from the walk to seek a better route. The accident happened in the evening, when the snow was falling, blowing, and to some extent obscuring the vision of the plaintiff, and filling the hole in the walk. Although advised of the defect, she did not have it presently in mind. Nor is it necessary that the thoughts of a traveler should be at all times fixed upon defects in the street or sidewalk, of which he may have notice. George v. Haverhill, 110 Mass. 506; Barton v. City of Springfield, 110 Mass. 131. It is certain that previous knowledge of the existence of a defect has an important, and oftentimes a decisive, bearing upon the question of contributory negligence; but mere inattention to a known danger, on the part of this plaintiff, cannot be held to conclude her. * * *

Order reversed.[99]

JUDSON v. GIANT POWDER CO.

(Supreme Court of California, 1895. 107 Cal. 549, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146.)

In an action against the Powder Company for damages caused by explosion resulting from its alleged negligence, the plaintiff below recovered judgment for $41,165.75. From this judgment, and an order denying a motion for a new trial, the Powder Company appeals.

GAROUTTE, J. * * * The damages to respondents' property were occasioned by an explosion of nitro-glycerine, in process of man-

[99] Parts of the opinion are omitted.

ufacture into dynamite, in appellant's powder factory, situated upon the shore of the bay of San Francisco. Appellant's factory buildings were arranged around the slope of a hill facing the bay. Nearest to respondents' property was the nitro-glycerine house; next was the washing-house; next were the mixing houses; then came the packing-houses, and finally the two magazines used for storing dynamite. These various buildings were situated from 50 to 150 feet apart, and a tramway ran in front of them. The explosion occurred in the morning during working hours, and originated in the nitro-glycerine house. There followed, within a few moments of time, in regular order, the explosion of the other buildings, the two magazines coming last; but, though last, they were not least, for their explosion caused the entire downfall and destruction of respondents' factory, residences, and stock on hand. There is no question but that the cause of this series of explosions following the first is directly traceable, by reason of fire or concussion, to the nitro-glycerine explosion. Of the many employés of appellant engaged in and about the nitro-glycerine factory at the time of the disaster none were left to tell the tale. Hence, any positive testimony as to the direct cause of the explosion is not to be had. The witnesses who saw and knew, like all things else around, save the earth itself, were scattered to the four winds.

1. Respondents sold the premises to appellant for the manufacture of dynamite, and it is claimed that the maxim, Volenti non fit injuria, applies, and therefore no recovery can be had. We attach but little importance to this contention. The grant of these premises for the purpose of a dynamite factory in no way carried to appellant the right to conduct its factory, as against the grantors, in any and every way it might see fit. There is no principle of law sustaining such a proposition. Let it be conceded that respondents, by reason of their grant, could not invoke the aid of a court of equity to prevent the appellant from conducting its business; still that concession proves nothing. This action is not based upon the theory that appellant's business is a nuisance per se, but negligence in the manner in which the business was conducted was alleged in the complaint, and is now insisted upon as having been proved at the trial. In making the grant respondents had a right to assume that due care would be exercised in the conduct of the business, and certainly they have a right to demand that such care be exercised.

It is argued that the explosion of all powder-works is a mere matter of time; that such explosions are necessarily contemplated by every one who builds beside such works, or who brings dynamite into his dooryard. It is further contended that appellant gave to respondents actual notice of the dangerous character of its business by a previous explosion, which damaged respondents' property, and that respondents, by still continuing in business after such notice, in a degree assumed and ratified the risk, and cannot now be heard to com-

plain. The only element of strength in this line of argument is its originality. The contention that in the ordinary course of events all powder-factories explode, conceding such to be the fact, presents an element foreign to the case. The doctrine of fatalism is not here involved. In the ordinary course of events the time for this explosion had not arrived, and appellant had no legal right to hasten that event by its negligent acts. Neither do we think respondents lost any legal rights by continuing to do business in this locality after being served with notice of the danger that surrounded them. While the notice was in the form of an object lesson, which came to them in no uncertain tones, yet appellant was not justified in serving it, nor were respondents negligent in disregarding it. Respondents were not bound to abandon their property, though negligence of appellant in the conduct of his factory was ever a menace and danger to their lives and property. Conceding that respondents, by their grant, thereby assumed certain risks and dangers which may be said to always surround the manufacture of dynamite, still they assumed no risks and waived no action for damages which might arise through appellant's negligence. Both reason and authority support this conclusion. * * *[1]

Judgment and order affirmed.

MAGAR v. HAMMOND.

(Court of Appeals of New York, 1902. 171 N. Y. 377, 64 N. E. 150, 59 L. R. A. 315.)

Appeal from a judgment of the Appellate Division of the Supreme Court, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

O'BRIEN, J. There is very little dispute with respect to the leading and important facts of this case, but the rule of law to be applied to the facts is not so clear. The defendant Hammond and his servant have been sued jointly in an action based upon a personal injury that the plaintiff sustained resulting from the servant's negligence, as is claimed. The jury rendered a verdict for the plaintiff of $15,000 and the judgment has been unanimously affirmed below.

In the year 1893 Hammond purchased over three hundred acres of wild forest land in Sullivan county. By damming up small streams or springs and other operations he created an artificial lake upon the property of considerable dimensions. There was some low land free from timber which it seems furnished a natural bed for the lake,

[1] In the omitted portion of the opinion, the court reaches the conclusion, after an elaborate consideration of authority, that although all the witnesses of the accident had "been scattered to the four winds," there was still a **prima facie case of negligence, in the principle of res ipsa loquitur.**

and it was surrounded by a dense growth of timber and bushes. Having created the lake he proceeded to stock it with trout. It seems that it was impossible for the fish to get into the lake through the dams on the surrounding springs or streams, but the fish were propogated by artificial means, and it became an industry that produced some revenue to the owner by selling the trout and permitting people to fish there for a compensation. He also built a house, boathouse and hatchery for trout spawn, in which it is said two million of the same were produced annually. He had to employ men to attend to the hatchery and otherwise in and about the property, and to prevent vermin from destroying the eggs. He prepared and posted notices around the tract to warn off trespassers, as prescribed by the statutes of the state.

The owner's co-defendant in this action was the night watchman, whose business it was to be on the lake at night to protect the fish from poachers and wild animals that frequently came to the place to take the fish. The owner had two guns, one a shotgun and the other a rifle. The watchman had been in the habit of carrying one or the other of the guns with him when on the lake in a boat for the purpose of killing muskrats, mink and other animals about the lake. He sometimes fired into the air in order to frighten off poachers. On the 9th day of June, 1899, the plaintiff and two other young men went to the lake to take fish, and were there after 10 o'clock in the evening, the night being very dark. They did some fishing and retired into the thick woods on the shore. It does not appear that the watchman had seen them or knew that they had been fishing, but the crackling of the brush in the woods indicated to him that some one was there, or at least the jury could have so found. There is no claim that the watchman knew that the plaintiff was in the woods, but there was some evidence tending to show that he knew or should have known that some human being was there, and the verdict affirms this proposition. The watchman had the rifle, and on hearing the noise in the woods fired at least three shots in the direction, and one of the bullets struck the plaintiff in the hip, inflicting a very serious if not permanent injury. The master was not present and knew nothing of the transaction, but he did know that the guns were on the premises and that the watchman was accustomed to use them in the manner and for the purposes described, and if he is responsible at all for the act of the servant it must be implied from these facts.

There were several propositions decided by the learned trial judge at the close of the case, which for all the purposes of this appeal must be treated as the law of the case. He ruled that there was no question for the jury and it could not be found that the shooting was willful or malicious, and the only question was whether the watchman was negligent and the owner responsible for such negligence. He instructed the jury that the plaintiff was guilty of a crime in going

upon the defendant's premises to fish in the manner described, and that the defendant owed him no duty except to refrain from intentionally doing him an unnecessary injury or an injury through wanton or reckless negligence; that the owner gave no express authority to the watchman to shoot at any human being, but on the contrary ordered him not to shoot at any human being, and that there was no evidence that it was within the scope of his employment to so shoot; that there was no evidence in the case that either of the defendants intended or desired to injure any human being or expected that the shooting would result in such injury. The theory upon which the case was submitted to the jury will clearly appear by the following passage from the charge:

"Now the question which I will leave to you in this case, gentlemen, is this, and I hope you will understand it: Did this man Tompkins, when he fired in the night and into the woods as he did, have reason to believe that there were human beings there, or did he in fact know they were there? Did he know, when he fired into the woods as he did, that human beings were where he fired, or by the exercise of ordinary care could he have ascertained from what has been described here as having happened, that human beings were there, and knowing they were there, or having the ability to find out by the exercise of ordinary care, did he, notwithstanding that, wantonly, recklessly, fire in the direction where these human beings were? That is the vital question in this case. Because, as I have stated, this defendant had a right to have a watchman. The watchman had a right to have a gun. He had a right to have a rifle loaded with a bullet. He had a right to fire his gun in the night anywhere and as often as he pleased on his own land. But did Tompkins, when he fired on that occasion, know he was firing where there were human beings, or in the immediate proximity of where there were human beings, and knowing that, or being able to find it out by the exercise of ordinary care, did he still, recklessly and wantonly, discharge his bullet in the direction where these human beings were?"

It will be seen that the learned judge excluded from the jury very important elements tending to support the plaintiff's case. Willfulness, malice, intention to injure or desire or motive to do so, express authority from the owner and perhaps other elements were eliminated from the case. It is not very plain how the jury could, with all these elements excluded, have found that the shooting was wanton or reckless, assuming always that the watchman had the right to do all the things that the court held that he had, but it is quite likely that the form in which the case comes here precludes any discussion in this court upon the question. There is, however, an exception in the case that we think is fatal to the judgment.

The defendants' counsel asked the court to instruct the jury that if the plaintiff knew that the watchman on the lake was in the habit of discharging a gun and went there after receiving such informa-

tion he cannot recover, even if the defendants or either of them were negligent, and that if the plaintiff knew or had heard that the lake was generally protected by a watchman who had and discharged a gun, there could be no recovery. The court refused to so charge, and the defendants' counsel excepted. This request embodied the general rule that where the negligence or misconduct of the injured party is a contributing cause of the injury he cannot recover, even though negligence could be imputed to the defendants. With all the elements to which reference has been made excluded from the case, the defendants were entitled to have the jury instructed that if the plaintiff voluntarily exposed himself to a known danger he could not recover for the act of the watchman, though this act, in defense of the master's property, was without due care, and that is the fair construction of the request. There was proof in the case, aside from the statutory notices warning intruders, which every one could see, that the plaintiff knew what other precautions the defendants had adopted for the protection of their property, including the use of firearms, and since the proposition amounted to a request to apply the general rule of law to these facts it was not a mere abstract one, but was applicable to the proofs in the case, and should have been given to the jury. It follows that the judgment must be reversed and a new trial granted, costs to abide the event.

Judgment reversed.[2]

DIXON v. NEW YORK, N. H. & H. R. CO.

(Supreme Judicial Court of Massachusetts, 1910. 207 Mass. 126, 92 N. E. 1039.)

Tort against the railway company for personal injuries to the plaintiff in the defendant's freight yard. Coombs, a teamster, had lawfully driven into the yard. His horse, frightened at an approaching engine, was rearing and plunging, when the plaintiff went to the assistance of Coombs, and received the injuries complained of. The

[2] Parker, C. J., and Gray, Haight, and Vann, JJ. (Bartlett, J., in result) concur. Martin, J., not voting.

This case came before the Court of Appeals again, in 1906. Magar v. Hammond (1906) 183 N. Y. 387, 76 N. E. 474, 3 L. R. A. (N. S.) 1038. Here Cullen, C. J., delivering the opinion, remarked, "On the previous appeal we reversed the judgment recovered because of the refusal of the trial court to submit to the jury the question of the plaintiff's contributory negligence. It will be seen, however, on an examination of the record then before us, that the case went to the jury on the theory of negligence, and that the question of whether such a theory could be upheld was not before us. If the defendants were to be held liable for negligence we held that to that liability the plaintiff's contributory negligence was a bar. Under the views that we have now expressed, however, that no liability of the defendants can be predicated on negligence, the contributory negligence or positive wrong of the plaintiff in trespassing on the premises becomes immaterial, for it was not the proximate cause of the injury for which he seeks to recover, and contributory negligence is not a defense to a willful or wanton wrong."

first count charged the defendant with a failure to use reasonable care; the second count charged it with reckless and wanton negligence. There was a verdict for plaintiff; the defendant excepts.

SHELDON, J. The jury could find on the evidence that Coombs was in a position of imminent peril, struggling to restrain a plunging horse upon or close to a track of the defendant upon which a train was approaching, and that the plaintiff came to his assistance for the purpose of rescuing him from the peril. The contention of the defendant that Coombs was endeavoring merely to save his master's property and that the plaintiff went upon the track for the sole purpose of assisting Coombs in this effort was for the jury to determine. It was not necessarily and as matter of law a trespass or a negligent act for the plaintiff to attempt to rescue Coombs from the impending danger, even at the risk of his own life. It was for the jury to say whether under the existing circumstances the plaintiff's act was so rash and reckless as to preclude a finding that he was in the exercise of due care and was justified in going upon the track. This is the doctrine of Linnehan v. Sampson, 126 Mass. 506, 30 Am. Rep. 692. And there is a great body of authority in other courts for the proposition that it may not be negligence for one not acting rashly or recklessly to expose himself voluntarily to great danger, even to the risk of life and limb, in order to rescue another from a like peril, and that such a voluntary exposure is not to be regarded as rash or reckless if there appears to be a fair chance of success, whether the person in danger is or is not a child or an aged or decrepit person, and even though the person attempting the rescue knows that it involves great hazard to himself without a certainty of accomplishing the intended rescue. The leading case is Eckert v. Long Island Railroad, 43 N. Y. 502, 3 Am. Rep. 721, and 57 Barb. (N. Y.) 555, the doctrine of which has been generally followed. * * *[3]

It is true, as was held in Linnehan v. Sampson, 126 Mass. 506, 30 Am. Rep. 692, and in many of the other cases above cited, that it is for the jury to say, upon all the circumstances, including the existing emergency and the need of immediate action under which they may find that the plaintiff acted, whether in fact his conduct was that of a reasonably prudent man; and it may be that the judge in his charge did not go far enough in requiring the jury, upon this issue, only to find whether the plaintiff "saw and as a reasonable man believed that Coombs was in imminent danger of his life," and "believed that he could rescue Coombs and at the same time avoid danger to himself." But it is not clear that this question was intended to be saved; it has not been argued by the defendant; and we need not consider it.

But it is necessary in this case, as in all similar actions, that negligence on the part of the defendant or its servants should be shown, even though the plaintiff was himself free from all blame. Hirsch-

[3] Mr. Justice Sheldon here referred to a large number of authorities.

man v. Dry Dock Railroad, 46 App. Div. 621, 61 N. Y. Supp. 304; De Mahy v. Morgan's Louisiana Co., 45 La. Ann. 1329, 14 South. 61; Spooner v. Delaware, Lackawanna & Western Railroad, 115 N. Y. 22, 21 N. E. 696; Evansville & Crawfordsville Railroad v. Hiatt, 17 Ind. 102; Thomason v. Southern Railway, 113 Fed. 80, 51 C. C. A. 67. In such a case as this, however, it is enough to hold the defendant if there was negligence on its part towards either Coombs or the plaintiff. Maryland Steel Co. v. Marney, 88 Md. 482, 42 Atl. 60, 42 L. R. A. 842, 71 Am. St. Rep. 441; Saylor v. Parsons, 122 Iowa, 679, 98 N. W. 500, 64 L. R. A. 542, 101 Am. St. Rep. 283; Donahoe v. Wabash, St. Louis & Pacific Railway, 83 Mo. 560, 53 Am. Rep. 594. Its negligence towards Coombs will be treated as directly inducing the attempt to rescue him and thereby causing the injury to the plaintiff. Such negligence could be found if the defendant was running its train in a manner likely to cause injury to any one properly in that vicinity. That was the only negligence that was shown in many of the cases already referred to. In our opinion there was such evidence here. * * *[4]

Exceptions overruled.

PRIESTLEY v. FOWLER.

(Court of Exchequer, 1837. 3 Mees. & W. 1, 49 R. R. 495.)

Case. The declaration stated that the plaintiff was a servant of the defendant in his trade of a butcher; that the defendant had desired and directed the plaintiff, so being his servant, to go with and take certain goods of the defendant's, in a certain van of the defendant then used by him, and conducted by another of his servants, in carrying goods for hire upon a certain journey; that the plaintiff, in pursuance of such desire and direction, accordingly commenced and was proceeding and being carried and conveyed by the said van, with the said goods; and it became the duty of the defendant, on that occasion, to use due and proper care that the said van should be in a proper state of repair, that it should not be overloaded, and that the plaintiff should be safely and securely carried thereby; nevertheless, the defendant did not use proper care that the van should be in a sufficient state of repair, or that it should not be overloaded, or that the plaintiff should be safely and securely carried thereby, in consequence of the neglect of all and each of which duties the van gave way and broke down, and the plaintiff was thrown with violence to the ground, and his thigh was thereby fractured, &c. Plea, Not guilty.

[4] The evidence of negligence was here considered by the Court. It appeared that in legal effect Coombs and the plaintiff were invitees in the defendant's freight yard.

Only so much of the case is given as relates to the first count.

At the trial before Park, J., at the Lincolnshire Summer Assizes, 1836, the plaintiff, having given evidence to show that the injury arose from the overloading of the van, and that it was so loaded with the defendant's knowledge, had a verdict for £100. In the following Michaelmas Term, Adams, Serjt, obtained a rule to show cause why the judgment should not be arrested, on the ground that the defendant was not liable in law, under the circumstances stated in the declaration.

Lord Abinger, C. B. This was a motion in arrest of judgment, after verdict for the plaintiff, upon the insufficiency of the declaration. (His Lordship stated the declaration.) It has been objected to this declaration, that it contains no premises from which the duty of the defendant, as therein alleged, can be inferred in law; or, in other words, that from the mere relation of master and servant no contract, and therefore no duty, can be implied on the part of the master to cause the servant to be safely and securely carried, or to make the master liable for damage to the servant, arising from any vice or imperfection, unknown to the master, in the carriage, or in the mode of loading and conducting it. For, as the declaration contains no charge that the defendant knew any of the defects mentioned, the Court is not called upon to decide how far such knowledge on his part of a defect unknown to the servant, would make him liable.

It is admitted that there is no precedent for the present action by a servant against a master. We are therefore to decide the question upon general principles, and in doing so we are at liberty to look at the consequences of a decision the one way or the other.

If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent. He who is responsible by his general duty, or by the terms of his contract, for all the consequences of negligence in a matter in which he is the principal, is responsible for the negligence of all his inferior agents. If the owner of the carriage is therefore responsible for the sufficiency of his carriage to his servant, he is responsible for the negligence of his coach-maker, or his harness-maker, or his coachman. The footman, therefore, who rides behind the carriage, may have an action against his master for a defect in the carriage owing to the negligence of the coach-maker, or for a defect in the harness arising from the negligence of the harness-maker, or for drunkenness, neglect, or want of skill in the coachman; nor is there any reason why the principle should not, if applicable in this class of cases, extend to many others. The master, for example, would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed; for that of the upholsterer, for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself; for the negligence of the cook, in not properly cleaning the copper vessels used in the kitchen; of the butcher, in supplying the family with meat of a quality injurious to the health; of the builder,

for a defect in the foundation of the house, whereby it fell, and injured both the master and the servant by the ruins.

The inconvenience, not to say the absurdity of these consequences, afford a sufficient argument against the application of this principle to the present case. But, in truth, the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care 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 danger 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. In that sort of employment, especially, which is described in the declaration in this case, the plaintiff must have known as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely. In fact, to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford.

We are therefore of opinion that the judgment ought to be arrested.

Rule absolute.[5]

[5] Accord: Murray v. South Carolina R. Co. (1841) 1 McMul. (S. C.) 385, 36 Am. Dec. 268: (P., a fireman on the defendant's railway, was injured, while engaged in the discharge of his duties, by the derailment of his engine through the carelessness of the engineer. The form of the action was trespass on the case.)

Farwell v. Boston, etc., R. Corp. (1842) 4 Metc. (Mass.) 49, 38 Am. Dec. 339: (P., an engineer on the defendant's railway, was injured, while engaged in the discharge of his duties, by the negligence of the defendant's switchman in "leaving a switch in wrong condition." The form of action was trespass on the case.)

The opinion in Farwell v. Boston, etc., R. Corp. was by Chief Justice Shaw. He said, in part:

"This is an action of new impression in our courts, and involves a principle of great importance. It presents a case, where two persons are in the service and employment of one company, whose business it is to construct and maintain a railroad, and to employ their trains of cars to carry persons and merchandize for hire. They are appointed and employed by the same company to perform separate duties and services, all tending to the accomplishment of one and the same purpose—that of the safe and rapid transmission of the trains; and they are paid for their respective services according to the nature of their respective duties, and the labor and skill required for their proper performance. The question is, whether, for damages sustained

by one of the persons so employed, by means of the carelessness and negligence of another, the party injured has a remedy against the common employer. It is an argument against such an action, though certainly not a decisive one, that no such action has before been maintained. * * *

"The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others. * * *

"If we look from considerations of justice to those of policy, they will strongly lead to the same conclusion. In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. This is, in truth, the basis on which implied promises are raised, being duties legally inferred from a consideration of what is best adapted to promote the benefit of all persons concerned, under given circumstances. To take the well known and familiar cases already cited; a common carrier, without regard to actual fault or neglect in himself or his servants, is made liable for all losses of goods confided to him for carriage, except those caused by the act of God or of a public enemy, because he can best guard them against all minor dangers, and because, in case of actual loss, it would be extremely difficult for the owner to adduce proof of embezzlement, or other actual fault or neglect on the part of the carrier, although it may have been the real cause of the loss. The risk is therefore thrown upon the carrier, and he receives, in the form of payment for the carriage, a premium for the risk which he thus assumes. So of an innkeeper: he can best secure the attendance of honest and faithful servants, and guard his house against thieves. Whereas, if he were responsible only upon proof of actual negligence, he might connive at the presence of dishonest inmates and retainers, and even participate in the embezzlement of the property of the guests, during the hours of their necessary sleep, and yet it would be difficult, and often impossible, to prove these facts.

"The liability of passenger carriers is founded on similar considerations. They are held to the strictest responsibility for care, vigilance and skill, on the part of themselves and all persons employed by them, and they are paid accordingly. The rule is founded on the expediency of throwing the risk upon those who can best guard against it. Story on Bailments, 590 et seq.

"We are of opinion that these considerations apply strongly to the case in question. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service, if the common employer will not take such precautions, and employ such agents as the safety of the whole party may require. By these means, the safety of each will be much more effectually secured, than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrong-doer. * * *

"It was strongly pressed in the argument, that although this might be so, where two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus to some extent provide for his own security; yet that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree control or influence the conduct of another. But we think this is founded upon a supposed distinc-

tion, on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish, what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, how near or how distant must they be, to be in the same or different departments. In a blacksmith's shop, persons working in the same building, at different fires, may be quite independent of each other, though only a few feet distant. In a ropewalk, several may be at work on the same piece of cordage, at the same time, at many hundred feet distant from each other, and beyond the reach of sight and voice, and yet acting together.

"Besides, it appears to us, that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability, because the servant has better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer; but because the implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow servant, does not depend exclusively upon the consideration, that the servant has better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments cannot create that liability, when it does not arise from express or implied contract, or from a responsibility created by law to third persons, and strangers, for the negligence of a servant."

It was held, therefore, that the action could not be maintained.

See, also, Pollock on Torts (8th Ed.) 98: "The old rule as it stood before the Act of 1880, is that a master is not liable to his servant for injury received from any ordinary risk of or incident to the service, including acts or defaults of any other person employed in the same service. Our law can show no more curious instance of a rapid modern development. The first evidence of any such rule is in Priestly v. Fowler, 3 M. & W. 1, 49 R. R. 495, decided in 1837, which proceeds on the theory (if on any definite theory) that the master 'cannot be bound to take more care of the servant than he may reasonably be expected to do of himself'; that a servant has better opportunities than his master of watching and controlling the conduct of his fellow-servants; and that a contrary doctrine would lead to intolerable inconvenience, and encourage servants to be negligent. According to this there would be a sort of presumption that the servant suffered to some extent by want of diligence on his own part. But it is needless to pursue this reasoning: for the like result was a few years afterwards arrived at by Chief Justice Shaw of Massachusetts by another way, and in a judgment which is the fountain-head of all the latter decisions, Farwell v. Boston & Worcester R. R. Corp. (1842) 4 Metc. (Mass.) 49, 38 Am. Dec. 339, and has now been judicially recognized in England as 'the most complete exposition of what constitutes common employment.' Sir Francis Jeune in The Petrel, [1893] p. 320, 323. The accepted doctrine is to this effect. Strangers can hold the master liable for the negligence of a servant about his business. But in the case where the person injured is himself a servant in the same business he is not in the same position as a stranger. He has of his free will entered into the business and made it his own. He cannot say to the master, You shall so conduct your business as not to injure me by want of due care and caution therein. For he has agreed with the master to serve in that business, and his claims on the master depend on the contract of service. Why should it be an implied term of that contract, not being an express one, that the master shall indemnify him against the negligence of a fellow-servant, or any other current risk. It is rather to be implied that he contracted with the risk before his eyes, and that the dangers of the service, taken all around, were considered in fixing the rate of payment. This is, I believe, a fair summary of the reasoning

THRUSSELL v. HANDYSIDE & CO.

(Queen's Bench Division, 1888. 20 Q. B. Div. 359.)

HAWKINS, J. (after stating the case, and holding that the facts established negligence in the defendant). But this does not determine the case, for the plaintiff may fail on one of two grounds, either that he contributed to the accident by his own negligence, or that the case comes within the maxim "Volenti non fit injuria."

As to the first of these grounds I cannot find any evidence which proves negligence on the part of the plaintiff.

The only remaining question is whether the plaintiff took the risk upon himself, so that the maxim "Volenti non fit injuria" applies. That question, as is shewn by the judgments in Yarmouth v. France, 19 Q. B. D. 647, was for the jury. The plaintiff was altogether unconnected with the defendants or their workmen, but was an independent workman employed by Messrs. Lucas, and it is difficult to say, where a man is lawfully working, subject to the orders of his employers, and to the risk of dismissal if he disobeys, that if after asking for and failing to obtain protection from the danger caused by other people's work, he suffers injury, the maxim "Volenti non fit injuria" applies. It is true that he knows of the danger, but he does not wilfully incur it. "Scienti," as was pointed out in Thomas v. Quatermaine, 18 Q. B. D. at p. 692, and in Yarmouth v. France, 19 Q. B. D. at p. 659, is not equivalent to "volenti." It cannot be said, where a man is lawfully engaged in work, and is in danger of dismissal if he leaves his work, that he wilfully incurs any risk which he may encounter in the course of such work, and here the plaintiff had asked the defendants' men to take care. It is different where there is no duty to be performed, and a man takes his chance of the danger, for there he voluntarily encounters the risk. If the plaintiff could have gone away from the dangerous place without incurring the risk of losing his means of livelihood, the case might have been different; but he was obliged to be there; his poverty, not his will, consented to incur the danger. * * *

The case of Woodley v. Metropolitan District Ry. Co., 2 Ex. D. 384, was relied on by Mr. Lush as an authority in favour of the defendants, and at first sight it looks somewhat like the present case, but

which has prevailed in the authorities. With its soundness we are not here concerned. It was not only adopted by the House of Lords for England, but forced by them upon the reluctant Courts of Scotland to make the jurisprudence of the two countries uniform. No such doctrine appears to exist in the law of any other country in Europe. The following is a clear judicial statement of it in its settled form: '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.' Erle, C. J., in Tunney v. Midland R. Co. (1866) L. R. 1 C. P. 296."

when the facts of the two cases are compared there is a clear distinction. The plaintiff in that case was in the employment of a contractor and was injured by a passing train while he was working in a tunnel on the Metropolitan District Railway, and he brought an action against the railway company. It was proved that there was a very small space between the wall of the tunnel and the passing train, but still the space was enough, if a workman was careful, to enable him to stand in safety while a train passed. It is true that the jury found that there was negligence on the part of the company in not having taken precautions for the protection of the workman, but the plaintiff having it in his power to protect himself, and knowing that the danger existed, the majority of the Court of Appeal held that he was not entitled to recover. He was injured not owing to an inevitable cause, but owing to a danger which by the use of proper care he might have avoided. In the present case the plaintiff could not have avoided the danger, unless he had disobeyed the orders of his employers, and incurred the risk of dismissal. * * *

Appeal dismissed.[6]

DOWD v. NEW YORK, O. & W. RY. CO.

(Court of Appeals of New York, 1902. 170 N. Y. 459, 63 N. E. 541.)

The action was against the railway company for alleged negligence in causing the death of plaintiff's intestate, a car repairer in the defendant's employ. The answer denied all the allegations of negligence on the part of the defendant, and alleged that the death of the decedent was caused by his own negligence.

It appeared that on the 31st of August, 1892, the plaintiff's intestate had been in the employ of the defendant as a car repairer for about six weeks, but not continuously. On that day, shortly after noon, he was at work under a car situated near the middle of a train consisting of twenty-five empty coal cars standing without an engine on siding No. 3. A blue as well as a red flag (signifying danger and the presence of a car repairer) was flying at the rear or southerly end of the train. A milk train consisting of an engine, express car, passenger car and three or four milk cars came in at this time and stopped at the station to transact its usual business. It was a little late and after discharging the passengers and freight, the engineer ran south past the switch and then, as was his custom, backed rapidly, severed his engine and kicked the train upon siding No. 3. Of the three trainmen belonging to this train but one remained thereon to manage the brakes and he was unable to control its movement. After some delay, he succeeded in setting the hand brake and then struggled with an air brake, but without success. The result was that the milk train ran down the

[6] The statement of facts, parts of the opinion of Hawkins, J., and all of the opinion of Grantham, J., are omitted.

grade without control, until, colliding with the empty cars, it shoved them forward about two car lengths and caused one of them to run over the plaintiff's intestate as he was working under it, and injured him so severely that he died within a few days.

The jury found for the plaintiff, and after affirmance by the Appellate Division, one of the justices dissenting, the defendant came to this court.[7]

VANN, J. * * * The defendant, by an appropriate exception, raised the question of law that the evidence did not authorize the jury to find that the decedent was not chargeable with knowledge of the practice that caused his death. If he knew of the practice and continued to work without any promise by the defendant to correct its methods, he assumed the danger and waived any claim for damages on account thereof. Crown v. Orr, 140 N. Y. 450, 35 N. E. 648.

The decedent was chargeable not only with what he actually knew, but also with what he ought to have known by the exercise of ordinary diligence. He had worked for the defendant about six weeks, in all, at different times, between the first of April and the last of August when he was hurt. "He was repairing cars all the time he was there," which kept him in a position where he could not well see the ordinary movement of trains in the yard. A witness who worked "in the same gang with him the most of the time," testified that he had never seen cars kicked "on the sidings where cars were being repaired" while he was working with him. It appeared that cars were kicked upon sidings every day and sometimes, but not so often when the signals were up. There was little other evidence upon the subject and none showing that the decedent was ever in such a position as necessarily to have seen cars kicked on a track where repairers were at work. If the burden of proof was upon the plaintiff to show affirmatively the absence of knowledge on the part of her intestate, it may be that the evidence was insufficient for the purpose. If, however, the burden of proof in this regard was upon the defendant, the finding of the jury should be sustained because the evidence did not conclusively establish the fact in accordance with its theory.

When the plaintiff's intestate entered the service of the defendant he impliedly assumed the obvious risks of the business and waived any right of action on account thereof. The common law makes this a part of the contract of employment, the same as if an express stipulation to that effect, committed to writing, had been signed by both parties. Furthermore, by continuing at work, with no prospect of a change of method, he waived such dangers as he subsequently discovered. The doctrine of assumed risks rests upon the implication of a promise by the employé to waive the consequences of dangers of which he is fully aware. It is distinct in principle from the doctrine of contributory

[7] The statement is abridged. Only so much of the opinion is given as relates to the one point.

negligence although they have frequently been confounded by the courts. In many cases this was owing to the fact that it appeared from the plaintiff's own showing that he knew of the dangers in advance and hence his complaint was properly dismissed. Whether the fact of a known or obvious risk is proved by the one party or the other is immaterial, provided it is proved at all, but the question now before us is upon whom rests the burden of proof in this respect. If the plaintiff knows the danger, under ordinary circumstances he waives it, but is the waiver a defense to be alleged and proved by the defendant, or only a form of contributory negligence, the absence of which is a part of the plaintiff's case?

Contributory negligence prevents a recovery because the plaintiff, of his own volition, intervenes between the negligence of the defendant and the injury received, so that the former is not the sole cause of the latter. * * * One who is injured by his own negligence is regarded by the law as not having been injured at all, so far as other parties are concerned. By assuming the risk, the plaintiff does not intervene but waives. Intervention in order to break the causal connection between the negligent act and the injury must come in between them. The assumption of the risk does not come in between, but is in advance of both. The independent will of the plaintiff is not exercised by intervening, but by voluntarily waiving and releasing, when he enters the service, any right of action which might accrue to him from the cause stated. * * *

We think that the burden of showing that the servant assumed the risk of obvious dangers rests upon the master and hence we cannot say, as matter of law, that the jury, in the case before us, was compelled to find that the plaintiff's intestate knew or should have known of the practice of kicking cars on a track where car repairers were at work. If he did not know of the practice, he did not waive the danger.

Judgment affirmed.

ENGLISH v. AMIDON et al.

(Supreme Court of New Hampshire, 1902. 72 N. H. 301, 56 Atl. 548.)

Action on the case against Amidon and others for personal injuries sustained by the plaintiff in falling down a dangerous stairway in the defendants' mill. A motion for a non-suit was granted, and the plaintiff excepted.

BINGHAM, J. It was the duty of the defendants, in the exercise of reasonable care and diligence, to provide and maintain a safe and suitable stairway by which the plaintiff, as their servant, could go to and from his place of work in the mill. Fifield v. Railroad, 42 N. H. 225; Jaques v. Company, 66 N. H. 482, 22 Atl. 552, 13 L. R. A. 824; Fitzgerald v. Company, 155 Mass. 155, 29 N. E. 464, 31 Am. St. Rep.

537; Mahoney v. Dore, 155 Mass. 513, 30 N. E. 366. Inasmuch as the defendants operated their mill at night, it is claimed that the stairway should then have been lighted to render it reasonably safe. If the stairway was unsuitable for the use of the defendants' servants at night, because the plan of construction, taken in conjunction with the darkness, made it dangerous, it might be found to have been the defendants' duty, in the exercise of ordinary care, to make it reasonably safe, either by suitably lighting it or by remedying the construction; and this was a personal duty, from which they could not relieve themselves by delegating its performance to another.

The evidence was that the plaintiff and seven other spinners, after finishing their work at 9 o'clock in the evening, regularly came down the stairway from the third floor of the mill; that no other way was provided for them; that the stairway was winding, steep, narrow, and worn; that the treads of the stairs varied in width, being narrowest on the inside of the curve; and that the defendants had placed lamps, which were usually lighted at night, over the stairs. On the night in question, when the plaintiff and the other workmen had finished their labors, they put out the lights over their machines, as was their custom, and started to go out of the mill. On reaching the stairway they found it was dark, but proceeded to go down and out, the plaintiff going on the outside of the curve, where the treads of the stairs were widest, steadying himself with his hand against the wall, there being no railing on that side of the stairway. When part way down he slipped, fell, and was injured. Reasonable men could conclude from this evidence that the defendants required their servants to use this stairway at night; that its construction, in conjunction with the darkness, rendered its use dangerous; that the defendants themselves so regarded it; that their neglect to make the stairway safe for such use was the proximate cause of the plaintiff's injury; and that under the circumstances he was exercising due care in undertaking to use the stairway (the only means provided for leaving the mill) and in his conduct while using it.

Did the plaintiff voluntarily assume the risk of the defendants' negligence? "One does not voluntarily assume a risk, within the meaning of the rule that debars a recovery, when he merely knows there is some danger, without appreciating the danger." Mundle v. Company, 86 Me. 400, 405, 30 Atl. 16; Demars v. Company, 67 N. H. 404, 40 Atl. 902. One cannot be said, as a matter of law, to assume a risk voluntarily, though he knows the danger and appreciates the risk, if at the time he was acting "under such an exigency, or such an urgent call of duty, or such constraint of any kind as in reference to the danger deprives his act of its voluntary character" (Mahoney v. Dore, supra); or if, after discovering the master's neglect, he "has no opportunity to leave the service before the injury is received" (Olney v. Railroad, 71 N. H. 427, 431, 52 Atl. 1097).

When the plaintiff went into the mill it was daylight. He knew that

his work would not be finished before 9 o'clock that night, and that it was the custom of the defendants to then have the stairway lighted. He had the right to believe they would perform their duty on the night in question, and to rely thereon. He entered the mill, worked until 9 o'clock, and then went to the stairway to go out. On reaching it he found himself surrounded in darkness. Although he then knew the defendants had failed to perform their duty, yet in view of the fact that he then had no choice open to him, the only exit provided being over the dark stairway, and no opportunity to leave the defendants' service before his injury was received, it cannot be said, as a matter of law, that he voluntarily assumed the risk. It was for the jury to say whether the plaintiff, knowing the defendant's neglect of duty, fully appreciated the danger therefrom and voluntarily encountered it. Demars v. Company, supra; Whitcher v. Railroad, 70 N. H. 242, 46 Atl. 740; Dempsey v. Sawyer, 95 Me. 295, 49 Atl. 1035; Mahoney v. Dore, supra; Fitzgerald v. Company, supra; 47 L. R. A. 161, 201, note.

Exception sustained.[8]

SCHLEMMER v. BUFFALO, R. & P. RY. CO.

(Supreme Court of the United States. 1911. 220 U. S. 590, 31 Sup. Ct. 561, 55 L. Ed. 596.)

In Error to the Supreme Court of the State of Pennsylvania.

MR. JUSTICE DAY. This action was brought in a Pennsylvania court to recover for wrongfully causing the death of Adam M. Schlemmer, plaintiff's intestate, as a result of injuries received while in the employ of the railroad company. The case has been once before in

[8] On motion for a rehearing, Walker, J., said: "* * * The case is clearly distinguishable from McLaine v. Company [1902] 71 N. H. 294, 52 Atl. 545, 58 L. R. A. 462 [93 Am. St. Rep. 522], for in that case the danger arose from the act of a fellow servant in the performance of the work, for which it was held to be unreasonable to hold the master responsible, and not from any defects in the instrumentalities provided by the master, for which he is liable if he does not exercise ordinary care in the premises. Manning v. Manchester Mills [1900] 70 N. H. 582, 49 Atl. 91, is distinguishable for a similar reason. In other cases cited by the defendants (Mellen v. Wilson [1893] 159 Mass. 88, 34 N. E. 96; Dene v. Print Works [1902] 181 Mass. 560, 64 N. E. 203; Kaare v. Company [1893] 139 N. Y. 369, 34 N. E. 901; New York, etc., R. R. v. Perriguey [1893] 138 Ind. 414, 34 N. E. 233, 37 N. E. 976; Collins v. Railroad [1882] 30 Minn. 31, 40 N. W. 60), the sole ground upon which negligence was claimed was the absence of light caused by the negligence of a fellow servant. The existence of light in those cases was not required to remedy or to obviate the danger arising from structural defects. Lamps for the production of light were regarded as a part of the properly constructed appliances or machines which it was the duty of the servant to operate. The question of their necessity and use to guard against the consequences of the master's negligence in unreasonably maintaining dangerously defective appliances was not considered. Motion denied." Id. (1902) 72 N. H. 301, 303, 56 Atl. 548, 550.

this court, and is reported in 205 U. S. 1, 51 L. Ed. 681, 27 Sup. Ct. 407. The injury was received while Schlemmer, an employee of the defendant railroad company was endeavoring to couple a shovel car to the caboose of one of the railroad trains of the defendant company.

Before the case first came here, the Supreme Court of Pennsylvania had held that the plaintiff could not recover damages because of the contributory negligence of the deceased. 207 Pa. 198, 56 Atl. 417. This court reversed the Supreme Court of Pennsylvania, and remanded the case for further proceedings in conformity with the opinion of this court.

For a proper understanding of the case a brief statement of the facts will be necessary. The shovel car was not equipped with an automatic coupler, as required by the act of March 2, 1893, chap. 196, § 2, 27 Stat. at L. 531, U. S. Comp. Stat. 1901, p. 3174, and that fact was the basis of the action for damages. The shovel car had an iron drawbar, weighing somewhere about 80 pounds, protruding beyond the end of the shovel car. The end of this drawbar had a small opening, or eye, into which an iron pin was to be fitted when the coupling was made; this was to be effected by placing the end of the drawbar into the slot of the automatic coupler with which the caboose was equipped. Owing to the difference in the height, the end of the shovel car would pass over the automatic coupler on the caboose in case of an unsuccessful attempt to make the coupling, and the end of the shovel car would come in contact with the end of the caboose.

Plaintiff's intestate was an experienced brakeman, having been in the service fifteen or sixteen years. At the time when he undertook to couple the train with the shovel car to the end of the caboose, he went under the end of the shovel car, and attempted to raise the iron drawbar so as to cause it to fit into the slot of the automatic coupler on the caboose. While so doing, his head was caught between the ends of the shovel car and the caboose, and he was almost instantly killed. This happened between 8 and 9 o'clock on an evening in the month of August, and while dusk had gathered, it was not very dark, and the testimony tends to show that the situation was plainly observable. * * *

The trial court submitted the case to the jury upon the issues joined under the Federal statute, including the question whether the plaintiff's intestate, at the time of the injury, had been guilty of contributory negligence. Under these instructions the jury found a verdict for the plaintiff.

The court then granted a rule to show cause why judgment should not be rendered non obstante veredicto, which motion was granted, and an opinion delivered, in which the judge held that the testimony did not warrant the conclusion that, in making the coupling, the risk was so obvious that an ordinarily careful and prudent brakeman would not have undertaken it; and therefore, under the statute, assumption of risk was no defense, but reached the conclusion that

the deceased was guilty of contributory negligence in failing to exercise care according to the circumstances in making the coupling in the way he attempted to make it, and in not adopting a safer way, which was pointed out to him at the time.

Upon the second appeal, the Supreme Court of Pennsylvania affirmed the judgment of the trial court, saying:

"Per Curiam: It is the settled law of Pennsylvania that any negligence of a party injured, which contributed to his injury, bars his recovery of damages without regard to the negligence, either greater or less than his own, of the other party. The present is a clear case of contributory negligence within this rule. The evidence is indisputable that the unfortunate decedent not only attempted to make the coupling in a dangerous way when his attention was directly called to a safer way, but also did it with reckless disregard of his personal safety by raising his head, though twice expressly cautioned at the time as to the danger of so doing." 222 Pa. 470, 71 Atl. 1053.

The case is now here upon a petition in error to reverse this judgment of affirmance. The statute at the time of the injury complained of took away assumption of risk on the part of the employee as a defense to an action for injuries received in the course of the employment. The defense of contributory negligence was not dealt with by the statute.

When the case was here before, we did not find it necessary to pass upon the question whether contributory negligence on the part of an injured employee would be a defense to an action under the law as it then stood, for, upon the record as then presented, the court was of opinion that to sustain the defense of contributory negligence would amount to a denial to the plaintiff of all benefit of the statute which made the assumption of risk no longer a defense.

While, as was said in the case when here before, assumption of risk sometimes shades into negligence as commonly understood, there is, nevertheless, a practical and clear distinction between the two. In the absence of statute taking away the defense, or such obvious dangers that no ordinarily prudent person would incur them, an employee is held to assume the risk of the ordinary dangers of the occupation into which he is about to enter, and also those risks and dangers which are known, or are so plainly observable that the employee may be presumed to know of them, and if he continues in the master's employ without objection, he takes upon himself the risk of injury from such defects. Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 67, 68, 48 L. Ed. 96, 100, 101, 24 Sup. Ct. 24, and former cases in this court therein cited.

Contributory negligence, on the other hand, is the omission of the employee to use those precautions for his own safety which ordinary prudence requires. See, in this connection, Narramore v. Cleveland C., C. & St. L. R. Co., 48 L. R. A. 68, 37 C. C. A. 499, 509, 96 Fed. 298.

In the present case, the statute of Congress expressly provides that the employee shall not be deemed to have assumed the risk of injury if such is occasioned by his continuing in the employ of the carrier after the unlawful use of the car or train in the failure to provide automatic couplers has been brought to his knowledge. Therefore, when Schlemmer saw that the shovel car was not equipped with an automatic coupler, he would not, from that knowledge alone, take upon himself the risk of injury without liability from his employer.

But there is nothing in the statute absolving the employee from the duty of using ordinary care to protect himself from injury in the use of the car with the appliances actually furnished. In other words, notwithstanding the company failed to comply with the statute, the employee was not, for that reason, absolved from the duty of using ordinary care for his own protection under the circumstances as they existed. This has been the holding of the courts in construing statutes enacted to promote the safety of employees. Krause v. Morgan, 53 Ohio St. 26, 40 N. E. 886; Holum v. Chicago, M. & St. P. R. Co., 80 Wis. 299, 50 N. W. 99; Grand v. Michigan C. R. Co., 83 Mich. 564, 11 L. R. A. 402, 47 N. W. 837; Taylor v. Carew Mfg. Co., 143 Mass. 470, 10 N. E. 308. And such was the holding of the court of appeals of the eighth circuit, where the statute now under consideration was before the court. Denver & R. G. R. Co. v. Arrighi, 63 C. C. A. 649, 129 Fed. 347.

In the absence of legislation at the time of the injury complained of, taking away the defense of contributory negligence, it continued to exist, and the Federal question presented upon this record is: Was the ruling of the state court in denying the right of recovery upon the ground of contributory negligence, in view of the circumstances shown, such as to deprive the plaintiff in error of the benefit of the statute which made assumption of risk a defense no longer available to the employer? To answer this question we shall have to look to the testimony adduced at the trial, all of which is contained in the record before us. As we have already said, the testimony shows that the plaintiff's intestate was an experienced brakeman. A witness, who is uncontradicted in the record, testified that just before Schlemmer got out of the caboose, when he saw the train backing up, he was told: "We had better shove that up by hand, the same as we did in Bradford. That is a dangerous coupling to make." (At Bradford the method of making the coupling was by means of pushing the caboose up against the train, instead of backing the train against the caboose.) To this Schlemmer replied, with emphasis, "Back up." He then proceeded to make the coupling, with the result stated.

Another witness, the yard conductor, testified without contradiction, that just before the cars got together he walked up to Schlemmer, and told him they had better shove the caboose on by hand, to which he answered: "Never mind, I will make this coupling." To which the witness answered: "Well, you will have to get down."

Witness testified that he called to him twice to get down, the last time not more than a second, possibly a couple of seconds, before he was injured. This witness furthermore testified that he had a sufficient crew to push the caboose up by hand, that there was plenty of force to shove the caboose up in that way; that that was a great deal safer way to make the coupling than backing onto the caboose. The testimony further shows that there was plenty of room under the projection of the shovel car to operate the drawbar and raise it up. In fact, in this manner, the coupling was made a few minutes after the unfortunate occurrence which resulted in the death of the deceased.

As the record is now presented, there is no proof in the case that the deceased was ordered to make the coupling in the manner he did, and there is testimony to the effect that, just before the injury, the conductor in charge of the train said to the deceased: "Mr. Schlemmer, you be very careful now, and keep your head down low, so as not to get mashed in between those cars." He said he would.

In view of this record we cannot say that the court, in denying a recovery to the plaintiff, upon the ground of contributory negligence of the deceased, denied to her any rights secured by the Federal statute. Entirely apart from the question of assumption of risk, which, under the law, could not be a defense to the plaintiff's action, as the law then stood, there remained the defense of contributory negligence.

After an examination of the record as now presented, containing testimony not adduced at the former trial, we are constrained to the conclusion that there was ample ground for saying, as both the trial court and the Supreme Court of the state of Pennsylvania did, that the decedent met his death because of his unfortunate attempt to make the coupling in a dangerous way, when a safer way was at the time called to his attention. Furthermore, he was injured in spite of repeated cautions, made at the time, as to the great danger of being injured if he raised his head in attempting to make the coupling in the manner which he did.

As we have said, the Federal question in the record, and the only one which gives us jurisdiction, is: Did the trial and judgment deprive the plaintiff in error of rights secured by the Federal statute? The views which we have expressed require that the question be answered in the negative.

The judgment of the Supreme Court of Pennsylvania is affirmed.[9]

[9] Part of the opinion is omitted.

IV. IMPUTED NEGLIGENCE AS AN EXCUSE[10]

THE BERNINA.

(Court of Appeal, 1887. L. R. 12 Prob. Div. 58.)

Appeal from a judgment by Butt, J., on a special case stated for the opinion of the court in three actions in personam against the owners of the steamship "Bernina." Butt, J., held, on the authority of Thorogood v. Bryan, 8 C. B. 115, that the plaintiffs were unable to recover. The plaintiffs appealed.[11]

LINDLEY, L. J. This was a special case. Three actions are brought in the Admiralty Division of the High Court by the respective legal personal representatives of three persons on board the Bushire against the owners of the Bernina. Those persons were killed by a collision between the two vessels, both of which were negligently navigated. One of the three persons (Toeg) was a passenger on the Bushire; one (Armstrong) was an engineer of the ship, though not to blame for the collision. The third (Owen) was her second officer, and was in charge of her, and was himself to blame for the collision. The questions for decision are, whether any, and if any, which of these actions can be maintained? and if any of them can, then whether the claims recoverable are to be awarded according to the principles which prevail at common law, or according to those which are adopted in the Court of Admiralty in cases of collision.[12] * * *

The first matter to be considered is whether there has been any such wrongful act, neglect, or default of the defendants as would, if death had not ensued, have entitled the three deceased persons respectively to have sued the defendants. Now, as regards one of them, namely, Owen, the second officer, who was himself to blame for the collision, it is clear that, if death had not ensued, he could not have maintained an action against the defendants. There was negligence on his part contributing to the collision, and no evidence to show that, notwithstanding his negligence, the defendants could, by taking reasonable care, have avoided the collision. There was what is called such contributory negligence on his part as to render an action by him unsustainable. It follows, therefore, that his representatives can recover nothing under Lord Campbell's Act for his widow and children, and their action cannot be maintained. The other two actions are not so easily disposed of. They raise two questions: (1) Whether the passenger Toeg, if alive, could have successfully sued the defendants;

[10] On the general bearing of the doctrine, see 29 Cyc. 542, notes 99, 1–6.

[11] The statement of the case is abridged.

[12] Only so much of the opinion is given as relates to this first question. As to the second question, it was held that actions under Lord Campbell's Act are not admiralty actions and, although brought in the Admiralty Division of the High Court, are not subject to the admiralty rule as to half damages.

and if he could, then (2) whether there is any difference between the case of the passenger and that of the engineer Armstrong. The learned judge whose decision is under review felt himself bound by authority to decide both actions against the plaintiffs. The authorities which the learned judge followed are Thorogood v. Bryan, 8 C. B. 115, and Armstrong v. Lancashire & Yorkshire Ry. Co., Law Rep. 10 Ex. 47; and the real question to be determined is whether they can be properly overruled or not. Thorogood v. Bryan, supra, was decided in 1849, and has been generally followed at Nisi Prius ever since when cases like it have arisen. But it is curious to see how reluctant the Courts have been to affirm its principle after argument, and how they have avoided doing so, preferring, where possible, to decide cases before them on other grounds. See, for example, Rigby v. Hewitt, 5 Ex. 240; Greenland v. Chaplin, 5 Ex. 243; Waite v. North Eastern Ry. Co., E. B. & E. 719. I am not aware that the principle on which Thorogood v. Bryan was decided has ever been approved by any Court which has had to consider it. On the other hand, that case has been criticised and said to be contrary to principle by persons of the highest eminence, not only in this country, but also in Scotland and in America. And while it is true that Thorogood v. Bryan has never been overruled, it is also true that it has never been affirmed by any Court which could properly overrule it, and it cannot be yet said to have become indisputably settled law. I do not think, therefore, that it is too late for a Court of Appeal to reconsider it, or to overrule it if clearly contrary to well settled legal principles.

Thorogood v. Bryan was an action founded on Lord Campbell's Act. The facts were shortly as follows. The deceased was a passenger in an omnibus, and he had just got off out of it. He was knocked down and killed by another omnibus belonging to the defendants. There was negligence on the part of the drivers of both omnibuses, and it appears that there was also negligence on the part of the deceased himself. The jury found a verdict for the defendants, and there does not seem to have been any reason why the Court should have disallowed the verdict if not driven to do so on technical grounds. In those days, however, a misdirection by the judge to the jury compelled the Court to grant a new trial, whether any injustice had been done or not; and accordingly the plaintiff moved for a new trial on the ground of misdirection, and it is with reference to this point that the decision of the Court is of importance. The learned judge who tried the case told the jury in effect to find for the defendant if they thought that the deceased was killed either by reason of his own want of care or by reason of want of care on the part of the driver of the omnibus out of which he was getting. The last direction was complained of, but was upheld by the Court. The ratio decidendi was that if the death of the deceased was not occasioned by his own negligence it was occasioned by the joint negligence of

both drivers, and that, if so, the negligence of the driver of the omnibus off which the deceased was getting was the negligence of the deceased; and the reason for so holding was that the deceased had voluntarily placed himself under the care of the driver. Maule, J., puts it thus: "The deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and the negligence of the driver was the negligence of the deceased." This theory of identification was quite new. No trace of it is to be found in any earlier decision, nor in any legal treatise, English or foreign, so far as I have been able to ascertain, nor has it ever been satisfactorily explained. It must be assumed, for the purpose of considering the grounds of the decision in question, that the passenger was not himself in fault. Assuming this to be so, then, if both drivers were negligent, and both caused the injury to the passenger, it is difficult to understand why both drivers or their masters should not be liable to him. The doctrine of identification laid down in Thorogood v. Bryan is, to me, quite unintelligible. It is, in truth, a fictitious extension of the principles of agency, but to say that the driver of a public conveyance is the agent of the passengers is to say that which is not true in fact. Such a doctrine, if made the basis of further reasoning, leads to results which are wholly untenable, e. g., to the result that the passengers would be liable for the negligence of the person driving them, which is obviously absurd, but which, of course, the Court never meant. All the Court meant to say was that for purposes of suing for negligence the passenger was in no better position than the man driving him. But why not? The driver of a public vehicle is not selected by the passenger otherwise than by being hailed by him as one of the public to take him up; and such selection, if selection it can be called, does not create the relation of principal and agent or master and servant between the passenger and the driver; the passenger knows nothing of the driver and has no control over him; nor is the driver in any proper sense employed by the passenger. The driver, if not his own master, is hired, paid, or employed by the owner of the vehicle he drives or by some other person who lets the vehicle to him. The orders he obeys are his employer's orders. These orders, in the case of an omnibus, are to drive from such a place to such a place and take up and put down passengers; and in the case of a cab the orders are to drive where the passenger for the time being may desire to go, within the limits expressly or impliedly set by the employer. If the passenger actively interferes with the driver by giving him orders as to what he is to do, I can understand the meaning of the expression that the passenger identifies himself with the driver, but no such interference was suggested in Thorogood v. Bryan. The principles of the law of negligence, and in particular of what is called contributory negligence, have been discussed on many occasions since that case was decided, and are much better understood now than they were

thirty years ago. Tuff v. Warman, 5 C. B. (N. S.) 573, in the Exchequer Chamber, and Radley v. London & North Western Ry. Co., 1 App. Cas. 754, in the House of Lords, show the true grounds on which a person himself guilty of negligence is unable to maintain an action against another for an injury occasioned by the combined negligence of both. If the proximate cause of the injury is the negligence of the plaintiff as well as that of the defendant, the plaintiff cannot recover anything. The reason for this is not easily discoverable. But I take it to be settled that an action at common law by A. against B. for injury directly caused to A. by the want of care of A. and B. will not lie. As Pollock, C. B., pointed out in Greenland v. Chaplin, supra, the jury cannot take the consequences and divide them in proportion according to the negligence of the one or the other party. But if the plaintiff can show that although he has himself been negligent, the real and proximate cause of the injury sustained by him was the negligence of the defendant, the plaintiff can maintain an action, as is shown not only by Tuff v. Warman, supra, and Radley v. London & North Western Ry. Co., supra, but also by the well-known case of Davies v. Mann, 10 M. & W. 546, and other cases of that class. The cases which give rise to actions for negligence are primarily reducible to three classes, as follows:

1. A. without fault of his own is injured by the negligence of B., then B. is liable to A. 2. A. by his own fault is injured by B. without fault on his part, then B. is not liable to A. 3. A. is injured by B. by the fault more or less of both combined; then the following further distinctions have to be made: (a) if, notwithstanding B.'s negligence, A. with reasonable care could have avoided the injury, he cannot sue B.: Butterfield v. Forrester, 11 East, 60; Bridge v. Grand Junction Ry. Co., 3 M. & W. 244; Dowell v. General Steam Navigation Co., 5 E. & B. 195; (b) if, notwithstanding A.'s negligence, B. with reasonable care could have avoided injuring A., A. can sue B.: Tuff v. Warman, supra; Radley v. London & North Western Ry. Co., supra; Davies v. Mann, supra; (c) if there has been as much want of reasonable care on A.'s part as on B.'s or, in other words, if the proximate cause of the injury is the want of reasonable care on both sides, A. cannot sue B. In such a case A. cannot with truth say that he has been injured by B.'s negligence, he can only with truth say that he has been injured by his own carelessness and B.'s negligence, and the two combined give no cause of action at common law. This follows from the two sets of decisions already referred to. But why in such a case the damages should not be apportioned, I do not profess to understand. However, as already stated, the law on this point is settled, and not open to judicial discussion. If now another person is introduced the same principles will be found applicable. Substitute in the foregoing cases B. and C. for B., and unless C. is A.'s agent or servant there will be no difference in the

result, except that A. will have two persons instead of one liable to him. A. may sue B. and C. in one action, and recover damages against them both; or he may sue them separately and recover the whole damage sustained against the one he sues: Clark v. Chambers, 3 Q. B. D. 327, where all the previous authorities were carefully examined by the late L. C. J. Cockburn. This is no doubt hard on the defendant, who is alone sued, and this hardship seems to have influenced the Court in deciding Thorogood v. Bryan, supra. In that case the Court appears to have thought it hard on the defendant to make him pay all the damages due to the plaintiff, and that it was no hardship to the plaintiff to exonerate the defendant from liability, as the plaintiff had a clear remedy against the master of the omnibus in which he was a passenger. But it is difficult to see the justice of exonerating the defendant from all liability in respect of his own wrong and of throwing the whole liability on some one who was no more to blame than he. The injustice to the defendant, which the Court sought to avoid, is common to all cases in which a wrong is done by two people and one of them alone is made to pay for it. The rule which does not allow of contribution among wrong-doers is what produces hardship in these cases, but the hardship produced by that rule (if really applicable to such cases as these under discussion) does not justify the Court in exonerating one of the wrong-doers from all responsibility for his own misconduct or the misconduct of his servants. I can hardly believe that if the plaintiff in Thorogood v. Bryan, had sued the proprietors of both omnibuses it would have been held that he had no right of action against one of them. Having given my reasons for my inability to concur in the doctrine laid down in Thorogood v. Bryan, supra, I proceed to consider how far that doctrine is supported by other authorities. * * * Thorogood v. Bryan and Armstrong v. Lancashire & Yorkshire Ry. Co. affirm that, although if A. is injured by the combined negligence of B. and C., A. can sue B. and C., or either of them, he cannot sue C. if he, A., is under the care of B. or in his employ. From this general doctrine I am compelled most respectfully to dissent, but if B. is A.'s agent or servant the doctrine is good. In Scotland the decision in Thorogood v. Bryan was discussed and held to be unsatisfactory in the case of Adams v. Glasgow & South Western Ry. Co., 3 Court Sess. Cas. 215. In America the subject was recently examined with great care by the Supreme Court of the United States in Little v. Hackett [116 U. S. 366] 14 Am. Law Record, 577, 54 Am. Rep. 15, in which the English and American cases were reviewed, and the doctrine laid down in Thorogood v. Bryan, supra, was distinctly repudiated as contrary to sound principles. In this case the plaintiff was driving in a hackney carriage and was injured by a collision between it and a railway train on a level crossing. There was negligence on the part of the driver of the carriage and on the part of the railway company's servants, but it was held that the plain-

tiff was not precluded from maintaining an action against the railway company. In this country Thorogood v. Bryan was distinctly disapproved by Dr. Lushington in The Milan, Lush. 388; and even Lord Bramwell, who has gone further than any other judge in upholding the decision, has expressed disapproval of the grounds on which it was based. No text-writer has approved of it, and the comments in Smith's Leading Cases are adverse to it (volume 1, p. 266, 6th Ed.). For the reasons above stated, I am of opinion that the doctrines laid down in Thorogood v. Bryan and Armstrong v. Lancashire & Yorkshire Ry. Co. are contrary to sound legal principles, and ought not to be regarded as law. Consequently, I am of opinion that the decision in Toeg's and Armstrong's case ought to be reversed.[13]

Appeal allowed.[14]

[13] The concurring opinions of Lord Esher, M. R., and Lopes, L. J., are omitted. Lord Esher's opinion (12 P. D. pages 60–84) contains an elaborate review of the authorities, English and American.

[14] From this decision an appeal was taken to the House of Lords, where, under the name, Mills v. Armstrong, L. R. 13, App. Cases (1888), the judgment of the Court of Appeal was affirmed.

Commenting on the doctrine of identification in Thorogood v. Bryan, Lord Herschell, in Mills v. Armstrong remarks as follows: "With the utmost respect for these eminent judges, I must say that I am unable to comprehend this doctrine of identification upon which they lay so much stress. In what sense is the passenger by a public stage-coach, because he avails himself of the accommodation afforded by it, identified with the driver? The learned judges manifestly do not mean to suggest (though some of the language used would seem to bear that construction) that the passenger is so far identified with the driver that the negligence of the latter would render the former liable to third persons injured by it. I presume that they did not even mean that the identification is so complete as to prevent the passenger from recovering against the driver's master; though if 'negligence of the owner's servants is to be considered negligence of the passenger,' or if he 'must be considered a party' to their negligence, it is not easy to see why it should not be a bar to such an action. In short, as far as I can see, the identification appears to be effective only to the extent of enabling another person whose servants have been guilty of negligence to defend himself by the allegation of contributory negligence on the part of the person injured. But the very question that had to be determined was, whether the contributory negligence of the driver of the vehicle was a defence as against the passenger when suing another wrongdoer. To say that it is a defence because the passenger is identified with the driver, appears to me to beg the question, when it is not suggested that this identification results from any recognized principles of law, or has any other effect than to furnish that defence the validity of which was the very point in issue. Two persons may no doubt be so bound together by the legal relation in which they stand to each other that the acts of one may be regarded by the law as the acts of the other. But the relation between the passenger in a public vehicle and the driver of it certainly is not such as to fall within any of the recognized categories in which the act of one man is treated in law as the act of another."

WAITE v. NORTHEASTERN RY. CO.

(Court of Queen's Bench, 1858. Court of Exchequer Chamber, 1859. El. Bl. & El. 719, 728, 113 R. R. 855.)

Action by Alexander Waite, an infant, to recover for the alleged negligence of the defendant railway company. The defendant filed a plea of not guilty and two special pleas. Issues on all the pleas.

LORD CAMPBELL, C. J. In this case we think that the rule ought to be made absolute for entering a verdict for the defendants, or for a nonsuit. The jury must be taken to have found that Mrs. Park, the grandmother of the infant plaintiff, in whose care he was when the accident happened, was guilty of negligence without which the accident would not have happened; and that, notwithstanding the negligence of the defendants, if she had acted upon this occasion with ordinary caution and prudence, neither she herself nor the infant would have suffered. Under such circumstances, had she survived she could not have maintained any action against the Company; and we think that the infant is so identified with her that the action in his name cannot be maintained. The relation of master and servant certainly did not subsist between the grandchild and the grandmother; and she cannot in any sense be considered his agent: but we think that the defendants, in furnishing the ticket to one and the half-ticket for the other, did not incur a greater liability towards the grandchild than towards the grandmother, and that she, the contracting party, must be implied to have promised that ordinary care should be taken of the grandchild.

We do not consider it necessary to offer any opinion as to the recent cases in which passengers by coaches or by ships have brought actions for damage suffered from the negligent management of other coaches and ships, there having been negligence in the management of the coaches and ships by which they were travelling, as, at all events, a complete identification seems to us to be constituted between the plaintiff and the party whose negligence contributed to the damage which is the alleged cause of action, in the same manner as if the plaintiff had been a baby only a few days old, to be carried in a nurse's arms.

Rule absolute.

The plaintiff having appealed against the above decision, the case was argued in the Exchequer Chamber.

COCKBURN, C. J. I am of opinion that the judgment of the Court of Queen's Bench ought to be affirmed. I put the case on this ground: that, when a child of such tender and imbecile age is brought to a railway station or to any conveyance, for the purpose of being conveyed, and is wholly unable to take care of itself, the contract of conveyance is on the implied condition that the child is to be conveyed subject to due and proper care on the part of the person having it in

charge. Such care not being used, where the child has no natural capacity to judge of the surrounding circumstances, a child might get into serious danger from a state of things which would produce no disastrous consequences to an adult capable of taking care of himself. Here the child was under the charge of his grandmother; and the company must be taken to have received the child as under her control and subject to her management. The plea and finding show that the negligence of the defendants contributed partially to the damage; but that the negligence of the person in whose charge the child was, and with reference to whom the contract of conveyance was made, also contributed partially. There is not therefore that negligence on the part of the defendants which is necessary to support the action.

POLLOCK, C. B. I entirely agree. The shortest way of putting Mr. Mellish's argument is that this is not a mere case of simple wrong, but one arising from the contract of the grandmother on the part of the plaintiff, who must avail himself of that contract, without which he cannot recover. There really is no difference between the case of a person of tender years under the care of another and a valuable chattel committed to the care of an individual, or even not committed to such care. The action cannot be maintained unless it can be maintained by the person having the apparent possession, even though the child or the chattel was not regularly put into the possession of the person, as, for instance, though the party taking charge of the child had done so without the father's consent; that circumstance would make no difference as to the question of the child's right. That is my reason for pressing this argument of Mr. Mellish, as it meets every possible view of the case.[15]

SECTION 5.—THE LAST CLEAR CHANCE

CLAY v. WOOD.

(At Nisi Prius, in the King's Bench, 1803. 5 Esp. 44.)

This was an action on the case, for negligently driving a chaise against a certain horse of the defendant's on which the plaintiff's servant then rode, by which he had his thigh broke; in consequence of which he died.

[15] The concurring opinions of Williams and Crowder, JJ., and of Bramwell, B., are omitted.

In the argument Pollock, C. B., put this question to counsel: "Suppose a man to drive his own gig, in which his child is, and to come into collision with another carriage through the negligence of both drivers. Can the child recover against the owners of the other carriage? That would be manifestly absurd. * * *"

The facts were, that the plaintiff's servant was riding on the wrong side of the road; but near the middle of it. The defendant was the owner of a chaise, then driven by his servant, coming out of another road, and crossing the road over to that side of the road on which the servant was riding, which was the proper side of the road for the defendant. In so crossing over, the shaft of the chaise struck the horse in the thigh, and broke it. The defendant's counsel replied, That it was the duty of the servant to have kept on his proper side; and that the accident being occasioned by his being so out of place, the defendant was not liable.

LORD ELLENBOROUGH said, That the circumstance of the person being on the wrong side of the road was not sufficient to discharge the defendant; for though a person might be on his wrong side of the road, if the road was of sufficient breadth, so that there was full and ample room for the party to pass, he was of opinion he was bound to take that course which should carry him clear of the person who was on his wrong side; and that if an injury happened, by running against such person, he would be answerable. A person being on his wrong side of the road could not justify another in wantonly doing an injury, which might be avoided. The question therefore to be left to the jury was, Whether there was such room, that though the plaintiff's servant was on his wrong side of the road, there was sufficient room for the defendant's carriage to pass between the plaintiff's horse and the other side of the road? If they were of opinion that there was, the plaintiff was entitled to recover.

Verdict for the plaintiff.

DAVIES v. MANN.

(Court of Exchequer, 1842. 10 Mees. & W. 546, 62 R. R. 698.)

Case for negligence. The declaration stated, that the plaintiff theretofore, and at the time of the committing of the grievance thereinafter mentioned, to wit, on, &c., was lawfully possessed of a certain donkey, which said donkey of the plaintiff was then lawfully in a certain highway, and the defendant was then possessed of a certain waggon and certain horses drawing the same, which said waggon and horses of the defendant were then under the care, government, and direction of a certain then servant of the defendant, in and along the said highway; nevertheless the defendant, by his said servant, so carelessly, negligently, unskillfully, and improperly governed and directed his said waggon and horses, that by and through the carelessness, negligence, unskillfulness, and improper conduct of the defendant, by his said servant, the said waggon and horses of the defendant then ran and struck with great violence against the said donkey of the plaintiff, and thereby then wounded, crushed and killed the same, &c. The defendant pleaded not guilty.

At the trial before Erskine, J., at the last Summer Assizes for the county of Worcester, it appeared that the plaintiff, having fettered the forefeet of an ass belonging to him, turned it into the public highway, and at the time in question the ass was grazing on the off side of a road about eight yards wide, when the defendant's waggon, with a team of three horses, coming down a slight descent, at what the witness termed a smartish pace, ran into the ass, knocked it down, and the wheels passing over it, it died soon after. The ass was fettered at the time and it was proved that the driver of the waggon was some little distance behind the horses. The learned Judge told the jury that though the act of the plaintiff, in leaving the donkey on the highway, so fettered as to prevent his getting out of the way of carriages travelling along it, might be illegal, still, if the proximate cause of the injury was attributable to the want of proper conduct on the part of the driver of the waggon, the action was maintainable against the defendant; and his Lordship directed them, if they thought that the accident might have been avoided by the exercise of ordinary care on the part of the driver, to find for the plaintiff. The jury found their verdict for the plaintiff, damages 40s.

Godson now moved for a new trial, on the ground of misdirection. The act of the plaintiff in turning the donkey into the public highway was an illegal one, and, as the injury arose principally from that act, the plaintiff was not entitled to compensation for that injury which, but for his own unlawful act, would never have occurred. [Parke, B. The declaration states that the ass was lawfully on the highway, and the defendant has not traversed that allegation; therefore it must be taken to be admitted.] The principle of law, as deducible from the cases is, that where an accident is the result of faults on both sides, neither party can maintain an action. Thus, in Butterfield v. Forrester, 11 East, 60, it was held that one who is injured by an obstruction on a highway, against which he fell, cannot maintain an action, if it appear that he was riding with great violence and want of ordinary care, without which he might have seen and avoided the obstruction. So, in Vennall v. Garner, 1 C. & M. 21, in case for running down a ship, it was held, that neither party can recover when both are in the wrong; and Bayley, B., there says, "I quite agree that if the mischief be the result of the combined negligence of the two, they must both remain in statu quo, and neither party can recover against the other." Here the plaintiff, by fettering the donkey, had prevented him from removing himself out of the way of accident; had his forefeet been free no accident would probably have happened. Pluckwell v. Wilson, 5 Car. & P. 375; Luxford v. Large, Ibid. 421, and Lynch v. Nurdin, 1 Ad. & E. (N. S.) 29; 4 P. & D. 672, are to the same effect.

LORD ABINGER, C. B. I am of opinion that there ought to be no rule in this case. The defendant has not denied that the ass was law-

fully in the highway, and therefore we must assume it to have been lawfully there; but even were it otherwise, it would have made no difference, for as the defendant might, by proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there.

PARKE, B. This subject was fully considered by this Court in the case of Bridge v. The Grand Junction Railway Company, 3 M. & W. 246, where, as appears to me, the correct rule is laid down concerning negligence, namely, that the negligence which is to preclude a plaintiff from recovering in an action of this nature, must be such as that he could, by ordinary care, have avoided the consequences of the defendant's negligence. I am reported to have said in that case, and I believe quite correctly, that "the rule of law is laid down with perfect correctness in the case of Butterfield v. Forrester, that, 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." In that case of Bridge v. Grand Junction Railway Company, there was a plea imputing negligence on both sides; here it is otherwise; and the judge simply told the jury, that the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway, was no answer to the action, unless the donkey's being there was the immediate cause of the injury; and that, if they were of opinion that it was caused by the fault of the defendant's servant in driving too fast or, which is the same thing, at a smartish pace, the mere fact of putting the ass upon the road would not bar the plaintiff of his action. All that is perfectly correct; for, although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road.

GURNEY, B., and ROLFE, B., concurred.

Rule refused.[16]

[16] Compare the earlier case of Payne v. Smith (1836) 4 Dana (Ky.) 497: Whilst driving his horse in a gig, in a brisk trot, in one of the streets of Lexington, the defendant, in passing through a narrow space of about ten feet in width, between a wagon and one of the side pavements, came in contact with the plaintiff's horse, which was walking alone across the street, rather obliquely towards the gig." A recovery for the plaintiff, suing in trespass, was permitted. "The testimony," said Robertson, C. J., "will not allow the inference that the violent collision was the consequence, altogether or chiefly, of the heedlessness, or voluntary perverseness of the plaintiff's horse; or that the injurious contact was unavoidable by the defendant; or that it would have occurred had he been reasonably vigilant and careful, or had he been driving with prudent speed."

TUFF v. WARMAN.

(In the Exchequer Chamber, 1858. 5 C. B. [N. S.] 573, 141 Reprint, 231, 116 R. R. 774.)

This was an appeal from a decision of the Court of Common Pleas discharging a rule for a new trial (moved on the ground of misdirection and that the verdict was against evidence) in an action against the defendant, a Trinity House pilot, for negligently navigating a steam vessel called the "Celt" in the river Thames, and running against and damaging the plaintiff's barge, the "Nancy."

The cause was tried before Willes, J., at the sittings in London after Hilary Term, 1857, when a verdict was found for the plaintiff.[17] The facts brought out in the evidence were substantially as follows:

At the time the collision took place, the "Nancy" was sailing down the river with a fair wind: and the "Celt" was steaming up the river. There were only two persons on board the "Nancy." One was occupied in washing the deck; the other was steering. The latter was in such a position that he could not see ahead (the sail being in the way) without stooping. He stated that he had seen the "Celt" when more than half a mile off, on the south side of the river, and when he so saw her there was no likelihood of her coming into collision with the barge; that he had not seen her again until just before the collision, when, he said, he ported his helm, but that it was then too late to alter the course of the barge; that, if he had seen the steamer a few minutes before, he should have ported his helm, but he should not have avoided the collision by porting his helm five minutes before; and that there was plenty of room on each side for the steamer to pass.

Two seamen who were in another vessel were called by the plaintiff, and stated that the "Celt" was about the middle of the river, but nearer to the north than to the south shore; that the "Celt" and the "Nancy" were for a quarter of a mile or more before the collision in a direct line; that the "Celt" did not port her helm; and that there was no difficulty in the steamer passing the "Nancy" on either side.

On the part of the defendant, witnesses were called to prove that the defendant was only one-fourth of the width of the river from the north bank of the river; that he was keeping a lookout and that he could not see whether any one was looking out on the barge; that, several minutes before the collision he directed the helm of the "Celt" to be ported, and that this direction was obeyed; that this was done in time to void the collision, had the "Nancy" at the same time ported her helm also, or if she had even kept on her course; but that her steersman had starboarded his helm instead of porting it.

In his summing up the learned Judge told the jury that the plaintiff was not entitled to recover if it was an accident, or if the plaintiff by his negligence had directly contributed to the accident; and that, if the injury was occasioned by the negligence of both parties, the plaintiff had no remedy: and he asked the jury whether they thought the absence of look-out was an act of negligence on the part of the plaintiff; and, if so, they would have to take it into consideration in deciding whether, notwithstanding that, the defendant was liable: and he further told them, that, if the parties on one vessel had a look-out and still persisted in a course which would inflict an injury,

[17] See Tuff v. Warman (1857) 2 C. B. N. S. 740, 140 Reprint, 607.

then they were liable, though there was no look-out on the other vessel, for that would not be the direct cause of the injury: and he referred to the case of Davies v. Mann, 10 M. & W. 546, by way of illustration. The learned Judge further told the jury, that, if they thought the accident had been partly caused by the plaintiff's own negligence, they should find for the defendant; but that, if they thought the barge was injured by the negligence of the defendant, and that the negligence of the plaintiff did not directly contribute thereto, the plaintiff was entitled to recover.

In the following Easter Term, a rule was obtained on the part of the defendant calling upon the plaintiff to show cause why there should not be a new trial, on the ground that the learned Judge had misdirected the jury, in this, that he ought to have told them, that, if the plaintiff by his negligence contributed to the occasioning of the accident, he could not recover, whether he contributed directly or indirectly; and that, even assuming negligence on the defendant's part, the plaintiff could not recover, if he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence; and that he should further have told the jury, that, if the plaintiff failed to comply with the statutory rule relative to porting his helm, whether his failure to do so arose from his not looking out or from other causes, and such failure either directly or indirectly contributed to the collision, he could not recover.

Cause was shown against this rule in Trinity Term, 1857, and the rule was discharged; but leave was given to the defendant to appeal, pursuant to the 35th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. (Vide 2 C. B. N. S. 740.)

If the Court should be of opinion that the objections made to the ruling of the learned Judge are unsustainable, the judgment below is to stand: if not, the judgment below is to be reversed, and a new trial ordered.

The case was argued on the 10th of May, 1858, before WIGHTMAN, J., ERLE, J., CROMPTON, J., WATSON, B., BRAMWELL, B., and CHANNELL, B.[18]

Cur. adv. vult.

WIGHTMAN, J., now delivered the judgment of the Court: It appears to us that the proper question for the jury in this case, and indeed in all others of the like kind, is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed 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,

[18] The statement of the case is abridged, and the arguments of counsel are omitted.

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 and 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.

This appears to be the result deducible from the opinion of the Judges in Butterfield v. Forrester, 11 East, 60, Bridge v. Grand Junction Railway Company, 3 M. & W. 246, Davies v. Mann, 10 M. & W. 548, and Dowell v. General Steam Navigation Company, 5 El. & Bl. 206.

In the present case the main objection taken to the summing-up was, that the judge left to the jury whether the plaintiff by his negligence "directly" contributed to the misfortune; and it was contended, for the defendant, that, whether he directly or indirectly contributed, was immaterial, if he contributed to it by his negligence at all. But the direction to the jury must have reference to the evidence in the case; and, taking the whole summing-up together, in connection with the evidence, we do not think that the jury could have been misled by the use of the word "directly." The learned Judge told the jury, that, if the absence of a look-out was negligence on the part of the plaintiff, still, if the defendant also had a look-out, and nevertheless persisted in a course that would inflict an injury, he would be liable, though the plaintiff had no look-out; for that neglect of the plaintiff would not be the direct cause of the injury, that is to say, would not be a cause without which the injury would not have happened.

In this, which seems to be the obvious sense in which the word "direct" was used, we do not think there was any misdirection; and, in other respects, the summing-up does not appear to be objectionable, according to the rules to be adduced from the authorities referred to.

Upon the whole, then, we are of opinion that the judgment should be affirmed.[19]

Judgment affirmed.[20]

[19] "The judgment of the Exchequer Chamber in Tuff v. Warman has been accepted, now for half a century, in England and I think we may say in most Common Law jurisdictions, as the leading authority in actions for negligence where there is evidence that both parties have contributed to the result by successive or alternate failures to act with due care and caution. In such a case the question is which of them might last have avoided the harmful result by the exercise of reasonable care. It has been justly said that the rule in Tuff v. Warman is not in terms applicable to cases where the negligence of the plaintiff and the defendant is not successive but simultaneous. There

[20] Compare the distinction taken in Ketch Frances v. Steamship Highland Loch, [1912] A. C. 312, where the defendants "were placed in a position in which they had to take one of two risks."

RADLEY et al. v. LONDON & N. W. RY. CO.

(House of Lords, 1876. 1 App. Cas. 754.)

This was an appeal against a decision of the Court of Exchequer Chamber.[21] The appellants were the plaintiffs in an action brought in the Court of Exchequer, in which they claimed damages for the destruction of a bridge occasioned, as they alleged, by the negligence of the defendants' servants. The cause was tried at the Liverpool Summer Assizes, 1873, before Brett, J., when the following facts were proved:

The plaintiffs were colliery proprietors owning and working a colliery close to a branch of the defendant's railway called the Parr Branch. In connection with the Parr Branch there were certain sidings on the land of the plaintiffs, and belonging to them, made by them for convenience of transferring and carrying coal raised from their colliery to and by the defendant's line of railway. Upon these sidings of the plaintiffs no engine of the defendants was accustomed to run throughout, and they were used solely, as far as the defendants were concerned, for placing therein returned empty waggons by the defendants and removing waggons therefrom when filled with coal. Waggons once left on these sidings by the defendants were entirely within the control of the plaintiffs. The defendants were accustomed to bring empty returned waggons along the Parr Branch at any hour by day or night, and without notice to the plaintiffs to shunt such waggons onto the plaintiffs sidings, where they were left under the plaintiffs' control. Part of the sidings was crossed by a bridge used as a tramway, about eight feet in height from the level of the rails, on which rested part of the head gearing and supports necessary for the working of the plaintiffs' colliery. An empty waggon, or one loaded in an ordinary way with coal, could pass safely and clearly under this bridge, and waggons were occasionally shunted under it by the defendants, but when they did so it was complained of by the plaintiffs, on the ground that waggons so left blocked up a public highway called Fleet Lane which crossed the siding between the railway and the bridge.

At the plaintiffs' colliery it was the ordinary custom to leave off work at 12:30 p. m. on Saturdays and to resume at 6 a. m. on Mondays. About 2:30 p. m. on Saturday, the 25th of January, 1873, the defendants brought three or four empty waggons of the plaintiffs', together with a disabled waggon of the plaintiffs' loaded upon another waggon, and marked "home for repairs," along the Parr Branch, and shunted them onto plaintiffs' siding, and left them there. The height of the waggon, with the disabled waggon loaded on it, was about eleven feet in all, too high to pass under the bridge before men-

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a simpler rule will suffice, namely, that if the plaintiff could have avoided the accident by the use of ordinary care he cannot recover. See the learned and judicious remarks of an anonymous reviewer in the Law Quarterly Review, v. 87. This distinction was taken as long ago as 1869. Murphy v. Deane (1869) 101 Mass. 455, 3 Am. Rep. 390. That judgment is not wholly satisfying to English readers, for it insists on the doctrine (not accepted by the majority of American jurisdictions) that the plaintiff has to prove, as part of his own case, that he was in the exercise of due care. But on the facts it would seem that the plaintiff recklessly exposed herself to an obvious risk, that the instruction given to the jury was substantially right, and that an instruction in the terms of Tuff v. Warman, as asked for on the plaintiff's behalf, would probably have made no difference." Sir Frederick Pollock, 116 R. R. iv, v.

[21] For the report of the case in the Exchequer Chamber, see Radley v. London & North Western Ry. Co. (1875) L. R. 10 Ex. 100. The report of the case in the Exchequer will be found in Radley v. London & North Western Ry. Co. (1874) L. R. 9 Ex. 71.

tioned. The disabled waggon loaded upon the other, and the two or three others, were known to a person left in charge of the plaintiffs' works during the absence of the workmen at 2:30 on Saturday, the 25th of January, to be on the siding, and were left standing there during Saturday afternoon and up till and during Sunday night, the 26th, and it was known to him that a number of waggons would arrive during that night.

On the night of Sunday, about 12:30, the defendants brought up on their line a train of forty-eight empty waggons of the plaintiffs', and proceeded to shunt them onto plaintiffs' siding: but the night being very dark, the defendants' servants engaged in shunting did not notice that the loaded-up waggon was different from any other waggon in height. The train of waggons was slowly backed along the siding, and coming against the waggons which had been left by the defendants on the previous Saturday, pushed them over Fleet Lane towards the bridge, so as to cause the loaded-up waggon to strike against the bridge, which checked the further progress of the train. On touching the bridge the engine-driver felt an obstruction, and not having got all the waggons off the main line, which it was his duty to do, and believing the obstruction to be caused by a break, he, to use his own words, drew back the engine and gave another jam-up; by this he gave such a momentum to the engine that the loaded-up waggon knocked down and carried away the bridge and head gearing, which was the accident complained of by plaintiffs.

A guard in charge of the empty waggons was, whilst they were being shunted as above described, seated on one of the waggons about the middle of the train. The plaintiffs had also a siding on the east side of the defendants' line, on which empty waggons were from time to time shunted by the defendants, and on which the waggons brought on the Sunday night might have been put.

At the trial, the defendants contended that there was no negligence on their part, and even if there was, that there was contributory negligence on the plaintiffs' part, inasmuch as, knowing that waggons might arrive at any hour of the day or night, and that in fact they were expected to arrive on the night of the 26th, it was their duty to have removed the loaded-up waggon and to have the sidings clear; the plaintiffs, on the other hand, contended that there was no such duty on their part, and that there was no evidence of contributory negligence.[22]

At the trial, Mr. Justice Brett told the jurors that:

"You must be satisfied that the plaintiffs' servants did not do anything which persons of ordinary care, under the circumstances, would not do, or that they omitted to do something which persons of ordinary care would do. * * * It is for you to say entirely as to both points, but the law is this, the plaintiffs must have satisfied you that this happened by the negligence of the defendants' servants, and without any contributory negligence of their own; in other words, that it was solely by the negligence of the defendants' servants. If you think it was, then your verdict will be for the plaintiffs. If you think it was not solely by the negligence of the defendants' servants your verdict must be for the defendants."

The jurors having, on this direction, stated that they thought there was contributory negligence on the part of the plaintiffs, the learned

[22] The statement of the case to this point is from the report in the Exchequer Chamber, L. R. 10 Ex. 100–102. The facts are stated also, but less explicitly, in L. R. 9 Ex. 71, and in 1 App. Cas. 754 (1876).

Judge directed that the verdict should be entered for the defendants, but reserved leave for the plaintiffs to move. A rule having been obtained for a new trial, it was, after argument made absolute. On appeal to the Exchequer Chamber, the decision of the Exchequer was reversed. This appeal to the House of Lords was then brought.[23]

LORD PENZANCE. The remaining question is whether the learned Judge properly directed the jury in point of law. The law in these cases of negligence is, as was said in the Court of Exchequer Chamber, perfectly well settled and beyond dispute.

The first proposition is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident.

But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him. This proposition, as one of law, cannot be questioned. It was decided in the case of Davies v. Mann, 10 M. & W. 546, supported in that of Tuff v. Warman, 5 C. B. (N. S.) 573, 27 L. J. C. P. 322, and other cases, and has been universally applied in cases of this character without question.

The only point for consideration, therefore, is whether the learned Judge properly presented it to the mind of the jury.

It seems impossible to say that he did so. At the beginning of his summing-up he laid down the following as the propositions of law which governed the case: It is for the plaintiffs to satisfy you that this accident happened through the negligence of the defendants' servants, and as between them and the defendants, that it was solely through the negligence of the defendants' servants. They must satisfy you that it was solely by the negligence of the defendants' servants, or, in other words, that there was no negligence on the part of their servants contributing to the accident; so that, if you think that both sides were negligent, so as to contribute to the accident, then the plaintiffs cannot recover.

This language is perfectly plain and perfectly unqualified, and in case the jurors thought there was any contributory negligence on the part of the plaintiffs' servant, they could not, without disregarding the direction of the learned Judge, have found in the plaintiffs' favor, however negligent the defendants had been or however easily they might with ordinary care have avoided any accident at all.

The learned Judge then went on to describe to the jury what it was that might properly be considered to constitute negligence, first

[23] The arguments are omitted.

in the conduct of the defendants, and then in the conduct of the plaintiffs; and having done this, he again reverted to the governing propositions of law, as follows: "There seem to be two views. It is for you to say entirely as to both points. But the law is this, the plaintiffs must have satisfied you that this happened by the negligence of the defendants' servants, and without any contributory negligence of their own; in other words, that it was solely by the negligence of the defendants' servants. If you think it was, then your verdict will be for the plaintiffs. If you think it was not solely by the negligence of the defendants' servants, your verdict must be for the defendants."

This, again, is entirely without qualification, and the undoubted meaning of it is, that if there was any contributory negligence on the part of the plaintiffs, they could in no case recover. Such a statement of the law is contrary to the doctrine established in the case of Davies v. Mann, 10 M. & W. 546, and the other cases above alluded to, and in no part of the summing-up is that doctrine anywhere to be found. The learned counsel were unable to point out any passage addressed to it.

It is true that in part of his summing-up the learned Judge pointed attention to the conduct of the engine driver, in determining to force his way by violence through the obstruction, as fit to be considered by the jury on the question of negligence; but he failed to add that if they thought the engine driver might at this stage of the matter by ordinary care have avoided all accident, any previous negligence of the plaintiffs would not preclude them from recovering.

In point of fact the evidence was strong to shew that this was the immediate cause of the accident, and the jury might well think that ordinary care and diligence on the part of the engine driver would, notwithstanding any previous negligence of the plaintiffs in leaving the loaded-up truck on the line, have made the accident impossible. This substantial defect of the learned Judge's charge is that that question was never put to the jury.

On this point, therefore, I propose to move that your Lordships should reverse the decision of the Exchequer Chamber, and direct a new trial.[24]

Judgment of the Court of Exchequer Chamber reversed.

Judgment of the Court of Exchequer restored, and a new trial ordered, with costs.

[24] The Lord Chancellor (Lord Cairns), "concurring with every word" of the opinion expressed by Lord Penzance, did not think it necessary that he should do more than say that he hoped their Lordships would agree to the motion which Lord Penzance had proposed. Lord Gordon concurred in the motion. Lord Blackburn agreed in the result.

BENNICHSEN v. MARKET ST. RY. CO.

(Supreme Court of California, 1906. 149 Cal. 18, 84 Pac. 420.)

Ruberta Bennichsen, by her guardian ad litem, sued to recover damages for personal injuries alleged to have been caused by being struck by a street car of the defendant. Verdict and judgment for the plaintiff. Defendant appeals from an order denying its motion for a new trial.

McFARLAND, J. The important features of the case are these: At the time of the alleged injuries defendant was operating a double track electric street railroad on Sansome street in San Francisco, the street running north and south. Defendant also was operating a similar street railroad on Broadway street, which runs east and west, crossing Sansome street. Plaintiff lived with her parents in a house on the southeast corner of Sansome and Broadway, where the two railroads cross each other. She had been going to school for about four years before the accident by which she was injured, and in going to and from school, doing errands, etc., she had been in the habit almost daily of crossing said railroads. She was at the time of the accident almost nine years old—eight years eight months and some days. Her mother had frequently cautioned her to be careful in crossing the railroads. The plaintiff herself testified that before the accident when crossing the railroad she would look to see if there was any car coming so that she would not get hurt, and that if she saw a car coming she would wait on the sidewalk until it had passed. On the day of the accident she undertook to cross Sansome street between Broadway and Pacific street, which is the next street south of and parallel with Broadway, when the car was close at hand going north toward Broadway, and was struck by it, and injured. She did not look to see if the car was coming. The evidence of defendant was to the point that she ran against the side of the car, and was thrown under it, although the jury may have been justified in finding that she was struck by the front end of the car. Witnesses for plaintiff testified that when they saw her just before the accident she was from 8 to 10 feet from the car. But under any view of the evidence on this point it is clear beyond doubt that if she had been a person of mature age she would have been guilty of contributory negligence, negligence which contributed proximately and directly to her injuries. And we need not inquire whether the jury would have been justified, under all the evidence on the point, in finding that on account of her age, no negligence could be attributed to her, because the case was tried on the theory, and the jury were instructed, that even though she, or her parents, were guilty of contributory negligence, still she was entitled to recover if "by reason of negligence on his part the motorman failed to avoid the accident," and "if the defendant's employés could have avoided the injury by the exercise of ordinary care."

The case, therefore, was tried upon the theory that there was evidence to bring it within the cases which hold that although the person injured put himself by his own negligence in a place of danger, if the employés in charge of the train discovered his danger in time to prevent injury by the exercise of ordinary care and did not do so, then, notwithstanding the contributory negligence of the injured person, he may recover. But there was no such evidence in the case at bar. There is no pretense that the motorman saw the plaintiff at all at the time of the accident until after it had occurred; on the other hand, it is shown clearly that he did not. The motorman testified that he did not see her, and his testimony is not only uncontradicted, but is confirmed by testimony of the plaintiff. He said that he was looking ahead on Sansome street, although somewhat to the left or west in order to watch for a car that might be coming down Broadway, but that he had Sansome street in full view, and did not see plaintiff until she had run into the side of the car. And to confirm the fact that he did not see her one of plaintiff's main witnesses testified that at the time of the accident the motorman "was looking behind" and that "his face was back, he was looking back, he was not looking ahead." And, indeed, plaintiff's whole case is argued upon the theory that the negligence of the motorman consisted in his not looking ahead, and that this is the negligence which entitles plaintiff to recover, even though she was guilty of contributory negligence. But no case has gone that far; and to go that far would be practically to destroy the whole doctrine of contributory negligence. There was in this case, therefore, no evidence to justify the jury in finding that there was such negligence on the part of defendant's employés as entitled plaintiff to recover notwithstanding her contributory negligence. Of course, contributory negligence implies some negligence on the part of the defendant; and the general rule is that a plaintiff complaining of personal injuries caused by a train or car, who was himself guilty of negligence, which contributed proximately and directly to the injuries, cannot recover, although the defendant was also guilty of negligence. There are exceptions to the rule, however, but they embrace only those cases where a person is by his own negligence in a dangerous situation and is discovered in that position by those in the management of the approaching train in time to prevent injury by the exercise of ordinary care. In the earlier cases the conduct of those in charge of a train who, seeing one in a dangerous position, made no effort to avoid injuring him when it could have been easily avoided, is characterized as "willful and wanton." The cases, however, all hold that the discovery of such a person in a dangerous position in time to prevent injury by the exercise of ordinary care is necessary to constitute an exception to the rule that one guilty of contributory negligence cannot recover. It is not necessary to review the authorities cited by respondent other than the case of Lee v. Market Street Railway Co., 135 Cal. 293, 67 Pac. 765, for that is the case

most favorable to respondent's contention. But in the Lee Case this court, after referring to certain evidence, said (italics ours): "Here, then, was enough to warrant the submission to the jury of the question whether or not the defendant exercised ordinary care *after the discovery of plaintiff's situation of peril.* If it did not, then notwithstanding the negligence of plaintiff, it was liable. The verdict of the jury is a finding to the effect that they did not believe that defendant's employés exercised proper care *after discovery of plaintiff's situation.*" And so that case was decided upon the theory that defendant failed to exercise ordinary care to prevent the accident after discovery of plaintiff's perilous situation. It has been expressly held that a case like the one at bar can be taken out of the doctrine of contributory negligence only where the defendant had actual knowledge of plaintiff's perilous situation. In Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85, this court, speaking through Angellotti, J., after quoting from Beach on Contributory Negligence, said "It is, of course, true, as urged by defendant, that it is essential to such liability that the defendant did actually know of the danger, and that there is no such liability where he does not know of the peril of the injured party, but would have discovered the same but for remissness on his part." In Herbert v. Southern Pacific Co., 121 Cal. 232, 53 Pac. 652, Temple, J., speaking for the court, said: "The case is not within the rule laid down in Esrey v. Southern Pacific Co., 103 Cal. 541, 37 Pac. 500. Doubtless, notwithstanding the negligence of a plaintiff has put him in peril, yet if his danger is perceived by the defendant in time, so that by the exercise of ordinary diligence on his part injury can be avoided, the defendant will be held for the injury. But that is based upon the fact that a defendant did actually know of the danger—not upon the proposition that he would have discovered the peril of the plaintiff but for remissness on his part. Under this rule, a defendant is not liable because he ought to have known." * * *

The order appealed from is reversed, and the cause remanded for a new trial.[25]

NICOL v. OREGON–WASHINGTON R. & NAVIGATION CO.

(Supreme Court of Washington, 1912. 71 Wash. 409, 128 Pac. 628, 43 L. R. A. [N. S.] 174.)

Action by Nicol against the Oregon-Washington Railroad & Navigation Company. There was a judgment for the plaintiff, and the defendant appeals.

GOSE, J. This is an action for damages against the defendant, a common carrier, for an alleged negligent destruction of plaintiff's

[25] Part of the opinion is omitted.

automobile at a country crossing. The case was tried to the court. Findings were made in favor of plaintiff, and a judgment was entered thereon, from which the defendant has appealed.

The negligence charged is that, while the respondent was in the act of driving his automobile over the railroad crossing in a public highway, the machine became stalled crosswise of the track, the engine of the machine stopped running, the respondent was unable to start it or to move the machine off the track, and "the engineer and fireman in charge of defendant's said train saw the plaintiff before the train got to him, and saw his automobile standing upon the crossing in sufficient time to have stopped said train and to have avoided colliding with and destroying plaintiff's automobile." The appellant joined issue on the charge of negligence, and pleaded that the collision resulted from the negligence of the respondent. The collision occurred about 1 o'clock in the morning.

The court did not find, and the evidence does not show, that the engineer actually saw the machine. The court's findings in this respect are: That, when the respondent found that he could not extricate his machine, he ran north along the track and right of way toward the approaching train, a distance of 650 or 700 feet, lighting matches, waving his arms, and shouting to signal the engineer in charge of the train, and that, had the engineer been keeping a proper lookout ahead, he would have seen the respondent, who while running down the straight track was in plain view of the engineer in the rays of the headlight of the engine for at least 1,000 feet before the engine passed him, and would have seen his signals in time to have stopped the train before striking the machine.

The first point urged is that there is a variance between the pleadings and the evidence, and that the findings are not within the issues. The variance is immaterial. Rem. & Bal. Code, § 1752; Irby v. Phillips, 40 Wash. 618, 82 Pac. 931; Richardson v. Moore, 30 Wash. 406, 71 Pac. 18.

The further consideration of the case necessitates a statement of the essential facts. The train which struck the automobile was a passenger train composed of nine cars, and was traveling from Tacoma in a southerly direction at a speed of 35 to 38 miles an hour. The engine was equipped with a standard electric headlight, burning brightly and lighting the track so that an object thereon could be seen on a bright night a distance varyingly estimated by the locomotive engineers at from 1,000 to 1,800 feet. The track has a one-degree curve for a distance of 200 feet immediately north of the crossing where the accident happened. From there northward it runs straight for a distance of 4,800 feet. The respondent says that he ran north towards the approaching train, following the center of the track, for about 500 or 600 feet, striking matches and waving his arms, and that he then stepped to the outside of the track and continued running along it a distance of 100 to 200 feet, giving the same signals, at which point he

was passed by the train. The engineer says that he passed him about 500 feet north of the crossing; that he did not see him until the headlight was opposite him; that he then applied his air, but did not apply the emergency brakes; and that he stopped the train in 1,000 feet. The engineer admitted that he knew that the track was crossed at grade by a public highway, at the point where the collision happened. The respondent was returning to Tacoma from the country club, at American Lake, in his machine, the morning of the accident. He was traveling north on the west side of the railroad track. He got on the wrong road, crossed the railroad track and, discovering his mistake, turned and started to recross the track, got off the planking, which was 16 feet wide over the track, and got his machine stalled crosswise of the track near the cattle guards, as before stated. He says that the night was bright, and that the stars were shining, and that all the lights upon his machine were lighted and in good condition. These facts clearly establish his negligence. Moore v. Great Northern Ry. Co., 58 Wash. 1, 107 Pac. 852, 28 L. R. A. (N. S.) 410. The principal fact in dispute was as to whether the night was clear or foggy. The respondent's witnesses asserted the former to be the fact, whilst the appellant's witnesses insisted that the latter was the fact. The court found that "the night was clear, there being no fog to any extent or other atmospheric difficulty to interfere with the engineer's view." We accept the fact as found by the court.

The respondent contends that, concerning his negligence, the negligence had ceased; that appellant owed the duty of keeping a lookout; that, had the engineer exercised reasonable care, he would have seen the respondent and his signals in time to have avoided the collision; and that the appellant is liable under the doctrine of "last clear chance." On the other hand, the appellant earnestly insists that it owed no duty to the respondent, except to not willfully injure him or his property after *actually* discovering his peril. We think the respondent has the correct view. His machine was within the public highway; he was in no sense a trespasser, although without the traveled portion of the road. The appellant knew of the presence of the highway, knew that it crossed the track at grade, and knew that it was traveled by the public. Moreover, it was the duty of the engineer to exercise reasonable care, and had he done so under his own testimony, assuming that the night was clear, he would have seen the respondent and his signals a distance of 1,000 feet or more. This would have given him at least 1,500 feet in which to stop the train, according to his own statement. He testified that he was keeping a lookout ahead, but that the presence of the fog obscured his vision. One of the appellant's witnesses, a locomotive engineer, testified that the engineer could see a man ahead a distance of 1,200 feet on a clear night. In failing to see the respondent and heed his signals, the engineer was clearly guilty of negligence. The act of a man running along a right of way at 1 o'clock in the morning, striking matches and

waving his arms, is a circumstance that ought to attract the attention of a prudent engineer, and it was notice that there was danger ahead.

The doctrine of last clear chance is applied perhaps most frequently to cases where the plaintiff's negligence has terminated, and where the defendant thereafter, in the exercise of reasonable care and owing a duty to exercise it, should have discovered the peril in time to have prevented an injury. It has also often been applied where it would be apparent to one in control of a dangerous agency, if exercising reasonable vigilance, that a traveler is unconscious of his danger or so situated as to be incapable of self-protection, and in such cases, if the one controlling the agency could have averted the danger by exercising reasonable care and failed to do so, liability follows. It is based upon the principle that the negligence of the one is remote, and that the negligence of the other is the proximate and efficient cause of the catastrophe; he having the last clear opportunity of preventing it. * * *[26]

The engineer testified that he stopped the train, after seeing the respondent, in a distance of 1,000 feet, and that he could have made an emergency stop in 700 or 900 feet. The locomotive engineers who testified for the respondent said that the particular train could have been stopped in an emergency in a distance of 600 feet. The engineer had a right to exercise his best judgment as to whether the conditions which confronted him demanded an emergency stop (his first and highest duty being owed to the passengers), and the appellant could not be held liable for an error of judgment made under such circumstances. We place the liability upon the ground that (as the court found) the respondent while running down the "straight track" was in plain view of the engineer, in the rays of the headlight, for at least 1,000 feet before the engine passed him. This being true, if the engineer had been keeping a proper lookout—and all the appellant's expert witnesses testified that all prudent engineers keep a constant lookout ahead—he would have seen the respondent and would have seen his signals, and in view of the lateness of the hour and the proximity of the highway crossing, it was his duty to heed the signals. We have found no case involving facts similar to these present in this case, but we think the case readily accommodates it-

[26] In the omitted portion of the opinion Mr. Justice Gose referred to or quoted from the following authorities: Bullock v. Wilmington & W. R. Co. (1890) 105 N. C. 180, 10 S. E. 988; Baltimore & O. R. Co. v. Anderson (1898) 85 Fed. 413, 29 C. C. A. 235; Southern Ry. Co. v. Fisk (1908) 159 Fed. 373, 86 C. C. A. 373; 3 Elliott on Railroads (2d Ed.) 1115; Grand Trunk Ry. Co. v. Ives (1892) 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; Turnbull v. New Orleans & C. R. Co. (1903) 120 Fed. 783, 57 C. C. A. 151; Inland & Seaboard C. Co. v. Tolson (1891) 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; Southern Ry. Co. v. Bailey (1910) 110 Va. 833, 67 S. E. 365, 27 L. R. A. (N. S.) 379; Klockenbrink v. St. Louis, etc., R. Co. (1899) 81 Mo. App. 351; Bergman v. St. Louis, etc., Ry. Co. (1886) 88 Mo. 678, 1 S. W. 384; Lloyd v. St. Louis, etc., Ry. Co. (1895) 128 Mo. 595, 29 S. W. 153, 31 S. W. 110.

self to the principles announced in the authorities which we have reviewed. * * *

We think the judgment is right, and it is affirmed.

MOUNT, C. J., and CROW, PARKER, and CHADWICK, JJ., concur.

BLODGETT v. CENTRAL VERMONT RY. CO.

(Supreme Court of Vermont, 1909. 82 Vt. 269, 73 Atl. 590.)

Action by Blodgett, as administrator, to recover for the death of his intestate through the alleged negligence of the defendant. Judgment for the plaintiff and the defendant excepts.

WATSON, J. At the close of the plaintiff's evidence, the defendant moved for a verdict on the grounds (1) that there was no evidence tending to show negligence on the part of the defendant; and (2) that the undisputed and unconflicting evidence showed contributory negligence on the part of the intestate. The case is here on exception to the overruling of this motion. The facts herein stated appear from or are supported by the evidence.

The intestate, a man about 72 years of age, while driving across defendant's railroad track at a highway crossing at West Berlin in the afternoon of May 18, 1905, was struck by defendant's engine drawing the mail train, so called, north-bound, and instantly killed. The train was running at about schedule rate of speed, 45 miles an hour. The depot at that place is a building about 25 feet in length and a little less than that in width. It stands 62 feet south of the crossing where the intestate was killed, wholly on the east side of the main track and about 9 feet from the east rail. There is a platform toward the track extending north and south beyond the building, the whole length of which is 134 feet. The northerly end of this platform comes to the highway. West Berlin is not a regular stopping place for any passenger trains. It is a flag station for some trains, but the one in question never stops there except to leave passengers coming from beyond Springfield, which happens only two or three times a year. * * *

The intestate was a peddler driving a single horse hitched to an open wagon with a small box containing his goods fitted into the rear end of the wagon body. East of the crossing in question the highway over which he was traveling is a gradual ascent to the railroad. At a distance of 328 feet east of the east rail a person traveling over the highway toward the crossing has a plain view of the railroad track from the depot southerly some 1500 or 1600 feet. The track there is elevated considerably above the level of the land, and is in plain view for the whole distance to the crossing, except as the vision is obstructed by the depot. Going westerly from a point in the middle of the road 41 feet east of the east rail to the crossing,

the view of the track southerly is thus obstructed until within 24 feet of the east rail. There the track can be seen past the westerly end of the building for a distance of 115 feet. At 20 feet from the east rail the track is visible for a distance of 160½ feet; and, when within 16 feet, the track is in full view practically as far southerly as it is from any place hereinbefore named. It was conceded by the plaintiff in argument that all signals required by law and more were given on the train. When the engine was about half way between the whistling post for the crossing and the station, the engineer, looking beyond the depot on its easterly side, saw the intestate on the highway driving toward the railroad. Thereupon he sounded a second whistle for the crossing. The team about the same time went behind the depot, and was seen no more by the engineer until it was on the crossing in front of the engine. It was argued that the engineer should have seen the team after it came in view on the westerly side of the depot before it went on the crossing and in season to have prevented the accident, and that a failure so to do is a circumstance from which a jury may infer negligence. We will assume without deciding this to be so, and pass to the question of contributory negligence.

The undisputed evidence shows that the intestate's senses of sight and hearing were good; that he was in good health and very active; that the day of the accident was warm and pleasant, and there was nothing over his ears to prevent him from hearing; that the horse he was driving was 12 or 13 years old, very quiet, easy to manage, and not easily frightened by a train of cars or anything; and that during the last six or seven years of his life he averaged to drive over the crossing in question once in four or five weeks, by reason of which he was acquainted with the railroad in that vicinity, also with the crossing and its surroundings. The horse was walking at a fair gait in the middle of the road as it went past the depot and approached the crossing. The intestate was looking at the horse, and did not look up the track southerly until the horse was partly on the crossing. When the horse was some five or ten feet from the track, two witnesses who were on the opposite side of the track and a short distance away saw the intestate driving toward the crossing, and hallooed to him, saying, "The cars are coming," at the same time throwing up their hands to attract his attention, but the noise from the train was such that the witnesses were not sure that he heard their voices, nor did they know that he saw their demonstrations. The point where the intestate's view was first obstructed by the depot is about 41 feet east of the east rail, and from there in the middle of the traveled road the track is visible 600 feet southerly, and a moving train of cars can be seen 1,000 feet further. When the intestate was 16 feet from the east rail, the approaching train must have been plainly in view, and the horse yet a distance of 4 feet from

the nearest rail. A stop might have been made at this place of safety until the train had passed. But, instead of thus avoiding the danger, the intestate without making vigilant use of his senses of sight and hearing recklessly drove on the crossing in front of the train. The rule making it the duty of a traveler nearing a railroad crossing to look and listen for approaching trains, and to make such vigilant use of his sight and hearing in so doing as a careful and prudent man would make in the same circumstances, was fully laid down in Manley v. Delaware & Hudson Canal Co., 69 Vt. 101, 37 Atl. 279, also in Carter v. Central Vermont R. R. Co., 72 Vt. 190, 47 Atl. 797, and need not be here repeated. In the latter case it is said that if by the vigilant use of his eyes and ears the plaintiff might have discovered and avoided the danger and omitted such vigilance, he was guilty of contributory negligence, and that he was chargeable with such knowledge of the approach of the train as he might have obtained by the exercise of that degree of care, which in the circumstances of danger he was bound to use. There seems to be no escape from the conclusion that the intestate was guilty of negligence which contributed to the accident and precludes a recovery by the plaintiff, unless the evidence tends to show the defendant guilty of such subsequent negligence as in the circumstances renders it liable.

It is urged by the plaintiff that, when the intestate's horse first came in view on the westerly side of the depot, it was visible to the engineer, and would have been seen by him had he been in the exercise of requisite care, before the intestate, sitting 12 feet back from the horse's head, could look past the depot and see the approaching train; that consequently the defendant had the last clear chance to avoid the collision; and that, since the engineer was negligent in failing thus to see the team, this negligence was the proximate cause of the accident, and the negligence on the part of the intestate in driving on the crossing was remote, and will not defeat a recovery. Again assuming that the defendant was negligent in not thus seeing the intestate before he drove on the crossing, yet it does not follow that the last clear chance was with the defendant. On the contrary, the undisputed testimony of the witnesses who saw the accident shows that the intestate had an equal opportunity to avoid a collision. We have already noted the intestate's negligence in driving on the track without first making proper use of his senses to ascertain whether there was approaching danger. So far as the evidence shows, he did not look to see whether a train was coming or not until his horse was just stepping on the crossing, or its forward feet were on the plank of the crossing. The horse was still walking, was undisturbed by the noise of the train, and was under the complete control of the intestate. On seeing the train, the intestate at first partly stopped the horse, or pulled it back, as though to back up, and then urged it forward. At that time the accident could have been prevented by backing the horse three or four feet off the crossing to a place of

safety. This the intestate had time to do, for, in fact, the team subsequently moved forward at a walk far enough to place the horse entirely over the crossing before the collision, by reason whereof it escaped injury. Thus it clearly appears that the intestate's negligence was continuous to the time when the engineer discovered the team on the track, after which everything possible was done by the defendant's servants in the management of the train to prevent a collision. So, even though as assumed the engineer was negligent in not seeing the team after it was visible on the westerly side of the depot before the time when it was no longer possible for him to avoid the accident, the intestate's negligence was of the same degree and concurrent during all of the same time, to say nothing of his negligence later, and no recovery can be had. In Trow v. Vt. Central R. Co., 24 Vt. 487, 58 Am. Dec. 191, upon examination of authorities, it was held that when there has been mutual negligence, and the negligence of each party was the proximate cause of the injury, no action can be sustained, and this is the established doctrine.

It follows that the motion for a verdict should have been granted. Judgment reversed, and judgment for the defendant to recover its costs.[27]

[27] Part of the opinion is omitted.

Compare: Quinn v. Chicago, etc., R. Co. (1903) 162 Ind. 442, 70 N. E. 526: (Action to recover for the death of the plaintiff's intestate through the alleged negligence of the defendant railway company. About 10 o'clock in the forenoon of a clear day the plaintiff's intestate, walking north on Third street, approached the public grade crossing of the defendant's tracks. He was acquainted with this crossing. He possessed ordinary intelligence. His eyesight and hearing were good. When he reached the crossing, a through freight train on the main track was moving toward Third street. When he was from sixty to eighty feet south of the side track, defendant's freight engine, with two loaded cars, went east on the side track, and when he reached the crossing of Third street, this engine and these cars were standing still about 260 feet east of Third street. The east end of that portion of the train on the side track which had been cut off from the two cars was about 600 feet westward from the crossing. The decedent stopped near the south rail of the side track, and remained on or near the track about two minutes, watching the through freight train on the main track, which passed in front of him, and only a few feet away, at a speed of from eight to ten miles per hour. No obstruction prevented him from seeing the engine and two cars on the side track, and if he had looked eastward he could have seen them when they were standing still, or after they started westward, when they were approaching him. While decedent's attention was directed to the train on the main track, the local freight engine and two cars were run back, westward, at a speed of about four miles per hour, and struck the decedent while he was standing on or very near the side track. No signal of the starting or approach of the engine and cars on the side track was given and no watch was kept by the train men as they approached the crossing of Third street. The question as framed for the court was this: "Whether there can be a recovery when a foot traveler on a public street, approaching a railroad crossing where there are two tracks, sees a train standing motionless on the track nearest him, and goes upon or near that track, and stands there, awaiting the passing of a train upon the further track, to which his attention is directed, and while so standing, with his attention directed to the passing train, is struck by the train upon the first track backing noiselessly down upon him, without signal or warning of any kind being given him of its approach." This court's answer was as follows: "In the present

EVANSVILLE & S. I. TRACTION CO. v. SPIEGEL.

(Appellate Court of Indiana, 1911. 49 Ind. App. 412, 94 N. E. 718.)

This is an action brought against the Traction Company to recover damages for the death of the plaintiff's minor son, Carl Spiegel. His death is alleged to have been caused by the negligence of the defendant in operating a car on Main street, in Evansville. There was a general denial, with a verdict for the plaintiff. From a judgment on this verdict for $1,363 the defendant appeals.

LAIRY, J. * * * Under the issues formed by the pleadings in this case, evidence might have been introduced that would bring the case within the operation of the doctrine known as the "last clear chance." This doctrine is clearly stated by a writer in 2 Law Quarterly Review, p. 507, as follows: "The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it." This doctrine has been frequently recognized and applied by our courts. Grass v. Fort Wayne, etc., Traction Co. (1908) 42 Ind. App. 395, 81 N. E. 514; Indianapolis St. R. Co. v. Schmidt (1905) 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478; Citizens' St. R. Co. v. Hamer (1902) 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778; Krenzer v. Pittsburgh, etc., R. Co. (1898) 151 Ind. 587, 43 N. E. 649, 52 N. E. 220, 68 Am. St. Rep. 252; Indianapolis, etc., R. Co. v. Pitzer (1887) 109 Ind. 179, 6 N. E. 310, 10 N. E. 70, 58 Am. St. Rep. 387; Indianapolis St. R. Co. v. Bolin (1906) 39 Ind. App. 169, 78 N. E. 210.

case the tracks of the appellee were straight, and the view from the point where the decedent stood was unobstructed for more than three hundred feet eastward. While standing still, the western end of the train which afterwards struck the decedent was about two hundred fifty feet eastward from him, and in plain view all the time. When it started toward him, at a speed of four or five miles per hour, if the decedent had looked in its direction, he must have seen it before it reached Third street, and ample time would have been afforded him to get off the track. The circumstance that his attention was directed to a train passing on the north track constituted no excuse for his failure to observe the train approaching him on the south track, nor for his negligence in standing upon the south track or very near to it. If the movement of the train on the north track filled the air with dust thereby obscuring the view up and down the south track, this was but an additional reason for the exercise of greater vigilance on the part of the decedent. Oleson v. Lake Shore, etc., R. Co. (1896) 143 Ind. 405, 42 N. E. 736, 32 L. R. A. 149; Cincinnati, etc., R. Co. v. Duncan (1895) 143 Ind. 524, 42 N. E. 37. If this condition existed, common prudence required that the decedent should get off and away from the track. The decedent had a basket of clothing on his right shoulder, and this probably prevented him from seeing the train as it came toward him. Had he turned his face eastward, or if he had put the basket down when he went upon the track, he must have discovered the coming train, and could instantly have stepped aside into a place of safety. He failed to take this natural and reasonable precaution, and his want of care for his own safety certainly contributed in some degree, and, as we think, in a very considerable degree, to occasion the accident and injury. The answers of the jury established the fact of contributory negligence on the part of the decedent. This being so, there could be no recovery by the plaintiff." Per Dowling, J.)

Even though it be conceded that the answers to the interrogatories show that the plaintiff's decedent negligently approached and entered upon appellant's track in front of an approaching car, and thus negligently exposed himself to the danger of a collision, this would not necessarily preclude a recovery for injury resulting from appellant's negligence. Answers to interrogatories showing such facts would not overthrow a general verdict in favor of the plaintiff, for the reason that evidence may have been introduced proving, or tending to prove, that after said decedent was in the position of danger in which he had so negligently placed himself, the defendant knew of his perilous position, or might have known it by the exercise of ordinary care, in time to prevent the injury, and that it negligently failed to take adavntage of the last clear chance to prevent the injury. It is the duty of this court to reconcile the interrogatories with the general verdict, if they can be so reconciled by any evidence which might have been introduced within the issues; and, to this end, the court, in ruling upon this motion, will treat the case as though this evidence had been introduced and acted upon by the jury. In view of what we have said, we are of opinion that the answers to the interrogatories are not in irreconcilable conflict with the general verdict and the motion of appellant for judgment in its favor on such interrogatories, notwithstanding the general verdict, was properly overruled.

Several reasons were assigned by appellant in its motion for a new trial. The first one presented and relied on by appellant is that the verdict is not sustained by sufficient evidence. In passing on this motion, it is the duty of the court to consider the answers to the interrogatories in connection with the evidence for the purpose of deciding whether the verdict is sustained by the evidence. Terre Haute, etc., R. Co. v. Clark (1880) 73 Ind. 168.

The jury found both by its general verdict and by the answers to interrogatories that defendant was negligent. The answers to the interrogatories show that its car was being run at the rate of fifteen miles an hour at the time of the accident, a rate which was three miles in excess of the rate permitted by the ordinance. There is much conflict in the evidence as to the speed of the car, some of the witnesses stating that it was running at a much greater speed and some that it was running much slower. Where the evidence is conflicting, the verdict of the jury is conclusive on this court.

We will next consider whether the undisputed evidence in the case, considered in connection with the interrogatories, shows that decedent was negligent in going upon appellant's track, where he was killed.

The evidence in reference to the conduct of decedent from the time he came out of Williams street until he was struck by the car is not in serious conflict. The jury have found the facts showing this conduct in answers to certain interrogatories, and the facts so found are fully sustained by the evidence. The jury find upon this question that decedent came out of Williams street, riding a bicycle, and started diag-

onally across Main street toward Sycamore street; that he was carrying a basket in his left hand, had his right hand on the handle-bar of the bicycle, and was traveling at a moderate rate of speed; that he had frequently crossed Main street at and near that place, and was familiar with the location and surroundings, and knew that cars frequently passed on Main street; that there was nothing to obstruct his view of the approaching car at any time after he rode out of Williams street into Main street, and no other car was passing at the time; that if he had looked north on Main street at any time after he came out of Williams street he could have seen a car for two blocks, and that he could have heard the car for half a block if he had listened, but that there were noises of pedestrians and vehicles in the vicinity which would have prevented him from hearing the car; that when he reached the space between the two tracks, he was met by another bicycle rider coming from the opposite direction in the space between the tracks, and that he was attempting to pass this bicycle rider when he went upon the west track; and that he went upon the west track at a point in a straight line between the middle of Williams street and the middle of Sycamore street and about three feet in front of the car. These facts having been found by the jury will be taken as true, so far as there is evidence to sustain them, and the fact that there may have been conflicting evidence as to some or all of such facts will not affect their verity. In deciding whether the general verdict is sustained by the evidence, the facts found by way of answers to interrogatories will be treated the same as though they were established by the undisputed evidence, unless some of the facts so found are unsupported by any evidence.

There is some conflict in the evidence as to whether decedent rode his bicycle in a straight line from the point where he entered upon Main street toward the middle of Sycamore street until he went upon the track, or whether he rode south in the space between the two tracks for a short distance before he went upon the west track, but this is not material. In either view of the case, it appears from the evidence, when considered in connection with the answers to the interrogatories, that he rode half way across Main street in plain view of the approaching car, and went upon the street-car track within three feet of the front end of such car, while it was moving at the rate of twelve or fifteen miles an hour. At that point Main street is shown by the map introduced in evidence to be about sixty feet in width, and the answers to interrogatories show that it was practically level, and that there was nothing to obstruct decedent's view of the approaching car. The evidence shows no conditions or circumstances surrounding the decedent just before the accident which could properly be considered by the jury as an excuse for decedent's apparent failure to observe or heed the approach of the car. Nothing is shown that could have obstructed his view or distracted his attention. While some of the witnesses testified that this was a busy street about the noon hour, and that many

people, on foot and in wagons and other vehicles, passed the point where the accident happened, about that hour, nothing is shown as to conditions and surroundings at the time the accident occurred. In the light of these facts we cannot think that the conduct of the decedent in approaching and entering upon the street-car track in the manner shown was consistent with due care on his part. We recognize that the rule of law which requires a person about to cross the track of a steam railroad to look and listen for approaching trains in order to absolve himself from the charge of contributory negligence does not apply in all its strictness to persons traveling along, or crossing street railways. Street railways are constructed along and operated in streets, and must be so operated with due regard to the rights of others using said streets for other modes of travel, and for just reasons the same degree of care is not required of one in crossing a street-car track as is required of one in crossing the track of a steam railroad. Indianapolis St. R. Co. v. Marschke (1906) 166 Ind. 490, 77 N. E. 945; White v. Worcester, etc., St. R. Co. (1896) 167 Mass. 43, 44 N. E. 1052.

This rule does not, however, absolve persons going upon or across the tracks of street railways from all care. A person about to cross a street-car track must use ordinary care in view of all the circumstances and surroundings. He must make reasonable use of his eyes to observe the approach of cars, and where there is nothing to obstruct his view, or to distract his attention, and he goes upon the track immediately in front of a moving car, he is guilty of negligence. Indianapolis St. R. Co. v. Zaring (1904) 33 Ind. App. 297, 71 N. E. 270, 501; Citizens' St. R. Co. v. Helvie (1899) 22 Ind. App. 515, 53 N. E. 191.

In this case we cannot escape the conclusion that appellee's decedent was negligent in approaching and entering upon appellant's street-car track, where he received the injury that caused his death.

The question of last clear chance yet remains to be considered. This doctrine finds its most frequent application in cases where the negligence of the defendant is shown, and where it also appears that the plaintiff, or decedent, by a want of due care on his part placed himself in a position of imminent peril exposing him to danger as a result of the negligence of the defendant. In such a case it may be shown that after the plaintiff, or decedent, had thus negligently exposed himself to the danger, circumstances or conditions existed, or then arose, which imposed upon the defendant or its agents a special duty to protect him from injury and afforded an opportunity to do so, and that such duty was not observed and the opportunity neglected. When this is shown, the negligent conduct of the plaintiff is held to be, not the cause, but a condition of the situation with reference to which the defendant must act. In the case of Louisville, etc., R. Co. v. East Tenn., etc., R. Co. (1894) 60 Fed. 993, 9 C. C. A. 314, the doctrine is thus stated: "If, with a knowledge of what plaintiff has done, or is about to do, the defendant can by ordinary care, avoid the injury likely to result therefrom, and does not, defendant's failure to avoid the injury is the last

link in the chain of causes, and is, in law, the sole proximate cause. The conduct of the plaintiff is not, then, a cause, but a condition of the situation with respect to which the defendant has to act."

Contributory negligence, when shown, is a complete defense to a case founded upon negligence of the defendant. To make out a case of contributory negligence, two elements must be established by the evidence: (1) That the plaintiff was negligent, and (2) that this negligence proximately and directly contributed to the injury. If the jury found from the evidence in this case that after the motorman discovered the peril of the plaintiff's decedent to which his negligence had exposed him, or was about to expose him, such motorman had time and opportunity to prevent the injury by the exercise of precautions to that end, and he failed to do so, then contributory negligence on the part of the decedent is not established. In such a case the negligence of decedent is established, but it is not shown to have directly and proximately contributed to his injury, and therefore the second element is wanting.

The doctrine of last clear chance is not an exception to the rule relating to contributory negligence. Facts which render the doctrine of last clear chance applicable in any case, do not tend to prove that the plaintiff was not negligent, but do tend to prove that the negligence of the plaintiff, which placed him in a situation of danger, was not the proximate cause of his injury, but was only the remote cause. Grass v. Fort Wayne, etc., Traction Co., supra.

In the case of Indianapolis St. R. Co. v. Schmidt, supra, it is said "that the negligence of the plaintiff ceases to be the proximate cause of the injury when the defendant has opportunity to prevent it, and, with knowledge of the exposed condition of the plaintiff, negligently refuses to do so, is well settled in this state."

In considering contributory negligence with reference to the doctrine of last clear chance, it is important to distinguish the facts tending to show want of due care on the part of plaintiff from those tending to show that such want of care on his part directly and proximately contributed to the injury. In a case like this, proof of facts tending to show that decedent approached and entered upon defendant's street-car track without taking any precaution for his own safety, makes out a prima facie showing upon the question of his negligence; and proof of facts tending to show that by reason of such negligence he was placed in a position where he was exposed to the danger of being injured, and where he was actually injured by reason of defendant's negligence, would make out a prima facie showing that the negligence of decedent directly and proximately contributed to his injury. Such a showing upon both of these questions would constitute a prima facie case of contributory negligence. This case may be met by evidence tending to rebut the showing made upon either or both of the constituent elements of contributory negligence. The showing upon the first element, before referred to, may be rebutted by evidence tending to

show that decedent used due care, and the showing upon the second element may be rebutted by evidence tending to prove that after decedent had by his own negligence become exposed to imminent and impending danger, defendant had it within its power to prevent the injury by the exercise of some precaution on its part which it failed to exercise. Evidence tending to establish "last clear chance," does not have the effect of confessing and avoiding contributory negligence, but its purpose and effect is to show that plaintiff's negligence was not the proximate cause of his injury, and thus to rebut the evidence tending to establish that fact.

The defendant in this case, as shown by the interrogatories considered in connection with the undisputed evidence, made out a prima facie case of contributory negligence upon both its essential elements. It was incumbent upon plaintiff to introduce the evidence, if such had not already been introduced, tending to prove, either that his decedent used due care, or that under the circumstances, facts existed which called for the application of the doctrine of "last clear chance." See Ency. Ev. 854: Gibson v. Harrison (1901) 69 Ark. 385, 63 S. W. 999, 54 L. R. A. 268; Koegel v. Missouri Pac. R. Co. (1904) 181 Mo. 379, 80 S. W. 905; Luna v. Missouri, etc., R. Co. (Tex. Civ. App. 1903) 73 S. W. 1061. If there is a total failure of evidence upon both of these propositions, the prima facie case of contributory negligence made by appellant must prevail; but if there is evidence tending to show, either that plaintiff used due care, or if he was negligent that such negligence was not the direct and proximate cause of his injury, but only the remote cause, then the question of contributory negligence was for the jury, and the burden of this issue remained with the defendant as to both of the constituent elements of contributory negligence. Grass v. Fort Wayne, etc., Traction Co., supra; 1 Elliott, Evidence, 139.

We have already stated that there is no evidence tending to show due care on the part of decedent, and we will now consider the evidence bearing upon the other questions. In order to make such a showing as calls for the application of the doctrine of last clear chance, the evidence must show, or tend to show (1) that, at some appreciable time before the accident happened, decedent was in a place of imminent and apparent danger, or that his appearance and conduct was such as to indicate to a man of ordinary prudence occupying the position of the motorman that he was about to place himself in such a position; and (2) that during the time which intervened after this situation arose and before the injury the motorman could have prevented or mitigated such injury by the exercise of due care, and decedent could not.

The only evidence bearing upon this question that we have been able to find is the evidence of the motorman. He said: "I saw him come out of Williams street, right onto Main. I was right down here pretty close to him. He had a basket in his left hand, and had his right hand on the handle-bar of the bicycle. He was headed in

the direction of Sycamore street. I saw another boy on a bicycle coming up Main street. When he got up right close to the boy, it seemed like he was going to run into that boy, and they were going to have a collision, and he whipped his wheel right square around on my track. I don't think I was more than three feet away, might say right against him when he got on my track. I did not reverse the power 'til he got on the track. I did not use the brake at all before the accident happened." The jury in the answers to interrogatories found that decedent was going diagonally across Main street toward Sycamore street at a moderate rate of speed, as described by the motorman, that he met another bicycle rider in the space between the two tracks, and that he turned onto the west track at a point only three feet in front of the car. The map introduced in evidence shows that it is about thirty or thirty-five feet from the south line of Main street to the place where the accident happened, although the jury found that there was no evidence as to the exact distance. The jury found that there was no evidence showing how far the car was from the place of collision when decedent entered Main street, and we have been unable to find any evidence on this question. The jury found that there was no more effective means of stopping the car than by reversing the power. There is no evidence tending to show how far the car was from the decedent at the time the motorman saw that the bicycles were likely to collide. There is no evidence showing that decedent, as he approached the track, was looking in the opposite direction from the car, or that he seemed to be abstracted or oblivious to his surroundings. There is nothing in the evidence showing that there was anything to indicate that decedent was likely to go upon the track in front of the car, except the general direction in which he was traveling.

This evidence does not prove, or tend to prove, a state of facts to which the doctrine of last clear chance is applicable. The first essential thing that the evidence must prove or tend to prove is that the decedent was in a situation of apparent and imminent danger at some appreciable time before the injury. If this evidence tends to show that Carl Spiegel was in such a place of apparent danger, when was it in reference to the time of the injury? Was it when he rode his bicycle upon the track within three feet of the front end of the moving car? If so, there was clearly no time within which the motorman could have prevented the injury. Was it when the motorman saw that there was a bicycle approaching from the south, and that there was likely to be a collision between the two bicycles? If so, there is no evidence tending to prove how far the car was from the decedent at that time, or that the motorman by any means could have prevented the injury. Was it when decedent was approaching the street-car track from Williams street? There is nothing in evidence tending to show that at that time there was any apparent danger that decedent would go upon the track in front of the car; nei-

ther is there any evidence to show how far the car was from the place of accident at the time decedent entered upon Main street. If there had been evidence tending to show that Carl Spiegel, as he approached the track was apparently abstracted and oblivious of his surroundings, and that he was moving in the direction of the track at such a speed as would likely carry him in front of the car and into dangerous proximity to it, and that the motorman, regardless of this apparent danger, took no steps to stop the car or slacken its speed, then we would have a different case presented. In such a case, it would be for the jury to say whether the negligence of the defendant directly and proximately contributed to decedent's injury, or whether it was only the remote cause; but, in this case, there is no evidence upon which the application of this doctrine can be predicated. We therefore conclude that appellant's motion for a new trial should have been sustained.

The judgment of the trial court is reversed with directions to grant a new trial.[28]

[28] The statement of facts is abridged. A portion of the opinion, and the dissenting opinion by Hottel, J., on the effect of the general verdict, are omitted.

Compare: Labelle v. Central Vermont R. Co. (1913) 87 Vt. 87, 88 Atl. 517: (P., driving a dump cart, was walking beside the tongue between the front wheels and the body of the cart, when he approached a public grade crossing of a railway. As he was just getting on the track he saw a train coming. He attempted to get across, but the train struck the cart and the cart struck him. P. claimed the right to go to the jury on the last clear chance. Said Watson, J.: "Should the case have been submitted to the jury upon the doctrine of the 'last clear chance'? The negligence of the plaintiff proximately contributing to the accident continued as long as it was possible for him to avoid personal injury. He was walking between the front wheels and the body of the dump cart, his horses perfectly manageable. The space between the forward wheels and the body was sufficient for cramping purposes, and there was no evidence tending to show that it was not large enough for the plaintiff to go through and outside the wheels, thereby to leave the team at any time before he went upon the track, if need be, for his safety. He could have done this until the train was so near, according to the undisputed evidence, that it was no longer possible for those in charge to prevent a collision. Thus it appears that the plaintiff's negligence, proximate in character, was concurrent with that of the defendant [assuming that the defendant was negligent] as long as it was possible for the latter to avoid the accident. In this respect the case is not distinguishable from that of Flint's Adm'r v. Central Vermont Ry. Co. [1909] 82 Vt. 269, 73 Atl. 590, cited above, and the doctrine of the 'last clear chance' does not apply." French v. Grand Trunk Ry. Co. [1882] 76 Vt. 441, 58 Atl. 722; Butler v. Rockland, etc., St. R. Co. [1904] 99 Me. 149, 58 Atl. 775, 105 Am. St. Rep. 267; Green v. Los Angeles Terminal R. Co. [1904] 143 Cal. 41, 76 Pac. 719, 101 Am. St. Rep. 68. A judgment for the defendant upon a directed verdict was therefore affirmed.)

TAYLOR v. METROPOLITAN ST. RY. CO.

(Supreme Court of Missouri, 1914. 256 Mo. 191, 165 S. W. 327.)

Action to recover damages for personal injuries received by one Albert P. Taylor in a collision with one of defendant's cars while Taylor was crossing Nineteenth street on Cherry street in Kansas City, Mo., about 8 p. m., September 20, 1907. Plaintiff recovered judgment in the trial court in the sum of $6,250, and the defendant perfected an appeal to the Kansas City Court of Appeals. After the appeal was taken, plaintiff died. The case was revived in the name of Jennie Taylor, as administratrix of his estate. In an opinion written by the Kansas City Court of Appeals, the judgment was affirmed; but, one of the judges of said Court of Appeals deeming its decision contrary to previous decisions of the Supreme Court, the cause was duly certified and transferred here. That portion of the plaintiff's petition charging negligence is as follows:

"Defendant, through the negligence and unskillfulness of its officers, agents, servants, and employés in running, conducting, and managing a car of the defendant, which was being moved by the defendant at an unusual and rapid rate of speed along said track, while in charge of its said officers, agents, servants, and employés, negligently and carelessly ran the said car into, upon, and against the wagon in which plaintiff was riding, as aforesaid, with great force and violence. That the officers, agents, servants, and employés of the defendant in charge of said car, and who were then engaged in running, conducting, and managing said car saw, or, by the exercise of ordinary care on their part, might have seen, said plaintiff, and become aware of the danger to which he was exposed while crossing said Nineteenth street, and while said wagon was on said track, crossing the same, in ample time to have stopped said car before it struck said wagon, as aforesaid, and thus have avoided injuring plaintiff, but that said officers, agents, servants, and employés of said defendant so in charge of said car negligently failed to stop said car, and negligently caused and permitted the same to strike said wagon as aforesaid, whereby plaintiff was violently knocked down and against said wagon and gig and out of said wagon to the street," etc.

The answer was a general denial.

WILLIAMS, C. * * * IV. A further contention is made that the demurrer to the evidence should have been sustained, on the ground that "it appears from plaintiff's own testimony that his own negligence was the proximate cause of the accident."

Plaintiff testified that, when the wagon started north across Nineteenth street, he did not know which way the cars ran on that street, and first looked toward the east, and then turned and looked to the west, and saw the car coming 60 or 70 yards distant. At this time the horses' front feet were between the rails, and he thought there was plenty of time for the wagon to cross ahead of the car, and did not therefore think it necessary for him to jump from the wagon. He is corroborated in this by both the driver of the wagon, and also by Jaggard, who was near him in the back portion of the wagon. At this time he thought the wagon was traveling about 6 miles an hour and had about 17 feet to go in order to clear the track. He thought

the car was running at a speed of from 25 to 30 miles an hour, and that it had 180 to 210 feet to go. He then turned and was engaged in conversation with Jaggard, and a little later, his attention being aroused by what was said by Jaggard directing the driver to "look out," he looked up and saw the car almost upon them and before he had time to change his position the collision occurred.

In the discussion in the preceding paragraph, it was found that there was evidence tending to show that the motorman, by the exercise of the proper degree of care, under the circumstances, could have seen plaintiff in a position of peril in time to have saved him by the exercise of proper care. Under such conditions, it could not be said that his negligence was the proximate cause of the injury, so as to defeat a recovery under the humanity rule. White v. Railroad, supra, 202 Mo. loc. cit. 564, 101 S. W. 14.

In order to justify the designation of plaintiff's negligence as the proximate cause of the injury, and therefore prevent the operation of the humanity rule, the situation must be such that plaintiff's negligence caused him to enter the danger zone too late for defendant to save him by the exercise of the care required under the situation.

The correct rule, applicable here, was announced by Lamm, J., in the case of Ellis v. Metropolitan Street Railway Co., 234 Mo. 657, 138 S. W. 23, as follows: "When a person, out of danger, negligently moves from his place of safety to one of danger from an on-coming street car, so close to it and under such circumstances that his danger could not be reasonably apprehended by those in charge of the car (who see or might see his peril) in time to have saved him by the exercise of ordinary care, then the negligence of the traveler is either the proximate cause of his own injury, or, in case the element of defendant's negligence be also present, then the negligence of the street traveler and the negligence of the carrier are coincident and concurrent; they (excluding the idea of comparative negligence) may be said to balance or offset each other. In either of which hypotheses there is no room at all for the application of the humanity rule. If a given case in that regard is so plain that average fair-minded men cannot reasonably differ about it, a recovery may be denied as a matter of law. That result has been reached in many cases cited. But, if there is a ground for fair difference of opinion about it, then the question is for the jury." * * *

The judgment is affirmed. Roy, C., concurs.

Per Curiam. The foregoing opinion of Williams, C., is adopted as the opinion of the Court.[29]

[29] The statement of facts is abridged and parts of the opinion of Williams, C., are omitted.

CHAPTER II

TORTS THROUGH MALICE

SECTION 1.—NATURE OF "MALICE"

Closely connected with the law and theory of intentional wrongdoing is the legal use of the word "malice." In a narrow and popular sense this term means ill-will, spite, or malevolence; but its legal signification is much wider. Malice means in law wrongful intention. It includes any intent which the law deems wrongful, and which therefore serves as a ground of liability. Any act done with such an intent is, in the language of the law, malicious, and this legal usage has etymology in its favour. The Latin "malitia" means badness, physical or moral—wickedness in disposition and in conduct—not specifically or exclusively ill-will or malevolence; hence the malice of English law, including all forms of evil purpose, design, intent, or motive.

We have seen, however, that intent is of two kinds, being either immediate or ulterior, the ulterior intent being commonly distinguished as the motive. The term "malice" is applied in law to both these forms of intent, and the result is a somewhat puzzling ambiguity which requires careful notice. When we say that an act is done maliciously we mean one of two distinct things. We mean either that it is done intentionally, or that it is done with some wrongful motive. In the phrases "malicious homicide" and "malicious injury to property," malicious is merely equivalent to wilful or intentional. I burn down a house maliciously if I burn it on purpose, but not if I burn it negligently. There is here no reference to any ulterior purpose or motive. But on the other hand malicious prosecution does not mean intentional prosecution; it means a prosecution inspired by some motive of which the law disapproves. A prosecution is malicious, for example, if its ulterior intent is the extortion of money from the accused. So also with the malice which is needed to make a man liable for defamation on a privileged occasion; I do not utter defamatory statements maliciously, simply because I utter them intentionally.

John W. Salmond, Jurisprudence (3d Ed.) 346.

Malice in common acceptation means ill will against a person, but in its legal sense it means a wrongful act, done intentionally without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally, and without just cause or excuse. If I maim cattle, without knowing whose they are, if I poison a fishery, without knowing the owner, I do it of malice, because it is a wrongful act and done intentionally. If I am arraigned of felony, and wilfully stand mute, I am said to do it of malice, because it is intentional, and without just cause or excuse.

BAYLEY, J., in Bromage v. Prosser (1825) 4 B. & C. 247, 255.

SECTION 2.—INDIVIDUAL TORTS TURNING ON MALICE.

I. MALICIOUS PROSECUTION

STATUTE OF MALICIOUS APPEALS.

(13 Edw. I, c. 12, 1285. 1 Pickering's Stats. at Large, 190.)

Forasmuch as many, through Malice intending to grieve other, do procure false Appeals to be made of Homicides and other Felonies by Appellors, having nothing to satisfy the King for their false Appeal, nor to the Parties appealed for their Damages; it is ordained, That when any, being appealed of Felony surmised upon him, doth acquit himself in the King's Court in due Manner, either at the Suit of the Appellor, or of our Lord the King, the Justices, before whom the Appeal shall be heard and determined, shall punish the Appellor by a Year's Imprisonment, and the Appellors shall nevertheless restore to the Parties appealed their Damages, according to the Discretion of the Justices, having Respect to the Imprisonment or Arrestment that the Party appealed hath sustained by reason of such Appeals, and to the Infamy that they have incurred by the Imprisonment or otherwise, and shall nevertheless make a grevious Fine unto the King. And if peradventure such Appellor be not able to recompense the Damages, it shall be inquired by whose Abetment or Malice the Appeal was commenced if the Party appealed desire it; and if it be found by the same Inquest, that any Man is Abettor through Malice at the Suit of the Party appealed he shall be distrained by a judicial Writ to come before the Justices; and if he be lawfully convict of such malicious Abetment, he shall be punished by Imprisonment and Restitution of Damages, as before is said of the Appellor.

The new forms of Tort which came into existence as varieties of the action of Case, because the older writs dealing with similar offences were unavailable, were notably, Malicious Prosecution and Nuisance. Malicious Prosecution was an adaptation of the old Writ of Conspiracy, which was itself based on a statute and ordinance of the years 1300 and 1305, respectively. These enactments, however, only applied to cases where, "two, three, or more persons of malice and covin do conspire and devise to indict any person falsely, and afterwards he who is so indicted is acquitted." The old writ was, consequently, confined to such cases; and subsequent judicial rulings seem to have restricted it still further, to cases of false indictments for treason or felony, whereby the accused's life was endangered. Obviously, there were many other cases in which oppression could be used, not merely by a group of persons acting together, but even by a single unscrupulous person, through the medium of baseless prosecutions. And so, after the Church Courts had tried to acquire jurisdiction in such cases through proceedings for defamation, we find in the King's Courts, by the end of the fifteenth century, an action of Case in the Nature of Conspiracy, which applied against single individuals and on false indictments for mere misdemeanors. This new form of action gradually acquired the name of Malicious Prosecution, and was further extended to cover the malicious procuring of search warrants against the plaintiff. It should be observed, however, that, unlike strict Conspiracy, the gist of the action of Malicious Prosecution is damage to the plaintiff, not the mere conspiring of the defendants; though, if a false and malicious prosecution is brought, damage to the party prosecuted will be presumed. Apparently, though the closely related Writ of Champerty (against person buying shares in lawsuits with a view of aiding in carrying them on) retained the form given to it by statute, the Action of Maintenance (against persons taking part in lawsuits in which they had no interest) was also a typical example of Case; being an enlargement of the narrower statutory remedy against royal officials.

Edward Jenks, Short Hist. Eng. Law, 142.

(A) Elements of the Prima Facie Case in Malicious Prosecution

FISHER v. BRISTOW et al.

(Court of King's Bench, 1779. 1 Doug. 215, 99 Reprint, 140.)

Action for a malicious presentment, (for incest,) in the Ecclesiastical Court of the Archdeaconry of Huntingdon. Demurrer to the declaration, and cause assigned, that it was not stated, how the prosecution was disposed of, or that it was not still depending. The Court was clearly of opinion, that the objection was fatal, and said it was settled

that the plaintiff in such an action, must shew the original suit, wherever instituted, to be at an end; otherwise he might recover in the action, and yet be afterwards convicted on the original prosecution.

Judgment for the defendant.

BYNE v. MOORE.

(Court of Common Pleas, 1813. 5 Taunt. 187, 128 Reprint, 658.)

This was an action for a malicious prosecution. The declaration alleged that the defendant, maliciously intending to injure the plaintiff, had falsely and maliciously and without reasonable or probable cause, charged the plaintiff with violently assaulting him, and had thereby procured a warrant for apprehending the plaintiff. The plaintiff gave no other evidence than that the indictment was returned "not found." On the trial, MacDonald, C. J., nonsuited the plaintiff.

Best, Serjt., obtained a rule nisi to set aside this non suit, and have a new trial.[1]

MANSFIELD, C. J. I feel a difficulty to understand how the plaintiff could recover in the present action, wherein he could recover no damages, because he clearly has not proved that he has sustained any: I can understand the ground upon which an action shall be maintained for an indictment which contains scandal, but this contains none, nor does any danger of imprisonment result from it: this bill was a piece of mere waste paper. All the cases in Buller's Nisi Prius, 13, are directly against this action, for the author speaks of putting the plaintiff to expense, and affecting his good fame, neither of which could be done here. If this action could be maintained, every bill which the grand jury threw out would be the ground of an action. The judge too might certify in this cause against the costs, if the damages had been under 40s.

HEATH, J., concurred.

CHAMBRE, J. It would be a very mischievous precedent if the action could be supported on this evidence.

Rule discharged.

FARMER v. SIR ROBERT DARLING.

(Court of King's Bench, 1766. 4 Burr. 1971, 98 Reprint, 27.)

On Thursday last, Sir Fletcher Norton, on behalf of the defendant, moved for a new trial, and to set aside the verdict, which had been given for the plaintiff in an action for a malicious prosecution, with £250 damages, at the Middlesex sittings at Nisi Prius before Lord

[1] The statement of the case is abridged.

Mansfield, on the 15th instant. His objections were—1st. That the damages were excessive; 2dly. That the verdict was against evidence. He had a rule to shew cause.

Lord Mansfield now reported the evidence.

It was an action for a malicious prosecution of the plaintiff, by two indictments for nuisances; one, by a drain; the other, by his poulterer's yard; both of them near the prosecutor's house; upon which indictments the then defendant and now plaintiff had been acquitted.

It appeared, upon the report "that there was malice implied;" and it appeared, that the plaintiff had actually and bona fide paid £140 in defending himself against the two indictments.

His Lordship said, he told the jury, that the foundation of this action was malice; which must be either express, or implied; and he acquainted them, that they were not obliged to give all the £140 expended; or, they might (on the other hand) give more, if they should see it proper to do so. He said, he left it to the jury, to consider of the implied malice, from the groundlessness of the prosecution.

Sir Fletcher Norton, Mr. Morton and Mr. Recorder Eyre now argued on behalf of the defendant, for a new trial. They said, there was another requisite to the maintenance of this sort of action, besides malice; it was also necessary to prove, "that the indictment was causeless and without any foundation." Both these are essential, and necessary to be proved.

As in a writ of conspiracy, falsity is necessary to be charged; so, in this case, malice alone is not sufficient: it must also be a prosecution without any foundation. These are two independent essentials to the maintenance of this action; there must be both malice and falsity. We admit there was some evidence of malice; but it was proved, by sufficient evidence, to be a nuisance. Therefore there was a probable cause for the indictments; and if there was, then the prosecutor is not liable to this action for a malicious prosecution; whatever motive might induce the prosecutor to indict the person guilty of the offence. It would be of dangerous consequence, to make a prosecutor liable to this action, where there is a probable cause for indicting an offender.

Secondly.—The damages are excessive.

Lord Mansfield. This action is for a malicious prosecution, without a probable cause.

I can not say that the jury have done wrong here, in finding that the indictments were preferred without probable cause.

This drain was an ancient drain. The fault arose above and below Farmer's part of it. His brick-drain was cleaned, and clear. The gist of the indictment was "that he did not lower his drain." He had no need to do it. The verdict was not, in my opinion, against evidence.

The next prosecution was for the feeding the fowls. And I can not say that the jury had no reason to find this likewise to be an indictment without probable cause. Every stench is not a nuisance: nor is every noisome trade a nuisance in every place; though many of them are nui-

sances by reason of their locality. This was an ancient trade, long carried on in this place; long before Sir Robert Darling came there. He comes and builds a house near it, in a place that was formerly a poultry-yard. Nobody before complained of it, or presented it. So that the conclusion does not follow, "that it was a nuisance." And the jury had a view. Therefore I can not say, that the jury had no reason to take the prosecution to be groundless.

As to the excessiveness of the damages—it does not appear by the verdict, how far the jury gave it upon the bill; and how far, upon the whole circumstances of the case taken together. The end and tendency of these two indictments was to drive this plaintiff from his business of a poulterer, after having long carried it on. This was sworn to have been the prosecutor's view in preferring them. And they might affect the man's credit. There are many circumstances which make it reasonable, not to indulge the present defendant in sending it to a new litigation, only to abate the quantum of the damages, when he has been so much in the wrong.

Therefore he was against granting a new trial.

The other three Judges entirely agreed with his Lordship in both points; and expressed their sentiments at large to the same effect. They likewise agreed with Sir Fletcher Norton, as to the grounds of this sort of action; viz. "That malice, (either express or implied,) and the want of probable cause must both concur." But they were clearly of opinion, that it appeared upon the whole state of the evidence, that in this case they did both concur. Therefore they thought the rule ought to be discharged; both objections being sufficiently answered.

PER CUR. unanimously. Rule discharged.

CHAPMAN et al. v. NASH.

(Court of Appeals of Maryland, 1913. 121 Md. 608, 89 Atl. 117.)

Action by Charles Carrol Nash, an infant, by his father and next friend, for malicious prosecution. There was a judgment for plaintiff, and the defendants appeal. The facts developed in the evidence were as follows:

The plaintiff was the son of Charles M. Nash, who lived in Baltimore county, about 25 miles from the city, and who was engaged in the business of buying hay in the county and hauling it to Baltimore city and selling it to various purchasers. Among his purchasers was the Chapman Coal Company, to which he had sold hay for about two years prior to August 10, 1911, on which date the occurrences took place which led to the prosecution of the plaintiff and his father upon the criminal charge hereinafter mentioned. The plaintiff was then about nineteen years old and had been driving the hay wagon for about two years, and during those years no one else, to his knowledge, had hauled hay to the coal company for his father. The father owned two wagons which he used in hauling hay to the city. One of these wagons was heavier than the other. The hay carriages of the two wagons were different in color—that of the heavy wagon was blue and that of the lighter one was red. Both wagons had been weighed at the Fremont Street

hay scales, and their weight had been registered there. When the plaintiff brought in a load of hay to be delivered to the defendants, the method of ascertaining the amount of hay to be paid for and the manner of collecting was this: The wagon and hay were weighed together, and the plaintiff would tell the weighmaster which wagon he was using. He would say the lighter or the heavier one as the case might be. The weighmaster would accept his statement and deduct the registered weight of the wagon which the plaintiff informed him he was using from the gross weight, and the difference would be the net weight to be paid for by the purchaser. The weighmaster would give the plaintiff a ticket which showed the net weight made up in this way. The ticket and hay were then taken to the South Baltimore yard of the coal company, where the hay was unloaded and the ticket O. K.'d by the superintendent of the coal company, and taken by the plaintiff for payment to the office of the company at Sharp and Lombard streets. The money was collected, not by the plaintiff, but by Charles M. Nash, his father, whose custom was to go to the office after the ticket had been left there and collect the money. The lighter wagon, as shown by the weight at the hay scales, weighed 3,000 pounds, and the heavy one 3,800 pounds. Within one year prior to August 10, 1911, the plaintiff had delivered 13 loads of hay to the coal company, and had presented tickets therefor which showed the wagon to weigh 3,000 pounds. These tickets were accepted as correct by the coal company, and the amounts shown to be due were paid without question to Charles M. Nash.

On August 5, 1911, the coal company wrote to Charles M. Nash, saying that he might send in a load of prime timothy hay the following week, and advised him that the hay must be weighed and the certificate presented from the state scales in the city. The prior 13 deliveries had been certified to by others than the state inspectors. The plaintiff left home with a load of hay on the 9th of August, and drove as far as Pikesville, where he spent the night, and on the morning of the 10th he proceeded to the Northwestern hay scales where the hay was weighed. He told the weighmaster that he was driving the lighter wagon, and was given a ticket which showed that 3,000 pounds were deducted from the gross weight. He then took the hay to the yard of the coal company, delivered the ticket, and unloaded the wagon. Mr. J. W. Chapman, one of the defendants, was present while the plaintiff was in the act of unloading. After Mr. Chapman had observed the wagon, he concluded that its weight was in excess of that stated in the certificate, and he asked the plaintiff to reweigh the wagon, which the plaintiff promised to do. The plaintiff at that time knew that he had made a misstatement to the weighmaster as to the wagon, and that the weight shown upon the ticket was not correct, and that there was a shortage of 950 pounds. He testified as follows as to his conversation with Mr. Chapman had at that time: "Q. You knew right then and there that it was the wrong weights, didn't you? A. Yes. Q. Did you tell him so? A. No, sir. Q. Then you knew when you left him that you had the wagon with the wrong weight? A. Yes. Q. And you never told him? A. No, sir. Q. Although he asked you what weight it was? A. The ticket showed that. Q. The ticket showed that, and he had brought it to your particular notice by asking you to go to the scales and have the wagon weighed? A. Yes. Q. You went right on up home? A. Yes; to tell my father and let him come down and attend to it." William J. Chapman testified that he asked the plaintiff if the weight shown on the ticket was correct, and that he said it was, and this testimony is not denied. Charles M. Nash testified that he knew the wagon used to haul this particular hay weighed 3,950 pounds, and that he told his son on August 9th to use the heavy wagon. Mr. Isaac, one of the members of coal company, went to the Northwestern hay scales to see the wagon weighed, but the plaintiff did not go to the scales, but continued on his way home without reweighing the wagon. He was overtaken near Arlington by two members of the coal company, and the wagon was weighed at that place, and it was found to weigh 3,800 pounds. It was then taken to the Northwestern hay scales, where it was found to weigh 3,950 pounds, and where the ticket was corrected by the state inspector.

Although the plaintiff, according to his own testimony, well knew at the time he delivered the hay that the weight of the wagon had been misstated,

he made no mention of that fact then or when he was overtaken on the road. On the morning of August 11th Charles M. Nash called at the office of the coal company and inquired what the trouble about the load of hay was, although it must be inferred that he well knew and was informed that it was short in weight, and asked for settlement on the corrected bill. William J. Chapman declined to settle, but told him to call in a few days, which he did. He testified that Mr. Chapman told him at that interview that he would not settle, but said, "If you will drop this load of hay, we will drop our side." He asked Mr. Isaac, the treasurer of the coal company, to pay for the amount of hay shown by the corrected bill, and said his son did not know the weight of the wagon, and that he should have told him. Charles M. Nash placed his account in the hands of an attorney for collection, and after some communication with William J. Chapman a suit was brought before a justice of the peace. Prior to the institution of the suit the coal company made a demand upon Charles M. Nash for alleged shortages amounting to $239.16 in hay delivered from August, 1909, to August 10, 1911, inclusive. On the day of the trial before the justice, December 13, 1911, G. Walter Chapman appeared before James W. Lewis, a police justice of Baltimore city, and swore out a warrant against the plaintiff and his father, charging them with a conspiracy to defraud the Chapman Coal Company of Baltimore a corporation, for $11.87, current money, by means of false certificate of weight of the load of hay delivered to it on August 10, 1911. They were arrested and indicted by the grand jury in the criminal court of Baltimore upon this charge, and after a trial in that court were acquitted. The explanation offered by the plaintiff at the trial of his statement to the weighmaster that he was using the lighter wagon was that he made a mistake.

BURKE, J. (after stating the facts and disposing of certain preliminary questions). There was testimony offered tending to show that the defendants were actuated by malice in the institution of the prosecution, but such evidence cannot be considered in determining the question of probable cause. While malice may be inferred from the want of probable cause, a want of probable cause cannot be adduced from the most express malice. "In the trial of actions of this nature," said Judge Washington, in Munns v. Dupont (3 Wash. c. c. 31, Fed. Cas. No. 9,926), supra, "it is of infinite consequence to mark with precision the line to which the law will justify the defendant in going and will punish him if he goes beyond it. On the one hand, public justice and public security require that offenders against the law should be brought to trial and to punishment if their guilt be established. Courts and juries, and the law officers whose duty it is to conduct the prosecution of public offenders, must, in most instances, if not in all, proceed upon the information of individuals, and if these actions are too much encouraged, if the informer acts upon his own responsibility and is bound to make good his charge at all events, under the penalty of responding in damages to the accused, few will be found able and willing at so great a risk to endeavor to promote the public good. The informer can seldom have a full view of the whole ground, and must expect to be frequently disappointed by evidence which the accused only can furnish. Even if he be possessed of the whole evidence, he may err in judgment, and in many instances the jury may acquit where to his mind the proofs of guilt were complete."

The question we are to determine is this: Were the facts we have stated such as justified the defendants, as reasonable, cautious men, in believing the plaintiff and his father had entered into a conspiracy to defraud them? That such a fraud by the methods adopted in weighing the wagon might have been perpetrated with the greatest facility is evident. The wagon which weighed 3,950 pounds was represented as weighing 3,000 pounds, the tickets for the 13 prior loads delivered gave the weight of the wagon as 3,000 pounds. The son delivered the tickets and the father collected the money. The plaintiff testified that he gave the weight as 3,000 pounds by mistake. It is possible that this statement is true, but it is almost inconceivable that he did not know it was the heavier wagon, and his misstatements to Mr. Chapman, and his suppression of the truth at the time when it was his duty to have spoken truthfully, were most unfortunate for him. The facts and circumstances which are undisputed, and which were within the knowledge of the defendants at the time the warrant was sworn out, were well calculated to create in their minds the strongest suspicion, and in our opinion would have warranted a prudent and cautious man in believing that a skillfully devised plan had been adopted by the defendants to defraud and cheat. We do not mean to say that any such plan or scheme did in fact exist. The plaintiff has been acquitted of the charge preferred against him. It is to be hoped that he was entirely free from any intent to do wrong, but the uncontradicted facts and circumstances which we have carefully weighed and considered have led us to the conclusion that under the legal principles governing this class of actions the plaintiff failed to show, by any evidence legally sufficient for that purpose that the prosecution was instituted without probable cause. It follows that the defendants' prayer which asked for the withdrawal of the case from the jury should have been granted.

This conclusion dispenses with the consideration of the other questions raised by the record. Judgment reversed, without a new trial, with costs to the appellants.

GIBSON v. CHATERS.

(Court of Common Pleas, 1800. 2 Bos. & P. 129, 126 Reprint, 1196.)

This was an action on the case for maliciously arresting the plaintiff and holding him to bail.

At the trial before Lord Eldon, C. J., it appeared that the plaintiff and the defendant were both resident at North Shields in Northumberland, the former being the master, and the latter the owner of a ship; that some matters in difference between them having been submitted to arbitration, the plaintiff was awarded to pay the sum of £19. 14s. on the 31st of November, 1797, but in consequence of his being absent from home at that time, and not returning till March,

1799, did not pay the sum awarded; that in December, 1798, the defendant being in London made an affidavit of debt to hold the plaintiff to bail, and that a writ issued thereupon; that on the plaintiff's returning to North Shields in March, 1799, he hearing of the defendant's intention to arrest him, paid the debt to the defendant's agent at North Shields, and took a receipt for the amount; that on the 4th of May following, the plaintiff having arrived in the river Thames from North Shields, was arrested and holden to bail by the defendant's attorney, on an alias writ taken out at that time, but grounded on the affidavit made by the defendant in December, 1798. His Lordship being of opinion that it was necessary to prove express malice, and that no evidence of malice had been given, nonsuited the plaintiff.

Best, Serjt., now moved for a rule nisi to set aside this nonsuit, and have a new trial; contending that the case was distinguishable from that of Scheibel v. Fairbain [1799] 1 Bos. & P. 388, the writ on which the plaintiff in that case was arrested having been sued out previous to the time when the debt was paid, whereas the writ in the present instance was actually taken out after the debt had been discharged and the receipt given; that the ground of complaint in Scheibel v. Fairbain was a mere nonfeasance in the defendant who had omitted to countermand a writ previously sued out, and was so treated by the Court, but that this was a malfeasance and came expressly within the rule laid down in Waterer v. Freeman, Hob. 267, that a man is liable to an action if he sue against his release, or after the debt duly paid. He observed, that the rule with respect to proving malice in actions for malicious prosecutions, did not hold in the case of actions for holding to bail in a mere civil suit, since the rule in the former instance proceeded on the danger of discouraging prosecutions for public offences.

But the Court were of opinion that the facts of this case precluded any inference of malice, and that the plaintiff therefore to entitle himself to recover, ought to have given evidence of actual malice

Best took nothing by his motion.

VANDERBILT v. MATHIS.

(Superior Court of City of New York, 1856. 5 Duer, 304.)

BOSWORTH, J. To maintain an action for malicious prosecution, three facts, if controverted, must be established: (1) That the prosecution is at an end, and was determined in favor of the plaintiff. (2) The want of probable cause. (3) Malice.

In such an action, it is necessary to give some evidence of the want of probable cause. It is insufficient to prove a mere acquittal; that,

alone, is not prima facie evidence of the want of probable cause. Gorton v. De Angelis, 6 Wend. 418.

It is equally essential, that the former prosecution should appear to have been maliciously instituted. Malice may be inferred from the want of probable cause, but such an inference is one which a jury is not required to make, at all events, merely because they may find the absence of probable cause.

Unless the evidence, in relation to the circumstances under which the prosecution was ended, and that given to establish the want of probable cause, justify the inference of malice, other evidence, in support of it, must be given.

Evidence as to the conduct of the defendant, in the course of the transaction, his declarations on the subject, and any forwardness and activity in exposing the plaintiff by a publication, are properly admitted to prove malice. Such evidence must be given as will justify a jury in finding the existence of malice.

The rule is uniformly stated, that, to maintain an action, for a former prosecution, it must be shown to have been without probable cause, and malicious. Vanduzor v. Linderman, 10 Johns. 106; Murray v. Long, 1 Wend. 140; Willans v. Taylor, 6 Bing. 183.

The judge, at the trial, charged, that the fact, that the plaintiff was discharged before the magistrate showed, prima facie, that there was no probable cause for the arrest, and shifted the burden of proof from the plaintiff to the defendant, who was bound to show, affirmatively, that there was probable cause.

He was requested to charge, "that the discharge of Vanderbilt was not prima facie evidence of the want of probable cause." This he refused to do. To this refusal to charge, and to the charge as made, the defendant excepted.

He also charged, "that, if probable cause is made out, the question of malice becomes immaterial, except as bearing on the question of damages."

"This question of malice, in fact, supposing that probable cause did not exist, is material only as affecting the question of damages."

He was requested to charge, "that the jury could not find a verdict for the plaintiff, unless he has proved that there was no probable cause for the complaint, and not even then, unless they believe, from the evidence, that, in making the complaint, the defendant acted from malicious motives." This the judge declined to do, and to his refusal to so charge the defendant excepted.

Although the evidence which establishes the want of probable cause may be, and generally is, such as to justify the inference of malice, yet we understand the rule to be, that when it is a just and proper inference from all the facts and circumstances of the case, upon all the evidence given in the cause, "that the defendant was not actuated by any improper motives, but only from an honest desire to bring a supposed offender to justice, the action will not lie, because such facts

and circumstances disprove that which is of the essence of the action, viz., the malice of the defendant in pressing the charge."

In Bulkley v. Smith, 2 Duer, 271, the court stated the rule to be, "that, in order to maintain a suit for a malicious prosecution, the plaintiff is bound to prove the entire want of a probable cause for the accusation, and the actual malice of the defendant in making it. Malice is a question of fact, which, when the case turns upon it, must be decided by the jury."

Story, J., in Wiggin v. Coffin, Fed. Cas. No. 17,624, instructed the jury that two things must concur, to entitle a plaintiff to recover in such an action: "The first is, the want of probable cause for the prosecution; the second is, malice in the defendant in carrying on the prosecution. If either ground fail, there is an end of the suit."

In Vanduzor v. Linderman, 10 Johns. 106, the court said: "No action lies merely for bringing a suit against a person without sufficient ground. Savil v. Roberts, 1 Salk. 13; Purton v. Honnor, 1 Bos. & Pul. 205. To sustain a suit for a former prosecution, it must appear to have been without cause, and malicious."

If the charge must be understood to mean, that if the want of probable cause was established, the plaintiff was entitled to recover, although the jury should believe, from the whole evidence, that, in making the complaint, the defendant did not act from malicious motives, then we deem it to be erroneous. This construction is the only one, of which the language of the instruction appears to be susceptible; for the judge, in charging the jury, stated that the "question of malice in fact, supposing that probable cause did not exist, is material only as affecting the question of damages."

Malice in fact, is that kind of malice which is to be proved. When malice may be, and is inferred, from the want of probable cause, it is actual malice which is thus proved.

There is no theoretical malice which can satisfy this rule, and which can coexist with the established fact, that the prosecution was instituted in an honest belief of the plaintiff's guilt, and with no other motives than to bring a supposed offender to justice.

The question of malice may be a turning-point of the controversy, in an action of this nature.

The want of probable cause may be shown, and yet, upon the whole evidence, in any given case, it may be a fair question for the determination of a jury, whether the defendant was actuated by malice. If the whole evidence is such, that a jury cannot properly doubt the honesty and purity of the motive which induced the former prosecution, and if they fully believe that it was instituted from good motives, and in the sincere conviction that the plaintiff was guilty of the offence charged, and without malice, the defendant would be entitled to a verdict.

The charge made, and which was excepted to, must be deemed to have been made, to give the jury a rule of action, in disposing of the

case upon the whole evidence. We think it was not only calculated to mislead, but was erroneous.

A new trial must be granted, with costs to abide the event.[2]

CINCINNATI DAILY TRIBUNE CO. v. BRUCK.

(Supreme Court of Ohio, 1900. 61 Ohio St. 489, 56 N. E. 198, 76 Am. St. Rep. 433.)

In an action against the Cincinnati Daily Tribune for the publication of a libel on the plaintiff, the defendant answered, by way of counterclaim, that just before the libel the plaintiff, a stockholder of the company, maliciously, and without probable cause, commenced a suit against it for dissolution and the appointment of a receiver, on the false averment that it was insolvent. The application was at once heard, denied, and the suit dismissed. It is then averred that the suit worked great injury to the credit of the company, prevented a sale of the property then being negotiated, and otherwise greatly embarrassed it in business. Issue having been made up, the case was tried to a jury, and at the close of the defendant's evidence the court, on motion of the plaintiff, withdrew from the consideration of the jury all the evidence offered by the defendant on its counterclaim, but in its charge left it to be considered in mitigation of damages. There was a judgment for the plaintiff. The defendant brings error.

PER CURIAM. The ruling of the court presents the question whether the facts pleaded in the answer constitute a counterclaim to that of the plaintiff. If, however, the facts stated constitute a cause of action in favor of the defendant for the recovery of damages against the plaintiff for the malicious prosecution of the suit for the

[2] "I have always understood, since the case of Johnstone v. Sutton (1786) 1 T. R. 510, which was decided long before I was in the profession, that no point of law was more clearly settled than that in every action for a malicious prosecution or arrest, the plaintiff must prove what is averred in the declaration, viz., that the prosecution or arrest was malicious and without reasonable or probable cause: If there be reasonable or probable cause, no malice, however distinctly proved, will make the defendant liable; but when there is no reasonable or probable cause, it is for the jury to infer malice from the facts proved. That is a question in all cases for their consideration, and it having in this instance been withdrawn from them, it is impossible to say whether they might or might not have come to the conclusion that the arrest was malicious. It was for them to decide it, and not for the judge. I can conceive a case, where there are mutual accounts between parties, and where an arrest for the whole sum claimed by the plaintiff would not be malicious; for example, the plaintiff might know that the set-off was open to dispute, and that there was reasonable ground for disputing it. In that case, though it might afterwards appear that the set-off did exist, the arrest would not be malicious. The term 'malice' in this form of action is not to be considered in the sense of spite or hatred against an individual, but of malus animus, and as denoting that the party is actuated by improper and indirect motives." Per Parke, J., in Mitchell v. Jenkins (1833) 5 B. & Ad. 588, 594.

appointment of a receiver, it is very clear that they would constitute a counterclaim in this action. They are connected with the subject of the action, and this is sufficient to warrant their being pleaded as a counterclaim. Section 5072, Rev. St.; Swan, Pl. & Pr. 259, note.

The real question is, do they constitute a cause of action in favor of the defendant against the plaintiff? We think not. It is a well-settled general rule, that no recovery can be had by a defendant against a plaintiff for the malicious prosecution of a civil action, where there has been no arrest of the person or seizure of property. The cases relied on by the plaintiff in error do not support its claim. That of Coal Co. v. Upson, 40 Ohio St. 17, arose from a suit where a temporary injunction had been obtained on false and malicious averments. A temporary injunction imposes a restraint upon the owner over his property as hurtful to him as if it were in fact seized, and it was held that for the malicious prosecution of such suit an action would lie. The case of Pope v. Pollock, 46 Ohio St. 367, 21 N. E. 356, 4 L. R. A. 255, 15 Am. St. Rep. 608, arose from the malicious prosecution of suits in forcible entry and detainer.

Judgments in such suits are not conclusive. The proceeding may be commenced and recommenced without limit, unless enjoined, and hence affords an opportunity for the gratification of malice and oppression, and when this is the case an action may be maintained by the injured party for the recovery of damages. In the above case a suit had been brought, and a verdict of not guilty rendered. Another was brought with the same result. A suit for malicious prosecution was then brought and sustained. The case stands upon a clear exception to the general rule. No ground for an exception appears in this case. Had a receiver been appointed and possession taken of the defendant's property, a different case would have been presented. Affirmed.*

*"The broad canon is true that in the present day and according to our present law the bringing of an ordinary action, however maliciously and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution. * * * The counsel for the plaintiff have argued this case with great ability, but they cannot point to a single instance since Westminster Hall began to be the seat of justice in which an ordinary action similar to the actions of the present day has been concluded to justify a subsequent action on the ground that it was brought maliciously and without reasonable and probable cause." Bowen, L. J., in Quartz Hill Mining Co. v. Eyre (1883) 11 Q. B. D. 674, 690.

In most American states, however, the trend of authority is now the other way. In 1882, Prof. Lawson, reviewing all the American cases upon the point, reached the conclusion that the weight of authority appears to be against the right of action for an unfounded malicious prosecution of an ordinary civil suit. 21 American Law Reg. 368. In 1906 Mr. Lewis, editing Cooley on Torts, found that the preponderance of authority had shifted since the previous edition of this work and was now in favor of permitting the action. In 1907 Judge Jaggard was able to state without question "that the prevailing rule in America is that the action may lie, although the original proceeding was begun by a civil summons only and the party seeking the recovery was not arrested and his property was not seized, and he suffered no peculiar injury, but only when the want of probable cause is very palpable." See 26 Cyc. 16, and cases there cited in notes 91–93.

(B) Excusable Prosecution

WALTER v. SAMPLE.

(Supreme Court of Pennsylvania, 1855. 25 Pa. 275.)

Error to the District Court of Allegheny county.

This was an action on the case for malicious prosecution. Upon the trial of the cause, defendant's counsel, called Jacob Whitesell, Esq., a member of the bar, who testified as follows:

"Mr. Sample stated to me the facts of the case, and I advised him to go before the Mayor and make information, and have the parties arrested and examined. He acted under my advice, so far as arresting the boys, and having an investigation of the matter, and the trial in Court."

The Court instructed the jury, inter alia, as follows:

"The opinion of private counsel cannot amount to proof of probable cause, unless the facts clearly warrant it, and were correctly stated."

Assignment of error: The Court erred in instructing the jury that "the opinion of private counsel cannot amount to proof of probable cause, unless the facts clearly warrant it, and were correctly stated."

WOODWARD, J. This was an action on the case for malicious prosecution, and the only question presented by the record is, whether the Court were right in instructing the jury that "the opinion of private counsel cannot amount to proof of probable cause, unless the facts clearly warrant it, and were correctly stated." Ever since the case of Farmer v. Darling, 4 Burr. 1971, it has been held that malice, either express or implied, and the want of probable cause, must both concur to support actions of this nature. The presumption of law is that every public prosecution is founded in probable cause, and the burden is, therefore, in the first instance, on the plaintiff; but when he has submitted evidence of want of probable cause, or of circumstances from which a violent presumption would arise that it was wanting, the burden of proof is shifted on to the defendant, and then it is competent for him to show that he acted under professional advice. To make this defence available, he must show that he submitted all the facts which he knew were capable of proof fairly to his counsel, and that he acted bona fide on the advice given. This proved, he negatives, if not the malice, the want of probable cause. * * *

The opinion of Judge Rogers, at Nisi Prius, in the case of Le Maistre v. Hunter, Brightly, N. P. 498, which seems to have been the authority followed by the Court below, is not, when taken altogether, in conflict with the current of authorities. The facts are not given

in reference to which he charged the jury in this language: "In conformity to a point put by counsel for the plaintiff, I instruct you that the opinion of private counsel of a prosecution cannot amount to proof of probable cause, nor prevent a recovery, unless the facts clearly warrant it, and are correctly stated. Even the application to counsel, and their opinion, in order to be available in the establishment of probable cause, must not be resorted to as a mere cover for the prosecution, but must be the result of an honest and fair purpose; and the statement made at the time, must be fair and full and consistent with that purpose."

This is no more than a statement of the general rule with its necessary qualifications. Nevertheless, the words, "unless the facts clearly warrant it," found both in Judge Rogers' opinion, and that under review, are ill chosen, because liable to misapplication. "Unless the facts clearly warrant" what? The opinion of counsel, or the prosecution? Whichever be the antecedent intended, it is apparent that these words would make the defence depend for its value wholly on the soundness of the legal opinion. If the facts must clearly warrant the legal opinion, that, to be a defence, must be the very judgment of the law on the facts; if they must clearly warrant the prosecution then the defence is complete without the professional opinion; and thus, either way, it goes for nothing. No matter how candidly and faithfully a prosecutor has submitted the facts to his legal adviser and followed his advice, if they turn out insufficient for the support of the prosecution, he is liable in an action for malicious prosecution. On this principle every acquittal of a defendant would be followed by such an action. A qualification of the rule in terms like these, destroys the rule itself.

The law is not so. Professors of the law are the proper advisers of men in doubtful circumstances, and their advice, when fairly obtained, exempts the party who acts upon it from the imputation of proceeding maliciously and without probable cause. It may be erroneous, but the client is not responsible for the error. He is not the insurer of his lawyer. Whether the facts amount to probable cause, is the very question submitted to counsel in such cases; and when the client is instructed that they do, he has taken all the precaution demanded of a good citizen.

To manifest the good faith of the party, it is important that he should resort to a professional adviser of competency and integrity. He is not, in the language of Judge Rogers, to make such a resort "a mere cover for the prosecution"; but when he has done his whole duty in the premises, he is not to be made liable, because the facts did not clearly warrant the advice and prosecution. The testimony here was, that Sample stated the facts of the case, and there is no suggestion on the record that they were not fairly stated. Suppression, evasion, or falsehood, would make him liable; but if fairly sub-

mitted, and if the advice obtained was followed in good faith, he had a defence to the action, and the Court should have given him the benefit of it.

The judgment is reversed and a venire de novo awarded.[3]

RAVENGA v. MACKINTOSH.

(Court of King's Bench, 1824. 2 Barn. & C. 693, 107 Reprint, 541, 26 R. R. 521.)

This was an action for malicious arrest. Plea, not guilty. The jury found a verdict for the plaintiff with £250 damages. The Attorney-General moved for a new trial.[4]

BAYLEY, J. I have no doubt that in this case there was a want of probable cause. I accede to the proposition, that if a party lays all the facts of his case fairly before counsel, and acts bona fide upon the opinion given by that counsel (however erroneous that opinion may be), he is not liable to an action of this description. A party, however, may take the opinions of six different persons, of which three are one way and three another. It is therefore a question for the jury, whether he acted bona fide on the opinion, believing that he had a cause of action. The jury in this case have found, and there was abundant evidence to justify them in drawing the conclusion, that the defendant did not act bona fide, and that he did not believe that he had any cause of action whatever. Assuming that the defendant's belief that he had a cause of action would amount to a probable cause, still, after the jury have found that he did not believe that he had any cause of action whatever, the judge would have been bound to say, that he had not reasonable or probable cause of action.

Rule refused.

MACK v. SHARP.

(Supreme Court of Michigan, 1904. 138 Mich. 448, 101 N. W. 631, 5 Ann. Cas. 109.)

This is an action for malicious prosecution. The plaintiff, at the instance of the defendant, was arrested upon a charge of criminal libel. He was acquitted, brought this action, and recovered judgment for substantial damages. The defendant brings error.

MONTGOMERY, J. * * * The court also ruled throughout the case that in this action the defendant was not at liberty to prove that the plaintiff was in fact guilty of the criminal offense imputed to him in the prosecution instituted by the defendant. It is well established

[3] Part of the opinion is omitted.

[4] The statement of facts is abridged, and the opinion of Holroyd, J., is omitted.

by authority that in an action for malicious prosecution it is complete defense to show that the plaintiff was in fact guilty of the offense charged against him by defendant, and this though the proof of guilt is furnished by evidence not known to defendant when the prosecution against the plaintiff was instituted. This testimony is not in such case offered in support of probable cause, but to show that the plaintiff has suffered no wrong by his arrest. The law considers that if a criminal is fortunate enough to escape conviction, he should rest content with his good luck, and not belabor one who suspected his guilt and acted accordingly. As it was said in Newton v. Weaver, 13 R. I. 617: "The action for malicious prosecution was designed for the benefit of the innocent, and not of the guilty. It matters not whether there was proper cause for the prosecution, or how malicious may have been the motives of the prosecutor, if the accused is guilty he has no legal cause of complaint." See, also, Threefoot v. Nuckols, 68 Miss. 123, 8 South. 335; Whitehurst v. Ward, 12 Ala. 264; Parkhurst v. Mastellar, 57 Iowa, 478, 10 N. W. 864; Turner v. Dinnegar, 20 Hun (N. Y.) 467; Lancaster v. McKay, 103 Ky. 616, 45 S. W. 887.

Inasmuch as it is essential to the plaintiff's action to show a termination of the criminal action as a basis for his suit for malicious prosecution, it is competent to establish this fact by the verdict of acquittal. Black on Judgments, § 529. But it is not conclusive evidence of the plaintiff's innocence. Id.

Plaintiff's counsel cite the case of Josselyn v. McAllister, 25 Mich. 45, as sustaining the ruling of the circuit judge. It does not appear that the precise question of whether the actual guilt of the plaintiff could be given in evidence as a defense was discussed in that case. It is true that testimony which might have amounted to an admission of one element of the offense was held properly excluded on the ground that defendant was not shown to have knowledge of the fact when the prosecution was instituted by him. It was said that, "if Josselyn acted without any knowledge or suspicion of the supposed fact, it could in no way affect his motives"—a proposition obvious enough in itself, and quite conclusive as to the admissibility of the proposed testimony in that case, for the opinion shows there were joined in that action counts for malicious prosecution and false imprisonment, and by reference to the report of the case at a former hearing (22 Mich. 304) it will be seen that the counts for malicious prosecution were disposed of on the first trial at the circuit, so that in the first opinion it was very pertinently said, "As no state of facts relied upon would have made the arrests lawful, the defense depends, so far as this class of testimony is concerned, purely on the consideration of malice." The case of Patterson v. Garlock, 39 Mich. 447, also cited, does not sustain the ruling below. Indeed, some of the language employed by Mr. Justice Graves makes strongly for what we hold to be the correct rule. In that case testimony offered by the plaintiff to establish his innocence was received. The court held

that, while it was not bound to make affirmative proof of his actual innocence, yet such testimony was admissible. Mr. Justice Graves said: "It requires no reasoning to show that, where the question is whether one man has fair ground to charge another with a crime, it cannot be laid down that the abstract fact of his guilt or innocence must be necessarily impertinent and immaterial."

There was error in the court's ruling. * * * The judgment is reversed and a new trial ordered.[5]

II. Malicious Abuse of Process

WATERER v. FREEMAN.

(Court of King's Bench, 1617–1619. Hobart, 266a, 80 Reprint, 412.)

The case of Waterer v. Freeman, supra, was this term judged for the plaintiff, and the rest of the judges desired me to deliver the judgment and reason. * * *

But now to the main point, we hold, that if a man bring an action upon a false surmise in a proper Court, he cannot bring an action against him and charge him with it as a fault directly, and ex diametro, as if the suit itself were a wrongful act, for executio juris non habet injuriam. And as all by nature is good, so Saint Paul saith, the law is good if a man use it lawfully; so the abuse of law is the fault. * * *

Now to the principal case, if a man sue me in a proper Court, yet if his suit be utterly without ground of truth, and that certainly known to himself, I may have an action of the case against him for the undue vexation and damage that he putteth me unto by his ill practice, though the suit itself be legal, and I cannot complain of it, as it is a suit, as in the case before; and therefore the 16 of E. 3, Fitz. Deceipt, 35, a conusee of a statute sued execution against his deed of defeasance, whereupon the conusor had an action of deceit against him and his assign, in the nature of an audita querela. So note the distinction upon this case, and 43 E. 3, before. If a man sue me, and hanging that suit commence another against me, to this I have a plea in abatement, which proves this latter suit unjust and vexatious: but if he discontinue the former he may bring a new action. Likewise I hold, that I may have an action upon the case against him that sues me against his release, or after the money duly paid; yea, though it be upon a single obligation. So where one doth bargain and sell his land at the common law, and refuse to make assurance accordingly, and after conveyeth the land to another, who hath knowledge of the first bargain, the first bargainee may have an action upon the case, or

[5] Parts of the opinion are omitted.

deceit as well as subpœna, whereupon Fairfax, 21 E. 4, 23, saith well, that if men will be good pleaders, there should not be cause of so many suits in Chancery. * * * [6]

GRAINGER v. HILL et al.

(Court of Common Pleas, 1838. 4 Bing. N. C. 212, 132 Reprint, 769.)

In September, 1836, the plaintiff, by deed, mortgaged to the defendants for £80 a vessel of which he was owner as well as captain: the money was to be repaid in September, 1837; and the plaintiff was to retain the register of the vessel in order to pursue his voyages.

In November, 1836, the defendants, under some apprehension as to the sufficiency of their security, resolved to possess themselves of the ship's register, and for this purpose, after threatening to arrest the plaintiff unless he repaid the money lent, they made an affidavit of debt, sued out a capias endorsed for bail in the sum of £95. 17s. 6d. in an action of assumpsit, and sent two sheriff's officers with the writ to the plaintiff, who was lying ill in bed from the effects of a wound. A surgeon present, perceiving he could not be removed, one of the defendants said to the sheriff's officers, "Don't take him away; leave the young man with him." The officers then told the plaintiff that they had not come to take him, but to get the ship's register; but that if he failed to deliver the register, or to find bail, they must either take him or leave one of the officers with him.

The plaintiff being unable to procure bail, and being much alarmed, gave up the register.

The plaintiff could not go to sea without the register, and because of its unlawful detention by the defendant lost four voyages from London to Caen. The plaintiff afterwards came to an arrangement with the defendants; was discharged from the arrest; paid the costs: repaid the money borrowed on mortgage; and received from the defendants a release of the mortgage deed. No further steps were taken in the action of assumpsit.

On these facts, a special action on the case was brought to recover the damage which the plaintiff had sustained from the defendants' wrongful acts. On the general issue there was a verdict for the plaintiff.

Taddy, Serjt., pursuant to leave, moved to enter a non suit on the ground, inter alia, that there was no proof of the defendants' action in assumpsit having been determined previously to the commencement of the present action, and without such proof the action will not lie.

PARK, J. * * * The argument as to the omission to prove the termination of the defendant's suit, and to allege want of reasonable

[6] Parts of the opinion are omitted.

and probable cause for it, has proceeded on a supposed analogy between the present case and an action for a malicious arrest. But this is a case primæ impressionis, in which the defendants are charged with having abused the process of the law, in order to obtain property to which they had no colour of title; and, if an action on the case be the remedy applicable to a new species of injury, the declaration and proof must be according to the particular circumstances. I admit the authority of the cases which have been cited, but they do not apply to the present. * * *[7]

Discharged.

MALONE v. BELCHER.

(Supreme Judicial Court of Massachusetts, 1913. 216 Mass. 209, 103 N. E. 637, 49 L. R. A. [N. S.] 753, Ann. Cas. 1915A, 830.)

Action for malicious prosecution. Verdict for plaintiff. Both parties bring exceptions.

MORTON, J. This is an action of tort to recover of the defendant damages for a malicious abuse of process in causing property which the plaintiff had bargained to sell to one Petersen to be maliciously attached for the purpose of preventing said sale and compelling the plaintiff to convey the same to the defendant or to such person or persons as he might designate. There was a verdict for the plaintiff with the amount of which he is dissatisfied. The case is here on exceptions by both parties to the refusal of the presiding judge to give certain rulings asked for—those requested by the plaintiff going to the measure of damages, and those requested by the defendant to the maintenance of the action. There is also an exception by the defendant to the charge.

There was evidence tending to show that while the suit was brought by the defendant and the attachment made for the ostensible purpose of collecting a commission which he claimed to be due him from the plaintiff, the real object was by means of the suit and attachment to prevent the conveyance of the property to Petersen and to secure it for himself. The plaintiff testified amongst other things that the defendant said: "'I am going to attach it' [meaning the property which the plaintiff had agreed to sell to Petersen]. I said, 'What right do you claim, Mr. Belcher, to attach it?' He said, 'I want to hold up the sale; that is the only way I can hold it up.'" The plaintiff also testified that in answer to his question, "Who is your customer," the defendant replied, "It was myself, Mr. Malone." This and other evidence introduced by the plaintiff warranted, if believed, a finding that the real object of the suit and attachment was not that for which the suit pur-

[7] The statement of facts is abridged, and the concurring opinion of Tindal, C. J., parts of the opinion of Park, J., and all of the opinions of Vaughan and Bosanquet, JJ., are omitted.

ported to have been brought and the attachment made, but was for the purpose of preventing the transfer of the property to Petersen and getting it, if the defendant could, for himself. This would constitute a malicious abuse of process for which the defendant would be liable. The gravamen of the cause of action was the malicious attachment by means of the suit for the purpose of preventing the transfer to Petersen. It was not necessary in order to maintain the action to show a termination of the suit in which the attachment was made, as it would have been in case of malicious prosecution. The attachment for the purpose of preventing the sale to Petersen was a perversion of the object which the writ was intended by law to effect, and it was therefore immaterial whether the suit in which the attachment was made had been terminated or not. But as to malice and want of probable cause the case stood differently. The defendant had the right, even though actuated by malicious motives, to attach the property to secure a claim which he had probable cause for believing was due to him from the defendant. In these respects the case was analogous to a case for malicious prosecution, and it was necessary, as the court instructed the jury, for the plaintiff to show malice and want of probable cause. * * * [8]

III. Malicious Falsehood

SHEPPARD v. WAKEMAN.

(Court of King's Bench, 1661. 1 Lev. 53, 83 Reprint, 293.)

Case, where the Plaintiff was to be married to such a one who intended to take her to his Wife; the Defendant falsely and maliciously to hinder the Marriage, writ a letter to the said Person, That the Plaintiff was contracted to him, whereby she lost her Marriage. After Verdict for the Plaintiff, 'twas moved, That the Action did not lie, the Defendant claiming Title to her himself, like as Gerrard's Case, 4 Co. for Slander of Title. But after divers Motions, the Plaintiff had Judgment, for it is found to be malicious and false; and if such an Action should not lie, a mean and base Person might injure any Person of Honour and Fortune by such a Pretence.

[8] Morton, J., here cited the following authorities: Savage v. Brewer (1835) 16 Pick. 453, 28 Am. Dec. 255; Wood v. Graves (1887) 144 Mass. 365, 11 N. E. 567, 59 Am. Rep. 95; Zinn v. Rice (1891) 154 Mass. 1, 27 N. E. 772, 12 L. R. A. 288; White v. Apsley Rubber Co. (1902) 181 Mass. 339, 63 N. E. 885; Grainger v. Hill (1838) 4 Bing. N. C. 212; Hearn v. Shaw (1881) 72 Me. 187; Mayer v. Walter (1870) 64 Pa. 283; Drake on Attachments (2d Ed.) § 726; 19 Am. & Eng. Encyc. of Law (2d Ed.) 632; Bigelow on Torts (8th Ed.) 230; 3 Ann. Cas. 722, note.

SIR G. GERARD v. DICKENSON.

(Court of King's Bench, 1590. 4 Co. Rep. 18a, 76 Reprint, 903.)

The plaintiff declared that he was seised of the manor and castle of H. in the county of Stafford in fee by purchase from George Lord Audley; and that he was in communication to demise the said castle and manor to Ralph Egerton for twenty-two years for two hundred pounds fine, and one hundred pounds rent per annum, and that the defendant (præmissorum non ignara) said, "I have a lease of the manor and castle of H. for ninety years;" and then and there shewed and published a demise supposed to be made by George Audley, grandfather to the said George Lord Audley, for ninety years, to Edward Dickenson, her husband, and published the said demise as a true and good lease; and so affirmed it, and offered to sell it; ubi revera the said lease was counterfeited by her husband, and that the defendant knew it to be counterfeited; by reason of which words and publication the said Ralph Egerton did not proceed to accept the said lease, to damage, &c. The defendant pleaded in bar, quod talis indentura (qualis in the declaration is alleged) came to the defendant's hands by trover, and traversed that she knew of the forgery, upon which the plaintiff demurred in law. And in this case three points were resolved: 1st. If the defendant had affirmed and published, that the plaintiff had no right to the castle and manor of H., but that she herself had right to them, in that case, because the defendant herself pretends right to them, although in truth she had none, yet no action lies. For if an action should lie when the defendant herself claims an interest, how can any make claim or title to any land, or begin any suit, or seek advice and counsel, but he should be subject to an action? which would be inconvenient. Which resolution agrees with the opinion in Banister's case before, no action upon the case lies against one who publishes another to be his villein without saying that he lies in wait to imprison him, et tales et tantas minas in ipsum fecit, quod circa negotia sua palam intendere non audebat. And therefore it was resolved, that for the said words, "I have a lease of the manor of H. for ninety years," although it is false, yet no action lies for slandering of his title or interest in the said castle and manor. And although it appears by the defendant's bar, that she has no title or interest in the said lease, but is a stranger to it; yet forasmuch as the matter alleged in the declaration doth not maintain the action, the bar will not make it good. 2. It was resolved that there was other matter in the declaration sufficient to maintain the action, and that was because it was alleged in the declaration that the defendant knew of the communication of the making of the said lease to Ralph Egerton, and also that she knew that the lease was forged and counterfeited, and yet (against her own knowledge) she has affirmed and published, that it was a good and true lease, by which the plaintiff was defeated of his

bargain. If a man forges a bond in my name, and puts it in suit against me, by which I am vexed and damnified, I shall have an action on the case. B. offered eight oxen to sell to A. as his proper goods, knowing them to be the proper goods of P. A. trusting in the fidelity of B. bought them for eight pounds, and afterwards P. retook the oxen; in that case A. shall have an action upon the case against B. * * *[9]

HATCHARD v. MEGE et al.

(Queen's Bench Division, 1887. 18 Q. B. Div. 771.)

The statement of claim, so far as material to the point decided, was as follows:

Paragraph 1 alleged that the plaintiff was a wine merchant and importer, and the registered proprietor of a trade-mark thereinafter described, and a dealer in a brand of champagne introduced by him and known as "the Delmonico" champagne.

Paragraph 4 alleged that the defendants wrote and published "of and concerning the plaintiff and his said trade as a wine merchant and importer the following false and malicious libel that is to say: 'Caution: Delmonico Champagne. Messrs. Delbeck & Co., finding that wine stated to be Delmonico Champagne is being advertised for sale in Great Britain, hereby give notice that such wine cannot be the wine it is represented to be, as no champagne shipped under that name can be genuine unless it has their names on their labels. Messrs. Delbeck & Co. further give notice that if such wine be shipped from France they will take proceedings to stop such shipments, and such other proceedings in England as they may be advised'—thereby meaning that the plaintiff had no right to use his said registered trade-mark or brand for champagne imported or sold by him, and that in using such trade-mark or brand he was acting fraudulently, and endeavoring to pass off inferior champagne as being of the manufacture of Messrs. Delbeck & Co., and that the champagne imported and sold by the plaintiff was not genuine wine, and that no person other than the defendants had the right to use the word 'Delmonico' as a trade-mark or brand, or part of a trade-mark or brand, of champagne in the United Kingdom.

"5. In consequence of the publication of the libel aforesaid, the plaintiff has been greatly injured in his credit and reputation, and in his said trade and business of a wine merchant and importer and dealer in champagne.

"The plaintiff claims:

"(3) £1000 damages in respect of the publication of the said libel.

"(4) An injunction restraining the defendants, their servants or agents, from continuing the publication of the said libel or any other advertisement or notice to a similar effect."

At the trial Lord Coleridge, C. J., after hearing the opening statement of counsel for the plaintiff, directed a nonsuit to be entered, on

[9] The third point is omitted.

Accord: Smith v. Spooner (1810) 3 Taunt. 246: D. had leased certain premises for 31 years. The tenant, P., was about to sell at auction a 24 year remainder of the time. D., thinking that he had a right to recover possession of the term for some misconduct of the tenant, went to the auction and told the auctioneer that he, D., was the owner and that P. could not make title to the time. And see the remark of Lawrence, J. (Id. 255): "An action (upon the case for slander of title) can only be maintained when the words are spoken maliciously. It is not necessary to plead specially; it is for the plaintiff to prove malice, which is the gist of the action and is a part of the declaration important to be proved by the plaintiff."

the ground that the action came to an end on the death of the original plaintiff.

DAY, J. This is an application to set aside a nonsuit, which was directed by the Lord Chief Justice on the opening statement of counsel, and the question is whether the nonsuit was properly entered.

The statement of claim alleges two distinct grievances. The first claim was for infringement of the plaintiff's trade-mark, but that was abandoned at the trial. The second claim is contained in paragraph 4, which sets out a distinct cause of action. The publication there set out is complained of as a libel on the plaintiff in relation to his trade. It is substantially a warning not to buy Delmonico champagne because it is not genuine. The statement of claim alleges that the publication is false and malicious; that would be a question for the jury; it is not for us to consider the facts of the case; we can only look at what was opened by the plaintiff's counsel and what appears on the pleadings. The innuendo charges that the defendants intended to convey the meaning that the plaintiff had no right to use his trade-mark or brand, and that the wine he sold was not genuine. It may be that the publication bears that meaning, and that the words used import dishonesty. The plaintiff has died, and the question to be decided is how much, if any part, of the cause of action survives. The statute 4 Edw. 3, c. 7, and the course of the practice, make it clear that a civil action for libel dies with the death of the person libelled. It does not come within the spirit, and certainly not within the letter of the statute. There is, however, a further question whether a right of action can survive because injury to the plaintiff's trade-mark is alleged. Injury to trade is constantly alleged in actions for libel, and therefore that does not affect the question of survivorship. In the present case the second part of the statement of claim may be subdivided into two separate and distinct claims. The first is for ordinary defamation, either independently of the plaintiff's trade, affecting his character by charging him with being a dishonest man, or defamation of him in his trade by charging him with being a dishonest wine-merchant. That claim would not survive, for it is nothing more than a claim in respect of a libel on an individual. But this publication may be construed to mean that the plaintiff had no right to use his trade-mark. This is not properly a libel, but is rather in the nature of slander of title, which is well defined in Odgers on Libel and Slander, c. V, p. 137, in the following passage: "But wholly apart from these cases there is a branch of the law (generally known by the inappropriate but convenient name—slander of title) which permits an action to be brought against any one who maliciously decries the plaintiff's goods or some other thing belonging to him, and thereby produces special damage to the plaintiff. This is obviously no part of the law of defamation, for the plaintiff's reputation remains uninjured; it is really an action on the case for maliciously acting in such a way as to inflict loss upon the plaintiff. All the preceding

rules dispensing with proof of malice and special damage are therefore wholly inapplicable to cases of this kind. Here, as in all other actions on the case, there must be et damnum et injuria. The injuria consists in the unlawful words maliciously spoken, and the damnum is the consequent money loss to the plaintiff."

It appears, therefore, that the first and last parts of the innuendo in the present case suggests slander of title. As appears from the passage I have read, an action for slander of title is not an action for libel, but is rather in the nature of an action on the case for maliciously injuring a person in respect of his estate by asserting that he has no title to it. The action differs from an action for libel in this, that malice is not implied from the fact of publication, but must be proved, and that the falsehood of the statement complained of, and the existence of special damage, must also be proved in order to entitle the plaintiff to recover. The question whether the publication is false and malicious is for the jury. Here, I think, special damage is alleged by the statement of claim, and if the plaintiff could have shewn injury to the sale of the wine which he sold under his trade-mark, he would have been entitled to recover, and that is a cause of action which survives.

For these reasons I am of opinion that the nonsuit was right so far as it related to the claim in respect of a personal libel, but was wrong as to the claim in respect of so much of the publication as impugned the plaintiff's right to sell under his trade-mark or brand.

There will, therefore, be an order for a new trial, but it will be limited to this latter part of the claim.[10]

MELLIN v. WHITE.

(Court of Appeal. [1894] 3 Ch. 276.)

The plaintiff was the manufacturer and proprietor of the food for infants known as "Mellin's Infants' Food." This food was sold wholesale by the plaintiff in bottles, which were inclosed in paper wrappers, bearing thereon the words "Mellin's Infants' Food" and the plaintiff's trade-mark.

The defendant was a chemist at Portsmouth, and the plaintiff had for some years been in the habit of supplying him with Mellin's Food. In 1893 the plaintiff discovered that the defendant had adopted the practice of affixing to the wrappers of the bottles of the plaintiff's food which he sold, a label in the following terms:

"Notice.

"The public are recommended to try Dr. Vance's Prepared Food for Infants and Invalids, it being far more nutritious and healthful than any other preparation yet offered, sold in barrels, containing 1 lb. net weight, at 7½ d. each; or in 7 lb. packets, 3s. 9d. each. Local agent, Timothy White, chemist, Portsmouth."

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[10] The statement of facts is abridged and opinion of Wills, J., is omitted.

The defendant was, in fact, the proprietor of Dr. Vance's Prepared Food.

The plaintiff, by his statement of claim, alleged that Dr. Vance's food was far inferior to the plaintiff's in nutritiveness and healthfulness for infants and invalids, and that the statement on the label to the contrary was untrue, and was made for the purpose and with the object of depreciating the plaintiff's food, and of inducing persons in the habit of purchasing and using it to believe that it was an inferior article, and to purchase Dr. Vance's food instead. The plaintiff further alleged that the statement on the label that the defendant was "an agent" was untrue; and the plaintiff claimed an injunction to restrain the defendant from offering the plaintiff's food for sale otherwise than under the original labels and wrappers, or offering it for sale, under the plaintiff's labels and wrappers, with any unauthorized variations, and from untruly stating or representing to persons purchasing, or about to purchase, the plaintiff's food, or to the public generally, that the plaintiff's food was not nutritious or healthful, or that the plaintiff's food was less nutritious or healthful than Dr. Vance's.

Moulton, Q. C., and A. B. Terrell, for the appeal: The putting this label on Mellin's bottles is a step calculated to injure the sale of Mellin's Food. It is a trade libel, being an untrue statement made to purchasers of Mellin's Food that it is inferior to Dr. Vance's.

Neville, Q. C., and Macnaghten, for the defendant: There is no difference of substance between this case and the ordinary case of a tradesman publishing a puff saying that his goods are the best of their kind in the market. Suppose a bootmaker were to advertise that his were the best boots in the market, could a bootmaker next door bring an action, on the ground that the advertiser was stigmatizing the neighbour's goods as inferior to his? This is that case.

LINDLEY, L. J. I think in this case the learned judge has gone too far in giving judgment for the defendant upon the materials which were laid before him. He appears to have proceeded on the ground that, even if the plaintiff's evidence stood uncontradicted, this action could not in point of law be sustained. I think that is going too far. The defendant has brought upon himself a new form of attack by adopting a new mode of carrying on business. Nobody in this court, at all events, has ever seen or heard of a tradesman selling goods in the bottles and with the labels used by the manufacturer, and putting on them labels which disparage the article contained in the bottles. It is quite a new idea. I do not say it is illegal. I do not say it is overstepping the mark. But if, upon hearing the whole of the evidence to be adduced, the result should be that the statement contained in the label complained of is a false statement about the plaintiff's goods to the disparagement of them, and if that statement has caused injury to, or is calculated to injure the plaintiff, this action will lie. * * *

LOPES, L. J. All I desire to say is, that in my opinion it is actionable to publish maliciously, without lawful occasion, a false statement disparaging the goods of another person, and causing such other person damage, or likely to cause such other person damage. I think, provided that can be made out, an action for an injunction will lie. All these matters as far as we know at the present moment are undecided, they have not been proved, the evidence has only been heard upon one side, and whether or not the statement in the defendant's notice is false we are not in a position to say. Evidence was given on the part of the plaintiff, but no evidence was given on the part of the defendant. For anything I know, the defendant may be able to shew that the evidence which was given for the plaintiff was incorrect, and that no false statement has been made at all. * * *

The Court of Appeal, therefore, discharged the judgment of Romer, J., and ordered a new trial. The defendant appealed to the House of Lords.[11]

WHITE v. MELLIN.

(House of Lords. [1895] A. C. 154.)

LORD HERSCHELL, L. C. (after stating the facts and quoting from the opinions of Lindley and Lopes, L. JJ., in the Court of Appeal). None of the learned judges in the Court of Appeal dealt with the evidence which had been adduced on behalf of the plaintiff; but I think it must be taken that they had arrived at the conclusion that that evidence did bring the case within those statements of the law. Of course, if the plaintiff, on his evidence, had made out no case, he could not complain that the learned judge decided against him and did not hear the witnesses for the defendant; the action was in that case properly dismissed. I take it, therefore, that although the learned judges did not analyse the evidence or make any reference to it, they must have concluded that it established a case coming within the law as they laid it down. My Lords, as I understand, in the view of these learned judges, or in the view of Lindley, L. J., to take his statement of the law in the first place, it was necessary in order to the maintenance of the action that three things should be proved: That the defendant had disparaged the plaintiff's goods, that such disparagement was false, and that damage had resulted or was likely to result. Now, my Lords, the only statement made by the defendant by means of the advertisement is this: that Vance's food was the most healthful and nutritious for infants and invalids that had been offered to the public. The statement was perfectly general, and would apply in its terms not only to the respondent's infants' food

[11] The statement of facts is abridged, and part of the opinions of Lindley, L. J., and Lopes, L. J., and the concurring opinion of Kay, L. J., are omitted.

but to all others that were offered to the public. I will take it as sufficiently pointed at the plaintiff's food by reason of its being affixed to a bottle of the plaintiff's food when sold, and that it does disparage the plaintiff's goods by asserting that they are not as healthful and as nutritious as those recommended by the defendant. The question then arises, Has it been proved on the plaintiff's own evidence that that was a false disparagement of the plaintiff's goods? * * *

I am not satisfied that it has been shewn that by means of this advertisement the defendant falsely disparaged the plaintiff's goods. But, my Lords, assuming that he did so, the Court of Appeal regarded it as requisite for the maintenance of the action that something further should be proved, and that is that the disparaging statement has caused injury to or is calculated to injure the plaintiff. Upon that there is a complete absence of evidence. The plaintiff was called, but he did not state that he had sustained any injury, nor did he even say that it was calculated to injure him, and I own it seems to me impossible, in the absence of any such statement or evidence, to say that it is a case in which such must be the necessary consequence; on the contrary, speaking for myself, I should doubt very much whether it was likely to be the consequence. After all, the advertisement is of a very common description, puffing, it may be, extremely and in an exaggerated fashion, these particular goods, Vance's food. That advertisement was outside the wrapper; inside was found an advertisement of Mellin's food, in which Mellin's food was stated to be recommended by the faculty as best for infants and invalids. Why is it to be supposed that any one buying this bottle at the chemist's would be led to believe that Mellin's food which he had bought was not a good article or not as good an article as another, merely because a person who obviously was seeking to push a rival article said that his article was better? My Lords, why should people give such a special weight to this anonymous puff of Vance's food, obviously the work of some one who wanted to sell it, as that it should lead him to determine to buy it instead of Mellin's food, which was said to be recommended by the faculty as the best for infants and invalids? I confess I do not wonder that the plaintiff did not insist that he had sustained injury by what the defendant had done. There is an entire absence of any evidence that the statement complained of either had injured or was calculated to injure the plaintiff. If so, then the case is not brought even within the definition of the law which Lindley, L. J., gives.

My Lords, the learned counsel relied upon recent cases in which an injunction has been granted to restrain the publication of a libel, and he suggested that there had been a growth of equity jurisprudence which had brought within its ambit a class of cases which were previously not regarded as within it. But when the case in which the Court of Appeal laid down that an injunction might be granted to restrain the publication of a libel is looked at, it will be seen

that the decision was not founded upon any principle or rule of equity jurisprudence, but upon the fact that a Court of Common Law could have granted such an injunction in an action of libel, and that since the Judicature Act the power which a Court of Common Law possessed in that respect is now possessed also by the Court of Chancery. That was distinctly the ground upon which the judgment was founded, that "the 79th and 82d sections of the Common Law Procedure Act 1854 undoubtedly conferred on the Courts of Common Law the power, if a fit case should arise, to grant injunctions at any stage of a cause in all personal actions of contract or tort, with no limitation as to defamation"; and then, inasmuch as those powers are now possessed by the Chancery Division, it was held that they likewise could in such cases grant an injunction. That was the decision in Bonnard v. Perryman, [1891] 2 Ch. 269.

My Lords, obviously to call for the exercise of that power it would be necessary to shew that there was an actionable wrong well laid, and if the statement only shewed a part of that which was necessary to make up a cause of action—that is to say, if special damage was necessary to the maintenance of the action, and that special damage was not shewn,—a tort in the eye of the law would not be disclosed, the case would not be within those provisions, and no injunction would be granted. I think, therefore, for these reasons, that the plaintiff would not be entitled to an injunction, any more than he would be entitled to maintain an action unless he established all that was necessary to make out that a tort had been committed; and for the reasons which I have given, taking the Western Counties Manure Company v. Lawes Chemical Manure Company, L. R. 9 Ex. 218, to be good law, he has not brought himself within it.

But, my Lords, I cannot help saying that I entertain very grave doubts whether any action could be maintained for an alleged disparagement of another's goods, merely on the allegation that the goods sold by the party who is alleged to have disparaged his competitor's goods are better either generally or in this or that particular respect than his competitors' are. Of course, I put aside the question (it is not necessary to consider it) whether where a person intending to injure another, and not in the exercise of his own trade and vaunting his own goods, has maliciously and falsely disparaged the goods of another, an action will lie; I am dealing with the class of cases which is now before us, where the only disparagement consists in vaunting the superiority of the defendant's own goods. In Evans v. Harlow, 5 Q. B. 624, Lord Denman expressed himself thus: "The gist of the complaint is the defendant's telling the world that the lubricators sold by the plaintiff were not good for their purpose, but wasted the tallow. A tradesman offering goods for sale exposes himself to observations of this kind, and it is not by averring them to be 'false, scandalous, malicious and defamatory' that the plaintiff can found a charge of libel upon them. To decide so

would open a very wide door to litigation, and might expose every man who said his goods were better than another's to the risk of an action." My Lords, those observations seem to me to be replete with good sense. It is to be observed that Evans v. Harlow, 5 Q. B. 624, does not appear to have been decided on the ground merely that there was no allegation of special damage. The only judge who alludes to the absence of such an allegation is Patteson, J. No reference to it is to be found either in the judgment of Lord Denman or in the judgment of Wightman, J., the other two judges who took part in that decision; and I think it is impossible not to see that, as Lord Denman says, a very wide door indeed would be opened to litigation, and that the courts might be constantly employed in trying the relative merits of rival productions, if an action of this kind were allowed.

Mr. Moulton sought to distinguish the present case by saying that all that Lord Denman referred to was one tradesman saying that his goods were better than his rival's. That, he said, is a matter of opinion, but whether they are more healthful and more nutritious is a question of fact. My Lords, I do not think it is possible to draw such a distinction. The allegation of a tradesman that his goods are better than his neighbour's very often involves only the consideration whether they possess one or two qualities superior to the other. Of course "better" means better as regards the purpose for which they are intended, and the question of better or worse in many cases depends simply upon one or two or three issues of fact. If an action will not lie because a man says that his goods are better than his neighbour's, it seems to me impossible to say that it will lie because he says that they are better in this or that or the other respect. Just consider what a door would be opened if this were permitted. That this sort of puffing advertisement is in use is notorious; and we see rival cures advertised for particular ailments. The Court would then be bound to inquire, in an action brought, whether this ointment or this pill better cured the disease which it was alleged to cure—whether a particular article of food was in this respect or that better than another. Indeed, the Courts of law would be turned into a machinery for advertising rival productions by obtaining a judicial determination which of the two was the better. As I said, advertisements and announcements of that description have been common enough; but the case of Evans v. Harlow, 5 Q. B. 624, was decided in the year 1844, somewhat over half a century ago, and the fact that no such action—unless it be Western Counties Manure Co. v. Lawes Chemical Manure Co., L. R. 9 Ex. 218, has ever been maintained in the Courts of Justice is very strong indeed to shew that it is not maintainable. It is, indeed, unnecessary to decide the point in order to dispose of the present appeal.

For the reasons which I have given I have come to the conclusion that the judgment of the Court below cannot be sustained, even assuming the law to be as stated by the learned judges; but inasmuch

as the case is one of great importance and some additional colour would be lent to the idea that an action of this description was maintainable by the observations in the Court below, I have thought it only right to express my grave doubts whether any such action could be maintained even if the facts brought the case within the law there laid down.

Upon the whole, therefore, I think that the judgment of Romer, J., was right and ought to be restored and that this appeal should be allowed, with the usual result as to costs; and I so move your Lordships.[12]

IV. Deceit

CHANDELOR v. LOPUS.

(In the Exchequer Chamber, 1603. Cro. Jac. 4, 79 Reprint, 3.)

Action upon the case. Whereas the defendant being a goldsmith, and having skill in jewels and precious stones, had a stone which he affirmed to Lopus to be a bezar-stone, and sold it to him for one hundred pounds; ubi revera it was not a bezar-stone: the defendant pleaded not guilty, and verdict was given and judgment entered for the plaintiff in the King's Bench.

But error was thereof brought in the Exchequer Chamber; because the declaration contains not matter sufficient to charge the defendant, viz. that he warranted it to be a bezar-stone, or that he knew that it was not a bezar-stone; for it may be, he himself was ignorant whether it were a bezar-stone or not.

And all the Justices and Barons (except Anderson) held, that for this cause it was error: for the bare affirmation that it was a bezar-stone, without warranting it to be so, is no cause of action: and although he knew it to be no bezar-stone it is not material; for every one in selling his wares will affirm that his wares are good, or the horse which he sells is sound; yet if he does not warrant them to be so, it is no cause of action, and the warranty ought to be made at the same time of the sale; as F. N. B. 94, c, and 98, b; 5 Hen. 7, pl. 41; 9 Hen. 6, pl. 53; 12 Hen. 4, pl. 1, 42 Ass. 8; 7 Hen. 4, pl. 15. Wherefore, forasmuch as no warrant is alleged, they held the declaration to be ill.

Anderson to the contrary; for the deceit in selling it for a bezar, whereas it was not so, is cause of action.

But, notwithstanding, it was adjudged to be no cause, and the judgment reversed.[13]

[12] Part of the Lord Chancellor's opinion, and the concurring opinions of Lords Watson, Macnaghten, Morris, and Shand, are omitted. Lord Ashbourne concurred in the judgment proposed.

[13] See the note to 1 Dyer, 752 (73 Reprint, 160, 161): "Lopus brought an action upon the case against Chandler, and shewed, that whereas the de-

BAILY v. MERRELL.

(Court of King's Bench, 1615. 3 Buist. 94, 81 Reprint, 81.)

In a special action upon the case for a deceit, the case appears to be this: The plaintiff being a common carrier, using to carry wares out of Essex into Northamptonshire; the defendant having a cade of woad to be carried, came unto the plaintiff, and bargained with him for the carriage of this, and by agreement, he was to give him 2s. for every hundred weight of this, and being demanded by the plaintiff, how many hundred weight this did contain, he said it was about 800 weight; upon this, he giving credit unto him, did cause this to be put into his cart, and he afterwards perceiving by the hardness of the draught, that his horses did overdraw themselves, and by reason of this carriage he did kill two of his horses, and then he did presently weigh the same, and found the same to be 2,000 pound weight, and so for this his deceit used, by reason of which he was so much damnified; for his remedy herein, he brought this action, to which the defendant pleaded non culp. All this matter appearing so to the jury upon the trial, and the loss of his horses, they gave a verdict for the plaintiff, and 20 marks damages.

DODDERIDGE, J. Here is a plain default in the carrier, that he did not weigh this; if he had carried this home for him, he would then have had for it according to the weight of it, after the rate of 2s. a hundred weight, as they agreed for, and that there it ought to be weighed; he himself at his peril ought to have looked unto this before.

TOTA CURIA (absent Coke, Chief Justice) that the action by the plaintiff lieth not, because the default was in himself, that he had not weighed this.

By the rule of the Court, this matter to stay till the plaintiff move the same again, and no judgment pronounced one way or other; but the plaintiff perceiving the opinion of the Court to be against him, never moved the Court again herein.*

fendant was a goldsmith, and skilled in the nature of precious stones, and being possessed of a stone which the defendant asserted and assured the said plaintiff to be a true and perfect stone called a bezoar stone, &c. upon which the plaintiff bought it, &c. There the opinion of Popham was, that if I have any commodities which are damaged (whether victuals or otherwise), and I, knowing them to be so, sell them for good, and affirm them to be so, an action upon the case lies for the deceit; but although they be damaged, if I, knowing not that, affirm them to be good, still no action lies, without I warrant them to be good." And see Lord Fitzgerald's comment upon this in Derry v. Peek (1889) 14 A. C. 337, 357: "The action seems originally to have been on a warranty which failed in fact, as there had been no warranty, and it was then sought to support it as an action for deceit; but it was not alleged in the count that the defendant knew the representation to be untrue. It was in reference to that that the observation of Popham, C. J., was made. He had the reputation of being a consummate lawyer."

*The opinions of Croke and Haughton, JJ., are omitted.

MORGAN v. BLISS.

(Supreme Judicial Court of Massachusetts, 1806. 2 Mass. 111.)

In an action of the case for deceit, the plaintiffs declare that Pliny Bliss and Charles Wiley, contriving and intending to cheat and defraud the plaintiffs, in pursuance of such intention made a pretended promissory note subscribed by said Pliny for the sum of twenty-three dollars, payable to the said Charles, which note the said Charles transferred and assigned to the plaintiffs. And afterwards the said Charles fraudulently gave to the said Pliny, and the said Pliny fraudulently received, a discharge of said note.

The writ having been served upon Pliny Bliss alone, he appeared and defended, and at the adjourned session in December last, upon the general issue of not guilty, joined between these parties, viz., the plaintiffs and Pliny Bliss, the plaintiffs gave in evidence a note, dated August 22, 1803, by which P. Bliss, for value received, promised C. Wiley to pay him 23 dollars on demand. Amos Daniels, a subscribing witness to the note, testified that P. Bliss said, at the time the note was given, it was to answer a debt of one J. Bliss to the plaintiffs, C. Wiley being indebted to the said J. Bliss.

THE COURT. This was an action for fraud, and the evidence was clearly insufficient to support the charge. Here was no evidence of any conspiracy between Bliss and Wiley; nor any proof of the plaintiffs' ever having released their demand on J. Bliss, (and no reason shown for not producing such proof,) or of their having in any other way given a valuable consideration for the note; and without such evidence, what damage do they show themselves to have sustained? There is nothing left in the case for the jury to deliberate upon.

THE CHIEF JUSTICE suggested that there might perhaps be a foundation for a criminal prosecution for conspiracy; but an act done in pursuance of an unlawful intent, and without occasioning actual damage, is no ground for a civil action.

Nonsuit not set aside.

PASLEY et al. v. FREEMAN.

(Court of King's Bench, 1789. 3 Term R. 51, 1 R. R. 634, 100 Reprint, 450.)

This was an action in the nature of a writ of deceit; to which the defendant pleaded the general issue. And after a verdict for the plaintiffs on the third count, a motion was made in arrest of judgment.

The third count was as follows:

"And whereas also the said Joseph Freeman, afterwards, to wit, on the 21st day of February in the year of our Lord 1787, at London aforesaid, in the parish and ward aforesaid, further intending to deceive and defraud the said John Pasley and Edward, did wrongfully and deceitfully encourage

and persuade the said John Pasley and Edward, to sell and deliver to the said John Christopher Falch divers other goods, wares, and merchandises, to wit, 16 other bags of cochineal of great value to wit, of the value of £2634. 16s. 1d. upon trust and credit: and did for that purpose then and there falsely, deceitfully, and fraudulently assert and affirm to the said John Pasley and Edward, that the said John Christopher then and there was a person safely to be trusted and given credit to in that respect; and did thereby falsely, fraudulently, and deceitfully, cause and procure the said John Pasley and Edward to sell and deliver the said last-mentioned goods, wares, and merchandizes, upon trust and credit, to the said John Christopher; and in fact they the said John Pasley and Edward, confiding in and giving credit to the said last-mentioned assertion and affirmation of the said Joseph, and believing the same to be true, and not knowing the contrary thereof, did afterwards, to wit, on the 28th day of February in the year of our Lord 1787 at London aforesaid, in the parish and ward aforesaid, sell and deliver the said last-mentioned goods, wares, and merchandizes, upon trust and credit, to the said John Christopher; whereas in truth and in fact, at the time of the said Joseph's making his said last-mentioned assertion and affirmation, the said John Christopher was not then and there a person safely to be trusted and given credit to in that respect, and the said Joseph well knew the same, to wit, at London aforesaid, in the parish and ward aforesaid. And the said John Pasley and Edward further say, that the said John Christopher hath not, nor hath any other person on his behalf, paid to the said John Pasley and Edward, or either of them, the said sum of £2634. 16s. 1d. last-mentioned, or any part thereof, for the said last-mentioned goods, wares, and merchandizes; but on the contrary the said John Christopher then was, and still is, wholly unable to pay the said sum of money last mentioned, or any part thereof, to the said John Pasley and Edward, to wit, at London aforesaid, in the parish and ward aforesaid; and the said John Pasley and Edward aver that the said Joseph falsely and fraudulently deceived them in this, that at the time of his making his said last-mentioned assertion and affirmation, the said John Christopher was not a person safely to be trusted or given credit to in that respect as aforesaid, and the said Joseph then well knew the same, to wit, at London aforesaid, in the parish and ward aforesaid: by reason of which said last-mentioned false, fraudulent, and deceitful assertion and affirmation of the said Joseph the said John Pasley and Edward have been deceived and imposed upon, and have wholly lost the said last-mentioned goods, wares, and merchandizes, and the value thereof, to wit, at London aforesaid in the parish and ward aforesaid; to the damage," &c.

Application was first made for a new trial, which, after argument, was refused: and then this motion in arrest of judgment. Wood argued for the plaintiffs, and Russell for the defendant, in the last term: but as the Court went so fully into this subject in giving their opinions, it is unnecessary to give the arguments at the Bar.

The Court took time to consider of this matter and now delivered their opinions seriatim.

BULLER, J. The foundation of this action is fraud and deceit in the defendant, and damage to the plaintiffs. And the question is, whether an action thus founded can be sustained in a Court of Law? Fraud without damage, or damage without fraud, gives no cause of action; but where these two concur, an action lies. Per Croke, J., 3 Bulst. 95. But it is contended, that this was a bare naked lie; that, as no collusion with Falch is charged, it does not amount to a fraud: and, if there were any fraud, the nature of it is not stated. And it was supposed by the counsel who originally made the motion, that no action could be maintained, unless the defendant, who made this false

assertion, had an interest in so doing. I agree that an action cannot be supported for telling a bare naked lie; but that I define to be, saying a thing which is false, knowing or not knowing it to be so, and without any design to injure, cheat, or deceive, another person. Every deceit comprehends a lie; but a deceit is more than a lie on account of the view with which it is practised, its being coupled with some dealing, and the injury which it is calculated to occasion, and does occasion, to another person. Deceit is a very extensive head in the law; and it will be proper to take a short view of some of the cases which have existed on the subject, to see how far the Courts have gone, and what are the principles upon which they have decided. * * *

These cases then are so far from being authorities against the present action, that they shew that, if there be fraud or deceit, the action will lie; and that knowledge of the falsehood of thing asserted is fraud and deceit. Collusion then is not necessary to constitute fraud. In the case of a conspiracy, there must be a collusion between two or more to support an indictment: but if one man alone be guilty of an offence, which, if practised by two, would be the subject of an indictment for a conspiracy, he is civilly liable in an action for reparation of damages at the suit of the person injured. That knowledge of the falsehood of the thing asserted constitutes fraud, though there be no collusion, is further proved by the case of Risney v. Selby, Salk. 211, where, upon a treaty for the purchase of a house, the defendant fraudulently affirmed that the rent was £30 per annum, when it was only £20 per annum, and the plaintiff had his judgment; for the value of the rent is a matter which lies in the private knowledge of the landlord and tenant, and if they affirm the rent to be more than it is, the purchaser is cheated, and ought to have a remedy for it. No collusion was there stated, nor does it appear that the tenant was ever asked a question about the rent, and yet the purchaser might have applied to him for information; but the judgment proceeded wholly upon the ground that the defendant knew that what he asserted was false. And by the words of the book it seems that, if the tenant had said the same thing, he also would have been liable to an action. If so, that would be an answer to the objection, that the defendant in this case had no interest in the assertion which he made. But I shall not leave this point on the dictum or inference which may be collected from that case. If A. by fraud and deceit cheat B. out of £1000, it makes no difference to B. whether A., or any other person, pockets that £1000. He has lost his money and if he can fix fraud upon A., reason seems to say that he has a right to seek satisfaction against him. * * *

The gist of the action is fraud and deceit, and if that fraud and deceit can be fixed by evidence on one who had no interest in his iniquity, it proves his malice to be the greater. But it was objected to this

declaration, that if there were any fraud, the nature of it is not stated: to this the declaration itself is so direct an answer, that the case admits of no other. The fraud is, that the defendant procured the plaintiffs to sell goods on credit to one whom they would not otherwise have trusted, by asserting that which he knew to be false. Here then is the fraud, and the means by which it was committed; and it was done with a view to enrich Falch by empoverishing the plaintiffs, or, in other words, by cheating the plaintiffs out of their goods. The cases which I have stated, and Sid. 146, and 1 Keb. 522, prove that the declaration states more than is necessary; for fraudulenter without sciens, or sciens without fraudulenter, would be sufficient to support the action. But as Mr. J. Twisden said in that case, the fraud must be proved. The assertion alone will not maintain the action; but the plaintiff must go on to prove that it was false, and that the defendant knew it to be so: by what means that proof is to be made out in evidence need not be stated in the declaration. Some general arguments were urged at the Bar, to shew that mischiefs and inconveniences would arise if this action were sustained; for if a man, who is asked a question respecting another's responsibility, hesitate, or is silent, he blasts the character of the tradesman: and if he say that he is insolvent, he may not be able to prove it. But let us see what is contended for: it is nothing less than that a man may assert that which he knows to be false, and thereby do an everlasting injury to his neighbour, and yet not be answerable for it. This is as repugnant to law as it is to morality. Then it is said that the plaintiffs had no right to ask the question of the defendant. But I do not agree in that; for the plaintiffs had an interest in knowing what the credit of Falch was. It was not the inquiry of idle curiosity, but it was to govern a very extensive concern. The defendant undoubtedly had his option to give an answer to the question, or not: but if he gave none, or said he did not know, it is impossible for any Court of Justice to adopt the possible inferences of a suspicious mind as a ground for grave judgment. All that is required of a person in the defendant's situation is, that he shall give no answer, or that if he do, he shall answer according to the truth as far as he knows. The reasoning in the case of Coggs v. Bernard [2 Ld. Raymond, 909] which was cited by the plaintiff's counsel, is I think very applicable to this part of the case. If the answer import insolvency, it is not necessary that the defendant should be able to prove that insolvency to a jury; for the law protects a man in giving that answer, if he does it in confidence and without malice. No action can be maintained against him for giving such an answer unless express malice can be proved. From the circumstance of the law giving that protection, it seems to follow, as a necessary consequence, that the law not only gives sanction to the question, but requires that, if it be answered at all, it shall be answered honestly. There is a case in the books, which, though not much to be relied on, yet serves to shew that this kind of con-

duct has never been thought innocent in Westminster Hall. In R. v. Gunston, 1 Str. 583, the defendant was indicted for pretending that a person of no reputation was Sir J. Thornycraft, whereby the prosecutor was induced to trust him; and the Court refused to grant a certiorari, unless a special ground were laid for it. If the assertion in that case had been wholly innocent, the Court would not have hesitated a moment. How indeed an indictment could be maintained for that, I do not well understand; nor have I learnt what became of it. The objection to the indictment is, that it was merely a private injury: but that is no answer to an action. And if a man will wickedly assert that which he knows to be false, and thereby draws his neighbour into a heavy loss, even though it be under the specious pretence of serving his friend, I say ausis talibus istis non jura subserviunt.[14]

DERRY et al. v. SIR HENRY WILLIAM PEEK.

(House of Lords, 1889. 14 App. Cas. 337.)

Appeal from a decision of the Court of Appeal. The facts are set out at length in the report of the decisions below, 37 Ch. D. 541. For the present report the following summary will suffice:

By a special Act (45 & 46 Vict. c. 159) the Plymouth, Devonport and District Tramways Company was authorized to make certain tramways.

By section 35 the carriages used on the tramways might be moved by animal power and, with the consent of the Board of Trade, by steam or any mechanical power for fixed periods and subject to the regulations of the Board.

By section 34 of the Tramways Act 1870 (33 & 34 Vict. c. 78), which section was incorporated in the said special Act, "all carriages used on any tramway shall be moved by the power prescribed by the special Act, and where no such power is prescribed, by animal power only."

In February, 1883, the appellants as directors of the company issued a prospectus containing the following paragraph:

"One great feature of this undertaking, to which considerable importance should be attached, is, that by the special Act of Parliament obtained, the company has the right to use steam or mechanical motive power, instead of horses, and it is fully expected that by means of this a considerable saving will result in the working expenses of the line as compared with other tramways worked by horses."

Soon after the issue of the prospectus the respondent, relying, as he alleged, upon the representations in this paragraph and believing

[14] Parts of the opinion of Buller, J., and all of the opinions of Grose and Ashhurst, JJ., and Lord Kenyon, C. J., are omitted.

that the company had an absolute right to use steam and other mechanical power, applied for and obtained shares in the company.

The company proceeded to make tramways, but the Board of Trade refused to consent to the use of steam or mechanical power except on certain portions of the tramways.

In the result the company was wound up, and the respondent in 1885 brought an action of deceit against the appellants claiming damages for the fraudulent misrepresentations of the defendants whereby the plaintiff was induced to take shares in the company.

At the trial before Stirling, J., the plaintiff and defendants were called as witnesses. The effect given to their evidence in this House will appear from the judgments of noble and learned Lords.

Stirling, J., dismissed the action; but that decision was reversed by the Court of Appeal (Cotton, L. J., Sir J. Hannen, and Lopes, L. J.) who held that the defendants were liable to make good to the plaintiff the loss sustained by his taking the shares, and ordered an inquiry, 37 Ch. D. 541, 591. Against this decision the defendants appealed.

Lord Bramwell. My Lords, I am of opinion that this judgment should be reversed. I am glad to come to this conclusion; for, as far as my judgment goes, it exonerates five men of good character and conduct from a charge of fraud, which, with all submission, I think wholly unfounded, a charge supported on such materials as to make all character precarious. I hope this will not be misunderstood; that promoters of companies will not suppose that they can safely make inaccurate statements with no responsibility. I should much regret any such notion; for the general public is so at the mercy of company promoters, sometimes dishonest, sometimes over sanguine, that it requires all the protection that the law can give it. Particularly should I regret if it was supposed that I did not entirely disapprove of the conduct of those directors who accepted their qualification from the contractor or intended contractor. It is wonderful to me that honest men of ordinary intelligence cannot see the impropriety of this. It is obvious that the contractor can only give this qualification because he means to get it back in the price given for the work he is to do. That price is to be fixed by the directors who have taken his money. They are paid by him to give him a good price, as high a price as they can, while their duty to their shareholders is to give him one as low as they can.

But there is another thing. The public, seeing these names, may well say, "These are respectable and intelligent men who think well enough of this scheme to adventure their money in it; we will do the same," little knowing that those thus trusted had made themselves safe against loss if the thing turned out ill, while they might gain if it was successful. I am glad to think that Mr. Wilde, a member of my old profession, was not one of those so bribed. The only shade of doubt I have in the case is, that this safety from loss in the directors

may have made them less careful in judging of the truth of any statements they have made.

There is another matter I wish to dispose of before going into the particular facts of the case. I think we need not trouble ourselves about "legal fraud," nor whether it is a good or bad expression; because I hold that actual fraud must be proved in this case to make the defendants liable, and, as I understand, there is never any occasion to use the phrase "legal fraud" except when actual fraud cannot be established. "Legal fraud" is only used when some vague ground of action is to be resorted to, or, generally speaking, when the person using it will not take the trouble to find, or cannot find, what duty has been violated or right infringed, but thinks a claim is somehow made out. With the most sincere respect for Sir J. Hannen I cannot think the expression "convenient." I do not think it is "an explanation which very clearly conveys an idea"; at least, I am certain it does not to my mind. I think it a mischievous phrase, and one which has contributed to what I must consider the erroneous decision in this case. But, with these remarks, I have done with it, and will proceed to consider whether the law is not that actual fraud must be proved, and whether that has been done.

Now, I really am reluctant to cite authorities to shew that actual fraud must be established in such a case as this. It is one of the first things one learned, and one has never heard it doubted until recently. I am very glad to think that my noble and learned friend (Lord Herschell) has taken the trouble to go into the authorities fully; but to some extent I deprecate it, because it seems to me somewhat to come within the principle Qui s'excuse s'accuse. When a man makes a contract with another he is bound by it; and, in making it, he is bound not to bring it about by fraud. Warrantizando vendidit gives a cause of action if the warranty is broken. Knowingly and fraudulently stating a material untruth which brings about, wholly or partly, the contract, also gives a cause of action. To this may now be added the equitable rule (which is not in question here), that a material misrepresentation, though not fraudulent, may give a right to avoid or rescind a contract where capable of such rescission. To found an action for damages there must be a contract and breach, or fraud. The statement of claim in this case states fraud. Of course that need not be proved merely because it is stated. But no one ever heard of or saw a statement of claim or declaration for deceit without it. There is not an authority at common law, or by a common law lawyer, to the contrary; none has been cited, though there may be some incautious, hesitating expressions which point that way. Every case from the earliest in Comyns' Digest to the present day alleges it. Further, the learned judges of the Court of Appeal hardly deny it. There is indeed an opinion to the contrary of the late Master of the Rolls, but it must be remembered that his knowledge of actions of deceit was small, if any. * * *

Lord Herschell. My Lords, in the statement of claim, in this

action the respondent, who is the plaintiff, alleges that the appellants made in a prospectus issued by them certain statements which were untrue, that they well knew that the facts were not as stated in the prospectus, and made the representations fraudulently, and with the view to induce the plaintiff to take shares in the company.

"This action is one which is commonly called an action of deceit, a mere common law action." This is the description of it given by Cotton, L. J., in delivering judgment. I think it important that it should be borne in mind that such an action differs essentially from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. The principles which govern the two actions differ widely. Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. In an action of deceit, on the contrary, it is not enough to establish misrepresentation alone; it is conceded on all hands that something more must be proved to cast liability upon the defendant, though it has been a matter of controversy what additional elements are requisite. I lay stress upon this because observations made by learned judges in actions for rescission have been cited and much relied upon at the bar by counsel for the respondent. Care must obviously be observed in applying the language used in relation to such actions to an action of deceit. Even if the scope of the language used extend beyond the particular action which was being dealt with it must be remembered that the learned judges were not engaged in determining what is necessary to support an action of deceit, or in discriminating with nicety the elements which enter into it.

There is another class of actions which I must refer to also for the purpose of putting it aside. I mean those cases where a person within whose special province it lay to know a particular fact, has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and has been held bound to make good the assurance he has given. Burrowes v. Lock, 10 Ves. 470, may be cited as an example, where a trustee had been asked by an intended lender, upon the security of a trust fund, whether notice of any prior incumbrance upon the fund had been given to him. In cases like this it has been said that the circumstance that the answer was honestly made in the belief that it was true affords no defence to the action. Lord Selborne pointed out in Brownlie v. Campbell, 5 App. Cas. at p. 935, that these cases were in an altogether different category from actions to recover damages for false representation, such as we are now dealing with.

One other observation I have to make before proceeding to consider the law which has been laid down by the learned judges in the Court of Appeal in the case before your Lordships. "An action of deceit is a

common law action, and must be decided on the same principles, whether it be brought in the Chancery Division or any of the Common Law Divisions, there being, in my opinion, no such thing as an equitable action for deceit." This was the language of Cotton, L. J., in Arkwright v. Newbould, 17 Ch. D. 320. It was adopted by Lord Blackburn in Smith v. Chadwick, 9 App. Cas. 193, and is not, I think, open to dispute.

In the Court below Cotton, L. J., said: "What in my opinion is a correct statement of the law is this, that where a man makes a statement to be acted upon by others which is false, and which is known by him to be false, or is made by him recklessly, or without care whether it is true or false, that is, without any reasonable ground for believing it to be true, he is liable in an action of deceit at the suit of anyone to whom it was addressed or anyone of the class to whom it was addressed and who was materially induced by the misstatement to do an act to his prejudice." About much that is here stated there cannot, I think, be two opinions. But when the learned Lord Justice speaks of a statement made recklessly or without care whether it is true or false, that is without any reasonable ground for believing it to be true, I find myself, with all respect, unable to agree that these are convertible expressions. To make a statement careless whether it be true or false, and therefore without any real belief in its truth, appears to me to be an essentially different thing from making, through want of care, a false statement, which is nevertheless honestly believed to be true. And it is surely conceivable that a man may believe that what he states is the fact, though he has been so wanting in care that the Court may think that there were no sufficient grounds to warrant his belief. I shall have to consider hereafter whether the want of reasonable ground for believing the statement made is sufficient to support an action of deceit. I am only concerned for the moment to point out that it does not follow that it is so, because there is authority for saying that a statement made recklessly, without caring whether it be true or false, affords sufficient foundation for such an action. * * *

It will thus be seen that all the learned judges concurred in thinking that it was sufficient to prove that the representations made were not in accordance with fact, and that the person making them had no reasonable ground for believing them. They did not treat the absence of such reasonable ground as evidence merely that the statements were made recklessly, careless whether they were true or false, and without belief that they were true, but they adopted as the test of liability, not the existence of belief in the truth of the assertions made, but whether the belief in them was founded upon any reasonable grounds. It will be seen, further, that the Court did not purport to be establishing any new doctrine. They deemed that they were only following the cases already decided, and that the proposition which they concurred in laying down was established by prior authorities. Indeed, Lopes, L. J., expressly states the law in this respect to be well settled. This ren-

ders a close and critical examination of the earlier authorities necessary.

I need go no further back than the leading case of Pasley v. Freeman, 2 Smith's L. C. 74. If it was not there for the first time held that action of deceit would lie in respect of fraudulent representations against a person not a party to a contract induced by them, the law was at all events not so well settled but that a distinguished Judge, Grose, J., differing from his Brethren on the Bench, held that such an action was not maintainable. Buller, J., who held that the action lay, adopted in relation to it the language of Croke, J., in 3 Bulstrode, 95, who said: "Fraud without damage, or damage without fraud, gives no cause of action, but where these two concur an action lies." * * *

Having now drawn attention, I believe, to all the cases having a material bearing upon the question under consideration, I proceed to state briefly the conclusions to which I have been led. I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

I think these propositions embrace all that can be supported by decided cases from the time of Pasley v. Freeman down to Western Bank of Scotland v. Addie in 1867, Law Rep. 1 H. L. Sc. 145, when the first suggestion is to be found that belief in the truth of what he has stated will not suffice to absolve the defendant if his belief be based on no reasonable grounds. I have shewn that this view was at once dissented from by Lord Cranworth, so that there was at the outset as much authority against it as for it. And I have met with no further assertion of Lord Chelmsford's view until the case of Weir v. Bell, 3 Ex. D. 238, where it seems to be involved in Lord Justice Cotton's enunciation of the law of deceit. But no reason is there given in support of the view, it is treated as established law. The dictum of the late Master of the Rolls, that a false statement made through carelessness, which the person making it ought to have known to be untrue, would sustain an action of deceit, carried the matter still further. But that such an action could be maintained notwithstanding an honest belief that the statement made was true, if there were no reasonable

grounds for the belief, was, I think, for the first time decided in the case now under appeal.

In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds. Indeed Cotton, L. J., himself indicated, in the words I have already quoted, that he should not call it fraud. But the whole current of authorities, with which I have so long detained your Lordships, shews to my mind conclusively that fraud is essential to found an action of deceit, and that it cannot be maintained where the acts proved cannot properly be so termed. And the case of Taylor v. Ashton, 11 M. & W. 401, appears to me to be in direct conflict with the dictum of Sir George Jessel, and inconsistent with the view taken by the learned judges in the Court below. I observe that Sir Frederick Pollock, in his able work on Torts (p. 243, note), referring, I presume, to the dicta of Cotton, L. J., and Sir George Jessel, M. R., says that the actual decision in Taylor v. Ashton, 11 M. & W. 401, is not consistent with the modern cases on the duty of directors of companies. I think he is right. But for the reasons I have given I am unable to hold that anything less than fraud will render directors or any other persons liable to an action of deceit.

At the same time I desire to say distinctly that when a false statement has been made the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the Court that it was not really entertained, and that the representation was a fraudulent one. So, too, although means of knowledge are, as was pointed out by Lord Blackburn in Brownlie v. Campbell, 5 App. Cas. at p. 952, a very different thing from knowledge, if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false.

I have arrived with some reluctance at the conclusion to which I have felt myself compelled, for I think those who put before the public a prospectus to induce them to embark their money in a commercial enterprise ought to be vigilant to see that it contain such representations only as are in strict accordance with fact, and I should be very unwilling to give any countenance to the contrary idea. I think there is much to be said for the view that this moral duty ought to some extent to be converted into a legal obligation, and that the want of reasonable care to see that statements, made under such circumstances, are true, should be made an actionable wrong. But this is not a mat-

ter fit for discussion on the present occasion. If it is to be done the legislature must intervene and expressly give a right of action in respect of such a departure from duty. It ought not, I think, to be done by straining the law, and holding that to be fraudulent which the tribunal feels cannot properly be so described. I think mischief is likely to result from blurring the distinction between carelessness and fraud, and equally holding a man fraudulent whether his acts can or cannot be justly so designated.

It now remains for me to apply what I believe to be the law to the facts of the present case. * * *

I agree with the Court below that the statement made did not accurately convey to the mind of a person reading it what the rights of the company were, but to judge whether it may nevertheless have been put forward without subjecting the defendants to the imputation of fraud, your Lordships must consider what were the circumstances. By the General Tramways Act of 1870 it is provided that all carriages used on any tramway shall be moved by the power prescribed by the special Act, and where no such power is prescribed, by animal power only, 33 & 34 Vict. c. 78, § 34. In order, therefore, to enable the company to use steampower, an Act of Parliament had to be obtained empowering its use. This had been done, but the power was clogged with the condition that it was only to be used with the consent of the Board of Trade. It was therefore incorrect to say that the company had the right to use steam; they would only have that right if they obtained the consent of the Board of Trade. But it is impossible not to see that the fact which would impress itself upon the minds of those connected with the company was that they had, after submitting the plans to the Board of Trade, obtained a special Act empowering the use of steam. It might well be that the fact that the consent of the Board of Trade was necessary would not dwell in the same way upon their minds, if they thought that the consent of the Board would be obtained as a matter of course if its requirements were complied with, and that it was therefore a mere question of expenditure and care. The provision might seem to them analogous to that contained in the General Tramways Act, and I believe in the Railways Act also, prohibiting the line being opened until it had been inspected by the Board of Trade and certified fit for traffic, which no one would regard as a condition practically limiting the right to use the line for the purpose of a tramway or railway. I do not say that the two cases are strictly analogous in point of law, but they may well have been thought so by business men.

I turn now to the evidence of the defendants. [LORD HERSCHELL here reviewed the evidence of each of the five defendants.]

As I have said, Stirling, J., gave credit to these witnesses, and I see no reason to differ from him. What conclusion ought to be drawn from their evidence? I think they were mistaken in supposing that the consent of the Board of Trade would follow as a matter of course

because they had obtained their Act. It was absolutely in the discretion of the Board whether such consent should be given. The prospectus was therefore inaccurate. But that is not the question. If they believed that the consent of the Board of Trade was practically concluded by the passing of the Act, has the plaintiff made out, which it was for him to do, that they have been guilty of a fraudulent misrepresentation? I think not. I cannot hold it proved as to any one of them that he knowingly made a false statement, or one which he did not believe to be true, or was careless whether what he stated was true or false. In short, I think they honestly believed that what they asserted was true, and I am of opinion that the charge of fraud made against them has not been established. * * *

Adopting the language of Jessel, M. R., in Smith v. Chadwick, 20 Ch. D. at p. 67, I conclude by saying that on the whole I have come to the conclusion that the statement, "though in some respects inaccurate and not altogether free from imputation of carelessness, was a fair, honest and bona fide statement on the part of the defendants, and by no means exposes them to an action for deceit."

I think the judgment of the Court of Appeal should be reversed.[15]

V. Malicious Use of Property or Influence for the Harm of Another

KEEBLE v. HICKERINGILL.

(Court of King's Bench, 1809. 11 East, 574, note, 11 R. R. 273, 103 Reprint, 1127.)

Action upon the case. Plaintiff declares

that he was, 8th November in the second year of the Queen, lawfully possessed of a close of land called Minott's Meadow, et de quodam vivario, vocato, a "decoy pond," to which divers wildfowl used to resort and come: and the plaintiff had at his own cost and charges prepared and procured divers decoy ducks, nets, machines, and other engines for the decoying and taking of the wildfowl, and enjoyed the benefit in taking them: the defendant knowing which, and intending to damnify the plaintiff in his vivary, and to fright and drive away the wildfowl used to resort thither, and deprive him of his profit, did, on the 8th of November, resort to the head of the said pond and vivary and did discharge six guns laden with gunpowder, and with the noise and stink of the gunpowder did drive away the wildfowl then being in the pond: and on the 11th and 12th days of November the defendant, with the design to damnify the plaintiff, and fright away the wildfowl, did place himself with a gun near the vivary, and there did discharge the said gun several times that was then charged with the gunpowder against the said decoy pond, whereby the wildfowl were frightened away, and did forsake the said pond.

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[15] The House of Lords were unanimous in reversing the order of the Court of Appeal and restoring the order of Stirling, J. Parts of the opinions of Lord Bramwell and Lord Herschell and all of the concurring opinions of Lord Chancellor Halsbury and of Lords Watson and Fitzgerald are omitted.

Upon not guilty pleaded, a verdict was found for the plaintiff and £20 damages.

HOLT, C. J. I am of opinion that this action doth lie. It seems to be new in instance, but it is not new in the reason or the principle of it. For, 1st, this using or making a decoy is lawful. 2dly. This employment of his ground to that use is profitable to the plaintiff, as is the skill and management of that employment. As to the first, Every man that hath a property may employ it for his pleasure and profit, as for alluring and procuring decoy ducks to come to his pond. To learn the trade of seducing other ducks to come there in order to be taken is not prohibited by either the law of the land or the moral law; but it is as lawful to use art to seduce them, to catch them, and destroy them for the use of mankind, as to kill or destroy wildfowl or tame cattle. Then when a man uses his art or his skill to take them, to sell and dispose of for his profit; this is his trade; and he that hinders another in his trade or livelihood is liable to an action for so hindering him. Why otherwise are scandalous words spoken of a man in his profession actionable, when without his profession they are not so? Though they do not affect any damage, yet are they mischievous in themselves; and therefore in their own nature productive of damage; and therefore an action lies against him. Such are all words that are spoken of a man to disparage him in his trade, that may bring damage to him; though they do not charge him with any crime that may make him obnoxious to punishment; as to say a merchant is broken, or that he is failing, or is not able to pay his debts, 1 Roll. 60, I; all the cases there put. How much more when the defendant does an actual and real damage to another when he is in the very act of receiving profit by his employment. Now there are two sorts of acts for doing damage to a man's employment, for which an action lies; the one is in respect of a man's privilege; the other is in respect of his property. In that a man's franchise or property whereby he hath a fair, market, or ferry, if another shall use the like liberty, though out of his limits, he shall be liable to an action; though by grant from the king. But therein is the difference to be taken between a liberty in which the public hath a benefit, and that wherein the public is not concerned. 22 H. 6. 14, 15.

The other is where a violent and malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases. But if a man doth him damage by using the same employment; as if Mr. Hickeringill had set up another decoy on the same ground near the plaintiff's, and that had spoiled the custom of the plaintiff, no action would lie, because he had as much liberty to make and use a decoy as the plaintiff. This is like the case of 11 H. 4. 47. One schoolmaster sets up a new school to the damage of an antient school, and thereby the scholars are allured from the old school to come to his new. (The action there was held not

to lie.) But suppose Mr. Hickeringill should lie in the way with his guns, and fright the boys from going to the school, and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars. 29 E. 3. 18. A man hath a market, to which he hath toll for horses sold: a man is bringing his horse to market to sell: a stranger hinders and obstructs him from going thither to the market: an action lies, because it imports damage. Action upon the case lies against one that shall by threat fright away his tenants at will. 9 H. 7. 8; 21 H. 6. 31; 9 H. 7. 7; 14 Ed. 4. 7. Vide Rastal. 662; 2 Cro. 423. Trespass was brought for beating his servant whereby he was hindered from taking his toll; the obstruction is a damage, though not the loss of his service.[16]

LETTS v. KESSLER.

(Supreme Court of Ohio, 1896. 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177.)

The plaintiff below (defendant in error here) filed her petition in the court of common pleas against defendant below (plaintiff in error here), averring that she was the owner by purchase under a land contract of certain permises in the city of Cleveland; that defendant owned and occupied the lot on the east side thereof; that she used her premises as an hotel and boarding house; that he was erecting a high board fence on his ground, which would obstruct her windows, and deprive her of light and air; that said fence was not being erected for any useful or ornamental purpose, but from motives of pure malice alone, and for the express malicious purpose of annoying plaintiff, and excluding light and air from her house, so as to render her house uninhabitable, to injure the value thereof; and that said fence would exclude the light and air, and thereby greatly injure the value of her house. She prayed that he might be restrained from completing said fence, and that, upon the final hearing, a mandatory injunction might compel its removal. Defendant below demurred to this petition, and the demurrer was overruled, and exceptions taken. The ruling upon this demurrer is reported in 7 Ohio Cir. Ct. R. 108. He then filed an answer, in substance a general denial, with an averment that the fence was erected to prevent the rush of water and eave drip from her premises onto his. This she denied in her reply. The case went to the circuit court on appeal, and that court overruled the demurrer, and on the trial made a finding of facts containing in sub-

[16] Compare: Tarleton v. McGawley (1793) 1 Peake, 270, 3 R. R. 689: (D., the master of a vessel trading on the coast of Africa, purposely fired a cannon from his vessel at a canoe in which natives were going to a rival ship, the "Tarleton," and killed one of them, "whereby the natives of the said coast were deterred and hindered from trading with" the "Tarleton.")

stance the allegations of the petition. The following is the finding of facts and the judgment:

"This cause came on to be heard upon the petition of the plaintiff, the answer of defendant, the reply of the plaintiff thereto, and the testimony, and the court being requested by the defendant to make a finding of facts in the case, and to state conclusions of the facts, as follows: That the plaintiff owns and occupies premises situated on Lake street, in the city of Cleveland, known as 'The Osborn,' and said plaintiff owned and occupied said premises at the time of the erection of the structure hereinafter described. Said premises were used by plaintiff as a boarding house. Defendant owns and occupies premises adjoining plaintiff in the east. Between the two houses is a driveway and open space about 20 feet wide. Plaintiff and defendant had litigation in May, 1891, on account of defendant having attached a shed roof to her building without consent of said plaintiff. About two weeks after the trial of said lawsuit, the defendant took down said shed or roof, and built up against the house of said plaintiff a tight-board fence. The said fence was 86 feet long. The scantlings were placed against the wall of said plaintiff's house, and reached up under the eaves of the same. Boards were nailed on to said scantlings, beginning about two feet from the ground, and extending to the sills of the second-story windows. Defendant nailed onto the rear portion of said fence, and extending about 40 feet towards the front, a shed or roof. Under this shed or roof defendant had lumber piled. Said board fence completely covered up the bathroom, kitchen, bedroom, and library windows, rendering said portion of house dark, damp, and uninhabitable, and causing a substantial damage to the same. Said structure was erected upon the land of the defendant, and belonged to him. The structure was erected by said defendant from motives of unmixed malice towards said plaintiff, and for no useful or ornamental purposes of the property of said defendant, except said shed or roof, and its back wall below the shed roof, which may subserve some useful purpose of defendant in the use of his property by protecting his lumber piled thereunder. The court, upon the foregoing facts, finds and decrees that said defendant be, and is hereby, enjoined from proceeding further with the erection of said fence. Adjudged and decreed that said defendant, within 20 days from the entering of this decree, take down all of said fence and scantling projecting above the roof of said shed, and all the remainder of said fence outside of and beyond said shed; and it is considered that the plaintiff recover his costs expended in the case, taxed at $———, and that the defendant pay his own costs, for which it is ordered that execution issue,—to all of which the defendant excepts."

A motion for a new trial was overruled, with exceptions taken. Thereupon a petition in error was filed to reverse the judgment of the circuit court.

BURKET, J. (after stating the facts). The only question in this case arises upon the following findings of fact by the circuit court: "Said structure was erected upon the land of the defendant, and belonged to him. The structure was erected by said defendant from motives of unmixed malice towards said plaintiff, and for no useful or ornamental purposes of the property of said defendant." It is not claimed that the person of the plaintiff was interfered with in this case, so that we have for consideration only the rights of property. The fence complained of is upon the land of the defendant, and belongs to him. Plaintiff fails to aver, and the court fails to find, that she has any right to or upon the lot of defendant below by contract, statute, or any other way known to the law for acquiring a right to, in, or upon lands, unless such right may be acquired by, and transferred to her, by means of the aforesaid, "motives of unmixed malice." This

is a manner of acquiring, on the one hand, and of transferring, on the other, a right to property unknown to the law.

But it is urged in her behalf that even if she had no right of property, and even if he was the owner of the lot, he could not use his own land for the purpose of erecting structures thereon which subserve no useful or ornamental purpose, and are erected through motives of unmixed malice towards his adjoining neighbor. It is and must be conceded that he might, by erecting a building on his lot, shut off her light and air to exactly the same extent as is done by this fence, and that in such case she would be without right and without remedy, even though done with the same feelings of malice as induced him to erect the fence; thus making his acts lawful when the malice is seasoned with profit, or some show of profit, to himself, and unlawful when his malice is unmixed with profit, the injury or inconvenience to her meanwhile remaining the same in both cases. If, through feelings of malice, he desires to shut the light and air from her windows, it is nothing to her whether he makes a profit or loss thereby. Her injury is no greater and no less in the one case than in the other. As to her it is the effect of the act, and not the motive. In effect, he has the right to shut off the light and air from her windows by a building on his own premises; and she is not, in effect, concerned in the means by which such effect is produced, whether by a building or other structure; nor is she concerned as to the motive, nor as to whether he makes or loses by the operation. In the one case she might have a strong suspicion of his malice, while in the other such suspicion would be reduced to a certainty. But this is nothing to her as affecting a property right. As long as he keeps on his own property, and causes an effect on her property which he has a right to cause, she has no legal right to complain as to the manner in which the effect is produced; and to permit her to do so would not be enforcing a right of property, but a rule of morals. It would be controlling and directing his moral conduct by a suit in equity,—by an injunction.

To permit a man to cause a certain injurious effect upon the premises of his neighbor by the erection of a structure on his own premises if such structure is beneficial or ornamental, and to prohibit him from causing the same effect in case the structure is neither beneficial nor ornamental, but erected from motives of pure malice, is not protecting a legal right, but is controlling his moral conduct. In this state a man is free to direct his moral conduct as he pleases, in so far as he is not restrained by statute.

But it is said that such acts are offensive to the principles of equity. Not so. There is no conflict between law and equity in our practice, and what a man may lawfully do cannot be prohibited as inequitable. It may be immoral, and shock our notions of fairness, but what the law permits equity tolerates. It would be much more inequitable and intolerable to allow a man's neighbors to question his motives

every time that he should undertake to erect a structure upon his own premises, and drag him before a court of equity to ascertain whether he is about to erect the structure for ornament or profit, or through motives of unmixed malice.

The case is not like annoying a neighbor by means of causing smoke, gas, noisome smells, or noises to enter his premises, thereby causing injury. In such cases something is produced on one's own premises, and conveyed to the premises of another; but in this case nothing is sent, but the air and light are withheld. A man may be compelled to keep his gas, smoke, odors, and noise at home, but he cannot be compelled to send his light and air abroad. Mullen v. Stricker, 19 Ohio St. 135, 2 Am. Rep. 379. If smoke, gas, offensive odors, or noise pass from one's own premises to or upon the premises of another, to his injury, an action will lie therefor, even though the smoke, gas, odor, or noise should be caused by the lawful business operations of defendant, and with the best of motives. Broom, Leg. Max. 372. In such cases it is the effect or injury, and not the motive, that is regarded. The true test is whether anything recognized by law as injurious passes from the premises of one neighbor to that of another. Anything so passing invades the legal rights of him whose premises it reaches, and such rights will be protected. But courts cannot regulate or control the moral conduct of a man, unless authorized so to do by statute.[17]

[17] Judge Burket here referred to a number of cases, with comments, as follows: The following cases, cited by plaintiff in error, bear more or less upon the question involved in this case, and seem to produce a decided weight of authority in his favor: Frazier v. Brown (1861) 12 Ohio St. 294; Falloon v. Schilling (1883) 29 Kan. 292, 44 Am. Rep. 642; Mahan v. Brown (1835) 13 Wend. (N. Y.) 261, 28 Am. Dec. 461; Greenleaf v. Francis (1836) 18 Pick. (Mass.) 123; Chatfield v. Wilson (1855) 28 Vt. 49. The following additional authorities are to the same effect: Gould, Waters, § 280, citing Chasemore v. Richards (1859) 7 H. L. Cas. 349; Dickinson v. Canal Co. (1852) 7 Exch. 282; Acton v. Blundell (1843) 12 Mees. & W. 324; Hammond v. Hall (1840) 10 Sim. 552; Cooper v. Barber (1810) 3 Taunt. 99; Balston v. Bensted (1808) 1 Camp. 463; Galgay v. Railway Co. (1854) 4 Ir. C. L. 456; Chase v. Silverstone (1873) 62 Me. 175, 16 Am. Rep. 419; Roath v. Driscoll (1850) 20 Conn. 533, 52 Am. Dec. 352; Brown v. Illius (1858) 27 Conn. 84, 71 Am. Dec. 49; Ocean Grove Camp Meeting Ass'n v. Asbury Park Com'rs (1885) 40 N. J. Eq. 447, 3 Atl. 168; Taylor v. Fickas (1878) 64 Ind. 167, 31 Am. Rep. 114; Village of Delhi v. Youmans (1871) 45 N. Y. 362, 6 Am. Rep. 100; Dexter v. Aqueduct Co. (1810) 1 Story, 387, Fed. Cas. No. 3,864; Wheatley v. Baugh (1855) 25 Pa. 528, 64 Am. Dec. 721, note; Haugh's Appeal (1882) 102 Pa. 42, 48 Am. Rep. 193, note; Haldeman v. Bruckhart (1863) 45 Pa. 514, 84 Am. Dec. 511; Coleman v. Chadwick (1876) 80 Pa. 81, 21 Am. Rep. 93; Trout v. McDonald (1877) 83 Pa. 146; Lybe's Appeal (1884) 106 Pa. 626, 51 Am. Rep. 542; Smith v. Adams (1837) 6 Paige (N. Y.) 435; Elster v. Springfield (1892) 49 Ohio St. 82, 30 N. E. 274; Ellis v. Duncan (1864) cited in 29 N. Y. 466; Radcliff v. Mayor, etc. (1850) 4 N. Y. 195, 200, 53 Am. Dec. 357; Pixley v. Clark (1866) 35 N. Y. 520, 91 Am. Dec. 72; Goodale v. Tuttle (1864) 29 N. Y. 466; Bliss v. Greeley (1871) 45 N. Y. 671, 6 Am. Rep. 157; Clark v. Conroe (1866) 38 Vt. 469; Taylor v. Welch (1876) 6 Or. 198; Mosier v. Caldwell (1872) 7 Nev. 363; Railway Co. v. Peterson (1860) 14 Ind. 112, 77 Am. Dec. 60; Bassett v. Manufacturing Co. (1862) 43 N. H. 573, 82 Am. Dec. 179; 30 Cent. Law J. 269; 23 Am. Law Rev. 376; Davis v. Afong (1884) 5 Hawaii, 216. The defendant in error cites the cases reviewed in Frazier v. Brown

But it is strongly urged by counsel for defendant in error that the maxim, "Enjoy your own property in such a manner as not to injure that of another person," applies in such cases as this, and that, as it must be conceded that the fence in question is an injury to the property of defendant in error, his acts are in conflict with the above maxim. At first blush, this would seem to be so, but a careful consideration shows the contrary. The maxim is a very old one, and states the law too broadly. In this case, for instance, it is conceded that the plaintiff in error had the right to enjoy his property by erecting a house so as to do the same injury which was done by the fence, and that, while that would be an injury to the property of defendant in error, she would be without remedy, and his act in erecting such house would not be regarded as violating the maxim.

In Jeffries v. Williams, 5 Exch. 797, it was claimed, and in Railroad Co. v Bingham, 29 Ohio St. 369, it was held, that the true and legal meaning of the maxim is: "So use your own property as not to injure the rights of another." Boynton, J., in that case says: "Where no right has been invaded, although one may have injured another, no liability has been incurred. Any other rule would be manifestly wrong." The maxim should be limited to causing injury to the rights of another, rather than to the property of another, because for an injury to the rights of another there is always a remedy; but there may be injuries to the property of another for which there is no remedy, as in draining a spring or well, or cutting off light and air or a pleasant view by the erection of buildings, and many other cases which might be cited.

Thus limiting the maxim to the rights of the defendant in error, it is plain that the acts of plaintiff in error in the use which he made of his property did not injure any legal right of hers, and that, therefore, what he did was not in violation of such maxim.*

(1861) 12 Ohio St. 294, and also the case of Burke v. Smith (1888) 69 Mich. 395, 37 N. W. 838. Most of the cases cited are cases arising out of interference with wells, springs, and percolating waters. Such cases bear but slightly upon the question. The Michigan case is substantially like the case under consideration. In that case the lower court enjoined the defendant, and that judgment was affirmed by an equally divided court. The syllabus says that, the court being equally divided, nothing is decided. As nothing was decided, the case is not an authority on either side of the question.

*Compare the remark of Professor Ames, Law & Morals (1908) 22 Harv. Law Review, 111: "Suppose, again, that the owner of land sinks a well, not in order to get water for himself, but solely for the purpose of draining his neighbor's spring, or that he erects an abnormally high fence on his own land, but near the boundary, not for any advantage of his own, but merely to darken his neighbor's windows or to obstruct his view. Is the landowner responsible to his neighbor for the damage arising from such malevolent conduct? In thirteen of our states he must make compensation for malevolently draining the neighbor's spring. In two other states the opposite has been decided. In four states one who erects a spite fence must pay for the damage to the neighbor. In six others he incurs no liability. Six states have passed special statutes giving an action for building such a fence."

For statutes changing the rule followed in the principal case, see the Massa-

The circuit court erred in overruling the demurrer to the petition, and in rendering judgment in favor of defendant in error upon the facts as found by the court. The judgment of the circuit court is therefore reversed, and, proceeding to render such judgment as the circuit court should have rendered upon the facts found, the petition of plaintiff below is dismissed, at her cost. Judgment reversed.

HUGHES v. McDONOUGH.

(Supreme Court of Judicature of New Jersey, 1881. 43 N. J. Law, 459, 39 Am. Rep. 603.)

The substance of the declaration was, that the plaintiff was a blacksmith and horseshoer by trade, of good character, &c.; that he had obtained the patronage of one Peter Van Riper, and that on a certain occasion he shod a certain mare of the said Van Riper in a good and workmanlike manner; that the defendant, maliciously intending to injure the plaintiff in his said trade, &c., "did willfully and maliciously mutilate, impair and destroy the work done and performed by the said plaintiff upon the mare of the said Van Riper, without the knowledge of the said Van Riper, by loosing a shoe which was recently put on by the said plaintiff, so that if the mare was driven, the shoe would come off easily, and thus make it appear that the said plaintiff was a careless and unskillful horseshoer and blacksmith, and that the said mare was not shod in a good and workmanlike manner, and thus deprive the plaintiff of the patronage and custom of the said Van Riper."

The second count charges the defendant with driving a nail in the foot of the horse of Van Riper, after it had been shod by the plaintiff, with the same design as specified in the first count.

The special damage was the loss of Van Riper as a customer.

BEASLEY, C. J. The single exception taken to this record is, that the wrongful act alleged to have been done by the defendant does not appear to have been so closely connected with the damages resulting to the plaintiff as to constitute an actionable tort. The contention was that the wrong was done to Van Riper; that it was his horse whose shoe was loosened, and whose foot was pricked, and that the immediate injury and damage were to him, and that, consequently, the damages to the plaintiff were too remote to be made the basis of a legal claim.

But this contention involves a misapplication of the legal principle, and cannot be sustained. The illegal act of the defendant had a close

chusetts act of June 2, 1887 (St. 1887, c. 348) discussed in Rideout v. Knox (1889) 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560, and the Indiana statute of February 27, 1909 (Laws 1909, p. 70, c. 26).

Compare, also, The German Civil Code (1896) § 826 (Wang's trans.): "A person who willfully causes damage to another in a manner contra bonos mores is bound to compensate the other for the damage."

causal connection with the hurt done to the plaintiff, and such hurt was the natural, and almost the direct product of such cause. Such harmful result was sure to follow, in the usual course of things, from the specified malfeasance. The defendant is conclusively chargeable with the knowledge of this injurious effect of his conduct, for such effect was almost certain to follow from such conduct, without the occurrence of any extraordinary event, or the help of any extraneous cause. The act had a twofold injurious aspect; it was calculated to injure both Van Riper and the plaintiff; and as each was directly damnified, I can perceive no reason why each cannot repair his loses by an action.

The facts here involved do not, with respect to their legal significance, resemble the juncture that gave rise to the doctrine established in the case of Vicars v. Wilcocks, 8 East, 1. In that instance the action was for a slander that required the existence of special damage as one of its necessary constituents, and it was decided that such constituent was not shown by proof of the fact that as a result of the defamation the plaintiff had been discharged from his service by his employer before the end of the term for which he had contracted. The ground of this decision was that this discharge of the plaintiff from his employment was illegal, and was the act of a third party, for which the defendant was not responsible, and that, as the wrong of the slander had been detrimental only by reason of an independent wrongful act of another, the injury was to be imputed to the last wrong, and not to that which was farther distant one remove. In his elucidation of the law in this case, Lord Ellenborough says, alluding to the discharge of the plaintiff from his employment, that it "was a mere wrongful act of the master, for which the defendant was no more answerable, than if, in consequence of the words, other persons had afterwards assembled and seized the plaintiff and thrown him into a horse-pond by way of punishment for his supposed transgression." The class of cases to which this authority belongs, rests upon the principle that a man is responsible only for the natural consequences of his own misdeeds, and that he is not answerable for detriments that ensue from the misdeeds of others. But this doctrine, it is to be remembered, does not exclude responsibility when the damage results to the party injured through the intervention of the legal and innocent acts of third parties, for, in such instances, damage is regarded as occasioned by the wrongful cause, and not at all by those which are not wrongful. Where the effect was reasonably to have been foreseen, and where, in the usual course of events, it was likely to follow from the cause, the person putting such cause in motion will be responsible, even though there may have been many concurring events or agencies between such cause and its consequences. * * *

The principles thus propounded must have a controlling effect in the decision of the question now before this court, as they decisively show that the damage of which the plaintiff complained was not, in a legal

sense, remote from the wrongful act. What, in point of substance, was done by the defendant, was this: he defamed, by the medium of a fraudulent device, the plaintiff in his trade, and by means of which defamation, the latter sustained special detriment. If this defamation had been accomplished by words spoken or written, or by signs or pictures, it is plain the wrong could have been remedied, in the usual form, by an action on the case for slander; and, plainly, no reason exists why the law should not afford a similar redress when the same injury has been inflicted by disreputable craft. It is admitted upon the record that the plaintiff has sustained a loss by the fraudulent misconduct of the defendant; that such loss was not only likely in the natural order of events, to proceed from such misconduct, but that it was the design of the defendant to produce such result by his act. Under such circumstances it would be strange indeed if the party thus wronged could not obtain indemnification by appeal to the judicial tribunals.

ASHLEY v. HARRISON.

(At Nisi Prius, Sittings after Michaelmas Term, 1793. 1 Peake, 256, 3 R. R. 686.)

This declaration stated that the plaintiff during the time of Lent, 1793, caused to be performed every Wednesday and Friday night, by divers singers and musicians at a certain place of public amusement called the Covent Garden Theatre, certain musical performances for the entertainment of the public for certain rewards paid to him for admission into the said place of public amusement by those persons who were desirous of hearing the said musical performances; by means whereof he derived great gains, &c., yet the defendant knowing the premises, but contriving to lessen the profits, &c. and to terrify, deter, &c. a certain public singer called Gertrude Elizabeth Mara; who had been before that time retained by the plaintiff to sing publicly for him at the said place, &c. from singing; wrote and published a certain false and malicious paper writing of and concerning the said G. E. Mara, and of and concerning her conduct, as such public singer as aforesaid, containing therein, &c. The libel was then set out, and the declaration concluded that by reason thereof the said G. E. M. could not sing without great danger of being assaulted, ill-treated, and abused, and was terrified, deterred, prevented, and hindered from so singing; and that the profits of the amusement were thereby rendered much less than they otherwise would have been.

On the opening of the cause, Lord Kenyon expressed his disapprobation of the action, but on Erskine, for the plaintiff, suggesting that the objection was on the record, his Lordship permitted the case to proceed.

The declaration was proved, and Madame Mara said, that "she did not choose to expose herself to contempt again, and therefore refused to sing."

When the defendant's counsel were proceeding to their defence, they were stopped by

LORD KENYON, who said: This action is unprecedented, and I think cannot be supported on principle. The injury is much too remote to be the foundation of an action. If this action is to be maintained, I know not to what extent the rule may be carried. For aught I can see to the contrary, it might equally be supported against every man who circulates the glass too freely, and intoxicates an actor, by which he is rendered incapable of performing his part on the stage. If any injury has happened, it was occasioned entirely by the vain fears or caprice of the actress. Madame Mara says, she did not choose to expose herself to contempt again. The action then is to depend entirely upon the nerves of the actress; if she chooses to appear on the stage again, no action can be maintained, if she does not, her refusal is to be followed with an action. In actions for defamations whereby a woman loses her marriage, it is not sufficient to prove that she was a virtuous woman, and one who might reasonably hope to have settled well in life; but a marriage already agreed upon must be shown to have been lost.

The plaintiff was nonsuited.

LUMLEY v. GYE.

(Court of Queen's Bench, 1853. 2 El. & Bl. 216, 95 R. R. 501.)

The first count of the declaration stated that the plaintiff was lessee and manager of the Queen's Theatre, for performing operas for gain to him; and that he had contracted and agreed with Johanna Wagner to perform in the theatre for a certain time, with a condition, amongst others, that she should not sing or use her talents elsewhere during the term without the plaintiff's consent in writing: yet defendant, knowing the premises, and maliciously intending to injure the plaintiff as lessee and manager of the theatre, whilst the agreement with Wagner was in force, and before the expiration of the term, enticed and procured Wagner to refuse to perform: by means of which enticement and procurement of defendant, Wagner wrongfully refused to perform, and did not perform during the term.

Count 2, for enticing and procuring Johanna Wagner to continue to refuse to perform during the term, after the order of Vice-Chancellor Parker—affirmed by Lord St. Leonards (see Lumley and Wagner, 1 D., M. & G. 604, 91 R. R. 193)—restraining her from performing at a theatre of the defendants.

Count 3, that Johanna Wagner had been and was hired by the plaintiff to sing and perform at his theatre for a certain time, as the

dramatic artiste of plaintiff, for reward to her, and had become and was such dramatic artiste of plaintiff at his theatre: yet defendant, well knowing &c., maliciously enticed and procured her, then being such dramatic artiste, to depart from the said employment.

In each count special damage was alleged.

Demurrer. Joinder.

The demurrer was argued in the sittings after Hilary Term last before COLERIDGE, WIGHTMAN, ERLE and CROMPTON, JJ.

Willes, for the defendant:

The counts disclose a breach of contract on the part of Wagner, for which the plaintiff's remedy is by an action on the contract against her. The relation of master and servant is peculiar; and, though it originates in a contract between the employer and the employed, it gives rise to rights and liabilities, on the part of the master, different from those which would result from any other contract. Thus the master is liable for the negligence of his servant, whilst an ordinary contractor is not liable for that of the person with whom he contracts. And a master may lawfully defend his servant when a contractor may not defend his contractee. And so a master may bring an action for enticing away his servant. But these are anomalies, having their origin in times when slavery existed: they are intelligible on the supposition that the servant is the property of his master: and, though they have continued long after all but free service has ceased, they are still confined to cases where the relation of master and servant, in the strict sense, exists. In the present case Wagner is a dramatic artiste, not a servant in any sense.

Cowling, contra:

The general principle is laid down in Comyns's Digest, Action upon the Case (A). "In all cases, where a man has a temporal loss, or damage by the wrong of another, he may have an action upon the case, to be repaired in damages." In Comyns's Digest, Action upon the Case for Misfeasance (A, 6), an instance is given: "If he threatens the tenants of another, whereby they depart from their tenures," citing 1 Rol. Abr. 108, Action sur Case (N) pl. 21. An action lies for procuring plaintiff's wife to remain absent: Winsmore v. Greenbank, Willes, 577. An action for ravishment of ward: and, if "a man procureth a ward to go from his guardian, this is a ravishment in law:" 2 Inst. 440. Now, as neither the tenants, the wife nor the ward are servants, it cannot be said that the action for procurement is an anomaly confined to the case of master and servant. * * *

CROMPTON, J. The declaration in this case consists of three counts. * * * To this declaration the defendant demurred: and the question for our decision is, whether all or any of the counts are good in substance?

The effect of the first two counts is, that a person, under a binding contract to perform at a theatre, is induced by the malicious act of the defendant to refuse to perform and entirely to abandon

her contract; whereby damage arises to the plaintiff, the proprietor of the theatre. The third count differs, in stating expressly that the performer had agreed to perform as the dramatic artiste of the plaintiff, and had become and was the dramatic artiste of the plaintiff for reward to her; and that the defendant maliciously procured her to depart out of the employment of the plaintiff as such dramatic artiste; whereby she did depart out of the employment and service of the plaintiff; whereby damage was suffered by the plaintiff. It was said, in support of the demurrer, that it did not appear in the declaration that the relation of master and servant ever subsisted between the plaintiff and Miss Wagner; that Miss Wagner was not averred, especially in the first two counts, to have entered upon the service of the plaintiff; and that the engagement of a theatrical performer, even if the performer has entered upon the duties, is not of such a nature as to make the performer a servant, within the rule of law which gives an action to the master for the wrongful enticing away of his servant. And it was laid down broadly, as a general proposition of law, that no action will lie for procuring a person to break a contract, although such procuring is with a malicious intention and causes great and immediate injury. And the law as to enticing servants was said to be contrary to the general rule and principle of law, and to be anomalous, and probably to have had its origin from the state of society when serfdom existed, and to be founded upon, or upon the equity of, the Statute of Labourers. * * *

The proposition of the defendant, that there must be a service actually subsisting, seems to be inconsistent with the authorities that show these actions to be maintainable for receiving or harbouring servants after they have left the actual service of the master. * * *

In Blake v. Lanyon, 6 T. R. 221, 3 R. R. 162, a journeyman who was to work by the piece, and who had left his work unfinished, was held to be a servant for the purposes of such an action; and I think that it was most properly laid down by the court in that case, that a person who contracts to do certain work for another is the servant of that other (of course with reference to such an action) until the work is finished. It appears to me that Miss Wagner had contracted to do work for the plaintiff within the meaning of this rule; and I think that, where a party has contracted to give his personal services for a certain time to another, the parties are in the relation of employer and employed, or master and servant, within the meaning of this rule. And I see no reason for narrowing such a rule; but I should rather, if necessary, apply such a remedy to a case "new in its instance," but "not new in the reason and principle of it" (11 East, 573), that is, to a case where the wrong and damage are strictly analogous to the wrong and damage in a well recognised class of cases. In deciding this case on the narrower ground, I wish by no means to be considered as deciding that the larger ground taken by Mr. Cowling is not tenable, or of saying that in no case except

that of master and servant is an action maintainable for maliciously inducing another to break a contract to the injury of the person with whom such contract has been made. It does not appear to me to be a sound answer, to say that the act in such cases is the act of the party who breaks the contract; for that reason would apply in the acknowledged case of master and servant. Nor is it an answer, to say that there is a remedy against the contractor, and the party relies on the contract; for, besides that reason also applying to the case of master and servant, the action on the contract and the action against the malicious wrong-doer may be for a different matter; and the damages occasioned by such malicious injury might be calculated on a very different principle from the amount of the debt which might be the only sum recoverable on the contract. Suppose a trader, with a malicious intent to ruin a rival trader, goes to a banker or other party who owes money to his rival, and begs him not to pay the money which he owes him, and by that means ruins or greatly prejudices the party: I am by no means prepared to say that an action could not be maintained, and that damages beyond the amount of the debt, if the injury were great, or much less than such amount if the injury were less serious, might not be recovered. Where two or more parties were concerned in inflicting such injury, an indictment or a writ of conspiracy at common law, might perhaps have been maintainable; and, where a writ of conspiracy would lie for an injury inflicted by two, an action on the case in the nature of conspiracy will generally lie; and in such action on the case the plaintiff is entitled to recover against one defendant without proof of any conspiracy, the malicious injury and not the conspiracy being the gist of the action. 1 Wms. Saund. 230. In this class of cases it must be assumed that it is the malicious act of the defendant, and that malicious act only, which causes the servant or contractor not to perform the work or contract which he would otherwise have done. The servant or contractor may be utterly unable to pay anything like the amount of the damage sustained entirely from the wrongful act of the defendant: and it would seem unjust, and contrary to the general principles of law, if such wrong-doer were not responsible for the damage caused by his wrongful and malicious act. Several of the cases cited by Mr. Cowling on this part of the case seem worthy of attention.

Without however deciding any such more general question, I think that we are justified in applying the principle of the action for enticing away servants to a case where the defendant maliciously procures a party, who is under a valid contract to give her exclusive personal services to the plaintiff for a specified period, to refuse to give such services during the period for which she had so contracted, whereby the plaintiff was injured.

I think, therefore, that our judgment should be for the plaintiff.

COLERIDGE, J. * * * In order to maintain this action, one of two propositions must be maintained; either that an action will lie

against anyone by whose persuasions one party to a contract is induced to break it to the damage of the other party, or that the action, for seducing a servant from the master or persuading one who has contracted for service from entering into the employ, is of so wide an application as to embrace the case of one in the position and profession of Johanna Wagner. After much consideration and enquiry I am of opinion that neither of these propositions is true; and they are both of them so important, and, if established by judicial decision, will lead to consequences so general, that, though I regret the necessity, I must not abstain from entering into remarks of some length in support of my view of the law. * * *

Persuading with effect, or effectually or successfully persuading, may no doubt sometimes be actionable—as in trespass—even where it is used towards a free agent: the maxims qui facit per alium facit per se, and respondeat superior, are questionable; but, where they apply, the wrongful act done 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. But when you apply the term of effectual persuasion to the breach of a contract it has obviously a different meaning; the persuader has not broken and could not break the contract, for he had never entered into any; he cannot be sued upon the contract; and yet it is the breach of the contract only that is the cause of the damage. Neither can it be said that in breaking the contract the contractor is the agent of him who procures him to do so; it is still his own act; he is principal in so doing, and is the only principal. This answer may seem technical: but it really goes to the root of the matter. It shows that the procurer has not done the hurtful act; what he has done is too remote for the damage to make him answerable for it. The case itself of Winsmore v. Greenbank, Willes, 577, seems to me to have little or no bearing on the present: a wife is not, as regards her husband, a free agent or separate person; if to be considered so for the present purpose, she is rather in the character of a servant, with this important peculiarity, that, if she be induced to withdraw from his society and cohabit with another or do him any wrong, no action is maintainable by him against her. In the case of criminal conversation, trespass lies against the adulterer as for an assault on her, however she may in fact have been a willing party to all that the defendant had done. No doubt, therefore, effectual persuasion to the wife to withdraw and conceal herself from her husband is in the eye of the law an actual withdrawing and concealing her; and so, in other counts of the declaration, was it charged in this very case of Winsmore v. Greenbank, Willes, 577. A case explainable and explained on the same principle is that of ravishment of ward. The writ of this lay against one who procured a man's ward to depart from him; and, where this was urged in a case hereafter

to be cited, Mich. 11 Hen. IV, fol. 23 A, pl. 46, post, p. 527 seq., Judge Hankford gives the answer: the reason is, he says, because the ward is a chattel, and vests in him who has the right. None of this reasoning applies to the case of a breach of contract: if it does, I should be glad to known how any treatise on the law of contract could be complete without a chapter on this head, or how it happens that we have no decisions upon it. Certainly no subject could be more fruitful or important; important contracts are more commonly broken with than without persuaders or procurers, and these often responsible persons when the principals may not be so. I am aware that with respect to an action on the case the argument primæ impressionis is sometimes of no weight. If the circumstances under which the action would be brought have not arisen, or are of rare occurrence, it will be of none or only of inconsiderable weight; but, if the circumstances have been common, if there has been frequent occasion for the action, I apprehend that it is important to find that the action has yet never been tried. * * *

Again, where several persons happen to persuade to the same effect, and in the result the party persuaded acts upon the advice, how is it to be determined against whom the action may be brought, whether they are to be sued jointly or severally, in what proportions damages are to be recovered? Again, if, instead of limiting our recourse to the agent, actual or constructive, we will go back to the person who immediately persuades or procures him one step, why are we [to] stop there? The first mover, and the malicious mover too, may be removed several steps backward from the party actually induced to break the contract: why are we not to trace him out? Morally he may be the most guilty. I adopt the arguments of Lord Abinger and my Brother Alderson in the case of Winterbottom v. Wright, 10 M. & W. 109, 62 R. R. 534; if we go the first step, we can show no good reason for not going fifty. And, again, I ask how is it that, if the law really be as the plaintiff contends, we have no discussions upon such questions as these in our books, no decisions in our reports? Surely such cases would not have been of rare occurrence: they are not of slight importance, and could hardly have been decided without reference to the Courts in Banc. Not one was cited in the argument bearing closely enough upon this point to warrant me in any further detailed examination of them. I conclude therefore what occurs to me on the first proposition on which the plaintiff's case rests.

I come now to the second proposition, that the decisions in respect of master and servant, and the seducing of the latter from the employ of the former, are exceptions grafted on the general law traceable up to the Statute of Labourers. This is of course distinct from the question of the extent of the exception, that is, to what classes of servants it applies: but the enquiries are so connected together in fact, and the latter has so obvious a bearing in support of the former, that it will be better to take them both together.

Now, in the first place, I cannot find any instance of this action having been brought before the statute passed; the weight of which fact is much increased by finding that it was of common occurrence very soon after. The evidence for it is not merely negative, for the mischief and the cause of action appear to have been well known before, and the want of the remedy felt. The common law did give a remedy in certain cases; and Judges are found pointing out what that remedy was, and to what cases it applied. From the cases collected in Fitzherbert's Abridgment, tit. Laborers, it appears that the distinction between the action at common law and the action upon the statute was well known: wherever the former action lay it was in trespass, and not on the case: in saying which I do not rely merely on the words,—writ of trespass,—which might be applicable to trespass on the case; but I rely on the operative words of the writ, which stated a taking vi et armis: it might be joined with trespass quare clausum fregit or trespass for the asportation of chattels or false imprisonment. The count necessarily charged the taking of the servant out of the service of the plaintiff; whereas the writ upon the statute, as appears from Fitzherbert's Natura Brevium, 167 B, charges the retainer and admission of the servant into the defendant's service after he has been induced to withdraw, or has withdrawn without reasonable cause, from that of the plaintiff. I do not wish unnecessarily to multiply citations from the Year Books; but it will be necessary to refer to some, and at a greater length than they are found in the abridgments. * * *

Any one, I am certain, who will go through the cases abstracted by Fitzherbert under the title Laborers, will be satisfied that at common law, before the statute, such an action as the present could not be maintained. Under that title 61 cases are abridged: many of them are for the seduction of servants; but there is no instance of any one in which the action at common law was sustained, unless an actual trespass was charged: and it is clear from the case which I have cited at so much length, that the distinction between taking and procuring to go was familiar to the lawyers of that day. I can hardly imagine that this could have been said, if the common law would have given relief in such a case: and, if it could, the rapid growth of the action after the Statute of Labourers had passed would be difficult to account for.

I come then to the Statute of Labourers (23 Edw. III); and my object now is to show that nothing in the provisions or policy of that statute will warrant the action under the circumstances of this case; and that the older authorities are decidedly against it. * * *

I conclude then that this action cannot be maintained, because: 1st. Merely to induce or procure a free contracting party to break his covenant, whether done maliciously or not, to the damage of another, for the reasons I have stated, is not actionable. 2nd. That the law with regard to the seduction of servants from their master's

employ, in breach of their contract, is an exception, the origin of which is known, and that that exception does not reach the case of a theatrical performer.

I know not whether it may be objected that this judgment is conceived in a narrow spirit, and tends unnecessarily to restrain the remedial powers of the law. In my opinion it is not open to this objection. It seems to me wiser to ascertain the powers of the instrument with which you work, and employ it only on subjects to which they are equal and suited; and that, if you go beyond this, you strain and weaken it, and attain but imperfect and unsatisfactory and often unjust, results. But, whether this be so or not, we are limited by only the principles and analogies which we find laid down for us, and are to declare, not to make, the rule of law.

I think, therefore, with the greatest and most real deference for the opinions of my Brethren, and with all the doubt as to the correctness of my own which these opinions, added to the novelty and difficulty of the case itself, cannot but occasion, that our judgment ought to be for the defendant: though it must be pronounced for the plaintiff.

Judgment for plaintiff.[18]

LA SOCIÉTÉ ANONYME DE REMORQUAGE À HELICE v. BENNETTS.

(High Court of Justice, King's Bench Division, 1910. [1911] 1 K. B. 243.)

Action tried in the Commercial Court before Hamilton, J., without a jury.

The plaintiffs claimed to recover damages suffered by them by reason of the negligence of the defendant's servants. The facts, so far as material, were as follows.

On April 4, 1910, the steam tug John Bull, belonging to the plaintiffs, was engaged in towing the ship Kate Thomas from Antwerp to Port Talbot, South Wales, when the steamship India, belonging to the defendant, by the negligence of defendant's servants, came into collision with and sank the Kate Thomas. The tug received no damage either to herself or to her equipment. The plaintiffs alleged that by reason of the negligence of the defendant's servants they were deprived of their tow and lost the towage remuneration they would otherwise have received, and claimed £80, as the amount of the towage remuneration so lost, that being the remuneration fixed by the contract for the towage of the Kate Thomas from Antwerp to Port Talbot. At the time of the accident about four-fifths of the voyage from Antwerp to Port Talbot had been completed. The defendant con-

[18] A large part of the opinion of Crompton, J., all of the concurring opinions of Erle and Wightman, JJ., and portions of the dissenting opinion of Coleridge, J., are omitted.

tended that the plaintiff had no cause of action in respect of the loss of the towage remuneration upon the ground that, although there was negligence on the part of the defendant's servants, the loss of towage remuneration was not damage to the plaintiffs which was the direct consequence of the negligence so as to be recoverable in law.

It appeared from the report of the master of the John Bull that, seeing that the Kate Thomas was in the most alarming sinking condition after the collision, he immediately cast off the hawser in order to be able to render assistance to the ship, but that before reaching the place of the disaster she had sunk. The defendant paid the plaintiffs for the loss of the hawser. Clause 9 of the towage contract provided as follows: "Sea towage interrupted by accident to be paid pro ratio of distance towed."

HAMILTON, J. * * * In my opinon the plaintiffs have no cause of action. The obligation upon the defendant which was broken by his servants was the general one of navigating the seas with reasonable care. In order to give the plaintiffs a cause of action arising out of that breach, they must show not only injuria, namely, the breach of the defendant's obligation, but also damnum to themselves in the sense of damage recognized by law. This they have failed to do. No doubt, as a direct consequence of the collision, in one sense, the plaintiffs lost the chance of completing their towage contract, because the Kate Thomas went to the bottom. If the plaintiffs' cause of action had been completed by damage to the tow inflicted by the defendant's servants whereby the tug was no longer able to tow, then the case would come within Lord Stowell's decision in The Betsey Caines, 2 Hagg. Adm. 28, and the decision of the House of Lords in The Argentino, 14 App. Cas. 519, would apply. But all that has occurred is that in the course of performing a profitable contract an event happened which rendered the contract no further performable and therefore less profitable to the plaintiffs. That appears to me to bring the case within the authority of Cattle v. Stockton Waterworks Co., L. R. 10 Q. B. 453, and within the general statement of the law by Lord Penzance in his judgment in Simpson v. Thomson, 3 App. Cas. 279. It has been suggested that a distinction can be drawn between a case where the contract has been entered into but performance of it has not been entered upon, in which case it is admitted on the plaintiffs' behalf that the loss does not give a cause of action, and a case where the contract has not only been entered into, but performance of it has commenced. No authority has been cited for making such a distinction and I can see none in principle. I think this case involves the very point anticipated by Blackburn, J., in Cattle v. Stockton Waterworks Co., L. R. 10 Q. B. 453, where in giving judgment he said: "In the present case the objection is technical and against the merits, and we should be glad to avoid giving it effect. But if we did so we should establish an authority for saying that in such a case as that of Rylands v. Fletcher (1868) L. R. 3 H. L. 330,

the defendant would be liable, not only to an action by the owner of the drowned mine, and by such of his workmen as had their tools or clothes destroyed, but also to an action by every workman and person employed in the mine, who in consequence of its stoppage made less wages than he otherwise would have done." It can make no substantial difference whether a contract which has been entered into is already in the course of performance or is only about to be performed. In either case all that has happened is that the conditions under which the contract was performable have been altered by the act of the defendant so as to make them less favorable to one of the contracting parties, namely, to the plaintiffs. I can understand that the law might regard any interference by the defendant with the plaintiffs' contractual chances with a third party as a ground of action in their favor, but I cannot understand why, as the policy of the law excludes a right of action in the one case, where the contract has been made but not performed, it should give a cause of action in the other case, where part performance has taken place. There must therefore, be judgment for the defendant.

Judgment for the defendant.[19]

TUTTLE v. BUCK.

(Supreme Court of Minnesota, 1909. 107 Minn. 145, 119 N. W. 946, 22 L. R. A. [N. S.] 599, 131 Am. St. Rep. 446, 16 Ann. Cas. 807.)

ELLIOTT, J. This appeal was from an order overruling a general demurrer to a complaint in which the plaintiff alleged: That for more than 10 years last past he has been and still is a barber by trade, and engaged in business as such in the village of Howard Lake, Minn., in said county, where he resides, owning and operating a shop for the purpose of his said trade. That until the injury hereinafter complained of his said business was prosperous, and plaintiff was enabled thereby to comfortably maintain himself and family out of the income and profits thereof, and also to save a considerable sum per annum, to wit, about $800. That the defendant, during the period of about 12 months last past, has wrongfully, unlawfully, and maliciously endeavored to destroy plaintiff's said business and compel plaintiff to abandon the same. That to that end he has persistently and systematically sought, by false and malicious reports and accusations of and concerning the plaintiff, by personally soliciting and urging plaintiff's patrons no longer to employ plaintiff, by threats of his personal displeasure, and by various other unlawful means and devices, to induce, and has thereby induced, many of said patrons to withhold from plaintiff the employment by them formerly given. That defendant is possessed of large means, and is engaged in the business of a banker in

[19] Part of the opinion is omitted.

said village of Howard Lake, at Dassel, Minn., and at divers other places, and is nowise interested in the occupation of a barber; yet in the pursuance of the wicked, malicious, and unlawful purpose aforesaid, and for the sole and only purpose of injuring the trade of the plaintiff, and of accomplishing his purpose and threats of ruining the plaintiff's said business and driving him out of said village, the defendant fitted up and furnished a barber shop in said village for conducting the trade of barbering. That failing to induce any barber to occupy said shop on his own account, though offered at nominal rental, said defendant, with the wrongful and malicious purpose aforesaid, and not otherwise, has during the time herein stated hired two barbers in succession for a stated salary, paid by him, to occupy said shop, and to serve so many of plaintiff's patrons as said defendant has been or may be able by the means aforesaid to direct from plaintiff's shop. That at the present time a barber so employed and paid by the defendant is occupying and nominally conducting the shop thus fitted and furnished by the defendant, without paying any rent therefor, and under an agreement with defendant whereby the income of said shop is required to be paid to defendant, and is so paid in partial return for his wages. That all of said things were and are done by defendant with the sole design of injuring the plaintiff, and of destroying his said business, and not for the purpose of serving any legitimate interest of his own. That by reason of the great wealth and prominence of the defendant, and the personal and financial influence consequent thereon, he has by the means aforesaid, and through other unlawful means and devices by him employed, materially injured the business of the plaintiff, has largely reduced the income and profits thereof, and intends and threatens to destroy the same altogether, to plaintiff's damage in the sum of $10,000.

It has been said that the law deals only with externals, and that a lawful act cannot be made the foundation of an action because it was done with an evil motive. In Allen v. Flood, [1898] A. C. 151, Lord Watson said that, except with regard to crimes, the law does not take into account motives as constituting an element of civil wrong. In Mayor v. Pickles, [1895] A. C. 587, Lord Halsbury stated that if the act was lawful, "however ill the motive might be, he had a right to do it." In Raycroft v. Tayntor, 68 Vt. 219, 35 Atl. 53, 33 L. R. A. 225, 54 Am. St. Rep. 882, the court said that, "where one exercises a legal right only, the motive which actuates him is immaterial." In Jenkens v. Fowler, 24 Pa. 318, Mr. Justice Black said that "mischievous motives make a bad case worse, but they cannot make that wrong which in its own essence is lawful." This language was quoted in Bohn Mfg. Co. v. Hollis, 54 Minn. 233, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319, and in substance in Ertz v. Produce Exchange, 79 Minn. 143, 81 N. W. 737, 48 L. R. A. 90, 79 Am. St. Rep. 433. See, also, Cooley, Torts (3d Ed.) p. 1505; Auburn & Co. v. Douglass, 9 N. Y. 444. Such generalizations are of little value in de-

termining concrete cases. They may state the truth, but not the whole truth. Each word and phrase used therein may require definition and limitation. Thus, before we can apply Judge Black's language to a particular case, we must determine what act is "in its own essence lawful." What did Lord Halsbury mean by the words "lawful act"? What is meant by "exercising a legal right"? It is not at all correct to say that the motive with which an act is done is always immaterial, providing the act itself is not unlawful. Numerous illustrations of the contrary will be found in the civil as well as the criminal law.

We do not intend to enter upon an elaborate discussion of the subject, or become entangled in the subtleties connected with the words "malice" and "malicious." We are not able to accept without limitations the doctrine above referred to, but at this time content ourselves with a brief reference to some general principles. It must be remembered that the common law is the result of growth, and that its development has been determined by the social needs of the community which it governs. It is the resultant of conflicting social forces, and those forces which are for the time dominant leave their impress upon the law. It is of judicial origin, and seeks to establish doctrines and rules for the determination, protection, and enforcement of legal rights. Manifestly it must change as society changes and new rights are recognized. To be an efficient instrument, and not a mere abstraction, it must gradually adapt itself to changed conditions. Necessarily its form and substance has been greatly affected by prevalent economic theories. For generations there has been a practical agreement upon the proposition that competition in trade and business is desirable, and this idea has found expression in the decisions of the courts as well as in statutes. But it has led to grievous and manifold wrongs to individuals, and many courts have manifested an earnest desire to protect the individuals from the evils which result from unrestrained business competition. The problem has been to so adjust matters as to preserve the principle of competition and yet guard against its abuse to the unnecessary injury to the individual. So the principle that a man may use his own property according to his own needs and desires, while true in the abstract, is subject to many limitations in the concrete. Men cannot always in civilized society, be allowed to use their own property as their interests or desires may dictate without reference to the fact that they have neighbors whose rights are as sacred as their own. The existence and well-being of society requires that each and every person shall conduct himself consistently with the fact that he is a social and reasonable person. The purpose for which a man is using his own property may thus sometimes determine his rights, and applications of this idea are found in Stillwater Water Co. v. Farmer, 89 Minn. 58, 93 N. W. 907, 60 L. R. A. 875, 99 Am. St. Rep. 541, Id., 92 Minn. 230, 99 N. W. 882, and Barclay v. Abraham, 121 Iowa, 619, 96 N. W. 1080, 64 L. R. A. 255, 100 Am. St. Rep. 365.

Many of the restrictions which should be recognized and enforced

result from a tacit recognition of principles which are not often stated in the decisions in express terms. Sir Frederick Pollock notes that not many years ago it was difficult to find any definite authority for stating as a general proposition of English law that it is wrong to do a willful wrong to one's neighbor without lawful justification or excuse. But neither is there any express authority for the general proposition that men must perform their contracts. Both principles, in this generality of form and conception, are modern and there was a time when neither was true. After developing the idea that law begins, not with authentic general principles, but with the enumeration of particular remedies, the learned writer continues: "If there exists, then, a positive duty to avoid harm, much more, then, exists the negative duty of not doing willful harm, subject, as all general duties must be subject, to the necessary exceptions. The three main heads of duty with which the law of torts is concerned, namely, to abstain from willful injury, to respect the property of others, and to use due diligence to avoid causing harm to others, are all alike of a comprehensive nature." Pollock, Torts (8th Ed.) p. 21. He then quotes with approval the statement of Lord Bowen that "at common law there was a cause of action whenever one person did damage to another, willfully and intentionally, without just cause and excuse." In Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330, Mr. Justice Hammond said: "It is said, also, that, where one has the lawful right to do a thing, the motive by which he is actuated is immaterial. One form of this statement appears in the first headnote in Allen v. Flood, as reported in [1898] A. C. 1, as follows: 'An act lawful in itself is not converted by a malicious or bad motive into an unlawful act, so as to make the doer of the act liable to a civil action.' If the meaning of this and similar expressions is that, where a person has the lawful right to do a thing irrespective of his motive, his motive is immaterial, the proposition is a mere truism. If, however, the meaning is that where a person, if actuated by one kind of a motive, has a lawful right to do a thing, the act is lawful when done under any conceivable motive, or that an act lawful under one set of circumstances is therefore lawful under every conceivable set of circumstances, the proposition does not commend itself to us as either logically or legally accurate." Similar language was used by Mr. Justice Wells in Walker v. Cronin, 107 Mass. 555; by Lord Coleridge in Mogul Steamship Co. v. McGregor, 21 Q. B. D. 544–553; by Lord Justice Bowen in the same case, 23 Q. B. D. 593; by Mr. Justice Holmes in Aikens v. Wisconsin, 195 U. S. 194, 204, 25 Sup. Ct. 3, 49 L. Ed. 154; by Chief Justice McSherry in Klingel's Pharmacy v. Sharp, 104 Md. 233, 64 Atl. 1029, 7 L. R. A. (N. S.) 976, 118 Am. St. Rep. 399, 9 Ann. Cas. 1184; and by Judge Sanborn in his dissenting opinion in Passaic Print Works v. Ely & Walker Dry Goods Co., 105 Fed. 163, 44 C. C. A. 426, 62 L. R. A. 673. Numerous cases

will be found referred to in the note to this case in 62 L. R. A. 673, and in an article in 18 Harvard Law Review, 411.

It is freely conceded that there are many decisions contrary to this view; but, when carried to the extent contended for by the appellant, we think they are unsafe, unsound, and illy adapted to modern conditions. To divert to one's self the customers of a business rival by the offer of goods at lower prices is in general a legitimate mode of serving one's own interest, and justifiable as fair competition. But when a man starts an opposition place of business, not for the sake of profit to himself, but regardless of loss to himself, and for the sole purpose of driving his competitor out of business, and with the intention of himself retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton wrong and an actionable tort. In such a case he would not be exercising his legal right, or doing an act which can be judged separately from the motive which actuated him. To call such conduct competition is a perversion of terms. It is simply the application of force without legal justification, which in its moral quality may be no better than highway robbery.

Nevertheless, in the opinion of the writer this complaint is insufficient. It is not claimed that it states a cause of action for slander. No question of conspiracy or combination is involved. Stripped of the adjectives and the statement that what was done was for the sole purpose of injuring the plaintiff, and not for the purpose of serving a legitimate purpose of the defendant, the complaint states facts which in themselves amount only to an ordinary everyday business transaction. There is no allegation that the defendant was intentionally running the business at a financial loss to himself, or that after driving the plaintiff out of business the defendant closed up or intended to close up his shop. From all that appears from the complaint he may have opened the barber shop, energetically sought business from his acquaintances and the customers of the plaintiff, and as a result of his enterprise and command of capital obtained it, with the result that the plaintiff, from want of capital, acquaintance, or enterprise, was unable to stand the competition and was thus driven out of business. The facts thus alleged do not, in my opinion, in themselves, without reference to the way in which they are characterized by the pleader, tend to show a malicious and wanton wrong to the plaintiff.

A majority of the Justices, however, are of the opinion that, on the principle declared in the foregoing opinion, the complaint states a cause of action, and the order is therefore affirmed.

Affirmed.

JAGGARD, J., dissents.

HUSKIE v. GRIFFIN.

(Supreme Court of New Hampshire, 1909. 75 N. H. 345, 74 Atl. 595, 27 L. R. A. [N. S.] 966, 139 Am. St. Rep. 718.)

In this action, by Huskie against Griffin, there was a judgment of nonsuit in the superior court, and the case was transferred on the plaintiff's exception.

The plaintiff's evidence tended to prove that, while he was employed by the defendant, he applied for an increase of wages, and was told by the defendant's superintendent that he was at liberty to leave at any time if he could better himself. He sought employment elsewhere, and one day received a note stating that he could have work at the McElwain factory. He showed the note to Griffin's superintendent, who made no objection to the proposed action, but at once went to the office and drew the plaintiff's wages for him. As soon as the plaintiff had left, Griffin telephoned to Trull, superintendent of the McElwain shop. Trull's testimony as to the conversation was in part as follows: "He telephoned and said there was a man from my factory came up to his factory with a note and hired, or was about to hire, one of his men, right in the middle of the day, and wanted to know if I thought that was a nice thing to do. I said it was not, and that I would not hire the man; and when I found out about it I told our man not to hire him. Q. That is, you instructed your agent not to hire him? A. Yes, sir; but after that Griffin told me I could hire him, but I told him I didn't want him. Q. That was a little ironical, wasn't it, Mr. Trull? A. Well, during the same conversation, right afterward, he said, 'You can have him if you want him, you can hire him.' Q. And you understood that to be a little bit ironical, didn't you. A. I didn't understand anything about it. Q. Well, you didn't hire him, anyhow? A. No, sir; I didn't hire him." On cross-examination, the witness stated the conversation more favorable to the defendant. When the plaintiff reached the McElwain factory he was refused employment. He then returned to the defendant, who complained because the plaintiff received a note in the shop. The conversation became heated, and the defendant refused to comply with the plaintiff's request to telephone to Trull and adjust the matter.

PEASLEE, J. The parties to this action do not agree as to what facts the evidence tended to prove. The defendant argues that because he asked Trull to retain the plaintiff as an employé therefore it cannot be found that the defendant sought to cause the plaintiff's discharge by Trull. The plaintiff's claim is that the request to retain him might be found to be a mere cover, well understood by both parties to the conversation. His claim is well founded. A jury might believe that the complaint made by the defendant to Trull was false, and that the defendant, after he had encouraged the plaintiff to seek

employment elsewhere, maliciously caused the plaintiff's discharge from such new employment. The plaintiff's engagement was not for any certain period. Trull might lawfully discharge him at any time. It therefore follows that cases involving recovery for procuring the breach of a binding executory contract (Bixby v. Dunlap, 56 N. H. 456, 22 Am. Rep. 475; South Wales Miners' Fed. v. Glamorgan Coal Co., [1905] A. C. 239) are not in point here. The issue presented is that of the existence and extent of what has come to be known as the right to an "open market." How far one may lawfully interfere to prevent the making of contracts between third parties is a problem which has been much discussed in other jurisdictions. It is new in this state. Three phases of it are presented by the case at bar: (1) When the interference is by fraud; (2) when it is without fraud or force (actually applied or reasonably apprehended), but prompted by a motive to injure the aggrieved party; (3) when it is unaccompanied by what are ordinarily considered illegal acts or motives, and is induced solely by a desire of the defendant to promote his own welfare.

1. It is well established that the inherent right of every man to freely deal, or refuse to deal, with his fellowmen is not to be destroyed or abridged by acts involving the elements of the common-law action for deceit. This is not denied. On this branch of the case the defendant relies upon the proposition that the facts are not made out. He concedes, as he plainly must concede, that the law is in favor of the plaintiff's position, provided only that there is evidence to support the several necessary findings. As before stated, there was evidence in this case which, if believed by the jury, would lead to the conclusion that the defendant was guilty of fraud. It could be found that the plaintiff quit the defendant's employ in an honorable manner; that the defendant, with knowledge of the facts, represented that the plaintiff's departure was dishonorable; that this was done with the intent to cause the new employer to act to the plaintiff's damage, and that such damaging action resulted from this cause. The plaintiff was entitled to go to the jury upon the issue of fraud.

2. Whether motive (when falsehood is absent) is a material element in these cases is a question upon which the authorities are not so fully agreed. That it is material, and that where malice, or a purpose to do the plaintiff injury, is the moving force to the commission of the act, a recovery may be had is the rule in many jurisdictions. Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330; Van Horn v. Van Horn, 56 N. J. Law, 318, 28 Atl. 669; Doremus v. Hennessy, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 802, 68 Am. St. Rep. 203; Ertz v. Produce Exchange, 79 Minn. 140, 81 N. W. 737, 48 L. R. A. 90, 79 Am. St. Rep. 433; Bowen v. Hall, 6 Q. B. Div. 333. The rule is well stated in a recent case in California: "Any injury to a lawful business, whether the result of a conspiracy or not, is prima facie actionable, but may be defended upon the ground that it was merely the result of a lawful

effort of the defendants to promote their own welfare. To defeat this plea of justification, the plaintiff may offer evidence that the acts of the defendants were inspired by express malice, and were done for the purpose of injuring the plaintiff, and not to benefit themselves. The principle is the same which permits proof of express malice to defeat the plea of privilege in libel, or the defense of probable cause in actions for malicious prosecution or false imprisonment." J. F. Parkinson Co. v. Trades Council, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165. The opposite view is taken by high authority. Macauley v. Tierney, 19 R. I. 255, 33 Atl. 1, 37 L. R. A. 455, 61 Am. St. Rep. 770; Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319; Judge Jeremiah Smith in 20 Harv. Law Rev. 451, et seq.

For the reason above indicated, and others which will be given in the discussion of the next issue in this case, it is held that a statement of the truth, made for the sole purpose of damaging the plaintiff by causing a third party to refuse to further deal with the plaintiff, is actionable if damage ensues. The state of mind of an offending person may be proved in various ways. It may appear that there was no good reason for doing the act. In that case, malice may be inferred from the proved absence of other motive for the act done. In case there be a sufficient justifiable motive, it may still be proved that in fact malice was the moving force. In either case the question is one of fact. There was in the case at bar sufficient evidence to support a finding that the defendant did what he did for the sole purpose of depriving the plaintiff of the benefit of a contract for employment. The question is not what the defendant now says his purpose was. It is not even what he said his purpose was at the time he made the complaint to Trull. Nor is his motive necessary to be found in a literal application of the words he used. The conversation as testified to was susceptible of more than one interpretation. It may have meant that the defendant intended to cause the plaintiff to be discharged as a matter of small revenge, and while the defendant was formally protesting against the act he had intentionally and maliciously caused. It is not, as the defendant claims, a case of guessing. It is one of interpreting the acts and words disclosed by the evidence in the case. Upon this issue the case should have been submitted to the jury, under instructions that if they found the act was done solely for the purpose of injuring the plaintiff he was entitled to recover. If the damage was done "for its own sake," liability would be made out. Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443, dissenting opinion of Holmes, J.

3. Beyond the issues of fraud and malicious injury lies one which has caused much of perplexity and conflicting adjudication. How far advantage may or may not lawfully be gained by appeal, persuasion, or threat of loss of future favor—whether those not involved in the

initial contest may be dragged into it by these and kindred means—are questions which courts, jurists, and publicists have not found it easy to answer. Between the early view that a peaceful strike for higher wages was inherently wicked (King v. Journeymen Tailors of Cambridge, 8 Mod. 11; In re Journeymen Cordwainers, Yates, Sel. Cas. 111, 277) and the theory that all honest and peaceful means are permissible (dis. op. Vegelahn v. Guntner, supra), there is room for every shade of opinion. "It will be seen that in the different courts there is considerable variety and some conflict of opinion." Berry v. Donovan, 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899, 108 Am. St. Rep. 499, 3 Ann. Cas. 738. Cases where the act complained of was committed by one person alone are comparatively rare, the plain reason being that peaceful and truthful persuasion, or promise of future favor, by a single individual is not likely to produce results of a character so grave as to induce the injured party to seek redress through the courts. But when the act is that of many persons, the result has not infrequently been to drive the injured party out of business or deprive him of an opportunity to labor at his chosen calling. In many cases it has been decided that the common law governing criminal conspiracies offered a sufficient ground for holding the offenders liable civilly. Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 S. W. 997, 22 L. R. A. (N. S.) 607, 128 Am. St. Rep. 492, and authorities there reviewed. It was soon perceived, however, that the argument was unsound; and the theory that acts which might lawfully be done by one or any number of persons, acting singly, were unlawful when done by several acting by a concerted plan was abandoned in most jurisdictions. Boutwell v. Marr, 71 Vt. 1, 42 Atl. 607, 43 L. R. A. 803, 76 Am. St. Rep. 746; Toledo, etc., Ry. v. Company (C. C.) 54 Fed. 730, 19 L. R. A. 387.

Another ground taken was that there is in the concerted action of the many a coercive element which should be placed on a par with the use of force, or with the undue influence sometimes exercised over persons not fully capable of protecting themselves. Boutwell v. Marr, supra; Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330; Curran v. Galen, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496; Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319; Casey v. Union (C. C.) 45 Fed. 135, 12 L. R. A. 193. The reasoning by which this view has been supported not infrequently suggests the true solution of the difficulty. The conclusion has been reached by deciding what was or was not reasonable conduct under the circumstances of the case. The more recent authorities reason that, as the right to deal or not to deal with others is inherent in the idea of Anglo-Saxon liberty, prima facie a man can demand an open market; and, since this is so, one who interferes with this free market must justify his acts or respond in damages. Thus far these authorities are uniform; but when they proceed to the determination of what

amounts to a justification, they differ widely. The cause is not far to seek. The rule which they apply is that of reasonable conduct, yet they discuss and decide each case as though it involved only a question of law. In reality, the issue is largely one of fact, and the result is what would be expected. Judges are men, and their decisions upon complex facts must vary as those of juries might on the same facts. Calling one determination an opinion and the other a verdict does not alter human nature, nor make that uniform and certain which from its nature must remain variable and uncertain. While these cases go too far in what they decide as questions of law, yet the test they constantly declare they are applying is the true one. The standard is reasonable conduct under all the circumstances of the case. Berry v. Donovan, 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899, 108 Am. St. Rep. 499, 3 Ann. Cas. 738; Macauley v. Tierney, 19 R. I. 255, 33 Atl. 1, 37 L. R. A. 455, 61 Am. St. Rep. 770; Doremus v. Hennessy, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 802, 68 Am. St. Rep. 203. "What is the measure or test by which the conduct of a combination of persons must be judged in order to determine whether or not it is an unlawful interference with freedom of employment in the labor market, and as such injurious to an employer of labor in respect of his 'probable expectancies,' has not as yet been clearly defined. Perhaps no better definition could be suggested than that which may be framed by conveniently using that important legal fictitious person who has taken such a large part in the development of our law during the last fifty years—the reasonably prudent, reasonably courageous, and not unreasonably sensitive man. Precisely this same standard is employed throughout the law of nuisance in determining what degree of annoyance * * * one must submit to." Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 766, 53 Atl. 230, 233. Occasionally courts have recognized in a degree the principle that the question should be treated as one of fact. "The judge rightly left to the jury the question whether, in view of all the circumstances, the interference was or was not for a justifiable cause. If the plaintiff's habits, or conduct, or character had been such as to render him an unfit associate in the shop for ordinary workmen of good character, that would have been a sufficient reason for interference in behalf of his shopmates. We can conceive of other good reasons. But the evidence tended to show that the only reason for procuring his discharge was his refusal to join the union. The question, therefore, is whether the jury might find that such an interference was unlawful." Berry v. Donovan, 188 Mass. 353, 357, 74 N. E. 603, 605, 5 L. R. A. (N. S.) 899, 108 Am. St. Rep. 499, 3 Ann. Cas. 738.

There is no such difficulty in dealing with the question here as has been met with elsewhere, and it is not necessary to attempt to reconcile the conflict which has resulted from the application of a view which does not obtain in this jurisdiction. In this state the question

of reasonable conduct, whether in relation to tangible property or to intangible rights, is one of fact. Ladd v. Brick Co., 68 N. H. 185, 37 Atl. 1041, and cases cited. But while the question to be settled is within the province of the jury, there are still legal propositions involved in the case. It must be determined whether there is anything for the jury to weigh—whether the evidence is not conclusive one way or the other upon the issue of reasonable conduct.

At the present time no one would think of submitting to a jury the question whether a peaceful strike for higher wages was reasonable. They would be told, as matter of law, that such action was within the laborers' rights. So there may be conduct which is clearly unreasonable, or not justifiable. An illustration of such conduct is presented by the second ground for recovery in this case. One may not interfere with his neighbor's open market or "reasonable expectancies" solely for the purpose of doing harm. It has been said, however, in several cases that a wrongful motive cannot convert a legal act into an illegal one, and many judges have thought this was the end of the law upon the question. They seem to proceed upon a theory of absolute right in the defendant, which is at variance with the holding in many of the same cases, that the defendant may be called upon to justify his conduct. Indeed, the authorities are practically unanimous to the effect that the defendant is liable unless he shows a justification. If this is true, it follows as matter of course that his right is not absolute. It is a qualified one, and the rightfulness of its exercise depends upon all those elements which go to make up a cause for human action. The reasonableness of the act cannot always be satisfactorily determined until something is known of the state of the actor's mind. The "justification may be found sometimes in the circumstances under which it is done, irrespective of motive, sometimes in the motive alone, and sometimes in the circumstances and motive combined." Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330.

Since the defendant is called upon to justify—to show reasonable cause for the interference with his neighbor's right—it seems to clearly follow that, where his only reason is his malicious wish to injure the plaintiff, he has no justification. It is a contradiction in terms to say that a desire to do harm for the harm's sake can be called a just motive. In a late case in this state it is said of the use of property that "it cannot be justly contended that a purely malicious use is a reasonable use. The question of reasonableness depends upon all the circumstances—the advantage and profit to one of the uses attacked, and the unavoidable injury to the other. Where the only advantage to one is the pleasure of injuring another, there remains no foundation upon which it can be determined that the disturbance of the other in the lawful enjoyment of his estate is reasonable or necessary." Horan v. Byrnes, 72 N. H. 93, 100, 54 Atl. 945, 948, 62 L. R. A. 602, 101 Am. St. Rep. 670. The same reason applies here. If the evi-

dence had been conclusive that the act was done solely from a malicious motive a verdict would have been directed for the plaintiff. It is not improbable that there are other plain cases—cases where there is nothing for the jury to pass upon. The third issue in this case does not come within that class. It cannot be said that all reasonable men would conclude that every reasonable man would or would not do what the defendant did, even though he acted honestly and from a proper motive. If any one doubts this assertion, he has but to read the cases where this and kindred questions have been discussed and decided as those of law. Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443; Berry v. Donovan, 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899, 108 Am. St. Rep. 499, 3 Ann. Cas. 738, and cases there cited; L. D. Willcutt & Sons Co. v. Driscoll, 200 Mass. 110, 85 N. E. 897, 23 L. R. A. (N. S.) 1236; National Protective Ass'n v. Cumming, 170 N. Y. 315, 68 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648; Jacobs v. Cohen, 183 N. Y. 207, 76 N. E. 5, 2 L. R. A. (N. S.) 292, 111 Am. St. Rep. 730, 5 Ann. Cas. 280; Wilson v. Hey, 232 Ill. 389, 83 N. E. 928, 16 L. R. A. (N. S.) 85, 122 Am. St. Rep. 119, 13 Ann. Cas. 82; Barnes v. Union, 232 Ill. 424, 83 N. E. 940, 14 L. R. A. (N. S.) 1018, 13 Ann. Cas. 54. When eminent judges come to opposite conclusions upon a question, it can hardly be said that jurors might not reasonably do the same.

The plaintiff was entitled to go to the jury upon all three grounds which have been considered: (1) Fraud, (2) malicious injury, and (3) unreasonable interference with the open market. Whether section 12, c. 266, Pub. St., affords a basis for a claim of greater right in the plaintiff is a question which has not been argued and is not considered.

Exception sustained. All concurred.

SECTION 3.—AS TO JUSTIFYING OR EXCUSING THE USE OF PROPERTY OR INFLUENCE FOR THE INTENTIONAL HARM OF ANOTHER

I. The Principle in General

There are indeed many authorities which appear to hold that to constitute an actionable wrong there must be a violation of some definite legal right of the plaintiff. But those are cases, for the most part at least, where the defendants were themselves acting in the lawful exercise of some distinct right, which furnished the defence of a justifiable cause for their acts, except so far as they were in violation of a superior right in another.

Thus every one has an equal right to employ workmen in his business or service; and if, by the exercise of this right in such manner as he may see fit, persons are induced to leave their employment elsewhere, no wrong is done to him whose employment they leave, unless a contract exists by which such other person has a legal right to the further continuance of their services. If such a contract exists, one who knowingly and intentionally procures it to be violated may be held liable for the wrong, although he did it for the purpose of promoting his own business.

One may dig upon his own land for water, or any other purpose, although he thereby cuts off the supply of water from his neighbor's well. Greenleaf v. Francis, 18 Pick. 117. It is intimated, in this case, that such acts might be actionable if done maliciously. But the rights of the owner of land being absolute therein, and the adjoining proprietor having no legal right to such a supply of water from lands of another, the superior right must prevail. Accordingly it is generally held that no action will lie against one for acts done upon his own land in the exercise of his rights of ownership, whatever the motive, if they merely deprive another of advantages, or cause a loss to him, without violating any legal right; that is, the motive in such cases is immaterial. Frazier v. Brown, 12 Ohio St. 294; Chatfield v. Wilson, 28 Vt. 49; Mahan v. Brown, 13 Wend. (N. Y.) 261, 28 Am. Dec. 461; Delhi v. Youmans, 50 Barb. (N. Y.) 316. A similar decision was made in Wheatley v. Baugh, 25 Pa. 528, 64 Am. Dec. 721, but the suggestion in Greenleaf v. Francis was approved so far as this, namely, that malicious acts without the justification of any right, that is, acts of a stranger, resulting in like loss or damage, might be actionable; and the case of Parker v. Boston & Maine Railroad, 3 Cush. 107, 50 Am. Dec. 709, was referred to as showing that such loss of advantages previously enjoyed, although not of vested legal right,

might be a ground of damages recoverable against one who caused the loss without superior right or justifiable cause.

Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is damnum absque injuria, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing, and falls within the principle of the authorities first referred to.

Wells, J., in Walker v. Cronin (1871) 107 Mass. 555, 563.

At Common Law there was a cause of action whenever one person did damage to another wilfully and intentionally, and without just cause or excuse. Under the head of that class of action came the action of slander of title, whether the subject of the slander was real or personal property. If a man falsely and maliciously—because the malice would shew there was no just cause—made a statement about the property of another which was calculated to do, and which did do, damage to the other in the management of that property, an action would lie at Common Law, and damages would be recoverable and in Chancery, I suppose that even if you could not prove that actual damage had occurred, the Court might, if actual damage was likely to occur, prevent the wrongful act by injunction.

Bowen, L. J., in Skinner & Co. v. Shew & Co., [1893] 1 Ch. 413, 422.

It has been considered that, prima facie, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape. Mogul Steamship Co. v. McGregor, 23 Q. B. D. 598, 613; S. C., [1892] A. C. 25. If this is the correct mode of approach it is obvious that justifications may vary in extent according to the principle of policy upon which they are founded, and that while some, for instance, at common law, those affecting the use of land, are absolute, Bradford v. Pickles, [1895] A. C. 587, others may depend upon the end for which the act is done. Moran v. Dunphy, 177 Mass. 485, 487, 50 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289; Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330; Squires v. Wason Manuf. Co., 182 Mass. 137, 140, 141, 65 N. E. 32. See cases cited in Passaic Print

Works v. Ely & Walker Dry-Goods Co., 105 Fed. 163, 44 C. C. A. 426, 62 L. R. A. 673. It is no sufficient answer to this line of thought that motives are not actionable and that the standards of the law are external. That is true in determining what a man is bound to foresee, but not necessarily in determining the extent to which he can justify harm which he has foreseen.

Holmes, J., in Aikens v. Wisconsin (1904) 195 U. S. 194, 204, 25 Sup. Ct. 3, 49 L. Ed. 154.[20]

At Common Law every member of the community is entitled to carry on any trade or business he chooses and in such manner as he thinks most desirable in his own interests, and inasmuch as every right connotes an obligation no one can lawfully interfere with another in the free exercise of his trade or business unless there exists some just cause or excuse for such interference. Just cause or excuse for interference with another's trade or business may sometimes be found in the fact that the acts complained of as an interference have all been done in the bona fide exercise of the doer's own trade or business and with a single view to his own interests (the Mogul Steamship Case, 23 Q. B. D. 598; [1892] A. C. 25). But it may also be found in the existence of some additional or substantive right conferred by letters patent from the Crown or by contract between individuals. In the case of letters patent from the Crown this additional or substantive right is generally described as a monopoly. In the lat-

[20] "X., who intentionally causes damage to A., has prima facie done an injury or wrong to A., and if X. can show no legal justification for the damage he has thus intentionally done to A., he is liable to an action by A." Professor A. V. Dicey, 18 Law Quar. Rev. 4.

"It is submitted that the discussion would be materially simplified if it were understood that all damage wilfully done to one's neighbor is actionable unless it can be justified or excused." Sir Frederick Pollock, Torts (7th Ed.) 319.

"The wilful causing of damage to another by a positive act, whether by one man alone, or by several acting in concert, and whether by direct action against him or indirectly by inducing a third person to exercise a lawful right, is a tort unless there was just cause for inflicting the damage. * * *" Professor James Barr Ames, 18 Harv. Law Rev. 412.

Quoting these three passages and the opening sentences from the opinions of Bowen, L. J., and Holmes, J., in the text, Professor Jeremiah Smith has remarked: "The above statements of Bowen, Dicey, Holmes, Pollock and Ames all seem to imply that the causing of the damage in question was the object immediately aimed at by the defendant. But they do not necessarily import the doing of damage 'for the sake of the harm as an evil in itself, and not merely as a means to some further end legitimately desired.' On the contrary, the desire to cause the harm is entirely consistent with the absence of personal ill will towards the plaintiff, and also with the existence of an ultimate good motive on the part of the defendant. Conceding that damage as such, i. e., because it is harmful or damaging to the plaintiff, is the very object immediately desired, yet it may not be the ultimate end which is sought to be attained. We think that the law should be held to go as far as the above general statements of Bowen, Dicey, Holmes and Pollock, and the more specific statement of Professor Ames." 20 Harv. Law Rev. 263 (1907).

ter case the contract on which the additional or substantive right is founded is generally described as a contract in restraint of trade. Monopolies and contracts in restraint of trade have this in common, that they both, if enforced, involve a derogation from the common law right in virtue of which any member of the community may exercise any trade or business he pleases and in such manner as he thinks best in his own interests.

Lord Parker of Waddington, in Attorney General of Australia v. Adelaide Steamship Co., [1913] A. C. 781, 793

MOGUL STEAMSHIP CO., Limited, v. McGREGOR, GOW & CO. et al.

(Queen's Bench Division, 1888. 21 Q. B. Div. 544. Court of Appeal, 1889. 23 Q. B. Div. 598. House of Lords. [1892] A. C. 25.)

In this action, the plaintiffs claimed damages for a conspiracy to prevent them from carrying on their trade between London and China, and an injunction against the continuance of the alleged wrongful acts. The facts were shortly as follows: [21]

[21] The statement here given is from the reports of the case in the Queen's Bench Division, 21 Q. B. D. 544, and in the Court of Appeal, 23 Q. B. D. 598. The facts are fully set forth also in The Mogul Steamship Company v. McGregor, Gow & Co. (1885) 15 Q. B. D. 476, when the plaintiffs were seeking an interim injunction. In this earlier consideration of the case Lord Coleridge, C. J., remarked: "This is an application for an interlocutory or interim injunction before the trial of the action. It is certainly conceivable that such a conspiracy,—because conspiracy undoubtedly it is,—as this might be proved in point of fact: and I do not entertain any doubt, nor does my learned Brother, that, if such a conspiracy were proved in point of fact, and the intuitus of the conspirators were made out to be, not the mere honest support and maintenance of the defendants' trade, but the destruction of the plaintiffs' trade, and their consequent ruin as merchants, it would be an offence for which an indictment for conspiracy, and, if an indictment, then an action for conspiracy, would lie. * * * [But] even assuming that the plaintiffs are right in their contention it will be competent to the jury at the trial to award, and I have no doubt they will award, the plaintiffs abundant damages to compensate them for the injury that they may have sustained at the hands of the defendants. I have always understood, and I am confirmed in that understanding by the larger experience of Lord Justice Fry, that that is almost of itself a reason for not issuing an injunction prior to the trial of the action. If the plaintiffs establish their case by the verdict of the jury or the decision of the judge, they will get all they are entitled to. Next, this does not appear to me to be a case in which, as I was at one time inclined to think, the plaintiffs can sustain irreparable injury by our declining to grant the relief prayed. It may be that they will suffer some damage; it may be that they will for a time have a difficulty in carrying on their China trade or may have to carry it on at a loss. But injury of that sort differs altogether from the injury which is called 'irreparable,' to prevent which injunctions have heretofore been granted in the Court of Chancery, and are now allowed to issue from this Court. For instance, if a fine old ornamental tree in a nobleman's park be cut down, the injury is practically irreparable, and cannot be compensated in damages. It is in cases of that nature that an interim injunction issues. The injury here, if it be made out, obviously is not one of that character." The motion for the interim injunction was therefore refused.

The plaintiffs were a shipping company incorporated for the purpose of acquiring shares in certain steamships—the Sikh, Afghan, Pathan, and Ghazee—and became the owners of a large number of shares in these ships, which were built for and employed in the China and Australian trades. The defendants were an associated body of shipowners trading (among other places) between China and London, who formed themselves into a conference or association for the purpose of keeping up the rate of freights in the tea trade between China and Europe, and securing that trade to themselves by allowing a rebate of 5 per cent. on all freights paid by shippers who shipped tea for Europe in conference vessels only. The defendants alleged (and, as is found in the judgment, truly alleged) that the large profits derived from the tea freights alone enabled them to keep up a regular line of communication all the year round between England and China, and that without a practical monopoly of the tea trade they must cease to do so. The plaintiffs were admitted to the benefits of this conference for the season of 1884, when the following circular was widely distributed by the defendants among the merchants engaged in the China trade:

"Shanghai, 10th May, 1884.

"To those exporters who confine their shipments of tea and general cargo from China to Europe (not including the Mediterranean and Black Sea ports) to the P. & O. Steam Navigation Co.'s, Messagerie Maritime Co.'s, Ocean Steamship Co.'s, Glen, Castle, Shire, and Ben Lines, and to the steamships Oopack and Ningchow, we shall be happy to allow a rebate of 5 per cent. on the freight charged.

"Exporters claiming the returns will be required to sign a declaration that they have not made nor been interested in any shipments of tea or general cargo to Europe (excepting the ports above named) by any other than the said lines.

"Shipments by the steamships Afghan, Pathan, and Ghazee on their present voyages from Hankow will not prejudice claims for returns.

"Each line to be responsible for its own returns only, which will be payable half-yearly, commencing 30th October next.

"Shipments by an outside steamer at any of the ports in China or at Hong Kong will exclude the firm making such shipments from participation in the return during the whole six-monthly period within which they have been made, even although its other branches may have given entire support to the above lines.

"The foregoing agreement on our part to be in force from present date till the 30th April, 1886."

In May, 1885, the defendants issued and widely distributed among the merchants in the China trade the following circular, which had the effect of excluding the plaintiffs from the benefits of the conference:

"Shanghai, 11 May, 1885.

"Referring to our circular dated 10th May, 1884, we beg to remind you that shipments for London by the steamships Pathan, Afghan, and Aberdeen, or by other non-conference steamers at any of the ports in China or at Hong Kong, will exclude the firm making such shipments from participation in the return during the whole six-monthly period in which they have been made, even although the firm elsewhere may have given exclusive support to the conference lines."

The plaintiffs by their statement of claim alleged a conspiracy on the part of the defendants to prevent the plaintiffs from obtaining

cargoes for their steamers, such conspiracy consisting in a combination and agreement amongst the defendants, having by reason of such combination and agreement control of the homeward shipping trade, pursuant to which combination and agreement shippers were bribed, coerced, and induced to agree to forbear, and to forbear, from shipping cargoes by the plaintiffs' steamers. In the alternative, the conspiracy was alleged to consist of a combination and agreement amongst the defendants pursuant to which the defendants, with intent to injure the plaintiffs and prevent them obtaining cargoes for their steamers, agreed to refuse, and refused, to accept cargoes from shippers except upon the terms that the shippers should not ship any cargoes by the plaintiffs' steamers, and by threats of stopping the shipment of homeward cargoes altogether, which they had the power and intended to carry into effect, prevented shippers from shipping cargoes by plaintiffs' steamers. * * *

The defence included a denial of the alleged conspiracy, and an objection that the plaintiffs' statement of claim disclosed no cause of action.

The action was tried without a jury, before Lord Coleridge, C. J., who delivered a written judgment for the defendants.[22] The plaintiffs appealed.

[22] In this judgment, 21 Q. B. D. 544, 547, which is omitted here, Lord Coleridge, C. J., remarks: "But it is said that the motive of these acts was to ruin the plaintiffs, and that such a motive, it has been held, will render the combination itself wrongful and malicious, and that if damage has resulted to the plaintiffs an action will lie. I concede that if the premises are established the conclusion follows. It is too late to dispute, if I desired it, as I do not, that a wrongful and malicious combination to ruin a man in his trade may be ground for such an action as this. Was then this combination such? The answer to this question has given me much trouble, and I confess to the weakness of having long doubted and hesitated before I could make up my mind. There can be no doubt that the defendants were determined, if they could, to exclude the plaintiffs from this trade. Strong expressions were drawn from some of them in cross-examination, and the telegrams and letters shewed the importance they attached to the matter, their resolute purpose to exclude the plaintiffs if they could, and to do so without any consideration for the results to the plaintiffs, if they were successfully excluded. This, I think, is made out, and I think no more is made out than this. Is this enough? It must be remembered that all trade is and must be in a sense selfish; trade not being infinite, nay, the trade of a particular place or district being possibly very limited, what one man gains another loses. In the hand to hand war of commerce, as in the conflicts of public life, whether at the bar, in Parliament, in medicine, in engineering, (I give examples only,) men fight on without much thought of others, except a desire to excel or to defeat them. Very lofty minds, like Sir Philip Sidney with his cup of water, will not stoop to take an advantage, if they think another wants it more. Our age, in spite of high authority to the contrary, is not without its Sir Philip Sidneys; but these are counsels of perfection which it would be silly indeed to make the measure of the rough business of the world as pursued by ordinary men of business. The line is in words difficult to draw, but I cannot see that these defendants have in fact passed the line which separates the reasonable and legitimate selfishness of traders from wrong and malice. In 1884 they admitted the plaintiffs to their conference; in 1885 they excluded them, and they were determined no doubt, if they could, to make the exclusion complete and effective, not from any personal malice or ill will to the

[In the Court of Appeal]

BOWEN, L. J. We are presented in this case with an apparent conflict or antinomy between two rights that are equally regarded by the law—the right of the plaintiffs to be protected in the legitimate exercise of their trade, and the right of the defendants to carry on their business as seems best to them, provided they commit no wrong to others. The plaintiffs complain that the defendants have crossed the line which the common law permits; and inasmuch as, for the purposes of the present case, we are to assume some possible damage to the plaintiffs, the real question to be decided is whether, on such an assumption, the defendants in the conduct of their commercial affairs have done anything that is unjustifiable in law. The defendants are a number of ship-owners who formed themselves into a league or conference for the purpose of ultimately keeping in their own hands the control of the tea carriage from certain Chinese ports, and for the purpose of driving the plaintiffs and other competitors from the field. In order to succeed in this object, and to discourage the plaintiffs' vessels from resorting to those ports, the defendants during the "tea harvest" of 1885 combined to offer to the local shippers very low freights, with a view of generally reducing or "smashing" rates, and thus rendering it unprofitable for the plaintiffs to send their ships thither. They offered, moreover, a rebate of five per cent. to all local shippers and agents who would deal exclusively with vessels belonging to the Conference, and any agent who broke the condition was to forfeit the entire rebate on all shipments made on behalf of any and every one of his principals during the whole year—a forfeiture of rebate or allowance which was denominated as "penal" by the plaintiffs' counsel. It must, however, be taken as established that the rebate was one which the defendants need never have allowed at all to their customers. It must also be taken that the defendants had no personal ill-will to the plaintiffs, nor any desire to harm them except such as is involved in the wish and intention to discourage by such measures the plaintiffs from sending rival vessels to such ports. The acts of which the plaintiffs particularly complained were as follows: First, a circular of May 10, 1885, by which the defendants offered to the local shippers and their agents a benefit by way of rebate if they would not deal with the plaintiffs, which was to be lost if this condition was not fulfilled. Secondly, the sending of special ships to Hankow in order by competition to deprive the plaintiffs' vessels of profitable freight. Thirdly, the offer at Hankow of freights at a level which would not repay a shipowner for his adventure, in order to "smash" freights and frighten

plaintiffs as individuals, but because they were determined, if they could, to keep the trade to themselves; and if they permitted persons in the position of the plaintiffs to come in and share it they thought, and honestly and, as it turns out, correctly thought, that for a time at least there would be an end of their gains."

the plaintiffs from the field. Fourthly, pressure put on the defendants' own agents to induce them to ship only by the defendants' vessels, and not by those of the plaintiffs. It is to be observed with regard to all these acts of which complaint is made that they were acts that in themselves could not be said to be illegal unless made so by the object with which, or the combination in the course of which, they were done; and that in reality what is complained of is the pursuing of trade competition to a length which the plaintiffs consider oppressive and prejudicial to themselves. We were invited by the plaintiffs' counsel to accept the position from which their argument started—that an action will lie if a man maliciously and wrongfully conducts himself so as to injure another in that other's trade. Obscurity resides in the language used to state this proposition. The terms "maliciously," "wrongfully," and "injure" are words all of which have accurate meanings, well known to the law, but which also have a popular and less precise signification, into which it is necessary to see that the argument does not imperceptibly slide. An intent to "injure" in strictness means more than an intent to harm. It connotes an intent to do wrongful harm. "Maliciously," in like manner, means and implies an intention to do an act which is wrongful, to the detriment of another. The term "wrongful" imports in its turn the infringement of some right. The ambiguous proposition to which we were invited by the plaintiffs' counsel still, therefore, leaves unsolved the question of what, as between the plaintiffs and defendants, are the rights of trade. For the purpose of clearness, I desire, as far as possible, to avoid terms in their popular use so slippery, and to translate them into less fallacious language wherever possible.

The English law, which in its earlier stages began with but an imperfect line of demarcation between torts and breaches of contract, presents us with no scientific analysis of the degree to which the intent to harm, or, in the language of the civil law, the animus vicino nocendi, may enter into or affect the conception of a personal wrong; see Chasemore v. Richards, 7 H. L. C. 349, at p. 388. All personal wrong means the infringement of some personal right. "It is essential to an action in tort," say the Privy Council in Rogers v. Rajendro Dutt, 13 Moore, P. C. 209, "that the act complained of should under the circumstances be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right; merely that it will, however directly, do a man harm in his interests, is not enough." What, then, were the rights of the plaintiffs as traders as against the defendants? The plaintiffs had a right to be protected against certain kind of conduct; and we have to consider what conduct would pass this legal line or boundary. Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse. Such in-

tentional action when done without just cause or excuse is what the law calls a malicious wrong (see Bromage v. Prosser, 4 B. & C. 247; Capital and Counties Bank v. Henty, 7 App. Cas. 741, at p. 772, per Lord Blackburn). The acts of the defendants which are complained of here were intentional, and were also calculated, no doubt, to do the plaintiffs damage in their trade. But in order to see whether they were wrongful we have still to discuss the question whether they were done without any just cause or excuse. Such just cause or excuse the defendants on their side assert to be found in their own positive right (subject to certain limitations) to carry on their own trade freely in the mode and manner that best suits them, and which they think best calculated to secure their own advantage.

What, then, are the limitations which the law imposes on a trader in the conduct of his business as between himself and other traders? There seem to be no burdens or restrictions in law upon a trader which arise merely from the fact that he is a trader, and which are not equally laid on all other subjects of the Crown. His right to trade freely is a right which the law recognizes and encourages, but it is one which places him at no special disadvantage as compared with others. No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by shew of violence, Tarleton v. McGawley, Peak, N. P. C. 270; the obstruction of actors on the stage by preconcerted hissing, Clifford v. Brandon, 2 Camp. 358, Gregory v. Brunswick, 6 M. & G. 205; the disturbance of wild fowl in decoys by the firing of guns, Carrington v. Taylor, 11 East, 571, and Keeble v. Hickeringill, 11 East, 574, n.; the impeding or threatening servants or workmen, Garret v. Taylor, Cro. Jac. 567; the inducing persons under personal contracts to break their contracts, Bowen v. Hall, 6 Q. B. D. 333; Lumley v. Gye, 2 E. & B. 216: all are instances of such forbidden acts. But the defendants have been guilty of none of these acts. They have done nothing more against the plaintiffs than pursue to the bitter end a war of competition waged in the interest of their own trade. To the argument that a competition so pursued ceases to have a just cause or excuse when there is ill-will or a personal intention to harm, it is sufficient to reply (as I have already pointed out) that there was here no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the entire tea freights of the ports, a portion of which would otherwise have fallen to the plaintiffs' share. I can find no authority for the doctrine that such a commercial motive deprives of "just cause or excuse" acts done in the course of trade which would but for such a motive be justifiable. So to hold would be to convert into an illegal motive the

instinct of self-advancement and self-protection, which is the very incentive to all trade. To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection. But we were told that competition ceases to be the lawful exercise of trade, and so to be a lawful excuse for what will harm another, if carried to a length which is not fair or reasonable. The offering of reduced rates by the defendants in the present case is said to have been "unfair." This seems to assume that, apart from fraud, intimidation, molestation, or obstruction, of some other personal right in rem or in personam, there is some natural standard of "fairness" or "reasonableness" (to be determined by the internal consciousness of judges and juries) beyond which competition ought not in law to go. There seems to be no authority, and I think with submission, that there is no sufficient reason, for such a proposition. It would impose a novel fetter upon trade. The defendants, we are told by the plaintiffs' counsel, might lawfully lower rates provided they did not lower them beyond a "fair freight," whatever that may mean. But where is it established that there is any such restriction upon commerce? And what is to be the definition of a "fair freight?" It is said that it ought to be a normal rate of freight, such as is reasonably remunerative to the ship-owner. But over what period of time is the average of this reasonable remunerativeness to be calculated? All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future; and until the present argument at the bar it may be doubted whether ship-owners or merchants were ever deemed to be bound by law to conform to some imaginary "normal" standard of freights or prices, or that law courts had a right to say to them in respect of their competitive tariffs, "Thus far shalt thou go, and no further." To attempt to limit English competition in this way would probably be as hopeless an endeavor as the experiment of King Canute. But on ordinary principles of law no such fetter on freedom of trade can in my opinion be warranted. A man is bound not to use his property so as to infringe upon another's right. "Sic utere tuo ut alienum non lædas." If engaged in actions which may involve danger to others, he ought, speaking generally, to take reasonable care to avoid endangering them. But there is surely no doctrine of law which compels him to use his property in a way that judges and juries may consider reasonable: see Chasemore v. Richards, 7 H. L. C. 349. If there is no such fetter upon the use of property known to the English law, why should there be any such a fetter upon trade?

It is urged, however, on the part of the plaintiffs, that even if the acts complained of would not be wrongful had they been committed by a single individual, they become actionable when they are the result of concerted action among several. In other words, the plain-

tiffs, it is contended, have been injured by an illegal conspiracy. Of the general proposition, that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise, and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights. In the application of this undoubted principle it is necessary to be very careful not to press the doctrine of illegal conspiracy beyond that which is necessary for the protection of individuals or of the public; and it may be observed in passing that as a rule it is the damage wrongfully done, and not the conspiracy, that is the gist of actions on the case for conspiracy: see Skinner v. Gunton, 1 Wms. Saund. 229; Hutchins v. Hutchins, 7 Hill's New York Cases, 104, Bigelow's Leading Cases on Torts, 207. But what is the definition of an illegal combination? It is an agreement by one or more to do an unlawful act, or to do a lawful act by unlawful means: O'Connell v. The Queen, 11 Cl. & F. 155; Reg. v. Parnell, 14 Cox, Crim. Cas. 508; and the question to be solved is whether there has been any such agreement here. Have the defendants combined to do an unlawful act? Have they combined to do a lawful act by unlawful means? A moment's consideration will be sufficient to shew that this new inquiry only drives us back to the circle of definitions and legal propositions which I have already traversed in the previous part of this judgment. The unlawful act agreed to, if any, between the defendants must have been the intentional doing of some act to the detriment of the plaintiffs' business without just cause or excuse. Whether there was any such justification or excuse for the defendants is the old question over again, which, so far as regards an individual trader, has been already solved. The only differentia that can exist must arise, if at all, out of the fact that the acts done are the joint acts of several capitalists, and not of one capitalist only. The next point is whether the means adopted were unlawful. The means adopted were competition carried to a bitter end. Whether such means were unlawful is in like manner nothing but the old discussion which I have gone through, and which is now revived under a second head of inquiry, except so far as a combination of capitalists differentiates the case of acts jointly done by them from similar acts done by a single man of capital. But I find it impossible myself to acquiesce in the view that the English law places any such restriction on the combination of capital as would be involved in the recognition of such a distinction. If so, one rich capitalist may innocently carry competition to a length which would become unlawful in the case of a syndicate with a joint capital no larger than his own, and one individual merchant may lawfully do that which a firm or a partnership may not. What limits, on such a theory, would be imposed by law on the competitive action of a joint-

stock company limited, is a problem which might well puzzle a casuist. The truth is, that the combination of capital for purposes of trade and competition is a very different thing from such a combination of several persons against one, with a view to harm him, as falls under the head of an indictable conspiracy. There is no just cause or excuse in the latter class of cases. There is such a just cause or excuse in the former. There are cases in which the very fact of a combination is evidence of a design to do that which is hurtful without just cause —is evidence—to use a technical expression—of malice. But it is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital, when used for purposes of competition, in the manner proposed by the argument of the plaintiffs, would, in the present day, be impossible—would be only another method of attempting to set boundaries to the tides. Legal puzzles which might well distract a theorist may easily be conceived of imaginary conflicts between the selfishness of a group of individuals and the obvious well-being of other members of the community. Would it be an indictable conspiracy to agree to drink up all the water from a common spring in a time of drought; to buy up by preconcerted action all the provisions in a market or district in times of scarcity: see Rex v. Waddington, 1 East, 143; to combine to purchase all the shares of a company against a coming settling-day; or to agree to give away articles of trade gratis in order to withdraw custom from a trader? May two itinerant match-vendors combine to sell matches below their value in order by competition to drive a third match-vendor from the street? In cases like these, where the elements of intimidation, molestation, or the other kinds of illegality to which I have alluded are not present, the question must be decided by the application of the test I have indicated. Assume that what is done is intentional, and that it is calculated to do harm to others. Then comes the question, Was it done with or without "just cause or excuse?" If it was bona fide done in the use of a man's own property, in the exercise of a man's own trade, such legal justification would, I think, exist not the less because what was done might seem to others to be selfish or unreasonable: see the summing-up of Erle, J., and the judgment of the Queen's Bench in Reg. v. Rowlands, 17 Q. B. 671. But such legal justification would not exist when the act was merely done with the intention of causing temporal harm, without reference to one's own lawful gain, or the lawful enjoyment of one's own rights. The good sense of the tribunal which had to decide would have to analyze the circumstances and to discover on which side of the line each case fell. But if the real object were to enjoy what was one's own, or to acquire for one's self some advantage in one's property or trade, and what was done was done honestly, peaceably, and without any of the illegal acts above referred to, it could not, in my opinion, properly be said that it was done without just cause or

excuse. One may with advantage borrow for the benefit of traders what was said by Erle, J., in Reg. v. Rowlands, 17 Q. B. 671, at page 687, n., of workmen and of masters: "The intention of the law is at present to allow either of them to follow the dictates of their own will, with respect to their own actions, and their own property; and either, I believe, has a right to study to promote his own advantage, or to combine with others to promote their mutual advantage."

Lastly, we are asked to hold the defendants' Conference or association illegal, as being in restraint of trade. The term "illegal" here is a misleading one. Contracts, as they are called, in restraint of trade, are not, in my opinion, illegal in any sense, except that the law will not enforce them. It does not prohibit the making of such contracts; it merely declines, after they have been made, to recognize their validity. The law considers the disadvantage so imposed upon the contract a sufficient shelter to the public. The language of Crompton, J., in Hilton v. Eckersley, 6 E. & B. 47, is, I think, not to be supported. No action at common law will lie or ever has lain against any individual or individuals for entering into a contract merely because it is in restraint of trade. Lord Eldon's equity decisions in Cousins v. Smith, 13 Ves. 542, is not very intelligible, even if it be not open to the somewhat personal criticism passed on it by Lord Campbell in his "Lives of the Chancellors." If indeed it could be plainly proved that the mere formation of "conferences," "trusts," or "associations" such as these were always necessarily injurious to the public—a view which involves, perhaps, the disputable assumption that, in a country of free trade, and one which is not under the iron régime of statutory monopolies, such confederations can ever be really successful—and if the evil of them were not sufficiently dealt with by the common law rule, which held such agreements to be void as distinct from holding them to be criminal, there might be some reason for thinking that the common law ought to discover within its arsenal of sound common-sense principles some further remedy commensurate with the mischief. Neither of these assumptions are, to my mind, at all evident, nor is it the province of judges to mould and stretch the law of conspiracy in order to keep pace with the calculations of political economy. If peaceable and honest combinations of capital for purposes of trade competition are to be struck at, it must, I think, be by legislation, for I do not see that they are under the ban of the common law.

In the result, I agree with Lord Coleridge, C. J., and differ, with regret, from the Master of the Rolls. The substance of my view is this, that competition, however severe and egotistical, if unattended by circumstances of dishonesty, intimidation, molestation, or such illegalities as I have above referred to, gives rise to no cause of action at common law. I myself should deem it to be a misfortune if we were to attempt to prescribe to the business world how honest and peaceable trade was to be carried on in a case where no such illegal elements as I have mentioned exist, or were to adopt some standard of judicial

"reasonableness," or of "normal" prices, or "fair freights," to which commercial adventurers, otherwise innocent, were bound to conform.

In my opinion, accordingly, this appeal ought to be dismissed with costs.[23]

From this decision of the Court of Appeal, the plaintiffs appealed to the House of Lords.

[In the House of Lords]

Lord Field. My Lords, I think that this appeal may be decided upon the principles laid down by Holt, C. J., as far back as the case of Keeble v. Hickeringill, cited for the appellants, 11 Mod. 74, 131, and note to Carrington v. Taylor, 11 East, 574. In that case the plaintiff complained of the disturbance of his "decoy" by the defendant having discharged guns near to it and so driven away the wild-fowl, with the intention and effect of the consequent injury to his trade. Upon the trial a verdict passed for the plaintiff, but in arrest of judgment it was alleged that the declaration did not disclose any cause of action. Holt, C. J., however, held that the action, although new in instance, was not new in reason or principle, and well lay, for he said that the use of a "decoy" was a lawful trade, and that he who hinders another in his trade or livelihood is liable to an action if the injury is caused by "a violent or malicious act;" suppose "for instance," he said, "the defendant had shot in his own ground, if he had occasion to shoot it would have been one thing, but to shoot on purpose to damage the plaintiff is another thing and a wrong." But, he added, if the defendant, "using the same employment as the plaintiff," had set up another decoy so near as to spoil the plaintiff's custom, no action would lie, because the defendant had "as much liberty to make and use a decoy" as the plaintiff. In support of this view he referred to earlier authorities. In one of them it had been held that for the setting up of a new school to the damage of an ancient one by alluring the scholars no action would lie, although it would have been otherwise if the scholars had been driven away by violence or threats.

It follows therefore from this authority, and is undoubted law, not only that it is not every act causing damage to another in his trade, nor even every intentional act of such damage, which is actionable, but also that acts done by a trader in the lawful way of his business, although by the necessary results of effective competition interfering injuriously with the trade of another, are not the subject of any action.

Of course it is otherwise, as pointed out by Lord Holt, if the acts complained of, although done in the way and under the guise of competition or other lawful right, are in themselves violent or purely

[23] A concurring opinion by Fry, L. J., and an elaborate dissenting opinion by Lord Esher, M. R., are omitted.

malicious, or have for their ultimate object injury to another from ill-will to him, and not the pursuit of lawful rights. No doubt, also, there have been cases in which agreements to do acts injurious to others have been held to be indictable as amounting to conspiracy, the ultimate object or the means being unlawful, although if done by an individual no such consequence would have followed, but I think that in all such cases it will be found that there existed either an ultimate object of malice, or wrong, or wrongful means of execution involving elements of injury to the public, or, at least, negativing the pursuit of a lawful object.

Now, applying these principles to the case before your Lordships, it appears upon the evidence that the appellants and respondents are shipowners, and have for many years been engaged, sometimes in alliance, at other times in competition, in the carrying trade of the eastern seas to and from Europe and elsewhere. A very important portion of this trade consists of a large amount of freight to be earned at the ports of Hankow and Shanghai during the season by carrying to Europe the teas brought there for shipment, and it was of the respondents' action in that business during the season of 1885 that the appellants complain. They do not allege that the respondents have been guilty of any act of fraud or violence, or of any physical obstruction to the appellants' business, or have acted from any personal malice or ill-will, but they say that the respondents acted with the calculated intention and purpose of driving the appellants out of the Hankow season carrying trade by a course of conduct which, although not amounting to violence, was equally effective, and so being in fact productive of injury to them was wrongful and presumably malicious.

It appeared upon the evidence that both parties have been for some years trading in competition at Hankow for tea freights, which amounted to a very considerable sum, and the earning of which was spread over a short annual season. The trade was carried on by a large number of independent shipowners, and the tonnage which was employed may be roughly divided into two classes: First, tonnage engaged in regular lines to and from ports in the China and Japan seas all the year through, loading both outwards and inwards; and secondly, tonnage loading generally outwards to ports in Australia or elsewhere, and only seeking freights and taking up "homeward" berths at Hankow during the short period when freights are abundant there and scarce elsewhere. The several respondents and the "Messageries Maritimes" of France represent substantially the first class of shipowners. The appellants and other shipowners, who are no parties to this record, but some of whom were in alliance with the appellants, in the same interest, forming a very influential class of traders, may be taken to represent the second.

The two ports of Hankow and Shanghai are the centres of these competing interests, and it is hardly necessary to add that the com-

petition was very severe, and the accumulation of tonnage for "homeward" freights produced by the circulation of an excessive number of ships rendered rates so unremunerative that in each of the years 1879, 1883, and 1885, a combination of shipowners known as a "conference," was formed, consisting in the main of the first class of owners, with the object of limiting the amount of tonnage to be sent up the river, and thus securing enhancement and regularity of rates. * * *[24]

It was under these circumstances that the appellants brought the present action, in which they in substance complain, first, of the return of 5 per cent. to the shippers who have not shipped with the appellants, and of the circular to that effect; secondly of the placing upon the berths of extra ships in order to meet the appellants' and other vessels; and thirdly, the reduction of freights to an unremunerative extent with the object of securing cargo. I fail, however, to see that any of those things are sufficient to support this action. Everything that was done by the respondents was done in the exercise of their right to carry on their own trade, and was bona fide so done. There was not only no malice or indirect object in fact, but the existence of the right to exercise a lawful employment, in the pursuance of which the respondents acted, negatives the presumption of malice which arises when the purposed infliction of loss and injury upon another cannot be attributed to any legitimate cause, and is therefore presumably due to nothing but its obvious object of harm. All the acts complained of were in themselves lawful, and if they caused loss to the appellants, that was one of the necessary results of competition.

It remains to consider the further contention of the appellants that these acts of the respondents, even if lawful in themselves if done by an individual, are illegal and give rise to an action as having been done in the execution of the conference agreement, which is said to amount to a conspiracy, as being in restraint of trade, and so against public policy, and illegal; but this contention I think, also fails. I cannot say upon the evidence that the agreement in question was calculated to have or had any such result, nor, even if it had, has any authority (except one, no doubt entitled to great weight, but which has not met with general approval) been cited to shew that such an agreement even if void is illegal, nor any that, even if it be so, any action lies by an individual.

For these, and the other reasons given by the learned Lords Justices Bowen and Fry, and which I need not recapitulate, I think that the appeal fails, and ought to be dismissed.[25]

[24] A portion of the opinion, giving a number of details, is omitted.

[25] The opinions of Lord Halsbury, L. C., Lord Watson, Lord Bramwell, Lord Morris, and Lord Hannen are omitted. They concur in holding that the appeal should be dismissed, and, for the most part, in expressly adopting the reasons assigned by Bowen and Fry, L. JJ., in the Court of Appeal.

TEMPERTON v. RUSSELL et al.

(In the Court of Appeal. [1893] 1 Q. B. 715.)

The plaintiff, a master mason and builder at Hull, sued the defendants, who were respectively the presidents and secretaries of three trade unions at Hull, called the Hull Branch of the Operative Bricklayers' Society, the Hull Branch of the Builders' Labourers' Society, and the Hull Branch of the Operative Plasterers' Society, and of a joint committee of such trade unions, and members of such committee, for (1) unlawfully and maliciously procuring certain persons who had entered into contracts with the plaintiff to break such contracts, and (2) for maliciously conspiring to induce certain persons not to enter into contracts with the plaintiff, by reason whereof the plaintiff sustained damage. * * *

The learned judge at the trial directed the jury that to induce a person who had made a contract with another to break it, in order to hurt the person with whom it had been made, to hamper him in his trade, or to put undue pressure upon him, or to obtain an indirect advantage, was in point of law to do it maliciously and that, if the jury were satisfied that the defendants or any of them had induced persons to break contracts with the plaintiff, of the existence of which they were aware, and, if their object in doing so was to injure the plaintiff in his trade in order to compel him to do something which he did not want to do, that would be "maliciously" in point of law, and a cause of action would be established. He also directed the jury in substance, that a malicious conspiracy to prevent persons from entering into contracts with another, if followed by damage to the person conspired against, was actionable. He left the following questions to the jury: (1) Did the defendants or any of them maliciously induce the persons named (viz., Brentano, Gibson and others), or any of them, to break their contracts with the plaintiff? (2) Did the defendants, or any two or more of them, maliciously conspire to induce the persons named and others not to enter into contracts with the plaintiff, and were such persons thereby induced not to make such contracts? The jury found for the plaintiff, against all the defendants, on both heads, with £50 damages on the first and £200 damages on the second. The learned judge gave judgment for the plaintiff for those amounts, and for an injunction to restrain the defendants from inducing persons to refuse to take goods from the plaintiff, or endeavoring to induce persons to break their contracts with the plaintiff. The defendants moved for judgment or a new trial, on the ground that the learned judge misdirected the jury, and that there was no evidence to go to the jury in support of the plaintiff's claim against the defendants respectively.[26]

[26] The statement of facts is abridged, and the arguments of counsel are omitted.

LORD ESHER, M. R. In this case I propose first to state the facts of the case, as I understand the effect of the evidence, and then my views as to the law applicable to those facts. There appear to have been three trade unions formed in Hull, consisting respectively of persons employed in each of the three branches of labor connected with the building trade there. The members of such trade unions respectively agree together to form a union, to subscribe certain amounts, and to subject themselves to certain obligations, in consideration of which they are respectively to be entitled to certain benefits. The main condition upon which the members of the union are to be entitled to the benefits of membership is, that they will obey the directions given with regard to certain trade matters by the persons authorized by all of the members to give such directions. If they do not, they may be deprived of the benefits to which they would otherwise have been entitled or expelled from the union. Therefore the members of the union have given up their liberty of action in respect of certain matters, in the sense that they have bound themselves by agreement not to exercise it on pain of losing certain benefits. These trade unions appear to have agreed together that certain rules, which they thought to be for their benefit, should be observed by the master builders of Hull, and that, if any builder would not observe such rules, they would act upon their respective members with a view to compelling him to do so. For this purpose they formed a joint committee, which appears to have been the authority appointed to determine what action should be taken by the individual members of the trade unions in respect of such building controversies, and, therefore, to have been for this purpose the agent of each of the trade unions, and of the individual members of them. Apparently this committee had power to delegate their authority to one or more individual members. I think that the evidence in this case proves that they did delegate such authority to the defendant Russell, who therefore acted in what he did as the delegate of such committee, and so of each of the three unions, and in a sense of each member of them. He, therefore, had authority to give directions to the individual members of the unions what to do in the case of building controversies. The trade unions and the joint committee seem to have come to the conclusion that a certain mode of carrying on building operations in Hull was detrimental to their interests or those of their constituents. They therefore agreed, as I have said, to a set of rules, one of which was the 9th rule which has been referred to.[27] As between themselves, the members of these

[27] This ninth rule provided "that no member of the Operative Bricklayers' Society shall be permitted, under any circumstances, to contract for or take by measurement, either in the whole or part, any kind of brickwork, brick-pointing, or plastering, that may have been contracted for or sub-contracted for under the original contract, nor to take any work of any master builder who is building property for himself; and that no member of this society shall be allowed to work on such jobs; that no member of these societies be allowed to work on any job where labor alone is contracted for."

trade unions had a perfect right to do that and to bind themselves to comply with such rules. But these rules could not bind any person who did not belong to such unions, and they had no right to enforce obedience to them by such a person. A firm of Myers & Temperton, who were builders in Hull, thought fit to carry on their business, as they had a perfect right to do, in a manner inconsistent with the terms of rule 9. The trade unions and their joint committee objected to this, and resolved to coerce the firm into carrying on their business in accordance with the rule. Failing to effect their object by direct action upon the firm, they endeavored to coerce them through the persons who dealt with them and who supplied them with the means of carrying on their business. Among these persons was the plaintiff, a brother of one of the members of the firm. They desired to coerce the firm by preventing these persons from dealing with them. The plaintiff refused to fall in with these views, and would not agree to cease dealing with his brother's firm. Having failed in preventing him from doing so by direct action upon him, they desired to overcome his resistance and to coerce him, in the same manner as they had sought to coerce the firm, viz., through the persons who had dealings with him. The joint committee in effect said that, if any person connected with the building trade in Hull should deal with the plaintiff for materials, the members of the unions should refuse to work for that person upon goods supplied by the plaintiff. They intended thus to coerce the plaintiff to comply with their views, and they contemplated that, if he did not submit, his business would be destroyed. Though, of course, in point of law such other persons might be free to enter into contracts with the plaintiff, and would be bound to perform contracts made with him, as before, in point of fact the committee knew that the probable result would be that his business would come to an end, and they thought that the prospect of this would have a strongly coercive effect upon him.

They were not, I think, actuated in their proceedings by spite or malice against the plaintiff personally in the sense that their motive was the desire to injure him, but they desired to injure him in his business in order to force him not to do what he had a perfect right to do. Amongst those who had dealings with the plaintiff were two persons named Brentano and Gibson. The result of the evidence appears to me to be that the joint committee and the defendant Russell, who was acting as the delegate of such committee, knew that Brentano had entered into a contract with the plaintiff, and also, I think, that he would in the course of his business enter in the future into other contracts with the plaintiff of a similar description. Russell lets Brentano know that, if he goes on dealing with the plaintiff, harm will come to him, because none of the workmen at Hull who are comprised in the unions will touch the materials supplied by the plaintiff or will do his work. What was said by Russell to Brentano, and the previous resolution of the committee which was made known to Brentano, clearly

had the object of preventing him from carrying out the contract he had already made with the plaintiff, and I should say that the inference any fair-minded man would draw would be that they also had the object of preventing Brentano from entering into contracts with the plaintiff in the future. The object was not to injure Brentano, but to injure the plaintiff in his business, in order to force him into obedience to the views of the unions. It was argued that the steps which the joint committee and Russell, their representative, took with regard to the men working for Brentano were only what they had a perfect right to take, that they merely gave notice or advice to such workmen that the rules were being infringed, and that they should withdraw from his employment if he carried out his contract with the plaintiff, and that the workmen could then do as they liked in the matter. It may be spoken of as "notice" or "advice" argumentatively; but those words do not represent the truth of the thing. These men had bound themselves to obey; and they knew that they had done so, and that, if they did not obey, they would be fined or expelled from the union to which they belonged. It was really an order which was given to them just as much as a direction given to a servant is one. It might be said that such a direction is not an order, because the servant could not be compelled to obey it; but, if he does not, he will lose his place. The unions through their joint committee, as it appears to me, ordered their members employed by Brentano to cease to work for him if he performed his contract with the plaintiff, or if he went on dealing with the plaintiff. I think that the meaning of what Russell said to Brentano was that, if he had made a contract with the plaintiff and proceeded to perform that contract, his men would leave him; and that, if he went on dealing with the plaintiff in the future, the same result would follow. The intention was that by so acting on Brentano the plaintiff should be compelled to obey their directions, and, if he did not, that his business should be ruined. I think that there was clearly evidence to go to the jury against all the defendants of having been parties to these transactions. They were all members of the unions and of the joint committee, and they none of them went into the box except Russell, which they would have done if they could have denied that they were parties to them. The evidence against the defendants with regard to the dealings with Gibson is substantially to the same effect. This is not simply a case of men saying that they will not work for a master if he does certain things which they do not like. Brentano and Gibson were dealt with thus for the purpose of injuring the plaintiff, in order to force him into obedience to the policy of the unions, which they had no right to impose upon him.

Then what is the law applicable to these facts? The questions of law were dealt with in the argument of the defendants' counsel boldly but briefly, the main bulk of their arguments being directed to the endeavor to make out that there was no evidence that the defendants

were responsible for the matters complained of. It was argued that the action for inducing persons to break a contract is confined to cases of master and servant or cases of personal service. But the case of Bowen v. Hall, 6 Q. B. D. 333, shows that the distinction relied on is not tenable. That was not a case of master and servant. In that case the majority of the judges in the Court of Appeal approved of the view taken by the majority of the judges in Lumley v. Gye, 2 E. & B. 216. Their judgment, after stating that merely to persuade a person to break his contract may not be wrongful in law or fact, proceeds as follows: "If the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act, if injury ensues from it. We think that it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact. The act complained of in such a case as Lumley v. Gye, and which is complained of in the present case, is therefore, because malicious, wrongful. That act is a persuasion by the defendant of a third person to break a contract existing between such third person and the plaintiff. It cannot be maintained that it is not a natural and probable consequence of that act of persuasion that the third person will break his contract. It is not only the natural and probable consequence, but, by the terms of the proposition which involves the success of the persuasion, it is the actual consequence." Nothing could be more directly in point to the present case with regard to the first ground of action set up. That case is an authority which is binding on us, and it appears to me to apply to the present case.

The next point is, whether the distinction taken for the defendants between the claim for inducing persons to break contracts already entered into with the plaintiff and that for inducing persons not to enter into contracts with the plaintiff can be sustained, and whether the latter claim is maintainable in law. I do not think that distinction can prevail. There was the same wrongful intent in both cases, wrongful because malicious. There was the same kind of injury to the plaintiff. It seems rather a fine distinction to say that, where a defendant maliciously induces a person not to carry out a contract already made with the plaintiff and so injures the plaintiff, it is actionable, but where he injures the plaintiff by maliciously preventing a person from entering into a contract with the plaintiff, which he would otherwise have entered into, it is not actionable. At any rate it appears to me that, on the principle acted on in the case of Gregory v. Duke of Brunswick, 6 M. & G. 953, where defendants conspire or combine together maliciously to injure the plaintiff by preventing persons from entering into contracts with him, and injury results to the plaintiff, it is actionable. The judgments in the case of Mogul Steamship Co. v. Macgregor, Gow & Co., [1892] A. C. 25, in the House of Lords, seem to show that such a combination if followed by damage to the

plaintiff is actionable. With regard to what was there said, the counsel for the defendants relied on the distinction between an indictment and a civil action, and said that, though such a combination might be the subject of an indictment for conspiracy, it could not be the subject of an action for damages. I agree that there is this distinction, viz., that, in the case of an indictment, when the conspiracy is proved the indictment is proved, but in the case of an action it is necessary to go further and to prove damage. Therefore it will not suffice in an action, if the jury only find that the defendants agreed together to take an unlawful course of action, but they do not find that it was taken and that damage resulted to the plaintiff, or if there is no evidence on which the jury can find that damage resulted to the plaintiff. But, if there is evidence, and they do find, that damage resulted to the plaintiff, then I think what Lord Bramwell said in the case of Mogul Steamship Co. v. Macgregor, Gow & Co. applies, and the action will lie. He said: "The plaintiffs also say that these things, or some of them, if done by an individual, would be actionable. This need not be determined directly, because all the things complained of have their origin in what the plaintiffs say is unlawfulness, a conspiracy to injure: so that, if actionable when done by one, much more are they when done by several, and, if not actionable when done by several, certainly they are not when done by one. It has been objected by capable persons that it is strange that that should be unlawful, if done by several, which is not if done by one, and that the thing is wrong if done by one, if wrong when done by several; if not wrong when done by one, it cannot be when done by several. I think there is an obvious answer, indeed two: one is that a man may encounter the acts of a single person, yet not be fairly matched against several; the other is that the act when done by an individual is wrong, though not punishable, because the law avoids the multiplicity of crimes: De minimis non curat lex; while if done by several it is sufficiently important to be treated as a crime." It seems to me that that language recognizes the doctrine of law as being that, if there is an agreement to take an unlawful course of action which amounts to a conspiracy, and that conspiracy causes damage to the plaintiff, an action will lie in respect of such conspiracy. It appears to me, therefore, that the combination here entered into by the defendants was wrongful both in respect of the interference with existing contracts and in respect of the prevention of contracts being entered into in the future. I cannot doubt that there was evidence from which the jury might find that people were prevented from dealing with the plaintiff by the resolution of the joint committee and the action taken by the defendants, and that the plaintiff was thereby injured, and it appears to me that the jury have so found. For there reasons I think this application must be refused.

LOPES, L. J. The case which I think must govern our decision as to the first head of claim is Bowen v. Hall, 6 Q. B. D. 333, which I

understand to lay down the broad principle that a person who induces a party to a contract to break it, intending thereby to injure another person or to get a benefit for himself, commits an actionable wrong. That appears to me to be the effect of the decision in that case, which was decided in 1881, and never appears to have been since questioned. I presume that the principle is this, viz., that the contract confers certain rights on the person with whom it is made, and not only binds the parties to it by the obligation entered into, but also imposes on all the world the duty of respecting that contractual obligation. That being the law on the subject, the jury found that the defendants did maliciously induce persons who had contracted with the plaintiff to break their contracts. It seems to me that there was abundant evidence to support that finding.

The second question in the case is with regard to inducing persons not to enter into contracts with the plaintiff. The question left to the jury as to that was, whether the defendants maliciously conspired to induce persons not to enter into contracts with the plaintiff, and such persons were thereby induced not to make such contracts. The jury answered that question in the affirmative. That being so, the question is whether, upon that finding, it is shown that the defendants committed an actionable wrong. I think that it is. I will state shortly what I believe to be the law on the subject. The result of the authorities appears to me to be that a combination by two or more persons to induce others not to deal with a particular individual, or enter into contracts with him, if done with the intention of injuring him, is an actionable wrong if damage results to him therefrom. That appears to me to follow from what was said in Gregory v. Duke of Brunswick, 6 M. & G. 953, and in the House of Lords in the case of Mogul Steamship Co. v. Macgregor, Gow & Co., [1892] A. C. 25. It was argued here that there was no evidence that any persons were induced not to enter into contracts with the plaintiff. I cannot agree with that contention. I think there was sufficient evidence to that effect, and that injury was thereby occasioned to the plaintiff. For these reasons, I think that the verdict ought to stand, and this application should be dismissed.[28] Application dismissed.

LEATHEM v. CRAIG et al.

(Court of Appeal in Ireland. [1899] 2 I. R. 744.)

Lord Ashbourne, C. This is an action instituted by Mr. Leathem, a flesher or butcher of Lisburn, against five fleshers' assistants and members of the Journeymen Butchers' Assistants' Association, to recover damages for maliciously and wrongfully procuring certain persons to break contracts into which they had entered with the plaintiff, and not to enter into other contracts with the plaintiff; and for maliciously and wrongfully enticing and procuring certain

[28] A concurring opinion by A. L. Smith, L. J., is omitted.

workmen in the employment of the said persons to leave the service of their employers, and to break their contracts of service with intent to injure the plaintiff, and to prevent the said persons from carrying out their contracts with the plaintiff; and for maliciously and wrongfully intimidating the said persons, and coercing them to break their contracts with the plaintiff, and intimidating the servants in their employ, and coercing them to leave the service of their employers; and for unlawfully conspiring together, and with certain other persons, to do the acts aforesaid with intent to injure the plaintiff.

The case was tried at the Summer Assizes of 1896, at Belfast, before Lord Justice FitzGibbon, and resulted in a verdict for the plaintiff. The Queen's Bench Division (Palles, C. B., dissenting) has upheld that verdict, and the defendants have brought the case before this Court on appeal.

The facts of the case are few and simple, and can be stated very shortly. The plaintiff offended the defendants by employing some men not members of the defendants' Association, and refused to dismiss them when requested. The plaintiff appears to have tried to come to an amicable agreement with the defendants' Association, and attended a meeting of theirs, where he practically offered to pay the dues and charges requisite to have his non-union men admitted to the Association, and thus remove the sole ground of trade dispute. In his evidence he says: "Shaw objected, and said my men should be put out and walk the streets for twelve months. I said it was a hard case to make a man with nine small children walk the streets for twelve months, and that I would not submit to it." The defendants then called out the plaintiff's union assistants, and induced one of them to break his contract of service, thus causing possibly some inconvenience to the plaintiff, though not much loss, as labour appears to have been abundant in the neighborhood.

The plaintiff, however, alleged a much graver element of loss, in the successful efforts of the defendants to prevent his customers dealing with him. Some evidence was given as to three, but attention may be concentrated on one. His principal customer appears to have been a Belfast butcher called Munce, who had dealt with him in a very large way for a great number of years. The course of dealing between them was that the plaintiff delivered a very extensive consignment of meat every week to Munce, which was invariably paid for in due course. The defendants determined to "put a screw" on Munce to withdraw his custom from the plaintiff, and he, yielding to a threat that his assistants would be otherwise called out, reluctantly telegraphed to the plaintiff to cease sending him meat.

The action of the defendants in reference to Munce was the cause of the most serious loss sustained by the plaintiff, and was the main element of damage proved by him at the trial. Unquestionably, the plaintiff was deprived of his best customer through the action of the

defendants. A course of dealing most profitable for the plaintiff was broken owing to their intervention. No formal contract may have existed between the plaintiff and Munce, though possibly one might have been implied from week to week, determinable only by adequate notice. But the real ground of large damage was the driving away of the plaintiff's best customer by the combined action of the defendants, and their deliberate damage to a most lucrative part of his trade. In addition, his name was put on a "black list" under circumstances fully detailed in evidence.

Lord Justice FitzGibbon, in charging the jury, told them to ask themselves the question whether the action of the defendants was or was not taken for the purpose of injuring Leathem in his trade or business, as distinguished from being action for the legitimate advancement of the interest of the men themselves. He pointed out that "maliciously" meant with intent to injure, as distinguished from advancing their own interests. He also told them that in calculating damages they were to consider money injury to the plaintiff in his business; but in considering the amount they were not bound to confine themselves to £ s. d. that could be proved.

The learned Lord Justice left three questions to the jury: First, Did the defendants, or any of them, maliciously induce the plaintiff's customers or servants named in the evidence to refuse to deal, or to continue, with the plaintiff? Second, Did the defendants, or any of them, maliciously conspire to induce the plaintiff's customers and servants not to deal with the plaintiff, or not to continue in his employment, and whether the persons thereby induced did so? Third, Did the defendants Davey, Dornan, and Shaw, or any of them, publish the "black list" with the intention of injuring the plaintiff? The jury answered the first and second questions in the affirmative against all the defendants, assessing the damages at £200; they also answered the third question in the affirmative against the three defendants named therein, assessing the damages at £50. It was conceded in the argument that no separate damages could be given on the third question, and it may therefore be disregarded in the consideration of the case.

The case of Allen v. Flood, [1898] A. C. 1, had not been decided in the House of Lords at the time of the trial before Lord Justice FitzGibbon, and the argument addressed to us substantially amounted to a contention that the decision of the House of Lords had rendered it impossible to uphold the verdict in the present case, and had practically swept away the authority of Temperton v. Russell, [1893] 1 Q. B. 715, on which the plaintiff might have otherwise relied.

The case of Temperton v. Russell, ibid., was unquestionably very like the present in its essential particulars. * * *[29]

[29] Parts of the opinion of Lord Ashbourne, C., and the opinions of Porter, M. R., and Walker and Holmes, L. JJ., are omitted.

Before considering how far this decision is affected by the judgment of the House of Lords in the case of Allen v. Flood, [1898] A. C. 1, I should like to refer to the case of the Mogul Steamship Company v. Macgregor & Co., [1892] A. C. 25, when the House of Lords laid down what could not be charged as a conspiracy to injure. The facts of that case are important.

"Owners of ships, in order to secure a carrying trade exclusively for themselves and at profitable rates, formed an association, and agreed that the number of ships to be sent by members of the association to the loading port, the division of cargoes and the freights to be demanded, should be the subject of regulation, that a rebate of 5 per cent. on the freights should be allowed to all shippers who shipped only with members; and that agents of members should be prohibited on pain of dismissal from acting in the interest of competing shipowners; any member to be at liberty to withdraw on giving certain notices. The plaintiffs, who were shipowners excluded from the association, sent ships to the loading ports to endeavour to obtain cargoes. The associated owners thereupon sent more ships to the port, underbid the plaintiffs, and reduced freights so low that the plaintiffs were obliged to carry at unremunerative rates. They also threatened to dismiss certain agents if they loaded the plaintiffs' ships, and circulated a notice that the rebate of 5 per cent. would not be allowed to any person who shipped cargoes on the plaintiffs' vessels. The plaintiffs having brought an action for damages against the associated owners alleging a conspiracy to injure the plaintiffs: Held, affirming the decision of the Court of Appeal (23 Q. B. D. 598), that since the acts of the defendants were done with the lawful object of protecting and extending their trade and increasing their profits, and since they had not employed any unlawful means, the plaintiffs had no cause of action."

It will thus be seen that the case of Temperton v. Russell, [1893] 1 Q. B. 715, is very like, while the Mogul Case, [1892] A. C. 25, is very unlike, the present; but each throws a flood of light on the principles which should guide our decision.

The facts of the case of Allen v. Flood, [1898] A. C. 1, have been stated so often that it is only necessary to refer to them very shortly. Flood and Taylor, the plaintiffs, were employed as shipwrights by the Glengall Iron Company, on the terms that they might be discharged at any time. The jury found that Allen, the defendant, maliciously induced the Company to discharge Flood and Taylor from the Company's employment and not to engage them, and that each had suffered £20 damages. The case, when finally presented for decision, was not one of conspiracy or unlawful combination.

None of the noble and learned Lords who concurred in the opinion of the majority laid it down that their decision would apply to a case of conspiracy, and several of them expressly guarded them-

selves against their judgments being quoted as applicable to a case of conspiracy. * * *

How does the decision of Allen v. Flood affect the authority of Temperton v. Russell? How does it necessarily compel us to regard the case as no longer entitled to weight? In my opinion it leaves entirely untouched and unshaken the larger part of that case—that in respect of which £200 damages was awarded for conspiracy.

In the present case the jury has expressly found that the defendants maliciously conspired to induce the plaintiff's customers and servants not to deal with the plaintiff, and not to continue in his service, and that he was damaged thereby to the extent of £200. Lord Justice FitzGibbon was careful to express what was meant by "maliciously"; and I take it that the jury found and meant that the defendants acted with motive and intention to injure and punish the plaintiff, and not to advance their own interests, or to further their own trade objects. I am disposed to think that there was evidence of coercion and intimidation; but as the jury did not return any separate finding on the subject, I do not enter on the subject as a separate or independent topic.

The Mogul Steamship Company's Case, [1892] A. C. 25, shows how carefully the law protects all legitimate trade competition, and that the law will not allow it to be interfered with because the combination which is formed for legal purposes is styled a conspiracy. On the other hand the case of Temperton v. Russell, [1893] 1 Q. B. 715, shows that where the elements of a real conspiracy to injure exist, the law will not deny relief to a man who is thereby damaged.

I am unable to concur in the interesting argument founded on section 3 of the Conspiracy and Protection of Property Act, 1875. I cannot regard the acts of the defendants as being done in contemplation and furtherance of a trade dispute; and I am also impressed by the argument of Mr. Justice Andrews that the enactment deals with criminal responsibility only, and not with the right of redress for civil wrongs.

I am unable to find anything in the case of Allen v. Flood, [1898] A. C. 1, as decided by the House of Lords, to apply to a case of conspiracy like the present; I can see nothing to justify our sending the case for a new trial; I think that the verdict for £200 damages should be upheld, and the decision of the Queen's Bench Division for that amount affirmed, and this appeal dismissed with costs.

QUINN, Appellant, and LEATHEM, Respondent.

(House of Lords, [1901] A. C. 495.)

Leathem brought an action in Ireland, against five defendants, and in the Queen's Bench Division obtained a judgment, on two causes of action, against all five, for £200 damages, and on an alleged third cause, the publication of a black list, had judgment in the further sum of £50 damages against three of the defendants. In the Irish Court of Appeal the decision below was affirmed as to the judgment for the £200 damages. Quinn, one of the five defendants, appealed.[30]

LORD LINDLEY. My Lords, the case of Allen v. Flood, [1898] A. C. 1, has so important a bearing on the present appeal that it is necessary to ascertain exactly what this House really decided in that celebrated case.[31]

It was an action by two workmen of an iron company against three members of a trade union, namely, Allen and two others, for maliciously, wrongfully, and with intent to injure the plaintiffs, procuring and inducing the iron company to discharge the plaintiffs. The action was tried before Kennedy, J., who ruled that there was no evidence to go to the jury of conspiracy, intimidation, coercion, or breach of contract. The result of the trial was that the plaintiffs obtained a verdict and judgment against Allen alone. He appealed, and the only question which this House had to determine was whether what he had done entitled the plaintiffs to maintain their action against him. What the jury found that he had done was, that he had maliciously induced the employers of the plaintiffs to discharge them, whereby the plaintiffs suffered damage. Different views were taken by the noble Lords who heard the appeal as to Allen's authority to call out the members of the union, and also as to the means used by Allen to induce the employers of the plaintiffs to discharge them; but, in the opinion of the noble Lords who formed the majority of your Lordships' House, all that Allen did was to inform the employers of the plaintiffs that most of their workmen would leave them if they did not discharge the plaintiffs. There being no question of conspiracy, intimidation, coercion, or breach of contract, for consideration by the House, and the majority of their Lordships having come to the conclusion that Allen had done no more than I have stated, the majority of the noble Lords held that the action against Allen would not lie; that he had infringed no right of the plaintiffs; that he had done nothing which he had no legal right to do, and that the fact that he

[30] The statement of facts is abridged, and the arguments of counsel and parts of Lord Lindley's opinion are omitted.

In the House of Lords, there were elaborate opinions, all concurring, from the Earl of Halsbury, L. C., Lord Macnaghten, Lord Shand, Lord Brampton, and Lord Lindley.

[31] On Allen v. Flood, the report of which in the House of Lords runs to 180 pages ([1898] A. C. 1–181), see Salmond on Torts (3d Ed.) 473, distinguishing the case from Quinn v. Leathem.

had acted maliciously and with intent to injure the plaintiffs did not, without more, entitle the plaintiffs to maintain the action.

My Lords, this decision, as I understand it, establishes two propositions: one a far-reaching and extremely important proposition of law, and the other a comparatively unimportant proposition of mixed law and fact, useful as a guide, but of a very different character from the first.

The first and important proposition is that an act otherwise lawful, although harmful, does not become actionable by being done maliciously in the sense of proceeding from a bad motive, and with intent to annoy or harm another. This is a legal doctrine not new or laid down for the first time in Allen v. Flood; it had been gaining ground for some time, but it was never before so fully and authoritatively expounded as in that case. In applying this proposition care, however, must be taken to bear in mind, first, that in Allen v. Flood criminal responsibility had not to be considered. It would revolutionize criminal law to say that the criminal responsibility for conduct never depends on intention. Secondly, it must be borne in mind that even in considering a person's liability to civil proceedings the proposition in question only applies to "acts otherwise lawful," i. e., to acts involving no breach of duty, or, in other words, no wrong to any one. I shall refer to this matter later on.

The second proposition is that what Allen did infringed no right of the plaintiffs, even although he acted maliciously and with a view to injure them. I have already stated what he did, and all that he did, in the opinion of the majority of the noble Lords. If their view of the facts was correct, their conclusion that Allen infringed no right of the plaintiffs is perfectly intelligible, and indeed unavoidable. Truly, to inform a person that others will annoy or injure him unless he acts in a particular way cannot of itself be actionable, whatever the motive or intention of the informant may have been.

My Lords, the questions whether Allen had more power over the men than some of their Lordships thought, and whether Allen did more than they thought, are mere questions of fact. Neither of these questions is a question of law, and no court or jury is bound as a matter of law to draw from the facts before it inferences of fact similar to those drawn by noble Lords from the evidence relating to Allen in the case before them.

I will pass now to the facts of this case, and consider (1) what the plaintiff's rights were; (2) what the defendants' conduct was; (3) whether that conduct infringed the plaintiff's rights. For the sake of clearness it will be convenient to consider these questions in the first place apart from the statute which legalizes strikes, and in the next place with reference to that statute.

1. As to the plaintiff's rights. He had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other

people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognized by law; its correlative is the general duty of every one not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law, he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress; the damage to him is too remote, and it would be obviously practically impossible and highly inconvenient to give legal redress to all who suffered from such wrongs. But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact—in other words, if he is wrongfully and intentionally struck at through others, and is thereby damnified—the whole aspect of the case is changed: the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done. Our law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances. The cases collected in the old books on actions on the case, and the illustrations given by the late Bowen, L. J., in his admirable judgment in the Mogul Steamship Company's Case, 23 Q. B. D. 613, 614, may be referred to in support of the foregoing conclusion, and I do not understand the decision in Allen v. Flood to be opposed to it.

If the above reasoning is correct, Lumley v. Gye, 2 E. & B. 216, was rightly decided, as I am of opinion it clearly was. Further, the principle involved in it cannot be confined to inducements to break contracts of service, nor indeed to inducements to break any contracts. The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him. Temperton v. Russell, [1893] 1 Q. B. 715, ought to have been decided and may be upheld on this principle. That case was much criticised in Allen v. Flood, and not without reason; for, according to the judgment of Lord Esher, the defendants' liability depended on motive or intention alone, whether anything wrong was done or not. This went too far, as was pointed out in Allen v. Flood. But in Temperton v. Russell there was a wrongful act, namely, conspiracy and unjustifiable interference with Brentano, who dealt with the plaintiff. This wrongful act warranted the decision, which I think was right.

2. I pass on to consider what the defendants did. The appellant and two of the other defendants were the officers of a trade union, and the jury have found that the defendants wrongfully and maliciously induced the customers of the plaintiff to refuse to deal with him, and maliciously conspired to induce them not to deal with him. There

were similar findings as to inducing servants of the plaintiff to leave him. What the defendants did was to threaten to call out the union workmen of the plaintiff and of his customers if he would not discharge some non-union men in his employ. In other words, in order to compel the plaintiff to discharge some of his men, the defendants threatened to put the plaintiff and his customers, and persons lawfully working for them, to all the inconvenience they could without using violence. The defendants' conduct was the more reprehensible because the plaintiff offered to pay the fees necessary to enable his non-union men to become members of the defendants' union; but this would not satisfy the defendants. The facts of this case are entirely different from those which this House had to consider in Allen v. Flood. In the present case there was no dispute between the plaintiff and his men. None of them wanted to leave his employ. Nor was there any dispute between the plaintiff's customers and their own men, nor between the plaintiff and his customers, nor between the men they respectively employed. The defendants called no witnesses, and there was no evidence to justify or excuse the conduct of the defendants. That they acted as they did in furtherance of what they considered the interests of union men may probably be fairly assumed in their favour, although they did not come forward and say so themselves; but that is all that can be said for them. No one can, I think, say that the verdict was not amply warranted by the evidence. I have purposely said nothing about the black list, as the learned judge who tried the case considered that the evidence did not connect the appellant with that list. But the black list was, in my opinion, a very important feature in the case.

3. The remaining question is whether such conduct infringed the plaintiff's rights so as to give him a cause of action. In my opinion, it plainly did. The defendants were doing a great deal more than exercising their own rights: they were dictating to the plaintiff and his customers and servants what they were to do. The defendants were violating their duty to the plaintiff and his customers and servants, which was to leave them in the undisturbed enjoyment of their liberty of action as already explained. What is the legal justification or excuse for such conduct? None is alleged and none can be found. This violation of duty by the defendants resulted in damage to the plaintiff—not remote, but immediate and intended. The intention to injure the plaintiff negatives all excuses and disposes of any question of remoteness of damage. Your lordships have to deal with a case, not of damnum absque injuria, but of damnum cum injuria.

Every element necessary to give a cause of action on ordinary principles of law is present in this case. As regards authorities, they were all exhaustively examined in the Mogul Steamship Co. v. MacGregor and Allen v. Flood, and it is unnecessary to dwell upon them again. I have examined all those which are important, and I venture to say that there is not a single decision anterior to Allen v. Flood in favour

of the appellant. His sheet anchor is Allen v. Flood, which is far from covering this case, and which can only be made to cover it by greatly extending its operation.

It was contended at the bar that if what was done in this case had been done by one person only, his conduct would not have been actionable, and that the fact that what was done was effected by many acting in concert makes no difference. My Lords, one man without others behind him who would obey his orders could not have done what these defendants did. One man exercising the same control over others as these defendants had could have acted as they did, and, if he had done so, I conceive that he would have committed a wrong towards the plaintiff for which the plaintiff could have maintained an action. I am aware that in Allen v. Flood, Lord Herschell, at pp. 128, 138, expressed his opinion to be that it was immaterial whether Allen said he would call the men out or not. This may have been so in that particular case, as there was evidence that Allen had no power to call out the men, and the men had determined to strike before Allen had anything to do with the matter. But if Lord Herschell meant to say that as a matter of law there is no difference between giving information that men will strike, and making them strike, or threatening to make them strike, by calling them out when they do not want to strike, I am unable to concur with him. It is all very well to talk about peaceable persuasion. It may be that in Allen v. Flood, there was nothing more; but here there was very much more. What may begin as peaceable persuasion may easily become, and in trades union disputes generally does become, peremptory ordering, with threats open or covert of very unpleasant consequences to those who are not persuaded. Calling workmen out involves very serious consequences to such of them as do not obey. Black lists are real instruments of coercion, as every man whose name is on one soon discovers to his cost. A combination not to work is one thing, and is lawful. A combination to prevent others from working by annoying them if they do is a very different thing, and is prima facie unlawful. Again, not to work oneself is lawful so long as one keeps off the poor-rates, but to order men not to work when they are willing to work is another thing. A threat to call men out given by a trade union official to an employer of men belonging to the union and willing to work with him is a form of coercion, intimidation, molestation, or annoyance to them and to him very difficult to resist, and, to say the least, requiring justification. None was offered in this case.

My Lords, it is said that conduct which is not actionable on the part of one person cannot be actionable if it is that of several acting in concert. This may be so where many do no more than one is supposed to do. But numbers may annoy and coerce where one may not. Annoyance and coercion by many may be so intolerable as to become actionable, and produce a result which one alone could not produce. I am aware of the difficulties which surround the law of conspiracy

both in its criminal and civil aspects; and older views have been greatly and, if I may say so, most beneficially modified by the discussions and decisions in America and this country. Amongst the American cases I would refer especially to Vegelahn v. Guntner, 167 Mass. 92, where coercion by other means than violence, or threats of it, was held unlawful. In this country it is now settled by the decision of this House in the case of the Mogul Steamship Co., [1892] A. C. 25, 23 Q. B. D. 598, that no action for a conspiracy lies against persons who act in concert to damage another and do damage him, but who at the same time merely exercise their own rights and who infringe no rights of other people. Allen v. Flood emphasizes the same doctrine. The principle was strikingly illustrated in the Scottish Co-operative Society v. Glasgow Fleshers' Association (1898) 35 Sc. L. R. 645, which was referred to in the course of the argument. In this case some butchers induced some salesmen not to sell meat to the plaintiffs. The means employed were to threaten the salesmen that if they continued to sell meat to the plaintiffs, they, the butchers, would not buy from the salesmen. There was nothing unlawful in this, and the learned judge held that the plaintiffs showed no cause of action, although the butchers' object was to prevent the plaintiffs from buying for co-operative societies in competition with themselves, and the defendants were acting in concert.

The cardinal point of distinction between such cases and the present is that in them, although damage was intentionally inflicted on the plaintiffs, no one's right was infringed—no wrongful act was committed; whilst in the present case the coercion of the plaintiff's customers and servants, and of the plaintiff through them, was an infringement of their liberty as well as his, and was wrongful both to them and also to him, as I have already endeavoured to show.

Intentional damage which arises from the mere exercise of the rights of many is not, I apprehend, actionable by our law as now settled. To hold the contrary would be unduly to restrict the liberty of one set of persons in order to uphold the liberty of another set. According to our law, competition, with all its drawbacks, not only between individuals, but between associations, and between them and individuals, is permissible, provided nobody's rights are infringed. The law is the same for all persons, whatever their callings: it applies to masters as well as to men; the proviso, however, is all-important, and it also applies to both, and limits the rights of those who combine to lock-out as well as the rights of those who strike. But coercion by threats, open or disguised, not only of bodily harm but of serious annoyance and damage, is prima facie, at all events, a wrong inflicted on the persons coerced; and in considering whether coercion has been applied or not, numbers cannot be disregarded. * * *

I conclude this part of the case by saying that, in my opinion, the direction given to the jury by the learned judge who tried the case was correct, so far as the liability of the defendants turns on principles of

common law, and that the objection taken to it by the counsel for the appellant is untenable. I mean the objection that the learned judge did not distinguish between coercion to break contracts of service, and coercion to break contracts of other kinds, and coercion not to enter into contracts. * * *

My Lords, I will detain your Lordships no longer. Allen v. Flood is in many respects a very valuable decision, but it may be easily misunderstood and carried too far.

Your Lordships are asked to extend it and to destroy that individual liberty which our laws so anxiously guard. The appellant seeks by means of Allen v. Flood, and by logical reasoning based upon some passages in the judgments given by the noble Lords who decided it, to drive your Lordships to hold that boycotting by trades unions in one of its most objectionable forms is lawful, and gives no cause of action to its victims although they may be pecuniarily ruined thereby.

My Lords, so to hold would, in my opinion, be contrary to well-settled principles of English law, and would be to do what is not yet authorized by any statute or legal decision.

In my opinion this appeal ought to be dismissed with costs.

Order appealed from affirmed, and appeal dismissed with costs.

READ v. FRIENDLY SOCIETY OF OPERATIVE STONEMASONS OF ENGLAND, IRELAND AND WALES et al.

(Court of Appeal. [1902] 2 K. B. 732.)

COLLINS, M. R., read the following judgment: This is an appeal by the defendants from the decision of the Divisional Court ordering a new trial of a case decided by a county court judge in favour of the defendants. There is a cross-appeal by the plaintiff asking that this Court should give judgment for the plaintiff with damages. The Court below, while agreed that the decision was unsatisfactory, were divided as to the relief; Darling, J., and Channell, J., holding that there ought to be a new trial, while Lord Alverstone, C. J., was of opinion that the plaintiff was entitled to judgment. The parties agreed before them and before us that if judgment were given for the plaintiff the Court should assess the damages.

The facts are stated in the judgments as reported below, and I need do no more than summarize them for the purpose of this judgment. The claim was for £50 damages for wrongfully and maliciously inducing Messrs. Wigg & Wright to break their contract of apprenticeship with the plaintiff. The evidence for the plaintiff was that he had become bound by an indenture of apprenticeship to Messrs. Wigg & Wright, stonemasons, of Ipswich, whereby they undertook to teach him the trade of a mason, paying him wages of 15s. a week during a period of three years. Messrs. Wigg & Wright had in their capacity as masters agreed to certain working rules with the defend-

ant society, one of which (6) was as follows: "That boys entering the trade shall not work more than three months without being legally bound apprentice, and in no case to be more than sixteen years of age, except masons' sons and stepsons. Employers to have one apprentice to every four masons on an average." The plaintiff's father was a mason. The plaintiff was not a member of the society, and was twenty-five years of age when he entered into the indenture of apprenticeship. The defendant society in concert with the other defendants, on becoming aware that the plaintiff had been taken as an apprentice by Messrs. Wigg & Wright, took steps to enforce compliance by them with rule 6 as interpreted by the defendants by threatening in the language of their letter set out in Darling, J.'s, judgment: "If the man in question (the plaintiff) starts working at the trade, we are bound to protest against you for introducing an individual not of the trade; and in accordance with our general rule we have empowered our members working for your firm to take prompt action in the matter. We regret the thing has occurred, but we feel that the blame does not rest with us in any way." This was in effect a threat that they would call out the workmen in Messrs. Wigg & Wright's employ, all of whom were members of the defendant society, and, as was explained by counsel, if so empowered, would be supported while off work out of the funds of the society. Messrs. Wigg & Wright disputed the construction placed by the defendants on rule 6, contending, and as I think rightly, that it did not extend to masons' sons. Feeling, however, that they could not resist the coercion brought to bear on them, they dismissed the plaintiff. It was not suggested before us that the acts complained of were not all done by the defendants in concert. The plaintiff has therefore lost the opportunity, which he was lawfully entitled to, of emerging from the position of a labourer at 15s. a week to that of a mason who may earn up to 35s. and he has brought his action accordingly. No evidence was called for the defendants, and no proof given of assent by Messrs. Wigg & Wright to any rules other than those put in, of which rule 6 is one.

On these facts the learned county court judge held as follows: "I hold that the facts as proved and admitted before me fall short of giving any ground of action against the defendants. The defendants seem to me to have acted bona fide in the best interests of the society of masons, and not to have been in any way actuated by any improper motives. They gave a certain interpretation to rule 6 and acted upon it, and though their interpretation may or may not be correct, as it was honestly held, I do not consider they have acted improperly in their method of enforcing it."

On these facts the case seems to me to be clear. The plaintiff was entitled to the benefit of the contract which he had made, and that benefit he would have continued to enjoy but for the intervention of the defendants. The object of the defendants' intervention was to deprive him of that benefit. The facts leave no room for doubt as

to that. He was not a member of their society, and was under no obligation, legal or moral, to conform to their rules. In these circumstances they conspired to enforce, by threats of a formidable character which they had the means of carrying into effect, a breach by his employers and instructors of the contract which the latter had with him; and the only justification they can suggest for this conduct is that Messrs. Wigg & Wright had come under an obligation to them, not perhaps legally enforceable, if not illegal, not to make such a contract as they had made with the plaintiff. But the justification to be of any avail must cover their whole conduct, the means they used as well as the end they had in view. As against Messrs. Wigg & Wright they had whatever rights within the law the rules assented to by Messrs. Wigg & Wright afforded them. But to combine to coerce them, by threats of the character I have described, to break their contract with the plaintiff was in my judgment an illegal act carried out by illegal means. They cannot be in a better position if the rules are unenforceable than they would have been had a breach of them given them a legal cause of action. But in such case how can they possibly justify taking the law into their own hands and compelling the opposing litigant by coercion to give effect to their view of a disputed obligation by breaking his contract with the plaintiff? Further, does not such conduct demonstrate that their object was to defeat the plaintiff's purpose of becoming a mason? Belief, however honest, that in what they did they were acting in the best interest of the society of masons could be no excuse for conspiring to deprive the plaintiff of the advantages of his contract. Persuasion by an individual for the purpose of depriving another person of the benefit of a contract, if it is effectual in bringing about a breach of the contract to the damage of that person, gives a cause of action: Lumley v. Gye, 2 E. & B. 216; and a strong belief on the part of the persuader that he is acting for his own interests does not seem to me to improve his position in any respect. Still less can it do so when he does not confine himself to persuasion, but joins with others to enforce their common interests at the plaintiff's expense by coercion. "That a conspiracy to injure —an oppressive combination—differs widely from an invasion of civil rights by a single individual cannot be doubted." See per Lord Macnaghten in Quinn v. Leathem, [1901] A. C. 495, at p. 511, and per Lord Brampton in the same case, [1901] A. C. at pp. 528 et seq. It seems to me, therefore, that this case stands wholly outside the debateable ground traversed in the discussion of Allen v. Flood, [1898] A. C. 1. The action of the defendants was as clearly malicious, or, if the phrase be preferred, "without just cause or excuse," as in Lumley v. Gye, which, as well as Temperton v. Russell, [1893] 1 Q. B. 715, has been finally established in Quinn v. Leathem to be a binding authority. "There are," says Lord Watson in Allen v. Flood, [1898] A C. 1, at p. 96, "in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for

its consequences. In the first place, he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case * * * the inducer may be held liable if he can be shewn to have procured his object by the use of illegal means directed against that third party." This view is approved by Lord Macnaghten and treated by him as embodying the opinion of the majority in that case. Quinn v. Leathem, [1901] A. C. 495, at p. 509. The present case inevitably falls under one or other of those propositions, and I think within both. The defendants did knowingly and for their own ends induce the commission of an actionable wrong, and they employed illegal means to bring it about. Such conduct would be actionable in an individual and incapable of justification, a fortiori where the defendants acted in concert. These considerations seem to me to exclude from discussion in this case the illustrations given in argument of what might in given circumstances be "just cause," or, in other words, suffice to negative malice. There was no relation between the defendants and either of the parties in this case at all analogous to those existing in the instances put of father and child, or doctor and patient, which I leave for solution when the case arises. The defendants have no higher immunity from legal obligations than any other members of the community, and if they have legal rights they can enforce them by legal means only. It is not at all necessary in this case to embark upon the question whether "without just cause" is a complete equivalent for what was meant in the common law by malice. I am inclined to think that, though in many cases adequate as a description, it is not co-extensive with it, nor do I think that in civil actions any more than in criminal it will be possible to eliminate motives from the discussion. See the weighty observations of Lord Brampton on this point in Quinn v. Leathem, [1901] A. C. 495, at p. 524. It is, however, very desirable to guard against the notion that if the act done be illegal "just cause" may still be averred to purge the wrong. For instance, where illegal means have been used to bring about the breach of a contract to the detriment of a party thereto, "just cause" cannot come into the discussion at all. The use of illegal means evidenced malice, and in this connection malice was not equivalent to "without just cause." The cause of intervention might be just, but the means used to enforce it might be illegal. The common law action threw the burden of proof on the plaintiff. It was not enough for him to shew that the defendant had brought about the breach of a contract between a third party and the plaintiff. He had to shew that it was done maliciously, and the burden of proving malice lay upon him. It was not a case of a prima facie cause of action based on the fact that a breach of contract had been brought about to the detriment of the plaintiff, party thereto, by a stranger to the con-

tract. The common law did not lightly extend rights arising out of contracts to and against persons not parties thereto, owing to the absence of privity. (See the cases collected in the notes to Pasley v. Freeman, 2 Sm. L. C. [10th Ed.] 64.) Some nexus had to be established between the plaintiff and the stranger, and this was found in malice. Unless the plaintiff could shew this he failed to bring the stranger into such relations with him as to ground a cause of action, and, therefore, the burden was upon the plaintiff to prove a cause of action, not upon the defendant to justify. I think some confusion has crept into the discussions on this matter through want of sufficient regard to these elementary points.

I think the materials before us are sufficient to enable us to enter judgment, and I agree with the Lord Chief Justice that the defendants' appeal should be dismissed and the plaintiff's cross-appeal allowed, and judgment entered for the plaintiff for £50.[32]

HOLBROOK et al. v. MORRISON.

(Supreme Judicial Court of Massachusetts, 1913. 214 Mass. 209, 100 N. E. 1111, 44 L. R. A. [N. S.] 228, Ann. Cas. 1914B, 824.)

MORTON, J. The complainants are dealers in real estate and own a number of lots on Wellington Hill in the Dorchester district of the city of Boston. The respondent owns a house and lot abutting on two of the lots belonging to the complainants and in close proximity to the others. She has caused to be placed on the front of her house a large sign headed with the words "For Sale," and concluding with the words "Best Offer from Colored Family," all in large letters. The first entrance onto Wellington Hill and the way prospective purchasers would take in going there is past her house. She has also caused, it is alleged, advertisements of like tenor to be inserted in the "Boston Globe," a newspaper of large circulation, and has threatened and is threatening to sell her house and lot to a colored family. This is a bill to restrain the respondent from maliciously interfering with the complainants' business by means of such sign and advertisements and by such threats. The bill alleges that the effect of the respondent's acts has been greatly to injure the sale of the complainants' lots and that the respondent's purpose is to injure the complainants' business, and that she has no real intention of selling her house and lot to members of the negro race.

The case was heard by a single justice and comes here on a report by him of the evidence and of a finding made by him "that the respondent did not put up the sign for the sole purpose of selling her property, but that she did so for the purpose of annoying the com-

[32] The statement of facts and opinions of Stirling and Cozens-Hardy, L. JJ., are omitted.

plainants." This finding was made by the single justice "without going into the question of whether she [the respondent] was justified in having that ill feeling"; and the report concludes, "such decree to be entered by the court as justice and equity may require."

It appeared from the uncontradicted evidence that the threatened sale by the respondent of her house and lot to a colored family has injured and will continue to injure the business of the complainants unless prevented. We interpret the finding made by the single justice as meaning that one purpose which the respondent had in putting up the sign and in advertising her property as she did was to sell it. She also had the purpose, as he finds, of annoying the complainants.

There can be no doubt that the respondent has the right to advertise her property for sale by signs or otherwise in the usual way, and to sell it if she sees fit to a negro family, even though the effect may be to impair the business of the complainants; just as, for instance, the owner of land on a hillside may cultivate it in the usual way even though the effect of the surface drainage may be to fill up his neighbor's millpond below. Middlesex Co. v. McCue, 149 Mass. 103, 21 N. E. 230, 14 Am. St. Rep. 402. Does the presence in the sign and advertisements of a malevolent motive quoad the complainants although they are not named, intended to annoy and in fact annoying and injuring the complainants' business by announcing in effect that the property is for sale to a colored family change what otherwise would be a legal right into an actionable wrong? It would seem clear according to our own decisions that it does not. Rideout v. Knox, 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560; Greenleaf v. Francis, 18 Pick. 118; Walker v. Cronin, 107 Mass. 555. See, also, Frazier v. Brown, 12 Ohio St. 294; Chatfield v. Wilson, 28 Vt. 49; Mahan v. Brown, 13 Wend. (N. Y.) 261, 28 Am. Dec. 461. In the present case it is plain, as we have said, that the respondent has the right, if she sees fit to do so, to sell her house and lot to a negro family whatever the effect may be upon the complainants' business and property. If she had put up the sign and had caused the advertisements to be inserted without any real intention as alleged in the bill of selling her property but solely with the purpose of injuring the business and property of the complainants, there can be no doubt that such conduct on her part would have been actionable. As was said in Rideout v. Knox, 148 Mass. 368, 372, 19 N. E. 390, 391 (2 L. R. A. 81, 12 Am. St. Rep. 560), "the right to use one's property for the sole purpose of injuring others is not one of the immediate rights of ownership." But as we have construed the finding of the single justice, one of her purposes in putting up the sign was to sell her property, which was a lawful purpose and one of the indefeasible rights of ownership. The case is different, therefore, from Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689; Quinn v. Leatham [1901] A. C. 495, and other similar

cases relied on or referred to by the complainants into which we do not deem it necessary to go, where the motive was wholly malicious and the case lacked the element of justification which is present here. If the offering of her property for sale by the respondent in the manner in which it has been offered had been or had been found to be a mere pretext on her part for the purpose of gratifying her spite and ill will towards the complainants, or if that had been her dominant and controlling purpose there would have been no justification for her conduct. But there is no finding to that effect. On the contrary it is found that one purpose which she has is to sell her property, which is a legitimate purpose, and to enable her to accomplish it she has a right to as wide a market as she can command by advertisements and signs or otherwise. She has a right to ask for bids from white people or colored people, or both. She is not limited to bidders of any particular race or class or creed. And if one of her purposes in asking for bids from colored families is to annoy and injure the complainants, and she succeeds in doing so, her conduct is not thereby rendered unlawful so long as her object is to procure a purchaser for and to sell her house and lot. It follows that the bill must be dismissed.

Bill dismissed with costs.[33]

[33] Compare: Falloon v. Schilling (1883) 29 Kan. 292, 44 Am. Rep. 642, where the facts were thus given by Brewer, J.: "The facts, as stated in the petition, are that defendant was the owner of a tract of eighty acres adjoining the town of Hiawatha. Out of this tract he conveyed three-fourths of an acre to one Oscar Spalsbury, which last-named tract by sundry conveyances passed to and became the property of plaintiff. It was his homestead. His family consisted of himself, wife, and two boys aged respectively six and one years. Plaintiff's dwelling-house is located within thirteen feet of the east line of his lot, and has three windows opening on that side. The town of Hiawatha has been growing rapidly for the last few years, and there is quite a demand for town lots. The eighty-acre tract, which as alleged was once wholly owned by defendant, is eligibly situated for the purposes of an addition to the town of Hiawatha, and defendant was anxious to lay off the entire eighty acres as such as an addition. He offered plaintiff $1,600 for his property, which was refused, the same being reasonably worth $1,900 or $2,000. Thereupon defendant conceived the oppressive and unlawful idea of rendering plaintiff's home obnoxious and unendurable to himself and family by erecting cheap tenement houses on either side of plaintiff's land, and filling them with worthless negroes, that they might annoy plaintiff's wife, who is a person in delicate health, and thereby punish plaintiff for refusing defendant's inadequate offer for the property. In pursuance of this purpose, defendant started to build one of these tenement houses directly on the line of plaintiff's land, and thus distant only thirteen feet from plaintiff's house. Upon these facts the petition prays for an injunction restraining the defendant from erecting such buildings."

GAGNON et al. v. FRENCH LICK SPRINGS HOTEL CO.

(Supreme Court of Indiana, 1904. 163 Ind. 687, 72 N. E. 849, 68 L. R. A. 175.)

The French Lick Springs Hotel Company filed its complaint in the circuit court of Orange county against George S. Gagnon, the Baden Lick Sulphur Springs Company, John L. Howard, and John C. Howard, asking that the defendants be temporarily restrained and enjoined from pumping water on the premises of the defendants, and from doing other acts alleged to be injurious to the property of the plaintiffs, and that on final hearing the injunction be made perpetual. Thereupon, an emergency being disclosed, the judge, in the vacation of the court and without notice issued a temporary restraining order pursuant to the prayer of the complaint, and fixed a day for the hearing of the application. The result was a temporary injunction as prayed, against all the defendants. Their motions to dissolve this injunction were subsequently overruled, and the defendants appealed.

The facts in the controversy, so far as material, were as follows:

The French Lick Springs Hotel Company owns some 550 acres of land situated in a valley 2½ miles long by three-fourths of a mile wide, known as "French Lick Valley," in Orange county, in this state. A group of springs, known as the "French Lick Springs," possessing healing and medicinal properties in a high degree, is situated on the lands of the appellee. The Baden Lick Company is the owner of 80 acres of land situated to the north and northeast of the lands of the French Lick Company, and adjoining the same. John C. and John L. Howard own a tract of land extending from the hilltops to the northeast of French Lick Springs down into said valley and to a point about 85 rods distant from the northeast corner of the lands owned by said French Lick Company. The waters flowing from the springs known as the French Lick Springs had for more than 30 years been known throughout the United States to possess healing and medicinal properties, and during that time had attracted many visitors to said valley from all parts of the United States, who came to drink and bathe in such waters. Underlying all the land in the said French Lick valley is a subterranean body of water, and the waters in the natural springs of the French Lick Company are forced upward through the rocks by the hydrostatic pressure of said body of water, and for more than 30 years said springs have had a natural flow resulting from said pressure. Within a year prior to the bringing of the action, the Baden Lick Company and the Howards have each sunk a well on their respective tracts of land in said valley for the purpose of tapping the body of water underlying said valley, and such wells were sunk to such depth as to penetrate such body of water; the Howard well being located at a point 85 rods northeast of the French Lick Company's premises, and 160 rods from the natural springs of said company, and the Baden Lick well being located at about one-half mile north of such springs.

About the 18th of July, 1903, having theretofore placed in said well a powerful steam pump, they commenced to operate the same, pumping water from said subterranean body of water, knowing that the same was connected with such springs, and knowing that their said pump had sufficient power of suction to draw the underlying waters away from said springs and destroy the same; and with such knowledge continued to operate said pump day and night, drawing millions of gallons of water from said body of water, which they allowed to escape on the ground and run into French Lick creek and be wasted, and such pumping being continued up to the time of the commencement of this action. Some weeks prior to the 18th of July, 1903, the appellant the Baden Lick Company, by Gagnon, who acted for it, also placed a powerful

pump in its said well, and operated the same almost continually up to, on, and after said last-mentioned date, drawing from said subterranean basin more than a half million gallons of water every day, and allowing all of the same to escape into French Lick creek and be wasted; such pumping continuing up to the time of the service of the temporary restraining order herein. Gagnon and the Baden Lick Company knew that the removal of a large quantity of water from said subterranean body would result in the destruction of the natural springs, and after the 19th of July they also knew that the joint action of the Howards and themselves in such pumping was resulting in the injury of such springs, and, with such knowledge, continued so to pump and waste said waters until said natural springs of the French Lick Company ceased to flow, and became for the time practically worthless, and so remained until the service of the restraining order. Neither the Baden Lick Company nor the Howards had any use for the waters so pumped by them through their respective wells from said subterranean basin of water, but wasted all of it, and while their pumping was in progress they caused observations to be made to discover its effect on the natural springs of the French Lick Company; and when they learned that said springs were being exhausted by reason of such pumping they continued to pump and waste said waters until the flow of water in said springs stopped, and the value thereof for the time being was destroyed. The connection between the wells of the Baden Lick Company and the Howards and the said natural springs of the appellee through said subterranean body of water is so well defined that when the pumping from said wells from any cause ceased for a few hours, the waters would again begin to flow into and out of the said springs, and when said pumping was again resumed the suction from the pumps would again cause said springs to cease flowing. About 11 p. m. on July 21, 1903 (the day prior to the commencement of this action), while the pumps in both of the wells referred to were being operated, John L. Howard, one of the appellants, visited the natural spring of the French Lick Company known as "Pluto," and, finding, on examination that the same had ceased to flow, said to his companion, "We have got her down; she has gone to hell." John Stevens, Howard's manager, after the well was sunk on Howard's land, and prior to placing a pump therein, said to John C. Howard, "I want you to get me a good pump and put in there, and I will sink old Pluto to hell." After such pump was procured and placed in operation, and was operated until about the time of the commencement of this action, Stevens again declared, "I have them working on old Pluto, and I don't give a d——n if Pluto goes as dry as a chip." John L. Howard, before sinking the well referred to said: "I will drill a hole up there deep enough to reach the sulphur water, and it doesn't matter whether it flows out natural or not, for I will put in a compressed air pump, and by this means I can lift the water from the bottom of the well instead of the top, and when this is done it will lower the fresh-water pressure here, and whenever you affect the fresh-water pressure Pluto will not run out." He again said, "I will have Pluto right here at my door." And again: "When we get through with them [referring to the French Lick Company], they will either take us back in the company or buy me out at my figures. * * * I know more about Pluto than anybody in this valley, and when I get through with my well they will want me, because I can control Pluto." [34]

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[34] "In certain portions of Indiana, and other states, hundreds of feet beneath the surface, natural gas was found confined under pressure in a stratum of porous rock. Owners of the surface claimed for themselves severally the right of making unrestricted drafts upon the common source of supply. Some owners opened up large wells—gushers—lighted the gas and let it burn day and night. Others who were putting their gas wells to beneficial use for heat, light or fuel purposes, protested against the reckless waste which was weakening their wells. But the wasters refused to quit. The beneficial users urged that, since their wells were being damaged without any benefit to the wasters, the act of the wasters could be attributed to nothing but pure malevolence. What of it, replied the wasters; we are on our own ground and can do as we please; we have as much right as you have to bore gas wells, and it is none of your concern what we do with the gas. This defense or justification has been stated in various forms: 'Where one exercises a legal right only, the

DOWLING, C. J. * * * The English and American cases cited by counsel for appellants undoubtedly state the general rules which have been applied by the courts to subterranean waters, and we have no inclination to question their wisdom and authority in the particular cases to which they apply. But there are well-recognized exceptions to these rules, and doubtless further exceptions and departures from them will from time to time be found necessary or expedient. Where the diversion of the water is purely malicious, and is detrimental to another proprietor, it may be prevented by injunction. Miller v. Black Rock, 99 Va. 747, 40 S. E. 27, 86 Am. St. Rep. 924. So where the water is simply wasted. Stillwater v. Farmer, 89 Minn. 58, 93 N. W. 907, 60 L. R. A. 875, 99 Am. St. Rep. 541. If the water flows in a definite channel under ground, the same rules apply to it as apply to surface streams, and the landowner cannot use or destroy it at his pleasure. Southern Pacific R. R. Co. v. Dufour, 95 Cal. 616, 30 Pac. 783, 19 L. R. A. 92, note. And the courts of New York have held that the drainage of land of a private owner by a city pumping works, which exhausts from all the ground in its vicinity the natural supply of underground or subterranean water, and thus

motive which actuates him is immaterial.' Raycroft v. Tayntor (1896) 68 Vt. 219, 35 Atl. 53, 33 L. R. A. 225, 54 Am. St. Rep. 882. 'Mischievous motives cannot make that wrong which in its own essence is lawful.' Jenkins v. Fowler (1855) 24 Pa. 308. 'An act lawful in itself is not converted by a malicious or bad motive into an unlawful act.' Allen v. Flood [1898] A. C. 1. It seems to me that these explanations must be taken to mean one or the other of two things. One is, that where an act is lawful without regard to motive, motive need not be regarded. That is worthless as being a mere running around in a circle. The other is that, where an act is lawful if done under one kind of a motive, it is therefore lawful if done under any and every kind of a motive—in short, that motive can never be determinative of the lawfulness of an act. And this, I submit, is not true in morals or logic or law. Plant v. Woods (1899) 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330. In the natural gas cases the Supreme Court of Indiana ruled, in substance, that the surface proprietors had coequal rights of access to the common source of supply—the common fund; that the right of each was therefore not an absolute right, but was limited and restricted by the coexisting and coextensive rights of the others; that each therefore had the right to the beneficial use and enjoyment of the whole supply except as it was cut down by the beneficial use and enjoyment of the others; that while the loss that came to each from the beneficial use of the common fund by the others was damnum absque injuria, a loss without cause of complaint, none of them was bound to suffer a loss malevolently inflicted—inflicted 'for the sake of the harm as an end in itself and not merely as a means to some further end legitimately desired.' Aikens v. Wisconsin (1904) 195 U. S. 194, 25 Sup. Ct. 3, 49 L. Ed. 154. And so it was held that the wasters could be stopped by injunction. Further, a penal statute of the state, punishing the wasting of gas as a species of malicious mischief, was sustained by the Supreme Court of the United States against an attack based on the ground that denying a landowner the right to do as he pleased with the gas flowing from a well in his own soil was a taking of private property without compensation. Ohio Oil Co. v. Indiana (1900) 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729. So far as I know there are no natural gas decisions that deny malicious waste may be enjoined, and no cases that fail to treat natural gas and petroleum as being of the same class. If adjoining landowners bore down into an underlying porous stratum containing a fluid, I fail to see any reason why their rights should be different whether they find gas, or oil, or water. Yet the common law of England (Corporation of Bradford v.

prevents the raising on it of crops to which it was or would be peculiarly adapted, or destroys such crops after they are grown or partly grown, renders the city liable to the landowner for the damages he sustains, and entitles him to an injunction against the continuance of the wrong. Forbell v. New York, 164 N. Y. 522, 58 N. E. 644, 51 L. R. A. 695, 79 Am. St. Rep. 666. In Willis v. Perry, 92 Iowa, 297, 60 N. W. 727, 26 L. R. A. 124, it was held that a use for natural purposes takes precedence over artificial ones. A further exception to the rules laid down in Acton v. Blundell, 12 Mees. & W. 335, Chasemore v. Richards, 7 H. L. Cases, 340, and Ewart v. Belfast, 9 L. R. (Ireland) 172, was made in the recent case of Katz, Ex'r, v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35, where it was declared that the owner of a portion of a tract of land which is saturated below the surface with an abundant supply of percolating water cannot remove water from wells thereon for sale, if the remainder of the tract is thereby deprived of water necessary for its profitable enjoyment. See, also, Bassett v. Salisbury Mfg. Co., 43 N. H. 569, 82 Am. Dec. 179; Dexter v. Providence Aqueduct Co., Fed. Cas. No. 3,864; Smith v. Brooklyn,

Pickles [1895] A. C. 687), that a landowner has an absolute and unqualified right to intercept on his own land underground percolating water, with the effect of preventing his neighbor from getting any from the common fund, even though his motive in so doing be not to benefit himself or his estate, but solely to injure his neighbor, has been quite generally followed in this country, and might be said to be sustained by the weight of authority, if a majority constitutes a preponderance. Huber v. Merkel (1903) 117 Wis. 355, 94 N. W. 354, 62 L. R. A. 589, 98 Am. St. Rep. 933, and cases cited in text and note. There are, however, some vigorous decisions in Maine, New Hampshire, New York, Iowa and Minnesota (Chesley v. King [1882] 74 Me. 164, 43 Am. Rep. 569; Bassett v. Salisbury Mfg. Co. [1862] 43 N. H. 569, 82 Am. Dec. 179; Swett v. Cutts [1870] 50 N. H. 439, 9 Am. Rep. 276; Forbell v. New York [1900] 164 N. Y. 522, 58 N. E. 644, 51 L. R. A. 695, 79 Am. St. Rep. 666; Smith v. Brooklyn [1899] 160 N. Y. 357, 54 N. E. 787, 45 L. R. A. 664; Barclay v. Abraham [1903] 121 Iowa, 619, 96 N. W. 1080, 64 L. R. A. 255, 100 Am. St. Rep. 365; Stillwater Co. v. Farmer [1903] 89 Minn. 58, 93 N. W. 907, 60 L. R. A. 875, 99 Am. St. Rep. 541) denying the landowner an absolute title in subterranean waters, and recognizing in him only a limited and qualified right which must be used and enjoyed by him with due regard to the equal rights of his neighbors in the common supply. These decisions square with the natural gas and oil cases already mentioned, and properly accord, I believe, with the basic theory of our social system." Judge Francis E. Baker, before the Chicago Bar Ass'n, 1911. The paper is reprinted in 5 Illinois Law Rev. 452.

The "natural gas cases" referred to by Judge Baker are Manufacturers' Gas Co. v. Indiana Nat. Gas Co. (1900) 155 Ind. 461, 57 N. E. 912, 50 L. R. A. 768; Lippincott Glass Co. v. Ohio Oil Co. (1898) 150 Ind. 695, 49 N. E. 1106; State v. Ohio Oil Co. (1898) 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627; Ohio Oil Co. v. Indiana (1900) 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729. See also, Westmoreland Nat. Gas Co. v. De Witt (1889) 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 731. In Hague v. Wheeler (1893) 157 Pa. 324, 27 Atl. 714, 22 L. R. A. 141, 37 Am. St. Rep. 736, the trial court found that the waste was malicious and entered an injunction. The Supreme Court reversed the decree on the ground that the finding of malice was not sustained. "I think," remarks Judge Baker, that "the Supreme Court should have determined malice, not as a state of mind subjectively held by defendant, but objectively as determined by the nature and necessary consequence of the act."

18 App. Div. 340, 46 N. Y. Supp. 141. The strong trend of the later decisions is toward a qualification of the earlier doctrine that the landowner could exercise unlimited and irresponsible control over subterranean waters on his own land, without regard to the injuries which might thereby result to the lands of other proprietors in the neighborhood. Local conditions, the purpose for which the landowner excavates or drills holes or wells on his land, the use or nonuse intended to be made of the water, and other like circumstances have come to be regarded as more or less influential in this class of cases, and have justly led to an extension of the maxim, "Sic utere tuo ut alienum non lædas," to the rights of landowners over subterranean waters, and to some abridgment of their supposed power to injure their neighbors without benefiting themselves.

The only conclusions which can fairly be drawn from the verified pleadings and evidence in this case is that a bitter rivalry exists between the parties to this action, their stockholders and officers, and that, without a real necessity therefor, the appellants dug wells and put machinery and appliances in them and pumped large quantities of water therefrom for the purpose of stopping the flow of water of the mineral springs on the land of the appellee. The thinly disguised pretext that some of the acts complained of were done in an attempt to repair a well or stop a leak in it, is an insufficient explanation of the injurious proceedings of the appellants, and wholly fails to convince us of their good faith. * * *

In our opinion, the court did not err in any of its rulings, and the judgment is affirmed.[35]

ANGLE v. CHICAGO, ST. P., M. & O. RY. CO.

(Supreme Court of the United States, 1894. 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55.)

This was an appeal from a decree of the Circuit Court of the United States for the Western District of Wisconsin dismissing plaintiff's bill. The facts in the case were shortly as follows:

The state of Wisconsin had granted certain lands to the Chicago, St. Paul, Minneapolis & Omaha Railway Company, hereafter referred to as the Omaha Company, for the purpose of constructing a defined railway. Certain other lands had been granted by Wisconsin to the Chicago, Portage & Superior Railway Company, hereafter referred to as the Portage Company, for the purpose of constructing another defined railway. The latter road, if constructed, would be, to some extent, a competitor of the Omaha road. The grant to the Portage Company was conditioned upon the completion of the road within a certain time. By a later act of the Wisconsin legislature this time was extended to May 9, 1882.

In 1881, the Portage Company made a contract with Horatio Angle for the construction of sixty-five miles of road covered by its land grant before May 5, 1882. Angle commenced work and made such progress that, on January 20th, 1882, he had 1,600 men employed along the line, and it was an assured

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[35] Parts of the opinion are omitted.

fact that, unless interfered with, he would complete the railway, according to the terms of the contract, on or before May 5, 1882.

But in February, 1882, the Wisconsin legislature, without inquiry or hearing, hurriedly passed an act forfeiting and revoking the grant to the Portage Company, and bestowing it upon the Omaha Company. This action of the legislature was intentionally caused by certain false representations made to the legislators by persons acting on behalf of the Omaha Company. As a result of this, and of other machinations by the Omaha Company, the Portage Company failed to meet its contract with Angle, and he, on his part, was thereby prevented from going on with the building of the road.

The contract with Angle having been thus broken by the Portage Company, he commenced an action at law against that company. While this action was pending Angle died, but a revivor was had in the name of his administratrix, who recovered a judgment for some $200,000. Upon this judgment execution was issued and returned "nulla bona," and thereupon this bill was filed to reach the land grant in the hands of the Omaha Company.[36]

The bill charged, among other things, that the Omaha Company conspired with other parties to wrest from the Portage Company its land grant, and to that end to prevent the completion of the contract by Angle and the construction of the road. The defendant's demurrer to the bill was sustained in the Circuit Court, and the decree of dismissal was entered.[37]

MR. JUSTICE BREWER, after stating the facts, delivered the opinion of the court.

That which attracts notice on even a casual reading of the bill—the truth of all the allegations in which must be taken, upon this record, to be admitted by the demurrer—is the fact that, while Angle was actively engaged in executing a contract which he had with the Portage Company,—a contract whose execution had proceeded so far that its successful completion within the time necessary to secure to the Portage Company its land grant was assured, and when neither he nor the Portage Company was moving or had any disposition to break that contract or stop the work,—through the direct and active efforts of the Omaha Company the performance of that contract was prevented, the profits which Angle would have received from a completion of the contract were lost to him, and the land grant to the Portage Company was wrested from it.

Surely it would seem that the recital of these facts would carry with it an assurance that there was some remedy which the law would give to Angle and the Portage Company for the losses they had sustained, and that such remedy would reach to the party, the Omaha Company, by whose acts these losses were caused.

That there were both wrong and loss is beyond doubt. And, as said by Croke, J., in Baily v. Merrell, 3 Bulst. 94, 95, "damage without

[36] The statement of the facts is abridged.

[37] For the case below, see Angle v. Chicago, St. P., M. & O. Ry. Co. (C. C. 1889), 39 Fed. 912, and Farmers' Loan & Trust Co. v. Chicago, P. & S. Ry. Co. (C. C. 1889) 39 Fed. 143. The opinion in the Circuit Court was by Mr. Justice Harlan, who dismissed the bill upon the ground that the Portage road had no interest in the lands which could be subjected in satisfaction of Angle's judgment against it.

fraud gives no cause of action; but where these two do concur and meet together, there an action lieth." The Portage Company held a land grant worth four millions of dollars. It had contracted for the construction of its road, such construction to be completed in time to perfect its title to the land. The contract had been so far executed that its full completion within the time prescribed was assured. The contractor had 1,600 men employed. The rails had been purchased. The company had lifted itself out of the embarrassments which years before had surrounded it. It had taken up all its old stock but $25,000, which was ignorantly or wrongfully withheld by one of its officers. It had issued 1,000,000 of new stock, had authorized a new issue of bonds, and had arranged for the canceling of all its obligations with 700,000 of these bonds and 1,000,000 of stock. It had consummated arrangements with a wealthy company for the advancement of moneys sufficient for its work, and had gone so far as to place in the hands of that company 100,000 of its bonds, upon which $50,000 in cash was to be advanced. Except through some wrongful interference, it was reasonably certain that everything would be carried out as thus planned and arranged.

At this time the Omaha Company, which was a rival in some respects, and which had located a line parallel and contiguous to the line of the Portage Company, interferes, and interferes in a wrongful way. It bribes the trusted officers of the Portage Company to transfer the entire outstanding stock into its hands, or at least place it under its control. Being thus the only stockholder, it induces the general manager to withdraw the several engineering corps, whose presence was necessary for the successful carrying on of the work of constructing the road; to give such notice as to result in the seizure of all the tools and supplies of the contractor and the company, and the dispersion of all laborers employed. To prevent any action by the faithful officers of the Portage Company, it wrongfully obtains an injunction tying their hands. In the face of this changed condition of affairs, the company, which had negotiated with the Portage Company, and was ready to advance it money, surrendered the 100,000 of the bonds, and abandoned the arrangement. By false representations to the legislature as to the facts of the case, it persuaded that body to revoke the grant to the Portage Company, and bestow the lands upon itself.

That this was a wrongful interference on the part of the Omaha Company, and that it resulted directly in loss to the contractor and to the Portage Company, is apparent. It is not an answer to say that there was no certainty that the contractor would have completed his contract, and so earned these lands for the Portage Company. If such a defense were tolerated, it would always be an answer in case of any wrongful interference with the performance of a contract, for there is always that lack of certainty. It is enough that there

should be, as there was here, a reasonable assurance, considering all the surroundings, that the contract would be performed in the manner and within the time stipulated, and so performed as to secure the land to the company.

It certainly does not lie in the mouth of a wrongdoer, in the face of such probabilities as attend this case, to say that perhaps the contract would not have been completed even if no interference had been had, and that, therefore, there being no certainty of the loss, there is no liability.

Neither can it be said that the Omaha Company had a right to contend for these lands; that it simply made an effort, which any one might make, to obtain the benefit of this land grant. No rights of this kind, whatever may be their extent, justify such wrongs as were perpetrated by the Omaha Company. Here, bribery was resorted to to induce the trusted officers of the Portage Company to betray their trust, and to place at least the apparent ownership of the stock in the hands of the rival company.

Without notice, without hearing, and by false allegations, it secured an injunction to stay the hands of the honest officers of the Portage Company. Such wrongful use of the powers and processes of the court cannot be recognized as among the legitimate means of contest and competition. It burdens the whole conduct of the Omaha Company with the curse of wrongdoing, and makes its interference with the affairs of the Portage Company a wrongful interference.

Further, by false representations as to what the Portage Company has done and intends to do, it induced the legislature of the state to revoke the grant to the Portage Company, and bestow it upon itself. The result, and the natural result, of these wrongful actions on the part of the Omaha Company was the breaking down of the Portage Company, the disabling it from securing the means of carrying on this work, the dispersion of the laborers, and the prevention of the contractor from completing his contract. It will not do to say that the contractor was not bound to quit the work, but might have gone on and completed his contract, and thus earned the lands for the Portage Company; nor that the wrongful act of the trusted officers of the Portage Company in betraying their trust could have been corrected by the Portage Company by appropriate suit in the courts; that the law in one shape or another would have offered redress to the Portage Company for all the wrongs that were attempted and done by the Omaha Company. Granting all of this, yet the fact remains that the natural, the intended, result of these wrongful acts was the breaking down of the Portage Company, the unwillingness of the foreign company to furnish it with money, and the prevention of the contractor from completing his contract.

It is not enough to say that other remedies might have existed and been resorted to by the Portage Company, and that notwithstanding

the hands of its officers were tied by this wrongful injunction. It is enough that the Portage Company did break down; that it broke down in consequence of these wrongful acts of the Omaha Company, and that they were resorted to by the latter with the intention of breaking it down. * * *

It follows from these considerations that the court erred in sustaining the demurrer to this bill, and the decree of dismissal must be

Reversed, and the case remanded with instructions to overrule the demurrer, and for further proceedings in conformity to law.[38]

CUMBERLAND GLASS MFG. CO. v. DE WITT.

(Court of Appeals of Maryland, 1913. 120 Md. 381, 87 Atl. 927, Ann. Cas. 1915A, 702.)

In this action, which was against the glass manufacturing company, the judgment below was for the plaintiff. The defendant appealed.

BURKE, J. The amended declaration upon which this case was tried alleged that since the year 1886 the plaintiff had been a dealer in imported and domestic bottles, demijohns, etc.; that the defendant, the Cumberland Glass Manufacturing Company, a foreign corporation, was engaged in the manufacture of glass bottles, window glass, etc., and conducted its factory at Bridgton in the state of New Jersey; that it complied with the requirements of the law of this state, which permit foreign corporations to transact business here, and that it was in fact doing business here. It further alleged that on February 8, 1906, the plaintiff entered into a written contract with the Mallard Distilling Company of New York to supply them with 1,000 gross of half-pint lettered gin flasks, eight-ounce capacity, at the price of $2.40 per gross, and that on or about the same date did verbally enter into an additional contract with said company for another 1,000 gross of bottles at $2.40 per gross, which bottles were to be made identical in every respect with those specified in the written contract. It then alleged "that the Cumberland Glass Manufacturing Company did, with knowledge of the existing contract, on or about the 15th day of February, 1906, by and through the medium of their agents, visit the said Mallard Distilling Company, and maliciously and without just cause, with the intent to injure the plaintiff and to derive a benefit for itself, cause, induce, and procure the said Mallard Distilling Company to rescind, break, and violate their contracts" with the plaintiff. It further alleged that at the time the Mallard Distilling Company broke its contracts, the plaintiff charged the defendant with having

[38] Part of the opinion is omitted. In this omitted portion, Mr. Justice Brewer, speaking for the Court, reached the conclusion that the wrongdoing of the Omaha Company had wrested the title of the lands from the Portage Company and transferred it to itself. "It has become, therefore, a trustee ex maleficio in respect to the property." On this question, Mr. Justice Harlan dissented.

interfered with and caused the Mallard Company to break the contracts; that the defendant denied that it had in any way interfered with the contracts, or had procured, or caused the same to be broken; that the plaintiff was unable to procure sufficient proof against the defendant of its violation of duty, and that the proof of the facts was not known or exhibited to him until the latter part of the year 1909, but was fraudulently concealed and withheld by the defendant. * * *

The declaration is said to be bad for three reasons: First, because it contains no allegation that the plaintiff was able and willing to carry out his contracts with the Mallard Distilling Company; secondly, for duplicity, since it contains two complete, separate, and independent causes of action in one count; thirdly, because one of the contracts was unenforceable under the statute of frauds, and the declaration does not allege that but for the defendant's interference the Mallard Company would have carried out this contract, and would not have relied upon the defense of the statute. The first and second grounds of objection rest upon the doctrine declared in Dimmick v. Hendley, 117 Md. 458, 84 Atl. 171; Milske v. Steiner Mantel Company, 103 Md. 235, 63 Atl. 471, 5 L. R. A. (N. S.) 1105, 15 Am. St. Rep. 354, and other cases. But those cases have no application to cases of this kind. The cause of action set out in the declaration is the wrongful interference by the defendant with the contract relations between the plaintiff and the Mallard Distilling Company. The cause of action is the tortious act of the defendant in procuring or causing the breach of the plaintiff's contracts with the Mallard Company. The suit is not upon the contracts, nor does it charge the defendant with several distinct torts. It charges one single tort, resulting in damages to the plaintiff. It is well settled that a declaration, whether it is based upon a contract or upon tort, cannot combine in one count two distinct causes of action. But we do not regard the declaration in this case as open to this objection. * * *

Nor does the fact that one of these contracts was oral affect the sufficiency of the narr. The contract is not void, although it might not have been enforceable against the Mallard Company. But this circumstance cannot avail the defendant. This was decided in Knickerbocker Ice Company v. Gardiner & Co., 107 Md. 556, 69 Atl. 405, 16 L. R. A. (N. S.) 746. We are of opinion that the declaration was sufficient. * * *

Since the decisions of this court in Knickerbocker Ice Company v. Gardiner Dairy Co., and the Sumwalt Ice Co. v. Knickerbocker Ice Co., 114 Md. 403, 80 Atl. 48, there ought not to be any difficulty about the general principles of law in this state applicable to this class of actions. In those cases this court adopted the conclusion reached by the majority of the judges of the Queen's Bench in Lumley v. Gye, 2 El. & Bl. 216. The doctrine of that case has been followed in Eng-

land in Bowen v. Hall, 6 Q. B. D. 333; Read v. Friendly Society, etc., 2 K. B. 88; South Wales Miners' Federation et al. v. Glamorgan Coal Co., Limited, et al., Appeal Cases (1905) 239. It has been affirmed by the Supreme Court of the United States in Angle v. Chicago, etc., R. R. Co., 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55, and is followed by many of the state courts. That decision, as stated by Lord Macnaghten in Quinn v. Leathem, Appeal Cases (1901) 495, established this general proposition: "That it is a violation of legal right to interfere with contractual relations recognized by law, if there is no sufficient justification for the interference."

Malice in this form of action does not mean actual malice, or ill will, but consists in the intentional doing of a wrongful act without legal justification or excuse. In South Wales Miners' Federation v. Glamorgan Coal Company, supra, Lord Lindley said: "Bearing in mind that malice may or may not be used to denote ill will, and that in legal language presumptive or implied malice is distinguishable from express malice, it conduces to clearness, in discussing such cases as these, to drop the word 'malice' altogether, and to substitute for it the meaning which is really intended to be conveyed by it. Its use may be necessary in drawing indictments, but when all that is meant by malice is an intention to commit an unlawful act without reference to spite or ill will, it is better to drop the word 'malice' and so avoid all misunderstanding." The same principle was announced in the Knickerbocker Ice Company Case, supra, in which Judge Boyd said: "Although many of the cases speak of the act as being maliciously done, it would seem to be clear that express malice is not necessary if the act is wrongful and unjustifiable."

Turning now to an examination of the facts appearing in the record we find evidence tending to establish the contracts between the plaintiff and the Mallard Distilling Company. Did the defendant know of these contracts, and did it intentionally cause the Mallard Company to break them? These are questions of fact. It is not the province of this court to decide these questions. We are merely to determine whether the plaintiff offered evidence from which the jury might have reasonably found that the defendant had this knowledge, and that it intentionally procured their cancellation. In our opinion the evidence of the plaintiff and that of Robert B. Frist and Charles M. Kohn was abundantly sufficient to have carried the case to the jury upon these questions. This evidence is uncontradicted, and tends to show that the defendant acquired knowledge of these contracts through Arthur MacLellan, its agent in Baltimore, and that it intentionally deprived the plaintiff of the fruits of the contracts by offering the Mallard Company lower prices on the flasks. * * * Unless, therefore, the defendant had a legal excuse or justification for its act, the plaintiff was entitled to recover; provided the evidence supported the allegation of the replication to the plea of limitations.

Now, what is the justification upon which the defendant relies to exonerate itself from responsibility? It is the right of competition in trade. It asserts this proposition: That the right of competition justifies a defendant in knowingly and deliberately, for its own benefit or advantage, inducing the breach of a contract by offering lower prices. No case has been cited to support this contention. Counsel for appellant have cited a number of cases bearing upon the right of competition in trade or business. But this is altogether different from the right which one has to be protected from interference with his rights under existing contracts. There is a wide distinction between the two classes of cases, and they are governed by distinct rules of law. The principles applicable to the first class are stated in Klingel's Pharmacy v. Sharp & Dohme, 104 Md. 218, 64 Atl. 1029, 7 L. R. A. (N. S.) 976, 118 Am. St. Rep. 399, 9 Ann. Cas. 1184, and in Mogul Steamship Company v. McGregor, Gow & Co., Appeal Cases (1892) 25, and other cases cited on appellant's brief.

In the last-cited case it was said "that the procuring of people to break their contracts" is an unlawful act. In his opinion in that case Lord Morris said: "All the acts done, and the means used, by the defendant were acts of competition for trade. There was nothing in the defendant's acts to disturb any existing contract of the plaintiffs, or to induce any one to break such." In discussing the right of competition in Walker v. Cronin, 107 Mass. 555, the court said: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is damnum absque injuria, unless some superior right by contract or otherwise is interfered with." We, therefore, hold that the right to compete furnished no justification to the defendant in this case.

We also hold that the evidence was legally sufficient to be considered by the jury on the issue raised upon the plea of limitation. The plaintiff suspected that the contracts with the Mallard Company had been canceled through the act of the defendant, and it made an effort to ascertain that fact. The Mallard Company declined to give him any information, and John F. Perry deliberately misled him, and, except for the information derived from Frist in the fall of 1909, it is doubtful if he ever would have been able to connect the defendant with the violation of his contracts.

The defendant got the full benefit under the general issue plea of all the facts set out in its third plea, and no harm resulted to it in sustaining the demurrer to that plea.

The judgment will be affirmed.[39]

[39] Parts of the opinion are omitted.

II. In Trade or Business Competition

BOHN MFG. CO. v. HOLLIS et al.

(Supreme Court of Minnesota, 1893. 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319.)

This action is by the Bohn Manufacturing Company for an injunction. Stripped of all extraneous matter, the case discloses just this state of facts:

The plaintiff is a manufacturer and vendor of lumber and other building material, having a large and profitable trade at wholesale and retail in this and adjoining states, a large and valuable part of this trade being with the retail lumber dealers. The defendant the Northwestern Lumberman's Association is a voluntary association of retail lumber dealers, comprising from 25 to 50 per cent. of the retail dealers doing business in the states referred to, many of whom are, or have been, customers of the plaintiff. A "retailer," as defined in the constitution of the association, is "any person who is engaged in retailing lumber, who carries at all times a stock of lumber adequate to the wants of the community, and who regularly maintains an office as a lumber dealer, and keeps the same open at proper times." Any wholesale dealer or manufacturer of lumber who conforms to the rules of the association may become an honorary member, and attend its meetings, but is not allowed to vote. The object of the association is stated in its constitution to be "the protection of its members against sales by wholesale dealers and manufacturers to contractors and consumers." The object is more fully stated, and the means by which it is to be carried into effect are fully set out, in sections 3, 3½, 4, and 6 of the by-laws, which are all that we consider material in this case. The plaintiff sold two bills of lumber directly to consumers or contractors at points where members of the association were engaged in business as retail dealers. Defendant Hollis, the secretary of the association, having been informed of this fact, notified plaintiff, in pursuance of section 3 of the by-laws, that he had a claim against it for 10 per cent. of the amount of these sales. Considerable correspondence with reference to the matter ensued, in which the plaintiff, from time to time, promised to adjust the matter, but procrastinated and evaded doing so for so long that finally Hollis threatened that unless plaintiff immediately settled the matter he would send to all the members of the association the lists or notices provided for by section 6 of the by-laws, notifying them that plaintiff refused to comply with the rules of the association, and was no longer in sympathy with it. Thereupon, plaintiff commenced this action for a permanent injunction, and obtained, ex parte, a temporary one, enjoining the defendants from issuing these notices, etc.

The appeal is from an order refusing to dissolve the temporary injunction. It is alleged, and in view of the facts was presumed by the court to be true, that if these notices should be issued the members of the association would thereafter refuse to deal with the plaintiff, thereby resulting in loss to it of gains and profits.

Mitchell, J. (after stating the facts). The case presents one phase of a subject which is likely to be one of the most important and difficult which will confront the courts during the next quarter of a century. This is the age of associations and unions, in all departments of labor and business, for purposes of mutual benefit and protection. Confined to proper limits, both as to end and means, they

are not only lawful, but laudable. Carried beyond those limits, they are liable to become dangerous agencies for wrong and oppression. Beyond what limits these associations or combinations cannot go, without interfering with the legal rights of others, is the problem which, in various phases, the courts will doubtless be frequently called to pass upon. There is, perhaps, danger that, influenced by such terms of illusive meaning as "monopolies," "trusts," "boycotts," "strikes," and the like, they may be led to transcend the limits of their jurisdiction, and, like the court of king's bench in Bagg's Case, 11 Coke, 98a, assume that, on general principles, they have authority to correct or reform everything which they may deem wrong, or, as Lord Ellsmere puts it, "to manage the state." But whatever doubts or difficulties may arise in other cases, presenting other phases of the general subject involved here, it seems to us that there can be none on the facts of the present case. Both the affidavits and brief in behalf of the plaintiff indulge in a great deal of strong, and even exaggerated, assertion, and in many words and expressions of very indefinite and illusive meaning, such as "wreck," "coerce," "extort," "conspiracy," "monopoly," "drive out of business," and the like. This looks very formidable, but in law, as well as in mathematics, it simplifies things very much to reduce them to their lowest terms. It is conceded that retail lumber yards in the various cities, towns, and villages are not only a public convenience, but a public necessity: also, that, to enable the owners to maintain these yards, they must sell their lumber at a reasonable profit. It also goes without saying that to have manufacturers or wholesale dealers sell at retail, directly to consumers, in the territory upon which the retail dealer depends for his customers, injuriously affects and demoralizes his trade. This is so well recognized as a rule of trade, in every department, that generally wholesale dealers refrain from selling at retail within the territory from which their customers obtain their trade.

Now, when reduced to its ultimate analysis, all that the retail lumber dealers, in this case, have done, is to form an association to protect themselves from sales by wholesale dealers or manufacturers, directly to consumers or other nondealers, at points where a member of the association is engaged in the retail business. The means adopted to effect this object are simply these: They agree among themselves that they will not deal with any wholesale dealer or manufacturer who sells directly to customers, not dealers, at a point where a member of the association is doing business, and provide for notice being given to all their members whenever a wholesale dealer or manufacturer makes any such sale. That is the head and front of defendants' offense. It will be observed that defendants were not proposing to send notices to any one but members of the association. There was no element of fraud, coercion, or intimidation, either towards plaintiff or the members of the association. True, the secretary, in accordance with section 3 of the by-laws, made a demand on

plaintiff for 10 per cent. on the amount of the two sales. But this involved no element of coercion or intimidation, in the legal sense of those terms. It was entirely optional with plaintiff whether it would pay or not. If it valued the trade of the members of the association higher than that of nondealers at the same points, it would probably conclude to pay; otherwise, not. It cannot be claimed that the act of making this demand was actionable; much less, that it constituted any ground for an injunction; and hence this matter may be laid entirely out of view. Nor was any coercion proposed to be brought to bear on the members of the association, to prevent them from trading with the plaintiff. After they received the notices, they would be at entire liberty to trade with plaintiff, or not, as they saw fit. By the provisions of the by-laws, if they traded with the plaintiff, they were liable to be "expelled;" but this simply meant to cease to be members. It was wholly a matter of their own free choice, which they preferred, —to trade with the plaintiff, or to continue members of the association. So much for the facts, and all that remains is to apply to them a few well-settled, elementary principles of law:

1. The mere fact that the proposed acts of the defendants would have resulted in plaintiff's loss of gains and profits does not, of itself, render those acts unlawful or actionable. That depends on whether the acts are, in and of themselves, unlawful. "Injury," in its legal sense, means damage resulting from an unlawful act. Associations may be entered into, the object of which is to adopt measures that may tend to diminish the gains and profits of another, and yet, so far from being unlawful, they may be highly meritorious. Com. v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346; Steamship Co. v. McGregor, 21 Q. B. Div. 544.

2. If an act be lawful,—one that the party has a legal right to do, —the fact that he may be actuated by an improper motive does not render it unlawful. As said in one case, "the exercise by one man of a legal right cannot be a legal wrong to another," or, as expressed in another case, "malicious motives make a bad case worse, but they cannot make that wrong which, in its own essence, is lawful." Heywood v. Tillson, 75 Me. 225, 46 Am. Rep. 373; Phelps v. Nowlen, 72 N. Y. 39, 28 Am. Rep. 93; Jenkins v. Fowler, 24 Pa. 308.

3. To enable the plaintiff to maintain this action, it must appear that defendants have committed, or are about to commit, some unlawful act, which will interfere with, and injuriously affect, some of its legal rights. We advert to this for the reason that counsel for plaintiff devotes much space to assailing this association as one whose object is unlawful because in restraint of trade. We fail to see wherein it is subject to this charge; but, even if it were, this would not, of itself, give plaintiff a cause of action. No case can be found in which it was ever held that, at common law, a contract or agreement in general restraint of trade was actionable at the instance of third

parties or could constitute the foundation for such an action. The courts sometimes call such contracts "unlawful" or "illegal," but in every instance it will be found that these terms were used in the sense, merely, of "void" or "unenforceable" as between the parties; the law considering the disadvantage so imposed upon the contract a sufficient protection to the public. Steamship Co. v. McGregor, 23 Q. B. Div. 598, [1892] App. Cas. 25.

4. What one man may lawfully do singly two or more may lawfully agree to do jointly. The number who unite to do the act cannot change its character from lawful to unlawful. The gist of a private action for the wrongful act of many is not the combination or conspiracy, but the damage done or threatened to the plaintiff by the acts of the defendants. If the act be unlawful, the combination of many to commit it may aggravate the injury, but cannot change the character of the act. In a few cases there may be some loose remarks apparently to the contrary, but they evidently have their origin in a confused and inaccurate idea of the law of criminal conspiracy, and in failing to distinguish between an unlawful act and a criminal one. It can never be a crime to combine to commit a lawful act, but it may be a crime for several to conspire to commit an unlawful act, which, if done by one individual alone, although unlawful would not be criminal. Hence, the fact that the defendants associated themselves together to do the act complained of is wholly immaterial in this case. We have referred to this for the reason that counsel has laid great stress upon the fact of the combination of a large number of persons, as if that, of itself, rendered their conduct actionable. Bowen v. Matheson, 14 Allen (Mass.) 499; Steamship Co. v. McGregor, 23 Q. B. Div. 598, [1892] App. Cas. 25; Parker v. Huntington, 2 Gray (Mass.) 124; Wellington v. Small, 3 Cush. (Mass.) 145, 50 Am. Dec. 719; Payne v. Railway Co., 13 Lea (Tenn.) 507, 49 Am. Rep. 666.

5. With these propositions in mind, which bring the case down to a very small compass, we come to another proposition, which is entirely decisive of the case. It is perfectly lawful for any man (unless under contract obligation, or unless his employment charges him with some public duty) to refuse to work for or to deal with any man or class of men, as he sees fit. This doctrine is founded upon the fundamental right of every man to conduct his own business in his own way, subject only to the condition that he does not interfere with the legal rights of others. And, as has been already said, the right which one man may exercise singly, many, after consultation, may agree to exercise jointly, and make simultaneous declaration of their choice. This has been repeatedly held as to associations or unions of workmen, and associations of men in other occupations or lines of business must be governed by the same principles. Summed up, and stripped of all extraneous matter, this is all that defendants have done, or threatened to do, and we fail to see anything unlawful

or actionable in it. Com. v. Hunt, supra; Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; Steamship Co. v. McGregor, [1892] App. Cas. 25.

Order reversed, and injunction dissolved.[40]

[40] Accord: Macauley Bros. v. Tierney (1895) 19 R. I. 255, 33 Atl. 1, 37 L. R. A. 455, 61 Am. St. Rep. 770: (The plaintiffs were master plumbers engaged in the plumbing business in Rhode Island. The National Association of Master Plumbers, of which the plaintiffs were not members, adopted a resolution that they would withdraw their patronage from any firm manufacturing or dealing in plumbing material who sold to a master plumber who was not a member of the National Association or one of its affiliated local associations. Notice of this was given to the wholesale dealers in plumbing materials throughout the United States. As a result, the wholesalers in Rhode Island from whom the plaintiffs were accustomed to buy refused to sell any longer to plaintiffs, nor could they purchase from wholesalers anywhere. The plaintiffs seek an injunction against the officers and members of the Providence Master Plumbers' Association, which was affiliated with the National Association. "The complainants proceed on the theory that they are entitled to protection in the legitimate exercise of their business; that the sending of the notices to wholesale dealers not to sell supplies to plumbers not members of the association, under the penalty, expressed in some instances and implied in others, of the withdrawal of the patronage of the members of the associations in case of a failure to comply, was unlawful, because it was intended injuriously to affect the plumbers not members of the association in the conduct of their business, and must necessarily have that effect. It is doubtless true, speaking generally, that no one has a right intentionally to do an act with the intent to injure another in his business. Injury, however, in its legal sense, means damage resulting from a violation of a legal right. It is this violation of a legal right which renders the act wrongful in the eye of the law and makes it actionable. If, therefore, there is a legal excuse for the act it is not wrongful, even though damage may result from its performance. The cause and excuse for the sending of the notices, it is evident, was a selfish desire on the part of the members of the association to rid themselves of the competition of those not members, with a view to increasing the profits of their own business. The question, then, resolves itself into this: Was the desire to free themselves from competition a sufficient excuse in legal contemplation for the sending of the notices?" Per Matteson, C. J.)

Scottish Co-op. Society v. Glasgow Fleshers' Ass'n (1898) 35 Sc. L. R. 645: ("Co-operative societies have of recent years been formed in this country with the object of supplying the public with provisions at cheaper rates than are usually charged in shops. Their tendency is no doubt to reduce the trade, the prices, and the profits of the ordinary shopkeeper, and among them of the butchers. The co-operative societies and the butchers are therefore in a position of antagonism and competition; and the butchers of Glasgow, or some of them, have recently formed themselves into an association in opposition to the co-operative societies. It occurred to them that the co-operative societies might be put in a position of disadvantage if they could be excluded from the American and Canadian meat market, which, as it happens, is at present carried on at only one place in Scotland,—the Yorkhill Wharf in Glasgow,—and is conducted there by means of sales by auction. The association considered that they would attain their object if they could induce the cattle salesmen who were in use to sell the cattle at Yorkhill to refuse to sell to the co-operative stores, and with that view they approached those cattle salesmen and intimated that they would not buy at their auction sales unless they declined to sell to the co-operative stores. The cattle salesmen were thus placed in a dilemma, and put to choose between the Glasgow Fleshers' Trade Association, as it is called, and the co-operative stores, and, judging (as I suppose) that the butchers were the better customers, they yielded to their pressure, and intimated in their conditions of sale that they would not accept the bids of persons connected with the co-operative stores, with the result that the co-operative societies have been cut out of the foreign meat market. The arrangement, it will be observed, is or seems to be doubly advantageous to the butchers, for

it relieves them from the competition of the co-operative stores at the auction sales, so presumably reducing the prices when they, the butchers, buy, and also from their competition in the sale in their shops of American and Canadian meat, so presumably enabling the butchers to raise their prices when they sell. This action has been brought to try whether this arrangement can be supported in law." Per Lord Kincairney.)

Heim v. New York Stock Exchange (1909) 64 Misc. Rep. 529, 118 N. Y. Supp. 591: (By a resolution of the New York Stock Exchange any member of this Exchange who transacted business with an active member of the Consolidated Stock Exchange was liable to suspension or expulsion. "This plaintiff is and was an active member on the Consolidated Exchange, also transacting business with Albert Loeb & Co., a Stock Exchange house, through whom he bought and sold stocks and bonds upon the floor of said Stock Exchange. On May 21, 1909, Albert Loeb & Co. notified the plaintiff that, because of the above resolution of their exchange, he must withdraw his account, and that thereafter they could transact no further business with him. It is alleged, and not denied, that by reason of the constitution and resolution above referred to all the members of the Stock Exchange will refuse to buy or sell stocks and bonds for the plaintiff, or any other active member of the Consolidated Exchange. It is conceded that the Consolidated Exchange, organized in 1875 as a mining stock exchange, is to a degree a rival of the Stock Exchange: its sales of stocks averaging per annum nearly one-fourth of those of the latter. There are 1,225 members, of whom 450 are active. The nature of the business transacted upon the floor of the Consolidated Exchange is very largely the same as that of the Stock Exchange. The plaintiff by this action seeks to enjoin the Stock Exchange from enforcing this resolution of nonintercourse as to him, and to prevent Albert Loeb & Co. from rejecting his account upon the reasons stated by them." Per Crane, J.)

Montgomery Ward & Co. v. South Dakota Retail Merchants' & Hardware Dealers' Ass'n (C. C. 1907) 150 Fed. 413: (The complainants, Montgomery Ward & Co., seek to enjoin the defendants from coercing or inducing wholesalers and jobbers to cease selling merchandise to the complainants. The defendants are members of an association of retail dealers who have agreed among themselves that they will not purchase any merchandise from wholesalers and jobbers who sell to catalogue or mail order houses. The defendants have corresponded with jobbers and wholesalers stating that the retail dealers are opposed to wholesalers and jobbers selling to a catalogue or mail order house and request that they do not make such sales. By reason of these letters some wholesalers and jobbers have declined, and continue to decline, to sell to the complainants, so that the complainants are unable to procure many articles of merchandise which they have been accustomed to sell.)

Whether the defendant's act in such a case is within the statute forbidding contracts in restraint of trade, see Retail Lumber Dealers' Ass'n v. Mississippi (1909) 95 Miss. 337, 48 South. 1021, 35 L. R. A. (N. S.) 1054, and note; Grenada Lumber Co. v. Mississippi (1910) 217 U. S. 433, 30 Sup. Ct. 535, 54 L. Ed. 826.

On the prima facie liability in these cases, compare Ertz v. Produce Exchange Co. of Minneapolis et al. (1900) 79 Minn. 140, 81 N. W. 737, 48 L. R. A. 90, 79 Am. St. Rep. 433. The question was on a demurrer to a complaint in which the following allegations appeared: That the defendant the Produce Exchange of Minneapolis and the other defendants were engaged in buying and selling farm produce in Minneapolis and were practically in control of this market; that the plaintiff was a commission merchant buying and selling farm produce in the Minneapolis market, and as such had been accustomed to buy of the defendants, paying them in full; that on a day named the defendant the Produce Exchange conspired with the other defendants not to sell to or buy from the plaintiff any farm produce; that in pursuance of this agreement the defendants and others refused to deal with the plaintiff and circulated among his patrons reports that he was unable to buy such produce, with the intent to induce his patrons to discontinue doing business with him; that as a result, the plaintiff's business was ruined, to his damage $20,000. Affirming the trial court in overruling the demurrer to this complaint, Start, C. J., remarked: "The defendants rely upon the case

of Bohn Mfg. Co. v. Hollis (1893) 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319, in support of their contention that the defendants' acts in question were lawful. The general propositions of law laid down in the decision in that case are sound as applied to the facts of that particular case. * * * It is to be noted that the defendants in the Bohn Case had similar legitimate interests to protect, which were menaced by the practice of wholesale dealers in selling lumber to contractors and consumers, and that the defendants' efforts to induce parties not to deal with offending wholesale dealers were limited to the members of the association having similar interests to conserve, and that there was no agreement or combination or attempt to induce other persons not members of the association to withhold their patronage from such wholesale dealer. In this respect the case differs essentially from the one at bar, in which the complaint does not show that the defendants had any legitimate interests to protect by their alleged combination. On the contrary, it is expressly alleged in the complaint that the combination, which was carried into execution, was for the sole purpose of injuring the plaintiff's business, and that the defendants conspired to induce the plaintiff's patrons and persons, other than the defendants, to refuse to deal with him. Such alleged acts on the part of the defendants are clearly unlawful. It is true, as claimed by the defendants and as stated in the Bohn Case, that a man, not under contract obligations to the contrary, has a right to refuse to work for, or deal with, any man or class of men, as he sees fit, and that the right which one man may exercise singly, many may lawfully agree to do jointly by voluntary association, provided they do not interfere with the legal rights of others. But one man singly, or any number of men jointly, having no legitimate interests to protect, may not lawfully ruin the business of another by maliciously inducing his patrons and third parties not to deal with him. See Walker v. Cronin (1871) 107 Mass. 555, 562; Delz v. Winfree (1891) 80 Tex. 400, 16 S. W. 111, 26 Am. St. Rep. 755; Graham v. St. Charles St. R. Co. (1895) 47 La. Ann. 214, 16 South. 806, 27 L. R. A. 416, 49 Am. St. Rep. 366; Hopkins v. Oxley Stave Co. (1894) 28 C. C. A. 99, 83 Fed. 912. This is just what the complaint in this case charges the defendants with doing, and we hold that it states a cause of action."

See, also, on the question of prima facie liability, Union Labor Hospital Ass'n v. Vance Redwood Lumber Co. et al. (1910) 158 Cal. 551, 112 Pac. 886, 33 L. R. A. (N. S.) 1034. The action was by the hospital association against seven lumber companies to enjoin them from conspiring to annoy and destroy the hospital business of plaintiff. The scheme of annoyance and destruction consisted in this: The defendants compelled every employé to consent to the deduction of $1 from his monthly wage, 12½ cents of which went into a contingent fund to help needy employés who might be injured and 87½ cents went to a hospital for an employé's ticket. This ticket entitled the employé to medical and surgical care and attendance in case of injury. The hospital could be selected by the employé from a list of three or four presented to him, but the Union Labor Hospital was not mentioned and was not on this list. The defendants were all companies engaged in lumbering and milling. The occupations of their men were dangerous. That provision should be made for the medical and surgical care of the men injured was most proper. No objection is made to this, nor to the means adopted to effectuate it, saving that plaintiff contends that because its hospital was not upon the list and because the employés were compelled to take out hospital tickets in one or another of the enumerated hospitals, a species of unlawful discrimination by the defendants against the plaintiff was thus established, a discrimination which it is urged and which the trial court found was an illegal boycott. It was found by the trial judge that the defendants, without any interests of their own to subserve, or any lawful object to promote, did conspire and confederate together for the purpose of unlawfully injuring the plaintiff in the manner alleged in the complaint; but it was also found, as shown in the opinion of the court that, the agreement with the four favored hospitals was entered into by the defendants solely for the purpose and with the intent to subserve their own interests. "These two findings appear to me to stand in absolute and irreconcilable opposition to each other, and the result is no finding at all upon a point essential to the validity of the judgment." Per Beatty, C. J.

JACKSON et al. v. STANFIELD et al.

(Supreme Court of Indiana, 1894. 137 Ind. 592, 36 N. E. 345, 23 L. R. A. 588.)

In this action, brought by Jackson, the judgment below was for the defendants. The plaintiffs appeal.

DAILEY, J. This is an action brought by the appellants against the appellees for damages, and for relief by injunction, on the ground that the defendants had entered into an unlawful combination for the purpose of injuring the appellees in their business, and that in consequence thereof plaintiffs had suffered actual damage and were threatened with great loss in their business. By request of the parties, the court below made a special finding of the facts and stated its conclusion of the law thereon,—that the plaintiffs were not entitled to recover. There was no motion for a new trial, and the only questions presented by the record are these: First. Whether the plaintiffs are entitled to an injunction. Second. If not entitled to an injunction, are they entitled to recover damages? * * *

We have, for convenience, taken so much of the special finding as we deemed material to the questions involved:

That the plaintiffs, Newton Jackson and Martha E. Jackson, are husband and wife. That Newton Jackson has no means, that his wife has means of her own, and for the past three years Newton Jackson has been engaged in the business of buying and selling lumber. That he has bought and sold lumber, dealing with his wife's means, and also on commission, by negotiating sales as agent of a wholesale dealer or manufacturer, and receiving a commission therefor, without owning the lumber himself. That the arrangement between plaintiffs was that the husband supported himself and family from his earnings and profits, and if any surplus remained it was the property of his wife. That the business was managed solely by Newton Jackson, in his own name, he occasionally using the word "agent" in connection with his own name, and using from $3,000 to $4,000 of his wife's means; but defendants had no knowledge that he was acting as agent for his wife. That plaintiffs have kept no lumber yard or stock on hand in South Bend, Ind., where they have done business for the past three years. That the defendants are partners, retail dealers in lumber in South Bend, Ind., and have kept a lumber yard and stock on hand. That prior to 1889 the defendants and other retail dealers in lumber in Indiana, about 150 in number, associated themselves together into an association known and designated as the "Retail Lumber Dealers' Association of Indiana," and agreed to a constitution and by-laws for their government, which constitution and by-laws are in these words: * * *

"Article 2. Conditions of Membership. Any person who may be regularly in the retail lumber trade, owning or operating a lumber yard, in which a general assortment of stock in kind and quantity commensurate with the demands of the community where located is kept for sale, may become a member of this association by subscribing to the constitution and paying the annual dues prescribed by the by-laws. * * *

"Article 10. Any manufacturer or wholesale dealer may become an honorary member of this association, with all the privileges and benefits save that of voting, upon payment of the annual dues. * * * Sec. 5. Members are entitled to the protection of this association in the towns in which their yards are situated and the adjacent territory, which must be designated in the application for membership, and written in the membership certificate. If protection is wanted for more than one point, where applicant owns or operates a yard, separate memberships must be taken. * * *

"Relations with Wholesalers. * * * Sec. 3. Whenever and as often as any manufacturer or wholesale dealer, or their agents, shall sell lumber, sash, doors, or blinds to any person not a regular dealer, as contemplated by article 2 of the constitution of the association, any member doing business in the town to which such shipment was made may notify the shipper, manufacturer, or wholesale dealer who made such shipment that he has a claim against them for such shipment. If the parties cannot adjust the claim, it shall be the duty of the member to notify the secretary of the facts in the case, who shall refer the case to the executive committee, whose duty it shall be to hear both sides of the question and determine the claim. If the wholesaler or manufacturer refuses to abide by the decision of the executive committee, it shall be the duty of the secretary to notify the members of this association of the name of such wholesaler or manufacturer. It shall also be the duty of the members to no longer patronize said wholesaler or manufacturer. If any member continues to deal with such dealer or manufacturer, he shall be expelled from the association. If the member refuses to abide by the decision of the executive committee, his name shall be stricken from the membership of the association. It is provided that nothing in this section shall be so construed as to entitle members to make complaint on account of lumber sold to manufacturers, and actually used in articles manufactured, nor to railroads or transportation companies, nor, in case of sash, doors, or blinds, to hardware merchants who keep a regular stock of such goods. * * *

We infer from article 2 of the constitution, that "any person in the retail lumber trade, owning and operating a lumber yard in which a general assortment of stock in kind and quantity commensurate with the demands of the community where located is kept for sale, is a regular dealer." The regular dealer, in accordance with the provisions of section 3 of the by-laws, when his territory is encroached upon by a wholesale dealer or manufacturer, is authorized to notify the person so offending that he has a claim against him for such sale or shipment, and to make a demand therefor. If the parties cannot adjust it, it is made the duty of the member to notify the secretary of the facts in the case, who shall refer the matter to the executive committee, whose duty it is to hear the grievances and determine the claim. If the wholesaler or manufacturer ignores the decision of the committee, it is the duty of the secretary to notify the members of the association of the name of the person so offending, and of the members to no longer patronize him. If they continue to deal with the offender, they shall be expelled from the association; and if any member refuses to abide by the decision of the executive committee, his name is to be stricken from the membership of the society.

The facts found by the court disclose that the appellees, as members of the combination complained of availed themselves of the means provided for in section 3 to destroy the business of the appellants as brokers in lumber, because they were not retail dealers within the definition of the term, and that they effectuated their purpose. The special findings of fact clearly show it to be a compact to suppress the competition of those dealers who did not own yards with an adequate stock on hand, by driving them out of business. By this plan they reach the wholesale dealer and compel him to pay an arbitrary penalty, under a threat of financial injury, and they force him

to assist in ruining the dealer who does not own a yard. There is such an element of coercion and intimidation in the by-law under consideration, towards the wholesale dealers, manufacturers, and even the members of the society, and such provision made for penalties and forfeitures against them, that it will not do to say it was optional with the wholesale dealer whether it would pay the demand or not, or that it was left to the discretion or choice of the members to either trade with the wholesaler or abandon the association. A conspiracy formed and intended, directly or indirectly, to prevent the carrying on of any lawful business, or to injure the business of any one, by wrongfully preventing those who would be customers from buying anything from the representatives of such business by threats or intimidation, is in restraint of trade and unlawful. * * *

The great weight of authority supports the doctrine that, where the policy pursued against a trade or business is of a menacing character, calculated to destroy or injure the business of the person so engaged, either by threats or intimidation, it becomes unlawful, and the person inflicting the wrong is amenable to the injured party in a civil action for damages therefor. It is not a mere passive, let-alone policy, a withdrawal of all business relations, intercourse, and fellowship, that creates the liability, but the threats and intimidation shown in the complaint. The learned counsel for the appellees, in his very able brief, contends that the plaintiffs were only incidentally injured by the acts of the defendants in enforcing a penalty of $100 against the West Michigan Lumber Company. It will be observed that the Retail Lumber Dealers' Association invites wholesalers to become honorary members, and that said lumber company is an honorary member. But the rules of the association do not affect, alone, members active and honorary. They extend to and reach any wholesale dealer in the United States with whom the threat to withdraw the trade of 150 retail dealers can have weight. It is shown in the finding that Michigan is the source from which most of the lumber in northern Indiana is procured, and that the rules of the association are published in pamphlet form and sent to every wholesale dealer in the United States. The retail dealers who organized the association in question are members of the various cities and towns where they are located. They have lumber yards containing stock in quantity and quality suited to and commensurate with the wants of the consumers in their several localities. These gentlemen are prominent, wealthy, and influential citizens of our state, whose power, from the elevated stations they occupy, so exercised, enables them to control the wholesale dealers of the United States against the agents and brokers within their own territory, and effectually drive them out of business. It is idle to say that the victim of such a combination is only "incidentally" affected thereby. The object of the association and the result attained is a monopoly of the trade by owners of yards, and the broker is simply ignored by the wholesale dealers.

It is not in point to cite cases where men voluntarily agree to observe rules adopted by themselves. This is no voluntary affair of the wholesale dealers. It is not even a combination of wholesalers. They may and do sometimes become honorary members, so as to keep within touch of the retail dealers and secure trade. It is, as stated, an association of retailers to restrict the liberty of wholesalers to sell to consumers and brokers, and the wholesalers must obey or lose their trade.

It is found as a fact that the market in which the plaintiffs could most profitably buy was in Michigan. Freight and railroad facilities necessarily limited the field. It is also found that the West Michigan Lumber Company is the dealer that made the plaintiff's trade most profitable, and that, for fear of the penalties, this company and another refused to deal with them. The West Michigan Lumber Company was willing and anxious to sell to the plaintiffs until fined by the defendants and mulcted in the sum of $100, when it refused to make further sales for the reason that it was afraid of the penalties. Such rules contravene the rights of nonmembers to earn their living by fair competition.

The case of Bohn Manuf'g Co. v. Hollis (1893) 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319, is cited by appellees as sustaining the decision of the lower court. It was a case in which a large number of lumber dealers had formed an association very similar in its character to the one in the case at bar. * * * The opinion proceeds upon the theory that there was no element of coercion or intimidation in the acts complained of, but we think the decision in this respect is in conflict with approved authority, and is bad as a precedent.

It appears from the facts found by the court that, after the payment of the $100 fine so assessed, the appellant Newton Jackson made an offer to the Studebaker Bros. Manufacturing Company, of South Bend, to sell said company two million feet of lumber, which offer was based on the price list of the West Michigan Lumber Company; that his commission thereon would have been $500; that the offer of said Jackson was accepted by the Studebaker Bros. Manufacturing Company, but the West Michigan Lumber Company refused to sell to or through Jackson by reason of the rules of said association, and on account of having paid said penalty, and said Jackson thereupon did not contract with said Studebaker Bros. Manufacturing Company, but turned over such sale to the West Michigan Lumber Company, and allowed it to make such sale without paying any commission to him; that said Newton Jackson thereafter caused lumber to be purchased for his customers in the name of Smith & Jackson, a firm of regular dealers as defined by the association, in South Bend, and paid to them $83 of his commission for the use of their name, which was a reasonable and fair charge therefor; that by reason of the refusal of the said West Michigan Lumber Company to sell him

lumber to fill an existing contract said Jackson went to Manistee, Mich., to purchase lumber, and expended in railroad fare and freight $82 more than it would have cost him had said West Michigan Lumber Company not refused to sell to him; that, except for such refusal, the West Michigan Lumber Company could have sold him lumber to fill such contract; that during the year 1890 plaintiffs' business had decreased, and before the commencement of this suit plaintiffs requested defendants to permit them to do business as heretofore, and to abandon their position in this matter, and not to complain to the association of sales made to plaintiffs, but defendants refused to do so, and declared their intention to adhere to their position, and that they intended to enforce the rules and by-laws of said association.

Without further extending this opinion, we only need to say that, if it had not been for the wrongful acts of the appellees, the plaintiffs would have made $583 in profits upon contracts of which they were deprived. They are entitled as compensation to the amount of damages sustained, which is measured by the loss actually incurred. If there was any circumstance to be considered in mitigation of damages, it was incumbent on the defendants to show that fact; but as the record is silent on this question, we must infer that none existed. We think the claim for expenses to Manistee and return too remote to be considered in this case. The judgment is reversed, with instructions to restate conclusions of law and render judgment upon the special findings in favor of the appellants for $583, and with the further instruction to render a judgment perpetually enjoining the defendants from in any way, other than fair, open competition, interfering with the plaintiffs in their business, and from demanding a penalty or making a claim against any one, under the by-laws of said association, who may sell to the plaintiffs, or through them to a consumer.[41]

MARTELL v. WHITE et al.

(Supreme Judicial Court of Massachusetts. 1904. 185 Mass. 255, 69 N. E. 1085, 64 L. R. A. 260, 102 Am. St. Rep. 341.)

Tort by Martell for conspiracy to injure his business. In the superior court a verdict was ordered for the defendants. The plaintiff excepted.

HAMMOND, J. The evidence warranted the finding of the following facts, many of which were not in dispute: The plaintiff was engaged in a profitable business in quarrying granite and selling the same to granite workers in Quincy and vicinity. About January, 1899, his customers left him, and his business was ruined, through the action of

[41] Parts of the opinion are omitted.

the defendants and their associates. The defendants were all members of a voluntary association known as the Granite Manufacturers' Association of Quincy, Mass., and some of them were on the executive committee. The association was composed of "such individuals, firms, or corporations as are, or are about to become manufacturers, quarriers, or polishers of granite." There was no constitution, and, while there were by-laws, still, except as hereinafter stated, there was in them no statement of the objects for which the association was formed The by-laws provided among other things, for the admission, suspension, and expulsion of members, the election of officers, including an executive committee and defined the respective powers and duties of the officers. One of the by-laws read as follows: "For the purpose of defraying in part the expense of the maintenance of this organization, any member thereof having business transactions with any party or concern in Quincy or its vicinity, not members hereof, and in any way relating to the cutting, quarrying, polishing, buying or selling of granite (hand polishers excepted) shall for each of said transactions contribute at least $1 and not more than $500. The amount to be fixed by the association upon its determining the amount and nature of said transaction."

Acting under the by-laws the association investigated charges which were made against several of its members that they had purchased granite from a party "not a member" of the association. The charges were proved, and, under the section above quoted, it was voted that the offending parties "should respectively contribute to the funds of the association" the sums named in the votes. These sums ranged from $10 to $100. Only the contribution of $100 has been paid, but it is a fair inference that the proceedings to collect the others have been delayed only by reason of this suit. The party "not a member" was the present plaintiff, and the members of the association knew it. Most of the customers of the plaintiff were members of the association, and after these proceedings they declined to deal with him. This action on their part was due to the course of the association in compelling them to contribute as above stated, and to their fear that a similar vote for contribution would be passed, should they continue to trade with the plaintiff. The jury might properly have found, also, that the euphemistic expression, "shall contribute to the funds of the association," contained an idea which could be more tersely and accurately expressed by the phrase "shall pay a fine," or, in other words, that the plain intent of the section was to provide for the imposition upon those who came within its provisions of a penalty in the nature of a substantial fine.

The bill of exceptions recites that "there was no evidence of threats or intimidation practiced upon the plaintiff himself, and the acts complained of were confined to the action of the society upon its own members." We understand this statement to mean simply that the acts of the association concerned only such of the plaintiff's customers

as were members, and that no pressure was brought to bear upon the plaintiff, except such as fairly resulted from action upon his customers. While it is true that the by-law was not directed expressly against the plaintiff by name, still he belonged to the class whose business it was intended to affect, and the proceedings actually taken were based upon transactions with him alone, and in that way were directed against his business alone. It was the intention of the defendants to withdraw his customers from him, if possible, by the imposition of fines upon them, with the knowledge that the result would be a great loss to the plaintiff. The defendants must be presumed to have intended the natural result of their acts. Here, then, is a clear and deliberate interference with the business of a person, with the intention of causing damage to him, and ending in that result. The defendants combined and conspired together to ruin the plaintiff in his business, and they accomplished their purpose. In all this, have they kept within lawful bounds? It is elemental that the unlawfulness of a conspiracy may be found either in the end sought, or the means to be used. If either is unlawful, within the meaning of the term as applied to the subject, then the conspiracy is unlawful. It becomes necessary, therefore, to examine into the nature of the conspiracy in this case, both as to the object sought and the means used.

The case presents one phase of a general subject which gravely concerns the interests of the business world, and, indeed, those of all organized society, and which in recent years has demanded and received great consideration in the courts and elsewhere. Much remains to be done to clear the atmosphere, but some things, at least, appear to have been settled; and certainly at this stage of the judicial inquiry it cannot be necessary to enter upon a course of reasoning or to cite authorities in support of the proposition that, while a person must submit to competition, he has the right to be protected from malicious interference with his business. The rule is well stated in Walker v. Cronin, 107 Mass. 555, 564, in the following language: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition, but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is damnum absque injuria, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing." In a case like this, where the injury is intentionally inflicted, the crucial question is whether there is justifiable cause for the act. If the injury be inflicted without just cause or excuse, then it is actionable. Bowen, L. J., in Mogul Steamship Co. v. McGregor, 23 Q. B. D. 598, 613; Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330. The justification must be as broad as the act, and must cover not

only the motive and the purpose, or, in other words, the object sought, but also the means used.

The defendants contend that both as to object and means, they are justified by the law applicable to business competition. In considering this defense, it is to be remembered, as was said by Bowen, L. J., in Mogul Steamship Co. v. McGregor, L. R. 23 Q. B. D. 598, 611, that there is presented "an apparent conflict or antinomy between two rights that are equally regarded by the law—the right of the plaintiff to be protected in the legitimate exercise of his trade, and the right of the defendants to carry on their business as seems best to them, provided they commit no wrong to others." Here, as in most cases where there is a conflict between two important principles, either of which is sound, and to be sustained within proper bounds, but each of which must finally yield, to some extent, to the other, it frequently is not possible by a general formula to mark out the dividing line with reference to every conceivable case, and it is not wise to attempt it. The best and only practicable course is to consider the cases as they arise, and, bearing in mind the grounds upon which the soundness of each principle is supposed to rest, by a process of elimination and comparison to establish points through which, at least, the line must run, and beyond which the party charged with trespass shall not be allowed to go.

While the purpose to injure the plaintiff appears clearly enough, the object or motive is left somewhat obscure, upon the evidence. The association had no written constitution, and the by-laws do not expressly set forth its objects. It is true that from the by-laws it appears that none but persons engaged in the granite business can be members, and that a member transacting any business of this kind with a person not a member is liable to a fine, from which it may be inferred that it is the idea of the members that, for the protection of their business, it would be well to confine it to transactions among themselves, and that one, at least, of the objects of the association is to advance the interests of the members in that way. The oral testimony tends to show that one object of the association is to see that agreements made between its members and their employés and between this association and similar associations in the same line of business, be kept and "lived up to." Whether this failure to set out fully in writing the objects, is due to any reluctance to have them clearly appear or to some other cause, is, of course, not material to this case. The result, however, is that its objects do not so clearly appear as might be desired; but, in view of the conclusion to which we have come as to the means used, it is not necessary to inquire more closely as to the objects. It may be assumed that one of the objects was to enable the members to compete more successfully with others in the same business, and that the acts of which the plaintiff complains were done for the ultimate protection and advancement of their own business interests, with no intention or desire to injure the plaintiff, except so far as such injury

was the necessary result of measures taken for their own interests. If that was true, then, so far as respects the end sought, the conspiracy does not seem to have been illegal.

The next question is whether there is anything unlawful or wrongful in the means used, as applied to the acts in question. Nothing need be said in support of the general right to compete. To what extent combination may be allowed in competition is a matter about which there is as yet much conflict, but it is possible that, in a more advanced stage of the discussion, the day may come when it will be more clearly seen, and will more distinctly appear in the adjudication of the courts, than as yet has been the case, that the proposition that, what one man lawfully can do any number of men, acting together by combined agreement lawfully may do, is to be received with newly disclosed qualifications, arising out of the changed conditions of civilized life and of the increased facility and power of organized combination, and that the difference between the power of individuals, acting each according to his own preference, and that of an organized and extensive combination, may be so great in its effect upon public and private interests as to cease to be simply one of degree, and to reach the dignity of a difference in kind. Indeed, in the language of Bowen, L. J., in the Mogul Steamship Case ubi supra (page 616): "Of the general proposition that certain kinds of conduct not criminal in one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which, if it proceeded only from a single person, would be otherwise; and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights." See, also, opinion of Stirling, L. J., in Giblan v. National Amalgamated Labourers' Union, [1903] 2 K. B. 600, 621. Speaking generally, however, competition in business is permitted although frequently disastrous to those engaged in it. It is always selfish, often sharp, and sometimes deadly. Conspicuous illustrations of the destructive extent to which it may be carried are to be found in the Mogul Steamship Case, above cited, and in Bowen v. Matheson, 14 Allen, 499. The fact, therefore, that the plaintiff was vanquished is not enough, provided that the contest was carried on within the rules allowable in such warfare. It is a right however, which is to be exercised with reference to the existence of a similar right on the part of others. The trader has not a free lance. He may fight, but as a soldier, not as a guerilla. The right of competition rests upon the doctrine that the interests of the great public are best subserved by permitting the general and natural laws of business to have their full and free operation, and that this end is best attained when the trader is allowed, in his business, to make free use of these laws. He may praise his wares, may offer more advantageous terms than his rival, may sell at less than cost, or in the words of

Bowen, L. J., in the Mogul Steamship Case, ubi supra, may adopt "the expedient of sowing one year a crop of apparently unfruitful prices, in order, by driving competition away to realize a fuller harvest of profit in the future." In these and many other obvious ways he may secure the customers of his rival, and build up his own business to the destruction of that of others; and, so long as he keeps within the operation of the laws of trade, his justification is complete. But from the very nature of the case, it is manifest that the right of competition furnishes no justification for an act done by the use of means which in their nature are in violation of the principle upon which it rests. The weapons used by the trader who relies upon this right for justification must be those furnished by the laws of trade, or at least must not be inconsistent with their free operation. No man can justify an interference with another man's business through fraud or misrepresentation, nor by intimidation, obstruction, or molestation. In the case before us the members of the association were to be held to the policy of refusing to trade with the plaintiff by the imposition of heavy fines, or, in other words, they were coerced by actual or threatened injury to their property. It is true that one may leave the association if he desires, but, if he stays in it, he is subjected to the coercive effect of a fine to be determined and enforced by the majority. This method of procedure is arbitrary and artificial, and is based in no respect upon the grounds upon which competition in business is permitted, but, on the contrary, it creates a motive for business action inconsistent with that freedom of choice out of which springs the benefit of competition to the public, and has no natural or logical relation to the grounds upon which the right to compete is based. Such a method of influencing a person may be coercive and illegal. Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287.

Nor is the nature of the coercion changed by the fact that the persons fined were members of the association. The words of Munson, J., in Boutwell v. Marr, 71 Vt. 1, 9, 42 Atl. 607, 609, 43 L. R. A. 803, 76 Am. St. Rep. 746, are applicable here: "The law cannot be compelled, by any initial agreement of an associate member, to treat him as one having no choice but that of the majority, nor as a willing participant in whatever action may be taken. The voluntary acceptance of by-laws providing for the imposition of coercive fines does not make them legal and collectible, and the standing threat of their imposition may properly be classed with the ordinary threat of suits upon groundless claims. The fact that the relations and processes deemed essential to a recovery are brought within the membership and proceedings of an organized body cannot change the result. The law sees in the membership of an association of this character both the authors of its coercive system and the victim of its unlawful pressure. If this were not so, men could deprive their fellows of established rights and evade the duty of compensation simply by working through an association."

In view of the considerations upon which the right of competition is based we are of opinion that as against the plaintiff the defendants have failed to show that the coercion or intimidation of the plaintiff's customers by means of a fine is justified by the law of competition. The ground of the justification is not broad enough to cover the acts of interference in their entirety, and the interference, being injurious and unjustifiable, is unlawful. We do not mean to be understood as saying that a fine is of itself necessarily, or even generally, an illegal implement. In many cases it is so slight as not to be coercive in its nature; in many it serves a useful purpose to call the attention of a member of an organization to the fact of the infraction of some innocent regulation; and, in many, it serves as an extra incentive to the performance of some absolute duty or the assertion of some absolute right. But where, as in the case before us, the fine is so large as to amount to moral intimidation or coercion, and is used as a means to enforce a right not absolute in its nature, but conditional, and is inconsistent with those conditions upon which the right rests, then the coercion becomes unjustifiable, and taints with illegality the act.

The defendants strongly rely upon Bowen v. Matheson, 14 Allen, 499; Mogul Steamship Co. v. McGregor [1892] A. C. 25; Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319; Macauley Bros. v. Tierney, 19 R. I. 255, 33 Atl. 1, 37 L. R. A. 455, 61 Am. St. Rep. 770; and Cote v. Murphy, 159 Pa. 420, 28 Atl. 190, 23 L. R. A. 135, 39 Am. St. Rep. 686. In none of these cases was there any coercion by means of fines upon those who traded with the plaintiff. Inducements were held out, but they were such as are naturally incident to competition—for instance, more advantageous terms in the way of discounts, increased trade, and otherwise. In the Minnesota case there was among the rules of the association a clause requiring the plaintiff to pay 10 per cent., but the propriety or the legality of that provision was not involved. In Bowen v. Matheson, it is true that the by-laws provided for a fine, but the declaration did not charge that any coercion by means of a fine had been used. A demurrer to the declaration was sustained upon the ground that there was no sufficient allegation of an illegal act. The only allegation which need be noticed here was that the defendants "did prevent men from shipping with" the plaintiff, and as to this the court said: "This might be done in many ways which are legal and proper and, as no illegal methods are stated, the allegation is bad." This comes far short of sustaining the defendants in their course of coercion by means of fines.
* * *

For the reasons above stated, a majority of the court are of opinion that the case should have been submitted to the jury. Exceptions sustained.[42]

[42] Part of the opinion is omitted.

CHAMBERS et al. v. BALDWIN.

(Court of Appeals of Kentucky, 1891. 91 Ky. 121, 15 S. W. 57, 11 L. R. A. 545, 34 Am. St. Rep. 165.)

Appeal by the plaintiffs below from a judgment sustaining a demurrer to their petition. The cause of action as stated in this petition was substantially as follows:

That, as partners doing business under the firm name of Chambers & Marshall, they made a contract with one Wise, whereby he sold, and agreed to deliver to them in good order during delivery season of 1877, his half of a crop of tobacco, then undivided, which he had raised on shares upon the farm of appellee; in consideration whereof they promised to pay on delivery at the rate of five cents per pound. That they were ready, able, and willing to receive and pay for the tobacco as and at the time agreed on, and demanded of him compliance with the contract; but he had already delivered it to appellee and Newton Cooper, tobacco dealers, and then notified appellants he would not deliver it to them, and they might treat the contract as broken and at an end. That appellee knew of the existence of said contract, but maliciously, on account of his personal ill will to Chambers, one of appellants, and with design to injure by depriving them of profit on their purchase, and to benefit himself by becoming purchaser in their stead, advised and procured Wise, who would else have kept and performed, to break the contract, whereby they have been damaged $———. That he (Wise) was at the time known by appellee to be, and now is, insolvent; so, being without other redress, they bring this action.

LEWIS, J., after stating the substance of the petition. Appellee is alleged to have been actuated to do the act complained of by ill will to one of appellants only, which, however, to avoid confusion we will treat as a malicious intent to injure both; and also by a design to benefit himself by becoming purchaser of the tobacco for the firm of which he was a member. And thus two questions of law arise on demurrer to the petition: First, whether one party to a contract can maintain an action against a person who has maliciously advised and procured the other party to break it; second, whether an act lawful in itself can become actionable solely because it was done maliciously.

As appellee, being no party to the contract, did not, nor could, himself break it, his wrong, if any, was in advising and procuring the equivalent of canceling, and inducing Wise to do so. Consequently, while the remedy of appellants against him (Wise) was by action ex contractu, recovery being limited to actual damage sustained, their action against appellee is, and could be, in no other than in form ex delicto; recovery, if any at all, not being so limited. Nevertheless, in Addison on Torts (volume 1, p. 37) it is said: "Maliciously inducing a party to a contract to break his contract, to the injury of the person with whom the contract was made, creates that conjunction of wrong and damage which supports an action." The authority cited in support of the proposition thus stated, without qualification, is the English case of Lumley v. Gye, 2 El. & Bl. 228, decided in 1853, followed by Bowen v. Hall, decided in 1881, and reported in 20 Amer. Law Reg. (N. S.) 578, though it is proper to say there was a dissenting opinion

in each case. The action of Lumley v. Gye was in tort, the complaint being that the defendant maliciously enticed and procured a person, under a binding contract to perform at plaintiff's theater, to refuse to perform, and abandon the contract. The majority of judges held, and the case was decided upon the theory, that remedies given by the common law in such cases are not in terms limited to any description of servants or service; and the action could be maintained upon the principle, laid own in Comyn's Digest, that, "in all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages." The position of Justice Coleridge was to the contrary,—that, as between master and servant, there was an admitted exception to the general rule of the common law confining remedies by action to the contracting parties, dating from the statute of laborers, passed in 25 Edw. III., and both on principle and authority limited by it; and that "the existence of intention, that is, malice, will in some cases be an essential ingredient in order to constitute the wrongfulness or injurious nature of the act; but it will neither supply the want of the act itself, or its hurtful consequences."

We have been referred to some American cases as being in harmony with the two cases mentioned. In Walker v. Cronin, 107 Mass. 555, it was held that where a contract exists by which a person has a legal right to continuance of service of workmen in business of manufacturing boots and shoes, and another knowingly and intentionally procures it to be violated, he may be held liable for the wrong, although he did it for the purpose of promoting his own business. But it was not alleged the defendant in that case had any such purpose in procuring the persons to leave and abandon the employment of the plaintiff; the real grievance complained of being damage by the wanton and malicious act of defendant and others. In Haskins v. Royster, 70 N. C. 601, 16 Am. Rep. 780, it was held that if a person maliciously entices laborers or croppers on a farm to break their contract, and desert the service of their employer, damages may be recovered against him. But both those cases relate to rights and duties growing out of the relation of employer and persons agreeing to do labor and personal service, and do not apply here, except so far as the decisions rest upon other grounds than the statute of laborers. In Jones v. Stanly, 76 N. C. 355, it was, however, held that the same reasons which controlled the decisions rendered in Haskins v. Royster "cover every case in which one person maliciously persuades another to break any contract with a third person. It is not confined to contracts for service." But we have not seen any other case in which the doctrine is stated so broadly. Chesley v. King, 74 Me. 164, 43 Am. Rep. 569, we do not regard at all decisive, because the court went no further than to say they were inclined to the view that there may be cases where an act, otherwise lawful, when done for the sole purpose of damage to a per-

son, without design to benefit the doer or others, may be an invasion of the legal rights of such person. Cooley on Torts, 497, agreeing with Justice Coleridge, says: "An action cannot, in general, be maintained for inducing a third person to break his contract with the plaintiff; the consequence, after all, being only a broken contract, for which the party to the contract may have his remedy by suing upon it." And it seems to us that the rule harmonizes with both principle and policy, and to it there can be safely and consistently made but two classes of exception; for, as to make a contract binding, the parties must be competent to contract and do so freely, the natural and reasonable presumption is that each party enters into it with his eyes open, and purpose and expectation of looking alone to the other for redress in case of breach by him. One such exception was made by the English statute of laborers to apply where apprentices, menial servants, and others, whose sole means of living was manual labor, were enticed to leave their employment, and may be applied in this state in virtue of and as regulated by our own statutes. The other arises where a person has been procured against his will, or contrary to his purpose, by coercion or deception of another to break his contract. Green v. Button, 2 Cromp. M. & R. 707; Ashley v. Dixon, 48 N. Y. 430, 8 Am. Rep. 559. But as Wise was not induced by either force or fraud to break the contract in question, it must be regarded as having been done of his own will, and for his own benefit. And his voluntary and distinct act, not that of appellee, being the proximate cause of damage to appellants, they, according to a familiar and reasonable principle of law, cannot seek redress elsewhere than from him.

That an action on the case will lie whenever there is concurrence of actual damage to the plaintiff, and wrongful act by the defendant, is a truism, yet, unexplained, misleading. The act must not only be the direct cause of the damage, but a legal wrong, else it is damnum absque injuria. But whether a legal wrong has been done for which the law affords reparation in damages depends upon the nature of the act, and cannot be consistently or fitly made to depend upon the motive of the person doing it; for an act may be tortious, and consequently actionable, though not malicious, nor even willful. If it was not so, there could be no reparation for an act of pure negligence, though ever so hurtful in its effects. And it is just as plain that an act which does not of itself amount to a legal wrong, without, cannot be made so by a bad motive accompanying it; for there is no logical process by which a lawful act, done in a lawful way, can be transformed or not into a legal wrong according to the motive, bad or good, actuating the person doing it. The proposition is clearly and forcibly stated in Jenkins v. Fowler, 24 Pa. 308, as follows: "Malicious motives make a bad case worse, but they cannot make that wrong which in its own essence is lawful. Where a creditor who has a just debt brings a suit or issues execution, though he does it out of

pure enmity to the debtor, he is safe. In slander, if the defendant proves the words spoken to be true, his intention to injure the plaintiff by proclaiming his infamy will not defeat justification. One who prosecutes another for a crime need not show he was actuated by correct feelings, if he can prove that there was good reason to believe the charge was well founded. In short, any transaction which would be lawful if the parties were friends cannot be made the foundation of an action merely because they happen to be enemies. As long as a man keeps himself within the law by doing no act which violates it, we must leave his motives to Him who searches hearts." In Frazier v. Brown, 12 Ohio St. 294, the cause of action stated was diversion, with malicious intent, by the defendant of subterraneous water on his own land from adjoining land of the plaintiff; but it was held there could be no recovery, because, as said by the court, "the act done, to wit, the using of one's own property, being lawful in itself, the motive with which it is done,—whatever it may be as a matter of conscience,—is, in law a matter of indifference." In Chatfield v. Wilson, 28 Vt. 49, the action was for the same cause substantially, and the language of the court was: "An act legal in itself, and which violates no right, cannot be made actionable on account of the motive which induced it." In Mahan v. Brown, 13 Wend. (N. Y.) 261, 28 Am. Dec. 461, the complaint was that the defendant wantonly and maliciously erected on his own premises a high fence near to and in front of plaintiff's window, without benefit to himself, and for the sole purpose of annoying the plaintiff, thereby rendering her house uninhabitable. But it was held the action would not lie, because, no legal right of the plaintiff having been injured, the defendant had not so used his property as to injure another, and, whether his motive was good or bad, she had no legal cause of complaint. To the same effect is the decided weight of authority in the United States. Adler v. Fenton, 24 How. 412, 16 L. Ed. 696; Phelps v. Nowlen, 72 N. Y. 39, 28 Am. Rep. 93; Benjamin v. Wheeler, 8 Gray (Mass.) 410; Iron Co. v. Uhler, 75 Pa. 467, 15 Am. Rep. 599; Plank-Road Co. v. Douglass, 9 N. Y. 444.

Upon neither principle nor authority could this action have been maintained if the same thing it is complained appellee did had been done by a person on friendly terms with appellant Chambers, or by a stranger, though he might have profited by the purchase to the damage of appellants; for competition in every branch of business being not only lawful, but necessary and proper, no person should, or can upon principle, be made liable in damages for buying what may be freely offered for sale by a person having the right to sell, if done without fraud, merely because there may be a pre-existing contract between the seller and a rival in business, for a breach of which each party may have his legal remedy against the other. Nor, the right to buy existing, should it make any difference, in a legal aspect, what motive

influenced the purchaser. Competition frequently engenders, not only a spirit of rivalry, but enmity; and, if the motive influencing every business transaction that may result in injury or inconvenience to a business rival was made the test of its legality, litigation and strife would be vexatiously and unnecessarily increased, and the sale and exchange of commodities very much hindered. As pertinently inquired in Plank-Road Co. v. Douglass, "Independently of authority, if malignant motive is sufficient to make a man's dealings with his own property, when accompanied by damage to another, actionable, where is this principle to stop?" And as correctly said by Lord Coleridge in Bowen v. Hall: "The inquiries to which this view of the law [making an act lawful or not according to motive] would lead, are dangerous and inexpedient inquiries for courts of justice. Judges are not very fit for them, and juries are very unfit."

In our opinion, no cause of action is stated in the petition, and the demurrer was properly sustained. Judgment affirmed.[43]

BITTERMAN v. LOUISVILLE & N. R. CO.

(Supreme Court of the United States, 1907. 207 U. S. 205, 28 Sup. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693.)

Upon a bill filed on behalf of the Louisville & Nashville Railroad Company, the circuit court of the United States for the eastern district of Louisiana entered a decree perpetually enjoining Bitterman and four other ticket brokers, engaged in business in the city of New Orleans, from dealing in nontransferable round-trip tickets issued at reduced rates for passage over the lines of railway of the complainant on account of the United Confederate Veterans' Reunion and the Mardi Gras celebration held in the city of New Orleans in the years 1903 and 1904, respectively. On an appeal prosecuted by the railroad company, complaining of the limited relief awarded, the circuit court of appeals held that the defendants should also be enjoined generally from dealing in nontransferable round-trip reduced-rate tickets whenever issued by the complainant, and ordered the cause to be remanded to the circuit court with directions to enter a decree in accordance with the views expressed in the opinion. 75 C. C. A. 192, 144 Fed. 34. A writ of certiorari was thereupon allowed.

It was averred in the bill that complainant was a Kentucky corporation, operating about 3,000 miles of railway for the carriage of passengers, baggage, mail, express, and freight, its lines of road extending from New Orleans through various states, and making connections by which it reached all railroad stations in the United States, Canada, and Mexico. The persons named as defendants were averred to be citizens and residents of Louisiana, each engaged in the city of

[43] Accord, Boyson v. Thorn (1893) 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233.

New Orleans as a ticket broker or scalper in the business of buying and selling the unused return portions of railroad passenger tickets, especially excursion or special-rate tickets issued on occasions of fairs, expositions, conventions, and the like. It was further averred that the defendants were joined in the bill, "because their business and transactions complained of are in act, purpose, and effect identical, and in order to prevent a multiplicity of suits, the same relief being sought as to each and all of them."

Six articles or paragraphs of the bill related to an approaching reunion of United Confederate Veterans to be held in the city of New Orleans, which it was expected would necessitate the transportation by the railroads entering New Orleans of 100,000 visitors, one fourth of which number would pass over the lines of railway of the complainant. A necessity was alleged to exist for special reduced rates of fare to secure a large attendance at such reunion, and it was averred that a rate of 1 cent a mile, one-third the regular rate, had been agreed upon for nontransferable round-trip, reduced-rate tickets which were to be issued for the occasion, and it was stated "that among the conditions on the face of said ticket, which ticket contract is signed by the original purchaser and the company, is one that said ticket is nontransferable, and, if presented by any other than the original purchaser, who is required to sign the same at date of purchase, it will not be honored, but will be forfeited, and any agent or conductor of any of the lines over which it reads shall have the right to take up and cancel the entire ticket." And for various alleged reasons, based mainly upon the large number of expected purchasers, it was averred that the return portion of each ticket was not required to be signed by the original purchaser or presented to an agent of the complainant in the city of New Orleans for the purpose of the identification of the holder as the purchaser of the ticket.

It was averred that each defendant was accustomed to buy and sell the return coupons of nontransferable tickets, for the express purpose, and no other, of putting them in the hands of purchasers, to be fraudulently used for passage on the trains of complainant, and it was further averred that the defendants intended in like manner to fraudulently deal in the return portion of the tickets about to be issued for the reunion in question, and that complainant would sustain irreparable injury, for which it would have no adequate remedy at law, unless it was protected from such wrongful acts.

MR. JUSTICE WHITE, after stating the case, delivered the opinion of the court. * * * That the complainant had the lawful right to sell nontransferable tickets of the character alleged in the bill at reduced rates we think is not open to controversy, and that the condition of nontransferability and forfeiture embodied in such tickets was not only binding upon the original purchaser, but upon anyone who acquired such a ticket and attempted to use the same in violation of its terms, is also settled. Mosher v. St. Louis, I. M. & S. R. Co., 127 U.

S. 390, 32 L. Ed. 249, 8 Sup. Ct. 1324. See also Boylan v. Hot Springs R. Co., 132 U. S. 146, 33 L. Ed. 290, 10 Sup. Ct. 50. * * * Any third person acquiring a nontransferable reduced-rate railroad ticket from the original purchaser, being therefore bound by the clause forbidding transfer, and the ticket in the hands of all such persons being subject to forfeiture on an attempt being made to use the same for passage, it may well be questioned whether the purchaser of such ticket acquired anything more than a limited and qualified ownership thereof, and whether the carrier did not, for the purpose of enforcing the forfeiture, retain a subordinate interest in the ticket, amounting to a right of property therein, which a court of equity would protect. Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, 49 L. Ed. 1031, 25 Sup. Ct. 637, and authorities there cited. See also Sperry & H. Co. v. Mechanics' Clothing Co. (C. C.) 128 Fed. 800.

We pass this question, however, because the want of merit in the contention that the case as made did not disclose the commission of a legal wrong conclusively results from a previous decision of this court. The case is Angle v. Chicago, St. P., M. & O. R. Co., 151 U. S. 1, 38 L. Ed. 55, 14 Sup. Ct. 240, where it was held that an actionable wrong is committed by one "who maliciously interferes in a contract between two parties and induces one of them to break that contract to the injury of the other." That this principle embraces a case like the present, that is, the carrying on of the business of purchasing and selling nontransferable reduced-rate railroad tickets for profit, to the injury of the railroad company issuing such tickets, is, we think clear. It is not necessary that the ingredient of actual malice, in the sense of personal ill will, should exist to bring this controversy within the doctrine of the Angle Case. The wanton disregard of the rights of a carrier, causing injury to it, which the business of purchasing and selling nontransferable reduced-rate tickets of necessity involved, constitute legal malice within the doctrine of the Angle Case. We deem it unnecessary to restate the grounds upon which the ruling in the Angle Case was rested, or to trace the evolution of the principle in that case announced, because of the consideration given to the subject in the Angle Case and the full reference to the authorities which was made in the opinion in that case. * * *

Affirmed.[44]

[44] The statement of facts is abridged, and parts of the opinion are omitted.

NATIONAL PHONOGRAPH CO., Limited, v. EDISON-BELL CONSOLIDATED PHONOGRAPH CO., Limited.

(Court of Appeal. [1908] 1 Ch. 335.)

The plaintiffs were dealers in Edison phonographs, records, and blanks. To secure uniformity of price and prevent their business from being injured by any dealer cutting prices, the plaintiffs sold their goods only upon the terms of two printed documents, described as the "factor's agreement" and "the retail dealer's agreement" applicable to the wholesale and the retail trade respectively. Both the factor's agreement and the retail dealer's agreement provided that the plaintiff's goods should not be sold at less than current list prices, or to dealers on the plaintiffs' suspended list. The defendant company dealt in phonographic goods and wished to sell the plaintiffs' machines. The plaintiffs, however, for trade reasons, desired to prevent the defendant company from having this trade, and to that end placed their name on the suspended list. The defendant company sought to frustrate this design to embarrass them in their business.

In 1903 one Ell, a dealer in phonographic materials, became a customer of one of the plaintiffs' factors, Simpson & Co., for the purpose of obtaining through them the plaintiffs' goods. Simpson & Co., before doing business with Ell, required him to sign the retail dealer's agreement, which he accordingly did. Ell was also a customer of the defendant company, and had purchased goods from them. In 1904 Ell, as the result of an interview with one Presland, an employee of the defendant company, obtained twenty-seven of the plaintiffs' phonographs from Simpson & Co., and supplied them through Presland to the defendant company. Ell paid to Simpson & Co. the prescribed factor's price for the machines with money paid to him by the defendant company, making no profit himself out of the transaction.

In 1904, two persons, Hughes and Leach, acting on behalf of and with the authority of the defendant company, assumed fictitious names, and, representing falsely that they were independent dealers in phonographic goods, applied to wholesale dealers who had entered into factors' agreements with the plaintiffs, and, having signed retailers' agreements in fictitious names, obtained from the wholesale dealers a large number of the plaintiffs' machines with the usual trade discounts. These machines were in fact, though not to the knowledge of the wholesale dealers, obtained for and were handed over to the defendant company.

It appeared from the evidence that the defendant company sold phonograph records, which fitted the plaintiffs' machines, at a cheaper rate than the records sold by the plaintiffs (1s., as against 1s. 6d.), and that records were a better paying product than the machines themselves. It was stated that the defendant company had obtained

about 700 of the plaintiff's machines. The plaintiffs alleged that the acts of the defendant company of which they complained had caused them great injury in their business. No direct pecuniary loss was proved, but a general falling off of business was shewn, which, it was said, was due to the fact that the sale of the plaintiffs' machines by the defendant company caused a demand for the records of the defendant company rather than for those of the plaintiffs, whereas if the plaintiffs' machines could only be obtained by the public from retailers who had signed the plaintiffs' retailer's agreement, the retailers would have obtained from the factors, and the public from the retailers, the plaintiff's records; it was also said that persons going to the defendant company's place of business to purchase the plaintiffs' machines might ultimately be induced to purchase the defendant company's machines instead of the plaintiff's, and it was further said that the plaintiffs' business would be injured by the acts of the defendant company, because if retailers saw that the plaintiffs' machines were being sold by the defendant company, and knew that the defendant company were on the suspended list, the retailers would think that the plaintiffs were incapable of maintaining their agreements, and would consequently cease to stock the plaintiffs' goods.

In respect of both these transactions—the Ell transaction and the Hughes and Leach transaction—the plaintiffs sued for an injunction and damages. The action came on for hearing before Joyce, J., who held that it failed altogether, and dismissed it with costs. The plaintiffs appealed to the Court of Appeal.[45]

KENNEDY, L. J., read the following judgment: In this case the plaintiffs' claim for damages and an injunction is based upon two distinct sets of circumstances, with which I will deal in the same order as that in which they have been dealt with in the judgment appealed against. The real defendant is the defendant company. The other defendants are practically nominal defendants only. The plaintiffs deal in phonographs and phonographic goods. These they sell to wholesale traders, whom they call factors, and they in their turn resell to retail dealers. The plaintiffs act upon a system of restrictive and exclusive trading. They exact from the factors who purchase from them an agreement not to sell to retail dealers except for certain discounts which the plaintiffs prescribe; not to sell to any retail dealers who decline to sign an agreement form to which I will presently refer;

[45] The statement of facts is abridged, and the arguments of counsel are omitted.

For the defendant it was urged by Hughes, K. C., and J. G. Wood that "neither Quinn v. Leathem nor South Wales Miners' Federation v. Glamorgan Coal Co. has anything to do with this case. In the former there was a conspiracy deliberately to injure, and in the latter case the miners were induced to break their contract in order to coerce the masters, and there necessarily was loss to the masters. With regard to the complaint that the defendants obtained goods by using fictitious names, it is not wrongful or a tort to buy goods under an alias. The only result is that the seller's malicious intent to boycott is frustrated."

and not to sell to any person whose name is on a list which they describe as "our suspended list," and which, although it is in the agreement itself only stated to include those who are referred to in the seventh condition, is a list in which the plaintiffs include the name of any person whom they choose in this way to proscribe. If a factor fails to observe any of these or certain further stipulations of the agreement, he may be at once cut off from any further supply of goods and be placed on the suspended list. The retail dealer's agreement, which he must sign and give to the factor before he can buy from the factor, purports to bind the retail dealer (inter alia) not to sell to any one at a discount or at less than current list prices, or to any dealer who is on the plaintiffs' suspended list. If a retail dealer fails to observe any of the stipulations, he may be placed by the plaintiffs on their suspended list, and so be cut off from any further supply of goods. The justification alleged by the plaintiffs for this system consists, as alleged by them, in the maintenance of price and the encouragement to hold large stocks of the plaintiffs' wares, which the assurance of this is said to afford to factors and dealers. * * *[46]

The learned judge has given judgment for the defendants in regard to both of the transactions.

In regard to the first, which I will call the Ell transaction, he has held, first, that there was no contract existing between the plaintiffs and Ell upon which the plaintiffs could have successfully sued Ell; secondly, that the plaintiffs failed to prove that the defendant company or Presland directly procured or incited Ell to violate the contract, if any existed; thirdly, that, if any contract existed between the plaintiffs and Ell, it did not create a contractual relation between them within the meaning of Lord Macnaghten's judgment in Quinn v. Leathem, [1901] A. C. 495; and fourthly, that the plaintiffs had failed to prove the real and actual damage which was essential to their case. I agree with Joyce, J., as to the first of these grounds; as to the second, which is one of fact, I should be slow to differ from the learned judge who himself heard the witnesses give their testimony. If either of these conclusions is correct the plaintiffs' claim on this part of their case fails, and it is unnecessary for the purposes of this appeal to consider the third and fourth grounds on which the learned judge has also decided adversely to the plaintiffs. I reserve, till I deal with the Leach and Hughes case, any consideration of the question of damage. But, as the question of contractual relation involves a legal point of much general importance, and as, with sincere respect, I am not disposed to concur in the view which Joyce, J., has expressed, I do not think that, whilst agreeing for other reasons with the result of his judgment on this branch of the case, I ought to pass over the point altogether without comment. The learned judge holds that a valid contract by A. with B. not to do a particular act or acts

[46] Part of the opinion, stating the facts of the two transactions, is omitted.

—for instance, not to purchase goods from or sell goods to C.—does not constitute a contractual relation in the sense in which Lord Macnaghten must be understood to have used that phrase in Quinn v. Leathem, [1901] A. C. 495, and in substance, as I understand his judgment, that an action at the suit of B. against one who procured or incited A. to break his contract not to do the particular act or acts could not properly be based upon any principles which are laid down in such cases as Lumley v. Gye, 2 E. & B. 216, Quinn v. Leathem, [1901] A. C. 495, and South Wales Miners' Federation v. Glamorgan Coal Co., [1905] A. C. 239. Now, I agree that in these cases, as well as in Bowen v. Hall, 6 Q. B. D. 333, and Temperton v. Russell, [1893] 1 Q. B. 715, the contractual relation, which the parties sued in those cases were held to have unlawfully interrupted, involved something more than an obligation to abstain from doing a particular act or acts. In each case there subsisted between the contracting parties, by virtue of the contract, that which, for want of a better phrase, I think might be described as a more or less continuous course of dealing, as, for example, of personal service, though the case is not confined to personal service, of which without justification the party sued had successfully tried to procure the rupture. I agree with the defendants' counsel that the decision of the Court of Appeal in Exchange Telegraph Co. v. Gregory & Co., [1896] 1 Q. B. 147, 157, cited by the plaintiffs, does not throw light upon this part of the case when carefully looked at. That decision as is correctly stated at the close of the head-note in the Law Reports, simply was that the plaintiffs in that case had a right of property at common law, and were entitled to an injunction to restrain the defendant from infringing that right. And indeed, in the following passage in his judgment Rigby, L. J., suggested that there is some limitation: "It is not every procuring of a breach of contract that will give a right of action." [47]

[47] On this remark by Rigby, J., this comment is made by Joyce, J., in the principal case, [1908] 1 Ch. 335, 350: "For instance, sometimes it happens that a lady, having contracted to marry A., is induced to change her mind and marry B., as, it must be presumed, upon a pressing invitation by him to do so. If B. was aware of the lady's previous engagement to A., can A., instead of bringing an action for breach of promise against the lady, recover damages in an action of tort against her husband B., upon the ground that he has interfered with a contractual relation between the lady and A. and induced her to break her contract? Could A., if he commenced his action soon enough, obtain an injunction against B. to restrain him from procuring the lady to marry him? If the contention of the counsel of the plaintiffs before me be correct, these questions would have to be answered in the affirmative. Again, suppose A. is employed by B., with a stipulation that after the termination of the engagement he shall not enter into any similar employment in the same neighbourhood, then suppose A., being no longer employed by B., enters the service of C., carrying on a similar business in the same town, can B. sue C. for damages and obtain an injunction to prevent his employing A. when he is no longer in the service of B.? We have heard lately that publishers, when they issue a book at a net price, stipulate that the booksellers they supply shall not resell within six months at less than such net price. Does any one who, within six months from the publication of such a book at a net price, asks, or if you like induces, the bookseller to let him have a copy for less than the net price, render himself liable to an action at the suit of the publisher?"

I am not aware of any case in which the line or nature of the limitation has been defined. But, if it had been necessary, which it is not, to decide the point, I do not see how, in view of the decisions of the House of Lords to which I have just referred, and of the language used by Lord Watson in Allen v. Flood, Lord Lindley in Quinn v. Leathem, and Lord Macnaghten in the same case, I could concur with Joyce, J., if he has held that in no circumstances could the intentional procurement of a breach of contract not to do a particular act constitute in law an actionable wrong.

The case made out by the plaintiffs in regard to the Hughes and Leach transactions appears to me to differ, in important respects, from the Ell transaction. By intentional misrepresentations the defendant company, through their agents or servants, procured from the factors goods of the plaintiffs' manufacture which the factors would not have parted with if they had known that the persons with whom they were dealing were agents or servants of a firm included in the suspended list. There has been, in a sense, a sale contrary to the terms and the intention of the factor's agreement. Then comes the question, Did such a transaction constitute, on the part of the factors, in each case an actionable violation of their contract with the plaintiffs, which I assume to be valid in point of law? I do not think it did. The factors did not know, or have reason to suppose, that they were selling to the defendants; on the contrary, they were intentionally misled by Hughes and Leach into the belief that they were selling to independent retail dealers, who had their own places of business and were in no way connected with the defendants. The names given by Hughes and Leach were not names on the suspended list. It seems to me that a sale honestly made by a factor under these circumstances ought not, according to the proper interpretation of the agreement, to be held to be a sale to a person on the suspended list, and, as such, constituting a breach of the agreement. The defendants' counsel contended that, if this be so—if the plaintiffs could not successfully sue the factor for damages or justly place him on the suspended list under the seventh condition—the plaintiffs' case at once fails, because (they argue) the defendants' stratagem, however reprehensible, did not produce a violation by the factors of the contracts with the plaintiffs. I think that this is too narrow a view. I am certainly disposed to hold that if A., who knows that B., the producer of an article, has stipulated in selling it to C., the factor, that he shall not resell it to A., procures by an intentional misrepresentation to C. a sale to himself, he has committed towards B. an actionable wrong provided that B. can prove he has been thereby damaged, although, in the particular circumstances, B. may have no cause of action against C. in respect of the transaction. I agree with the defendants' counsel that Exchange Telegraph Co. v. Gregory & Co., [1896] 1 Q. B. 147, is not an authority for such a proposition, for in that case the subscriber who improperly supplied the

defendant with the information in which the plaintiffs had proprietary rights must have known that he was violating his contract with the plaintiffs in so doing. There is no suggestion in the case, as reported, that he did not. But I think a sufficient declaration of the soundness of the view which I have expressed appears in a passage in the judgment of Bowen, L. J., in Mogul Steamship Co. v. McGregor, Gow & Co., 23 Q. B. D. 614, to which my attention has been drawn: "No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it." And in Allen v. Flood, [1898] A. C. 96, Lord Watson remarks: "When the act induced is within the right of the immediate actor and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case, according to the law laid down by the majority in Lumley v. Gye, 2 E. & B. 216, the inducer may be held liable if he can be shewn to have procured his object by the use of illegal means directed against that third party." [48]

WEST VIRGINIA TRANSP. CO. v. STANDARD OIL CO. et al.

(Supreme Court of Appeals of West Virginia, 1902. 50 W. Va. 611, 40 S. E. 591, 56 L. R. A. 804, 88 Am. St. Rep. 895.)

Trespass on the case against the Standard Oil Company and the Eureka Pipe Line Company. A demurrer to the declaration, which was framed in two counts, was sustained by the Circuit Court, and the plaintiff brings error.[49]

BRANNON, J. * * * What wrongful acts does this first count state? The formation of trade combination—call it "monopoly"—is not actionable alone. How far the grant of exclusive privilege by the state (and this is the only monopoly, legally speaking) is valid when its right is contested, is one thing. We are not dealing with that. This monopoly is not that. It is the act of persons and corporations, by union of means and effort, drawing to themselves, in the field of competition, the lion's share of trade. This is not monopoly condemned by law. * * *

Observe the question here is not one of enforcing a contract in favor of a monopoly, or of determining whether its conditions are

[48] The opinions of Lord Alverstone, C. J., and Buckley, L. J., are omitted. The result of the case was that "the defendant company agreed to an injunction in the form suggested by Buckley, L. J.;" that is, "to restrain the defendant company, their servants and agents, from inducing any persons or firms who have entered into factors' agreements with the plaintiff company to deal with the defendant company in goods of the plaintiff company by representing or leading to the belief that the purchaser is not the defendant company."

[49] The statement of facts is abridged.

reasonable; not a question of how far the courts would go to enforce a contract between the Standard Oil Company and producers, or between the Eureka Company and producers binding the latter to transport oil only over that line; not a proceeding by the state to forfeit a charter for misuse. The question here is, has the company, by illegal act, violated the rights of the plaintiff? Counsel for plaintiff put emphasis on the charge of conspiracy and malice; but there can be no conspiracy to do a legitimate act,—an act which the law allows,—nor malice therein. To give action there must not only be conspiracy, but conspiracy to do a wrongful act. If the act is lawful, no matter how many unite to do it. Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319. "A conspiracy cannot be made the subject of an action, though damages result, unless something is done which, without the conspiracy, would give right of action. The true test as to whether such action will lie is whether the act accomplished after the conspiracy is formed is itself actionable." Delz v. Winfree, 80 Tex. 400, 16 S. W. 111, 26 Am. St. Rep. 755. An agreement to get trade into your own hands,—that being the sole purpose,—though it harm others, is not actionable. Steamship Co. v. McGregor, 21 Q. B. Div. 544, 23 Q. B. Div. 598 (see note below); Huttley v. Simmons, [1898] 1 Q. B. Div. 181. The case cited by counsel (Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173, 8 Am. Rep. 159), was a combination of coal companies to enhance prices to the public. So People v. Sheldon, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. Rep. 690, and People v. Milk Exchange, 145 N. Y. 267, 39 N. E. 1062, 27 L. R. A. 437, 45 Am. St. Rep. 609, involved right of a corporation to fix prices of milk, and it was declared against public policy, so as to forfeit charter. Jackson v. Stanfield, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588, comes nearer the point, though it, too, has in it the element of an agreement harmful to the public, and is not a case where owners of property and business, as here, seek to further their interests by inducing others to trade with them, and not with competitors. There it was a pure agreement to compel others not to deal with a party (a boycott), not, as in this instance, to compel persons to deal with the defendants. State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541, was an agreement to control production and prices against the public interests, and was a proceeding by the state to withdraw a charter, not an action by an individual on the theory of private injury. I do not say that an individual damaged by a combination against public policy and law cannot sue. I say he can. In Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319, it is held that "any man, unless under contract obligation, or unless his employment charges him with some public duty, has right to refuse to work for or deal with any man or class of men, as he sees fit; and this right, which one man may exercise singly,

any number may exercise jointly." The wholesale merchants refuse to deal with consumers in favor of retail dealers. Can we consumers sue them? "He may refuse to deal with any man or class of men. It is no crime for any number of persons, without any unlawful object in view, to associate and agree that they will not work for or deal with certain men, or classes of men, or work under a certain price, or without certain conditions." Carew v. Rutherford, 106 Mass. 1, 14, 8 Am. Rep. 287. The great Chief Justice Shaw said that the legality of the association depends upon its object, and whether it be innocent or otherwise. Com. v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346. The law allows men to combine to obtain a lawful benefit to themselves. Greenh. Pub. Pol. 651. In Olive v. Van Patten, 7 Tex. Civ. App. 630, 25 S. W. 428, while condemning the particular act involved in that case, the court declared the right to compete, though it injured the plaintiff. "This would be legitimate. They could do this without responsibility for injurious consequence to the plaintiff's business; but they could not, without some legal purpose directly serving their own business, maliciously induce others not to trade with the plaintiff." Who can say that the acts attributed to the defendants did not benefit them? Had they done these acts to benefit strangers, from malice, it would be different. Now, these companies were furthering their own interests in lawful competition with others. If they possessed the lawful right above stated, what matters it that they did have the intent to cut down the business of others, or that they did cut it down and injure others, though they did this that they might themselves fatten? So far this first count charges only the exercise by the defendants of a right of constitutional liberty, accorded alike to all,—simply the right of self-advancement in legitimate business,—self-preservation, we may say. * * *

Second Count. It specifies as its pointed gravamen that the defendants and Shattuck conspired to destroy the plant and business of the plaintiff, and did by threats and unfair means oblige persons owning and producing oil to ship it by other means of transportation than those of the plaintiff, which persons had before been the customers of the plaintiff; and that the West Virginia Oil Company and Shattuck notified such customers not to ship any oil over the plaintiff's line, and not to permit plaintiff to do any business in transporting oil, so far as such customers could prevent it. While the first count does, the second count does not, state that the defendants were engaged in the business of buying, refining, and transporting oil as competitors with the plaintiff, and thus present a justification for their action, but simply charges that they interfered unlawfully and maliciously with the plaintiff's business, with malign purpose to destroy it. This, I think, is a legal cause of action. It is argued for the defendants that it is not stated that the plaintiff had contracts with its patrons with which the defendants interfered, and without right in-

duced such patrons to break such contracts; and that, as such customers had right to deal with whom they pleased, the defendants could not commit an actionable wrong in inducing them to withdraw their usual patronage from the plaintiff. But it does seem to me that, though those customers had such right, it did not impart to the defendants any right and immunity to step in between them and the plaintiff, and induce those customers to withdraw their patronage, not for the benefit of the defendants in the exercise of the right of free competition, but in malice only to injure and destroy the plaintiff. Cases above cited show this. In Delz v. Winfree, 80 Tex. 400, 16 S. W. 111, 26 Am. St. Rep. 755, it is held that while one has a right to deal with whom he pleases, yet this right is limited to him, and does not give another the right to influence him not to deal. It is an officious act, hurtful to another, not done in legitimate competition, without just excuse, done only to injure a fellow. It is a "boycott." Cook, Trade & Labor Combin. § 9; Crump's Case, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895; Beach, Monop. 311, 322. "In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action on the case to be repaired in damages. The intentional causing of such loss to another, without justifiable cause, and with the malicious purpose to inflict it, is of itself a wrong." Walker v. Cronin, 107 Mass. 555; Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287. "Every one has a right to enjoy the fruits of his own enterprise, industry, skill, and credit. He has no right to be protected against skill and competition, but he has a right to be free from malicious and wanton interference, disturbance, and annoyance. If disturbance and annoyance come as a result of competition, or the execution of like rights by others, it is damnum absque injuria, unless some superior right by contract or otherwise is interfered with. But if it comes from the mere wanton or malicious acts of others, without the justification of competition, or the service of any interest or lawful purpose, it then stands on a different footing," and the wrong is actionable. Walker v. Cronin, supra; 1 Eddy, Trade Comb. § 480.

Counsel for defendants, in answer to the second count, take the position that no contract is stated as subsisting between the plaintiff and its patrons, and that the defendants are not charged with inducing the violation of any contract, and that as these patrons of the plaintiff had perfect right to withhold their patronage, and could not be sued for so doing, the defendants did no legal wrong in inducing those patrons to do so. I do not concur in this view. The authorities above logically repel it. That there is no binding contract between employer and employé, or between the trader and his usual customers, makes no difference. Presumably, the customers would have continued their voluntary patronage but for the wrongful intervention and influence of the intervener. I think this contention is met by Chipley v. Atkinson, 23 Fla. 206, 1 South. 934, 11 Am. St. Rep. 367; Benton v. Pratt,

2 Wend. (N. Y.) 385, 20 Am. Dec. 623; Rice v. Manley, 66 N. Y. 82, 23 Am. Rep. 30.

I understand the law to be as follows: One may without liability induce the customers of another to withdraw their custom from him, in the race of competition, in order that the former may himself get the custom, there being no contract; and it is no matter that such person is injured, and it is no matter that the other party was moved by express intent to injure him; motive being immaterial where the act is not unlawful. But where the act is not done under the right of competition, or under the cover of friendly, neighborly counsel, but wantonly or maliciously, with intent to injure another, it is actionable, if loss ensue. Nor is it material in the latter case that there was no binding contract between the business man and his customers. * * * [50]

DUNSHEE v. STANDARD OIL CO. et al.

(Supreme Court of Iowa, 1911. 152 Iowa, 618, 132 N. W. 371, 36 L. R. A. [N. S.] 263.)

This was an action at law against the Standard Oil Company and others, to recover damages for an alleged unlawful interference with the trade of plaintiff's assignor. The judgment below was for the plaintiff, and the defendants appealed. There was an appeal by the plaintiff also, but in the discussion of the case the defendants only are spoken of as appellants.

WEAVER, J. During all the period covered by this controversy, the Standard Oil Company has been a wholesale dealer in oil at the city of Des Moines. In the year 1893 the Crystal Oil Company (plaintiff's assignor), a local corporation, entered the retail trade in oil, selling its goods from tank wagons hauled about the streets, and delivered to its customers at their homes. Its business grew from year to year until, in 1898, it employed from four to eight wagons, covering the territory of the city very generally. During the period mentioned, the Crystal Company purchased its supplies from the defendant, but in 1898 it for some reason began to make purchases from other wholesale dealers. Trouble at once ensued. The defendant, which, up to that time, had abstained from the retail trade, proceeded to equip itself with tank wagons, teams, and drivers substantially equal in number to those of the Crystal Company, and began active solicitation for the patronage of the "ultimate consumer." At the end of some months of strife, the Crystal Company abandoned the contest and quit the business at a loss, claiming to have been driven out by the tactics of its rival. The plaintiff, as assignee of said com-

[50] A considerable portion of the opinion is omitted. The case was reversed and remanded, but apparently not exclusively for the reasons given above.

pany, brings this action for damages, alleging a conspiracy between the Standard Oil Company and its managers, agents, and employés to ruin the business of said Crystal Company, and setting forth alleged wrongful acts done in pursuance of such conspiracy by which said company's business was destroyed. * * *

1. Upon the issues of fact, we shall attempt no general review of the testimony. For present purposes it is enough to say that the case as made by the plaintiff tends strongly to show that defendant installed its scheme of retail distribution of oil in the city of Des Moines not for the purpose of establishing a retail trade, but as a mere temporary expedient to drive out the Crystal Company, and that, this being accomplished and having the field to itself, it withdrew its wagons and drivers, and gave its whole attention to its wholesale business. In the prosecution of its business, the Crystal Company was accustomed to supply its customers with cards to be displayed from a window or other conspicuous place, indicating a desire to purchase oil and inviting the distributor to stop and furnish the needed supply. The evidence further tends to show that when the Standard entered the field its drivers were directed to give special attention to the Crystal Company's "green cards," and that, at the outset at least, there was little or no attempt to build up a retail trade with the public generally, but to take away or destroy the trade of the Crystal Company. Some of the witnesses say the Standard's drivers would make it a point to get in advance of the Crystal's wagons, and wherever a green card was displayed would stop and make the sale if possible, sometimes permitting the buyer to suppose that he or she was dealing with a Crystal agent, and in other cases appropriating or carrying away the Crystal's cards. The Standard's hand in these efforts was not disclosed to the public. The drivers were instructed to do business ostensibly as independent dealers driving their own wagons, none of which were marked with the Standard's name, though in fact the outfits were furnished and all expenses paid by it, and the entire business was carried on under the secret management of its agent, who held frequent meetings with the drivers, urging them to "go after the green cards," to "hustle the green cards," to "go after the Crystal Oil Company," and at the same time cautioned them to "keep quiet" about the real ownership and management. It is further testified that when the Crystal Company had been eliminated the manager in charge had a final meeting of the drivers at his residence, where he said, "The fight is over and we have bought them out." Plaintiff also shows that defendants' movement in the matter followed closely upon the Crystal Company's exercise of its right to purchase part of its oil from another dealer, and had refused to yield to the Standard's insistence that it wanted "all or none" of the Crystal's trade. In short, the record as a whole is sufficient to justify the inference that the real end sought to be accomplished was to bar or

exclude from the retail trade one who would not give the Standard Company, as a wholesale dealer, its exclusive patronage. The defendants take issue upon the charge as thus preferred, but the jury could properly find the facts to be as above outlined.

As we understand appellants' contention, it is that their conduct did not transgress the bounds of legitimate competition, and that so long as they kept within this limitation the question of the alleged malice or motive inspiring their acts is wholly immaterial. Cases involving the question thus suggested have frequently arisen, both in this country and in England, and there is much inharmony in the expressions of judicial opinion thereon. Many authorities may be found holding without apparent qualification or exception, that the law takes no account whatever of motives as constituting an element of civil wrong. In other words, if a man do a thing which is otherwise lawful, the fact that he does it maliciously and for the express purpose of injuring his neighbor affords the latter no remedy at law. Such is the net effect of Raycroft v. Tayntor, 68 Vt. 219, 35 Atl. 53, 33 L. R. A. 225, 54 Am. St. Rep. 882; Jenkins v. Fowler, 24 Pa. 308, and others of that class. If this be the correct view of the law, a man may excavate the earth near the boundary of his own land for the mere purpose of seeing the foundation of the house of his neighbor slide into the pit thus prepared for it; he may dig through his own soil to the subterranean sources of his neighbor's spring or well and divert the water into a ditch, where it will serve no purpose of use or profit to himself or any one else; if a banker or merchant, he may punish the blacksmith who refuses to patronize him by temporarily establishing a shop on the next lot and hiring men to shoe horses without money and without price, until he has driven the offending smith to come to his terms or to go out of business; and if a farmer, dependent upon a subterranean supply of water for the irrigation of his soil or watering of his live stock, he may contrive to ruin his competing neighbor by wasting the surplus not reasonably required for his own use. The laws of competition in business are harsh enough at best; but if the rule here suggested were to be carried to its logical and seemingly unavoidable extreme there is no practical limit to the wrongs which may be justified upon the theory that "it is business." Fortunately, we think, there has for many years been a distinct and growing tendency of the courts to look beneath the letter of the law and give some effect to its beneficent spirit, thereby preventing the perversion of the rules intended for the protection of human rights into engines of oppression and wrong. It is doubtless true that under many circumstances an act is legally right and defensible without regard to the motive which induces or characterizes it; but there is abundance of authority for saying that this is by no means the universal rule, and that an act which is legally right when done without malice may become legally wrong when done malicious-

ly, wantonly, or without reasonable cause. * * *[51] In Parkinson v. Council, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165, the court, while reaching the opposite conclusion generally, concedes it to be the law that: "Any injury to a lawful business, whether the result of conspiracy or not, is prima facie actionable, but may be defended on the ground that it was merely a lawful effort of the defendants to promote their own welfare. To defeat this plea of justification, the plaintiff may offer evidence that the acts of the defendants were inspired by express malice, and were done for the purpose of injuring the plaintiff, and not to benefit themselves." * * *[52]

Coming to the case in hand, we may concede to the appellants the undoubted right to establish a retail oil business in Des Moines, to employ agents and drivers, and send them out over the same routes and make sales to the same people with whom the Crystal Oil Company was dealing; but in so doing it was bound to conduct such business with reasonable regard and consideration for the equal right of the Crystal Company to continue supplying oil to such of its customers as desired to remain with it. If, however, there was no real purpose or desire to establish a competing business, but, under the guise or pretense of competition, to accomplish a malicious purpose to ruin the Crystal Company or drive it out of business, intending themselves to retire therefrom when their end had been secured, then they can claim no immunity under the rules of law which recognize and protect competition between dealers in the same line of business seeking in good faith the patronage of the same people. And if, under such pretense of competition, defendants maliciously interfered with the business of the Crystal Oil Company in the manner charged, and injury to the latter was thereby inflicted, a right of action exists for the recovery of damages. It may be conceded that authorities are not wanting to sustain the position that, even though the Standard Oil Company had no intention of becoming a retail dealer in oil in Des Moines, but entered the business of selling oil in this manner temporarily, for the sole purpose of driving the Crystal Company out, it is a matter into which the courts will not inquire; but we think such precedents are out of harmony with fundamental principles of justice, which, as we have said, underlie the law, as well as out of harmony with the later and better-considered cases. True the Standard Company, as a wholesale dealer, would violate no law in offering its product for sale at retail at half price in the territory supplied by the Crystal Company, but such fact, if proven, would have a distinct bearing upon the reasonableness of its methods employed in divert-

[51] Judge Weaver here cited a number of authorities, and quoted from Van Horn v. Van Horn (1890) 52 N. J. Law, 284, 20 Atl. 485, 10 L. R. A. 184.

[52] Huskie v. Griffin (1909) 75 N. H. 345, 74 Atl. 595, 27 L. R. A. (N. S.) 966, 139 Am. St. Rep. 718, given in text, ante, 1251, is here quoted at length, and other cases are cited.

ing trade from said company, as well as upon the charge that in interfering between the Crystal Company and its customers the Standard Company was actuated by malice or spirit of wanton assault upon the business of another, who had given it offense. * * *[53] No man entering or carrying on business has any right to demand protection against fair competition, and if he cannot meet it and succeed he must expect to fail, and for losses and injuries resulting the law affords him no remedy. But if competition be "war," in which "everything is fair," or if it be so regarded by those who participate therein, certainly the law will not give that doctrine its sanction. It follows of necessity that the trial court did not err in refusing to direct a verdict in defendants' favor.

2. In ruling upon the defendants' motion for a directed verdict, the trial court seems to have held or suggested that proof that defendants, in pursuance of their alleged conspiracy, had interfered with contracts made between the Crystal Company and its patrons would give rise to a cause of action, and upon the final submission of the cause it instructed the jury, as a matter of law, that the display of the green cards were orders upon the Crystal Company for the delivery of oil, and that a malicious interference by the defendants with the filling of such orders by the Crystal Company would be a wrong for which an action would lie, if such interference was in pursuance of a conspiracy between the defendants to injure the business of said company. Of this instruction both parties complain, and we are inclined to the view that it cannot be sustained as broadly as stated.

Referring, first, to plaintiff's exception, we think the proposition last stated places a too narrow construction upon the rule of law here applicable, in that it seems to require, not only the proof of a malicious wrong and injury therefrom, but further proof that such wrong was done in pursuance of a conspiracy previously formed. The gravamen of the charge made is not the alleged conspiracy, but the wrong done to the plaintiff's assignor, and if the wrong is sufficiently established by the evidence a recovery may be had by the party injured, although there be a failure of proof of the conspiracy.

The defendants' exception to the instruction is that the display of the cards by the Crystal Company's customers cannot be said as a matter of law, to constitute orders upon that company. The point is well made. True, if there were some prior arrangement or agreement with a customer by which the display of a card would evidence a definite order, such act might be as effective as the sending of a written request to the company for a stated quantity of oil at a definite price; but the record does not disclose such a state of facts, and we think that, so far as the evidence goes, the display should be

[53] The court here quotes from Tuttle v. Buck (1909) 107 Minn. 145, 119 N. W. 946, 22 L. R. A. (N. S.) 599, 131 Am. St. Rep. 446, 16 Ann. Cas. 807, given in text, ante, p. 1216, as illustrating the principle.

treated rather as a notice or invitation to the Crystal Company's drivers, observance of which on their part would lead to a sale.

But we are not of the opinion that an actual contract must exist before wanton interference by a third party would amount to a legal wrong. For illustration, if, instead of displaying cards, it was the habit of the Crystal Company's customers to communicate their wants by messenger or by telephone, and that defendant in the zeal of competition should maliciously intercept the messenger and induce him to reveal the nature of his errand, or should maliciously tap the telephone wire and with the advantage thus acquired should rush their wagons to the front and deprive the company of the sales which it would otherwise have made, we think no advocate of the widest allowable license of unrestricted competition would contend that this would not constitute a legal wrong, even though the conduct complained of did not in fact amount to an interference with an existing contract. For the same reason we think the defendants could not, upon the plea of competition, justify any malicious interference with existing contracts or orders of the Crystal Company, or interfere with or remove the cards posted as an invitation or notice to said company for the delivery of oil; but we think the court cannot assume to say, as a matter of law, that the display of such cards constituted in itself either a contract or order. It may be open to some question whether the error of the instruction was of a prejudicial character, but, taking the record as a whole, we think it the safer conclusion to solve that doubt in the appellants' favor.

3. The trial court correctly instructed the jury that, if plaintiff had established his right to recover because of the wrongful and malicious acts of the defendants as charged, he was entitled to a verdict for the actual damages so sustained by the Crystal Company, to which sum the jury were at liberty to add exemplary damages. It also, in another connection and in a general way, told the jury that, if found entitled to recover, plaintiff should also be allowed interest on the damages so sustained. The jury returned a general verdict for plaintiff for a sum stated in round numbers, but not indicating what part, if any, of said amount was allowed as exemplary damages. Neither does it indicate how much of the verdict is for interest, nor on what part of it interest was computed. The point is made that interest is not allowable upon exemplary damages, and as there are no data or basis from which to determine what part of the verdict represents damages of that kind there is no way in which the court can cure or remove the prejudice. We see no way to avoid the force of this objection. It may be that little or no allowance was made for exemplary damages; it may also be that no interest was computed; but there is nothing by which to determine that fact. It may also be that much the larger part of the verdict was for exemplary damages, and if so, and interest was computed thereon (as the jury under the court's charge may have felt authorized to do), the amount of the recovery

must have been very materially increased by that item. Interest as such upon exemplary damages is not recoverable. 16 Am. & Eng. Ency. Law (2d Ed.) 1031. The error is one which is not amenable to correction in this court, except by an order for a new trial. * * *

For the reasons stated, the judgment of the district court is reversed, and the cause remanded for a new trial.

Reversed.[54]

BOGGS v. DUNCAN-SCHELL FURNITURE CO.

(Supreme Court of Iowa, 1913. 163 Iowa, 106, 143 N. W. 482, L. R. A. 1915B, 1196.)

This action was brought against the Duncan-Schell Furniture Company to recover damages for an alleged injury to the plaintiff's business. The plaintiff claimed that on February 1, 1910, he was the exclusive agent for the sale of the New Improved White sewing machine in Lee county and adjoining counties; that the defendant Duncan-Schell Furniture Company, prior to that time, had been selling the same machines for profit, or as agents for the said sewing machine company; that, after plaintiff had secured the sole and exclusive agency for said machine, and while he was selling the same as agent, the defendants, for the purpose of destroying plaintiff's business, and breaking him up financially, and putting him out of business, maliciously and willfully procured various old styles of said White sewing machine, and advertised the same at a price of $24.75, and published that they were selling the latest improved drop head White sewing machine for that price, the same kind of machine which the plaintiff was handling, and was selling for $45; that the selling price of the sewing machines, and the price at which the defendants sold the machine during the time the defendant company was the agent, was $45; that defendants further advertised and published that they had just received new White sewing machines, both rotary and vibrator, which they would sell at $24.75; that they did not have any such machines, and the statement that they had just received them was untrue; that the defendants had not received, at any time, any new White sewing machines of the rotary type; that they further falsely said that the machines just received by them were of the latest pattern of said machine. The usual market price of the latest improved White sewing machine was $45, and the defendants knew this at the time. Plaintiff says all the foregoing acts were committed by the defendants willfully and maliciously, and for the sole purpose of driving the plaintiff out of business in the sale of his machines, and for the purpose of falsely putting the plaintiff in the light of a dishonest dealer, and unworthy of patronage, in that he was attempting to sell a $25 ma-

[54] Parts of the opinion are omitted.

chine for $45. Defendants' answer to plaintiff's claim is a general denial. Upon the issues thus tendered, the cause was tried to a jury, and resulted in a verdict and judgment for the plaintiff. The defendants appealed.

On the trial these facts appeared in the evidence:

The defendant Duncan inserted the following advertisments in one of the daily papers published in Keokuk on or about March 2d:

"Duncan-Schell Furniture Co. March Sale Special.

"[Followed by a cut of a White Sewing Machine.]

"Automatic Drop Lift White Sewing Machine, both Vibratory and Rotary, Latest Pattern.....$24.75"

And again:

"March Sale Prices on Sewing Machines.

"More White Machines just received. March Sale price on White Sewing Machines, the latest patterns, both Vibratory and Rotary....$24.75"

Again:

"March Sale on Special Sewing Machines.

"[With cut of White Machine in advertisement.]

"More White Sewing Machines just received.

"March Sale Special.

"White Sewing Machines in latest patterns, both vibratory and rotary .....$24.75"

Again, with the same heading:

"The March Sale of Drop Head White Sewing Machines of the latest pattern.....$25.00"

Again, with the same caption:

"$25.00 buys the latest improved 6 Drawer Drop Head White Sewing Machine, with Automatic Lift and best set of attachments."

Again, the same caption, with cut of White Sewing Machine:

"The best machine at any price.....$25.00

"Your money back in 365 days if you are not convinced you have the best on earth. White Sewing Machine with White Sewing Machine Co.'s guarantee.....$25.00"

Then in September appeared the following advertisement:

"Duncan-Schell Furniture Co.'s Annual September Sale.

"$25.00 buys the latest improved 6 Drawer, Drop Head White Sewing Machine, with Automatic Lift and best set of attachments."

Then follows practically the same advertisement that appeared in March.

Some time before these advertisements appeared, and on or about February 1st, Duncan had said to the plaintiff: "Boggs, I understand that you are going to take the agency for the White sewing machine. You know you have no money, and you cannot get the machines, and, if you get them, I will run you out of business with the same machine." After the advertisements came out in March, Duncan said to the plaintiff: "Boggs, have we starved you out yet? If you are not starved out yet, we will soon see that you are starved out."

The defendants did not buy any White sewing machines of the White Sewing Machine Company in 1910, or at any time after that. On an offer by the White Sewing Machine Company in September, 1910, to buy, at the defendants' own price, all the White machines which the defendants then had, Duncan declined to sell at all, saying that he wanted to keep them as souvenirs. When told that he was hurting Boggs and the White Sewing Machine Company, he answered that he did not care for that; he advertised as he pleased.

The Duncan-Schell Furniture Company, prior to the time Boggs became the sole agent, had handled these White sewing machines, and sold them at retail, and had done so for a number of years. Boggs was then in the serv-

ice of the defendant company as its agent in disposing of those machines. When Boggs quit, the company had 12 White machines on hand, eight in its Keokuk store, and four in its Carthage store. The latter were brought to Keokuk in March, 1910. The company had bought these machines outright from the White Sewing Machine Company. They were not the latest improved pattern of the White machine, and did not have the attachments advertised. The company had not just received them, as stated in the advertisement, and they were not furnished with the improvements advertised. The machines handled by the plaintiff were of that character and kind, and had the latest improvements. [55]

GAYNOR, J., after stating the facts shown in the evidence: So it is apparent that, upon the issues tendered by the plaintiff, there was evidence upon which the jury might well find all the material facts, upon which plaintiff bases his right to recover, established, both as to what the defendants did, and as to the motive by which they were actuated in the doing. We do not understand that the defendants seriously questioned this, but contend that, conceding the facts to be established as alleged, and as established by the evidence, still the plaintiff has no right to recover: (1) Because the defendants had an absolute right to publish the advertisements complained of, and their motive in so doing cannot be questioned. (2) That, inasmuch as the advertisements complained of made no attack upon the plaintiff, or upon the machines kept for sale by the plaintiff, no legal right of Boggs was assailed by the defendants, and whether they thought good or ill of him when they published these articles is immaterial. (3) That public policy forbids that the motive of established trader, in publishing a legal advertisement of his own wares, shall be inquired into or questioned.

Defendants' contention resolves itself into the proposition that malicious motives in the doing of an act may make the act worse, where the act is wrongful or unlawful, yet it cannot make that wrong or unlawful which is, in itself not unlawful or wrongful; or, in other words, that an action cannot be predicated upon the doing of an act which does not, in itself, amount to a legal wrong, because the party doing the act was moved to it by a wicked or malevolent heart. Therefore the defendant contends that, as it had in its possession certain White sewing machines, and had the same for sale, the fact that they wrongfully or purposely deceived the public as to the character or the quality of the articles for sale would not entitle one engaged in the same business to complain, though the defendant, in the doing of the act, had the purpose and intent to injure his competitor, and was, in fact, actuated by malice towards his competitor, and though the competitor lost his business by reason of the defendant's conduct.

This would seem like a simple proposition, and, abstractly considered, would appeal to any mind, possessing legal acumen, as sound. No one could seriously question the proposition that, if one does that only which he has a right to do under the law, and does it in a legal

[55] The statement of facts is abridged, and part of the opinion is omitted.

way, he ought not to be called to account for his conduct, no matter what his motive might be, and there are many authorities to support the abstract proposition that a lawful act cannot be made the foundation of an action because it was done with an evil motive, and some cases have held that the motive with which an act is done is not an element of a civil wrong. It may go to enhance the damages, but is not an element of the wrong itself.

In Guethler v. Altman, 26 Ind. App. 587, 60 N. E. 355, 84 Am. St. Rep. 313, an action in which a merchant sought to recover damages of the members of the school board and a teacher in the school, on the ground that they had willfully and maliciously prevented their students, by threats and intimidations, from trading at plaintiff's store, alleging that they had talked to the pupils, advising them to stay away from plaintiff's place of business, and to purchase their supplies elsewhere, and threatening that, if they did not do so, they would be suspended, and that, as a result of the wrongful act of the defendants, plaintiff was injured in his business, plaintiff alleged that, when high school pupils started to enter his store, they would discover they were being watched by the defendant, Crull, and they would turn away and not enter; that Crull wrote letters to the parents of the pupils containing threats that, if the pupils visited plaintiff's store, they would be suspended, and that it was all done with the systematic purpose and intent of injuring plaintiff in his business; that Crull was following the instructions of the other defendants in what he did; and that plaintiff was thereby injured in his business. The case was disposed of on demurrer. In the opinion delivered by the Supreme Court, it says: "It was not an unlawful act for Crull to advise or persuade the pupils not to visit appellant's store. The fact that he acted maliciously does not change the rule. The act which is not unlawful in itself, and which violates no right, cannot be made actionable because of the motive which induced it. A malicious motive will not make that wrong which, in its own essence, is lawful, and cites, in support of that rule, Chatfield v. Wilson, 28 Vt. 49; Jenkins v. Fowler, 24 Pa. 308; Frazier v. Brown, 12 Ohio St. 294; Phelps v. Nowlen, 72 N. Y. 39, 28 Am. Rep. 93; Cooley on Torts (2d Ed.) 832; Boyson v. Thorn, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233. Many other cases might be cited in support of this abstract proposition.

These cases present, as strongly as any, the application of the abstract rule contended for by appellant. They present the general rule to concrete cases that, what a man has a lawful right to do, he may do, no matter what his motive may be, no matter what injuries may result from it, and yet not be called to answer for his conduct.

It is not so difficult to know what the law is as to know what is a just and fair and right application of the law to a given state of facts. As civilization advances, and the social and business conditions become more involved and complicated, when even legitimate competi-

tion has become so strong that even honest men are tempted to force their way beyond the limits of legitimate competition, the law—which is a rule of civil conduct for the government of men in their social and business relationships—ought to keep pace with the new conditions. The integrity of the social order, the stability of business itself, requires, and the law should require, that every man conduct himself in full recognition of the fact that he is a member of that social order; that he not only has rights, but has corresponding duties; and that the performance of those duties is as binding upon him as a member of the social order as are the rights given to him. Men, as members of organized society, under the law, have the right to do certain things; but that right is restricted and limited by the duty imposed upon them not to exercise those rights wantonly and willfully to the injury of another. In the exercise of the law-given right, the well-being of the social order requires that each person should exercise his right consistently with the fact that he is a member of the social order out of which his rights grew. While a person has the right to pursue his avocations and his business for his own pleasure and profit, he has no right, directly or indirectly, to willfully and maliciously injure another in his lawful business or occupation. Men have the right to engage in lawful competition, and, though the competition may have the effect of driving another out of business, if the competition is lawful, no action arises, though injury resulted from the competition. Where there is lawful competition for gain, for supremacy in business, for the legitimate control of business, even though the purpose and effect of the competition is to drive from business competitors, yet, if the competition is lawful and carried on in a lawful way, no action will lie. There is a difference between lawful competition and simulated competition carried on with the sole purpose and intent, not of profit and gain, but of maliciously injuring others engaged in that particular business.

The case before us does not present a case of lawful competition, but a case of simulated or pretended competition, designed and carried out with malice for the purpose of injury to the plaintiff in his business. At least the jury might have so found from the evidence. * * *

Every man has the legal right to advance himself before his fellows, and to build up his own business enterprises, and to use all lawful means to that end, although in the path of his impetuous movements he leaves strewn the victims of his greater industry, energy, skill, prowess or foresight. But the law will not permit him to wear the garb of honor only to destroy. The law will not permit him to masquerade in the guise of honest competition solely for the purpose of injuring his neighbor. The law will not permit him to simulate that which is right for the sole purpose of protecting himself in the doing of that which is palpably wrong. * * *

We find no error in the record, and the case is affirmed.

III. In Labor Contests; Strikes, Lockouts, Boycotts

But the vital question remains whether a court of equity will, under any circumstances, by injunction, prevent one individual from quitting the personal service of another? An affirmative answer to this question is not, we think, justified by any authority to which our attention has been called or of which we are aware. It would be an invasion of one's natural liberty to compel him to work for or to remain in the personal service of another. One who is placed under such constraint is in a condition of involuntary servitude,—a condition which the supreme law of the land declares shall not exist within the United States, or in any place subject to their jurisdiction. Courts of equity have sometimes sought to sustain a contract for services requiring special knowledge or peculiar skill, by enjoining acts or conduct that would constitute a breach of such contract. To this class belong the cases of singers, actors, or musicians, who after agreeing, for a valuable consideration, to give their professional service, at a named place and during a specified time, for the benefit of certain parties, refuse to meet their engagement, and undertake to appear during the same period for the benefit of other parties at another place. Lumley v. Wagner, 1 De Gex, M. & G. 604, 617; Id., 5 De Gex & S. 485, 16 Jur. 871; Montagne v. Flockton, L. R. 16 Eq. 189. While in such cases the singer, actor, or musician has been enjoined from appearing during the period named at a place and for parties different from those specified in his first engagement, it was never supposed that the court could by injunction compel the affirmative performance of the agreement to sing or to act or to play. In Powell Duffryn Steam-Coal Co. v. Taff Vale Ry. Co., 9 Ch. App. 331, 335, Lord Justice James observed that when what is required is not merely to restrain a party from doing an act or wrong, but to oblige him to do some continuous act involving labor and care, the court has never found its way to do this by injunction. In the same case Lord Justice Mellish stated the principle still more broadly, perhaps too broadly, when he said that a court can only order the doing of something which has to be done once for all, so that the court can see to its being done.

The rule, we think, is without exception that equity will not compel the actual, affirmative performance by an employé of merely personal services, any more than it will compel an employer to retain in his personal service one who, no matter for what cause, is not acceptable to him for service of that character. The right of an employé engaged to perform personal service to quit that service rests upon the same basis as the right of his employer to discharge him from further personal service. If the quitting in the one case or the discharging in the other is in violation of the contract between the parties, the one in-

jured by the breach has his action for damages; and a court of equity will not, indirectly or negatively, by means of an injunction restraining the violation of the contract compel the affirmative performance from day to day or the affirmative acceptance of merely personal services. Relief of that character has always been regarded as impracticable.

Mr. Justice Harlan, in Arthur v. Oakes (1894).[56]

In 1705 it was decided that, if wild ducks alight in the plaintiff's decoy pond, the defendant, though he has the right to set up a rival decoy pond on his own land and by offering greater inducements persuade the wild ducks to pass by the plaintiff's pond and come to his own, and though he has the further right on his own land to shoot or shoot at the wild ducks that are on or are passing over his own land, even if the effect is to scare away the wild ducks that are on the plaintiff's land, still he has no right to shoot off guns or explode rockets on his own land, when the purpose and the only possible effect is to frighten the wild ducks from the plaintiff's pond. Whether the law was so determined on account of the difficulty of enforcing statutes to regulate the movements of ducks, or because the competition was between members of the same caste, it is needless to speculate; but certain it is that the court had no difficulty in deciding that an action would lie even if the plaintiff had no dominant right over the defendant—would lie simply because the defendant was abusing a coequal right of his own—was doing a harm purely for the sake of the harm.

Through all these instances, and more can undoubtedly be found, one broad principle runs—a principle broad enough to serve as a basis for a classification of all litigation under one or the other of two heads. Under one the plaintiff complains of a harm that flows from the defendant's invasion of the plaintiff's absolute, exclusive, dominant right; under the other the plaintiff complains of a harm that flows from the manner in which the defendant exercises his coequal, competitive right. And the principle running through all the instances I have given of the latter class is this: Wherever there is an antinomy —a conflict between coequal and competitive rights—the one party must suffer in silence the harm that is the direct and natural consequence of the other's bona fide effort to benefit himself by the exercise of his competitive right, but does not have to submit to the harm that is attributable exclusively to malevolence. Take the spite fence, for

[56] 63 Fed. 310, 317, 11 C. C. A. 209, 25 L. R. A. 414; Justice Harlan there delivering the opinion of the Circuit Court of Appeals for the Seventh Circuit. On the point that the relief suggested was impracticable, specific reference was made to Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co. (C. C. 1893) 54 Fed. 730, 740, 19 L. R. A. 387, Taft, J., and authorities cited; Fry, Spec. Perf. (3d Am. Ed.) §§ 87–91, and authorities cited.

instance. The harm to you is one and the same whether your neighbor limits your access to light and air by means of a useless fence fifty feet high or a useful house fifty feet high. If he builds the useful house, he knows that your supply of light and air will be curtailed, and in that sense he intends harm. But the harm you suffer is only the inevitable harm that comes from his beneficial enjoyment of his property. Organized society, government, has conferred upon you and your neighbor coequal rights, limited and conditioned by coequal obligations. If he builds the useless fence to punish you, I say he is exercising neither a legal nor a moral right. If he thinks you guilty of violating the laws of the land, organized society, government, has not authorized him to act as prosecutor, judge, jury, and executioner. If he thinks you guilty of violating the laws of God, he has not been ordained to administer God's punishment.

The underlying principle above stated may be expressed in a slightly different form: Wherever there is a conflict between coequal and competitive rights, so exercise your right that you do not unnecessarily interfere with your neighbor in the exercise of his equal, reciprocal right. This was a universal maxim of the civil law. "Sic utere tuo ut alienum non lædas." It was transported sporadically by the old English chancellors into the English common law. In our land, under our pledges of manhood equality, no interpretation of our common law should long endure that gives to any man under any circumstances the right to inflict a wanton and malicious injury.

By "wanton and malicious" I do not mean the subjective state of mind of the doer of the harm, as determined by some psychologist or other; I mean the character of the act as determined objectively by weighing the external facts and circumstances; I mean motive as judged by setting up ideally the average good neighbor as a standard, just as in the law of negligence we set up ideally the average prudent man as a standard.

I have been endeavoring to develop before you the idea that the strike is not a question that stands by itself, to be solved according to separate and unique principles, to be dealt with by processes that are applicable to it alone. While at first blush it may seem a far cry from wild ducks to strikes, yet on reflection I hope you will agree that the contestants in the wild game cases, in the light and air cases, in the spring and well cases, in the natural oil and gas cases, did not have—any one of them as against his opponent—an absolute and exclusive right; that the right of each was limited and qualified by the right of the other; and that their rights in the common source of supply—the common fund—were coexistent and coequal. And since, as I have already stated, a strike, originating in a competition or struggle over the division between wages and dividends, involves a competition or struggle for control of the labor market—involves the effort of each side to draw to itself the common fund of available labor

—I hope you will also agree that the strike case is not unique, but is merely one of a broad class. And if the principles of truth and justice that govern all other cases of the same kind have been properly declared, then a means for measuring the rights of labor in its conflict with capital is to apply the same principles to the strike case.

If we examine, for example, a supposititious strike of bricklayers against their employing contractor, we find that they intend to deprive him of their own labor and to prevent him from getting other labor to take their places. They knowingly inflict the harm as a means of compelling him to grant their demands. This infliction of harm is unjustifiable unless the harm comes from a truly competitive act. That is, the demands must be pending. For if there were no demands pending, the infliction of harm would properly be charged to a desire to harm for the sake of harm as the end. And further, the demands must really and substantially relate to the terms and conditions of the bricklayers' employment. For instance, a demand that the contractor somehow or other compel the theaters to employ union musicians is outside of the direct and immediate interests of bricklayers as bricklayers; and a strike merely to enforce such a demand—a sympathetic strike—is therefore unlawful. For the sympathetic strike, like the spite fence, is not the beneficial use of a coequal right, but is the usurpation of the power to punish.

This infliction of harm is unjustifiable unless the harm is only the harm that naturally and directly flows from the good-faith exercise of the competitive right. That is, the loss to his business that the contractor suffers by reason of the striking bricklayers presenting their side of the controversy to other bricklayers (actual or potential) so that the other bricklayers freely and of their own judgment decline to work for the contractor, must be suffered by him without complaint. Therefore, persuasion and picketing limited to learning who the new bricklayers are to whom to present their cause, are lawful; and all judgments to the contrary are wrong, as I believe. But the use of force or intimidation to keep other bricklayers away from the contractor against their will is unjustifiable, because it deprives the contractor of his coequal right of access to a free labor market. And it must not be forgotten that force and intimidation are just as unlawful when exercised under the guise of persuasion or picketing. More unjustifiable than the use of force and intimidation to keep new bricklayers away is the combined assault of the striking bricklayers upon the business of outsiders for the purpose of compelling them to cut off all intercourse with the contractor. The strikers may deprive the contractor of their own society and trade, if they choose, for that is in the exercise of a coequal right; but concerted pressure by the strikers to coerce members of society who are not directly concerned in the pending controversy with the contractor to make raids in the rear—the secondary boycott—is wrong not only because such action is not

within the immediate field of competition, but because the direct, the primary attack is upon society itself.

Without attempting to follow further this supposititious case of the bricklayers, and without considering the many difficult complications of fact that have arisen or may hereafter arise in labor cases, I venture to express my belief that a just decree can always be framed by applying to the controversy the principle of coequal and coexistent rights in a common fund as the means of solution.

Society—government—has a definite interest in seeing to it that harm shall be kept at the minimum and that harm shall never be inflicted for the mere sake of the harm. But independently of the interests of society, one set of rules should govern the action of both contestants. Any fighter who wants to be fair would not ask for more. If blows below the belt are prohibited on one side, they should be prohibited to the other. If the sympathetic strike is a foul blow, a sympathetic lock-out is equally foul. If a boycott under certain circumstances is held to be an attack in the rear and therefore prohibited, under like circumstances a blacklist as an attack in the rear should also be prohibited. In short, the same rights and the same restrictions should be applied to both. And for the enforcement of these mutual and reciprocal rights and restraints the courts of our land offer to both parties equally, all the instrumentalities of law and of equity.

Judge Francis E. Baker, before Chicago Bar Ass'n (1911).[57]

The word "boycott" at the present time is no more obnoxious than was the word "strike" a quarter of a century ago. Then it was sought through the courts of equity to invoke the injunctive writ to restrain laboring men from organizing a peaceable strike. In some instances, inferior federal courts granted injunctions, but they were never upheld in the superior courts of the country. It is well settled now that a man, or a number of men, may refuse to continue to work for their employer, and they may combine for the purpose of organizing a strike. They may advise others to quit work and join in the strike, so long as no contractual rights are invaded, and they may advise others not to engage their services to the employer against whom the strike is directed. All this is within their constitutional rights, and is justified by their freedom to do those things which they think will better their condition. It is no answer that it may not, in many instances, accomplish that end, or that it invariably damages the employer and interferes with his property rights. Of course, a man has a property right in his business, so has a laboring man a property right equally

[57] Judge Baker's paper has been printed in 5 Ill. Law Rev. 453, 462–465. On the right to strike, historically considered, see Mr. W. A. Purrington's article on "The Tubwomen v. The Brewers of London," 3 Columbia Law Review 446 (1903). See, also, 24 Cyc. 820.

sacred in his labor; and when these rights conflict, there must, of necessity, be injury to one or the other, or both. This is the result of conflicting opinion and an exigency of the contractual relation, for which the law furnishes no relief.

I am not unmindful of the rule of the common law that combinations of two or more persons to injure the rights of others were held to be illegal. But if the injury there referred to be held to include the combination of two or more persons to withhold patronage from another, then the rule of the common law has long since been overruled by the courts of this country in dealing with strikes. I am aware that, at common law, a combination of two or more persons to do an unlawful thing, even if nothing is done in furtherance of the intent, is a conspiracy,—a substantive offense; while in the case of an individual, there can be no offense until there is some affirmative act tending to carry the intent into effect. But that has no bearing where the unlawful intent is the same, and the offense has actually been committed, either by the individual or by a number of persons combined together for that purpose.

The old rule that one may do lawfully what, if done by two or more persons in combination together, may become unlawful, has been greatly modified in this country. It is a rule that gained currency at a time when even the right of assembly was looked upon with disapproval and suspicion. When this rule was first announced by the English courts, a labor union would not have been tolerated. In one of the early English cases, decided in 1721 (Tubwomen v. Brewers of London, 3 Columbia L. Rev. 447), it was held to be a criminal conspiracy for two or more persons to combine together and refuse to continue to work for their employer unless he should comply with their demand for higher wages. In other words, it was held to be a criminal conspiracy for workmen to join together and strike. It was conceded in the same case that one person might abandon his employment if his demand was not complied with, but it was held unlawful for two or more persons to combine together for the purpose of demanding higher wages. It was held that such a combination constituted a criminal conspiracy. The same rule was applied as late as 1809 in New York, in the case of Re Journeymen Cordwainers, reported in Yates, Sel. Cas. 111.

The right of laboring men to organize into unions, and the right of these unions to conduct peaceable strikes, is justified because of their inability to compete single-handed in contests with their employers. In this competition, any peaceable and lawful means may be resorted to, and it is only when the means employed become unlawful that the courts will interfere. The law recognizes the right of both labor and capital to organize. The contest between employer and employé is one which courts of equity should recognize as entitled to be fought out upon the basis of equality; and the rule applied by the courts to the

strike is based, I think, upon that principle. The fundamental principle underlying this contest is, that the employer who employs one thousand workmen is in possession of the same competitive power to force those workmen to his terms as the one thousand workmen, by the most powerful lawful organization, have to force him to a compliance with their terms. The contest, therefore, opens with the one on one side and a thousand on the other upon a substantial basis of equality. The employer has a property right in his business which he asks the courts to protect, and which is entitled to protection. It consists, among other things, in his right to employ whom he pleases. That right extends to a discrimination against workmen of a certain class, or to men belonging to labor organizations. He may use in his business such types of machinery and appliances as he may think adapted to carry out his work most successfully, so long as they are reasonably safe and sanitary. The law protects him in these rights, and the courts will require others to respect them. On the other hand, the thousand employés have a property right in their labor, which is equally sacred with that of the employer. They have a right to engage their services wherever and to whomsoever they can secure the largest rewards and the fairest treatment. They have a right to cease working for their employer, with due regard for their contractual relations, when in their judgment, they can better their condition by so doing. They have a right to organize for this purpose, and they have a right to advise others to join their organization, and the law will protect them in the exercise of these rights equally with the rights of the employer. The refusal of the employés to work for the employer may result in his financial ruin, but the loss will be no greater than the damage his refusal to employ the one thousand laborers may work in the aggregate upon them and those dependent upon their labor. In this contest between employer and employed, it should be remembered that the one who most strictly recognizes and observes the legal and equitable rights of the other enters the struggle with tremendous odds in his favor.

Applying the same principle, I conceive it to be the privilege of one man, or a number of men, to individually conclude not to patronize a certain person or corporation. It is also the right of these men to agree together, and to advise others, not to extend such patronage. That advice may be given by direct communication or through the medium of the press, so long as it is neither in the nature of coercion or a threat. As long as the actions of this combination of individuals are lawful, to this point it is not clear how they can become unlawful because of their subsequent acts directed against the same person or corporation. To this point, there is no conspiracy,—no boycott. The word "boycott" is here used as referring to what is usually understood as "the secondary boycott." It is, therefore, only when the combination becomes a conspiracy to injure by threats and coercion the property rights of another, that the power of the courts can be invoked.

This point must be passed before the unlawful and unwarranted acts which the courts will punish and restrain are committed.

Van Orsdel, J., in American Fed. of Labor v. Buck's Stove and Range Co. (1909) 33 App. D. C. 83.[58]

PICKETT et al. v. WALSH et al.

(Supreme Judicial Court of Massachusetts, 1906. 192 Mass. 572, 78 N. E. 753, 6 L. R. A. [N. S.] 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638.)

Bill to enjoin Walsh and others from combining and conspiring to interfere with the plaintiffs in pursuing their trade of brick and stone pointers. The facts in dispute are thus stated by Loring, J.:

It appears from the evidence that the trade of brick and stone pointing is a trade which, in the neighborhood of the city of Boston at any rate, has been carried on to some extent as a separate trade for nearly if not quite 100 years. It further appears that there are now some 45 men engaged in that trade in the vicinity of that city.

The trade of a brick or stone pointer consists in going over a building (generally when it is first erected) to clean it and put a finish on the mortar of the joints. Apparently in the city of Worcester, and to some extent in the city of Boston, this work of pointing is done by bricklayers and stone masons.

The dispute which gave rise to the suit now before us had its origin in a set of rules adopted in January, 1905, by the Bricklayers' and Masons' International Union of America, to which the two unions here in question were subordinate unions. This set of rules contained a provision that bricklaying masonry should consist (inter alia) of "all pointing and cleaning brick wall," and that stone masonry should consist (inter alia) of the "cleaning and pointing of stone work." The practical working of the principles of brick and stone masonry as defined in these rules was left to the subordinate unions.

By the constitution, by-laws and rules of order of the Bricklayers' Union No. 3, it is provided that members shall not accept employment "where a difficulty exists in consequence of questions involving the rules which govern the union," and that any member violating a law of the union shall on conviction "be reprimanded, suspended or fined at the discretion of the union." * * *

There was an executive committee of the two unions. On July 28, 1905, this executive committee voted "that beginning September 18, 1905, no member of the bricklayers' and masons' unions of Boston and vicinity, will work on any building where the contractor will not agree to have the pointing done by bricklayers or masons."

This action of the executive committee was formally adopted by the Bricklayers' Union No. 3, and seems to have been informally adopted by the Stone Masons' Union No. 9. In pursuance thereof the following circular letter was issued: "The bricklayers' and masons' unions of Boston and vicinity have voted that no bricklayer or mason will work for any firm or contractor who will not employ bricklayers or masons to do the pointing of brick, terra cotta and stone masonry. This action will go into effect September 18, 1905."

In September, 1905, L. D. Willcutt & Son as general contractors were erecting (among other buildings) a stone building on the corner of Massachusetts avenue and Boylston street in Boston. On the 18th day of that month, Mr. L. D. Willcutt of that firm was notified that if he did not discharge the pointers who were working for his firm in pointing that building all the masons and bricklayers working for his firm on other buildings in Boston (all of whom were union men) would strike. Thereupon he suspended the work which was being done by the pointers on the building on the corner of Massachusetts avenue and Boylston street. This evidence was admitted to show that there

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[58] S. c., 32 L. R. A. (N. S.) 748. On the origin of the word "boycott," see State v. Glidden (1887) 55 Conn. 46, 76, 8 Atl. 890, 3 Am. St. Rep. 23.

was a general scheme that where pointing was given to any one besides union bricklayers and stone masons there would be a strike.

On November 13, 1905, the defendant Walsh, the walking delegate of the Stone Masons' Union No. 9, and the defendant Driscoll, the walking delegate of the Bricklayers' Union No. 3, came to the Ford Building, for which the corporation of L. P. Soule & Son Company were the general contractors, and found that the cleaning and pointing of that building was being done under a contract between the owners of the building and Robert H. Pickett, one of the plaintiffs here. They then went to a brick building which was being erected by the L. P. Soule & Son Company as contractors, namely, a cold storage warehouse on Eastern avenue, where Driscoll notified the man that the pointing at the Ford Building was being done by pointers. In consequence all the bricklayers employed by the L. P. Soule & Son Company on the cold storage building, 50 in all, being union men, struck work on that or the next day. The next day, November 14, Walsh went to a stone building which was being erected by the same corporation for the International Trust Company on the corner of Arch and Devonshire streets, and told the workmen there of the pointing on the Ford building; whereupon all the stone masons working there, 5 or 6 in all, being union men, struck work. * * *

It appeared from the testimony of Parker F. Soule, an officer of the L. P. Soule & Son Company, that it was cheaper to make a contract with pointers for the work of pointing and cleaning than to employ stone masons and bricklayers to do that work. It appeared from other evidence that the wages of a bricklayer or stone mason were 55 cents an hour, while pointers are paid $3.00 a day of eight hours, or 37½ cents an hour. It further appeared from Mr. Soule's testimony that he preferred to give the work to the pointers because in cleaning a building acid has to be used, and, if the acid is used to excess, stains are caused which in some instances it is impossible to "get out"; he did not think that the bricklayers and stone masons were competent to use these acids. He preferred also to give the work to the pointers because the work which is done by the pointers usually is done by contract, in which case the general contractor who employs the pointers is relieved from responsibility on account of accidents which may occur because of the fact that the work is done on a swinging stage, at times at great heights. It also appeared from the evidence that L. P. Soule & Son Company were not the only contractors who thought they got better work at a smaller cost and with less liability by making a contract with stone pointers for the doing of this work than by employing stone masons and bricklayers to do it.

All this was explained to the walking delegate of the Bricklayers' Union here in question, at an interview between Mr. Soule and the walking delegate of that union held within two days of the strike. It also appeared that at that interview the delegate told Mr. Soule that while it had been against the rules of the union that any member should take piece work, the taking of piece work recently had been allowed; whereupon Mr. Soule told him that "if he had any members of his union who were reliable men, whom we could have confidence enough in to let a contract to, who would give prices as low, * * * he would have no trouble in getting all the stone pointing there was going." No offer to make a contract on these terms was made, and on the evidence it must be assumed that there was nothing in this statement of the defendant Walsh.

On these facts, inter alia, a bill was filed, on November 20, 1905, against the officers of the Unincorporated Bricklayers' Union No. 3, the officers of the Unincorporated Stone Masons' Union No. 9, the walking delegates of these unions respectively, Driscoll and Walsh, and certain other persons. The purpose of the bill as stated in the prayers for relief was to enjoin the defendants (1) "from combining and conspiring in any way to compel L. P. Soule & Son Company, or any other person, firm or corporation, by force, threats, intimidation or coercion, to discharge the complainants in the bill of complaint, * * * or to refrain from further employing them in and about

their trade and occupation"; (2) "from combining and conspiring to compel the owners of the so-called Ford Building on Ashburton Place in the city of Boston to break or decline to carry out their said contract with the complainant Robert H. Pickett"; and (3) "from combining and conspiring to interfere with the said complainants, or any of them, in the practice of their trade and occupation, or to prevent them from obtaining further employment thereat."

At the hearing, a final decree in favor of the plaintiff, on all those grounds, was made in the superior court, and the defendants appealed.[59]

LORING, J., after stating the facts and the pleading. There seem therefore to be three causes of action upheld by the decree.[60] * * * In the third cause, the plaintiffs sought to be protected against a strike by the defendants in order to get the work of pointing for the members of their unions. * * *

The question, so far as this the third cause of action goes, apart from a question of fact which we will deal with later, is whether the defendant unions have a right to strike for the purpose for which they struck; or, to put it more accurately and more narrowly, it is this: Is a union of bricklayers and stone masons justified in striking to force a contractor to employ them by the day to do cleaning and pointing at higher wages than pointers are paid, where the contractors wish to make contracts with the pointers for such work to be done by the piece, because they think they get better work at less cost with no liability for accidents, and where the pointers wish to make contracts for that work with the contractors on terms satisfactory to them?

In other words, we have to deal with one of the great and pressing questions growing out of the powerful combinations, sometimes of capital and sometimes of labor, which have been instituted in recent years where their actions come into conflict with the interests of individuals. The combination in the case at bar is a combination of workmen, and the conflict is between a labor union on the one hand and several unorganized laborers on the other hand.

It is only in recent years that these great and powerful combinations have made their appearance, and the limits to which they may go in enforcing their demands are far from being settled.

It is settled however that laborers have a right to organize as labor unions to promote their welfare. Further, there is no question of the general right of a labor union to strike.

On the other hand, it is settled that some strikes by a labor union are illegal. It was held in Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287, that a strike by the members of labor unions was illegal when set on foot to force their employer to pay a fine imposed upon

[59] The statement of the case is abridged.

[60] Only so much of the opinion is given as relates to this third cause.

him by the union of which he was not a member, for not giving the union all his work. * * *

We are brought to the question of the legality of the strike in the case at bar, namely, a strike of bricklayers and masons to get the work of pointing, or, to put it more accurately, a combination by the defendants, who are bricklayers and masons, to refuse to lay bricks and stone where the pointing of them is given to others. The defendants in effect say we want the work of pointing the bricks and stone laid by us, and you must give us all or none of the work.

The case is a case of competition between the defendant unions and the individual plaintiffs for the work of pointing. The work of pointing for which these two sets of workmen are competing is work which the contractors are obliged to have. One peculiarity of the case therefore is that the fight here is necessarily a triangular one. It necessarily involves the two sets of competing workmen and the contractor, and is not confined to the two parties to the contract, as is the case where workmen strike to get better wages from their employer or other conditions which are better for them. In this respect the case is like Mogul Steamship Co. v. McGregor, 23 Q. B. D. 598, on appeal [1892] A. C. 25.

The right which the defendant unions claim to exercise in carrying their point in the course of this competition is a trade advantage, namely, that they have labor which the contractors want, or, if you please, cannot get elsewhere; and they insist upon using this trade advantage to get additional work, namely, the work of pointing the bricks and stone which they lay. It is somewhat like the advantage which the owner of back land has when he has bought the front lot. He is not bound to sell them separately. To be sure the right of an individual owner to sell both or none is not decisive of the right of a labor union to combine to refuse to lay bricks or stone unless they are given the job of pointing the bricks laid by them. There are things which an individual can do which a combination of individuals cannot do. But having regard to the right on which the defendants' organization as a labor union rests, the correlative duty owed by it to others, and the limitation of the defendants' rights coming from the increased power of organization, we are of opinion that it was within the rights of these unions to compete for the work of doing the pointing and, in the exercise of their right of competition, to refuse to lay bricks and set stones unless they were given the work of pointing them when laid. See in this connection Plant v. Woods, 176 Mass. 492, 502, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330; Berry v. Donovan, 188 Mass. 353, 357, 74 N. E. 603, 5 L. R. A. (N. S.) 899, 108 Am. St. Rep. 499, 3 Ann. Cas. 738.

The result to which that conclusion brings us in the case at bar ought not to be passed by without consideration.

The result is harsh on the contractors, who prefer to give the work

to the pointers because (1) the pointers do it by contract (in which case the contractors escape the liability incident to the relation of employer and employé); because (2) the contractors think that the pointers do the work better, and if not well done the buildings may be permanently injured by acid; and finally (3) because they get from the pointers better work with less liability at a smaller cost. Again, so far as the pointers (who cannot lay brick or stone) are concerned, the result is disastrous. But all that the labor unions have done is to say you must employ us for all the work or none of it. They have not said that if you employ the pointers you must pay us a fine, as they did in Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287. They have not undertaken to forbid the contractors employing pointers, as they did in Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330. So far as the labor unions are concerned the contractors can employ pointers if they choose, but if the contractors choose to give the work of pointing the bricks and stones to others, the unions take the stand that the contractors will have to get some one else to lay them. The effect of this in the case at bar appears to be that the contractors are forced against their will to give the work of pointing to the masons and bricklayers. But the fact that the contractors are forced to do what they do not want to do is not decisive of the legality of the labor union's acts. That is true wherever a strike is successful. The contractors doubtless would have liked it better if there had been no competition between the bricklayers and masons on the one hand and the individual pointers on the other hand. But there is competition. There being competition, they prefer the course they have taken. They prefer to give all the work to the unions rather than get nonunion men to lay bricks and stone to be pointed by the plaintiffs.

Further, the effect of complying with the labor unions' demands apparently will be the destruction of the plaintiff's business. But the fact that the business of a plaintiff is destroyed by the acts of the defendants done in pursuance of their right of competition is not decisive of the illegality of them. It was well said by Hammond, J., in Martell v. White, 185 Mass. 255, 260, 69 N. E. 1085, 1087, 64 L. R. A. 260, 102 Am. St. Rep. 341, in regard to the right of a citizen to pursue his business without interference by a combination to destroy it: "Speaking generally, however, competition in business is permitted, although frequently disastrous to those engaged in it. It is always selfish, often sharp, and sometimes deadly."

We cannot say on the evidence that pointing is something foreign to the work of a bricklayer or a stone mason, and therefore something which a union of bricklayers and stone masons have no right to compete for or insist upon and so to bring the case within Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; March v. Bricklayers' and Plasterers' Union No. 1, 79 Conn. 7, 63 Atl. 291, 4 L. R. A. (N. S.)

1198, 118 Am. St. Rep. 127, 6 Ann. Cas. 848; and Giblan v. National Amalgamated Labourers' Union, [1903] 2 K. B. 600. On the contrary the evidence shows that in Boston the pointing is done to some extent by bricklayers and stone masons, and there is no evidence that the trade of pointing exists outside that city.

The protest of the defendant unions against the plaintiffs' being allowed to organize a pointers' union is not an act of oppression.[61] It is not like the refusal of the union in Quinn v. Leathem, [1901] A. C. 495, to work with the nonunion men or to admit the nonunion men to their union. The defendants' unions are not shown to be unwilling to admit the plaintiffs to membership if they are qualified as bricklayers or stone masons. But the difficulty is that the plaintiffs are not so qualified. They are not bricklayers or masons. The unions have a right to determine what kind of workmen shall compose the union, and to insist that pointing shall not be a separate trade so far as union work is concerned. They have not undertaken to say that the contractors shall not treat the two trades as distinct. What they insist upon is that if the contractors employ them they shall employ them to do both kinds of work.

The application of the right of the defendant unions, who are composed of bricklayers and stone masons, to compete with the individual plaintiffs, who can do nothing but pointing (as we have said), is in the case at bar disastrous to the pointers and hard on the contractors. But this is not the first case where the exercise of the right of competition ends in such a result. The case at bar is an instance where the evils which are or may be incident to competition bear very harshly on those interested but in spite of such evils competition is necessary to the welfare of the community. * * *

TEMPERTON v. RUSSELL et al.

(Court of Appeal. [1893] 1 Q. B. 715.)

[This case is given in the text, ante p. 1274.[62]]

[61] It appeared from the evidence that the brick and stone pointers of Boston had applied to the Building Trades Council for a charter, that the defendant unions had protested, and that the requested charter had been denied.

[62] On the question whether Temperton v. Russell "denies to the laborer a right which is allowed to the trader," see Professor Jeremiah Smith, "Crucial Issues in Labor Litigation," 20 Harv. Law Rev. 429, 443, 444 (1907).

PLANT et al. v. WOODS et al.

(Supreme Judicial Court of Massachusetts. 1900. 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330.)

Bill in equity by the officers and members of a labor union to restrain the officers and members of another labor union from any acts or the use of any methods tending to prevent the members of the plaintiff association from securing employment or continuing in their employment. From a decree for the plaintiffs the defendants appeal.

HAMMOND, J. This case arises out of a contest for supremacy between two labor unions of the same craft, having substantially the same constitution and by-laws. The chief difference between them is that the plaintiff union is affiliated with a national organization having its headquarters in Lafayette, in the state of Indiana, while the defendant union is affiliated with a similar organization having its headquarters in Baltimore, in the state of Maryland. The plaintiff union was composed of workmen who, in 1897, withdrew from the defendant union. There does not appear to be anything illegal in the object of either union, as expressed in its constitution and by-laws. The defendant union is also represented by delegates in the Central Labor Union, which is an organization composed of five delegates from each trades union in the city of Springfield, and had in its constitution a provision for levying a boycott upon a complaint made by any union. The case is before us upon the appeal of the defendants from a final decree in favor of the plaintiffs, based upon the findings stated in the report of the master.

The contest became active early in the fall of 1898. In September of that year the members of the defendant union declared "all painters not affiliated with the Baltimore headquarters to be nonunion men," and voted "to notify bosses" of that declaration. The manifest object of the defendants was to have all the members of the craft subjected to the rules and discipline of their particular union, in order that they might have better control over the whole business, and to that end they combined and conspired to get the plaintiffs, and each of them, to join the defendant association, peaceably, if possible, but by threat and intimidation if necessary. Accordingly, on October 7th, they voted that, "If our demands are not complied with, all men working in shops where Lafayette people are employed refuse to go to work." The plaintiffs resisting whatever persuasive measures, if any, were used by the defendants, the latter proceeded to carry out their plan in the manner fully set forth in the master's report. Without rehearsing the circumstances in detail, it is sufficient to say here that the general method of operations was substantially as follows:

A duly authorized agent of the defendants would visit a shop where one or more of the plaintiffs were at work, and inform the employer of the action of the defendant union with reference to the plaintiffs,

and ask him to induce such of the plaintiffs as were in his employ to sign applications for reinstatement in the defendant union. As to the general nature of these interviews the master finds that the defendants have been courteous in manner, have made no threats of personal violence, have referred to the plaintiffs as nonunion men, but have not otherwise represented them as men lacking good standing in their craft; that they have not asked that the Lafayette men be discharged, and in some cases have expressly stated that they did not wish to have them discharged, but only that they sign the blanks for reinstatement in the defendant union. The master, however, further finds, from all the circumstances under which those requests were made, that the defendants intended that employers of Lafayette men should fear trouble in their business if they continued to employ such men, and that employers to whom these requests were made were justified in believing that a failure on the part of their employés who were Lafayette men to sign such reinstatement blanks, and a failure on the part of the employers to discharge them for not doing so, would lead to trouble in the business of the employers in the nature of strikes or a boycott; and the employers to whom these requests were made did believe that such results would follow, and did suggest their belief to the defendants, and the defendants did not deny that such results might occur; that the strikes which did occur appear to have been steps taken by the defendants to obtain the discharge of such employés as were Lafayette men who declined to sign application blanks for reinstatement; that these defendants did not in all cases threaten a boycott of the employers' business, but did threaten that the place of business of at least one such employer would be left off from a so-called "fair list" to be published by the Baltimore union. The master also found that, from all the evidence presented, the object which the Baltimore men and the defendant association sought to accomplish in all the acts which were testified to was to compel the members of the Lafayette union to join the Baltimore union, and as a means to this end they caused strikes to be instituted in the shops where strikes would seriously interfere with the business of the shops, and in all other shops they made such representations as would lead the proprietors thereof to expect trouble in their business.

We have, therefore, a case where the defendants have conspired to compel the members of the plaintiff union to join the defendant union, and, to carry out their purpose, have resolved upon such coercion and intimidation as naturally may be caused by threats of loss of property by strikes and boycotts, to induce the employers either to get the plaintiffs to ask for reinstatement in the defendant union, or, that failing, then to discharge them. It matters not that this request to discharge has not been expressly made. There can be no doubt, upon the findings of the master and the facts stated in his report, that the compulsory discharge of the plaintiffs in case of noncompliance with the demands of the defendant union is one of the prominent features

of the plan agreed upon. It is well to see what is the meaning of this threat to strike, when taken in connection with the intimation that the employer may "expect trouble in his business." It means more than that the strikers will cease to work. That is only the preliminary skirmish. It means that those who have ceased to work will by strong, persistent and organized persuasion and social pressure of every description do all they can to prevent the employer from procuring workmen to take their places. It means much more. It means that, if these peaceful measures fail, the employer may reasonably expect that unlawful physical injury may be done to his property; that attempts in all the ways practiced by organized labor will be made to injure him in his business, even to his ruin, if possible; and that by the use of vile and opprobrious epithets and other annoying conduct, and actual and threatened personal violence, attempts will be made to intimidate those who enter or desire to enter his employ; and that whether or not all this be done by the strikers or only by their sympathizers, or with the open sanction and approval of the former, he will have no help from them in his efforts to protect himself. However mild the language or suave the manner in which the threat to strike is made under such circumstances as are disclosed in this case, the employer knows that he is in danger of passing through such an ordeal as that above described, and those who make the threat know that as well as he does. Even if the intent of the strikers, so far as respects their own conduct and influence, be to discountenance all actual or threatened injury to person or property or business except that which is the direct necessary result of the interruption of the work, and even if their connection with the injurious and violent conduct of the turbulent among them or of their sympathizers be not such as to make them liable criminally, or even answerable civilly in damages to those who suffer, still, with full knowledge of what is to be expected, they give the signal, and in so doing must be held to avail themselves of the degree of fear and dread which the knowledge of such consequences will cause in the mind of those—whether their employer or fellow workmen—against whom the strike is directed; and the measure of coercion and intimidation imposed upon those against whom the strike is threatened or directed is not fully realized until all those probable consequences are considered. Such is the nature of the threat, and such the degree of coercion and intimidation involved in it. If the defendants can lawfully perform the acts complained of in the city of Springfield, they can pursue the plaintiffs all over the state in the same manner, and compel them to abandon their trade, or bow to the behests of their pursuers.

It is to be observed that this is not a case between the employer and employed, or, to use a hackneyed expression, between capital and labor, but between laborers all of the same craft, and each having the same right as any one of the others to pursue his calling. In this as in every other case of equal rights the right of each individual is to

be exercised with due regard to the similar right of all others, and the right of one be said to end where that of another begins. The right involved is the right to dispose of one's labor with full freedom. This is a legal right, and it is entitled to legal protection. Sir William Erle, in his book on Trades Unions (page 12), has stated this in the following language, which has been several times quoted with approval by judges in England: "Every person has a right, under the law, as between himself and his fellow subjects, to full freedom in disposing of his own labor or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description, done not in the exercise of the actor's own right, but for the purpose of obstruction, would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition." The same rule is stated with care and discrimination by Wells, J., in Walker v. Cronin, 107 Mass. 555: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition, but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as the result of competition, or the exercise of like rights by others, it is damnum absque injuria, unless some superior right by contract, or otherwise, is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition, or the service of any interest or lawful purpose, it then stands upon a different footing." In this case the acts complained of were calculated to cause damage to the plaintiffs, and did actually cause such damage; and they were intentionally done for that purpose. Unless, therefore, there was justifiable cause, the acts were malicious and unlawful. Walker v. Cronin, ubi supra; Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287, and cases cited therein.

The defendants contend that they have done nothing unlawful, and in support of that contention they say that a person may work for whom he pleases, and, in the absence of any contract to the contrary, may cease to work when he pleases, and for any reason whatever, whether the same be good or bad; that he may give notice of his intention in advance, with or without stating the reason; that what one man may do several men acting in concert may do, and may agree beforehand that they will do, and may give notice of the agreement; and that all this may be lawfully done, notwithstanding such concerted action may, by reason of the consequent interruption of the work, result in great loss to the employer and his other employés, and that such a result was intended. In a general sense, and without reference to exceptions arising out of conflicting public and private in-

terests, all this may be true. It is said also that, where one has the lawful right to do a thing, the motive by which he is actuated is immaterial. One form of this statement appears in the first headnote in Allen v. Flood, as reported in (1898) App. Cas. 1, as follows: "An act lawful in itself is not converted, by a bad or malicious motive, into an unlawful act, so as to make the doer of the act liable to a civil action." If the meaning of this and similar expressions is that, where a person has the lawful right to do a thing irrespective of his motive, his motive is immaterial, the proposition is a mere truism. If, however, the meaning is that where a person, if actuated by one kind of a motive, has a lawful right to do a thing, the act is lawful when done under any conceivable motive, or that an act lawful under one set of circumstances is therefore lawful under every conceivable set of circumstances, the proposition does not commend itself to us as either logically or legally accurate. In so far as a right is lawful it it lawful, and in many cases the right is so far absolute as to be lawful whatever may be the motive of the actor,—as, where one digs upon his own land for water (Greenleaf v. Francis, 18 Pick. 117), or makes a written lease of his land for the purpose of terminating a tenancy at will (Gronstra v. Bourges, 141 Mass. 7, 4 N. E. 623); but in many cases the lawfulness of an act which causes damage to another may depend upon whether the act is for justifiable cause, and this justification may be found sometimes in the circumstances under which it is done, irrespective of motive, sometimes in the motive alone, and sometimes in the circumstances and motive combined. This principle is of very general application in criminal law, and also is illustrated in many branches of the civil law, as in cases of libel, and of procuring a wife to leave her husband. Tasker v. Stanley, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468, and cases therein cited. Indeed, the principle is a prominent feature underlying the whole doctrine of privilege, malice, and intent. See, on this, an instructive article in 8 Harv. Law Rev. 1, where the subject is considered at some length. It is manifest that not much progress is made by such general statements as those quoted above from Allen v. Flood, whatever may be their meaning.

Still standing for solution is the question, under what circumstances, including the motive of the actor, is the act complained of lawful, and to what extent? In cases somewhat akin to the one at bar this court has had occasion to consider the question how far acts manifestly coercive and intimidating in their nature, which cause damage and injury to the business or property of another, and are done with intent to cause such injury, and partly in reliance upon such coercion, are justifiable. In Bowen v. Matheson, 14 Allen, 499, it was held to be lawful for persons engaged in the business of shipping seamen to combine together into a society for the purpose of competing with other persons engaged in the same business, and it was held lawful for them, in pursuance of that purpose, to take men out of a ship if men shipped by a nonmember were in that ship, to refuse to furnish

seamen through a nonmember, to notify the public that they had combined against nonmembers and had "laid the plaintiff on the shelf," to notify the plaintiff's customers and friends that the plaintiff could not ship seamen for them, and to interfere in all these ways with the business of the plaintiff as a shipping agent, and compel him to abandon the same. The justification for these acts so injurious to the business of the plaintiff, and so intimidating in their nature, is to be found in the law of competition. No legal right of the plaintiff was infringed upon, and, as stated by Chapman, J., in giving the opinion of the court (page 503), "if the effect of these acts was to destroy the business of shipping masters who are not members of the association, it is such a result as, in the competition of business, often follows from a course of proceeding that the law permits." The primary object of the defendants was to build up their own business, and this they might lawfully do to the extent disclosed in that case, even to the injury of their rivals. Similar decisions have been made in other courts where acts somewhat coercive in their nature and effect have been held justifiable under the law of competition. Steamship Co. v. McGregor (1892) App. Cas. 25; Manufacturing Co. v. Hollis, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319; Macauley v. Tierney, 19 R. I. 255, 33 Atl. 1, 37 L. R. A. 455, 61 Am. St. Rep. 770.

On the other hand, it was held in Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287, that a conspiracy against a mechanic—who is under the necessity of employing workmen in order to carry on his business—to obtain a sum of money from him, which he is under no legal obligation to pay, by inducing his workmen to leave him, or by deterring others from entering into his employ, or by threatening to do this, so that he is induced to pay the money demanded under a reasonable apprehension that he cannot carry on his business without yielding to the demands, is illegal, if not criminal, conspiracy; that the acts done under it are illegal, and that the money thus obtained may be recovered back. Chapman, C. J., speaking for the court, says that "there is no doubt that, if the parties under such circumstances succeed in injuring the business of the mechanic, they are liable to pay all the damages done to him." That case bears a close analogy to the one at bar. The acts there threatened were like those in this case, and the purpose was, in substance, to force the plaintiff to give his work to the defendants, and to extort from him a fine because he had given some of his work to other persons. Without now indicating to what extent workmen may combine, and in pursuance of an agreement may act by means of strikes and boycotts to get the hours of labor reduced, or their wages increased, or to procure from their employers any other concession directly and immediately affecting their own interests, or to help themselves in competition with their fellow workmen, we think this case must be governed by the principles laid down in Carew v. Rutherford, ubi supra. The purpose of these de-

fendants was to force the plaintiffs to join the defendant association, and to that end they injured the plaintiffs in their business, and molested and disturbed them in their efforts to work at their trade. It is true they committed no acts of personal violence, or of physical injury to property, although they threatened to do something which might reasonably be expected to lead to such results. In their threat, however, there was plainly that which was coercive in its effect upon the will. It is not necessary that the liberty of the body should be restrained. Restraint of the mind, provided it would be such as would be likely to force a man against his will to grant the thing demanded, and actually has that effect, is sufficient in cases like this. As stated by Lord Bramwell in Reg. v. Druitt, 10 Cox, Cr. Cas. 592: "No right of property or capital is so sacred or carefully guarded by the law of the land as that of personal liberty. That liberty is not liberty of the mind only; it is also a liberty of the mind and will; and the liberty of a man's mind and will to say how he should bestow himself, his means, his talent, and his industry is as much a subject of the law's protection as that of his body." It was not the intention of the defendants to give fairly to the employer the option to employ them or the plaintiffs, but to compel the latter against their will to join the association, and to that end to molest and interfere with them in their efforts to procure work by acts and threats well calculated by their coercive and intimidating nature to overcome the will. The defendants might make such lawful rules as they please for the regulation of their own conduct, but they had no right to force other persons to join them. The necessity that the plaintiffs should join this association is not so great, nor is its relation to the rights of the defendants, as compared with the right of the plaintiffs to be free from molestation, such as to bring the acts of the defendant under the shelter of the principles of trade competition. Such acts are without justification, and therefore are malicious and unlawful, and the conspiracy thus to force the plaintiffs was unlawful. Such conduct is intolerable, and inconsistent with the spirit of our laws. The language used by this court in Carew v. Rutherford, 106 Mass. 1, may be repeated here with emphasis, as applicable to this case: "The facts alleged and proved in this case are peculiarly offensive to the free principles which prevail in this country, and, if such practices could enjoy impunity, they would tend to establish a tyranny of irresponsible persons over labor and mechanical business which would be extremely injurious to both." See, in addition to the authorities above cited, Com. v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346; Sherry v. Perkins, 147 Mass. 214, 17 N. E. 307, 9 Am. St. Rep. 689; Vegelahn v. Guntner, 167 Mass. 97, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443; St. 1894, c. 508, § 2; State v. Donaldson, 32 N. J. Law, 151, 90 Am. Dec. 649; State v. Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710; State v. Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23; State v. Dyer, 67 Vt. 690, 32 Atl. 814; Lucke v. Assembly, 77 Md. 396, 26

Atl. 505, 19 L. R. A. 408, 39 Am. St. Rep. 421. As the plaintiffs have been injured by these acts, and there is reason to believe that the defendants contemplate further proceedings of the same kind, which will be likely still more to injure the plaintiffs, equity lies to enjoin the defendants. Vegelahn v. Guntner, ubi supra.

Some phases of the labor question have recently been discussed in the very elaborately considered case of Allen v. Flood, ubi supra. Whether or not the decision made therein is inconsistent with the propositions upon which we base our decision in this case, we are not disposed, in view of the circumstances under which that decision was made, to follow it. We prefer the view expressed by the dissenting judges, which view, it may be remarked, was entertained not only by three of the nine lords who sat in the case, but also by the great majority of the common-law judges who had occasion officially to express an opinion. There must be, therefore, a decree for the plaintiffs. We think, however, that the clause, "or by causing or attempting to cause any person to discriminate against any employer or members of plaintiffs' said association (because he is such employer) in giving or allowing the performance of contracts to or by such employer," is too broad and indefinite, inasmuch as it might seem to include mere lawful persuasion and other similar and peaceful acts; and for that reason, and also because, so far as respects unlawful acts, it seems to cover only such acts as are prohibited by other parts of the decree, we think it should be omitted. Inasmuch as the association of the defendants is not a corporation, an injunction cannot be issued against it as such, but only against its members, their agents and servants. As thus modified, in the opinion of the majority of the court, the decree should stand. Decree accordingly.

HOLMES, C. J. (dissenting). When a question has been decided by the court, I think it proper, as a general rule, that a dissenting judge, however strong his convictions may be, should thereafter accept the law from the majority, and leave the remedy to the legislature, if that body sees fit to interfere. If the decision in the present case simply had relied upon Vegelahn v. Guntner, I should have hesitated to say anything, although I might have stated that my personal opinion had not been weakened by the substantial agreement with my views to be found in the judgments of the majority of the house of lords in Allen v. Flood. But, much to my satisfaction, if I may say so, the court has seen fit to adopt the mode of approaching the question which I believe to be the correct one, and to open an issue which otherwise I might have thought closed. The difference between my Brethren and me now seems to be a difference of degree, and the line of reasoning followed makes it proper for me to explain where the difference lies.

I agree that the conduct of the defendants is actionable unless justified. May v. Wood, 172 Mass. 11, 14, 51 N. E. 191, and cases cited. I agree that the presence or absence of justification may depend upon

the object of their conduct; that is, upon the motive with which they acted. Vegelahn v. Guntner, 167 Mass. 92, 105, 106, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443. I agree, for instance, that, if a boycott or a strike is intended to override the jurisdiction of the courts by the action of a private association, it may be illegal. Weston v. Barnicoat, 175 Mass. 454, 56 N. E. 619, 49 L. R. A. 612. On the other hand, I infer that a majority of my Brethren would admit that a boycott or strike intended to raise wages directly might be lawful, if it did not embrace in its scheme or intent violence, breach of contract, or other conduct unlawful on grounds independent of the mere fact that the action of the defendants was combined. A sensible workingman would not contend that the courts should sanction a combination for the purpose of inflicting or threatening violence, or the infraction of admitted rights. To come directly to the point, the issue is narrowed to the question whether, assuming that some purposes would be a justification, the purpose in this case of the threatened boycotts and strikes was such as to justify the threats. That purpose was not directly concerned with wages. It was one degree more remote. The immediate object and motive was to strengthen the defendants' society as a preliminary and means to enable it to make a better fight on questions of wages or other matters of clashing interests.

I differ from my Brethren in thinking that the threats were as lawful for this preliminary purpose as for the final one to which strengthening the union was a means. I think that unity of organization is necessary to make the contest of labor effectual, and that societies of laborers lawfully may employ in their preparation the means which they might use in the final contest.

Although this is not the place for extended economic discussion, and although the law may not always reach ultimate economic conceptions, I think it well to add that I cherish no illusions as to the meaning and effect of strikes. While I think the strike a lawful instrument in the universal struggle of life, I think it pure phantasy to suppose that there is a body of capital of which labor, as a whole, secures a larger share by that means.

The annual product, subject to an infinitesimal deduction for the luxuries of the few, is directed to consumption by the multitude, and is consumed by the multitude always. Organization and strikes may get a larger share for the members of an organization, but, if they do, they get it at the expense of the less organized and less powerful portion of the laboring mass. They do not create something out of nothing.

It is only by devesting our minds of questions of ownership and other machinery of distribution, and by looking solely at the question of consumption,—asking ourselves what is the annual product, who consumes it, and what changes would or could we make,—that we can keep in the world of realities.

But, subject to the qualifications which I have expressed, I think it lawful for a body of workmen to try by combination to get more than they now are getting, although they do it at the expense of their fellows, and to that end to strengthen their union by the boycott and the strike.

NATIONAL PROTECTIVE ASS'N OF STEAM FITTERS AND HELPERS et al. v. CUMMING et al.

(Court of Appeals of New York, 1902. 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648.)

This action was brought by the National Protective Association of Steam Fitters and Helpers, a domestic corporation, and Charles McQueed, a member of the corporation, suing for the benefit of himself and his fellow members. The defendants were two individuals, Cumming, the walking delegate of the Enterprise Association of Steam Fitters, and Nugent, the walking delegate of the Progress Association of Steam Fitters, these associations, as such, each being an unincorporated association of more than seven members, and certain other persons. The prayer was to restrain the defendants, and each of them, from preventing the employment of members of the plaintiff corporation, and from coercing or obtaining by command, threats, strikes, or otherwise, the dismissal or discharge by any employer, contractor, or owner, of members of this corporation, or the plaintiff McQueed, from their work, employment, or business.

On the issues raised by the denials of the several defendants, the trial Justice, in stating the grounds upon which he proceeded, found specifically as follows:

"That the defendants have entered into a combination which, in effect prevents, and will continue to prevent, the plaintiff McQueed and the other members of the plaintiff association from working at his or their trade in the city of New York; * * * that the defendant Cumming threatened to cause a general strike against the plaintiff association and against the plaintiff McQueed wherever he found them at work, and that he would not allow them to work at any job in the city of New York, except some small jobs where the men of the Enterprise Association were not employed, and that he and the defendant Nugent threatened to drive the plaintiff association out of existence; * * * that the defendants, Cumming and Nugent, while acting in their capacity of walking delegates for their respective associations, and members of the board of delegates, caused the plaintiff McQueed and other members of the plaintiff association to be discharged by their employers from various places of work upon buildings in the course of erection by [naming three different employers who were erecting buildings at different places in the boroughs of Brooklyn and Manhattan], by threatening the said employers that if they did not discharge the members of the plaintiff association, and employ the members of the Enterprise Progress Association in their stead, the said walking delegates would cause a general strike of all men of other trades employed on said buildings, and that the defendant Cumming, as such walking delegate, did cause strikes * * * in order to prevent the members of the plaintiff association from continuing with the work they were doing at the time the strike was ordered, and that the said employers, by reason of said

threats and the acts of the defendants Cumming and Nugent, discharged the members of the plaintiff association, * * * and employed the members of the Enterprise and Progress Associations in their stead; * * * that the threats made by the defendants, and the acts of said walking delegates in causing the discharge of the members of the plaintiff association by means of threats of a general strike of other working men, constituted an illegal combination and conspiracy, injured the plaintiff association in its business, deprived its members of employment and an opportunity to labor, prevented them from earning their livelihood in their trade or business. * * *"

A judgment was directed and entered restraining the defendants from "preventing the work, business, or employment of the plaintiff corporation, or any of its members, in the city of New York or elsewhere, and from coercing or obtaining, by command, threats, strikes, or otherwise, the dismissal or discharge by any employer, contractor, or owner of the members of the plaintiff corporation, or the plaintiff McQueed, or any or either of them, from their work, employment, or business, or in any wise interfering with the lawful business or work of the plaintiff corporation or of its members. But the defendants are not, nor is any one of them, enjoined and restrained from refusing to work with the plaintiff or any member of the plaintiff corporation."

The decision in the Special Term awarded to the plaintiffs substantially all the relief demanded in their complaint, and a judgment was entered accordingly. Cumming and the Enterprise Association and Nugent and the Progress Association appealed. In the Appellate Division the judgment of the Special Term was reversed.[63] The plaintiffs then appealed to the Court of Appeals.[64]

PARKER, C. J. The order of the Appellate Division should be affirmed, on the ground that the facts found do not support the judgment of the Special Term. * * *

If the organization notifies the employer that its members will not work with nonmembers, and its real object is to benefit the organization and secure employment for its members, it is lawful. If its sole purpose be to prevent nonmembers working, then it is unlawful. I do not assent to this proposition, although there is authority for it. It seems to me illogical and little short of absurd to say that the everyday acts of the business world, apparently within the domain of competition, may be either lawful or unlawful according to the motive of the actor. If the motive be good, the act is lawful. If it be bad, the act is unlawful. Within all the authorities upholding the principle of competition, if the motive be to destroy another's business in order to secure business for yourself, the motive is good, but, according to a few recent authorities, if you do not need the business, or do not wish it, then the motive is bad; and some court may say to a jury, who are generally the triors of fact, that a given act of competition which destroyed A.'s business was legal if the act was prompted by a desire on the part of the defendant to secure to himself the

[63] See National Protective Ass'n of Steam Fitters v. Cumming (1900) 53 App. Div. 227, 65 N. Y. Supp. 946.

[64] The statement of the case is taken partly from the report of the case in the Appellate Division, and partly from the statement of the findings given in the introductory portion of Judge Vann's opinion. Several passages are omitted, as indicated, from the opinions given, and a short opinion by Judge Gray is entirely omitted.

benefit of it, but illegal if its purpose was to destroy A.'s business in revenge for an insult given. But for the purpose of this discussion I shall assume this proposition to be sound, for it is clear to me that, applying that rule to the facts found, it will appear that the Appellate Division order should be sustained.

While I shall consider every fact found by the learned trial judge, I shall consider the findings in a different order, because it seems to me the more logical order. He finds "that the defendants Cumming and Nugent, while acting in their capacity of walking delegates for their respective associations and members of the board of delegates, caused the plaintiff McQueed and other members of the plaintiff association to be discharged by their employers from various pieces of work upon buildings in the course of erection, * * * by threatening the * * * employers that if they did not discharge the members of the plaintiff association, and employ the members of the Enterprise and Progress Associations in their stead, the said walking delegates would cause a general strike of all men of other trades employed on said buildings, and that the defendant Cumming, as such walking delegate, did cause strikes * * * in order to prevent the members of the plaintiff association from continuing with the work they were doing at the time the strike was ordered, and that said employers, by reason of said threats and the acts of the defendants Cumming and Nugent, discharged the members of the plaintiff association, and employed the members of the Enterprise and Progress Associations in their stead." Now there is not a fact stated in that finding which is not lawful, within the rules which I have quoted supra. Those principles concede the right of an association to strike in order to benefit its members; and one method of benefiting them is to secure them employment,—a method conceded to be within the right of an organization to employ. There is no pretense that the defendant associations or their walking delegates had any other motive than one which the law justifies,—of attempting to benefit their members by securing their employment. Nowhere throughout that finding will be found even a hint that a strike was ordered, or a notification given of the intention to order a strike, for the purpose of accomplishing any other result than that of securing the discharge of the members of the plaintiff association, and the substitution of members of the defendant associations in their place. Such a purpose is not illegal within the rules laid down in the opinion of Judge VANN, nor within the authorities cited therein. On the contrary, such a motive is conceded to be a legal one. It is only where the sole purpose is to do injury to another, or the act is prompted by malice, that it is insisted that the act becomes illegal. No such motive is alleged in that finding. It is not hinted at. On the contrary, the motive which always underlies competition is asserted to have been the animating one. It is beyond the right and the power of this court to import into that finding, in contradiction of another finding or otherwise, the further finding that the motive which

prompted the conduct of defendants was an unlawful one, prompted by malice, and a desire to do injury to plaintiffs, without benefiting the members of the defendant associations. I doubt if it would ever have occurred to any one to claim that there was anything in that finding importing a different motive from that specially alleged in the finding, had not the draftsman characterized the notice given to the employers by the associations of their intention to strike as "threats." The defendant associations, as appears from the finding quoted, wanted to put their men in the place of certain men at work who were nonmembers, working for smaller pay, and they set about doing it in a perfectly lawful way. They determined that if it were necessary they would bear the burden and expense of a strike to accomplish that result, and in so determining they were clearly within their rights, as all agree. They could have gone upon a strike without offering any explanation until the contractors should have come in distress to the officers of the associations, asking the reason for the strike. Then, after explanations, the nonmembers would have been discharged, and the men of defendant associations sent back to work. Instead of taking that course, they chose to inform the contractors of their determination, and the reason for it. It is the giving of this information—a simple notification of their determination, which it was right and proper and reasonable to give—that has been characterized as "threats" by the Special Term, and which has led to no inconsiderable amount of misunderstanding since. But the sense in which the word was employed by the court is of no consequence, for the defendant associations had the absolute right to threaten to do that which they had the right to do. Having the right to insist that plaintiff's men be discharged, and defendants' men put in their place, if the services of the other members of the organization were to be retained, they also had the right to threaten that none of their men would stay unless their members could have all the work there was to do.

The findings further stated that the defendants Cumming and Nugent were the walking delegates of the defendant associations, and as such were members of the board of delegates of the building trades in New York, and were therefore in control of the matters in their respective trades. The trial court also found "that the defendant Cumming threatened to cause a general strike against the plaintiff association and against the plaintiff McQueed wherever he found them at work, and that he would not allow them to work at any job in the city of New York, except some small jobs where the men of the Enterprise Association were not employed, and that he and the defendant Nugent threatened to drive the plaintiff association out of existence." Now, this finding should be read in connection with and in the light of the other findings which I have already read and commented on, and which show that the purpose of the strike was to secure the employment of members of the defendant associations in the places filled by the members of plaintiff's associa-

tion, who were willing to work for smaller wages,—a perfectly proper and legitimate motive, as we have seen. But if the other findings be driven from the mind while considering this one, which the opinions of the Appellate Division indicate was not justified by the evidence, it will be found that it fairly means no more than that the defendant associations did not purpose to allow McQueed and the members of his association to work upon any jobs where members of defendant associations were employed; that they were perfectly willing to allow them to have small jobs, fitted, perhaps, for men who were willing to work for small wages, but that the larger jobs, where they could afford to pay and would pay the rate of wages demanded by defendant associations, they intended to secure for their members alone,—a determination to which they had a perfect right to come, as is conceded by the rules which I have quoted. Having reached that conclusion, defendants notified McQueed, who had organized an association when he failed to pass the defendants' examination, that they would prevent him and the men of his association from working on a certain class of jobs. They did not threaten to employ any illegal method to accomplish that result. They notified them of the purpose of the defendants to secure this work for themselves, and to prevent McQueed and his associates from getting it, and in doing that they but informed them of their intention to do what they had a right to do; and, when an man purposes to do something which he has the legal right to do, there is no law which prevents him from telling another, who will be affected by his act, of his intention. A man has a right, under the law, to start a store, and to sell at such reduced prices that he is able in a short time to drive the other storekeepers in his vicinity out of business, when, having possession of the trade, he finds himself soon able to recover the loss sustained while ruining the others. Such has been the law for centuries. The reason, of course, is that the doctrine has generally been accepted that free competition is worth more to society than it costs, and that on this ground the infliction of damages is privileged. Com. v. Hunt, 4 Metc. (Mass.) 111, 134, 38 Am. Dec. 346. Nor could this storekeeper be prevented from carrying out his scheme because, instead of hiding his purpose, he openly declared to those storekeepers that he intended to drive them out of business in order that he might later profit thereby. Nor would it avail such storekeepers, in the event of their bringing an action to restrain him from accomplishing their ruin by underselling them, to persuade the trial court to characterize the notification as a "threat," for on review the answer would be, "A man may threaten to do that which the law says he may do, provided that, within the rules laid down in those cases, his motive is to help himself." A labor organization is endowed with precisely the same legal right as is an individual to threaten to do that which it may lawfully do.

Having finished the discussion of the facts, I reiterate that, within the rules of law I have quoted, it must appear, in order to make out

a cause of action against these defendants, that in what they did they were actuated by improper motives,—by a malicious desire to injure the plaintiffs. There is no such finding of fact, and there is no right in this court to infer it if it would, and, from the other facts found, it is plain that it should not if it could.

The findings conclude with a sentence which commences as follows: "I find that the threats made by the defendants, and the acts of the said walking delegates in causing the discharge of the members of the plaintiff association by means of threats of a general strike of other workmen, constituted an illegal combination and conspiracy." That is not a finding of fact, but a conclusion of law, that the trial court erroneously, as I think, attempted to draw from the facts found, which I have already discussed, and which clearly, in my judgment, require this court to hold that the defendants acted within their legal rights.

In the last analysis of the findings, therefore, it appears that they declare that members of the organizations refused to work any longer, as they lawfully might; that they threatened to strike, which was also within their lawful right, but without any suggestion whatever in the findings that they threatened an illegal or unlawful act. And such findings are claimed to be sufficient to uphold a judgment that absolutely enjoins the defendant associations and their members from striking. This is certainly a long step in advance of any decision brought to my attention. * * *

VANN, J., dissenting, after stating the findings of the trial justice. * * * The Appellate Division, according to its order, which is the only evidence of its action that we can consider, did not reverse upon a question of fact; and a reversal upon the law, only, is an affirmance of the facts found, which are thus placed beyond our control, as there was some evidence to support the findings. People v. Adirondack Ry. Co., 160 N. Y. 225, 235, 54 N. E. 689; Code Civ. Proc. § 1338. Thus we have before us a controversy, not between employer and employé, but between different labor organizations, wherein one seeks to restrain the others from driving its members out of business, and absolutely preventing them from earning a living by working at their trade, through threats, made to the common employer of members of all the organizations, to destroy his business unless he discharged the plaintiff's members from his employment. The primary question is whether the action of the defendants was unlawful, for a lawful act done in a lawful manner cannot cause actionable injury. It is not the duty of one man to work for another unless he has agreed to, and if he has so agreed, but for no fixed period, either may end the contract whenever he chooses. The one may work or refuse to work at will, and the other may hire or discharge at will. The terms of employment are subject to mutual agreement, without let or hindrance from any one. If the terms do not suit, or the employer does not please, the right to quit is absolute, and no one may demand a reason therefor. Whatever one

man may do alone, he may do in combination with others, provided they have no unlawful object in view. Mere numbers do not ordinarily affect the quality of the act. Workingmen have the right to organize for the purpose of securing higher wages, shorter hours of labor, or improving their relations with their employers. They have the right to strike (that is, to cease working in a body by prearrangement until a grievance is redressed), provided the object is not to gratify malice, or inflict injury upon others, but to secure better terms of employment for themselves. A peaceable and orderly strike, not to harm others, but to improve their own condition, is not a violation of law. They have the right to go farther, and to solicit and persuade others, who do not belong to their organization, and are employed for no fixed period, to quit work, also, unless the common employer of all assents to lawful conditions, designed to improve their material welfare. They have no right, however, through the exercise of coercion, to prevent others from working. When persuasion ends, and pressure begins, the law is violated; for that is a trespass upon the rights of others, and is expressly forbidden by statute. Pen. Code, § 168. They have no right, by force, threats, or intimidation, to prevent members of another labor organization from working, or a contractor from hiring them or continuing them in his employment. They may not threaten to cripple his business unless he will discharge them, for that infringes upon liberty of action, and violates the right which every man has to conduct his business as he sees fit, or to work for whom and on what terms he pleases. Their labor is their property, to do with as they choose; but the labor of others is their property, in turn, and is entitled to protection against wrongful interference. Both may do what they please with their own, but neither may coerce another into doing what he does not wish to with his own. The defendant associations made their own rules and regulations, and the plaintiff corporation did the same. Neither was entitled to any exclusive privilege, but both had equal rights according to law. The defendants could not drive the plaintiff's members from the labor market absolutely, and the plaintiff could not drive the defendants' members therefrom. The members of each organization had the right to follow their chosen calling without unwarrantable interference from others. Public policy requires that the wages of labor should be regulated by the law of competition and of supply and demand, the same as the sale of food or clothing. Any combination to restrain "the free pursuit in this state of any lawful business," in order "to create or maintain a monopoly," is expressly prohibited by statute, and an injunction is authorized to prevent it. In re Davies, 168 N. Y. 89, 96, 61 N. E. 118, 56 L. R. A. 855; Laws 1897, c. 383; Laws 1899, c. 690.

A combination of workmen to secure a lawful benefit to themselves should be distinguished from one to injure other workmen in their trade. Here we have a conspiracy to injure the plaintiffs in their busi-

ness, as distinguished from a legitimate advancement of the defendants' own interests. While they had the right by fair persuasion to get the work of the plaintiff McQueed, for instance, they had no right, either by force or by threats, to prevent him from getting any work whatever, or to deprive him of the right to earn his living by plying his trade. Competition in the labor market is lawful, but a combination to shut workmen out of the market altogether is unlawful. One set of laborers, whether organized or not, has no right to drive another set out of business, or prevent them from working for any person upon any terms satisfactory to themselves. By threatening to call a general strike of the related trades, the defendants forced the contractor to discharge competent workmen who wanted to work for him, and whom he wished to keep in his employment. They conspired to do harm to the contractor in order to compel him to do harm to the plaintiffs, and their acts in execution of the conspiracy caused substantial damage to the members of the plaintiff corporation. * * *

The object of the defendants was not to get higher wages, shorter hours, or better terms for themselves, but to prevent others from following their lawful calling. Thus one of the defendants said to the plaintiff McQueed: "I will strike against your men wherever I find them, and not allow them to work on any job in the city, except some small place where the Enterprise men are not employed." The same man said to one of the contractors that he could not have the plaintiff's men in his employment and unless they were discharged he would order a "general strike of the whole building." They were discharged accordingly, although the contractor testified that they were good workmen, that their work was satisfactory, and that he had no reason for discharging them, other than the threats made. Another contractor testified that two of the defendants told him that he must take the plaintiff's men off and put their men on, "or else the whole building would be tied up, as they would not allow the other men to work." The usual discharge followed, although the men were satisfactory to their employer. The same witness testified that "Mr. Cumming would neither allow my men to work, nor would he allow his men to go to work until the time had been paid for between the interval they struck and the time they were to go to work again." A member of the plaintiff corporation swore that "Mr. Cumming told us that, if he ever found us on a job in the vicinity of New York, he would strike it by order of the board of delegates. He said they would not allow us to work on any job, except it was a small job,—a cheap job,—and he allowed us to do it." The threat was repeated in substance to the employer, who discharged the witness, and he was not employed on the building afterwards. There was other evidence to the same effect, and, although the defendants denied making these threats, the trial judge accepted the version of the plaintiff's witnesses, and hence we must do the same. I assume, therefore, that the defendants caused the dis-

charge of the plaintiff's men by threatening to cripple their employer's business unless he discharged them, and that they also molested them by threatening to prevent them from working at their trade in the city of New York, by calling a general strike of all trades on any building where they might be employed. The action of the defendants was wrongful and malicious, and their object was to force men who had learned a trade to abandon it and take up some other pursuit. There is no finding that the defendants maintain a higher standard of skill than the plaintiffs. * * *

The conclusions I have announced are supported by the weight of authority in this country and in England. The leading case in this state is controlling in principle, and requires a reversal of the order appealed from. Curran v. Galen, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496. The plaintiff in that case alleged in his complaint that the defendants wrongfully conspired to injure him and take away his means of earning a livelihood; that they threatened to accomplish this unless he would join their association; that in pursuance of the conspiracy, "upon plaintiff's refusing to become a member of said association," the defendants "made complaint to the plaintiff's employers, and forced them to discharge him from their employ, and, by false and malicious reports in regard to him, sought to bring him into ill repute with members of his trade and employers, and to prevent him from prosecuting his trade and earning a livelihood." The answer set forth an agreement between a brewer's association and a labor organization, of which defendants were members, to the effect that all employés of the brewery companies belonging to the former should be members of the latter, and that no employé should work for a longer period than four weeks without becoming a member. It was further alleged that the plaintiff was retained in the employment of one of the brewing companies for more than four weeks after he was notified of the provisions of said agreement requiring him to become a member of the local assembly; that the defendants requested him to become a member, and, on his refusal to comply, they, through their committee, notified the officers of said company that the plaintiff, after repeated requests, had refused for more than four weeks to become a member of said assembly; and that they did so solely in pursuance of said agreement, and in accordance with the terms thereof, without intent or purpose to injure plaintiff in any way. The plaintiff demurred to this defense upon the ground that it was insufficient, in law, upon the face thereof. The demurrer was sustained in all the courts. 77 Hun, 610, 28 N. Y. Supp. 1134; 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496. All the judges who sat in this court united with Judge Gray in saying that: "Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workingmen

be to hamper or to restrict that freedom, and, through contracts or arrangements with employers, to coerce other workingmen to become members of the organization, and to come under its rules and conditions, under the penalty of the loss of their position and of deprivation of employment, then that purpose seems clearly unlawful, and militates against the spirit of our government and the nature of our institutions. The effectuation of such a purpose would conflict with that principle of public policy which prohibits monopolies and exclusive privileges. It would tend to deprive the public of the services of men in useful employment and capacities. It would, to use the language of Mr. Justice Barrett in People v. Smith, 5 N. Y. Cr. R., at page 513, 'impoverish and crush a citizen for no reason connected in the slightest degree with the advancement of wages or the maintenance of the rate.'" * * * [65]

L. D. WILLCUTT & SONS CO. v. BRICKLAYERS' BENEVOLENT & PROTECTIVE UNION NO. 3 et al.

(Supreme Judicial Court of Massachusetts, 1908. 200 Mass. 110, 85 N. E. 897, 23 L. R. A. [N. S.] 1237.)

This bill, brought by the L. D. Willcutt & Sons Company, ran originally against two unincorporated labor unions by name, but was amended so as to run only against certain individuals as officers and members of these unions and against their other members as thus represented. No question was made that the defendants did not sufficiently represent all the members of both unions.

In the Superior Court the justice who heard the case entered a decree in favor of the defendants and reported the facts for the opinion of the Supreme Judicial Court. The case grew out of a trade dispute between the plaintiff and certain members of the union who were in the plaintiff's employ. Briefly, the facts were as follows:

In April, 1906, these unions adopted a code of working rules, in which, beside some minor demands not now material, they demanded that wages be increased five cents an hour, that all foremen should be members of the unions, that the business agent of the unions should be allowed to visit any building under construction to attend to his official duties, and that wages should be paid during working hours. The plaintiff declined to accept these rules, and a strike followed.

By the constitution and rules of the unions it appeared that a code of fines and penalties was established by the International Union, an association composed of these and other similar unions throughout the country, and that this code was being actively enforced by the local unions. One rule provided that any member violating any section of the working code should be fined upon conviction not less than $5 nor more than $25, one of these sections being that "no member of the union shall work with a nonunion man who refuses to join the union." Various other penalties were provided, varying from $5 to $500 for each offense, to be imposed upon persons designated as "common scabs," "inveterate or notorious scabs," and "union wreckers"; these terms

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[65] O'Brien, Haight, and Gray, JJ., concurred with Parker, C. J. Bartlett and Martin, JJ., concurred with Vann, J.

being applied to those who in different ways persist in working after a strike has been called. These fines in their operation are likely to be coercive in their nature.

This code was actively enforced by the unions, and most of the members of the unions who left their work did so through fear of the fines that would be imposed upon them if they continued to work. The defendants Driscoll and Reagan on one occasion found two men at work for the plaintiff, one a journeyman who had been and the other a foreman who was a member of the union. Reagan threatened the journeyman with a fine of $100 if he continued to work, and Driscoll notified the foreman that he was called out. Both refused to leave. Driscoll reported the fact at a meeting of the union and a vote was passed that charges be preferred against the men for working contrary to the rules. A preliminary injunction was issued in this case, and no further steps were taken under the vote.

The defendants established a strike headquarters, and provided a strike fund from which payments were made to the strikers and other men out of work. Some of the defendants made constant visits to a job of the plaintiff, generally at noontime, to persuade men whom the plaintiff had hired to leave its employ. They offered as inducements in some cases to nonunion men membership without the full payments usually required, and in other cases work elsewhere. Men frequently left the plaintiff's employ after these talks, in some cases stating that they would like to work but could not run the risk of being fined. The defendant Driscoll induced two men to go who otherwise would have continued at work, by paying them with funds of the unions the wages due them from the plaintiff and providing them with transportation to Utica, N. Y., where he had secured other work for them.

HAMMOND, J. (after stating the facts). * * * The strike had four objects. Of these the demand for an increase of wages was properly enforceable by a strike. The demand that wages should be paid during working hours amounts merely to a demand for a shorter day, and also was properly enforceable by a strike. The reasonableness of such demands we have not the means of determining; and it is settled that such matters are best left to be adjudicated in the freedom of private contract between the interested parties. More difficult questions are presented by the demands that all foremen shall be members of the unions, and that the business agent of the unions shall be allowed to visit any building under construction. See as to the first of these points a very interesting article by Professor Smith, 20 Harvard Law Review, 431, note 1. But it is unnecessary under the circumstances to determine these questions, as the plaintiff replied with a bare refusal of all the demands.

We are of opinion therefore that this strike must be regarded as simply a strike for higher wages and a shorter day. It was not a mere sympathetic strike, as in Pickett v. Walsh, 192 Mass. 572, 587, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638, or one whose immediate object was only remotely connected with the ultimate object of the strikers, as in Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330. It was a direct strike by the defendants against the other party to the dispute, instituted for the protection and furtherance of the interests of the defendants in matters in which both parties were directly interested and as to which each party had the right, within all lawful limits, to determine its own course. Such a strike must be treated as a justifiable strike so far as respects its ultimate object.

But however justifiable or even laudable may be the ultimate objects of a strike, unlawful means must not be employed in carrying it on; and it is contended by the plaintiff that the use of fines and threats of fines, under the circumstances disclosed in the record, are unlawful. The question is stated by the trial judge in the following language: "In case of a justifiable strike, has the contractor the right to invoke the aid of the court to prevent the labor union from imposing a fine [which the court has found to be coercive in its nature] or taking action to impose one upon one or more of its members under its rules to induce them to leave the contractor's employ to his injury?" Under the findings of the court it would seem that the question is not intended to be quite so broad as otherwise might be inferred from its language. The language is broad enough to include the case where the employé is under a contract to stay with his employer and where to leave would be a violation of that contract. But no such state of things appears upon the record. The plaintiff "hired its masons by the day and paid them on the basis of the number of hours worked, and it might have discharged them and they might have left at the close of any day." The question must therefore be considered as applying only to cases where the employé by leaving violates no contractual right of the employer.

The question how far the imposition of fines by an organization upon its members where the effect is to injure a third party is justifiable, was considered by this court in Martell v. White, 185 Mass. 255, 69 N. E. 1085, 64 L. R. A. 260, 102 Am. St. Rep. 341, and it was there adjudged that the imposition of such a fine by which members of the organization were coerced into refusing to trade with the plaintiff, not a member, to his great damage, was inconsistent with the ground upon which the right to competition in trade is based, and as against him was not justifiable. * * *

That principle, if applicable to the facts of this case, is decisive. The majority of the court are of the opinion that it is applicable, and hence that there should be a decree for the plaintiff enjoining intimidation or coercion by fines.

Under ordinary circumstances this opinion would end here. But inasmuch as a minority of the court still think that the principle laid down in Martell v. White, with reference to intimidation by fines imposed by an organization upon its members, is not correct, and also perhaps, that, even if correct, it is not applicable to the facts of this case, and are unwilling to accept that principle as law in this commonwealth notwithstanding the authority of that case, it may be well to say something in addition to what was there said. We are also somewhat influenced to take this action by reason of the importance of the question and its relation to a part of the law still in the nebulous but clearing stage.

Before entering more fully upon the discussion it is well to get a clear conception of what the case is. To begin with, it is not a con-

test between the members of two competing labor unions, as was Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330, nor is it a conflict between an organization and one of its members in a matter in which no third party is interested. Nor does the plaintiff corporation contend that it has any right to compel the intimidated workman to enter its employ. Neither is it seeking, in behalf of a member of a union, to enforce or defend the right of such member to be free from a fine or threat of a fine. The plaintiff has no concern with the imposition of fines by a union upon its members unless, and only so far as, such an imposition is in violation of a right of the plaintiff. Even if the fine be illegal the plaintiff has no standing in court to complain unless some one of its rights is invaded to its damage. In a word, the case is not between the party imposing the fine and the person fined, nor between the person fined as such and a third party who suffers, but on the contrary it is between such third party and the party imposing the fine. If it were only between the person fined and the party imposing the fine, then with some degree of plausibility it might be said that the former had no right to complain, or at least had waived that right; but it is manifest that neither of the immediate parties to the fine can, either by an agreement among themselves or by waiver, justify the invasion of the right of a third party, if any he has, to object to it.

What is the complaint of the plaintiff? It is a corporation engaged in the construction of buildings and employing a number of men. Its men left its employ on a strike. To keep them away the defendants threatened with fines such as were members of the unions, and by that means kept them away from the plaintiff when otherwise they would have stayed; all to the great damage of the plaintiff. Shortly stated the case is this: The plaintiff's men are being coerced by threats of a fine to leave its employ, greatly to its injury, the fines to be levied in accordance with the by-laws of a voluntary association of which the proposed victims are members. This injury to the plaintiff is intended by the defendants. Has the plaintiff any standing in equity to an injunction against the infliction of such injury?

It is to be premised that the right which the plaintiff seeks to have protected against the acts of the defendants arises from no contract or statute, but out of the nature of things. It is one of the large body of rights which have their foundation in the fitting necessities of civilized society. It is the common law right to a reasonably free labor market. Vice Chancellor Stevenson, in speaking of it, says it has been called a "probable expectancy" and describes it as "the right which every man has to earn his living or pursue his trade without undue interference." Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 765, 53 Atl. 230. He further remarks (pages 765, 766 of 63 N. J. Eq., and page 233 of 53 Atl.): "It will probably be found * * * that the natural expectancy of employers in relation to the labor market and the natural expectancy of merchants

in respect to the merchandise market must be recognized to the same extent by courts of law and courts of equity and protected by substantially the same rules. It is freedom in the market, freedom in the purchase and sale of all things, including both goods and labor, that our modern law is endeavoring to insure to every dealer on either side of the market." And in Atkins v. Fletcher Co., 65 N. J. Eq. 658, 664, 55 Atl. 1074, 1076, the same judge says: "The elemental right of the employer of labor which the courts recognize today no doubt is the right to employ, while the corresponding right of the workman is the right to be employed. In other words, the right to buy labor and the right to sell labor are recognized by the law, and their enjoyment is greatly impaired or destroyed unless freedom in the labor market—freedom on both sides of the labor market—is maintained. Each party to a contract for the sale of labor has an interest in the freedom of the other party with respect to making the contract." In the words of Lord Lindley in Quinn v. Leathem [1901] A. C. 495, 534, "a person's liberty or right to deal with others is nugatory unless they are at liberty to deal with him if they choose to do so." This right of the employer is conclusively established by the numerous cases which hold that he may maintain an action against those who by intimidation prevent persons from entering into his employ. See remarks of Lord Halsbury in Allen v. Flood [1898] A. C. 1, 71, 72. In our own reports such a case may be found in Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443. This is the right—the right to a free labor market—which the plaintiff claims has been invaded by the defendants, and for which he seeks protection.

The defendants also have rights. They have the right to work or not to work, to sell their labor upon such terms as they see fit and to combine for the purpose of getting more pay or a shorter day. And for the purpose of strengthening their organization and making it more effective they have the right to make appropriate by-laws for its internal management, and for the regulation of the conduct of its members toward each other in matters affecting the general interests of the body; and they may enforce obedience to such by-laws and regulations by fines or other suitable penalties.

But not much progress is made by this general statement of the rights of the respective parties. We are still only on the skirmish line. In the jurisprudence of any civilized country there are but few, if any, absolute rights—rights which bend to nothing and to which everything else must bend. The right to one's life would seem to be quite absolute, but it must yield to the private right of self-defense and to the public right to punish for crime. And so in the case before us, neither the right of the plaintiff to a free labor market nor the right of the union to impose a fine upon its members is absolute. Neither is to be considered apart from the other, or without reference to any other conflicting right, whether public or private; but

each must be regarded as having in the rules of human conduct its own place beyond the limits of which it must not go. Moreover it must be borne in mind (what sometimes seems to be forgotten by the actors upon each side of such controversies) that the controversy is not a warfare in the sense that for the time being the usual rules of conduct are changed, as in the case of an actual war between two countries. There is no martial law in these cases, no change in the ordinary rules of society, but these rules remain the same as before, commanding what was theretofore right and prohibiting what was theretofore wrong.

The right of an employer to free labor is subject to the right of the laborer to hamper him by many expedients short of fraud or intimidation amounting to injury to the person or property of those who desire to enter his employ, or threats of such injury. For instance, persuasion not amounting to such intimidation is lawful, and perhaps the same may be said of social pressure even when carried to the extent of social ostracism, not including however any threat in a business point of view. See Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443; Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 769, 53 Atl. 230; 20 Harvard Law Review, 267. Social rights and privileges must take care of themselves. The law cannot prescribe with whom one shall shake hands or associate as a friend.

So long also as the by-laws of a union relate to matters in which no one is interested except the association and its members, and violate no right of a third party or no rule of public policy, they are valid. Fines may be imposed, for instance for tardiness, absence, failure to pay dues, or for misconduct affecting the organization or any of its members; and for numerous other acts. It cannot be successfully contended, however, that as against the right of some party other than the association and its members an act, otherwise a violation of the third party's rights, is any less a violation because done by some member in obedience to a by-law. If a member commits an assault upon a person, and is called into court by the commonwealth upon a criminal complaint or in a civil action by the victim, he can find no valid ground of defense in the fact that he committed the assault in compliance with the requirements of a contract with some other person, or in obedience to a by-law of an association of which he was a member. So a by-law providing that, upon an order to strike, every employé shall quit work even although such an act should be in violation of a contract then existing between him and his employer for continuous service, and that for failure thus to break his contract the member should be fined, doubtless would be declared invalid. And the principle at the bottom of such a decision is this, namely: An interference with the right of a third party cannot be justified upon the ground that the intruder is acting in accordance with an agreement between him and some other person. In a word,

so long as a fine is imposed for the guidance of members in matters in which outside parties have no interest, or in which there is no violation of a right of an outside party, then no such party can complain. But when the right of such a party is invaded, it is no defense, either to the person fined or to those who have imposed the fine, that the invasive act was done in accordance with the by-laws of an association.

In the case before us, standing opposed to each other are these two rights: The right of the employer to a free labor market, and the right of the striking employés in their strife with him to impair that freedom; and the crucial question is, how far can the latter go? On which side of the line shall stand the matter of coercion by fines imposed by a union upon its members to impair that freedom? Is the employer's right to a free market subject to this system of mutual intimidation and coercion by fines, or is the right to establish such a system subject to the right of the employer to a free market? If the employer's right is not subject to this method of intimidation, then of course as against him it is unlawful. If it is subject to it, then he cannot complain, no matter how severe the blow.

So far as concerns the law of this commonwealth at least, some things seem to be settled. It is settled that the flow of labor to the employer cannot be obstructed by intimidation or coercion produced by means of injury to person or property, or by threats of such injury. Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443. In that case Allen, J., said: "Such an act [picketing as a means of intimidation] is an unlawful interference with the rights both of employer and employed. An employer has a right to engage all persons who are willing to work for him at such prices as may be mutually agreed upon; and persons employed or seeking employment have a corresponding right to enter into or remain in the employment of any person or corporation willing to employ them. These rights are secured by the Constitution itself. Com. v. Perry, 155 Mass. 117, 28 N. E. 1126, 14 L. R. A. 325, 31 Am. St. Rep. 533; People v. Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; Braceville Coal Co. v. People, 147 Ill. 66, 71, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. Rep. 206; Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315; Low v. Rees Printing Co., 41 Neb. 127, 59 N. W. 362, 24 L. R. A. 702, 43 Am. St. Rep. 670." See, also, Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689. And it is unnecessary to cite cases in support of the proposition that such is the great weight of authority elsewhere, even though the ultimate object of the strike be legal.

There can be no doubt that fining is one method of injuring a man in his estate, and that a threat to fine is a threat of such an injury. Indeed this is recognized by the decree made by the trial court in this very case, so far as it affects Reagan, one of the defendants,

who it was found had threatened with a fine a man once but not then a member of a union.

It is urged however that although this method of intimidation is generally an invasion of the employer's right to a free market and therefore illegal, yet when the intimidation is exerted by a union upon its members in accordance with its by-laws in a strike whose object is legal, it is justifiable and legal. To this the obvious reply is that the rule of freedom to contract is founded upon principles of public policy, that each party to a contract is interested in the freedom of the other party, that it can make no difference to the public or to the employer (who in this case is the other party) that the person intimidated is or is not a member of the society intimidating. In either case the injury is the same and is from the same cause namely intimidation. The workman is no longer free. In Longshore Printing Co. v. Howell, 26 Or. 527, 38 Pac. 547, 28 L. R. A. 464, 46 Am. St. Rep. 640, the court, after speaking of the general right of labor unions to make rules, proceeds thus: "It must be understood, however, that these associations, like other voluntary societies, must depend for their membership upon the free and untrammelled choice of each individual member. No resort can be had to compulsory methods of any kind to increase or keep up or maintain such membership. Nor is it permissible for associations of this kind to enforce the observance of their laws, rules and regulations through violence, threats or intimidation, or to employ any methods that would induce the intimidation or deprive persons of perfect freedom of action."

The keynote on this matter is struck in Booth v. Burgess, 72 N. J. Eq. 181, 197, 65 Atl. 226, 233, in the following language: "No surrender of liberty or voluntary agreement to abide by by-laws on the part of the employés who are first coerced, made by them when they enter their labor unions, can * * * affect the right of the complainant to a free market, which right he will enjoy for all it may be worth if these employés are permitted to exercise their liberty. The employés may be able to surrender their own right but they certainly cannot surrender the rights of other parties"—citing Boutwell v. Marr, 71 Vt. 1, 42 Atl. 607, 43 L. R. A. 803, 76 Am. St. Rep. 746, and Berry v. Donovan, 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899, 108 Am. St. Rep. 499, 3 Ann. Cas. 738. And in Downes v. Bennett, 63 Kan. 653, 662, 66 Pac. 623, 626 (55 L. R. A. 560, 88 Am. St. Rep. 256), there is a recognition of the same doctrine: "This is not the case of a union or association of persons intimidating its members from engaging in a specific service offered by an employer and standing ready and open to be entered. In such cases, on a showing of continuous damage caused by inability to secure employés, preventive relief has been afforded." Boutwell v. Marr, 71 Vt. 1, 42 Atl. 607, 43 L. R. A. 803, 76 Am. St. Rep. 746.

An opposite doctrine leads to strange conclusions. For instance, if ten men banded together undertake by coercion to keep two other men from entering an employment, and they do this in order to force the employer, for lack of ability to get the two, to employ them (the ten), the employer's right to a free market is invaded, and if he suffers thereby he may proceed either in equity or law against the ten; but if the ten men first induce the two other men to enroll themselves in the same organization with the ten, then, it is said, the ten man may by fines or threats of fines so intimidate the two men as to frighten them from the employer, and that such intimidation is no violation of the employer's right. A rule of law which leads to such inconsistencies is not to be adopted. It does not distinguish between coercion and noncoercion, but between organized coercion and sporadic coercion. It makes a distinction entirely foreign and immaterial to the ground upon which the right to a free market is based.

If it be said that fines are not in themselves illegal, and that consequently their use cannot be illegal, the answer is that when they are used as a method of coercion and create a kind of coercion inconsistent with the right of a person they are, as against that person's right, illegal. If it be said as we have heard it said that fines are innocent and cannot be illegal because they are used by all governments as a method of punishing criminals, the answer is that if the principle is true that, what a government may do to punish for crime, individuals or societies may do to enforce private rights, then it follows that a by-law providing for imprisonment or even death may be legal.

If it be said that the member fined may take his choice either to leave the organization or abide by its rules to which he has before assented, and that where there is a choice there can be no coercion, the answer is that in almost every conceivable case of coercion short of an actual overpowering of the physical forces of the victim there is a choice. The highwayman, who presents his cocked pistol to the traveler and demands his purse under pain of instant death in case of refusal, offers his victim a choice. He may either give up his purse and live, or refuse and die. In Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287, the victim had a choice either to pay a fine or take the consequences of a refusal. And so the member of a labor union has the choice either to pay the fine or leave the union. Is it difficult to realize what that choice is in these days of organized labor? Is it too much to say that many times it is very difficult, indeed practically impossible, for a workman to get bread for himself and his family by working at his trade unless he is a member of a union? It is true he has a choice between paying his fine and not paying it, but is it not frequently a hard one? May not the coercion upon him sometimes be most severe and effective? Such is not a free choice. And a mar-

ket filled with such men is not a reasonably free market. In this connection the language of Boutwell v. Marr, 71 Vt. 1, 42 Atl. 607, 43 L. R. A. 803, 76 Am. St. Rep. 746, seems significant and appropriate: "The law cannot be compelled by any initial agreement of an associate member to treat him as one having no choice but that of the majority, nor as a willing participant in whatever action may be taken. The voluntary acceptance of by-laws providing for the imposition of coercive fines does not make them legal and collectible. * * * The fact that the relations and processes deemed essential to a recovery are brought within the membership and proceedings of an organized body cannot change the result. The law sees in the member of an association of this character both the authors of its coercive system and the victims of this unlawful pressure. If this were not so, men could deprive their fellows of established rights, and evade the duty of compensation simply by working through an association."

If it be said that without fines the same result may be indirectly reached by the organization by exercising two rights, namely the right to expel a member and the right to charge an initiation fee upon his return, and since the same result may thus be legitimately reached, nobody is harmed if it be reached by fine, the reply is that if the purpose of expulsion and the subsequent initiation fee be each a part of one and the same transaction, namely, the imposition of a fine, and the two acts are in substance the procedure by which the intimidation by fine is exercised, and such is the intention, then there may be a strong reason for holding that such a procedure is one imposing a fine and should be treated as such. Ordinarily, however, each separate act should be treated by itself and its validity judged by itself. The fact that separately and independently executed they incidentally may have the effect of a fine is immaterial on the question of the right to fine. The fact that a result may be incidentally reached in one way does not show that the same result may be lawfully reached in another way.

In considering this question we cannot lose sight of the great power of organization. It should be taken into account when one is considering where the line should be drawn between the right of the employer to a free market and the right of workmen to interfere with that market by coercion through the rules of a labor union. It is not universally true that what one man may do any number of men by concerted action may do. In Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638, Loring, J., after alluding to the great increase of power by combination, says: "The result of this greater power of coercion on the part of a combination of individuals is that what is lawful for an individual is not the test of what is lawful for a combination of individuals, or to state it in another way, there are things which it is lawful for an individual to do which it is not lawful for a combination of individuals to do."

This organization of labor to better the condition of the laborer is natural and proper. There can be no doubt that it is the most effective way, perhaps the only effective way, in which as against the organization of capital the rights of the laborer can be adequately protected. In many ways the labor unions have succeeded in bettering the condition of the laborer; and so far as their ultimate intentions and the means used in accomplishing them are legal they are entitled to protection to the extreme limit of the law.

But their powers must not be so far extended as to encroach upon the rights of others. It is clear that if the power to intimidate by fine be regarded as one of the powers which labor unions may rightfully exercise, then the right to a free market for labor—nay, even the right of the laborer to be free—is seriously interfered with, to the injury both of the public and the employer as well as the laborer.

In Martell v. White, 185 Mass. 255, 69 N. E. 1085, 64 L. R. A. 260, 102 Am. St. Rep. 341, it was said: "The right of competition rests upon the doctrine that the interests of the public are best subserved by permitting the general and natural laws of business to have their full and free operation, and that this end is best attained when the trader is allowed in his business to make free use of those laws." So of competition in labor; and so of competition between the employer and employé. The contest between them is only competition on a wide basis. As was said by Knowlton, C. J., in Berry v. Donovan, 188 Mass. 353, 358, 74 N. E. 603, 605, 5 L. R. A. (N. S.) 899, 108 Am. St. Rep. 499, 3 Ann. Cas. 738, "In a broad sense the contending forces may be called competitors." If the contest be carried on under the rules which regulate the law of supply and demand, leaving those engaged on either side to act under the general and natural laws of business, free from artificial coercion or intimidation as the words are ordinarily understood in this connection, then neither party has the right to complain; but if the coercion or intimidation by threats of a direct personal loss, due not to causes arising out of the situation or logical to the situation, but to a cause having no natural relation to the situation and entirely inconsistent with the basic principle of freedom of action under the natural laws of business, then there is cause for the complaint. Such a method of coercion must be declared illegal, as in violation of the right of the public and all concerned to a reasonably free labor market, that is, a market where all may act under this basic principle of freedom.

In view of these considerations and of others more fully set forth, in Martell v. White, which are not here repeated, and in Boutwell v. Marr, ubi supra, a majority of the court are of opinion that the overwhelming sense of the thing is that the principle that the right of the employer is not subject to coercion or intimidation by injury or threats of injury to the persons or property of laborers standing in the market to meet him, should apply to the coercion and intimidation ex-

erted by labor unions upon their members by fines or threats of fines. Any other conclusion is inconsistent with the existence of a reasonably free labor market to which both the employer and the employé are entitled.

Our attention has not been called to any case, nor are we aware of any, in which the precise point here involved has been discussed, which is inconsistent with the conclusion which we have reached. We are not aware of any case in which it has been adjudged that where a third party has a right to insist that those with whom he deals shall be free from coercion the rule does not apply to coercive acts by way of fines or threats of fines, imposed or to be imposed, by a voluntary association upon its members in accordance with its by-laws. The case of Bowen v. Matheson, 14 Allen, 499, was explained in Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330. Neither in that case nor in Pickett v. Walsh, supra, was there any evidence of coercion by fines. And the same may be said of Mogul Steamship Co. v. McGregor, 15 Q. B. D. 476, 21 Q. B. D. 544, 23 Q. B. D. 598, [1892] A. C. 25. In that case there was simply a withdrawal of trade advantages under certain conditions. The defendants had two prices—one price for one class of customers, and a different one for another class. There was nothing in the nature of an arbitrary fine. As stated by Fry, L. J., in the case as reported in 23 Q. B. D. 598, 622: "Competition was in substance the only weapon which the defendants intended to use against their rivals in trade. No thought of using violence, molestation, intimidation, fraud, or misrepresentation was entertained by the defendants." See, also, in same case the language of Coleridge, C. J., 21 Q. B. D. 544, 552, and that of Halsbury, Lord Chancellor, [1892] A. C., on p. 36, as follows: "After a most careful survey of the evidence in this case, I have been unable to discover anything done by the members of the associated body of traders other than an offer of reduced freights to persons who would deal exclusively with them"—and that of Lord Watson, on page 43 of the same volume. * * *

The result is that in the opinion of a majority of the court there should be a decree restraining and enjoining the defendants, their agents and servants from intimidating by the imposition of a fine, or by a threat of such fine, any person or persons from entering into the employ of the plaintiff or remaining therein, or from in any way being a party or privy to the imposition of any fine or threat of such imposition upon any person desiring to enter into or remain in the employ of the plaintiff; and it is

So ordered.[66]

[66] The statement of facts is abridged and parts of the opinion are omitted. Knowlton, C. J., and Sheldon, J., dissented from the reasoning of the majority, upon the ground that the strike in this case was lawful, "because it must

GIBLAN v. NATIONAL AMALGAMATED LABOURERS' UNION OF GREAT BRITAIN AND IRELAND.

(Court of Appeal. [1903] 2 K. B. 600.)

The action was brought by James Giblan, a labourer, residing at Newport, Mon., against the National Amalgamated Labourers' Union of Great Britain and Ireland, Harry W. Williams, its general secretary, and John Toomey, its local secretary at Newport, claiming damages for loss of wages; also an injunction to restrain the defendants respectively, or their agents or coadjutors, (a) from interfering in any manner howsoever with any person or persons, company or corporation, with a view to causing such person or persons, company or corporation, to break his or their contract or contracts with the plaintiff, or to cease to employ him, or to abstain from entering into contracts with him; (b) from preventing, or attempting to prevent, any person or persons from working with the plaintiff; and (c) from otherwise molesting or interfering in any manner with the plaintiff in follow-

be treated as instituted and carried on for the lawful purpose of obtaining higher wages and shorter periods of labor," and the method employed was neither forbidden by any rule of law or "inconsistent with some rule of public policy. * * * What seems to us the fallacy of the majority opinion is its failure to act upon the fact that the strike in this case was upon justifiable grounds, and of course was lawful. It follows that the action of each member of the union in trying to maintain the strike, without force, or wrongful coercion or intimidation exercised upon any one, was justifiable and lawful. It was not an interference with the rights of the plaintiff, because, as we have seen, the right of an employer to conduct his business without interference in the labor market is subordinate to the right of his employés to strike and to maintain the strike in a lawful manner. As against this right of the employés the employer has no right to have their labor flow to him uninfluenced or undiverted."

But compare the remark of Professor Jeremiah Smith in 20 Harv. Law Rev. 355 (1907): "Assuming that a combination, in its intrinsic nature, is not necessarily unlawful, and assuming also that the obvious aiming at monopoly by labor combinations does not make them unlawful, still such combinations may use special methods which are unlawful. Two methods deserve particular consideration here: The expulsion of members and the imposition of fines. * * * Suppose that is one of the articles of agreement that disobedient members may be heavily fined; and that thereafter the majority use the threat of imposing a heavy fine in order to induce a minority member to join in action damaging to a third person. Is this, as against the third person, an unlawful method of inducement?"

It has been held unlawful in Vermont and Massachusetts. Boutwell v. Marr (1899) 71 Vt. 1, 42 Atl. 607, 43 L. R. A. 803, 76 Am. St. Rep. 746, and Martell v. White (1904) 185 Mass. 255, 69 N. E. 1085, 64 L. R. A. 260, 102 Am. St. Rep. 341. And this result seems correct. The initial agreement of the member does not make the imposition of the fine a lawful method of coercion. "* * * When the will of the majority of an organized body, in matters involving the rights of outside parties, is enforced upon its members by means of fines and penalties, the situation is essentially the same as when unity of action is secured among unorganized individuals by threats or intimidation." Munson, J., in Boutwell v. Marr (1899) 71 Vt. 1, 8, 42 Atl. 607, 43 L. R. A. 803, 76 Am. St. Rep. 746.

ing his calling. The facts leading to the commencement of the action were as follows:

In 1891 the plaintiff, who was at the time a riveter employed in the business of repairing ships, became a member of the defendant union. He lived at Newport, Mon., where there was a branch of the union, and ultimately he became treasurer of that branch, holding that office in 1896 and 1897. In 1899 some difficulties arose with reference to his accounts; and it was alleged that he had retained a sum in hand of about £38, which should have been handed over to the society. He was seen by the general secretary, the defendant Williams, in reference to the matter, and on September 28, 1899, an agreement was signed by which he admitted his indebtedness to the society in a sum of £36. 9s. 2d., and agreed to pay this by £10 on October 9, 1899, and £1 a month until the whole debt was liquidated. As he failed to carry out this agreement an action was brought against him in the county court, at the instance of the union, in December, 1899, when judgment was obtained against him for the amount of the arrears payable under the agreement, which at that time amounted to about £11. By the judgment he was ordered to pay £5 forthwith, and the balance of the amount by installments of £1 per month. Shortly afterwards he paid £4, but after making that payment he failed to make any further payments under the judgment or the agreement.

On February 5, 1900, whilst the plaintiff was engaged at work at the Prince of Wales Dry Dock at Swansea, the defendant Williams went to the foreman and gave him notice that unless the plaintiff was dismissed the other union men who were employed there would be called out on strike. In consequence of that the plaintiff's employers discharged him, and for some two or three weeks he was out of employment. After that, however, he again obtained employment, and was in full work until nearly the close of the year 1900. Meanwhile, he had made no payments in respect of the amount he owed the union, and in June, 1900, a judgment summons was issued against him at the instance of the union in the county court, claiming that £11 was due from him. This proved to be an error, and the summons was dismissed with costs. This fact, according to the plaintiff's case, irritated the officials and members of the union, and determined them, by the course they subsequently took, to punish him by preventing him from obtaining employment or from continuing to work if he happened to obtain a job. He was still a member of the union, and had duly paid his contributions as such. In August, 1900, his position in relation to the union, and his indebtedness to that body, came up for consideration at the annual general meeting of the union, which took place on August 6, 7, and 8, at the town hall, Newport, when a resolution for his expulsion was passed, which was embodied in the following minutes: "The general secretary explained what he had done in this matter, and the position at present. He said that Giblan seemed determined not to pay back to the society his defalcations, but was putting it to all the trouble and expense he could. After the whole of the facts had been stated, it was moved by brothers J. Burns and Kenny, 'That after hearing the general secretary's statement re Giblan's actions, and the amount of his defalcations, he shall be expelled from this union and shall only be allowed to rejoin by paying to the society such moneys as are due, being defalcations when treasurer of Newport No. 4 branch. The terms of payment to be arranged with the general secretary on the basis of this resolution.'"

The plaintiff having thus been expelled from the union, the defendant Williams, on August 11, 1900, wrote to the then treasurer of the Newport branch, informing him of the resolution, and requesting him to post by registered letter to the plaintiff a notice of his expulsion, also requesting him to consider the plaintiff a non-member, and so to inform the members of that and other branches, and to post up in the club-room a notification that he was not a member, and that he must be treated by the members as a non-unionist until further orders. Notice of expulsion was accordingly sent to the plaintiff. At a district joint committee meeting held at Newport on October 13, 1900, several union men were fined for working with the plaintiff as being an expelled member.

On December 29, 1900, the plaintiff was in employment at Newport, when the defendant Toomey, the union's local secretary there, went to his employer

and gave him notice that unless the plaintiff was discharged other men in the employment would be called out by the union; and Toomey also gave notice to the other men, being members of the union, that if they worked with the plaintiff they would be called out. Consequently the plaintiff was discharged. In a similar way, on four subsequent occasions, at Newport, Sharpness, and Swansea, the last occasion being on April 19, 1901, once through the intervention of the defendant Williams, and thrice through that of the defendant Toomey, the plaintiff was prevented from retaining employment, in each case notice being given to the union men in the employment that if they worked with the plaintiff they would be called out. It appeared that another ground for those proceedings against the plaintiff was that he, a non-unionist, was obtaining employment when union men were out of work.

The action was tried at Cardiff before Walton, J., with a jury, when after hearing a considerable amount of evidence the learned judge left the following questions to the jury:

(1) Did the defendants Williams and Toomey, acting together or individually, call out the union men or threaten to call them out unless the plaintiff was stopped? (2) If they or either of them did, did they or he by so doing prevent, or endeavour to prevent, the plaintiff from getting employment or retaining his employment? (3) Was this done in order to compel the plaintiff to pay the arrears of his defalcations? (4) Was it done in order to punish the plaintiff for not paying such arrears? The following alternative questions were also submitted to the jury in the event of their answering the above questions in the affirmative: (5) Was what the defendants Williams and Toomey, or either of them, did only to warn the employers that the union men would leave in consequence of union workmen being unwilling to work with the plaintiff? (6) Was this done in consequence of the union men objecting to work with the plaintiff? (7) What damages, if any? The jury answered the first three questions in the affirmative, and the fourth also as regarded Williams, but in the negative as regarded Toomey. Their replies to the alternative questions were in the negative, and they assessed the damages at £100.

The result was that Walton, J., came to the conclusion that the defendant Williams was individually liable to the plaintiff for the acts complained of, but he gave judgment for the other defendants, the union and Toomey. The plaintiff appealed against so much of the judgment as refused the relief he claimed by his action. The defendant Williams did not appeal from the judgment against him.[67]

Romer, L. J. What are the facts of this case as stated by Walton, J., and found by the jury? In effect they are that the defendants Williams and Toomey, as officers of the defendant union, had, by virtue of their position, control over the men of the union, and consequently power to influence employers by calling out or threatening to call out the men unless the demands of the defendants Williams and Toomey were complied with; and accordingly that the defendants

[67] The statement of facts is abridged, and the arguments of counsel are omitted.

combined to prevent, and did prevent, the plaintiff from getting or retaining employment by calling out or threatening to call out the men; and, further, that this caused damage to the plaintiff to the extent of £100, and the jury negatived the suggestion that what the defendants did, first, was only to warn the employers that the men would leave in consequence of the men objecting to work with the plaintiff; and, secondly, was done in fact in consequence of the men objecting to work with the plaintiff. Lastly, it is found that the defendants acted as they did in order to compel the plaintiff to pay the arrears of some moneys due from him to the union.

The question then is whether, on these facts, the defendant Toomey ought not to have been held liable to the plaintiff, as well as the defendant Williams who was also found to have been actuated by a desire to punish the plaintiff for not paying the arrears. Now, since the decision of the House of Lords in the case of Quinn v. Leathem, [1901] A. C. 495, I take it to be clear, even if it had not been clear before, that a combination of two or more persons, without justification, to injure a workman by inducing employers not to employ him or continue to employ him, is, if it results in damage to him, actionable. But although I think there is no difficulty in stating the law, I fully realize that considerable difficulty may often arise in particular cases in ascertaining what is a "justification" within the meaning of my statement. As to this, I can only say that regard must be had to the circumstances of each case as it arises, and that it is not practically feasible to give an exhaustive definition of the word to cover all cases; and I would refer to what I have already said on a similar point in the judgment I have just delivered in the case of the Glamorgan Coal Co. v. South Wales Miners' Federation, [1903] 2 K. B. 545. I will only add that I do not think any excessive practical difficulty would arise in directing a jury on the point in any particular case; and I may refer as illustrating this, to the direction given to the jury by FitzGibbons, L. J., in the case of Quinn v. Leathem, [1901] A. C. at p. 500. In the case now before us I cannot say that I feel any difficulty in applying the law as regards the defendant Toomey. For, on the facts, I have simply to determine whether two or more persons, who by virtue of their position have special power to carry out their design, are justified in combining to prevent, and in fact preventing, a workman from obtaining any employment in his trade or calling, to his injury, merely because they wish to compel him to pay a debt due from him. In my opinion they are not justified; and consequently the defendants Toomey and Williams are, in my opinion, liable to the plaintiff for the damage suffered by him through the conduct of the defendants.

I may point out, with reference to some observations made in the course of the argument, that this is not a case where the defendants, knowing of the plaintiff's defalcations, thought it their duty to warn

employers as to the plaintiff's character, or where the plaintiff's fellow-workmen, by reason of that character, declined to work with him. The findings of the jury negative any such case. And, further, I desire to add, with reference to an argument addressed to us on behalf of the defendants, that the intent on the part of the defendants Williams and Toomey to injure the plaintiff appears from the findings of the jury. The intent of the defendants was to prevent the plaintiff's obtaining or retaining employment, in order to compel him to pay a debt due from him; and from this the intent to injure the plaintiff appears to me to follow.

But I should be sorry to leave this case without observing that, in my opinion, it was not essential, in order for the plaintiff to succeed, that he should establish a combination of two or more persons to do the acts complained of. In my judgment, if a person who, by virtue of his position or influence, has power to carry out his design, sets himself to the task of preventing, and succeeds in preventing, a man from obtaining or holding employment in his calling, to his injury, by reason of threats to or special influence upon the man's employers, or would be employers, and the design was to carry out some spite against the man, or had for its object the compelling him to pay a debt, or any similar object not justifying the acts against the man, then that person is liable to the man for the damage consequently suffered. The conduct of that person would be, in my opinion, such an unjustifiable molestation of the man, such an improper and inexcusable interference with the man's ordinary rights of citizenship, as to make that person liable in an action. And I think this view is borne out by the views expressed by the members of the House of Lords who decided the case of Quinn v. Leathem, [1901] A. C. 495.[68]

The remaining question is as to the liability of the defendant union. That depends upon whether, if the acts complained of had been done by the executive committee, the union would have been liable. I have come to the conclusion that the union would have been liable on the principle stated in Barwick v. English Joint Stock Bank, L. R. 2 Ex. 259,—that the acts were done in the service and for the benefit of the union.

STIRLING, L. J. The findings of the jury in this case, even when taken most favourably for the defendants, appear to amount to this—that the defendants Williams and Toomey, acting together, prevented or endeavoured to prevent the plaintiff from being employed, by threatening his employers that the union men would be called out on strike unless they dismissed him (which those employers could do without breach of any contract between them and the plaintiff), and that Williams and Toomey so acted with the object of compelling the

[68] For a discussion of this point, see Salmond on Torts (3d Ed.) 476–479.

plaintiff to pay the arrears of his defalcations as a former officer of the union.

I shall first consider the case as against the defendant Toomey, which appears to turn on the question whether he and his codefendant Williams have been engaged in an unlawful conspiracy.

In the case of Mulcahy v. Reg. (1868) L. R. 3 H. L. 306, 317, Willes, J. (advising the House of Lords), defined a conspiracy as consisting in the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means.[69]

In this case I assume that the defendants agreed to do what they did for a lawful object, namely, to obtain payment from the plaintiff of what he owed to the trade union. It must then be made out that they sought to do so by unlawful means. It was contended in argument that unlawful means must be such as would be wrongful if committed by a single individual: I cannot agree. In Mogul Steamship Co. v. McGregor (1889) 23 Q. B. D. 598, 616, Bowen, L. J., states the law thus: "Of the general proposition, that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise, and the very fact of the combination may shew that the object is simply to do harm and not to exercise one's own just rights. In the application of this undoubted principle it is necessary to be very careful not to press the doctrine of illegal conspiracy beyond that which is necessary for the protection of individuals or of the public; and it may be observed in passing that as a rule it is the damage wrongfully done, and not the conspiracy, that is the gist of actions on the case for conspiracy." This view of the law has been recognized in the House of Lords in the same case on appeal, [1892] A. C. 25, and also in Quinn v. Leathem, [1901] A. C. 495, particularly by Lord Macnaghten, at pp. 510, 511, by Lord Brampton, at pp. 529–531, and by Lord Lindley, at p. 538. Lord Brampton further says, at pp. 528, 529; "The essential elements, whether of a criminal or of an actionable conspiracy, are, in my opinion, the same, though to sustain an action special damage must be proved." This agrees with what is laid down by Bowen, L. J., in the last sentence cited above, and is supported by the case of Barber v. Lesiter (1860) 7 C. B. (N. S.) 175, to which Lord Brampton refers. In the present case damage has been found by the jury.

The question then arises whether the preventing the plaintiff from obtaining employment, by threats of calling out the union men unless he was dismissed, is an unlawful act on the part of Toomey and Williams acting in combination; and in considering this question there

[69] On conspiracy as a substantive wrong, see also Pollock on Torts (9th Ed.) 328; Salmond on Torts (3d Ed.) 471; Burdick on Torts (3d Ed.) 325; 27 Halsbury's Laws of England, 655–658.

must be borne in mind the observation of Bowen, L. J., just quoted, as to the necessity of using great care not to extend too far the doctrine of illegal conspiracy. In the Mogul Case, [1892] A. C. 25, it was decided that acts done by traders in the exercise of their right to carry on a legal business were not illegal, although highly detrimental to another trader engaged in a similar and competing business. Fry, L. J., puts the matter thus, 23 Q. B. D. 625: "The right of the plaintiffs to trade is not an absolute but a qualified right—a right conditioned by the like right in the defendants and all Her Majesty's subjects, and a right therefore to trade subject to competition." So also every workman is entitled to dispose of his labour on his own terms; but that right is conditioned by the right of every other workman to do the like. In particular, each employee is, as I think, at liberty to decide for himself whether he will or will not work along with another individual in the same employ; and if all the workmen but one determine that they will not continue their labour in company with that one, they may inform their employer of their decision. On this I refer to what was said in Allen v. Flood, [1898] A. C. 1, by Lord Watson, at pp. 98–9, and Lord Davey, at p. 173. Those who desire to exercise such a right must indeed proceed with care, for the law forbids in this connection various classes of acts. I think, however, that it is unnecessary on this occasion to discuss this part of the subject, for the fifth and sixth findings of the jury appear to me to negative any suggestion that the acts of Williams and Toomey were done on behalf of the fellow-labourers of the plaintiff, or in exercise of any right of theirs to withdraw themselves from an employment in which he took part. These acts were directed to inflict harm on the plaintiff by preventing him from obtaining or retaining employment, and consequently from earning his livelihood in the only way in which he could do so. By their acts they, Williams and Toomey, caused him as serious an injury as can well be done to a working man; and that injury resulted in damage. They did those acts from time to time, as the plaintiff succeeded in obtaining employment, by going to his employer and threatening that they would resort to the powers which were, or were believed to be, vested in them as officers of a trade union, and which involved a resort to the power of numbers in a way which might and probably would cause detriment to the employer. It may, in my opinion, be fairly inferred from the evidence that this course of conduct was intended to be continued until the plaintiff made terms satisfactory to the trade union. Such acts, so persisted in, seem to me to be in the nature of molestation or coercion; and although they do not involve recourse to physical force, I am far from satisfied that they are not such as to be illegal even if done by a single individual. Fry, L. J., in the same judgment in the Mogul Case, says: "I do not doubt that it is unlawful and actionable for one man to interfere with another's trade by fraud or misrepresentation, or by molesting his customers, or those who would be his customers, whether by physical

obstruction or *moral intimidation*." It is unnecessary, however, to decide this point, for these acts which inflicted injury on the plaintiff, resulting in damage, were done by two persons in combination, and amounted to an interference with the plaintiff's rights no less serious than that which was the subject of the action of Gregory v. Duke of Brunswick (1843–44) 6 Man. & G. 205, 953, a case which has been treated as an authority in the House of Lords in Quinn v. Leathem, [1901] A. C. at p. 503. It was there held that a conspiracy to hiss an actor off the stage, and so injure him in his trade or calling, was illegal, and that acts done in pursuance of such a conspiracy were not excused by shewing that the actor was an unfit person to appear before the public. So here, the acts of the defendants Williams and Toomey were not excused, in my opinion, by the fact that the plaintiff had been guilty of defalcations and owed a considerable sum to the trade union. I do not in the least extenuate the wrongs suffered by the trade union at the hands of the plaintiff: I think he behaved badly and the trade union shewed him great forbearance: still, even a criminal ought not to be persecuted but to be punished according to law. If the plaintiff was guilty of a criminal offence he might and ought to have been prosecuted, in which case the appropriate punishment would have been meted out to him by a legal tribunal. If he failed to pay a just debt, the law provides ample means for enforcing payment of it. In certain cases, though not universally, the non-payment of a debt is punishable by imprisonment. The plaintiff might possibly have been punished in this way: an attempt to punish him was made and was defeated on technical grounds only; but, so far as I can see, the attempt might have been repeated with a fair prospect of success. This was not done, but Williams and Toomey adopted the course which has resulted in the present action. If the existence of the default or debt were admitted as a valid excuse for depriving a defaulter or debtor of his employment, a punishment might be inflicted on him far greater than that which is allowed by law.

I come, therefore, to the conclusion that the defendants Williams and Toomey were guilty of a tort in respect of which they are liable to the plaintiff in this action; and I pass on to consider whether the defendants, the trade union, are also liable. * * *[70]

Appeal allowed.[71]

[70] On this question, Stirling, L. J., reached the conclusion that the union was liable.

[71] An opinion by Vaughan Williams, L. J., that the appeal must be allowed, is omitted.

GLAMORGAN COAL CO., Limited, et al. v. SOUTH WALES MINERS' FEDERATION et al.

(King's Bench Division. [1903] 1 K. B. 118. Court of Appeal. [1903] 2 K. B. 545.)

This action was brought by the Glamorgan Coal Company, Limited, and seventy-three other plaintiffs against the South Wales Miners' Federation, its trustees, its officers, and a number of the members of its executive council, to recover damages for wrongfully and maliciously procuring and inducing the workmen in the plaintiffs' collieries to break their contracts of service with the plaintiffs. In the alternative, the plaintiffs also sue the defendants for wrongfully, unlawfully, and maliciously conspiring together to do the acts complained of. The conspiracy count is put this way: The defendant federation, by its agents, its executive council, and the other defendants (naming them), well knowing the terms and conditions of the contracts of service with the workmen, wrongfully, unlawfully, and maliciously conspired together to do the acts complained of, that is, to procure the workmen to break their contracts of service by taking holidays, called stop-days. The plaintiffs claim both damages and an injunction.

The defendants, after denying the material allegations in the statement of claim, alleged in substance that the acts complained of, if done at all, were done with reasonable justification and excuse.

In his written judgment in the Divisional Court Bigham, J., made a finding of facts, in which the following, among other facts, appear:

The plaintiffs are seventy-four limited liability companies associated together for the protection of their own interests under the style of the Monmouthshire and South Wales Coal Owners' Association. They work upwards of 200 collieries in the South Wales district, and in these collieries they employ about 100,000 men. For the last twenty or twenty-five years the masters and the men in the South Wales colliery district have worked together under an agreement, called the sliding scale agreement, by which the rate of wages paid to the men is made to depend on the price for the time being of a certain agreed class of coal—that is to say, as the price of that coal rises or falls so the rate of wages moves up or down. It is thus to the interest, not only of the masters, but also of the men, to keep up the price of coal, but, at the same time, not to drive it up to such a point as will unduly interfere with the demand. Against the producers of coal there are always arrayed a number of coal dealers, known as merchants or middlemen, who buy coal to be shipped to foreign ports, or for resale in the South Wales market. The interest of these men is, of course, to keep down prices, so that they may buy as cheaply as possible. They frequently sell large quantities of coal for forward delivery at prices below those current for immediate delivery, trusting to supply themselves later on by purchases from one or other of the many collieries at prices which will make their bargains remunerative. This has the effect of depressing the market, and on more than one occasion, and particularly in the years 1896 and 1897, the masters and men have tried together to devise some scheme to so regulate the output of the mines, by means of stop-days or otherwise, as to counteract this effect. There has, however, always been a difficulty in getting a sufficient number of the colliery proprietors to fall in with any scheme having for its object the restriction of output, and thus nothing has been done. On April 1, 1898, a strike broke out in the South Wales district, and the col-

lieries were closed from that date to August 31. On September 1 work was resumed throughout the district. At the collieries of forty-seven of the plaintiff companies it was resumed under an agreement which embodied the old sliding scale. By this agreement it was provided that a joint committee of masters and men should be formed, which should be called the joint sliding scale committee; and that it should be comprised of twelve masters, representing the forty-seven firms, and of twelve men elected by the colliers in the employment of those firms. Each half of this committee was to have its own secretary, elected from its own twelve members, and it was contemplated that each half might from time to time meet separately to discuss matters affecting its own interests. One of the principal objects of the joint committee was to ascertain, by audits of the sales of the forty-seven firms, the average price of coal, for the purpose of regulating wages thereby. The agreement contained many other provisions in addition to the provision for the formation of the joint committee, but it is only necessary to refer to one of them—clause 23 of the embodied sliding scale agreement, which is as follows: 'It is hereby agreed that all notices to terminate contracts on the part of the employers, as well as employed, shall be given only on the first day of any calendar month, and to terminate on the last day of the same month.' Although only forty-seven of the plaintiffs were parties to that agreement and were alone to be represented on the joint sliding scale committee, the men employed by the other twenty-seven plaintiffs went back to work on the same terms, both as to wages and notice, as those contained in the agreement. On October 11, 1898, the defendant federation was formed, and practically all the miners in the South Wales district became members of it. They number about 128,000, and they include all, or very nearly all, the men who work for the plaintiffs.

The federation prospered greatly so that by the end of 1900 it found itself in the possession of funds amounting to £100,000. The price of coals also rose, and with it the rate of wages. But in October or November, 1900, the council of the federation seemed to have felt some apprehension that this prosperity was being threatened by the merchant and the middleman. It is at this season of the year that foreign governments and others make their contracts for forward delivery of coal, and the prices at which these contracts were being effected alarmed the council, and foreshadowed a fall in prices.

To guard against this, and in the honest belief that the danger was real, the council of the federation passed a resolution ordering a stop-day for Friday, November 9. A further resolution was passed that a general conference of the federation should be convened for November 12. In the meanwhile the following manifesto was ordered to be circulated: "Fellow Workmen—Your council, having seriously considered the present condition of the coal trade, are strongly of opinion that an organized attempt is being made to unduly interfere with trade and prices to such an extent as will prejudice the interest of the members of the federation. With a view of preventing the industry being exploited by merchants and middlemen, we have unanimously resolved that a general holiday be taken throughout the coal field by all colliery workmen on Friday next, November 9, 1900. We also request you upon that day to hold general meetings for the purpose of appointing delegates to attend a conference at the Cory Memorial Hall on Monday next, November 12, 1900, to consider and determine our future policy, as embodied in the following resolution: That the conference hereby authorizes the council to declare a general holiday at any time they think it necessary for the protection of our wages and the industry generally. W. Abraham." This manifesto had the desired effect, and on November 9 all the colliers in the coal field, including the men working in the plaintiffs' collieries, stopped work. No notice of any kind was served on the masters, and they knew nothing of the matter until they saw a report of Mr. Abraham's speech in the newspapers of November 6. This stoppage on November 9 is the first matter of which the plaintiffs complain in this action. On November 12, 1900, the conference which had been convened for that day was held, and at it a resolution was passed authorizing the council of the federation to declare a general holiday at any time they might think it necessary for the protection of wages and of the industry generally.

In ordering the stop-day on November 9, the federation acted as they thought in the best interest of the men, and without any intention, malicious

or otherwise, of injuring the plaintiffs. About three weeks after this stop-day, the associated owners met, and, after negativing the expediency of prosecuting the men, resolved as follows: "That the owners' side of the sliding scale committee point out to the workmen's representatives that a resolution has been passed by the association, that, if the men make any future illegal stoppage, the owners will take proceedings against the men."

On October 23, 1901, the federation published the following signed manifesto: "To the workmen employed at the South Wales and Monmouthshire Collieries. It having come to the knowledge of your representatives upon the sliding scale committee that large contracts have already been made at considerably lower prices than the average price declared by the last sliding scale audit, and fearing the result of those contracts upon annual and other contracts about to be made, which must of necessity mean a heavy reduction in wages, it was unanimously resolved that the workmen shall observe as general holidays Friday and Saturday next." Telegrams were then sent to all the collieries in South Wales, notifying the fact that the stop-days had been declared. Subsequently two other stop-days were ordered by the federation, one for October 31 and one for November 6.

The result of all this was that the men stayed away from work on the four days, and so broke their contracts with the masters.

In concluding his finding of facts, Bigham, J., remarked as follows:

"There was no quarrel at all between the masters and the men, and, so far as I can see, no ill will. The men objected to the course of business adopted by the middlemen, and in this objection some, at least, of the masters seem to have shared. The evidence satisfies me that the action of the federation, and of the other defendants in 1901, was dictated by an honest desire to forward the interest of the workmen, and was not, in any sense, prompted by a wish to injure the masters. Neither the federation nor the other defendants had any prospect of personal gain from the operation of the stop-days. Having been requested by the men, by the resolution of November 12, 1900, to advise and direct them as to when to stop work, the federation and the other defendants, who were its officers, in my opinion, did to the best of their ability advise and direct the men. Whether they advised them wisely I cannot say, though I am inclined to think not. But I am satisfied that they advised them honestly and without malice of any kind against the plaintiffs.

"I have to decide, in these circumstances, whether an action in tort will lie against the defendants. The advice and guidance of the defendants was solicited and given. If followed, it involved, as the defendants knew, the breaking of the subsisting contracts. It was followed, as the defendants wished it should be; and damage resulted to the masters; but there was no malicious intention to cause injury, no profit was gained for themselves by the defendants, and their sole object was to benefit the men, whom they were advising and directing."

On these facts the judgment in the Divisional Court was for the defendants on both branches of the plaintiffs' claim. The plaintiffs appealed.

[In the Court of Appeal]

The following judgments were read:

VAUGHAN WILLIAMS, L. J. * * * This decision of Bigham, J., does not, of course, involve any such proposition as that the workmen have a right to break the contracts entered into by them respectively because each one of them may think honestly that it is either for his individual advantage, or for the advantage of the workmen collectively, that the contracts should be broken. Each workman will, of course, be liable to be sued for his own breach of contract. The question is whether an action will lie for procuring a breach of contract or for conspiracy. Taken in its simplest form, the question would be whether, if a hundred men in the same employ agreed that they would each of them with the same object break their respective contracts on a given day, an action would lie, either against each of them for procuring breaches of contract by the others, or against the hundred collectively for conspiracy, or whether it could be said that there was anything in the relation of the men one to another which negatived an action in the form of an action for procuring a breach of contract, or an action for conspiracy, in a case in which that which was agreed to be done, or to do which the combination was formed, was undoubtedly a wrongful act, for which each one could be sued for breach of his own personal contract. It seems to me that if these prima facie causes of action, arising for procuring a breach of contract or combining to procure it, do not lie, it must be either on the ground that community of interest excludes a procuring each of the other connected by community of interest, or because the relation of the parties, whoever they are, raises a duty to counsel one another and to arrange for concerted action. Some such proposition would cover the instances suggested by the learned judge and by counsel in argument, such as a brother advising a sister, or a parent a child, or a doctor a patient, or a solicitor a client, but the principle is the same in each case, and the question must be the same in each case. Is the relation such as to raise the duty? In each of those cases the person breaking the contract is not the agent of the person giving the advice, however influential the adviser may be. The action for procuring a breach of contract is an action for wrongfully interfering in the contractual relations of other persons. The effect, if any, of the duty or right arising from the relation is only that it negatives the prima facie presumption of malice which the law supposes from interference with the contractual rights between the parties to a contract of which the interferer has notice; and the defendant can always rebut the prima facie presumption thus arising by the proof of circumstances raising a duty to advise; but the plaintiff on his part can neutralize this by proof of express malice. In no other sense is it true to say that, in an action for procuring a breach

of contract, it is necessary to prove malice or motive, or anything more than mere notice of the contract. I think that similar observations arise on conspiracy; for, prima facie, a combination to interfere with the civil rights of another, whether it be his right to full freedom in disposal of his own labor or his own capital or any other right of citizenship, is an unlawful combination, because such interference, if carried into effect, is an actionable wrong, and it is this fact, and not any mere malicious motive, which constitutes the combination a conspiracy. This prima facie wrongful interference may be negatived by showing that the exercise of the defendants' own rights involved the interference complained of, which interference is merely the exercise of the right of a man to interfere in a matter in which he is jointly interested with others, and such interference gives no cause of action. In such a case there will be intentional procurement of a violation of individual rights, contractual or other, but just cause for it, as being done for the maintenance of the equal civil rights of the defendants. * * *

But whatever may be the identity of the federation and the men, it seems impossible in any action for breach of contract merely, and nothing else, brought against the federation, as the collective forensic name of the men, to sign a judgment against the federation, because the federation are not parties to the contract which has been broken. It follows that, if the federation is liable at all, it must be either in an action for procuring breaches of contract or conspiracy, and in either form of action there is a prima facie case against the federation, and the federation, being a separate entity from the men, must shew some sufficient justification for their interference. The federation and the members of their council who are defendants seek to base this justification on the suggestion that their relation to the men raises a duty on their part to advise the men, or, at all events, negatives their being mere meddlers. It was argued before us that the defendants were not mere advisers, but that they were actors who did the very thing complained of, in that they issued the notices ordering the stop-days, and compelled reluctant men to break their contracts by staying away from work without giving proper notices to their employers, and that the view of the federation was that men who refused to stay away would be guilty of disloyalty to the federation; but this argument does not convince me that the federation were not acting as advisers, nor does the fact that the federation actually issued the notices deprive the defendants of their character of advisers. It is not suggested in this case that the men stayed away from work under threats, intimidation, or physical compulsion. I think, therefore, the judgment of Bigham, J., must be affirmed for the reasons given by him. * * *

Romer, L. J. The law applicable to this case is, I think, well settled. I need only refer to two passages in which that law is shortly

and comprehensively stated. In Quinn v. Leathem, [1901] A. C. 495, at p. 510, Lord Macnaghten said: "A violation of legal right committed knowingly is a cause of action, and it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference." And in Mogul Steamship Co. v. McGregor, Gow & Co., 23 Q. B. D. 598, at p. 614, Bowen, L. J., included in what is forbidden "the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it." But although, in my judgment, there is no doubt as to the law, yet I fully recognize that considerable difficulties may arise in applying it to the circumstances of any particular case. When a person has knowingly procured another to break his contract, it may be difficult under the circumstances to say whether or not there was "sufficient justification or just cause" for his act. I think it would be extremely difficult, even if it were possible, to give a complete and satisfactory definition of what is "sufficient justification," and most attempts to do so would probably be mischievous. I certainly shall not make the attempt. * * * But, though I deprecate the attempt to define justification, I think it right to express my opinion on certain points in connection with breaches of contract procured where the contract is one of master and servant. In my opinion, a defendant sued for knowingly procuring such a breach is not justified of necessity merely by his showing that he had no personal animus against the employer, or that it was to the advantage or interest of both the defendant and the workman that the contract should be broken. I take the following simple case to illustrate my view. If A. wants to get a specially good workman, who is under contract with B., as A. knows, and A. gets the workman to break his contract to B.'s injury by giving him higher wages, it would not, in my opinion, afford A. a defence to an action against him by B. that he could establish he had no personal animus against B., and that it was both to the interest of himself and of the workman that the contract with B. should be broken. I think that the principle involved in this simple case, taken by me by way of illustration, really governs the present case. For it is to be remembered that what A. has to justify is his action, not as between him and the workman, but as regards the employer B. And, if I proceed to apply the law I have stated to the circumstances of the present case, what do I find? On the findings of fact it is to my mind clear that the defendants, the federation, procured the men to break their contracts with the plaintiffs—so that I need not consider how the question would have stood if what the federation had done had been merely to advise the men, or if the men, after taking advice, had arranged between themselves to break their contracts, and the federation had merely notified the men's intentions to the plaintiffs. The federation did more than advise. They acted, and by their

agents actually procured the men to leave their work and break their contracts. In short, it was the federation who caused the injury to the plaintiffs. This was practically admitted before us by the counsel for the federation, and, indeed, such an admission could not, in my opinion, be avoided, having regard to the facts stated by the learned judge in his judgment. And it is not disputed that the federation acted as they did knowingly. So that the only question which remains is one of justification. Now the justification urged is that it was thought, and I will assume for this purpose rightly thought, to be in the interest of the men that they should leave their work in order to keep up the price of coal, on which the amount of wages of the men depended. As to this, I can only say that to my mind the ground alleged affords no justification for the conduct of the federation towards the employers; for, as I have already pointed out, the absence on the part of the federation of any malicious intention to injure the employers in itself affords no sufficient justification. But it was said that the federation had a duty towards the men which justified them in doing what they did. For myself I cannot see that they had any duty which in any way compelled them to act, or justified them in acting, as they did towards the plaintiffs. And the fact that the men and the federation, as being interested in or acting for the benefit of the men, were both interested in keeping up prices, and so in breaking the contracts, affords in itself no sufficient justification for the action of the federation as against the plaintiffs, as I have already pointed out. I think, therefore, that the appeal must succeed.

STIRLING, L. J. The law applicable to the decision of this case is, in my judgment, as stated by Lord Macnaghten in Quinn v. Leathem, [1901] A. C. 495, at p. 510. Referring to Lumley v. Gye, 2 E. & B. 216, his lordship said: "Speaking for myself, I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference." If it were necessary to say anything more on the subject of Lumley v. Gye, I should be content to refer to what was said by Lord Herschell in Allen v. Flood, [1898] A. C. at pp. 121–123, to which I can add nothing.

In my opinion, therefore, only two questions have to be considered: (1) Did the defendants interfere with the contractual relations between the plaintiffs and their workmen? (2) Was there in law sufficient justification for the interference?

As to the first question: Bigham, J., has expressly found that whatever was done in the way of interference was the act of the federation. I need not refer to specific acts beyond this—that all the men working at the South Wales and Monmouthshire Collieries

were directed to observe as holidays two days, October 25 and 26, 1901, contrary to the contracts entered into by the workmen. The uncontradicted evidence of Evan Williams at the trial shows that in consequence of that direction men who otherwise would have worked on those two days did not do so. In these circumstances it seems to me to be made out that the federation wilfully and with notice of the contracts procured some men to break their contracts, and therefore knowingly brought about a violation of legal rights, which is actionable unless there is sufficient justification for what was done. That interference with contractual relations known to the law may in some cases be justified is not, in my opinion, open to doubt. For example, I think that a father who discovered that a child of his had entered into an engagement to marry a person of immoral character would not only be justified in interfering to prevent that contract from being carried into effect, but would greatly fail in his duty to his child if he did not. This duty is recognized by the courts; for the Court of Chancery and the Chancery Division of the High Court of Justice have continually so interfered on behalf of wards of Court, sometimes with a heavy hand; and the principle on which the judges of those courts have acted is simply that of doing on behalf of the ward that which a right-minded father would do in the true interest of his child. I conceive that circumstances might occur which would give rise to the same duty in the case of a contract of service. I need not say that the present is a very different case from that which I have just put. It would no doubt be desirable if a general rule could be formulated which would determine in what cases such a justification exists; but no such rule has been laid down, and I doubt whether this can be done; so far as I can see it must be left (in the language of Lord Bowen) to the tribunal to analyze the circumstances of each particular case and discover whether a justification exists or not.

In the present case the learned judge finds that the federation and the other defendants "had lawful justification or excuse for what they did in this, that having been solicited by the men to advise and guide them on the question of stop-days, it was their duty and right to give them advice, and to do what might be necessary to secure that the advice should be followed"; and the existence of this duty has been strongly pressed upon us in argument by the learned counsel for the several defendants. It will be observed that the learned judge expressly finds that the defendants were not merely advisers, but also agents "to do what might be necessary to secure that the advice should be followed." In the view which I take of the facts the defendants not only gave advice, but acted, and their action took the form of interfering with the contractual relations between the masters and the men. If in so doing they committed a tort, it would be no answer to say that they acted upon the advice of a third person, as, for example,

their own solicitor; and it is difficult to see how they can be in a better position simply because the advice on which they acted emanated from themselves.

In my judgment the liability of the defendants must turn on the answer to be given to the question whether the circumstances of the case were in fact such as to justify the defendants, or any of them, in acting as they did.

The circumstances were these: Middlemen at Cardiff were attempting to reduce the price of coal, and it was feared that some employers might yield to the pressure of competition and enter into agreements for the sale of coal at prices lower than those existing at the time, with the result that the wages of the miners, which were regulated by a sliding scale, would be reduced.

To counteract this it was considered desirable by the men's advisers that prices should be sustained by diminishing the output of coal, and that this should be effected by the men taking the holidays complained of. It was not contended or suggested that a limitation of the output of coal was an illegitimate object or aim on the part of the men, or that, if it could have been attained without the breach of contracts (as, for example, by the service of proper notices putting an end to those contracts), the men would not have been within their legal rights. The difficulty which presented itself was this,—that one of the terms of the arrangement under which the sliding scale of wages existed was that notices of the determination of contracts of employment should only be given on the first day of a calendar month to terminate on the last day, and this prevented notices of determination being effective at the desired moment. The critical period was known to occur in October or November. The men persuaded themselves that it was the masters' interest as well as their own that they should have power to take holidays at this period; but this was a point on which the masters were entitled to have their own opinion; and from what occurred in November, 1900, it was known to the men that the masters' view did not agree with that of the men. If the men had faith in the soundness of their opinion, their course was to negotiate through the defendants for a modification of the sliding scale arrangement; what they actually thought fit to do was that while insisting on the benefit of the sliding scale they treated themselves as emancipated from the observance of one of the terms on which that scale had been agreed to, although the masters objected, and although the course taken by the men might result in serious damage to the masters, or some of them. This is, I think, a difficult position to maintain. The justification set up seems to me to amount to no more than this—that the course which they took, although it might be to the detriment of the masters, was for the pecuniary interest of the men; and I think it wholly insufficient. The defendants took active steps to carry this policy into effect, and, as I have said,

interfered to bring about the violation of legal rights. In my judgment they fail to justify those acts, and the appeal ought to be allowed. * * *

Appeal allowed.[72]

SOUTH WALES MINERS' FEDERATION et al., Appellants, v. GLAMORGAN COAL CO., Limited, et al., Respondents.

(House of Lords. [1905] A. C. 239.)

In this action, brought by the Glamorgan Coal Company, the judgment in the King's Bench Division was for the defendants.[73] This decision was reversed by the Court of Appeal,[74] which entered judgment for the plaintiffs. The defendants then appealed to the House of Lords.[75]

EARL OF HALSBURY, L. C. My Lords, I cannot think that in this case there is anything to be determined except the question of fact. I say so because the questions of law discussed are so well settled by authority, and by authority in this House.

To combine to procure a number of persons to break contracts is manifestly unlawful. This is found as a fact to have been done here, and is also found to have caused serious damage to the persons who were entitled to have these contracts performed.

It is, further, a principle of the law, applicable even to the criminal law, that people are presumed to intend the reasonable consequences of their acts. It is not, perhaps, necessary to have recourse to such a presumption where, as upon the facts stated, it is apparent that what they were doing must necessarily cause injury to the employers. We start, then, with the infliction of an unlawful injury upon the persons entitled to have the services of their workmen. It follows that this is an actionable wrong unless it can be justified.

Now it is sought to be justified, first, because it is said that the men were acting in their own interest, and that they were sincerely under the belief that the employers would themselves benefit by their collieries being interrupted in their work; but what sort of excuse is this for breaking a contract when the co-contractor refuses to allow the breach? It seems to me to be absurd to suppose that a benefit which he refuses to accept justified an intentional breach of contractual

[72] The statement of facts from 1 K. B. 118, and parts of the opinions of Vaughan Williams, Romer, and Stirling, L. JJ., are omitted.

[73] Glamorgan Coal Company v. South Wales Miners' Federation, [1903] 1 K. B. 118.

[74] Glamorgan Coal Company v. South Wales Miners' Federation, [1903] 2 K. B. 545.

[75] The reporter's statement of the facts and the summary of the arguments of counsel, which occupied six days, and part of Lord James' opinion, are omitted. For the facts, see the report of the case in the lower courts, ante, p. 1406.

rights. It may, indeed, be urged in proof of the allegation that there was no ill-will against the employers. I assume this to be true, but I have no conception what can be meant by an excuse for breaking a contract because you really think it will not harm your co-contractor.

I absolutely refuse to discuss the cases which have been suggested widely apart from the question of what pecuniary advantage may be reaped from breaking a contract, where, upon moral or religious grounds, people may be justly advised to refuse to perform what they have agreed to do.

Some cases may be suggested when higher and deeper considerations may, in a moral point of view, justify the refusal to do what has been agreed to be done. Such cases may give rise to the consideration whether, in a moral or religious point of view, you are not bound to indemnify the person whom your refusal injures; but a court of law has only to decide whether there is a legal justification.

Again, I refuse to go into a discussion of the duty or the moral right to tender advice. The facts in this case shew nothing in the nature of advice, even if the supposed duty could be created by people who made them their official advisers who were to advise them even to break the law. But, as I have said, these are peremptory orders given by the official superiors of the body, and it has been found by the learned judge who tried the case that the body sued was responsible for the interference with the workmen.

I think the appeal should be dismissed.

Lord Macnaghten. My Lords, I agree in the motion which my noble and learned friend the Lord Chancellor proposes, and I also agree with him in thinking that the question before your Lordships lies in a very narrow compass.

It is not disputed now—it never was disputed seriously—that the union known as the South Wales Miners' Federation, acting by its executive, induced and procured a vast body of workmen, members of the union, who were at the time in the employment of the plaintiffs, to break their contracts of service, and thus the federation acting by its executive knowingly and intentionally inflicted pecuniary loss on the plaintiffs. It is not disputed that the federation committed an actionable wrong. It is no defence to say that there was no malice or ill-will against the masters on the part of the federation or on the part of the workmen at any of the collieries thrown out of work by the action of the federation. It is settled now that malice in the sense of spite or ill-will is not the gist of such an action as that which the plaintiffs have instituted. Still less is it a defence to say that if the masters had only known their own interest they would have welcomed the interference of the federation.

It was argued—and that was the only argument—that although the thing done was prima facie an actionable wrong, it was justifiable under the circumstances. That there may be a justification for that

which in itself is an actionable wrong I do not for a moment doubt. And I do not think it would be difficult to give instances putting aside altogether cases complicated by the introduction of moral considerations. But what is the alleged justification in the present case? It was said that the council—the executive of the federation—had a duty cast upon them to protect the interests of the members of the union, and that they could not be made legally responsible for the consequences of their action if they acted honestly in good faith and without any sinister or indirect motive. The case was argued with equal candour and ability. But it seems to me that the argument may be disposed of by two simple questions. How was the duty created? What in fact was the alleged duty? The alleged duty was created by the members of the union themselves, who elected or appointed the officials of the union to guide and direct their action; and then it was contended that the body to whom the members of the union have thus committed their individual freedom of action are not responsible for what they do if they act according to their honest judgment in furtherance of what they consider to be the interest of their constituents. It seems to me that if that plea were admitted there would be an end of all responsibility. It would be idle to sue the workmen, the individual wrong-doers, even if it were practicable to do so. Their counsellors and protectors, the real authors of the mischief, would be safe from legal proceedings. The only other question is, What is the alleged duty set up by the federation? I do not think it can be better described than it was by Mr. Lush. It comes to this—it is the duty on all proper occasions, of which the federation or their officials are to be the sole judges, to counsel and procure a breach of duty.

I agree with Romer and Stirling, L. JJ., and I think the appeal must be dismissed.

Lord James. My Lords, * * * at the trial and at the bar of your Lordships' House the counsel for the appellants contended that their clients had good cause and excuse for the alleged unlawful act they committed. That such justification—such "good cause and excuse"—may exist is, I think, a sound proposition. The above words of Lord Macnaghten and of Bowen, L. J., so declare. The facts upon which this attempted justification in this case is based are fully before your Lordships and need not be recapitulated. I take the results of them to be that in one sense the defendants acted in good faith. They, I think, honestly believed that the stoppage of work they resolved upon would increase the price of coal and so benefit both the workmen and the employers. Towards their employers the defendants entertained no malice. At the same time they knew that the employers had given notice of their objection to any such stoppage of work. And so the federation not only advised, but resolved and ordered that the workmen should break their contracts under conditions that would constitute an unlawful act in the men. As far as the defendants could exercise control the men were not allowed to make use of their own

discretion. In order, therefore, to establish the existence of good cause and excuse all the defendants can say is, "We, the federation, had the duty cast upon us to advise the workmen. We did advise them to commit an unlawful act, but in giving that advice we honestly believed that they would be in a better financial position than if they acted lawfully and fulfilled their contracts." Even if it be assumed that such allegations are correct in fact, I think that no justification in law is established by them. The intention of the defendants was directly to procure the breach of contracts. The fact that their motives were good in the interests of those they moved to action does not form any answer to those who have suffered from the unlawful act. During the arguments that have been addressed to your Lordships I do not think quite sufficient distinction was drawn between the intention and the motives of the defendants.[76] Their intention clearly was that the workmen should break their contracts. The defendants' motives no doubt, were that by so doing wages should be raised. But if in carrying out the intention the defendants purposely procured an unlawful act to be committed, the wrong that is thereby inflicted cannot be obliterated by the existence of a motive to secure a money benefit to the wrong-doers.

For these reasons I think the judgment of the Court of Appeal should be affirmed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.[77]

LARKIN et al., Appellants, v. LONG, Respondent.

(House of Lords. [1915] A. C. 814.)

This action was brought against Larkin, who was the organizing secretary of an association of dock labourers known as the Transport Workers' Union, Hopkins and Redmond, who were delegates of this association, and three other defendants, Newman, William Long, and Donohoe, members of an association of employers called the Stevedores' Association. The action was for damages and an injunction in respect of an alleged conspiracy on the part of the defendants to procure and induce the plaintiff's labourers to leave his employment. The facts out of which the action arose were as follows:

The plaintiff, Matthew Long, had been a stevedore in the port of Dublin for many years. He had never had any dispute with his men or with the Transport Workers' Union and he had always paid the highest rate of wages. Until 1912 there had been no stevedores' association in the port. In June, 1912, the Irish Transport and General Workers' Union proposed a change in the conditions of employment of labour in the port of Dublin, with a view to procuring

[76] "At present 'intent' and 'motive' are often used interchangeably, as though they were exact equivalents of each other." Professor Jeremiah Smith, 20 Harv. Law Rev. 256 (1907). For the distinction between the two terms, and for instances in which they have been confounded, see Ibid. 256–259.

[77] The concurring opinion of Lord Lindley is omitted.

the employment of a larger number of men in the discharge of a ship, and the Dublin stevedores were invited by circular to meet representatives of the Transport Workers' Union at the headquarters of the union, to discuss the matter. The plaintiff attended this meeting. Larkin submitted to the stevedores a manuscript list of new prices for labourers in some branches of the stevedoring business. Some of the stevedores objected that they could not pay the proposed rates of wages owing to the undercutting of prices due to competition amongst themselves. Larkin then suggested that the stevedores ought to form an association to protect themselves against the shipowners. No decision was arrived at and the meeting was adjourned. At the adjourned meeting, held on June 18, which the plaintiff also attended, the new list of prices was produced and discussed. The plaintiff informed the meeting that the list did not affect his business as the rate of wages and terms of employment were the same as those then current in his business, and he took no further interest in the matter and attended no further meetings. He first became aware that the Stevedores' Association had been formed on July 24, 1912, from his brother William Long, who showed him the list of rates that the stevedores had drawn up to charge to the shipowners, and told him that he had been sent by Newman to give him the list. William Long then asked the plaintiff to join the association and, on the plaintiff's refusal, told him that unless he joined and charged the same rates he would get no men to work for him, as they (the stevedores) had made an arrangement with Larkin not to allow the men to work. The plaintiff replied that he had no dispute with his workmen and that it was none of Larkin's business. William Long then said: "That is all nonsense. What is it Larkin cannot do?"

On July 27 the plaintiff met Newman, William Long, and Donohoe in Dublin. Newman asked the plaintiff what he was going to do, and he replied that he had made up his mind not to join the association. Newman then warned the plaintiff that he would not get men to work for him, as Larkin had promised to assist the association in every way and to withdraw men from the plaintiff unless he joined. On August 6 a meeting was held of the Transport Workers' Union, when the attitude of the plaintiff in refusing to join the Stevedores' Association was discussed and eventually the meeting was adjourned. The adjourned meeting was held on August 7, and it was then resolved that members of the union should not be allowed to work for the plaintiff and that the union officials be instructed to that effect. On the same day, the Sieben Jarl arrived at the port, and on that evening the plaintiff was informed by Larkin that he had arranged with the stevedores to assist them in every way and to withdraw the men from the plaintiff unless he joined the association. The plaintiff had engaged thirty-three men to discharge the Sieben Jarl, and the work of discharging was begun at 6 a. m. the next day. At 7:15 a. m. Hopkins and Redmond, acting under Larkin's directions, came down to the ship and ordered the men off, and told the plaintiff that he would be further stopped unless he joined the association. The men thereupon ceased work and reported themselves at headquarters.

On August 19, the plaintiff issued the writ in this action. On two subsequent occasions, namely, on August 22 and September 23, Hopkins prevented the plaintiff from discharging ships by calling off the men he had engaged.

The statement of claim, delivered on October 21, 1912, succinctly set forth the plaintiff's cause or causes of action, in these terms:

"In or about the months of August and September, 1912, the defendants wrongfully and maliciously conspired and agreed to combine amongst themselves and did so combine to procure, cause, and induce the aforesaid workmen of the plaintiff to leave his employment and abstain from continuing therein, and did further procure, cause, and induce dock labourers and others to refuse to work for the plaintiff. In furtherance and pursuance of the said conspiracy the defendants did in fact procure, cause, and induce workmen of the plaintiff to leave his employment and abstain from continuing therein and did further in fact procure, cause, and induce dock labourers and others to refuse to work for the plaintiff."

On the trial of the action, Palles, C. B., upon the findings of a special jury, entered judgment for the plaintiff for £200 and granted an injunction. An application by the defendants for judgment or a new trial was refused by the Divisional Court and afterwards by the Court of Appeal. The officials of the Transport Workers' Union then appealed to the House of Lords.

Serjeant Sullivan, K. C. (of the Irish and also of the English Bar), and H. R. Poole (of the Irish Bar), for the appellants. * * * There was here no unlawful combination amongst the defendants. That depends upon the object of the defendants in compelling the plaintiff to join the Stevedores' Association. If the object of the defendants was not the injury of the plaintiff but the furtherance of their trade interests, that was perfectly legitimate. A combination to secure a monopoly necessarily involves the prevention of other persons from carrying on that trade, but although injury may result to those persons, no action for conspiracy will lie if the object is to improve the trade and not to injure others. This test applies equally whether it is a combination of men or of masters: Ward, Lock & Co. v. Operative Printers' Assistants' Society, [1906] 22 Times L. R. 327; Bulcock v. St. Anne's Master Builders' Federation, [1902] 19 Times L. R. 27. Here the object of the defendants in compelling the plaintiff to join the Stevedores' Association was to find employment in the trade for as many union men as possible. Quinn v. Leathem, [1901] A. C. 495, differs from the present case in almost every particular; the combination, the acts done, and the end sought to be achieved were all different in character. There were here no threats and intimidation such as existed in that case.*

Lord Atkinson. My Lords, this is an appeal against an order of the Court of Appeal in Ireland, affirming an order of the King's Bench Division of the High Court of Justice in Ireland * * *†

The next ground relied on by the appellants in support of the appeal was that set forth in the fifth paragraph of their defence, to the effect that at the time the things complained of were done by them a trade dispute was pending between the plaintiff, the dock labourers of the port of Dublin, and the Transport Workers' Union acting on their behalf, relative to the wages and rate of remuneration to be paid by the plaintiff to dock labourers for their work in discharging cargoes, and that in refusing to allow any of such labourers to work for the plaintiff, and in withdrawing them from his employment, they were acting as they lawfully might in contemplation and furtherance of such trade dispute within the meaning of the Trade Disputes Act, 1906 (6 Edw. VII, c. 47).

The jury have found on the issues raised on this plea that there was no dispute between the plaintiff and the dock labourers. And

* The statement of the case is abridged, and part of the arguments of counsel is omitted.

† For the decision of the Court of Appeal in Ireland, see [1914] 2 I. R. 285.

they have also found that the dispute was a dispute between the plaintiff and the Stevedores' Association, into which the stevedores brought Larkin, Hopkins, and Redmond to assist. And further, that the labourers did not insist that the plaintiff should become a member of the Stevedores' Association.

There was, in my opinion, ample evidence to sustain all these findings. The evidence of the two defendants, William Long and Newman, would be quite sufficient in itself for that purpose. It was plain upon the evidence that the only dispute which existed was a dispute between the members of the Stevedores' Association and the plaintiff. The Association sought to force the plaintiff to enter its ranks in order that he might thereby be compelled to adopt the scale of remuneration for any dock labourers he might employ which this Association had adopted. Larkin, Hopkins, and Redmond, at the request of the Association, came to their aid, and sought to bring pressure to bear upon the plaintiff to force him to enter it, by refusing to permit the dock labourers who were members of the Transport Union to work for him.

But these officers of the union of employés by so aiding the association of employers in its contest with the plaintiff, another employer, did not change the character of the original dispute. It was from the first a dispute between an individual stevedore and an association of stevedores.

The Trade Disputes Act of 1906 has no application to such disputes.‡ It only deals with disputes between employers and workmen and workmen and workmen. This dispute was neither of these. This defence, therefore, wholly fails.

On behalf of the appellants, Serjeant Sullivan insisted that the fact that the members of the Transport Union thought it for their own interest to pass a rule that they should not work for a stevedore who was not a member of the Stevedores' Union was quite legitimate, that they were not bound to work for him or for any other person for whom they did not choose to work, and were, in the legitimate pro-

‡ The Trades Dispute Act, 1906 (6 Edw. VII, c. 47), to "provide for the regulation of Trade Unions and Trade Disputes," declares, in its third section, that "an act done by a person in furtherance or contemplation of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills." The definition of a "trade dispute" is thus framed in section 5, subsection 3, of the same act: "The expression 'trade dispute' means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment and non-employment, or the terms of employment, or with the conditions of labour." The scope of these provisions was considered by Lord Parmoor, in Larkin v. Long, [1915] A. C. 814, 844-846, who remarks: "To hold that the acts in this case bring the dispute within the Act of 1906 would be in effect to disregard the definition of the Act of 1906, and to bring within the protection of the Act every dispute of whatever character in which workmen and their representatives determined to take part with one side or the other."

motion of their own interest, entitled, within the decision of Mogul Steamship Co. v. McGregor, Gow & Co., [1892] A. C. 25, to observe that rule, though it might incidentally cause injury to those who desired to employ these workmen, but for whom they themselves did not desire to work. It is undoubtedly true that the members of a trade union need not work for whom they do not desire to work. That is the right to personal freedom of action referred to in the following well-known passages from the judgment of Lord Bramwell in Reg. v. Druitt (1867) 10 Cox, C. C. 592, at p. 600, and from the essay of Sir W. Erle on Trade Unions (p. 12). They have been many times approved of in your Lordships' House. They respectively run thus: "The Liberty of a man's mind and will, to say how he should bestow himself and his means, his talents, and his industry was as much a subject of the law's protection as was that of his body." And, "Every person has a right under the law, as between himself and his fellow subjects, to full freedom in disposing of his own labour or his own capital, according to his own will. It follows that every person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others."

But it is equally true that the members of trade unions are bound to respect the right of other workmen to work for whom they please, on what terms and at what times they please, so long as they do nothing illegal, and are also bound to respect the right of an employer to undertake any work he pleases to undertake, and to employ what workmen he chooses, on whatever terms they both agree to, unless there is something unlawful in his action. If, therefore, any two or more members of a trade union, whatever its rules may be, wilfully and knowingly combine to injure an employer by inducing his workmen to break their contracts with him, or not to enter into contracts with him, resulting in damage to him, that is an entirely different matter. That is an invasion of the liberty of action of others, and has no analogy to the action of the defendant in the Mogul Case, [1892] A. C. 25; for there, as Lord Halsbury pointed out in Quinn v. Leathem, [1901] A. C. 495, no legal right has been interfered with, no coercion of mind or will had been effected, all were left free to trade on what terms they willed, and nothing was done except in rival trading which could be supposed to interfere with the appellant's interest.

The fact that members of a trade union are merely acting in obedience to a rule of their union believed by them to be for their benefit is no defence to an action for the breach of any contracts they have entered into,—Read v. Friendly Society of Operative Stonemasons, [1902] 2 K. B. 88, 732,—and still less is it a defence to the wilful and malicious infringement in combination of that legal right of personal freedom of action which they claim for themselves, but which others are entitled to quite as fully and as absolutely as they are.

I am clearly of opinion that the decision appealed from was right and should be upheld, and the appeal should be dismissed with costs.

My Lords, I am directed by the Lord Chancellor to say that he concurs in the judgment I have just read.††

IRON MOLDERS UNION et al. v. ALLIS-CHALMERS CO.

(United States Circuit Court of Appeals, 1908. 91 C. C. A. 631, 166 Fed. 45, 20 L. R. A. [N. S.] 315.)

This is an appeal,[78] in a strike injunction suit, from a final decree which enjoined four Wisconsin labor unions[79] and some sixty individuals who were officers and members from doing the following:[80]

"(4) And from congregating upon or about the company's premises or the streets, approaches and places adjacent or leading to said premises for the purpose of intimidating its employés or preventing or hindering them from fulfilling their duties as such employés or for the purpose of in such manner as to induce or coerce by threats, violence, intimidation or persuasion, any of the said company's employés to leave its service or any person to refuse to enter its service.

"(5) From congregating upon or about the company's premises or the sidewalk, streets, alleys or approaches adjoining or adjacent to or leading to said premises, and from picketing the said complainant's places of business or the homes or boarding houses or residences of the said complainant's employés.

†† Lord Parker of Waddington, Lord Sumner, Lord Parmoor, and Lord Dunedin concurred, the first three in judgments which are here omitted. The order of the Court of Appeal in Ireland was affirmed, and the appeal dismissed with costs.

78 For the report of this case in the District Court, see Allis-Chalmers Co. v. Iron Molders Union (1906) 150 Fed. 155.

79 These unions were unincorporated. On the procedural question of suing them in their association names, Judge Baker remarked: "No Wisconsin statute authorized an unincorporated voluntary association to be sued in its common name. So the objection might have prevailed if it had been seasonably made. Karges Furniture Co. v. Amalgamated Wood Workers' Union (1905) 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.) 788, 6 Ann. Cas. 829; Pickett v. Walsh (1906) 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638. But the members could have been reached, of course, either by naming and serving them all, or, if that were impracticable on account of their numbers, by suing some as representatives of all. The bill treated the unions as representative of their membership; an individual member filed a verified answer in the names of the unions, alleging that he had been authorized by them so to do; and the case was carried through three hearings (temporary injunction, contempt, final decree) without a suggestion that there was a defect of parties, or rather a defect in the form under which appellee asked to have the membership of the unions brought into court. An objection of this kind will not be entertained on appeal unless it has been first duly presented in the trial court. Barnes v. Chicago Typographical Union (1908) 232 Ill. 424, 83 N. E. 940, 14 L. R. A. (N. S.) 1018, 13 Ann. Cas. 54."

80 Eleven sections of this decree are omitted.

"(6) From interfering with the said company's employés in going to and from their work.

"(7) From going singly or collectively to the homes of the said company's employés for the purpose of intimidating or threatening them or collectively persuading them to leave its service."

"(16) From by threats, intimidation, persuasion, force or violence, compelling or attempting to compel or induce any of the apprentices in the employ of the said complainant to break their contracts and leave the employ of the said complainant."

BAKER, Circuit Judge. * * * So far as persuasion was used to induce apprentices or others (section 16 of the decree) to break their contracts to serve for definite times, the prohibition was right. And the reason, we believe, is quite plain. Each party to such a contract has a property interest in it. If either breaks it, he does a wrong, for which the other is entitled to a remedy. And whoever knowingly makes himself a party to a wrongful and injurious act becomes equally liable. But in the present case the generality of the men who took or sought the places left by the strikers were employed or were offered employment at will, as the strikers had been. If either party, with or without cause, ends an employment at will, the other has no legal ground of complaint. So if the course of the new men who quit or who declined employment was the result of the free play of their intellects and wills, then against them appellee had no cause of action, and much less against men who merely furnished information and arguments to aid them in forming their judgments. Now it must not be forgotten that the suit was to protect appellee's property rights. Regarding employments at will, those rights reached their limit at this line: For the maintenance of the incorporeal value of a going business appellee had the right to a free access to the labor market, and the further right to the continuing services of those who accepted employment at will until such services were terminated by the free act of one or the other party to the employment. On the other side of this limiting line, appellants, we think, had the right, for the purpose of maintaining or increasing the incorporeal value of their capacity to labor, to an equally free access to the labor market. The right of the one to persuade (but not coerce) the unemployed to accept certain terms is limited and conditioned by the right of the other to dissuade (but not restrain) them from accepting. For another thing that must not be forgotten is that a strike is one manifestation of the competition, the struggle for survival or place, that is inevitable in individualistic society. Dividends and wages must both come from the joint product of capital and labor. And in the struggle wherein each is seeking to hold or enlarge his ground, we believe it is fundamental that one and the same set of rules should govern the action of both contestants. For instance, employers may lock out (or threaten to lock out) employés at will, with the idea that idleness will force them to accept lower wages or more onerous conditions; and employés at

will may strike (or threaten to strike), with the idea that idleness of the capital involved will force employers to grant better terms. These rights (or legitimate means of contest) are mutual and are fairly balanced against each other. Again, an employer of molders, having locked out his men, in order to effectuate the purpose of his lockout, may persuade (but not coerce) other foundrymen not to employ molders for higher wages or on better terms than those for which he made his stand, and not to take in his late employés at all, so that they may be forced back to his foundry at his own terms; and molders, having struck, in order to make their strike effective may persuade (but not coerce) other molders not to work for less wages or under worse conditions than those for which they struck, and not to work for their late employer at all, so that he may be forced to take them back into his foundry at their own terms. Here, also, the rights are mutual and fairly balanced. On the other hand, an employer, having locked out his men, will not be permitted, though it would reduce their fighting strength, to coerce their landlords and grocers into cutting off shelter and food; and employés, having struck, will not be permitted, though it might subdue their late employer, to coerce dealers and users into starving his business. The restraints, likewise, apply to both combatants and are fairly balanced. These illustrations, we believe, mark out the line that must be observed by both. In contests between capital and labor the only means of injuring each other that are lawful are those that operate directly and immediately upon the control and supply of work to be done and of labor to do it, and thus directly affect the apportionment of the common fund, for only at this point exists the competition, the evils of which organized society will endure rather than suppress the freedom and initiative of the individual. But attempts to injure each other by coercing members of society who are not directly concerned in the pending controversy to make raids in the rear cannot be tolerated by organized society, for the direct, the primary, attack is upon society itself. And for the enforcement of these mutual rights and restraints organized society offers to both parties, equally, all the instrumentalities of law and of equity.

With respect to picketing as well as persuasion, we think the decree went beyond the line. The right to persuade new men to quit or decline employment is of little worth unless the strikers may ascertain who are the men that their late employer has persuaded or is attempting to persuade to accept employment. Under the name of persuasion, duress may be used; but it is duress, not persuasion, that should be restrained and punished. In the guise of picketing, strikers may obstruct and annoy the new men, and by insult and menacing attitude intimidate them as effectually as by physical assault. But from the evidence it can always be determined whether the efforts of the pickets are limited to getting into communication with the new men for the purpose of presenting arguments and appeals to their free judgments.

Prohibitions of persuasion and picketing, as such, should not be included in the decree. Karges Furniture Co. v. Amalgamated Wood Workers' Union, 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.) 788, 6 Ann. Cas. 829; Everett-Waddy Co. v. Typographical Union, 105 Va. 188, 53 S. E. 273, 5 L. R. A. (N. S.) 792, 8 Ann. Cas. 798. * * *[81]

[81] Part of Judge Baker's opinion and the corresponding parts of the order are omitted. A concurring opinion by Judge Grosscup is omitted.

Compare the remarks of Hadley, J., in Karges Furniture Co. v. Amalgamated W. W. U. No. 131 (1905) 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.) 788, 6 Ann. Cas 829: "It is argued that the maintenance of pickets at the plaintiff's factory was an unlawful interference with its business, and that the appointment, instruction, and the receiving of daily reports from such pickets constituted all participating members of the union civil conspirators. Whether picketing is lawful or unlawful depends in each particular case upon the conduct of the pickets themselves. The fact that they are serving under appointment and instructions from their union adds nothing to their rights and privileges as affecting third persons. Under no circumstances have pickets the right to employ force, menaces, or intimidation of any kind in their efforts to induce nonstriking workmen to quit, or to prevent those about to take the strikers' places to refrain from doing so; neither have they the right, as pickets or otherwise, to assemble about the working place in such numbers or in such manner as to impress workmen employed, or contemplating employment, with fear and intimidation. Beaton v. Tarrant (1902) 102 Ill. App. 124; Vegelahn v. Guntner (1896) 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443; Murdock v. Walker (1893) 152 Pa. 595, 25 Atl. 492, 34 Am. St. Rep. 678. It is, however, generally conceded in this country and in England that workmen, when free from contract obligations, may not only themselves, singly and in combination, cease to work for any employer, but may also, as a means of accomplishing a legitimate purpose, use all lawful and peaceful means to induce others to quit or refuse employment. The law, having granted workmen the right to strike to secure better conditions from their employers, grants them also the use of those means and agencies, not inconsistent with the rights of others, that are necessary to make the strike effective. This embraces the right to support their contest by argument, persuasion, and such favors and accommodations as they have within their control. The law will not deprive endeavor and energy of their just reward, when exercised for a legitimate purpose and in a legitimate manner. So, in a contest between capital and labor on the one hand to secure higher wages, and on the other to resist it, argument and persuasion to win support and co-operation from others are proper to either side, provided they are of a character to leave the persons solicited feeling at liberty to comply or not, as they please. Likewise a union may appoint pickets or a committee to visit the vicinity of factories for purpose of taking note of the persons employed, and to secure, if it can be done by lawful means, their names and places of residence for the purpose of peaceful visitation. Eddy on Comb. § 537; Perkins v. Rogg (1892) 28 Wkly. Law Bul. 32. The decided cases are not in harmony with respect to the right to persuade, but the clear weight of authority is to the effect that so long as a moving party does not exceed his absolute legal rights, and so does not invade the absolute rights of another, he may do as he pleases, and may persuade others to do like him. To illustrate: A. resides in a populous, residential part of the city. B. has established a saloon in the same square. Keeping a saloon there is lawful business. Many of the neighbors patronize the saloon, and the business prospers. A. disapproves of the business in that place, and withholds his patronage. He has the absolute right to withhold it. The other neighbors have the absolute right to bestow theirs. B. has no absolute right to the patronage of either, and without patronage will fail in business. Here it is plain that A. has the absolute right to stand on the street corner and note all his neighbors who enter and leave the saloon, hail them on the street, or visit them at their respective homes, and by argument and persuasion (they being willing to listen) endeavor to induce them to cease their patronage. A.'s object is to make B.'s business unprofitable and losing, and thus compel him to move away, and improve the

The decree is modified by striking out "persuasion" and "persuading" from the 4th and 7th paragraphs; further modified by adding after "picketing" in the 5th paragraph "in a threatening or intimidating manner"; * * * affirmed as to the * * * 16th paragraph.

PIERCE v. STABLEMEN'S UNION, LOCAL NO. 8,760 et al.

(Supreme Court of California, 1909. 156 Cal. 70, 103 Pac. 324.)

This was an action by Pierce against the Stablemen's Union and others, to enjoin the defendants from illegal interference with the plaintiff's business. The following facts were found:

The plaintiff conducted a livery stable in San Francisco. The officers of the defendant union asked him to "unionize" his stable by discharging his nonunion employés, and employing union men in their places. Upon his refusal a strike of the union men was declared. Following the strike, a boycott was decreed. A patrol about plaintiff's place of business was established, and, under the findings, these representatives of the defendants, the pickets, "called forth in loud, threatening, and menacing tones to the patrons and customers of plaintiffs not to patronize plaintiffs in their said business. Defendant, the Stablemen's Union, through its agents and representatives, has stated to, and threatened, patrons and customers and other persons dealing with plaintiffs that, if said patrons and customers and other persons continued to patronize and do business with plaintiffs, said Stablemen's Union would cause them respectively to be boycotted in their business." Menacing terms and threatening language were made use of by the agents, representatives, and pickets of the union toward the employés of the plaintiff, such as: "Unfair stable, union men locked out, and nonunion men put in. Look at this stable; the only unfair stable on Market street; the stable that always was, and always will be, unfair. This is a scab stable. When we catch you outside, we will finish you. We will get you yet. It is a scab stable, full of scabs. We will fix you yet. It is a matter of time when we will get you all right. You will never get out of the stable alive. We will break you in half. We will beat you to death. When we catch you outside, we will finish you."

Upon these findings in the superior court a judgment for an injunction was granted. This judgment by its terms commanded the defendant, its agents, and employés to desist and refrain—

"from in any wise interfering with, or harassing, or annoying, or obstructing plaintiffs in the conduct of the business of their stable, known as the 'Nevada

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place and attractiveness of A.'s neighborhood. Now if A. converts all of his neighbors to his course of conduct by argument, reason, entreaty, and other fair and proper means, and thereby effects the suppression of the saloon and financial ruin of B., it is damnum absque injuria. A. has done nothing but what the law protects him in doing. Eddy on Comb. §§ 537, 539; Beach on Mon. & Ind. Trusts, § 107; Union P. Ry. Co. v. Reuf (C. C. 1902) 120 Fed. 102; Foster v. Retail Clk., etc., Ass'n (1902) 39 Misc. Rep. 48, 78 N. Y. Supp. 860; Rogers v. Evarts (Sup. 1891) 17 N. Y. Supp. 264; Perkins v. Rogg, 28 Wkly. Law Bul. 32; Reg. v. Druitt, 10 Cox, Cr. R. 592; Reg. v. Hilbert, 13 Cox, Cr. R. 82. According to the finding, the pickets, after being chosen and before going out, were "invariably" instructed by the presiding officer of the union to observe only peaceable means, and under no circumstances resort to force, menaces, threats, or intimidation of any kind. There is no finding of any departure from these instructions by any picket, and we must therefore presume, as against the plaintiff, that there was none, and consequently hold that the maintaining of the pickets at the plaintiff's factory under the facts proved was not unlawful."

See also George Jonas Glass Co. v. Glass Bottle Blowers' Ass'n (1907) 72 N. J. Eq. 653, 66 Atl. 953.

Stables,' and situated at No. 1350 Market street, in the city and county of San Francisco; or from in any wise molesting, interfering with, threatening, intimidating, or harassing any employé or employés of plaintiffs; or from intimidating, harassing, or interfering with any customer or customers, patron or patrons, of plaintiffs in connection with the business of plaintiffs, either by boycott or by threats of boycott, or by any other threats; or by any kind of force, violence, or intimidation, or by other unlawful means, seeking to induce any employé or employés of plaintiffs to withdraw from the service of plaintiffs; or by any kind of violence, threats, or intimidation inducing, or seeking to induce, any customer or customers, patron or patrons, of plaintiffs to withdraw their patronage or business from them, or from stationing or placing in front of said plaintiffs' place of business any picket, or pickets, for the purpose of injuring, obstructing, or in any wise interfering with, the business of plaintiffs, or for the purpose of preventing any customer or customers, patron or patrons, of plaintiffs from doing business with them; or from in any other way molesting, intimidating or coercing, or attempt to molest or intimidate or coerce, any customer, patron, or employé of plaintiffs now or hereafter dealing with, or any employé now or hereafter employed by or working for, plaintiffs in their said business."

From the judgment as thus framed and rendered the defendants have appealed.

HENSHAW, J. * * * We think that to-day no court would question the right of an organized union of employés, by concerted action, to cease their employment (no contractual obligation standing in the way), and this action constitutes a "strike." We think, moreover, that no court questions the right of those same men to cease dealing by concerted action, either socially or by way of business, with their former employer, and this latter act, in its essence, constitutes the primary boycott. But what acts organized labor may do, and what means it may adopt to accomplish its end, without violation of the law, have presented questions of much nicety, over which the courts have stood, and still stand, widely divided. It would not be profitable to discuss and analyze these widely divergent cases. It is sufficient to formulate briefly the principles adopted in this state many of which have recently found elaborate expression in the case of Parkinson v. Building & Trades Council of Santa Clara, 154 Cal. 581, 98 Pac. 1040, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165. The right of united labor to strike, in furtherance of trade interests (no contractual obligation standing in the way) is fully recognized. The reason for the strike may be based upon the refusal to comply with the employés' demand for the betterment of wages, conditions, hours of labor, the discharge of one employé, the engagement of another—any one or more of the multifarious considerations which in good faith may be believed to tend toward the advancement of the employés. After striking, the employé may engage in a "boycott," as that word is here employed. As here employed, it means not only the right to the concerted withdrawal of social and business intercourse, but the right by all legitimate means—of fair publication, and fair oral or written persuasion—to induce others interested in, or sympathetic with, their cause to withdraw their social intercourse and business patronage from the employer. They may go even further than this, and request of

another that he withdraw his patronage from the employer, and may use the moral intimidation and coercion of threatening a like boycott against him if he refuse so to do. This last proposition necessarily involves the bringing into a labor dispute between A. and B., C., who has no difference with either. It contemplates that C., upon the request of B., and under the moral intimidation lest B. boycott him, may thus be constrained to withdraw his patronage from A., with whom he has no controversy. This is the "secondary boycott," the legality of which is vigorously denied by the English courts, the federal courts, and by the courts of many of the states of this nation.

Without presenting the authorities, which are multitudinous, suffice it to state the other view, in language of the president of the United States, but recently uttered: "A body of workmen are dissatisfied with the terms of their employment. They seek to compel their employer to come to their terms by striking. They may legally do so. The loss and inconvenience he suffers he cannot complain of. But when they seek to compel third persons, who have no quarrel with their employer, to withdraw from all association with him by threats that, unless such third persons do so, the workmen will inflict similar injury on such third persons, the combination is oppressive, involves duress, and, if injury results, it is actionable." President Taft, McClure's Magazine, June, 1909, p. 204. Notwithstanding the great dignity which attaches to an utterance such as this, which, as has been said, is but the expression of numerous courts upon the subject-matter, this court, after great deliberation, took what it believed to be the truer and more advanced ground, above indicated and fully set forth in Parkinson v. Building Trades Council, etc., supra. In this respect this court recognizes no substantial distinction between the so-called primary and secondary boycott. Each rests upon the right of the union to withdraw its patronage from its employer, and to induce by fair means any and all other persons to do the same, and, in exercise of those means, as the unions would have the unquestioned right to withhold their patronage from a third person who continued to deal with their employer, so they have the unquestioned right to notify such third person that they will withdraw their patronage if he continues so to deal. However opposed to the weight of federal authority the views of this court are, that they are not unique may be noted by reading National Protective Association v. Cumming, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648; Lindsay v. Montana Federation of Labor, 37 Mont. 264, 96 Pac. 127, 18 L. R. A. (N. S.) 707, 127 Am. St. Rep. 722, where the highest courts of those states formulate and adopt like principles.

It has been said that it is important to any correct understanding of, or adjudication upon, such questions that a definition of the word "boycott" should be first stated. Thus, to say that a boycott is a "conspiracy" immediately implies illegality, and puts the conduct of the boycotters under the ban of the law. So also does the definition which

describes boycotting as "illegal coercion," designed to accomplish a certain end. As we have undertaken to define boycott, it is an organized effort to persuade or coerce, which may be legal or illegal, according to the means employed. In other jurisdictions where a definition is given to a boycott which imports illegality, the injunction will of course lie against boycotting as such. In this state the injunction will issue depending upon the circumstance whether the means employed, or threatened to be employed, are legal or illegal.

We are thus brought to consider the method of "picketing," the use of which appellants contend is a legal weapon in their hands. So far in this discussion we have dealt exclusively with the respective rights of the employer and of the employé. There are other parties, however, whose rights are entitled to equal consideration, and whose rights always become involved and imperiled when picketing is adopted as a coercive measure in aid of a boycott.

If the strikers have the right, as above indicated, to withdraw patronage themselves, and by fair publication, written and oral persuasion, to induce others to join in their cause, and finally by threat of like boycott, to coerce others into so doing, their rights go no further than this. It is the equal right of the employer to insist before the law that his business shall be subject at the hands of the strikers to no other detriment than that which follows as a consequence of the legal acts of the strikers so above set forth. It is not to be forgotten that when the employés have struck, they occupy no contractual relationship whatsoever to their former employer, and have no right to coerce him, or attempt to coerce him, by the employment of any other means than those which are equally open to any other individual, or association of individuals. No sanctity attaches to a trades union which puts it above the law, or which confers upon it rights not enjoyed by any other individual or association. The two classes of persons to whom we have adverted, and whose rights necessarily become involved where a picket or patrol is established, are, first, the rights of those employed, or seeking employment, in the place of the striking laborers; and, second, the rights of the general public. It is the absolute, unqualified right of every employé, as well as of every other person, to go about his legal business unmolested and unobstructed, and free from intimidation, force, or duress. The right of a labor association to strike is no higher than the right of a nonunion workman to take employment in place of the strikers. Under the assurance and shield of the Constitution and of the laws, the nonunion laborer may go to and from his labor, and remain at his place of labor, in absolute security from unlawful molestations, and wherever such protection is not fully accorded, their execution, and not the laws themselves, is to be blamed. In this country a man's constitutional liberty means far more than his mere personal freedom. It means that, among other rights, his is the right freely to labor and to own the fruits of his toil. Ex parte

Jentzsch, 112 Cal. 468, 44 Pac. 803, 32 L. R. A. 664. Any act of boycotting, therefore, which tends to impair this constitutional right freely to labor, by means passing beyond moral suasion, and playing by intimidation upon the physical fears, is unlawful.

The inconvenience which the public may suffer by reason of a boycott lawfully conducted is in no sense a legal injury. But the public's rights are invaded the moment the means employed are such as are calculated to, and naturally do, incite to crowds, riots, and disturbances of the peace. A picket, in its very nature, tends to accomplish, and is designed to accomplish, these very things. It tends to, and is designed by physical intimidation to, deter other men from seeking employment in the places vacated by the strikers. It tends, and is designed, to drive business away from the boycotted place, not by the legitimate methods of persuasion, but by the illegitimate means of physical intimidation and fear. Crowds naturally collect; disturbances of the peace are always imminent and of frequent occurrence. Many peaceful citizens, men and women, are always deterred by physical trepidation from entering places of business so under a boycott patrol. It is idle to split hairs upon so plain a proposition, and to say that the picket may consist of nothing more than a single individual, peacefully endeavoring by persuasion to prevent customers from entering the boycotted place. The plain facts are always at variance with such refinements of reason. Says Chief Justice Shaw, in Commonwealth v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346: "The law is not to be hoodwinked by colorable pretenses; it looks at truth and reality through whatever disguise it may assume." If it be said that neither threats nor intimidations are used, no man can fail to see that there may be threats, and there may be intimidations, and there may be molesting, and there may be obstructing, without there being any express words used by which a man should show violent threats toward another, or any express intimidation. We think it plain that the very end to be attained by picketing, however artful may be the means to accomplish that end, is the injury of the boycotted business through physical molestation and physical fear, caused to the employer, to those whom he may have employed, or who may seek employment from him, and to the general public. The boycott having employed these means for this unquestioned purpose is illegal, and a court will not seek by overniceties and refinements to legalize the use of this unquestionably illegal instrument. Vegelahn v. Guntner [167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443], supra; Crump v. Commonwealth, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895; Union Pacific v. Reuf (C. C.) 120 Fed. 124; 18 Ency. of Law (2d Ed.) p. 85.

In conclusion, then, and applying these principles to the injunction here under consideration, it appears that, while the injunction was properly granted, it was broader in its terms than the law warrants.

It was, for example, too broad in restraining defendants from "in any wise interfering with" plaintiff's business, since the interference which we have discussed, of publication, reasonable persuasion, and threat to withdraw patronage, is legal, and such as defendants could employ. So, also, was the injunction too broad in restraining defendants from "intimidating any customer by boycott or threat of boycott" since, as has been said, the secondary boycott is likewise a legal weapon. In all other respects, however, the injunction was proper.

The trial court is directed to modify its injunction in the particulars here specified, and in all other respects the judgment will stand affirmed.[82]

SHAW, J. I agree with all that is said by Justice HENSHAW in his opinion, except the part relating to the so-called "secondary boycott" and the attempt to draw a distinction between the compulsion of third persons caused by picketing and the compulsion of third persons produced by a boycott. My views concerning the "secondary boycott" are expressed in my dissenting opinion in Parkinson v. Building Trades Council, 154 Cal. 581, 98 Pac. 1040, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165. The means employed for the coercion or intimidation of a third person in a "secondary boycott" are unlawful whenever they are such as are calculated to, and actually do, destroy his free will, and cause him to act contrary to his own volition in his own business, to the detriment of the person toward whom the main boycott or strike is directed; in other words, whenever the means used constitute duress, menace, or undue influence. Whether this coercion or compulsion comes from fear of physical violence, as in the case of picketing, or from fear of financial loss, as in the "secondary boycott," or from fear of any other infliction, is, in my opinion, immaterial, so long as the fear is sufficiently potent to control the action of those upon whom it is cast. I can see no logical or just reason for the distinction thus sought to be made. There is no such distinction in cases where contracts or wills are declared void, because procured by duress, menace, or undue influence. There should be none where actual injury is produced or threatened through such means acting upon third persons. Nor do I believe any well-considered case authorizes any such distinction. The opinions in the case of National Protective Association v. Cumming, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648, are devoted to a discussion of the right to strike, and the limitations of that right, and not to a discussion of the "secondary boycott." A close analysis of the cases on the subject will, as I believe, show that this court stands alone on this point.

[82] A part of Mr. Justice Henshaw's opinion is omitted. Beatty, C. J., and Lorigan and Melvin, JJ., concurred in the opinion. Angellotti and Sloss, JJ., concurred in the judgment, on the facts as found, although not prepared to hold that there may not be acts coming within the term "picketing," as it is accepted and understood in labor disputes, that are entirely lawful.

For these reasons I do not agree to that part of the judgment directing a modification of the injunction. I believe that it should stand in the form as given by the court below.

MARCH v. BRICKLAYERS' AND PLASTERERS' UNION NO. 1 et al.

(Supreme Court of Errors of Connecticut, 1906. 79 Conn. 7, 63 Atl. 291, 4 L. R. A. [N. S.] 1198, 118 Am. St. Rep. 127, 6 Ann. Cas. 848.)

In this action, brought by March against the union, the plaintiff seeks to recover $100 which he paid to the defendant union under the circumstances shown in the opinion. The judgment below was for the plaintiff. The defendants appeal.

PRENTICE, J. The complaint alleges that the defendants conspired, combined, and confederated with each other and other persons to extort, demand, and obtain from the plaintiff the sum of $100; that in pursuance of that conspiracy and combination they threatened to injure the plaintiff in his property and business, unless said sum was paid; and that by reason of said conspiracy and combination, and by reasons of said threats, intimidation, and coercion, and by such means alone said sum was paid by the plaintiff to the defendants. It is found that the payment was made, that the combination between the members of the defendant union to secure that payment and Butler's agency for it existed, and that the money was paid through the operation of that combination. So far there is no contention here. The plaintiff further claims that the combination for the purposes of its controversy with him, resulting in the payment by him, was an unlawful one. He claims that it was unlawful (1) because its object was unlawful; and (2) because the means to accomplish that object were unlawful. He also claims that, as the payment was one into which he was coerced through the operation of this unlawful conspiracy, he is entitled to recover it back. The defendants do not deny that a combination or confederation of men either for the accomplishment of an unlawful object or for the accomplishment of a lawful object by unlawful means is unlawful, neither do they deny that, if the combination between them which resulted in the payment in question was an unlawful one, the plaintiff is entitled to recover.

The contention between the parties, therefore, becomes primarily resolved into one as to whether the conceded confederation of the defendants through which the payment was obtained was an unlawful one by reason of the unlawful character of either its object or the means employed. The plaintiff asserts the right to a judgment upon narrower grounds than those thus suggested and notwithstanding a failure to establish an unlawful conspiracy. This claim, however, is subordinate to his main proposition, and need not be considered unless it shall

appear that his principal contention already stated fails him. The disagreement between the plaintiff and the defendants as to the lawfulness of the object of the latter's combination is one which arises chiefly, if not entirely, out of a difference of view as to what is to be regarded as that object. The defendants say that the object was the ultimate object of the union, to wit, among other things, the promotion of the welfare of its members and the advancement of their rights and privileges as laboring men, or, if not that, the freeing of themselves from the competition of those not members of the union, or, if not that, and the object is to be brought into closer relation to the matters in controversy, the compelling of "unfair" bosses to become "fair." The plaintiff finds the object sought in the immediate injury attempted to be inflicted upon him—the extortion of the $100 from him as the price of his freedom from harassment in the marketing of his product. These differences in the analysis of the situation disclosed by the record are more formal than vital. Their chief importance arises from the changed form which must be given to the discussion of the underlying questions involved and the different use of terms which must be made according, as one view or the other be adopted. For the purposes of our consideration, therefore, we may well assume, as did the court below, that the object sought by the defendants in what they confederated to do was some one of the more remote objects, as claimed by them, and that this object was a lawful one. This, of course, involves the transferring into the field of means that which would in the other view be regarded as an end and the consideration of all that the defendants did in the accomplishment of its object as means to that accomplishment.

The question before us thus becomes narrowed down to the single inquiry as to whether or not the defendants in the pursuit of their object, whether it be regarded as their general welfare as laboring men, or the diminution of outside competition, or the enlargement of their field of opportunity by increasing the number of employers of union labor only, used unlawful means. This question suggests the possibility of a wide range of inquiry, involving the consideration of important legal principles which have been much discussed, and upon certain of which there has been some divergence of opinion. The facts of this case, however, are such as to require from us the application of no principles which have not been long and well established, and but few of them. The salient facts in the story spread upon the record are that this defendant association through their representative, the defendant Butler, demanded of the plaintiff the payment to them of a sum of money upon the threatened alternative that, if payment was refused, he would by their action in refusing to handle his product in their work then in progress be annoyed and harassed in the enjoyment of the benefit of the market for that product which he had obtained, and in all probability be wholly deprived of that market.

The action thus threatened was within the power of the defendants to take. The consequences which would flow to the plaintiff from it, if taken, were such as might well excite in him a reasonable apprehension of serious injury. To the pressure thus brought to bear upon him he yielded and paid the sum exacted. There is nothing in the record to relieve this picture. It does not improve it to say that the defendants were seeking to enforce a penalty or to collect damages assessed. They had no right to inflict a penalty upon or assess damages against this man, who owed them no duty through association in the membership of the union, by contract or otherwise. The plaintiff owed them nothing. To overawe him into the payment of something by means of threats of injury in their power to inflict and of such a character as to naturally arouse a reasonable apprehension of serious consequences to him, in the event of his refusal, was an act of the purest extortion, using that word in its widest meaning, by means of threats and intimidation, and in the plainest violation of our statute (Gen. St. 1902, § 1296), our decisions, and the universally accepted principles of the common law. State v. Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23; State v. Stockford, 77 Conn. 227, 58 Atl. 769, 107 Am. St. Rep. 28. The statement of what the defendants undertook to do easily discloses that this is not the ordinary case found in the books involving the exercise by trade, capital, or labor combinations of claimed powers in their struggles for success. These cases have not infrequently called for the determination of nice legal questions, and the application of doctrines which, while they might be pertinent to the present situation, are wholly unnecessary for the decision of the simpler question before us. The most elemental principles of justice and right which have by universal consent been adopted into the common law suffice for a conclusion that money cannot be lawfully exacted of a man in the manner here successful. We are aware of no case wherein the progress of a labor or trade controversy a similar attempt to extort money as the price of forbearance from threatened injurious action has ever come before the courts, save that of Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287, where the attempt is characterized as a species of annoyance and extortion which the common law has never tolerated.

It is attempted to justify the action of the union in its money demand upon the proposition that, as its members had the right to decline to handle the plaintiff's brick, they had the right to waive the exercise of that right upon such conditions as they might impose. The proposition is that money demanded and obtained as the price of forbearance from the commission of an act of injury, even when the commission of that act is held over the man to coerce and intimidate him into compliance with the demand, is lawfully obtained, if the threatened act was one which the threatener might lawfully do. Such a proposition could oftentimes be used to justify the vilest blackmailer,

and is palpably unsound, in that it ignores certain elements which may be present to convert the proceeding into a wrong or a crime. 28 Am. & Eng. Ency. Law (2d Ed.) 141.

It is further said that the action of the defendants was justified in the exercise of the rights of fair trade competition. If it be assumed that these journeymen, bricklayers, and this brick manufacturer whose business touched each other, only in that the latter sold brick to persons for whom the former worked, are to be regarded as trade competitors, so that the recognized doctrines applicable to such competitors are applicable to them, it yet remains that the means resorted to in this case would not be permitted.

There is no error. All concur.[83]

BURNHAM et al. v. DOWD.

(Supreme Judicial Court of Massachusetts, 1914. 217 Mass. 351, 104 N. E. 841, 51 L. R. A. [N. S.] 778.)

SHELDON, J.[84] * * * The leading material facts found by the master may be summarized as follows: The plaintiffs carry on a business which includes the selling at wholesale and retail of masons' supplies. The defendants are members of a voluntary unincorporated association or labor union in Holyoke, hereinafter called the union. It is the object and purpose of all the members of this union to make themselves and the union as powerful as possible in Holyoke and its immediate environment, and to exert their power for the purpose of bettering the labor conditions of members of the union, especially with reference to rates of wages and periods of labor. It is a part of their principles which all the members of the union are under obligation to respect and uphold, that all men of their craft or trade working in Holyoke or its immediate vicinity, that is, within the jurisdiction of their union, must be members thereof; that all their members should refuse to work with men of their craft who were not members of the union or had not declared their intention to join it; should refuse to work for employers who were declared "unfair" by the union; and should refuse to use in their work any materials that had been sold or furnished by any merchant who was declared unfair by the union. They aimed to accomplish their purpose, of bettering the labor conditions of their members, primarily by persuasion coupled with the fear of consequences if the party addressed should not yield, and secondarily, if necessary, by troubles and loss to the business of contractors or merchants. This union was connected with the Building Trades Council of Holyoke, which represented the various building

[83] The statement of facts is abridged.

[84] Parts of the opinion are omitted.

trades unions (some 14 in number) of Holyoke and vicinity, and was composed of delegates sent from these unions. In July, 1911, one Gauthier employed nonunion masons in certain construction work in Holyoke, against the protest of this union; and the plaintiffs furnished to him mason materials. In August, 1911, the union voted to refuse to handle any building material of any firm that furnished stock to Gauthier or to any "unfair" contractor. Soon after this, the delegates from the union to the Building Trades Council reported these facts to that body; and the agent of the council sent a written notice to the plaintiff that Gauthier was "doing work contrary to laws of Building Trades Council," and was "therefore recognized by us as being unfair," and expressing the hope of "co-operation in this matter." The plaintiffs continued to furnish material to Gauthier. Thereupon, by successive votes, the union declared that the plaintiffs were "unfair." This was for the reason that the plaintiffs continued to furnish masons' supplies to Gauthier, and refused to promise not to sell to any party who should not be in good standing with the union. All the members of the union would have refused since August, 1911, and would refuse now and in the future (so long as the plaintiffs were held by the union to be unfair) to work with materials purchased from the plaintiffs. It has not been and in the future it will not be practicable, without the labor of members of the union, to perform building contracts of any size or importance in Holyoke or its immediate vicinity, without serious inconvenience, trouble and loss to the contractors, and the defendants have intended that owners and contractors should fear this result if they purchased masons' supplies from the plaintiffs. The union and its officers and members, including some of the defendants, have notified various owners and contractors, who either were buying or were intending to buy masons' supplies from the plaintiffs for construction work upon which members of the union necessarily were employed, that the plaintiffs were upon the "unfair" list of the union, and that its members would not use or work upon material furnished by the plaintiffs, and in substance threatened to strike if masons' supplies were purchased from the plaintiffs. These contractors and owners feared, and it was intended that they should fear and they were justified in fearing, that these threats would be carried out; and in consequence thereof they ceased or refrained from buying supplies of the plaintiff, as otherwise they would have done, and the plaintiffs' sales of masons' supplies were considerably diminished and their profits lessened in consequence of these facts. This state of affairs will continue, to the serious loss and damage of the plaintiffs, unless they shall promise not to sell to any one considered unfair by the union.

The defendants did not act from actual personal malice towards the plaintiffs; but their acts were done in pursuance of their union principles and purposes, as above stated, and without caring for the injurious consequences to the plaintiffs. Indeed these injurious conse-

quences were anticipated and contemplated by the defendants. They did not attempt to declare or enforce any boycott against the plaintiffs, except as this is included in the acts that have been mentioned. During the period involved in this case, some of the defendants have bought for their own use small quantities of masons' supplies from the plaintiffs, and others of the defendants during the same time have made purchases from the plaintiffs in other branches of the plaintiffs' business.

Although there has been a little contrariety of decisions in other jurisdictions, we do not consider that there is any doubt as to the rule of law to be applied in this case. The defendants have no real trade dispute with the plaintiffs. No one of the members of the union is, or so far as appears ever has been, employed by the plaintiffs. The plaintiffs have not interfered or sought to interfere with the employment of any of those members, or with the rates of pay, the periods of labor, or any of the conditions of such employment. There is no competition between these parties, as there was in Bowen v. Matheson, 14 Allen, 499. The matter that lies at the foundation of these proceedings is a dispute between the union and Gauthier. He employs or has employed nonunion labor; the defendants (including under this term all the members of the union) object to this. They have a right to say that they will do no work for him unless he will give to them all the work of their trade, that they will do all or none of his work. That was settled by our decision in Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638. If they were employed by Gauthier, and if he employed also nonunion men of their craft, they would have a right, unless they were bound by some term of their contract of employment, to strike unless all of this work should be given to them or to their associates. But it was pointed out in the same case that not all strikes are lawful; and it now is settled in this commonwealth that it is a question of law whether any particular strike is a lawful one. Reynolds v. Davis, 198 Mass. 294, 84 N. E. 457, 17 L. R. A. (N. S.) 162; De Minico v. Craig, 207 Mass. 593, 94 N. E. 317, 42 L. R. A. (N. S.) 1048. But the second point decided in Pickett v. Walsh, supra, is in our opinion decisive of the principal question raised in this case. It was there held that the members of a labor union who are employed by a contractor to do work upon a building, and who have no dispute with that contractor as to work which they or their fellows are doing for him, cannot lawfully strike against him for the mere reason that he is doing work and employing some of their fellows upon another building upon which nonunion men are employed to do like work, not by him, but by the owner, of that building. The language and reasoning of that decision are applicable here. The reason of the decision was that, as the court said (Loring, J., 192 Mass. 587, 78 N. E. 760, 6 L. R. A. [N. S.] 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638), such a strike "has an element in it like that in a sympathetic strike, in

a boycott and in a blacklisting, namely: It is a refusal to work for A., with whom the strikers have no dispute, because A. works for B., with whom the strikers have a dispute, for the purpose of forcing A. to force B. to yield to the strikers' demands." So in the case at bar, the threat of the defendants was to strike against owners and contractors, with whom the defendants had no dispute, for the purpose of forcing those owners and contractors to refuse to buy masons' supplies from the plaintiffs, and thus by the loss of business and of the profits to be derived therefrom, force the plaintiffs to refuse to sell to Gauthier or others whom the defendants might call unfair, and thus put a pressure upon those persons which should force them to cease employing nonunion masons and to give all their mason work to the defendants. This was a step further than what was held in Pickett v. Walsh to be an unlawful combination for an unjustifiable interference with another's business. It was in intention and effect a boycott; and it was none the less so because it was aimed at only one branch of the plaintiffs' business. There is no more right to interfere with one branch of a merchant's business, to obstruct it and lessen its profits, and so far as may be done to destroy it entirely, than there is so to interfere with, obstruct and destroy the whole of that business. The difference is merely one of degree, not of kind. And Pickett v. Walsh is well supported as to this point both upon the reasoning of the opinion and by authority. * * *[85]

As was said in Hopkins v. Oxley Stave Co., 83 Fed. 912, 917, 28 C. C. A. 99, 105: "Persons engaged in any service have the power, with which a court of equity will not interfere by injunction, to abandon that service, either singly or in a body, if the wages paid or the conditions of employment are not satisfactory; but they have no right to dictate to an employer what kind of implements he shall use, or whom he shall employ." * * *

The defendants contend earnestly that each one of them has a perfect right to refrain from dealing himself, and to advise his friends and associates to refrain from dealing, with the plaintiffs, and that

[85] Mr. Justice Sheldon here cited or referred to a large number of cases, and especially "the cases collected on page 588 of 192 Mass.," page 760 of 78 N. E. (6 L. R. A. [N. S.] 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638 [1906]). See also New England Cement Gun Co. v. McGivern (1914) 218 Mass. 198, 105 N. E. 885, where De Courcy, J., remarks: "It was not lawful for them to strike to compel Monahan, with whom they had no trade dispute, to compel the general contractor to compel the owner to compel the plaintiff to give to the defendants the work they demanded. In other words, it was an unjustifiable interference with the plaintiff's business to injure others in order to compel them to coerce the plaintiff. Martin, Modern Law of Labor Unions, § 77, and cases cited. The acts of coercion and procuring breaches of contract mentioned in the sixth finding plainly are not justified by the law of this commonwealth. It is unnecessary to consider further the unlawfulness of such a secondary or compound boycott in view of the full discussion of the subject in the recent opinions of this court in Pickett v. Walsh (1906) 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638, and Burnham v. Dowd (1914) 217 Mass. 351, 104 N. E. 841, 51 L. R. A. (N. S.) 778, in which cases are collected the authorities in this and other jurisdictions."

they have a right to do together and in concert what each one of them lawfully may do by himself. But that is not always so. It is especially true in dealing with such questions as these that the mere force of numbers may create a difference not only of degree, but also of kind. No doubt the defendants' organization is a lawful one, and certainly some of the objects aimed at by the union thus formed are both legal and of high utility. But, as was pointed out by the Supreme Court of the United States in Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, "the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights and appealing to the preventive powers of a court of equity. When such appeal is made it is the duty of government to protect the one against the many as well as the many against the one." To the same effect is what was said by this court, through Mr. Justice Hammond, in Martell v. White, 185 Mass. 255, 260, 69 N. E. 1085, 1087, 64 L. R. A. 260, 102 Am. St. Rep. 341, quoting the words of Lord Justice Bowen in Mogul Steamship Co. v. McGregor, 23 Q. B. D. 598, 616: "Of the general proposition that certain kinds of conduct not criminal in any one individual may become criminal if done in combination among several, there can be no doubt." So in Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638, it was held among other things that "what is lawful if done by an individual may become unlawful if done by a combination of individuals." And see the cases collected on page 582 of 192 Mass., on page 757 of 78 N. E. (6 L. R. A. [N. S.] 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638), in that opinion. This principle is peculiarly applicable to cases like the one at bar. There is no such thing in our modern civilization as an independent man. No single individual could continue even to exist, much less to enjoy any of the comforts and satisfactions of life, without the society, sympathy and support of at least some of those among whom his lot is cast. Every individual has the right to enjoy these, and is bound not to interfere with the enjoyment of them by others. That right indeed is usually one of merely moral obligation, incapable of enforcement by the courts, but it is none the less an actual wrong for any body of men actively to cause the infringement of that right in definite particulars; and especially where such an infringement is made possible only by the concerted action of many in combination against one and results in direct injury to his business or property, the courts should interfere for the protection of that person.

In Worthington v. Waring, 157 Mass. 421, 32 N. E. 744, 20 L. R. A. 342, 34 Am. St. Rep. 294, where the court refused to enjoin the

defendants from putting the names of the plaintiffs upon a blacklist and thus making it impossible for them to obtain in that neighborhood employment in their trade, there was a misjoinder of plaintiffs. Apart from this technical difficulty, the decision was put upon the ground that while courts of equity may protect property from threatened injury when the property rights are equitable or when they cannot be protected adequately at law, yet equity has in general no jurisdiction to restrain the commission of crime or to assess damages for torts already committed, and the rights there alleged to have been violated were said to be merely personal rights and not rights of property. That case is not applicable here, for the rights now in question are distinctly property rights. Accordingly we need not consider whether the doctrine of that case can be reconciled with our later decisions, or whether it now would be followed if the same state of facts were again presented.

The question of damages remains to be dealt with. Upon that we find no error in the master's report. That the plaintiffs have sustained substantial damage is manifest; and the mere facts that it may be impossible to determine the total amount of their loss, and that it may be difficult to ascertain with absolute certainty the money value of even the damages that can be proved, is no reason for refusing to allow to the plaintiff what has been found to be capable of substantial proof. Fox v. Harding, 7 Cush. 516; Speirs v. Union Drop Forge Co., 180 Mass. 87, 61 N. E. 825; C. W. Hunt Co. v. Boston Elev. Ry., 199 Mass. 220, 235, 85 N. E. 446 et seq.; De Minico v. Craig, 207 Mass. 593, 600, 94 N. E. 317, 42 L. R. A. (N. S.) 1048. We find nothing inconsistent with this in Todd v. Keene, 167 Mass. 157, 45 N. E. 81; John Hetherington & Sons v. William Firth Co., 210 Mass. 8, 23, 95 N. E. 961, et seq., or the other cases relied on by the defendants. Doubtless merely speculative damages or any damages that have not been proved cannot be recovered; but this does not require absolute mathematical demonstration or prevent the drawing of reasonable inferences from the facts and circumstances in evidence.

The result is that the plaintiffs are entitled to a decree enjoining the defendants from keeping the names of the plaintiffs upon their unfair list, from threatening to strike or to leave the work of any owner, builder or contractor by reason of such persons having purchased masons' supplies from the plaintiffs or having dealt otherwise with the plaintiffs, and from ordering or inducing any strike against an owner, builder or contractor for such reason, and that the plaintiffs shall recover from the defendants the sum of $500 with interest from the date of the filing of the master's report, and their costs of suit, and have execution therefor.

So ordered.

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