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CASES ON TORTS

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INTRODUCTION.

THE ESSENCE OF A TORT.[1]

RICH v. N. Y. C. & H. R. R. Co.

(87 New York, 382.—1882.)

APPEAL from a judgment of the General Term of the Supreme Court, entered upon an order, which affirmed a judgment in favor of the defendant, entered upon an order nonsuiting the plaintiff.

The complaint alleged, among other things, that the plaintiff with others owned certain lands in the village of Yonkers and, in 1850, entered into an agreement with the Hudson River Railroad, whereby they agreed to convey to said company a site for a depot, and the company agreed to erect and ever after maintain its depot thereon; that the site was conveyed and the depot erected; that the defendant succeeded to the rights and franchises, etc., of said company, and the plaintiff acquired the titles of the other property owners; that subsequently the defendant was authorized by the legislature to bridge, without opening or draw, a certain navigable inlet, then crossed by their tracks by means of a bridge with opening or draw, on making compensation to the riparian owners; that thereafter it threatened to and did remove its depot to another site, because the riparian owners refused to surrender their rights without compensation; that prior to such removal, the plaintiff had erected certain buildings upon his premises adjoining the old site, and for that purpose had borrowed money

[1] While a tort has been variously and imperfectly defined, the following definition by Mr. Bigelow, (Torts, 6th ed., p. 10), is, within the decisions and general treatment of the subject by the courts, both convenient and practicable: "A tort may be said to be a breach of duty fixed by municipal law for which a suit for damages can be maintained."

For a proposed new definition of a tort, see article by Mr. F. H. Cooke in XII. Harvard Law Review, 335.

secured by mortgage on the aforesaid property; that in consequence of said removal his premises became wholly unproductive and unsalable; that, to have the depot restored to its original site, he entered into an agreement with the defendant on March 7, 1877, whereby he surrendered his riparian rights with reference to the aforesaid navigable inlet on condition of the defendant's agreeing to restore the depot to the original site and forever thereafter to maintain its principal passenger depot for Yonkers thereon; that thereafter the bridge was built without opening or draw, and the defendant also built its depot on the old site, but, because of plaintiff's refusal to consent to the closing of a certain street without compensation, the defendant willfully and maliciously violated its contract, delayed the restoration of the depot, and instigated the mortgagee to foreclose the aforesaid mortgage; and that his property was sold at great sacrifice and loss to the plaintiff.

Proof of the contract and its breach, of delay in restoring the depot and reasons therefor, was excluded, and the plaintiff was nonsuited because he had given no proof of a tort or a fraud.

FINCH, J. We have been unable to find any accurate and perfect definition of a tort. Between actions plainly *ex contractu* and those as clearly *ex delicto* there exists what has been termed a border-land, where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other, and become so nearly coincident as to make their practical separation somewhat difficult. (Moak's Underhill on Torts, 23.) The text writers either avoid a definition entirely (Addison on Torts), or frame one plainly imperfect (2 Bouvier's Law Dict. 600), or depend upon one which they concede to be inaccurate, but hold sufficient for judicial purposes. (Cooley on Torts, 3, note 1; Moak's Underhill, 4; 1 Hilliard on Torts, 1.) By these last authors a tort is described in general as "a wrong independent of contract." And yet, it is conceded that a tort may grow out of, or make part of, or be coincident with a contract (2 Bouvier [*supra*]), and that precisely the same state of facts, between the same parties, may admit of an action either *ex contractu* or *ex delicto*. (Cooley on Torts, 90.) In such cases the tort is dependent upon, while at the same time independent of the contract; for if the latter imposes a legal

duty upon a person, the neglect of that duty may constitute a tort founded upon a contract. (1 Addison on Torts, 13.)

Ordinarily, the essence of a tort consists in the violation of some duty due to an individual, which duty is a thing different from the mere contract obligation. When such duty grows out of relations of trust and confidence, as that of the agent to his principal or the lawyer to his client, the ground of the duty is apparent, and the tort is, in general, easily separable from the mere breach of contract. But where no such relation flows from the constituted contract, and still, a breach of its obligation is made the essential and principal means, in combination with other and perhaps innocent acts and conditions, of inflicting another and different injury, and accomplishing another and different purpose, the question whether such invasion of a right is actionable as a breach of contract only, or also as a tort, leads to a somewhat difficult search for a distinguishing test.

In the present case, the learned counsel for the respondent seems to free himself from the difficulty by practically denying the existence of any relation between the parties, except that constituted by the contract itself, and then, insisting that such relation was not of a character to originate any separate and distinct legal duty, argues that, therefore, the bare violation of the contract obligation created merely a breach of contract, and not a tort. He says that the several instruments put in evidence showed that there never had been any relation between the plaintiff and the railroad company, *except* that of parties contracting in reference to certain specific subjects, by plain and distinct agreements, for any breach of which the parties respectively would have a remedy, but none of which *created any such rights* as to lay the foundation for a charge of wilful misconduct or any other tortious act. Upon this theory the case was tried. Every offer to prove the contracts, and especially their breach, was resisted upon the ground that the complaint, through all its long history of plaintiff's grievances, alleged but a single cause of action, and that for a tort, and, therefore, something else, above and beyond and outside of a mere breach of contract, must be shown, and proof of such breach was immaterial. From every direction in which the plaintiff approached the allegations of his complaint, the same barrier obstructed his path and excluded his proof. Whatever may be true of the earlier agreements between the plaintiff

and the railroad company, and conceding, what seems probable, that the evidence relating to them was properly rejected, on the ground that they left the defendant entirely at liberty to change the site of its depot, so that such change was in no respect either unlawful or wrong; there was yet a later agreement by the terms of which the defendant was bound, as soon as practicable and within a reasonable time, to restore the depot to its old location. The complaint explains the importance of such restoration to the plaintiff. It alleges that valuable property of his, heavily mortgaged, had depreciated in value in consequence of the removal of the depot, and could only be restored to something like its old value, and saved from the sacrifice of a foreclosure in a time of depression, by the prompt return of the depot to its former site. The complaint further avers, that to secure this result, the plaintiff had surrendered valuable riparian rights to the defendant, but the latter, fully understanding the situation, maliciously and wilfully broke its agreement, and delayed a restoration of the depot for the express purpose of preventing plaintiff from being enabled to ward off a foreclosure of the mortgage, and itself instigated such foreclosure and caused the ultimate sacrifice. For the breach of this contract to restore the depot within a reasonable time, the plaintiff had a cause of action. But that was not the one with which he came into court. His complaint was for a single cause of action, and that for a tort; and what that alleged tort was, it is quite necessary to know, and in what respect, and how it differs from a mere breach of contract, in order to determine whether the rejected proofs were admissible or not.

That a good cause of action, sounding in tort, was stated in the complaint was not denied upon the trial. Neither by demurrer nor by motion was the sufficiency of the complaint in any manner assailed. The second ground upon which a nonsuit was asked practically confessed that there was a good cause of action but merely a failure to prove it. The ground stated was, "because the gist of this action is the malicious and unlawful acts of the defendant in pursuing a scheme or plan to injure the plaintiff by depriving him of his property, based upon an alleged malicious violation of certain alleged contracts; but the proof offered fails to make out any cause of action as set forth in the complaint." The opinion of the General Term

distinctly concedes the point, saying, that the facts alleged made out "a clear case of fraud." And on the present appeal the learned counsel for the respondent explicitly admits, in his brief, that it was competent for the plaintiff, under the issue of fact joined by the pleadings, to give evidence of any of the alleged wrongful acts charged in the complaint, as a basis for the claim of damages which he asserted. There was, therefore, something to try; something which was susceptible of proof; a tortious act or omission, or a series of such acts or omissions, properly alleged in the complaint and open to the plaintiff's evidence. Why he was not permitted to have a single one of the forty questions put to his witnesses answered becomes, now, the important inquiry. It will not be necessary to consider them all, for many were excluded for a defect in their form, or because totally immaterial, or in the exercise of the proper discretion as to the order of proof, but enough remain, and may be grouped together, to raise the serious question argued at the bar.

The plaintiff offered to show the agreement of March, 1877, between himself and the railroad company, for the restoration of the depot to its original site within a reasonable time, and the breach of that agreement by the defendant company. The objection, put upon the ground that the offered proof was irrelevant and incompetent, was sustained and the evidence excluded. The plaintiff then sought to show how long a time elapsed, after the execution of the contract, before the depot was re-established at the foot of Main street; whether an interval did occur, and how much time elapsed from the date of the contract to the building of the new depot, which evidence was also excluded as immaterial. A series of questions were further put, to show what the defendant did, if anything, in and about procuring plaintiff's mortgaged property to be sold and sacrificed under the mortgage; when the foreclosure took place; at whose instigation; and at what price, compared with its real value, the property was sold. These questions were excluded. The plaintiff also attempted to show that the re-establishment of the depot at the foot of Main street would have largely increased the value of his adjoining property covered by the mortgage. That evidence was rejected. The plaintiff was then asked if he had an interview with the officers of the defendant in reference to the removal and the re-establishment of the

depot. This question was objected to, and the only ground assigned was, "as it is in writing." No proof of that was given; the case shows nothing but the assertion of the party objecting, and thereupon the witness was not permitted to answer the inquiry, whether he had an interview, at all. He was then asked what reasons they assigned for removing the depot and refusing to bring it back, and this was excluded. And in the end the plaintiff was nonsuited because he had given no proof of a tort or a fraud. He now insists that he was first debarred from giving such proof, and then nonsuited because he had not given it.

The exclusion of proof of the contract for re-establishing the depot, and the wilful and intended breach of that contract, brings up for our consideration the question principally argued. Such exclusion must rest for its justification upon the theory of the defendant's counsel, already adverted to, which we are troubled to reconcile with his concession that a cause of action was alleged in the complaint. At the foundation of every tort must lie some violation of a legal duty, and, therefore, some unlawful act or omission. (Cooley on Torts, 60.) Whatever, or however numerous or formidable, may be the allegations of conspiracy, of malice, of oppression, of vindictive purpose, they are of no avail; they merely heap up epithets, unless the purpose intended, or the means by which it was to be accomplished, are shown to be unlawful. (*O'Callaghan* v. *Cronan*, 121 Mass. 114; *Mahan* v. *Brown*, 13 Wend. 261.) The one separate and distinct unlawful act or omission alleged in this complaint, or rather the only one so separable which we can see may have been unlawful, was the unreasonable delay in restoring the depot to its original location; and that was unlawful, not inherently or in itself, but solely by force of the contract with plaintiff. The instigation of the sale on foreclosure, as a separate fact, may have been unkind or even malicious, but cannot be said to have been unlawful. The mortgagee had a perfect right to sell, judicially established, and what it might lawfully do, it was not unlawful to ask it to do. The act of instigating the sale may be material and have force, as one link in a chain of events, and as serving to explain and characterize an unlawful purpose, pursued by unlawful means; but, in and of itself, it was not an unlawful act, and cannot serve as the foundation of a tort. (*Randall* v. *Hazelton*, 12 Allen, 412.) We are forced

back, therefore, to the contract for re-establishing the depot and its breach as the basis or foundation of the tort pleaded. If that will not serve the purpose in some manner, by some connection with other acts and conditions, then there was no cause of action for a tort stated in the complaint. We are thus obliged to study the doctrine advanced by the respondent, and measure its range and extent. It rests upon the idea that unless the contract creates a relation, out of which relation springs a duty, independent of the mere contract obligation, though there may be a breach of the contract, there is no tort, since there is no duty to be violated. And the illustration given is the common case of a contract of affreightment, where, beyond the contract obligation to transport and deliver safely, there is a duty, born of the relation established to do the same thing. In such a case, and in the kindred cases of principal and agent, of lawyer and client, of consignor and factor, the contract establishes a legal relation of trust and confidence; so that upon a breach of the contract there is not merely a broken promise, but, outside of and beyond that, there is trust betrayed and confidence abused; there is constructive fraud, or a negligence that operates as such, and it is that fraud and that negligence which, at bottom, makes the breach of contract actionable as a tort. (*Coggs* v. *Bernard*, 2 Lord Raym. 909; *Orange Bank* v. *Brown*, 3 Wend. 161, 162.)

So far we see no reason to disagree with the learned counsel for the respondent save in one respect, but that is a very important one. Ending the argument at this point leaves the problem of the case still unsolved. If a cause of action for a tort, as is admitted, was stated in the complaint, it helps us but little to learn what it was not, and that it does not fall within a certain class of exceptional cases, and cannot be explained by them. We have yet to understand what it is, if it exists at all, as a necessary preliminary to any just appreciation of the relevancy or materiality of the rejected evidence. The General Term, as we have remarked, described the tort pleaded as a "clear case of fraud." If that be true, it cannot depend upon a fiduciary or other character of the relation constituted by the contract merely, for no such relation existed; and there must be some other relation not created by the contract alone, from which sprang the duty which was violated. Let us analyze the tort alleged somewhat more closely.

At the date of the contract, the complaint shows the relative situation and needs of the two parties. The railroad company desired to close the draw over the Nepperhan river, and substitute a solid bridge. With the growth of its business, and the multitude of its trains the draw had become a very great evil, and a serious danger. The effort to dispense with it was in itself natural and entirely proper. On the other hand the plaintiff was both a riparian owner above the draw, and likely to be injured in that ownership by a permanent bridge, and had suffered, and was still suffering from a severe depreciation in the value of his property near Main street by the previous removal of the railroad station. The defendant was so far master of the situation, that it could and did shut up the plaintiff to a choice of evils. He might insist upon the draw, and leave his mortgaged property to be lost from depreciation, and save his riparian rights, or he might surrender the latter to save the former. This last was the alternative which he selected, and the contract of 1877 was the result. In the making of this contract there was no deceit or fraud, and no legal or actionable wrong on the part of the defendant. If it drove a hard bargain, and had the advantage in the negotiation, it at least invaded no legal right of the plaintiff, and he was free to contract or not as he pleased. The complaint does not allege that at the execution of this agreement there was any purpose or intention of not fulfilling its terms. The tort, if any, originated later. What remains then is this: The railroad company conceived the idea of closing Main street to any travel where it passed their tracks at grade; of substituting a bridge crossing in its stead; and of fencing in its track along the street beneath, so as to compel access to the cars through its depot in such manner that the purchase of tickets could be compelled. This in itself was a perfectly lawful purpose. The grade crossing was a death-trap, and the interest of the company and the safety of individuals alike made a change desirable, and the closing in of the depot was in no sense reprehensible. But there was a difficulty in the way. This plaintiff again stood as an obstacle in the path. The closing of Main street, though beneficial to the company, was to him and his adjoining property claimed to be a very serious injury. He declined to consent, except upon the condition of an award of heavy damages, and in dread of that peril the common council refused to pass the necessary ordinance. At this

point, according to the allegations of the complaint, if at all or ever, arose the tort. It is alleged that the defendant, in order to reach a lawful result, planned a fraudulent scheme for its accomplishment by unlawful means, and through an injury to the plaintiff, which would strip him of his damages by a complete sacrifice of his property. That plan was executed in this manner. The company wilfully and purposely refused to perform its contract. It had built its permanent bridge over the Nepperhan, and so received the full consideration of its promise; its new depot was substantially finished and ready for occupation; and no just reason remained why its contract should not be fulfilled. But the company refused. It did not merely neglect or delay; it openly and publicly refused. The purpose of that public refusal was apparent. It was to drive the plaintiff's mortgagee to a foreclosure; it was to shut out from plaintiff that appreciation of his property which would enable him to save it; it was to strip him of it, so as to extinguish the threatened damages, and thus procure the assent of the common council, and get Main street closed. This unlawful refusal to perform the contract, this deliberate announcement of the purpose not to restore the depot, was well calculated to influence the mortgagee toward a foreclosure. But the defendant's direct instigation was added. The foreclosure came; the mortgagee bid in the property at a sacrifice; swiftly followed a release of damages, an ordinance of the common council; the closing of Main street, and then the restoration of the depot.

We are thus able to see what the tort pleaded was. It was not a constructive fraud, drawn from the violation of a duty imposed by law out of some specific relation of trust and confidence, but an actual and affirmative fraud; an alleged scheme to accomplish a lawful purpose by unlawful means. There was here, on the theory of the complaint, something more than a mere breach of contract. That breach was not the tort; it was only one of the elements which constituted it. Beyond that and outside of that there was said to have existed a fraudulent scheme and device by means of that breach to procure the foreclosure of the mortgage at a particular time and under such circumstances as would make that foreclosure ruinous to the plaintiff's rights, and remove him as an obstacle by causing him to lose his property, and thereby his means of resistance to the purpose ultimately sought. In other words, the necessary

theory of the complaint is that a breach of contract may be so intended and planned; so purposely fitted to time, and circumstances and conditions; so inwoven into a scheme of oppression and fraud; so made to set in motion innocent causes which otherwise would not operate, as to cease to be a mere breach of contract, and become, in its association with the attendant circumstances, a tortious and wrongful act or omission.

It may be granted that an omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty. But such legal duty may arise, not merely out of certain relations of trust and confidence, inherent in the nature of the contract itself, as in the cases referred to in the respondent's argument, but may spring from extraneous circumstances, not constituting elements of the contract as such, although connected with and dependent upon it, and born of that wider range of legal duty which is due from every man to his fellow, to respect his rights of property and person, and refrain from invading them by force or fraud. It has been well said that the liability to make reparation for an injury rests not upon the consideration of any reciprocal obligation, but upon an original moral duty enjoined upon every person so to conduct himself, or exercise his own rights as not to injure another. (*Kerwhacker* v. *C. C. & C. R. R. Co.*, 3 Ohio St. 188.) Whatever its origin, such legal duty is uniformly recognized, and has been constantly applied as the foundation of actions for wrongs; and it rests upon and grows out of the relations which men bear to each other in the framework of organized society. It is then doubtless true, that a mere contract obligation may establish no relation out of which a separate or specific legal duty arises, and yet extraneous circumstances and conditions, in connection with it, may establish such a relation as to make its performance a legal duty, and its omission a wrong to be redressed. The duty and the tort grow out of the entire range of facts of which the breach of the contract was but one. The whole doctrine is accurately and concisely stated in 1 Chit. Pl. 135, that "if a common-law duty result from the facts, the party may be sued in tort for any negligence or misfeasance in the execution of the contract." It is no difficulty that the mortgagee's agreement to give time, and postpone the sale for plaintiff's benefit was invalid, and a mere act of grace which could not have been compelled. If it is made plain that the mort-

gagee would have waited but for the fraudulent scheme and conduct of the defendant, that is enough. (*Benton* v. *Pratt*, 2 Wend. 385; *Rice* v. *Manley*, 66 N. Y. 83.) Nor is it a difficulty that the injury suffered was the result of a series of acts some of which were lawful and innocent. (Cooley on Torts, 70; *Bebinger* v. *Sweet*, 1 Abb. N. C. 263.)

Assuming now that we correctly understand what the tort pleaded was, and which was conceded to constitute a cause of action, it seems to us quite clear that the plaintiff was improperly barred from proving it. From the very nature of the case a fraud can seldom be proved directly, and almost uniformly is an inference from the character of the whole transaction, and the surrounding and attendant circumstances. Proof of the contract and its breach, of the delay in restoring the depot and the reasons therefor were essential links in the chain. If the proof should go no further, a nonsuit would be proper, but without these elements the tort alleged could not be established at all. And so the situation of the parties as it respected their several properties, the existence of the mortgage, the agreement to postpone the sale were elements of the transaction proper to be shown. The plaintiff's interview with the officers of the defendant company, and their statement of the reasons for refusing to restore the depot were improperly excluded. While we cannot know what it was which actually occurred, it is very plain that their statement of reasons would bear materially upon the issues involved.

We are not concerned with the question of the wisdom of the plaintiff's choice of his form of action, or of what may result if the cause of action pleaded as a tort shall be hereafter assailed, instead of its sufficiency being conceded. It may well be that he has chosen the one most difficult to maintain, and that an action upon one or more of the contracts would be less surrounded by difficulties. But we have nothing to do with his choice. He is entitled to prove his cause of action if he can.

The judgment should be reversed, and a new trial granted, costs to abide the event.

All concur, except RAPALLO and MILLER, JJ., not voting.

Judgment reversed.[1]

[1] At the second trial of this action the plaintiff, notwithstanding latitude shown in the admission of evidence, failed to prove the defendant guilty of

TORT AND CONTRACT DISTINGUISHED.

MASTERS v. STRATTON.

(7 Hill, 101.—1845.)

IN April, 1842, the parties entered into a covenant, by which the defendant, in consideration of $350 to be paid him, agreed, among other things, to take the charge, management and superintendence of a certain farm belonging to the plaintiff, for one year, "and to take charge and care of the stock, etc., on said farm." The defendant immediately entered upon the farm, and continued to work there until November 16, 1842, when he gave up the management of it to the plaintiff, and went away. The stock on the farm during this time consisted in part of a flock of sheep, and the present action was brought for the defendant's neglect to take proper care of them. The alleged neglect was fully proved, but the circuit judge ordered a nonsuit on the ground that the plaintiff's remedy was by action of covenant, and that trespass on the case could not be maintained. The plaintiff now moved for a new trial on a case.

By the Court, NELSON, CH. J. In *Govett* v. *Radnidge*, (3 East, 62,) it was held by the K. B. that an action of tort might be maintained against the defendants for the negligent performance of a duty arising out of contract. They had been employed to load a hogshead of molasses; and so carelessly conducted in loading the same that it fell and was lost to the plaintiff. This was decided in 1802.

But in *Powell* v. *Layton*, (2 New R. 365,) the C. B. held that tort could not be maintained for negligence in the performance of a duty arising out of a contract to transport goods; it not appearing that the defendant was a common carrier. The action was for so negligently carrying the goods that they became wholly lost. The court denied the correctness of the decision in *Govett* v. *Radnidge*, and said the case before them was not

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the acts charged against it in the complaint, or to connect it with the mortgagee in the matter of foreclosure proceedings. The complaint was again dismissed for failure of proof, and judgment entered thereon was affirmed by the General Term of the Supreme Court (89 Hun, 604), and also by the Court of Appeals (154 N. Y. 733).

distinguishable from any other action founded upon contract. This was decided in 1806. The same thing was held in *Max* v. *Roberts*, (2 New Rep. 454; 12 East, 89, S. C.).

It is remarkable that this conflict between the two courts on the point remains open and apparently unsettled down to the present time; though in point of fact the doctrine of the case of *Powell* v. *Layton* seems finally to have prevailed. (See *Pozzi* v. *Shipton*, 8 Adol. & Ellis, 963, A. D. 1838.)

In *Brotherton* v. *Wood*, (3 Brod. & Bing. 54,) the action was case for so negligently carrying the plaintiff in a stage coach that he was thrown out and injured. The objection taken was that the action rested altogether in contract; it not having been averred that the defendants were common carriers, though it appeared on the trial they were. The court said: "If it were true that the action is founded on a contract, so that, to support it, a contract between the parties to it must have been proved, the objection would deserve consideration. But we are of opinion that this action is not so founded, and that, on the trial, it could not have been necessary to show that there was any contract, and therefore that objection fails. This action is on the case against a common carrier, upon whom a duty is imposed by the custom of the realm, or, in other words, by the common law, to carry and convey their goods or passengers safely and securely, so that by their negligence or default, no injury or damage happen. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it."

The same doctrine was laid down in *Leslie* v. *Wilson*, (3 Brod. & Bing. 171). That was an action on the case for negligently shipping goods; and the court said: "The owners of a ship, for whose benefit she is navigated, are bound by the maritime law to owners of goods, shipped and received on board to be carried, for the safe carriage thereof, and are liable for any negligence on the part of themselves or their servants whereby the goods may be damaged. If without fraud, and in the due course of the ship's employment, the master makes a charter-party, the ship-owners are not thereby divested of liability, but are still liable for the performance of such duties, belonging to them in that character, as are not inconsistent with the stipulations of the charter-party." The court added, that the action

was not founded upon the charter-party, but upon the general liability of the defendants for the performance of such duties as belonged to them as carriers.

In *Weall* v. *King*, (12 East, 452,) an action of tort was brought upon a warranty in the sale of sheep. Heath, J., who tried the cause, ordered a nonsuit, saying, that if the reasoning of the counsel for the plaintiff were to prevail, every breach of promise might be converted into a tort: and the ruling was upheld in the K. B.

The general result of all the decisions is well stated in a note to *Cabell* v. *Vaughan*, (1 Wm. Saund. 291, 5th ed.,) and is in substance this: Where the action is maintainable for the tort simply, without reference to any contract made between the parties, no objection can be raised on the ground that the plaintiff should have declared upon the contract; as, for instance, in actions against common carriers founded on the custom of the realm, and the like. But where the action is not maintainable without referring to a contract between the parties, and laying a previous ground for it by showing such contract, there the plaintiff must proceed upon the contract, and a special action on the case will not lie.

Testing the case under consideration by this rule, it appears to me the decision of the learned judge at the circuit was correct. Here was no common law liability independently of what arose out of the contract; and of course no duty founded upon the common law alone. The obligation of the defendant rested entirely upon contract. He was hired as a laborer by the plaintiff, to take charge of her farm upon certain terms and conditions specified in the written instrument; and, for aught I can see, if she can leave the contract, and maintain an action of tort for negligence in the performance of it, there is no case of hire for service in which the same thing may not be done.

I am of opinion that a new trial should be denied.

Ordered accordingly.

TORT AND CRIME DISTINGUISHED.

Chapman v. The State.[1]

(78 Alabama, 463. — 1885.)

Somerville, J. The defendant was indicted for an assault and battery upon the person of one McLeod, and was convicted of a mere assault.

It may be that, if the indictment had been for robbery, the facts in evidence would have sustained the allegation of an assault, which, in cases of that nature, is often merely constructive; for every attempt at robbery, or to commit rape, or to do other like personal injury, involves within it the idea of an assault, either actual or constructive.

The present conviction, however, can be sustained only on the theory, that it was an assault for the defendant to present

[1] Criticising this case on its criminal side, Mr. Bishop (II. New Crim. Law, 8th ed., § 32) says: "Any definition involving the idea that there is no assault without 'the present means of carrying the intent into effect' — that is, committing the battery — is absolutely foreign to our common law. It would make it not an assault for one to pull the trigger of a loaded and pointed gun where the cap proved defective, or where a stronger man pushed the gun aside before the charge was ignited, or where an officer seized his arm just in time to save the life of the intended victim, or where he fell in a fit an instant too soon; in no one of which supposed cases would any lawyer doubt that there was an assault. Of course, to constitute any crime, there must be a sufficient act and a sufficient evil intent, and authority has settled it that words alone are not adequate in act. And authority has equally settled it that a force which has traveled so far toward a battery as to be worthy of the law's recognition, which is the common case of assault short of a battery, does not cease to be indictable though the wrongdoer finds himself incapable, as ordinarily in such cases he does, of accomplishing what he meant; in other words, where he has not 'the present means of carrying the intent into effect.'"

Criminal liability, in such a case, has been well stated by Wells, J., in *Commonwealth* v. *White*, 110 Mass. 407, 409: "It is not the secret intent of the assaulting party, nor the undisclosed fact of his ability or inability to commit a battery, that is material; but what his conduct and the attending circumstances denote at the time to the party assaulted. If to him they indicate an attack, he is justified in resorting to defensive action. The same rule applies to the proof necessary to sustain a criminal complaint for an assault. It is the outward demonstration that constitutes the mischief which is punished as a breach of the peace."

or aim an unloaded gun at the person charged to be assaulted, in such a menacing manner as to terrify him, and within such distance as to have been dangerous had the weapon been loaded and discharged. On this question, the adjudged cases, both in this country, and in England, are not agreed, and a like difference of opinion prevails among the most learned commentators on the law. We have had occasion to examine these authorities with some care, on more occasions than the present; and we are of the opinion that the better view is, that presenting an unloaded gun at one who supposes it to be loaded, although within the distance the gun would carry if loaded, is not, without more, such an assault as can be punished criminally, although it may sustain a civil suit for damages. The conflict of authorities on the subject is greatly attributable to a failure to observe the distinction between these two classes of cases. A civil action would rest upon the invasion of a person's "right to live in society without being put in fear of personal harm," and can often be sustained by proof of a negligent act resulting in unintentional injury. *Peterson* v. *Haffner*, 26 Amer. Rep. 81; Cooley on Torts, 161. An indictment for the same act could be sustained only upon satisfactory proof of criminal intention to do personal harm to another by violence. *State* v. *Davis*, 1 Ired. Law, 125; S. C. 35 Amer. Dec. 735. The approved definition of an assault involves the idea of an inchoate violence to the person of another, with the present means of carrying the intent into effect. 2 Greenl. Ev. § 82; Rosc. Cr. Ev. (7th ed.) 296; *People* v. *Lilley*, 43 Mich. 521. Most of our decisions recognize the old view of the text-books, that there can be no criminal assault without a present intention, as well as present ability, of using some violence against the person of another. 1 Russ. Cr. (9th ed.) 1019; *State* v. *Blackwell*, 9 Ala. 79; *Johnson* v. *State*, 43 Ala. 354. In *Lawson* v. *State*, 30 Ala. 14, it was said that, "to constitute an assault, there must be the commencement of an act, which, if not prevented, would produce a battery." The case of *Balkum* v. *State*, 40 Ala. 671, which was decided by a divided court, probably does not harmonize with the foregoing decisions.

It is true that some of the modern text-writers define an assault as an *apparent* attempt by violence to do corporal hurt to another, thus ignoring entirely all question of any criminal intent on the part of the perpetrator. 1 Whart. Cr. Ev. § 603;

2 Bish. Cr. Law, § 32. The true test cannot be the mere tendency of an act to produce a breach of the peace: for opprobrious language has this tendency, and no words, however violent or abusive, can, at common law, constitute an assault. It is unquestionably true, that an apparent attempt to do corporal injury to another may often justify the latter in promptly resorting to measures of self-defense. But this is not because such apparent attempt is itself a breach of the peace, for it may be an act entirely innocent. It is rather because the person who supposes himself to be assaulted, has a right to act upon appearances, where they create reasonable grounds from which to apprehend imminent peril. There can be no difference, in reason, between presenting an unloaded gun at an antagonist in an affray and presenting a walking cane, as if to shoot, provided he honestly believes, and from the circumstances has reasonable ground to believe, that the cane was a loaded gun. Each act is a mere menace, the one equally with the other; and mere menaces, whether by words or acts, without intent or ability to injure, are not punishable crimes, although they may often constitute sufficient ground for a civil action for damages. The test, moreover, in criminal cases, cannot be the mere fact of unlawfully putting one in fear, or creating alarm in the mind; for one may obviously be assaulted, although in complete ignorance of the fact, and, therefore, entirely free from alarm. (*People* v. *Lilley*, 43 Mich. 525; S. C. 1 Crim. Law Mag. 605.) And one may be put in fear under pretense of begging, as in *Taplin's case*, occurring during the riots in London, decided in 1780, and reported in 2 East, P. C. 712, and cited in many of the other old authorities. These views are sustained by the spirit of our own adjudged cases, cited above, as well as by the following authorities, which are directly in point: 2 Greenl. Cr. Law Rep. and *note* on pp. 271–275, where all the cases are fully reviewed; 2 Addison on Torts (Wood's ed. 1881), § 788, *note*, pp. 4–7; Roscoe's Crim. Ev. (7th ed.) 296; 1 Russell Cr. (9th ed.) 1020; *Blake* v. *Barnard*, 9 C. & P. 626; *Reg.* v. *James*, 1 C. & P. 530; *Robinson* v. *State*, 31 Tex. 170; *McKay* v. *State*, 44 Tex. 43; *State* v. *Davis*, 35 Amer. Dec. 735.

The opposite view is sustained by the following authors and adjudged cases: 7 Bish. Cr. Law (7th ed.) § 32; 1 Whart. Cr. Law (9th ed.) §§ 603, 182; *Reg.* v. *St. George*, 9 C. & P. 483; *Com.* v. *White*, 110 Mass. 407; *State* v. *Shepard*, 10 Iowa, 126;

State v. *Smith*, 2 Hump. 457. See, also, 3 Greenl. Ev. (14th ed.) § 59, *note b*; 1 Arch. Cr. Pr. & Pl. (Pomeroy's ed.) 907, 282–283; *State* v. *Benedict*, 11 Vt. 238; *State* v. *Neely*, 74 N. C. 425; S. C. 21 Amer. Rep. 496.

The rulings of the court were opposed to these views; and the judgment must therefore be reversed and the cause remanded.

CIVIL AND CRIMINAL PROSECUTIONS NOT MERGED.[1]

BOSTON & WORCESTER R. R. CO. v. DANA.

(1 Gray, 83. — 1854.)

ASSUMPSIT for money had and received.

BIGELOW, J. The main objection, raised by the defendant in the present case, which, if well maintained, is fatal to the plaintiffs' action, presents an interesting and important question, hitherto undetermined by any authoritative judgment in the courts of this commonwealth.

The plaintiffs seek to recover in an action of assumpsit a large sum of money alleged by them to have been fraudulently abstracted from their ticket office by the defendant, while he was in their employment as depot-master, having charge of their principal railway station in Boston. In regard to this item of the plaintiffs' claim, the defendant contended at the trial, and requested the judge who presided to instruct the jury, that the plaintiffs were not entitled to recover in this action the money thus taken by the defendant, because their cause of action, if any they had, was suspended, until an indictment had been found or complaint made against the defendant for larceny. This request was refused, and the jury were instructed, that if the defendant had fraudulently taken and appropriated the plaintiffs' money in the manner alleged, and was thereby guilty

[1] As early as 1801, the legislature of the State of New York enacted (Sess. Laws, 1801, Greenleaf's ed., chap. 60, § 19, p. 264) that civil remedies should not be merged in the felony. To the same effect is § 1899 of the N. Y. Code Civ. Pro.

of larceny, he would be liable in the present action, although no criminal prosecution had first been instituted therefor. It is upon the correctness of this instruction that the first and main question in the case arises.

The doctrine, that all civil remedies in favor of a party injured by a felony are, as it is said in the earlier authorities, merged in the higher offense against society and public justice, or, according to more recent cases, suspended until after the termination of a criminal prosecution against the offender, is the well settled rule of law in England at this day, and seems to have had its origin there at a period long anterior to the settlement of this country by our English ancestors. *Markham* v. *Cob*, Latch, 144, and Noy, 82; *Dawkes* v. *Coveneigh*, Style, 346; *Cooper* v. *Witham*, 1 Sid. 375, and 1 Lev. 247; *Crosby* v. *Leng*, 12 East, 413; *White* v. *Spettigue*, 13 M. & W. 603; 1 Chit. Crim. Law, 5.

But although thus recognized and established as a rule of law in the parent country, it does not appear to have been, in the language of our constitution, "adopted, used and approved in the province, colony or state of Massachusetts Bay, and usually practised on in the courts of law." The only recorded trace of its recognition in this commonwealth is found in a note to the case of *Higgins* v. *Butcher*, Yelv. (Amer. ed.) 90 a, note 2, by which it appears to have been adopted in a case at *nisi prius* by the late Chief Justice Sewall. The opinion of that learned judge, thus expressed, would certainly be entitled to very great weight, if it were not for the opinion of this court in *Boardman* v. *Gore*, 15 Mass. 338, in which it is strongly intimated, though not distinctly decided, that the rule had never been recognized in this state, and had no solid foundation, under our laws, in wisdom or sound policy. Under these circumstances, we feel at liberty to regard its adoption or rejection as an open question, to be determined, not so much by authority, as by a consideration of the origin of the rule, the reasons on which it is founded, and its adaptation to our system of jurisprudence.

The source, whence the doctrine took its rise in England, is well known. By the ancient common law, felony was punished by the death of the criminal, and the forfeiture of all his lands and goods to the crown. Inasmuch as an action at law against a person, whose body could not be taken in execution and whose property and effects belonged to the king, would be a useless

and fruitless remedy, it was held to be merged in the public offense. Besides; no such remedy in favor of the citizen could be allowed without a direct interference with the royal prerogative. Therefore a party injured by a felony could originally obtain no recompense out of the estate of a felon, nor even the restitution of his own property, except after a conviction of the offender, by a proceeding called an appeal of felony, which was long disused, and wholly abolished by St. 59, Geo. 3, c. 46; or under St. 21 H. 8, c. 11, by which the judges were empowered to grant writs of restitution, if the felon was convicted on the evidence of the party injured or of others by his procurement. 2 Car. & P. 43, *note.* But these incidents of felony, if they ever existed in this state, were discontinued at a very early period in our colonial history. Forfeiture of lands or goods, on conviction of crime, was rarely, if ever, exacted here; and in many cases, deemed in England to be felonies and punishable with death, a much milder penalty was inflicted by our laws. Consequently the remedies, to which a party injured was entitled in cases of felony, were never introduced into our jurisprudence. No one has ever heard of an appeal of felony, or a writ of restitution under St. 21, H. 8, c. 11, in our courts. So far therefore as we know the origin of the rule and the reasons on which it was founded, it would seem very clear that it was never adopted here as part of our common law.

Without regard however to the causes which originated the doctrine, it has been urged with great force and by high authority, that the rule now rests on public policy; 12 East, 413, 414; that the interests of society require, in order to secure the effectual prosecutions of offenders by persons injured, that they should not be permitted to redress their private wrongs, until public justice has been first satisfied by the conviction of felons; that in this way a strong incentive is furnished to the individual to discharge a public duty, by bringing his private interest in aid of its performance, which would be wholly lost, if he were allowed to pursue his remedy before the prosecution and termination of a criminal proceeding. This argument is doubtless entitled to great weight in England, where the mode of prosecuting criminal offenses is very different from that adopted with us. It is there the especial duty of every one, against whose person or property a crime has been committed, to trace out the offender, and prosecute him to conviction. In the dis-

charge of this duty, he is often compelled to employ counsel; procure an indictment to be drawn and laid before the grand jury, with the evidence in its support; and if a bill is found, to see that the case on the part of the prosecution is properly conducted before the jury of trials. All this is to be done by the prosecutor at his own cost, unless the court, after the trial, shall deem reimbursement reasonable. 1 Chit. Crim. Law, 9, 825. The whole system of the administration of criminal justice in England is thus made to depend very much upon the vigilance and efforts of private individuals. There is no public officer, appointed by law in each county, as in this commonwealth, to act in behalf of the government in such cases, and take charge of the prosecution, trial and conviction of offenders against the laws. It is quite obvious that, to render such a system efficacious, it is essential to use means to secure the aid and coöperation of those injured by the commission of crimes, which are not requisite with us. It is to this cause, that the rule in question, as well as many other legal enactments, designed to enforce upon individuals the duty of prosecuting offenses, owes its existence in England. But it is hardly possible, under our laws, that any grave offense of the class designated as felonies can escape detection and punishment. The officers of the law, whose province it is to prosecute criminals, require no assistance from persons injured, other than that which a sense of duty, unaided by private interest, would naturally prompt.

On the other hand, in the absence of any reasons, founded on public policy, requiring the recognition of the rule, the expediency of its adoption may well be doubted. If a party is compelled to await the determination of a criminal prosecution before he is permitted to seek his private redress, he certainly has a strong motive to stifle the prosecution and compound with the felon. Nor can it contribute to the purity of the administration of justice, or tend to promote private morality, to suffer a party to set up and maintain in a court of law a defense founded solely upon his own criminal act. The right of every citizen, under our constitution, to obtain justice promptly and without delay, requires that no one should be delayed in obtaining a remedy for a private injury, except in a case of the plainest public necessity. There being no such necessity calling for the adoption of the rule under consideration, we are of opinion that it ought not to be engrafted into our jurisprudence.

We are strengthened in this conclusion by the weight of American authority, and by the fact that in some of the states, where the rule had been established by decisions of the courts, it has been abrogated by legislative enactments. *Pettingill* v. *Rideout*, 6 N. H. 454; *Cross* v. *Guthery*, 2 Root, 90; *Piscataqua Bank* v. *Turnley*, 1 Miles, 312; *Foster* v. *Commonwealth*, 8 W. & S. 77; *Patton* v. *Freeman*, Coxe, 113; *Hepburn's case*, 3 Bland, 114; *Allison* v. *Farmers' Bank of Virginia*, 6 Rand. 223; *White* v. *Fort*, 3 Hawks, 251; *Robinson* v. *Culp*, 1 Const. Rep. 231; *Story* v. *Hammond*, 4 Ohio, 376; *Ballew* v. *Alexander*, 6 Humph. 433; *Blassingame* v. *Glaves*, 6 B. Monr. 38; Rev. Sts. of N. Y. Part 3, c. 4, § 2; St. of Maine of 1844, c. 102.

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Judgment on the verdict.

PRINCIPLES OF LIABILITY.

INJURIA SINE (ABSQUE) DAMNO.

Webb v. Portland Manufacturing Co.

(3 Sumner, 189.—1838.)

Bill in equity for an injunction to prevent the defendant from diverting a watercourse from the plaintiff's mill.

At the Saccarappi Falls, on the Presumpscut river, were two successive falls, upon which were erected, about 40 or 50 rods apart, two milldams, called the upper and the lower dams, in the latter of which the plaintiff and the defendant were entitled to certain mill privileges, in severalty. In order to supply water to its factory near the left bank of the river, the defendant opened a canal into the pond just below the upper dam, and returned the water thus withdrawn into the river below the lower dam, insisting upon its right so to divert because it was a small part only, (about one-fourth), of the water, to which it was entitled as mill owner on the lower dam.

Story, J. The question, which has been argued upon the suggestion of the court, is of vital importance in the cause; and, if decided in favor of the plaintiff, it supersedes many of the inquiries, to which our attention must otherwise be directed. It is on this account, that we thought it proper to be argued, separately from the general merits of the cause.

The argument for the defendants then presents two distinct questions. The first is, whether, to maintain the present suit, it is essential for the plaintiff to establish any actual damage. The second is, whether, in point of law, a mill-owner, having a right to a certain portion of the water of a stream for the use of his mill at a particular dam, has a right to draw off the same portion, or any less quantity of the water, at a considerable distance above the dam, without the consent of the owners of other mills on the same dam. In connection with these questions the point will also incidentally arise, whether it makes

any difference, that such drawing off of the water above, can be shown to be no sensible injury to the other mill-owners on the lower dam.

As to the first question, I can very well understand that no action lies in a case where there is *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 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.

So long ago as the great case of *Ashby* v. *White*, 2 Ld. Raym. 938, 6 Mod. 45, Holt, 524, the objection was put forth by some of the judges, and was answered by Lord Holt, with his usual ability and clear learning; and his judgment was supported by the house of lords, and that of his brethren overturned. By

the favor of an eminent judge, Lord Holt's opinion, apparently copied from his own manuscript, has been recently printed. In this last printed opinion, (page 14), Lord Holt says: "It is impossible to imagine any such thing, as *injuria sine damno*. Every injury imports damage in the nature of it." S. P. 2 Ld. Raym. 955. And he cites many cases in support of his position. Among these is *Starling* v. *Turner*, 2 Lev. 50, 2 Vent. 25, where the plaintiff was a candidate for the office of bridgemaster of London bridge, and the lord mayor refused his demand of a poll; and it was determined, that the action was maintainable for the refusal of the poll. Although it might have been, that the plaintiff would not have been elected, the action was nevertheless maintainable; for the refusal was a violation of the plaintiff's right to be a candidate. So in the case cited, as from "23 Edw. III. 18, tit. Defense," (it is a mistake in the MS., and should be 29 Edw. III. 18*b*; Fitz. Abr. tit. "Defense," pl. 5), and 11 Hen. IV. 47, where the owner of a market, entitled to toll upon all cattle sold within the market, brought an action against the defendant, for hindering a person from going to the market with the intent to sell a horse, it was, on the like ground, held maintainable; for though the horse might not have been sold, and no toll would have become due; yet the hindering the plaintiff from the possibility of having toll was such an injury as did import such damage, for which the plaintiff ought to recover. So in *Hunt* v. *Dowman*, Cro. Jac. 478, 2 Rolle, 21, where the lessor brought an action against the lessee, for disturbing him from entering into the house leased, in order to view it, and to see whether any waste was committed; and it was held, that the action well lay, though no waste was committed and no actual damage done; for the lessor had a right so to enter, and the hindering of him was an injury to that right, for which he might maintain an action. So *Herring* v. *Finch*, 2 Lev. 250, where it was held, that a person entitled to vote, who was refused his vote at an election, might well maintain an action therefor, although the candidate for whom he might have voted might not have been chosen; and the voter could not sustain any perceptible or actual damage by such refusal of his vote. The law gives the remedy in such case; for there is a clear violation of the right. And this doctrine, as to a violation of the right to vote, is now incontrovertibly established; and yet it would be impracticable to show any temporal or actual damage thereby.

See *Harman* v. *Tappenden*, 1 East, 555; *Drewe* v. *Coulton*, id. 563, note; *Kilham* v. *Ward*, 2 Mass. 236; *Lincoln* v. *Hapgood*, 11 Mass. 350; 2 Vin. Abr. "Actions," [Case] n. *c*. pl. 3. In the case of *Ashby* v. *White*, as reported by Lord Raymond (2 Ld. Raym. 953), Lord Holt said: "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy, if he is injured in the exercise or enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal." S. P. 6 Mod. 53. The principles laid down by Lord Holt are so strongly commended, not only by authority, but by the common sense and common justice of mankind, that they seem absolutely, in a juridical view, incontrovertible. And they have been fully recognized in many other cases. The note of Mr. Sergeant Williams to *Mellor* v. *Spateman*, 1 Saund. 346*a*, note 2; *Wells* v. *Watling*, 2 W. Bl. 1239; and the case of the Tunbridge Dippers, *Weller* v. *Baker*, 2 Wils. 414, are direct to the purpose. I am aware that some of the old cases inculcate a different doctrine, and perhaps are not reconcilable with that of Lord Holt. There are also some modern cases, which at first view seem to the contrary. But they are distinguishable from that now in judgment, and, if they were not, *ego assentior scævolæ*. The case of *Williams* v. *Morland*, 2 Barn. & C. 910, seems to have proceeded upon the ground, that there was neither any damage nor any injury to the right of the plaintiff. Whether that case can be supported upon principle, it is not now necessary to say. Some of the *dicta* in it have been subsequently impugned; and the general reasoning of the judges seems to admit, that if any right of the plaintiff had been violated, the action would have lain. The case of *Jackson* v. *Pesked*, 1 Maule & S. 235, turned upon the supposed defects of the declaration, as applicable to a mere reversionary interest, it not stating any act done to the prejudice of that reversionary interest. I do not stop to inquire, whether there was not an overnicety in the application of the technical principles of pleading to that case; although, notwithstanding the elaborate opinion of Lord Ellenborough, one might be inclined to pause upon it. The case of *Young* v. *Spencer*, 10 Barn. & C. 145, turned also upon the point, whether any injury was done to a reversionary interest. I confess myself better pleased with the ruling of the learned judge (Mr. Justice Bayley), at the trial, than with the

decision of the court in granting a new trial. But the court admitted, that, if there was any injury to the reversionary right, the action would lie; and although there might be no actual damage proved, yet if anything done by the tenant would destroy the evidence of title, the action was maintainable. *A fortiori*, the action must have been held maintainable, if the act done went to destroy the existing right, or to found an adverse right.

On the other hand, *Marzetti* v. *Williams*, 1 Barn. & Adol. 415, goes the whole length of Lord Holt's doctrine; for there the plaintiff recovered, notwithstanding no actual damage was proved at the trial; and Mr. Justice Taunton on that occasion cited many authorities to show, that, where a wrong is done, by which the right of the party may be injured, it is a good cause of action, although no actual damage be sustained. In *Hobson* v. *Todd*, 4 Term R. 71, 73, the court decided the case upon the very distinction which is most material to the present case, that if a commoner might not maintain an action for an injury, however small, to his right, a mere wrong-doer might, by repeated torts, in the course of time establish evidence of a right of common. The same principle was afterwards recognized by Mr. Justice Gross, in *Pindar* v. *Wadsworth*, 2 East, 162. But the case of *Bower* v. *Hill*, 1 Bing. N. C. 549, fully sustains the doctrine for which I contend; and, indeed, a stronger case of its application cannot well be imagined. There the court held, that a permanent obstruction to a navigable drain of the plaintiff's, though choked up with mud for sixteen years, was actionable, although the plaintiff received no immediate damage thereby; for, if acquiesced in for twenty years, it would become evidence of a renunciation and abandonment of the right of way. The case of *Blanchard* v. *Baker*, 8 Greenl. 253, 268, recognizes the same doctrine in the most full and satisfactory manner, and is directly in point; for it was a case for diverting water from the plaintiff's mill. I should be sorry to have it supposed, for a moment, that *Tyler* v. *Wilkinson*, 4 Mason, 397, imported a different doctrine. On the contrary, I have always considered it as proceeding upon the same doctrine.

Upon the whole, without going farther into an examination of the authorities on this subject, my judgment is, that, whenever there is a clear violation of a right, it is not necessary in

an action of this sort to show actual damage; that every violation imports damage; and if no other be proved, the plaintiff is entitled to a verdict for nominal damages. And, *a fortiori*, that this doctrine applies, whenever the act done is of such a nature, as that by its repetition or continuance it may become the foundation or evidence of an adverse right. See, also, *Mason* v. *Hill*, 3 Barn. & Adol. 304, 5 Barn. & Adol. 1.

But if the doctrine were otherwise, and no action were maintainable at law, without proof of actual damage; that would furnish no ground why a court of equity should not interfere, and protect such a right from violation and invasion; for, in a great variety of cases, the very ground of the interposition of a court of equity is, that the injury done is irremediable at law; and that the right can only be permanently preserved or perpetuated by the powers of a court of equity. And one of the most ordinary processes, to accomplish this end is by a writ of injunction, the nature and efficacy of which for such purpose, I need not state, as the elementary treatises fully expound them. See Eden, Inj.; 2 Story, Eq. Jur. c. 23, §§ 86–959; *Bolivar Manuf'g Co.* v. *Neponset Manuf'g Co.*, 16 Pick. 241. If, then, the diversion of water complained of in the present case is a violation of the right of the plaintiff, and may permanently injure that right, and become, by lapse of time, the foundation of an adverse right in the defendant, I know of no more fit case for the interposition of a court of equity, by way of injunction, to restrain the defendant from such an injurious act. If there be a remedy for the plaintiff at law for damages, still that remedy is inadequate to prevent and redress the mischief. If there be no such remedy at law, then, *a fortiori*, a court of equity ought to give its aid to vindicate and perpetuate the right of the plaintiff. A court of equity will not indeed entertain a bill for an injunction in case of a mere trespass fully remediable at law. But if it might occasion irreparable mischief, or permanent injury, or destroy a right, that is the appropriate case for such a bill. See 2 Story, Eq. Jur. §§ 926–928, and the cases there cited; *Jerome* v. *Ross*, 7 Johns. Ch. 315; *Van Bergen* v. *Van Bergen*, 3 Johns. Ch. 282; *Newburgh & C. Turnpike* v. *Miller*, 5 Johns. Ch. 101; *Gardner* v. *Village of Newburgh*, 2 Johns. Ch. 162.

Let us come, then, to the only remaining question in the cause; and that is, whether any right of the plaintiff, as mill-owner on

the lower dam, is or will be violated by the diversion of the water by the canal of the defendant. And here it does not seem to me that, upon the present state of the law, there is any real ground for controversy, although there were formerly many vexed questions, and much contrariety of opinion. The true doctrine is laid down in *Wright* v. *Howard*, 1 Sim. & S. 190, by Sir JOHN LEACH, in regard to riparian proprietors, and his opinion has since been deliberately adopted by the king's bench. *Mason* v. *Hill*, 3 Barn. & Adol. 304, 5 Barn. & Adol. 1. See, also, *Bealey* v. *Shaw*, 6 East, 208. "*Prima facie*," says that learned judge, "the proprietor of each bank of a stream is the proprietor of half the land covered by the stream; but there is no property in the water. Every proprietor has an equal right to use the water, which flows in the stream; and consequently, no proprietor can have the right to use the water to the prejudice of any other proprietor, without the consent of the other proprietors, who may be affected by his operations; no proprietor can either diminish the quantity of water, which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above. Every proprietor, who claims a right either to throw the water back above, or to diminish the quantity of water, which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years, which term of twenty years is now adopted upon a principle of general convenience, as affording conclusive presumption of a grant." The same doctrine was fully recognized and acted upon in the case of *Tyler* v. *Wilkinson*, 4 Mason, 397, and also in the case of *Blanchard* v. *Baker*, 8 Greenl. 253, 266. In the latter case the learned judge, (Mr. Justice Weston), who delivered the opinion of the court, used the following emphatic language: "The right to the use of a stream is incident or appurtenant to the land through which it passes. It is an ancient and well-established principle, that it cannot be lawfully diverted, unless it is returned again to its accustomed channel, before it passes the land of a proprietor below. Running water is not susceptible of an appropriation, which will justify the diversion or unreasonable detention of it. The proprietor of the water-course has a right to avail himself of its momentum as a power, which may be turned to beneficial purposes." Mr. Chancellor Kent has

also summed up the same doctrine, with his usual accuracy, in the brief, but pregnant, text of his Commentaries, (3 Kent's Comm. Lect. 42, p. 439, 3d ed.); and I scarcely know, where else it can be found reduced to so elegant and satisfactory a formulary. In the old books, the doctrine is quaintly, though clearly stated; for it is said, that a water-course begins *ex jure naturæ*, and having taken a certain course naturally, it cannot be [lawfully] diverted. "*Aqua currit, et debet currere, ut currere solebat.*" *Shury* v. *Piggot*, 3 Bulst. 339, Poph. 166.

The same principle applies to the owners of mills on a stream. They have an undoubted right to the flow of the water, as it has been accustomed of right and naturally to flow to their respective mills. The proprietor above has no right to divert, or unreasonably to retard, this natural flow to the mills below; and no proprietor below has a right to retard or turn it back upon the mills above, to the prejudice of the right of the proprietors thereof. This is clearly established by the authorities already cited; the only distinction between them being, that the right of a riparian proprietor arises by mere operation of law, as an incident to his ownership of the bank; and that of a mill-owner, as an incident to his mill. *Bealey* v. *Shaw*, 6 East, 208; *Saunders* v. *Newman*, 1 Barn. & Ald. 258; *Mason* v. *Hill*, 3 Barn. & Adol. 304, 5 Barn. & Adol. 1; *Blanchard* v. *Baker*, 8 Greenl. 253, 268; and *Tyler* v. *Wilkinson*, 4 Mason, 397, are fully in point. Mr. Chancellor Kent, in his Commentaries, relies on the same principles, and fully supports them by a large survey of the authorities. 3 Kent Comm. Lect. 52, pp. 441–445, 3d ed.

Now, if this be the law on this subject, upon what ground can the defendant insist upon a diversion of the natural stream from the plaintiff's mills, as it has been of right accustomed to flow thereto? First, it is said, that there is no perceptible damage done to the plaintiff. That suggestion has been already in part answered. If it were true, it could not authorize a diversion, because it impairs the right of the plaintiff to the full, natural flow of the stream; and may become the foundation of an adverse right in the defendant. In such a case, actual damage is not necessary to be established in proof. The law presumes it. The act imports damage to the right, if damage be necessary. Such a case is wholly distinguishable from a mere fugitive, temporary trespass, by diverting or withdrawing the water

a short period, without damage, and without any pretense of right. In such a case the wrong, if there be no sensible damage and it be transient in its nature and character, as it does not touch the right, may possibly (for I give no opinion upon such a case), be without redress at law; and certainly it would found no ground for the interposition of a court of equity by way of injunction.

But I confess myself wholly unable to comprehend, how it can be assumed, in a case like the present, that there is not and cannot be an actual damage to the right of the plaintiff. What is that right? It is the right of having the water flow in its natural current at all times of the year to the plaintiff's mills. Now, the value of the mill privileges must essentially depend, not merely upon the velocity of the stream, but upon the head of water, which is permanently maintained. The necessary result of lowering the head of water permanently, would seem, therefore, to be a direct diminution of the value of the privileges. And if so, to that extent it must be an actual damage.

Again, it is said, that the defendants are mill-owners on the lower dam, and are entitled, as such, to their proportion of the water of the stream in its natural flow. Certainly they are. But where are they so entitled to take and use it? At the lower dam; for there is the place, where their right attaches, and not at any place higher up the stream. Suppose they are entitled to use, for their own mills on the lower dam, half the water which descends to it, what ground is there to say, that they have a right to draw off that half at the head of the mill-pond? Suppose, the head of water at the lower dam in ordinary times is two feet high, is it not obvious, that by withdrawing at the head of the pond one-half of the water, the water at the dam must be proportionally lowered? It makes no difference, that the defendants insist upon drawing off only one-fourth of what, they insist, they are entitled to; for, *pro tanto*, it will operate in the same manner; and if they have a right to draw off to the extent of one-fourth of their privilege, they have an equal right to draw off to the full extent of it. The privilege, attached to the mills of the plaintiff, is not the privilege of using half, or any other proportion merely, of the water in the stream, but of having the whole stream, undiminished in its natural flow, come to the lower dam with its full power, and there to use his full share of the water power. The plaintiff

has a title, not to a half or other proportion of the water in the pond, but is, if one may so say, entitled *per my et per tout* to his proportion of the whole bulk of the stream, undivided, and indivisible, except at the lower dam. This doctrine, in my judgment, irresistibly follows from the general principles already stated; and what alone would be decisive, it has the express sanction of the supreme court of Maine, in the case of *Blanchard* v. *Baker*, 8 Greenl. 253, 270. The court there said, in reply to the suggestion, that the owners of the eastern shore had a right to half the water, and a right to divert it to that extent: "It has been seen, that, if they had been owners of both sides, they had no right to divert the water without again returning it to its original channel, (before it passes the lands of another proprietor). Besides, it was impossible, in the nature of things, that they could take it from their side only. An equal portion from the plaintiff's side must have been mingled with all that was diverted."

A suggestion has also been made, that the defendants have fully indemnified the plaintiff from any injury, and in truth have conferred a benefit on him, by securing the water by means of a raised dam, higher up the stream, at Sebago pond, in a reservoir, so as to be capable of affording a full supply in the stream in the dryest seasons. To this suggestion several answers may be given. In the first place, the plaintiff is no party to the contract for raising the new dam, and has no interest therein; and cannot, as a matter of right, insist upon its being kept up, or upon any advantage to be derived therefrom. In the next place, the plaintiff is not compellable to exchange one right for another; or to part with a present interest in favor of the defendants at the mere election of the latter. Even a supposed benefit cannot be forced upon him against his will; and, certainly, there is no pretense to say, that, in point of law, the defendants have any right to substitute, for a present existing right of the plaintiff's, any other, which they may deem to be an equivalent. The private property of one man cannot be taken by another, simply because he can substitute an equivalent benefit.

Having made these remarks, upon the points raised in the argument, the subject, at least so far as it is at present open for the consideration of the court, appears to me to be exhausted. Whether, consistently with this opinion, it is practi-

cable for the defendants successfully to establish any substantial defense to the bill, it is for the defendants, and not for the court, to consider.

I am authorized to say that the district judge concurs in this opinion.

Decree accordingly.

DAMNUM SINE (ABSQUE) INJURIA.

THURSTON v. HANCOCK.

(12 Massachusetts, 220.—1815.)

ACTION on the case.

A trial was had upon the issue of not guilty, and a verdict found for the defendants, was to be set aside, and a new trial granted, if in the opinion of the court the plaintiff was entitled to maintain his action upon the following state of facts reported by the judge who sat in the trial: *viz.* That the plaintiff in the year 1802, purchased a parcel of land upon Beacon Hill, so called, in Boston, bounded westwardly on land belonging to the town of Boston on said hill, eastwardly on Bowdoin street so called, and northwardly and southwardly on land of D. D. Rogers.—That afterwards in the year 1804, the plaintiff erected a valuable brick dwelling house thereon, which stood at the distance of forty feet from the northern and southern bounds of his land; the back of said house being about two feet from the western bounds of said land.—That the foundation of said house was placed about fifteen feet below the ancient surface of the land.—That the plaintiff with his family occupied said house and land, from December, 1804, until they were obliged to remove therefrom, as hereafter mentioned.—That the defendants commenced digging and removing the gravel from the side of said hill in the year 1811.—That on January 27, 1811, the plaintiff gave them written notice that his house was endangered thereby.—That the defendants notwithstanding continued to dig and carry away the earth and gravel from the hill, until the commencement of this action.—That the only land belonging to the defendants, which adjoined to the said house and land of the plaintiff, was purchased by them of the town of Boston, and conveyed by deed dated August 6,

1811.—That the land thus bought consisted of a lot about 100 feet square, upon the top of said hill, and a right in a highway, 30 feet wide, leading to it from Sumner street.—That this lot and highway were laid out by said town more than sixty years since, for the purpose of erecting a beacon, and have never been used for any other purpose, except the erection of a monument. —That the town derived its title to said land from long continued possession for the purpose aforesaid.—That all these facts were known to the defendants, before they purchased said land of the town.—That this land adjoined the plaintiff's house and land on the western side, and at the time of suing out the plaintiff's writ the defendants' digging and removal of the earth as aforesaid had approached on the surface within five or six feet of the plaintiff's house on the western side thereof, and in some places the earth had, by reason of said digging and removal, fallen from the walls thereof.—That the defendants had dug and carried away the earth near the northwestwardly corner of said house to the depth of 45 feet, and on the western side thereof to the depth of 30 feet, below the natural surface of their own as well as of the plaintiff's land.—That the earth dug and removed by the defendants as aforesaid was upon and from their said land next adjoining the plaintiff's land.—That by reason of the digging and removing of the earth as aforesaid, to the depth aforesaid, below the ancient surface of the earth, a part of the plaintiff's earth and soil, on the surface of his said land, had fallen away and slidden upon the defendant's land; and the foundation of the plaintiff's house was rendered insecure, and it became, and was at the time of commencing this action, unsafe and dangerous to dwell in said house; and the plaintiff was obliged to quit and abandon the same, previous to his commencing this action, and afterwards to take it down in order to save the materials thereof.

Parker, C. J. The facts agreed present a case of great misfortune and loss, and one which has induced us to look very minutely into the authorities, to see if any remedy exists in law against those who have been the immediate actors in what has occasioned the loss: but after all the researches we have been able to make, we cannot satisfy ourselves that the facts reported will maintain this action.

The plaintiff purchased his land in the year 1802, on the sum-

mit of Beacon Hill, which has a rapid declivity on all sides. In 1804 he erected a brick dwelling-house and outhouses on this lot; and laid his foundation, on the western side, within two feet of his boundary line. The inhabitants of the town of Boston were at that time the owners, either by original title or by an uninterrupted possession for more than sixty years, of the land on the hill lying westwardly of the lot purchased by the plaintiff. On the 6th of August, 1811, the defendants purchased of the town the land situated westwardly of the said lot owned by the plaintiff; and in the same year commenced levelling the hill, by digging and carrying away the gravel: they not actually digging up to the line of division between them and the plaintiff; but keeping five or six feet therefrom. Nevertheless by reason of the slope of the hill, the earth fell away, so as in some places to leave the plaintiff's foundation wall bare, and so to endanger the falling of his house, as to make it prudent and necessary, in the opinion of skillful persons, for the safety of the lives of himself and his family, to remove from the house; and in order to save the materials, to take down the house, and to rebuild it on a safer foundation. The defendants were notified of the probable consequences of thus digging by the plaintiff, and were warned that they would be called upon for damages, in case of any loss.

The manner in which the town of Boston acquired a title to the land, or to the particular use to which it was appropriated, can have no influence upon the question; as the fee was in the town, without any restriction as to the manner in which the land should be used or occupied.

It is a common principle of the civil and of the common law, that the proprietor of land, unless restrained by covenant or custom, has the entire dominion, not only of the soil, but of the space above and below the surface, to any extent he may choose to occupy it.

The law, founded upon principles of reason and common utility, has admitted a qualification to this dominion, restricting the proprietor so to use his own, as not to injure the property, or impair any actual existing rights of another. *Sic utere tuo ut alienum non lædas.* Thus no man, having land adjoining his neighbor's which has been long built upon, shall erect a building in such manner as to interrupt the light or the air of his neighbor's house, or expose it to injury from the weather, or to unwholesome smells.

But this subjection of the use of a man's own property to the convenience of his neighbor, is founded upon a supposed pre-existing right in his neighbor to have and enjoy the privilege, which by such act is impaired. Therefore it is that by the ancient common law no man could maintain an action against the owner of an adjoining tract of land, for interrupting the passage of the light or the air to a tenement, unless the tenement thus affected was ancient: so that the plaintiff could prescribe for the privilege, of which he had been deprived; upon the common notion of prescription, that there was formerly a grant of the privilege, which grant has been lost by lapse of time, although the enjoyment of it has continued.

Now in such case of a grant presumed, it shall for the purposes of justice be further presumed, that it was from the ancestor of the man interrupting the privilege; or from those whose estate he has; so as to control him in the use of his own property, in any manner that shall interfere with or defeat an ancient grant thus supposed to have been made. This is the only way of accounting for the common-law principle, which gives one neighbor an action against another, for making the same use of his property which he has made of his own. And it is a reasonable principle: for it would be exceedingly unjust that successive purchasers or inheritors of an estate for the space of sixty years, with certain valuable privileges attached to it, should be liable to be disturbed by the representatives or successors of those who originally granted or consented to, or acquiesced in the use of the privilege.

It is true that of late years the courts in England have sustained actions for the obstruction of such privileges of much shorter duration than sixty years. But the same principle is preserved of the presumption of a grant. And indeed the modern doctrine, with respect to easements and privileges, is but a necessary consequence of the late decisions, that grants and title deeds may be presumed to have been made, although the title or privilege claimed under them is of a much later date than the ancient time of prescription.

The plaintiff cannot pretend to found his action upon this principle; for he first became proprietor of the land in 1802, and built his house in 1804, ten years before the commencement of his suit. So that if the presumption of a grant were not defeated by showing the commencement of his title to be

so recent; yet there is no case, where less than twenty years has entitled a building to the qualities of an ancient building, so as to give the owner a right to the continued use of privileges, the full enjoyment of which necessarily trenches upon his neighbor's right to use his own property in the way he shall deem most to his advantage. A man who purchases a house, or succeeds to one, which has the marks of antiquity about it, may well suppose that all its privileges of right appertain to the house: and indeed they could not have remained so long without the culpable negligence, or friendly acquiescence of those, who might originally have had a right to hinder or obstruct them. But a man who himself builds a house, adjoining his neighbor's land, ought to foresee the probable use by his neighbor of the adjoining land; and by convention with his neighbor, or by a different arrangement of his house, secure himself against future interruption and inconvenience.

This seems to be the result of the cases anciently settled in England, upon the subject of nuisance or interruption of privileges and easements: and it seems to be as much the dictate of common sense and sound reason, as of legal authority.

The decisions cited by the counsel for the plaintiff, (1 Domat, 309, 408; Fitz. N. B. 183; 9 Co. 59; Palmer, 536; 1 Roll. Abr. 140; ibid. 430; *Slingsby* v. *Barnard*, 1 Roll. Rep. 88; 2 Roll. Abr. 565; 2 Saund. 697; Co. Lit. 56 *b*; 1 Burr. 337; 6 D. & E. 411; 7 East, 368; 1 B. & P. 405; 3 Wils. 461), in support of this action, generally go to establish only the general principle, that a remedy lies for one who is injured consequentially by the acts of his neighbor done on his own property. The civil-law doctrine cited from *Domat* will be found upon examination to go no further than the common law upon this subject. For although it is there laid down, that new works on a man's ground are prohibited, provided they are hurtful to others, who have a right to hinder them: and that the person erecting them shall restore things to their former state, and repair the damages; from whence probably the common-law remedy of abating a nuisance as well as recovery of damages; yet this is subsequently explained and qualified in another part of the same chapter, where it is said, that if a man does what he has a right to do upon his own land, without trespassing upon any law, custom, title or possession, he is not liable to damage for injurious consequences; unless he does it, not for

his own advantage, but maliciously; and the damages shall be considered as casualties for which he is not answerable.

The common law has adopted the same principle, considering the actual enjoyment of an easement for a long course of years, as establishing a right which cannot with impunity be impaired by him who is the owner of the land adjoining.

The only case cited from common-law authorities, tending to show that a mere priority of building operates to deprive the tenant of an adjoining lot of the right of occupying and using it at his pleasure, without being subjected to damages if by such use he should injure a building previously erected, is that of *Slingsby* v. *Barnard*, cited from Rolle. Sir John Slingsby brought his action on the case against Barnard and Ball, and declared that he was seized of a dwelling-house *nuper edificatus*, and that Barnard was seized of a house next adjoining; and that Barnard and Ball under him, in making a cellar under Barnard's house, dug so near the foundation of the plaintiff's house, that they undermined the same, and one-half of it fell. Judgment upon this declaration was for the plaintiff, no objection having been made as to the right of action, but only to the form of the declaration.

The report of this case is very short and unsatisfactory; it not appearing whether the defendant confined himself in his digging to his own land, or whether the house then lately built was upon a new or an old foundation. Indeed it seems impossible to maintain that case upon the facts made to appear in the report, without denying principles, which seem to have been deliberately laid down in other books, equally respectable as authorities.

Thus in Siderfin 167, upon a special verdict the case was thus. A having a certain quantity of land, erected a new house upon part of it, and leased the house to B and the residue of the land to C who put logs and other things upon the land adjoining said house, so that the windows were darkened, etc. It was holden that B could maintain case against C for this injury. But the reason seems to be that C took his lease seeing that the house was there, and that he should not, any more than the lessor, render the house first leased less valuable by his obstructions. It was however decided in the same case, that if one seized of land lease forty feet of it to A to build upon, and another forty feet to B to build upon, and one builds a house, and

then the other digs a cellar upon his ground, by which the wall of the first house adjoining falls, no action lies; and so, they said, it was adjudged in *Pigott & Suries case*, for each one may make what advantage he can of his own. The principle of this decision is, that both parties came to the land with equal rights in point of time and title; and that he who first built his house should have taken care to stipulate with his neighbor, or to foresee the accident and provide against it by setting his house sufficiently within his line to avoid the mischief. In the same case it is stated, as resolved by the court, that if a stranger have the land adjoining to a new house, he may build new houses, etc., upon his land, and the other shall be without remedy, when the lights are darkened: otherwise when the house first built was an ancient one.

In Roll's Abridgment, 565, A, seized in fee of copyhold estate, next adjoining land of B, erects a new house upon his copyhold land, and a part is built upon the confines next adjoining the land of B, and B afterwards digs his land so near the house of A, but on no part of his land, that the foundation of the house, and even the house itself fall; yet no action lies for A against B, because it was the folly of A, that he built his house so near to the land of B. For by his own act he shall not hinder B from the best use of his own land that he can. And after verdict, judgment was arrested. The reporter adds however, that it seems that a man, who has land next adjoining my land, cannot dig his land so near mine, as to cause mine to slide into the pit; and if an action be brought for this, it will lie.

Although at first view the opinion of Roll seems to be at variance with the decision which he has stated, yet they are easily reconciled with sound principles. A man in digging upon his own land is to have regard to the position of his neighbor's land, and the probable consequences to his neighbor, if he digs too near his line; and if he disturbs the natural state of the soil, he shall answer in damages: but he is answerable only for the natural and necessary consequences of his act, and not for the value of a house put upon or near the line by his neighbor. For in so placing the house, the neighbor was in fault, and ought to have taken better care of his interest.

If this be the law, the case before us is settled by it: and we have not been able to discover that the doctrine has ever been overruled, nor to discern any good reason why it should be.

The plaintiff purchased his land in 1802. At that time the inhabitants of Boston were in possession, and the owners of the adjoining land now owned by the defendants. The plaintiff built his house within two feet of the western line of the lot, knowing that the town, or those who should hold under it, had a right to build equally near to the line, or to dig down into the soil for any other lawful purpose. He knew also the shape and nature of the ground, and that it was impossible to dig there without causing excavations. He built at his peril: for it was not possible for him, merely by building upon his own ground, to deprive the other party of such use of his, as he should deem most advantageous. There was no right acquired by his ten years' occupation, to keep his neighbor at a convenient distance from him. He could not have maintained an action for obstructing the light or air: because he should have known that, in the course of improvements on the adjoining land, the light and air might be obstructed. It is in fact *damnum absque injuria.*

By the authority above cited however, it would appear that for the loss of, or injury to the soil merely, his action may be maintained. The defendants should have anticipated the consequence of digging so near the line; and they are answerable for the direct consequential damage to the plaintiff, although not for the adventitious damage arising from his putting his house in a dangerous position.

CAUSA PROXIMA NON REMOTA SPECTATUR. [1]

Guille v. Swan.

(19 Johnson's Reports, 381.—1822.)

In error, on certiorari, to the Justices' Court in the city of New York.

Swan sued Guille in the Justices' Court, in an action of trespass, for entering his close, and treading down his roots and vegetables, in a garden in the city of New York.

The facts were, that Guille ascended in a balloon in the vicinity of Swan's garden, and descended into his garden. When he descended, his body was hanging out of the car of the balloon in a very perilous situation, and he called to a person at work in Swan's field, to help him, in a voice audible to the pursuing crowd. After the balloon descended, it dragged along over potatoes and radishes, about thirty feet, when Guille was taken out. The balloon was carried to a barn, at the farther end of the premises. When the balloon descended, more than two hundred persons broke into Swan's garden through the fences, and came on his premises, beating down his vegetables and flowers. The damage done by Guille, with his balloon, was about fifteen dollars, but the crowd did much more. The plaintiff's damages, in all, amounted to ninety dollars. It was contended before the Justice, that Guille was answerable only for the damage done by himself, and not for the damage done by the crowd. The Justice was of the opinion, and so instructed the jury, that the defendant was answerable for all the damages done to the plaintiff. The jury, accordingly, found a verdict for him, for ninety dollars, on which the judgment was given, and for costs.

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[1] In determining liability for harm suffered, the wrongful act complained of must be to the harm suffered as cause to effect; it must be the proximate or immediate, and not the remote cause of the harm. "The proximate cause of an injury is that which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. . . . The remote cause is that cause which some independent force merely took advantage of to accomplish something not the probable or natural effect thereof." *Goodlander Mill Co.* v. *Standard Oil Co.*, 63 Fed. Rep. 400. See also *Milwaukee, etc., Railway Co.* v. *Kellogg*, 94 U. S. 469, 474.

Spencer, Ch. J. The counsel for the plaintiff in error supposes, that the injury committed by his client was involuntary, and that done by the crowd was voluntary, and that, therefore, there was no union of intent; and that upon the same principle which would render Guille answerable for the acts of the crowd, in treading down and destroying the vegetables and flowers of S., he would be responsible for a battery, or a murder committed on the owner of the premises.

The intent with which an act is done, is by no means the test of the liability of a party to an action of trespass. If the act cause the immediate injury, whether it was intentional, or unintentional, trespass is the proper action to redress the wrong. It was so decided, upon a review of all the cases, in *Percival* v. *Hickey*, 18 Johns. Rep. 257. Where an immediate act is done by the coöperation, or the joint act of several persons, they are all trespassers, and may be sued jointly or severally; and any one of them is liable for the injury done by all. To render one man liable in trespass for the acts of others, it must appear, either that they acted in concert, or that the act of the individual sought to be charged, ordinarily and naturally, produced the acts of the others. The case of *Scott* v. *Shepherd*, 2 Black. Rep. 892, is a strong instance of the responsibility of an individual who was the first, though not the immediate, agent in producing an injury. Shepherd threw a lighted squib, composed of gunpowder, into a market-house, where a large concourse of people were assembled; it fell on the standing of Y., and to prevent injury, it was thrown off his standing, across the market, where it fell on another standing; from thence, to save the goods of the owner, it was thrown to another part of the market-house, and in so throwing it, it struck the plaintiff in the face, and, bursting, put out one of his eyes. It was decided, by the opinion of three Judges against one, that Shepherd was answerable in an action of trespass, and assault and battery. De Grey, Ch. J., held, that throwing the squib was an unlawful act, and that whatever mischief followed, the person throwing it was the author of the mischief. All that was done subsequent to the original throwing, was a continuation of the first force and first act. Any innocent person removing the danger from himself was justifiable; the blame lights upon the first thrower; the new direction and new force, flow out of the first force. He laid it down as a prin-

ciple, that every one who does an unlawful act, is considered as the doer of all that follows. A person breaking a horse in Lincolns-Inn-Fields, hurt a man, and it was held, that trespass would lie. In *Leame* v. *Bray*, 3 East, Rep. 595, Lord Ellenborough said, if I put in motion a dangerous thing, as if I let loose a dangerous animal, and leave to hazard what may happen, and mischief ensue, I am answerable in trespass; and if one, (he says) put an animal or carriage in motion, which causes an immediate injury to another, he is the actor, the *causa causans.*

I will not say that ascending in a balloon is an unlawful act, for it is not so; but, it is certain, that the aeronaut has no control over its motion horizontally; he is at the sport of the winds, and is to descend when and how he can; his reaching the earth is a matter of hazard. He did descend on the premises of the plaintiff below, at a short distance from the place where he ascended. Now, if his 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; all this he ought to have foreseen, and must be responsible for. Whether the crowd heard him call for help or not, is immaterial; he had put himself in a situation to invite help, and they rushed forward, impelled, perhaps, by the double motive of rendering aid, and gratifying a curiosity which he had excited. Can it be doubted, that if the plaintiff in error had beckoned to the crowd to come to his assistance, that he would be liable for their trespass in entering the enclosure? I think not. In that case, they would have been co-trespassers, and we must consider the situation in which he placed himself, voluntarily and designedly, as equivalent to a direct request to the crowd to follow him. In the present case, he did call for help, and may have been heard by the crowd; he is, therefore, undoubtedly, liable for all the injury sustained.

Judgment affirmed.

Vandenburgh v. Truax.

(4 Denio, 464.—1847.)

Error to Schenectady Common Pleas. The return states that the plaintiff declared in an action of trespass, that on the 16th or 18th of April, 1842, defendant did wilfully drive a black boy through plaintiff's store, knock a faucet from his barrel, and destroy two gallons of port wine, to his damage of $50.00. Plea, the general issue. The case proved was as follows: A negro boy, sixteen or eighteen years old, was plaintiff's ostler; the boy was seen in the street, near 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, 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. 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 the faucet from a cask of wine, and about two gallons of the liquor, of the value of $4, were lost. The justice gave judgment for the plaintiff for $4, damages, which was affirmed by the Common Pleas. The defendant brings error.

By the Court, Bronson, Ch. J. It may be laid down as a general rule, that when one does an illegal or mischievous act, which is likely to prove injurious to others, and when he does a legal act in such a careless and improper manner that injury to third persons may probably ensue, he is answerable in some form of action, for all the consequences which may directly and naturally result from his conduct; and in many cases he is answerable criminally as well as civilly. It is not necessary that he should intend to do the particular injury which follows; nor,

indeed, any injury at all. If a man without just cause aim a blow at his enemy, which, missing him, falls upon his friend, it is a trespass upon the friend; and may be murder if a deadly weapon was used, and death ensued. Or if, in attempting to steal, or destroy the property of another, he unfortunately wound the owner, or a third person, he must answer for the consequences, although he did not intend that particular mischief. And although no mischief of any kind may be intended, yet if a man do an act which is dangerous to the persons or property of others, and which evinces a reckless disregard of consequences, he will be answerable civilly, and in many cases criminally, for the injuries which may follow: as if he discharge a gun, or let loose a ferocious or mad animal, in a multitude of people; or throw a stone from the house-top into a street where many are passing; or keep a large quantity of gunpowder near the dwelling of another. In these, and such like cases, he must answer for any injury which may result from his misconduct to the persons or property of others. And if the act was so imminently dangerous to others as to evince a depraved mind, regardless of human life, and death ensue, it will be murder. These are familiar cases, which need not be proved by referring to books.

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. Black. 892; 3 Wils. 403, *S. C.* 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 John. 381, 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 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 co-trespassers; 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.

It is not necessary to inquire whether the action should be trespass or case; for this declaration may as well be considered one thing as the other. It seems that the plaintiff, when before the justice, called the action trespass; but the declaration does not allege that the act was done either *vi et armis* or *contra pacem*. Courts of record might well enough have been less nice than they have been about the distinctions between trespass and case. *Seneca Road Company* v. *Auburn and Rochester R. R. Company*, 5 Hill, 170. And clearly, as the pleadings in justices' courts are construed in the most liberal manner for the advancement of justice, this may very well be regarded as an action on the case.

Judgment affirmed.

MENTAL SUFFERING UNACCOMPANIED BY BODILY INJURY.[1]

Mitchell v. Rochester Railway Co.

(151 New York, 107. — 1896.)

Appeal from an order of the General Term of the Supreme Court, which affirmed an order of the Special Term setting

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[1] In case of pure assault, or mere *attempt* to do bodily harm, without physical contact, the law has allowed recovery, on the theory that every one has a right to live without being put in fear of personal harm. (*Martin* v. *Shoppee*, 3 Carr. & P. 373; *Stephens* v. *Myers*, 4 Carr. & P. 349; *Beach* v. *Hancock*, 27 N. H. 223.) This is in fact allowing recovery for mental suffering, unaccompanied by bodily injury; for *fear* of harm, short of actual

aside a nonsuit and granting a new trial, in an action to recover damages for personal injuries, alleged to have been caused by the negligence of the defendant.

Martin, J. The facts in this case are few and may be briefly stated. On the first day of April, 1891, the plaintiff was standing upon a crosswalk on Main street in the city of Rochester, awaiting an opportunity to board one of the defendant's cars which had stopped upon the street at that place. While standing there, and just as she was about to step upon the car, a horse car of the defendant came down the street. As the team attached to the car drew near, it turned to the right and came so close to the plaintiff that she stood between the horses' heads when they were stopped.

She testified that from fright and excitement caused by the approach and proximity of the team she became unconscious, and also that the result was a miscarriage and consequent illness. Medical testimony was given to the effect that the mental shock which she then received was sufficient to produce that result.

Assuming that the evidence tended to show that the defendant's servant was negligent in the management of the car and horses, and that the plaintiff was free from contributory negligence, the single question presented is whether the plaintiff is entitled to recover for the defendant's negligence which occasioned her fright and alarm, and resulted in the injuries already mentioned. While the authorities are not harmonious

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contact. When, however, fear and its consequences are the result of a *negligent*, instead of a *wilful* act, the tendency of the decisions is to deny recovery, unless physical injury precedes the mental suffering. Theoretically, this cannot satisfactorily be explained. The courts, in applying the rule of proximate cause, hold that mental suffering, unaccompanied by bodily injury, is too remote from the alleged wrong, and are seemingly influenced so to hold by the consideration that to allow such claims would open the flood-gates of litigation and pave the way for much deception, because "mental suffering is so largely subjective, so peculiarly dependent upon the mental traits and idiosyncracies of the alleged sufferer, and so peculiarly incapable of demonstration to a third person." (I. University Law Rev. 322.) The rule thus existing seems to rest rather on policy and convenience than on sound reason. The rule of proximate cause is simple and clear; the difficulty lies in its application; but the difficulty of applying a rule is poor argument against its application. (See I. University Law Rev. 10; III. id. 130; VII. Harvard Law Rev. 304; X. id. 239.)

upon this question, we think the most reliable and better considered cases, as well as public policy, fully justify us in holding that the plaintiff cannot recover for injuries occasioned by fright, as there was no immediate personal injury. (*Lehman* v. *Brooklyn City R. R. Co.*, 47 Hun, 355; *Victorian Railways Commissioners* v. *Coultas*, L. R. [13 Appeal Cases] 222; *Ewing* v. *P., C. & St. L. Ry. Co.*, 147 Penn. St. 40.) The learned counsel for the respondent in his brief very properly stated that, "The consensus of opinion would seem to be that no recovery can be had for mere fright," as will be readily seen by an examination of the following additional authorities: *Haile* v. *Texas & Pacific R. Co.* (23 Lawyers' Rep. 774); *Joch* v. *Dankwardt* (85 Ill. 331); *Canning* v. *Inhabitants of Williamstown* (1 Cush. 451); *Western Union Tel. Co.* v. *Wood* (57 Fed. Repr. 471); *Renner* v. *Canfield* (36 Minn. 90); *Allsop* v. *Allsop* (5 Hurl. & Nor. [N. S.] 534); *Johnson* v. *Wells, Fargo & Co.* (6 Nev. 224); *Wyman* v. *Leavitt* (71 Me. 227).

If it be admitted that no recovery can be had for fright occasioned by the negligence of another, it is somewhat difficult to understand how a defendant would be liable for its consequences. Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can, then an action may be maintained, however slight the injury. If not, then there can be no recovery, no matter how grave or serious the consequences. Therefore, the logical result of the respondent's concession would seem to be, not only that no recovery can be had for mere fright, but also that none can be had for injuries which are the direct consequences of it.

If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injury, in determining whether they exist, and if so, whether they were caused by the negligent act

of the defendant, would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy.

Moreover, it cannot properly be said that the plaintiff's miscarriage was the proximate result of the defendant's negligence. Proximate damages are such as are the ordinary and natural results of the negligence charged, and those that are usual and may, therefore, be expected. It is quite obvious that the plaintiff's injuries do not fall within the rule as to proximate damages. The injuries to the plaintiff were plainly the result of an accidental or unusual combination of circumstances, which could not have been reasonably anticipated, and over which the defendant had no control, and, hence, her damages were too remote to justify a recovery in this action.

These considerations lead to the conclusion that no recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury.

The orders of the General and Special Terms should be reversed, and the order of the Trial Term granting a nonsuit affirmed, with costs.

All concur, except HAIGHT, J., not sitting, and VANN, J., not voting.

Ordered accordingly.

SPADE v. LYNN & BOSTON R. R. CO

(168 Massachusetts, 285.—1897.)

ACTION to recover for personal injuries alleged to have been sustained through the negligence of the defendant. The declaration alleged that on February 16, 1895, while the plaintiff was a passenger in the defendant's car, and in the exercise of due care, "one of the defendant's agents or servants, in attempting to remove from said car a certain person claimed and alleged by said defendant's agent to be noisy, turbulent, and unfit to remain as a passenger in said car, conducted himself with such carelessness, negligence, and with the use of such un-

necessary force, that said agent and servant, acting thus negligently, created a disorder, disturbance, and quarrel in said car, and thereby frightened the plaintiff and subjected her to a severe nervous shock, by which nervous shock the plaintiff was physically prostrated and suffered, and has continued to suffer, great mental and physical pain and anguish, and has been put to great expense."

At the trial, the plaintiff testified that in the removal of the disorderly person, an intoxicated person, standing directly in front of her, "lurched over so it kind of pushed me back against the car."

"Q. Your body was not injured in any way by contact with this man? A. Oh, no, I was not injured. There were not any marks on me, anything like that.

"Q. You suffered no pain from this man touching you? A. No, not any injury from that.

"Q. What was the cause of this man's touching you, the one that lurched forward? A. When the conductor jumped and grabbed this man that I told about, on the opposite side of the car, that made a commotion, and as he twitched him it pushed this other man over on to me."

Verdict for plaintiff. The defendant alleged exceptions.

Allen, J. This case presents a question which has not heretofore been determined in this Commonwealth, and in respect to which the decisions elsewhere have not been uniform. It is this: whether in an action to recover damages for an injury sustained through the negligence of another, there can be a recovery for a bodily injury caused by mere fright and mental disturbance. The jury were instructed that a person cannot recover for mere fright, fear, or mental distress occasioned by the negligence of another, which does not result in bodily injury; but that when the fright or fear or nervous shock produces a bodily injury, there may be a recovery for that bodily injury, and for all the pain, mental or otherwise, which may arise out of that bodily injury.

In *Canning* v. *Williamstown*, 1 Cush. 451, it was held, in an action against a town to recover damages for an injury sustained by the plaintiff in consequence of a defective bridge, that he could not recover if he sustained no injury to his person, but merely incurred risk and peril which caused fright and mental

suffering. In *Warren* v. *Boston & Maine Railroad*, 163 Mass. 484, the evidence tended to show that the defendant's train struck the carriage of the plaintiff, thereby throwing him out upon the ground, and it was held to be a physical injury to the person to be thrown out of a wagon, or to be compelled to jump out, even although the harm consists mainly of nervous shock. It was not therefore a case of mere fright, and resulting nervous shock.

The case calls for a consideration of the real ground upon which the liability or non-liability of a defendant guilty of negligence in a case like the present depends. The exemption from liability for mere fright, terror, alarm, or anxiety does not rest on the assumption that these do not constitue an actual injury. They do in fact deprive one of enjoyment and of comfort, cause real suffering, and to a greater or less extent disqualify one for the time being from doing the duties of life. If these results flow from a wrongful or negligent act, a recovery therefor cannot be denied on the ground that the injury is fanciful and not real. Nor can it be maintained that these results may not be the direct and immediate consequence of the negligence. Danger excites alarm. Few people are wholly insensible to the emotions caused by imminent danger, though some are less affected than others.

It must also be admitted that a timid or sensitive person may suffer not only in mind, but also in body, from such a cause. Great emotion may and sometimes does produce physical effects. The action of the heart, the circulation of the blood, the temperature of the body, as well as the nerves and the appetite, may all be affected. A physical injury may be directly traceable to fright, and so may be caused by it. We cannot say, therefore, that such consequences may not flow proximately from unintentional negligence, and if compensation in damages may be recovered for a physical injury so caused, it is hard on principle to say why there should not also be a recovery for the mere mental suffering when not accompanied by any perceptible physical effects.

It would seem therefore that the real reason for refusing damages sustained from mere fright must be something different; and it probably rests on the ground that in practice it is impossible satisfactorily to administer any other rule. The law must be administered in the courts according to general rules.

Courts will aim to make these rules as just as possible, bearing in mind that they are to be of general application. But as the law is a practical science, having to do with the affairs of life, any rule is unwise if in its general application it will not as a usual result serve the purposes of justice. A new rule cannot be made for each case, and there must therefore be a certain generality in rules of law, which in particular cases may fail to meet what would be desirable if the single case were alone to be considered.

Rules of law respecting the recovery of damages are framed with reference to the just rights of both parties; not merely what it might be right for an injured person to receive, to afford just compensation for his injury, but also what it is just to compel the other party to pay. One cannot always look to others to make compensation for injuries received. Many accidents occur, the consequences of which the sufferer must bear alone. And in determining the rules of law by which the right to recover compensation for unintended injury from others is to be governed, regard must chiefly be paid to such conditions as are usually found to exist. Not only the transportation of passengers and the running of trains, but the general conduct of business and of the ordinary affairs of life, must be done on the assumption that persons who are liable to be affected thereby are not peculiarly sensitive, and are of ordinary physical and mental strength. If, for example, a traveller is sick or infirm, delicate in health, specially nervous or emotional, liable to be upset by slight causes, and therefore requiring precautions which are not usual or practicable for travellers in general, notice should be given, so that, if reasonably practical, arrangements may be made accordingly, and extra care be observed. But, as a general rule, a carrier of passengers is not bound to anticipate or to guard against an injurious result which would only happen to a person of peculiar sensitiveness. This limitation of liability for injury of another description is intimated in *Allsop* v. *Allsop*, 5 H. & N. 534, 538, 539. One may be held bound to anticipate and guard against the probable consequences to ordinary people, but to carry the rule of damages further imposes an undue measure of responsibility upon those who are guilty only of unintentional negligence. The general rule limiting damages in such a case to the natural and probable consequences of the acts done is of wide application, and has often

been expressed and implied. *Lombard* v. *Lennox*, 155 Mass. 70; *White* v. *Dresser*, 135 Mass. 150; *Fillebrown* v. *Hoar*, 124 Mass. 580; *Derry* v. *Flitner*, 118 Mass. 131; *Milwaukee & St. Paul Railway* v. *Kellogg*, 94 U. S. 469, 475; *Wyman* v. *Leavitt*, 71 Maine, 227; *Ellis* v. *Cleveland*, 55 Vt. 358; *Phillips* v. *Dickerson*, 85 Ill. 11; *Hampton* v. *Jones*, 58 Iowa, 317; *Renner* v. *Canfield*, 36 Minn. 90; *Lynch* v. *Knight*, 9 H. L. Cas. 577, 591, 595, 598; *The Notting Hill*, 9 P. D. 105; *Hobbs* v. *London & Southwestern Railway*, L. R. 10 Q. B. 111, 122.

The law of negligence in its special application to cases of accidents has received great development in recent years. The number of actions brought is very great. This should lead courts well to consider the grounds on which claims for compensation properly rest, and the necessary limitations of the right to recover. We remain satisfied with the rule that there can be no recovery for fright, terror, alarm, anxiety, or distress of mind, if these are unaccompanied by some physical injury; and if this rule is to stand, we think it should also be held that there can be no recovery for such physical injuries as may be caused solely by such mental disturbance, where there is no injury to the person from without. The logical vindication of this rule is, that it is unreasonable to hold persons who are merely negligent bound to anticipate and guard against fright and the consequences of fright; and that this would open a wide door for unjust claims, which could not successfully be met. These views are supported by the following decisions: *Victorian Railways Commissioners* v. *Coultas*, 13 App. Cas. 222; *Mitchell* v. *Rochester Railway*, 151 N. Y. 107; *Ewing* v. *Pittsburg, Cincinnati, Chicago & St. Louis Railway*, 147 Penn. St. 40; *Haile* v. *Texas & Pacific Railway*, 60 Fed. Rep. 557.

In the following cases, a different view was taken: *Bell* v. *Great Northern Railway*, 26 L. R. (Ir.) 428; *Purcell* v. *St. Paul City Railway*, 48 Minn. 134; *Fitzpatrick* v. *Great Western Railway*, 12 U. C. Q. B. 645; see also Beven, Negligence, 77 *et seq.*

It is hardly necessary to add that this decision does not reach those classes of actions where an intention to cause mental distress or to hurt the feelings is shown, or is reasonably to be inferred, as, for example, in cases of seduction, slander, malicious prosecution, or arrest, and some others. Nor do we include cases of acts done with gross carelessness or recklessness, show-

ing utter indifference to such consequences, when they must have been in the actor's mind. *Lombard* v. *Lennox*, and *Fillebrown* v. *Hoar*, already cited. *Meagher* v. *Driscoll*, 99 Mass. 281.

In the present case, no such considerations entered into the rulings or were presented by the facts. The entry therefore must be,

Exceptions sustained.

Purcell v. St. Paul City Ry. Co.

(48 Minnesota, 134.—1892.)

Appeal from an order of the District Court, overruling a demurrer to the complaint.

Gilfillan, C. J. Appeal from an order overruling a general demurrer to the complaint. From the complaint it appears that the plaintiff was a passenger on one of defendant's cars running upon its line on Jackson street, St. Paul; that, when the car reached the intersection of that line with the defendant's cable-car line running on East Seventh street, the persons in charge of it negligently attempted to cross, and did cross, the cable line in front of a then near and rapidly approaching cable train thereon; that a collision seemed so imminent, and was so nearly caused, that the incident and attending confusion of ringing alarm bells and passengers rushing out of the car caused to plaintiff sudden fright and reasonable fear of immediate death or great bodily injury, and that the shock thus caused threw her into violent convulsions, and caused to her, she being then pregnant, a miscarriage, and subsequent illness. The complaint shows a duty on the part of the defendant to exercise the highest degree of care to carry the plaintiff safely. It also shows negligence in respect to that duty, and, if the negligence caused what the law regards as actionable injury, the action is well brought. Of course, negligence without injury gives no right of action. On the argument there was much discussion of the question whether fright and mental distress alone constitute such injury that the law will allow a recovery for it. The question is not involved in the case. So it may be conceded

that any effect of a wrongful act or neglect on the mind alone will not furnish ground of action. Here is a physical injury, as serious, certainly, as would be the breaking of an arm or a leg. Does the complaint show that defendant's negligence was the proximate cause of that injury? If so, the action will, of course, lie. What is in law a proximate cause is well expressed in the definition, often quoted with approval, given in *Milwaukee & St. Paul Railroad Co.* v. *Kellogg*, 94 U. S. 469, as follows: "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. *Scott* v. *Shepherd*, 2 W. Bl. 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?"

There may be a succession of intermediate causes, each produced by the one preceding, and producing the one following it. It must appear that the injury was the natural consequence of the wrongful act or omission. The new, independent, intervening cause must be one not produced by the wrongful act or omission, but independent of it, and adequate to bring about the injurious result. Whether the natural connection of events was maintained, or was broken by such new, independent cause, is generally a question for the jury. In this case the only cause that can be suggested as intervening between the negligence and the injury is plaintiff's condition of mind, to wit, her fright. Could that be a natural, adequate cause of the nervous convulsions? The mind and body operate reciprocally on each other. Physical injury or illness sometimes causes mental disease. A mental shock or disturbance sometimes causes injury or illness of body, especially of the nervous system. Now, if the fright was the natural consequence of — was brought about, caused by — the circumstances of peril and alarm in which defendant's negligence placed plaintiff, and the fright caused the nervous shock and convulsions and consequent illness, the negligence was the proximate cause of those injuries. That a men-

tal condition or operation on the part of the one injured comes between the negligence and injury does not necessarily break the required sequence of intermediate causes. If a passenger be placed, by the carrier's negligence, in apparent, imminent peril, and, obeying the natural instinct of self-preservation, endeavor to escape it by leaping from the car or coach, and in doing so is injured, he may, if there be no contributory negligence on his part, recover for the injury, although, had he remained in the car or coach, he would not have been injured. The endeavor to escape is not of itself contributory negligence. *Wilson* v. *Northern Pac. R. Co.*, 26 Minn. 278. In such case, though there comes, as an intermediate cause between the negligence and injury, a condition or operation of mind on the part of the injured passenger, the negligence is nevertheless the proximate cause of the injury. The defendant suggests that plaintiff's pregnancy rendered her more susceptible to groundless alarm, and accounts more naturally and fairly than defendant's negligence for the injurious consequences. Certainly a woman in her condition has as good a right to be carried as any one, and is entitled at least to as high a degree of care on the part of the carrier. It may be that, where a passenger, without the knowledge of the carrier, is sick, feeble, or disabled, the latter does not owe to him a higher degree of care than he owes to passengers generally, and that the carrier would not be liable to him for an injury caused by an act or omission not negligent as to an ordinary passenger. But when the act or omission is negligence as to any and all passengers, well or ill, any one injured by the negligence must be entitled to recover to the full extent of the injury so caused, without regard to whether, owing to his previous condition or health, he is more or less liable to injury. If the recovery of a passenger in feeble health were to be limited to what he would have been entitled to had he been sound, then, in case of a destruction by fire or wrecking of a railroad car through the negligence of those in charge of it, if all the passengers but one were able to leave it in time to escape injury, and that one could not because sick or lame, he could not recover at all. The suggestion mentioned would, if carried to its logical consequences, lead to such a conclusion.

Order affirmed.

PARTIES LIABLE.

LIABILITY OF INFANTS.

Fitts v. Hall.

(9 New Hampshire, 441.—1838.)

Case. The declaration alleged, that on May 26, 1830, the plaintiff was the owner of a quantity of palm-leaf and chip hats; that a conversation was then had between the parties about the defendant's purchasing the hats; that the plaintiff, not knowing whether the defendant was of age, inquired of him whether he was of full age or not; that the defendant, well knowing that he was an infant under the age of twenty-one years, and intending to deceive and defraud the plaintiff, falsely represented that he was then of full age; and that the plaintiff, relying thereon, sold and delivered the hats to the defendant, and took his note therefor for the sum of $57.00. The declaration further set forth, that the note not being paid when due, the plaintiff sued the defendant thereon; that the defendant pleaded the general issue, and infancy; that the plaintiff joined the general issue, and to the plea of infancy replied that the defendant represented himself to be of full age, etc.; that to this replication there was a demurrer and joinder, and the plaintiff became nonsuit, the defendant recovering judgment for costs, taxed at $37.62; and that the defendant has never paid said note, nor redelivered the hats to the plaintiff, nor paid him therefor.

There was also a count in trover for the hats.

The jury found a verdict for the plaintiff for $128.91; whereupon the defendant moved that the verdict be set aside, and a nonsuit entered.

Parker, C. J. The general principle applicable to this case is, that an infant is liable in actions *ex delicto*, whether founded on positive wrongs, or constructive torts, or frauds. 2 Kent's Com. 197; 1 Chitty's Pl. 65.

Thus he is liable in trover, although the goods converted were in his possession by virtue of a previous contract. *Vasse* v. *Smith*, 6 Cranch, 231; *Homer* v. *Thwing*, 3 Pick. 492. And in detinue, where he received skins to finish, and afterwards withheld them. *Mills* v. *Graham*, 4 Bos. & Pul. 140. And assumpsit for money had and received, has been sustained against an infant for money embezzled. *Bristow* v. *Eastman*, 1 Esp. 172; s. c. Peake, 222.

But a matter of contract, or arising *ex contractu* and properly belonging to that class, is not to be turned into a tort, in order to charge the infant by a change of the form of action. 2 Kent's Com. 197. As, for instance, where the plaintiff declared that having agreed to exchange mares with the defendant, the defendant, by falsely warranting his mare to be sound, well knowing her to be unsound, falsely and fraudulently deceived the plaintiff, etc.; held that infancy was a good plea in bar. *Green* v. *Greenbank*, 2 Marshall, 485; s. c. 4 E. C. L. 375.

In *Jennings* v. *Randall* the plaintiff declared in case, that, at the request of the defendant, he delivered to him a certain mare, to be moderately ridden, and the defendant wrongfully rode her in an immoderate, excessive and improper manner, and took so little care of her, that by reason thereof she was strained and damaged; and in a second count alleged that he delivered the mare to the defendant to go and perform a reasonable and moderate journey, and the defendant wrongfully rode and worked her a much longer journey. On a demurrer to a plea of infancy, the court considered the action as founded substantially on the contract, and gave judgment for the defendant. Lord Kenyon said: "The plaintiff let the mare to hire; and in the course of the journey an accident happened, the mare being strained, and the question is, whether this action can be maintained? I am clearly of opinion that it cannot; it is founded on contract. If it were in the power of a plaintiff to convert that which arises out of a contract into a tort, there would be an end of that protection which the law affords to infants." 8 D. & E. 336.

It is undoubtedly true, that the substance of all the matter thus alleged in the plaintiff's declaration, in *Jennings* v. *Randall*, might have been set forth in an action of assumpsit; and regarding it, as Lord Kenyon did, as an injury resulting from an accident, it would seem to be an attempt to convert an action founded on contract into a tort. But the attention of the

court does not seem, in the opinion delivered, to have been directed to the question whether part of the matter thus alleged might not, upon proper proof, have sustained the count in trover, which was also contained in the declaration, or an action of trespass.

It is apparent, from the cases before cited, that an infant may be charged for a tort arising subsequent to a contract, and so far connected with his contract that but for the latter the tort would not have been committed. In *Homer* v. *Thwing*, the defendant hired a horse to go to a place agreed on, but went to another place, in a different direction, and he was held liable in trover for an unlawful conversion.

And in *Campbell* v. *Stakes*, 2 Wendell, 137, where an infant took a mare, on hire, and drove her with such violence, and otherwise cruelly used her, that she died, it was held that trespass might be maintained against him, and the judgment of the supreme court was unanimously confirmed by the court of errors. Chancellor Walworth said: "If the infant does any wilful and positive act, which amounts on his part to an election to disaffirm the contract, the owner is entitled to the immediate possession. If he wilfully and intentionally injures the animal, an action of trespass lies against him for the tort. If he should sell the horse, an action of trover would lie, and his infancy would not protect him."

The principle to be deduced from these authorities seems to be, that if the tort or fraud of an infant arises from a breach of contract, although there may have been false representations or concealment respecting the subject-matter of it, the infant cannot be charged for this breach of his promise or contract, by a change of the form of action. But if the tort is subsequent to the contract, and not a mere breach of it, but a distinct, wilful and positive wrong of itself, then, although it may be connected with a contract, the infant is liable.

Upon this principle the count in trover, in this case, cannot be supported, upon the evidence offered. The goods went into the possession of the defendant by virtue of a contract, which he has avoided by reason of his infancy. The effect of that contract was to authorize him to appropriate the goods to his own use as owner, and to dispose of them at his pleasure. If he has done so by using them, or selling them to third persons, so that he cannot redeliver them, neither his refusal to pay, nor

a refusal to deliver the goods, can be considered as anything more than a breach of contract. A refusal to pay is a breach of the express contract, and a refusal to return the goods, after he had converted them with the assent of the plaintiff, and when he no longer had it in his power to return them, could be considered as no more than a breach of an implied assumpsit to return the goods, upon request, after he had rescinded the contract by a refusal to pay. Were this otherwise, the law would furnish him no protection against his contract, in such case; for by a subsequent demand of the goods, which he had not the power to comply with, he would be made liable for their value in trover, although he could not be charged in assumpsit. It does not appear in this case that there was such a demand; but if one was made, there is no evidence that the defendant, after he denied his liability on the contract, could have complied with it.

Still less is there any ground for charging the defendant in trover, because the plaintiff was induced to make the contract, upon which he received the goods, by his misrepresentations. The goods were, notwithstanding, received upon a contract; and if the contract had not been rescinded by the defendant, upon the ground of his infancy, there would have been no pretence for an action of trover. His thus rescinding it cannot be held, of itself, to be a conversion.

If after the defendant in this case had interposed his plea of infancy, and refused to perform the contract, the plaintiff had demanded the hats, and the defendant, having them in his possession, had refused to deliver them, that would have been a wilful, positive wrong of itself, disconnected from the contract, and upon such evidence the court in trover might have been maintained. Where goods were sold to an infant, on a credit, upon his representation that he was of full age, and a plea of infancy was interposed, an action of replevin was sustained against his administrator, after a demand upon him. *Badger* v. *Phinney*, 15 Mass. 359. In this latter case, the defense of infancy was made by the administrator of the infant; the demand of the goods was made upon him, and the action sustained against him; but the court said: "The basis of this contract has failed, from the fault, if not the fraud of the infant; and on that ground the property may be considered as never having passed from, or as having revested in, the plaintiff." And upon

this ground, if the infant, having rescinded his contract, withholds the goods purchased, after a demand which he had power to comply with, there seems to be no good reason why he should not answer in trover, the same as for any other conversion of property lawfully in his possession. 6 Cranch, 231; 4 B. & Pul. 140, before cited.

The next question is, whether this action can be maintained against the defendant, for the fraudulent representation that he was of age, by reason of which the plaintiff was induced to sell him the hats, on a credit, and to take his note.

An action may be maintained for false and fraudulent representations, in order to induce a party to sell, and whereby he was induced to sell, goods to one of the defendants, on a credit. *Livermore* v. *Herschell*, 3 Pick, 33, 36.

But *Johnson* v. *Pie*, 1 Lev. 169, was "case, for that the defendant, being an infant, affirmed himself to be of full age, and by means thereof the plaintiff lent him 100*l*., and so he had cheated the plaintiff by this false affirmation." After verdict for the plaintiff, it was moved in arrest of judgment that the action would not lie for this false affirmation, but the plaintiff ought to have informed himself by others. "Kelynge and Wyndham held, that the action did not lie, because the affirmation, being by an infant, was void; and it is not like to trespass, felony, etc., for there is a fact done. Twysden doubted, for that infants are chargeable for trespass. Dyer, 105. And so, if he cheat with false dice," etc. The report in Levinz states that the case was adjourned, but in a note, referring to 1 Keb. 905, 913, it is stated that judgment was arrested.

If this case be sound, the present action cannot be sustained on the first count. From a reference in the margin, it seems that the same case is reported, 1 Sid. 258. Chief Baron Comyns, however, who is himself regarded as high authority, seems to have taken no notice of this case in his Digest, "Action on the Case for Deceit," but lays down the rule that, "If a man affirms himself of full age when he is an infant, and thereby procures money to be lent to him upon mortgage," he is liable for the deceit; for which he cites 1 Sid. 183; Com. Dig. Action, &c., A. 10.

We are of opinion that this is the true principle. If infancy is not permitted to protect fraudulent acts, and infants are liable in action *ex delicto*, whether founded on positive wrongs, or con-

structive torts, or frauds (2 Kent, 197), as for slander (*Hodsman* v. *Grissel*, Noy, 129) and goods converted (auth. *ante*), there is no sound reason that occurs to us why an infant should not be chargeable in damages, for a fraudulent misrepresentation, whereby another has received damage.

In the argument of *Johnson* v. *Pie*, Grove and Nevill's case was cited, "where, in case against an infant, for selling a false jewel, affirming it to be a true one, it was adjudged the action did not lie," and the case seems to have been considered as if the affirmation that he was of age was to be regarded as part of the contract. But there is a wide difference between the two cases. In Grove and Nevill's case, the subject-matter of the contract was the jewel which was sold. The affirmation that it was a true one was a false warranty of the article sold. If the defendant had been of age, assumpsit might have been maintained. The infant was not to be charged, by adopting a different form of action. But the representation in *Johnson* v. *Pie*, and in the present case, that the defendant was of full age, was not part of the contract, nor did it grow out of the contract, or in any way result from it. It is not any part of its terms, nor was it the consideration upon which the contract was founded. No contract was made about the defendant's age. The sale of the goods was not a consideration for this affirmation or representation. The representation was not a foundation for an action of assumpsit. The matter arises purely *ex delicto*. The fraud was intended to induce, and did induce, the plaintiff to make a contract for the sale of the hats, but that by no means makes it part and parcel of the contract. It was antecedent to the contract; and if an infant is liable for a positive wrong connected with the contract, but arising after the contract has been made, he may well be answerable for one committed before the contract was entered into, although it may have led to the contract.

It has been said that "all the infants in England might be ruined," if infants were bound by acts that sound in deceit. But this cannot be a reason why the action should not be maintained for fraudulent wrongs done, for the same reason would seem to apply equally well in cases of slander, trover and trespass. The latter are as much the results of indiscretion as the former, and quite as likely to be committed.

In Bac. Abr., Infancy, I, 3, it is said: "Also, it seems, that

if an infant, being above the age of discretion, be guilty of any fraud in affirming himself to be of full age, or if by combination with his guardian, &c., he make any contract or agreement, with an intent afterwards to elude it by reason of his privilege of infancy, that a court of equity will deem it good against him according to the circumstances of the fraud." 3 Gwillim's Bac. 604. The authorities cited do not seem to state, specifically, the first branch of the proposition in the text; but there are several cases sustaining the general proposition that an infant may be bound, in equity, by a contract which the other party has been induced to enter into by his fraudulent representation or concealment. *Lord Teynham* v. *Webb*, 2 Ves. Sen. 212; *Evroy* v. *Nicholas*, 2 Eq. Cas. Abr. 489, and cases cited; *Beckett* v. *Cordley*, 1 Brown's Ch. 358; Fonblanque's Eq. (4 Am. ed.) 80, *note*, z. At law, he is not bound by the contract, although it was procured by his fraudulent representation that he was of full age. *Conroe* v. *Birsdall*, 1 Johns. Cas. 127. If, in equity, the infant may be bound by the contract, because of his fraud in procuring it, he may well, at law, be answerable for the previous deceit through which it was procured, if he has thereby obtained the property of another and refuses performance on his part.

Our conclusion is that the action may be sustained on the first count.

But we are of opinion that the plaintiff is not entitled to recover, in damages, the costs of the action he commenced on the note, or those which he was obliged to pay in that suit. For aught which appears, he knew, when he commenced that action, that the defendant was an infant, and would avail himself of his infancy. If he chose to try an experiment, he must abide the consequences. For this reason the verdict must be set aside, and

New trial granted.

Huchting v. Engel.

(17 Wisconsin, 230.—1863.)

Error to the Circuit Court.

Action to recover for breaking and entering plaintiff's premises, and breaking down and destroying his shrubbery and flowers therein standing and growing. The answer, after a general denial, stated that if defendant ever committed the alleged trespass, "he did so through the want of judgment and discretion, being an infant of about six years of age."

The circuit court, on appeal, reversed the judgment rendered against the defendant for $3 damages and costs, and the plaintiff sued out the present writ of error.

By the Court, Dixon, C. J. "Infants are liable in actions arising *ex delicto*, whether founded on positive wrongs, as trespass or assault, or constructive torts or frauds." 2 Kent's Com. 241.

"Where the minor has committed a tort with force, he is liable at any age; for in case of civil injuries with force, the intention is not regarded; for in such a case a lunatic is as liable to compensate in damages as a man in his right mind." Reeve's Dom. Rel. 258.

"The privilege of infancy is purely protective, and infants are liable to actions for wrong done by them; as to an action for slander, an action of trover for property embezzled, or an action grounded on fraud committed." Macpherson on Infants, 481 (41 Law Lib. 305).

"Infants are liable for torts and injuries of a private nature; as disseisins, trespass, slander, assault, etc." Bingham on Infancy, 110.

"All the cases agree that trespass lies against an infant." *Hartfield* v. *Roper*, 21 Wend. 620.

This is the language of a few of the many writers and courts who have spoken upon the subject. All agree, and all are supported by the authorities, with no single adjudged case to the contrary. *Jennings* v. *Randall*, 8 Term, 335; *Sikes* v. *Johnson*, 16 Mass. 389; *Homer* v. *Thwing*, 3 Pick. 492; *Campbell* v. *Stakes*, 2 Wend. 137; *Bullock* v. *Babcock*, 3 Wend. 391; *Neal*

v. *Gillett*, 23 Conn. 437; *Humphrey* v. *Douglass*, 10 Vermont, 71. In the latter case the minor was held answerable for a trespass committed by him, although he acted by command of his father.

The authorities cited by the counsel for the defendant in error have no bearing upon the question. They relate to the criminal responsibility of infants; to the question of negligence on their part, as whether it can be imputed to them so as to defeat actions brought by them to recover damages for personal injuries sustained in part in consequence of the negligence or unskilfulness of others; and to the liability of parents and guardians for wrongs committed by infants under their charge by reason of the neglect or want of proper care of such parents or guardians. The case at bar is none of these. The defendant is not prosecuted criminally; the action is not by him to recover damages for personal injury occasioned by the joint negligence of himself or his parents, and another; nor is the liability of the parents involved. The suit is brought to recover damages for a trespass committed by him; not vindictive or punitory damages, but compensation; and for that he is clearly liable. If damages by way of punishment were demanded, undoubtedly his extreme youth and consequent want of discretion would be a good answer.

Judgment of the circuit reversed, and that of the justice of the peace affirmed.

LIABILITY OF LUNATICS.

JEWELL v. COLBY.

(66 New Hampshire, 399.—1890.)

ACTION to recover damages for the death of plaintiff's intestate, alleged to have been caused by the wrongful act of the defendant, under such circumstances as amount in law to felony, except as the same might be modified by proof of the defendant's insanity.

BINGHAM, J. In the agreed case, it appears that the defendant is guilty of causing the death of Martha Fortier by his wrong-

ful act, unless it is otherwise by reason of insanity. The question presented is, whether the defendant is liable for his torts, and especially those committed when insane. The executor or administrator of a deceased person, whose death was caused by the wrongful act or neglect of another, may recover damages of the wrongdoer for the injury to the deceased person and his estate caused by such act, although the death, in law, may be a felony. The cause of action survives, and may be prosecuted by an executor or administrator, the same as by an injured person, when death does not ensue. Laws 1887, c. 71. *French* v. *Mascoma Flannel Co.*, *ante*, p. 90.

Generally an insane person is liable for his torts to the extent of compensation for the actual loss sustained by the injured party; but when the wrong lies in the intent, and the intent is an impossibility, there can be no recovery. Cool. Torts, 103; Sedgw. Dam. (5th ed.) 456, n. 1; 1 Hill. Torts, 228, s. 4; *Lancaster Co. Nat. Bank* v. *Moore*, 78 Pa. St. 407; *Jackson* v. *King*, 15 Am. Dec. 368, n.; *Morain* v. *Devlin*, 132 Mass. 87; *Bullock* v. *Babcock*, 3 Wend. 391, 393. There may be an exception, however, in the case of an inevitable accident. *Brown* v. *Collins*, 53 N. H. 442, 451.

On the facts stated in the case, evidence of the defendant's insanity is not admissible to defeat the right to recover, or at all, unless the plaintiff claims punitive, exemplary, or a greater sum in damages than compensation for the actual loss sustained, and the action may be maintained. If greater damages are sought on account of the intent or malice of the defendant, insanity is a good answer to the same, as an insane person has no will or malice, and the measure of damages is compensation for the actual loss. *Krom* v. *Schoonmaker*, 3 Barb. 647.

Case discharged.

Blodgett, J., did not sit: the others concurred.

Williams v. Hays.[1]

(143 New York, 442.—1894.)

Appeal from a judgment of the General Term of the Supreme Court, which affirmed a judgment in favor of the defendant entered upon a verdict, in an action brought by the plaintiff, as assignee of the Phœnix Insurance Co., to recover the amount paid upon a policy of insurance issued to the firm of Parsons & Loud, as part owners of a vessel.

Earl, J. The defendant and others, among whom were Parsons and Loud, were joint owners of the brig "Sheldon." By an arrangement between the defendant and the other owners he took the vessel to sail on shares. He was to man the vessel, to pay the crew and to furnish the supplies, and he was to have one-half of her earnings, after certain deductions, for his share, and the other owners were to have from him the other half, after certain deductions, for their share. He was to have the absolute control and management of the vessel, and become her owner *pro hac vice*. *Webb* v. *Pierce*, 1 Curt. 113; *Thorp* v. *Hammond*, 12 Wall. 416; *Somes* v. *White*, 65 Me. 542.

The defendant, under the arrangement between him and the other owners, in no sense became their agent or servant. In *Webb* v. *Pierce* it was held that where a master hires a vessel on shares under an agreement to victual and man her, and employ her on such voyages as he thinks best, having thereby the entire possession, command and navigation of her, he thereby becomes her owner *pro hac vice*, and the relation of principal

[1] "There are few decisions on the subject of the liability of insane persons for torts by negligence, and the text-writers appear to be in great conflict. Some of the latter hold that insanity is no defense. 1 Shearman and Redfield on Negligence, § 121; Cooley on Torts, 2d ed., 117. Others incline to the view that insanity should in some cases be a bar. 1 Beavan on Negligence, 2d ed., 52–55; Wharton on Negligence, § 88; 2 Jaggard on Torts, 872; Clerk and Lindsell on Torts, 11, 34. The true view seems to be expressed by Mr. Justice Holmes: 'If insanity of a pronounced type exists, manifestly incapacitating the sufferer from complying with the rule which he has broken, good sense would require it to be admitted as an excuse.' Holmes, The Common Law, 109." X. Harvard Law Rev. 65.

For a criticism of this case, see X. Harvard Law Rev. 182.

and agent does not exist between him and the owners. The other cases are to the same effect. The defendant thus became the charterer or lessee of the vessel and was responsible to the other owners for due care in her management, and so the trial judge held.

The case of *Moody* v. *Buck*, 1 Sand. 304, which holds that one co-owner of a vessel who takes and navigates her for his own benefit, is not liable to his co-owners for her loss by his carelessness, even if correctly decided upon the facts there existing, is not applicable to a case like this, where the co-owner takes the vessel, not in his right as co-owner for the purpose of using his own, but under an agreement with the other owners whereby he becomes the charterer, lessee or bailee of the vessel, and thus bound to some duty of care and fidelity. There can, however, be no question that that case was incorrectly decided, and the rule laid down therein is not consonant with reason or justice. I cannot find that it has ever been followed as authority in any subsequent case and it is in conflict with many authorities. *Sheldon* v. *Skinner*, 4 Wend. 529; *Chesley* v. *Thompson*, 3 N. H. 9; *Herrin* v. *Eaton*, 13 Me. 193; *Martin* v. *Knowllys*, 8 T. R. 145; *Gillot* v. *Dossat*, 4 Martin (La.), 203; Domat's Civ. Law, § 1489; 1 Parsons on Maritime Law, 95; Ford's Law of Merchant Shipping, 35, 45; Cooley on Torts, 328, 659.

The Sheldon was loaded with ice and started from the coast of Maine for a southern port. She soon encountered storms, and the defendant for more than two days was constantly on duty, and then becoming exhausted, he went to his cabin, leaving the vessel in charge of the mate and crew. He took a large dose of quinine and laid down. The mate found that the rudder was broken and useless, and that the vessel could not be steered. He caused the captain to come on deck. He refused to believe that the vessel was in any trouble, and refused the help of two tugs, the masters of which saw the difficulty under which his vessel was laboring, and successively offered to take her in tow. They cautioned him that his vessel was gradually and certainly drifting upon the shore; and in broad daylight she did drift upon the shore without any effort upon the part of the defendant or any of his crew to save her, and she became a total wreck. Parsons and Loud had insured their interest in the Phœnix Insurance Company, and it paid them the loss. It

thus became subrogated to their claim, if any, against the defendant for his negligence or misconduct in the management of the vessel, and it assigned that claim to the plaintiff. He, standing in the shoes of Parsons and Loud, brought this action against the defendant to recover damages for the loss of the vessel, alleging that it was due to his carelessness and misconduct.

The defendant claims that from the time he went to his cabin, leaving the vessel in charge of his mate and crew, to the time the vessel was wrecked, and he found himself in the life-saving station, he was unconscious and knew nothing of what occurred — that in fact he was from some cause insane, and, therefore, not responsible for the loss of the vessel. The case was submitted to the jury on the theory that the defendant, if sane, was guilty of negligence causing the destruction of the vessel, but if insane was not responsible for her loss through any conduct on his part which in a sane person would have constituted such negligence as would have imposed responsibility.

The important question for us to determine then is whether the insanity of the defendant furnishes a defense to the plaintiff's claim, and I think it does not. The general rule is that an insane person is just as responsible for his torts as a sane person, and the rule applies to all torts, except perhaps those in which malice, and, therefore, intention, actual or imputed, is a necessary ingredient, like libel, slander and malicious prosecution. In all other torts intention is not an ingredient, and the actor is responsible, although he acted with a good and even laudable purpose, without any malice. The law looks to the person damaged by another and seeks to make him whole, without reference to the purpose or the condition, mental or physical, of the person causing the damage. The liability of a lunatic for his torts, in the opinions of judges, has been placed upon several grounds. The rule has been invoked that where one of two innocent persons must bear a loss, he must bear it whose act caused it. It is said that public policy requires the enforcement of the liability that the relatives of a lunatic may be under inducement to restrain him, and that tort feasors may not simulate or pretend insanity to defend their wrongful acts causing damage to others. The lunatic must bear the loss occasioned by his torts, as he bears his other misfortunes, and the burden of such loss may not be put upon others.

In Buswell on Insanity (sec. 355) it is said: "Since in a civil

action for a tort it is not necessary to aver or prove any wrongful intent on the part of the defendant, it is a rule of the common law that although a lunatic may not be punishable criminally, he is liable in a civil action for any tort he may commit."

In Cooley on Torts (98) the learned author says: "A wrong is an invasion of right to the damage of the party who suffers it. It consists in the injury done, and not commonly in the purpose or mental or physical capacity of the person or agent doing it. It may or may not have been done with bad motive; the question of motive is usually a question of aggravation only. Therefore, the law in giving redress has in view the case of the party injured, and the extent of his injury, and makes what he suffers the measure of compensation. . . . There is consequently no anomaly in compelling one who is not chargeable with wrong intent to make compensation for an injury committed by him; for, as is said in an early case, 'the reason is because he that is damaged ought to be recompensed.'" And at page 100 he says: "Undoubtedly there is some appearance of hardship — even of injustice — in compelling one to respond for that which, for want of the control of reason, he was unable to avoid; that it is imposing upon a person already visited with the inexpressible calamity of mental obscurity an obligation to observe the same care and precaution respecting the rights of others that the law demands of one in the full possession of his faculties. But the question of liability in these cases, as well as in others, is a question of policy, and it is to be disposed of as would be the question whether the incompetent person should be supported at the expense of the public, or of his neighbors, or at the expense of his own estate. If his mental disorder makes him dependent, and at the same time prompts him to commit injuries, there seems to be no greater reason for imposing upon the neighbors or the public one set of these consequences rather than the other; no more propriety or justice in making others bear the losses resulting from his unreasoning fury when it is spent upon them or their property, than there would be in calling upon them to pay the expense of his confinement in an asylum when his own estate is ample for the purpose."

In Shearman and Redfield on Negligence (sec. 57) it is said: "Infants and persons of unsound mind are liable for injuries caused by their tortious negligence; and, so far as their respon-

sibility is concerned, they are held to the same degree of care and diligence as persons of sound mind and full age. This is necessary, because otherwise there would be no redress for injuries committed by such persons, and the anomaly might be witnessed of a child, having abundant wealth, depriving another of his property without compensation."

In Reeves' Domestic Relations (386) it is said: "Where the minor has committed a tort with force, he is liable at any age; for in case of civil injuries, with force, the intention is not regarded; for in such case a lunatic is as liable to compensate in damages as a man in his right mind."

The doctrine of these authorities is illustrated in many interesting cases. *Bullock* v. *Babcock*, 3 Wend. 391; *Hartfield* v. *Roper*, 21 id. 615; *Krom* v. *Schoonmaker*, 3 Barb. 647; *Conklin* v. *Thompson*, 29 id. 218; *Cross* v. *Kent*, 32 Md. 581; *Neal* v. *Gillett*, 23 Conn. 437; *Huchting* v. *Engel*, 17 Wis. 230; *Brown* v. *Howe*, 9 Gray, 84; *Morain* v. *Devlin*, 132 Mass. 87; *Beales* v. *See*, 10 Penn. St. 56; *Humphrey* v. *Douglass*, 10 Vt. 71; *Morse* v. *Crawford*, 17 id. 499; *Cross* v. *Andrews*, Croke, Elizabeth, 622; *Jennings* v. *Randall*, 8 T. R. 336.

In *Bullock* v. *Babcock*, Judge Marcy, writing in a case where an infant twelve years old was held liable for putting out one of the eyes of another infant, said: "The liability to answer in damages for trespass does not depend upon the mind or capacity of the actor; for idiots and lunatics are responsible in the action of trespass for injuries inflicted by them."

In *Krom* v. *Schoonmaker* it was held that a lunatic may be sued for an injury done to another, because the intent with which the act was done is not material. There the action was against a justice of the peace for false imprisonment for issuing a warrant without any complaint, by virtue of which the plaintiff was arrested.

In *Cross* v. *Kent* it was held that a lunatic or insane person, though not punishable criminally, is liable to a civil action for any tort he may commit; that in an action against a party for setting fire to and burning a barn, neither evidence of his lunacy, nor that the burning was the result of accident, is admissible in mitigation of compensatory damages.

In *Neal* v. *Gillett*, in an action on the case for damages caused by the negligence of the defendants, who were severally of the ages of thirteen and sixteen at the time of the injury, it was

held that where the plaintiff claims only actual damages, the youth of the defendants is not to be taken into consideration in determining the question of their negligence.

In *Huchting* v. *Engel* it was held that an infant, though under seven years of age, was liable in an action of trespass for breaking and entering the plaintiff's premises and breaking down and destroying his shrubbery and flowers.

In *Karow* v. *The Continental Insurance Company* it is said in the opinion: "While the burning of his own property by an assured under no restraint of duty and incapable of care, and without any intent or design, does not relieve the company from liability, yet the same act of burning another's property might subject such person to damages therefor, not on the ground of negligence, as that word is usually understood, but, in the language of Chief Justice GIBSON, 'on the principle that where a loss must be borne by one of two innocent persons, it should be borne by him who occasioned it.'"

In *Brown* v. *Howe* an insane person carelessly set fire to the dwelling house of his guardian, and while it was held that the guardian could not be allowed the amount of his damages in his probate account, it was held that his only course was to sue the administrator of the lunatic who had died, in a court of law, and have a judgment fixing his damages, and collect it from the assets, if the estate was solvent; if not, to share with the other creditors.

In *Morain* v. *Devlin* it was held that a lunatic was civilly liable for an injury caused by the defective condition of a place, not in the exclusive occupancy and control of a tenant, upon real estate of which he is the owner, and of which his guardian has the care and management.

In *Beales* v. *See* it was said by GIBSON, C. J.: "As an insane man is civilly liable for his torts, he is liable to bear the consequences of his infirmity, as he is liable to bear his misfortunes, on the principle that where a loss must be borne by one of two innocent persons it shall be borne by him who occasioned it."

In *Morse* v. *Crawford*, in an action for tort, it was held that the fact that the defendant was insane at the time of committing the injury was no defense to the action, and that if the action be for destroying property intrusted to the defendant, it is no defense that the plaintiff, at the time of delivering the property to the defendant, knew that he was insane. In the

opinion of the court it is said: "It is a common principle that a lunatic is liable for any tort which he may commit, though he is not punishable criminally. When one receives an injury from the act of another, this is a trespass, though done by mistake or without design. Consequently no reason can be assigned why a lunatic should not be held liable."

In *Jennings* v. *Rundall* Lord Chief Justice KENYON said: "If an infant commit an assault, or utter slander, God forbid that he should not be answerable for it in a court of justice." LAWRENCE, J., also writing in that case, mentioned the distinction between negligence and an act done by an infant; and he held that the same rule would have to be applied if an action were brought against an infant for negligently keeping the plaintiff's cattle, by which they died, as would be applied if the declaration charged the infant with having given the cattle bad food by which they died.

There can be no distinction as to the liability of infants and lunatics, between torts of non-feasance and of misfeasance — between acts of pure negligence and acts of trespass. The ground of the liability is the damage caused by the tort. That is just as great whether caused by negligence or trespass; the injured party is just as much entitled to compensation in the one case as in the other, and the incompetent person must, upon principles of right and justice and of public policy, be just as much bound to make good the loss in the one case as the other; and I have found no case which makes the distinction. That infants and lunatics are liable for damage to property caused by their negligent acts, was asserted in several of the authorities above cited; and it has never been doubted that at common law an action of trover would lie against one intrusted with the personal property of another who destroys it, whether the destruction be by a negligent act or a wilful tort.

I sum up the result of my examination of the authorities as follows: This vessel was intrusted to the defendant — not as agent — but as to the other owners as charterer, lessee or bailee, and if he caused her destruction by what in sane persons would be called wilful or negligent conduct, the law holds him responsible. The misfortune must fall upon him and not upon the other owners of the vessel.

If the defendant had become insane solely in consequence of his efforts to save the vessel during the storm, we would have

had a different case to deal with. He was not responsible for the storm, and while it was raging his efforts to save the vessel were tireless and unceasing, and if he thus became mentally and physically incompetent to give the vessel any further care, it might be claimed that his want of care ought not to be attributed to him as a fault. In reference to such a case we do not now express any opinion.

If it could be held that the obligation of the defendant to take due care of the vessel while she was in his possession, under his contract with the other owners, was an obligation springing out of his contract, and thus a contract obligation, such a view of the case would not aid him. He was sane when he entered into the contract, and his subsequent insanity would furnish no defense to an action for a breach of the contract. *Oakley* v. *Mortin*, 11 N. Y. 625; *Booth* v. *Spuyten Duyvil Rolling Mill Co.*, 60 id. 487; *Evans* v. *United States Life Insurance Co.*, 64 id. 304; *Spalding* v. *Rosa*, 71 id. 40.

If it should be found upon the new trial of this action that the defendant's mental condition was produced wholly by his efforts to save the vessel during the storm, and it should, therefore, be held that no fault could be attributed to him on account of what he personally did or omitted to do, then the question would still remain whether the carelessness of his mate and crew, who were his servants, could not be attributed to him, and his liability be thus based upon their carelessness. They did nothing whatever to save the vessel. They did not even expostulate with him or tender him any advice or a word of caution, and yet the mate saw what the captains of the tugs saw at a distance, that something was the matter with him. It is difficult to perceive how they could have failed to see that he was either incompetent to manage the vessel, or that he was wilfully wrecking her. We leave the effect of their conduct upon the defendant's liability to be determined, if it should become necessary, upon the new trial, simply saying that the question is worthy of careful consideration, whether the defendant can allege his own incompetency, and at the same time claim that for any reason the mate ought not to have taken control of the vessel.

The case of *Hays* v. *Phenix Insurance Co.*, 25 J. & S. 199, aff. 127 N. Y. 656, which seems to have controlled the decision below, is not an authority for the defendant. There he brought

an action against the insurance company to recover the amount of his insurance upon this vessel, and his mere carelessness, whether sane or insane, was no defense to such an action. It is an unquestioned rule of law that an insurance company cannot successfully defend an action upon its policy to recover for a loss by showing that the insured destroyed the property while insane, or that its destruction was caused by the carelessness of his agents and servants. The liability of the insured to respond in damages for the loss or destruction of the property of another owner stands upon different principles. *Liverpool S. Co.* v. *Phœnix Insurance Co.*, 129 U. S. 438; *Karow* v. *Continental Insurance Co.*, 57 Wis. 56.

Since writing the above, suggestions have been made by some of my brethren which should receive some attention.

The fact that the defendant was a part owner of the vessel can play no part in this discussion. He did not take the vessel as part owner, but under the contract with the other owners; and as to them, his duties and obligations were such as spring from the relation created by that contract. Further, he was the minority part owner, and the others were the majority part owners, and, as such, had the right and the power to control the vessel against his will. *Ward* v. *Ruckman*, 36 N. Y. 36; *Gould* v. *Stanton*, 16 Conn. 12; *The William Bagaley*, 5 Wall. 406; McLochlin's Merchant Shipping, 89. In *Ward* v. *Ruckman* it was held that the majority owners of a vessel have the right to displace the master at their pleasure, though he be in possession as part owner. In making their contract with the defendant, the other part owners were exercising their right as the majority part owners. *Non constat*, but that they would, except for the contract, have displaced the defendant and appointed some other person master of the vessel. Therefore, as I have before said, he must be treated as the charterer, lessee or bailee of the vessel.

I quite agree, and no one in this case has contended for more, that the defendant was bound, in the navigation and use of the vessel, to bestow only ordinary care, to wit: Such care as a reasonably careful and prudent owner would ordinarily give to his own vessel. Such is the standard of care set up for all bailees of personal property for hire. But what is that standard? It is not such care as a lunatic, a blind man, a sick man, or a man otherwise physically or mentally imperfect or impo-

tent could give. Such a man is not the jural man of ordinary prudence, and he does not furnish the standard. The standard man is no individual man, but an abstract or ideal man of ordinary mental and physical capacity and ordinary prudence. The particular man whose duty of care is to be measured does not furnish the standard. He may fall below it in capacity and prudence, yet the law takes no account of that, but requires that he should come up to the standard and his duty be measured thereby.

So when we have defined, as above, the duty of care resting upon the defendant, we have made no progress in the solution of the question here involved, for it is conceded that he took no care whatever. It is sought, however, to excuse him because he was insane and incapable of care; and the question, and, in the end, the sole question for us to determine, is whether that excuse is a good one; and I have heard no argument to sustain it. It is unquestioned that an insane person is civilly liable for his active torts; and is there then any reason for saying that he is not liable for his negligent torts? To uphold this judgment, we must engraft upon the general rule the exception or qualification that he is not liable for his negligent torts. If the defendant had taken a torch and fired the vessel, he would have been liable for her destruction, although his act was unconscious and accompanied by no free will. But if he had negligently fired the vessel and thus destroyed her, being incapable from his mental infirmity from exercising any care, the claim must be that he would not be liable. Such a distinction is not hinted at in any authority, has no foundation whatever in principle or reason, and cannot stand with authorities I have before cited.

My conclusion, therefore, is that the judgment should be reversed and a new trial granted, costs to abide event.

All concur, except Peckham, Gray and O'Brien, JJ., dissenting.

Judgment reversed. [1]

[1] At the second trial of this action, judgment in favor of the plaintiff, entered upon the direction of a verdict, was affirmed by the Appellate Division of the Supreme Court, but, on appeal to the Court of Appeals, the judgment was again reversed and a new trial granted. In its opinion, per Haight, J., the court said: "This action was considered in this court on a former review (143 N. Y. 442), at which time the law of the case was settled, except upon two points. It was then held that the defendant, as charterer of the brig, was liable for losses which occurred through his

LIABILITY OF MARRIED WOMEN. (1)

FITZGERALD v. QUANN.

(33 Hun, 652.—1884.)

Appeal from an order at Circuit, setting aside a verdict in favor of the plaintiff and dismissing the complaint as to the defendant husband, and from the judgment entered thereon, in an action brought against husband and wife jointly to recover damages for slanderous words alleged to have been uttered by the wife.

BRADLEY, P. J. The question presented is whether the husband may or may not properly be joined as a defendant with his wife in an action for the tort of the latter, having no relation to her separate property. This depends upon the interpretation given to section 450 of the Code of Civil Procedure, which provides that " in an action or special proceeding a married woman appears, prosecutes or defends, alone or joined with

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want of care or skill in the navigation of the vessel; that he was required to exercise such care and skill as a reasonably careful and prudent owner would ordinarily give to his own vessel, and that an insane person is responsible for his torts the same as if sane. The opinion contains some comments of the judge, which have been understood as indicating an intention to do away with any distinction between misfeasance and nonfeasance, and to hold that lunatics and infants were just as liable for their failure to act as they were for their affirmative torts. But when the judge comes to sum up the resnlt of his examination of the authorities, he concludes by stating the rule to be that, if the defendant 'caused her destruction by what in sane persons would be called wilful or negligent conduct, the law holds him responsible.' The final conclusion reached by the judge we accept as the law of this case. Whether a lunatic or a person mentally incapacitated should be held responsible in all instances for his nonfeasance or failure to act we will not now stop to consider." *Williams* v. *Hays*, 157 N. Y. 541, 546.

[1] A married woman " is liable for her wrongful or tortious acts; her husband is not liable for such acts unless they were done by his actual coercion or instigation; and such coercion or instigation shall not be presumed but must be proved." N. Y. Laws of 1896, ch. 272, § 27. And " The husband is not a necessary or proper party to an action or special proceeding to recover damages to the person, estate or character of another on account of the wrongful acts of his wife committed without his instigation." N. Y. Code Civ. Pro., § 450, as amended by Laws, 1890.

other parties as if she was single. It is not necessary or proper to join her husband with her as a party in any action or special proceeding affecting her separate property." The learned justice at Special Term in support of his conclusion sought the reason of the rule which at common law made the husband a necessary party defendant with the wife in actions for her torts, and held that the reason having ceased, the legislative intent fairly derived from that section and consummated by it was to require, that the wife for the purposes of all actions to which she may be a party be treated as a *feme sole*.

It has not been the policy in this State for courts to move any in advance of the clearly expressed legislative purpose to remove the common-law disabilities, rights or liabilities of coverture, or to modify the marital relations (*Tait* v. *Culbertson*, 57 Barb. 9; *Bertles* v. *Nunan*, 92 N. Y. 152), while in some of the States the courts have determined that the reason for the common-law rule relating to the marriage relation in certain respects had been removed by statute, and therefore the rule itself had ceased to exist although the legislature had not by any act in terms abrogated it. And notably in Illinois it was held that the effect of the statute giving the wife the right to acquire, own, control and dispose of property, etc., free from any interference of her husband, was to relieve him from liability to be joined as a defendant with her in actions for her personal torts. (*Martin* v. *Robson*, 65 Ill. 129; 16 Am. R. 578.)

At common law the husband and wife were treated as one person and as having but one will between them, and that in the husband. By the marriage the wife was deemed to surrender to him absolute power of disposition of her personal property, and to collect her choses in action and appropriate to his own use the proceeds, and only such of them as he did not collect were retained by her if she survived him. She could not, at law, make any contract or alone be a party to an action, nor in any manner, except through her husband, defend one in which she was joined as defendant. Of this he had entire control; yet she, as well as he, was charged in execution issued on the judgment recovered. (*McKinstry* v. *Davis*, 3 Cow. 339.) In all actions for debts owing to and by the wife *dum sola*, and for torts committed by and against her before and during coverture, brought while the marriage relation continued, the husband and wife had to be joined as plaintiffs or defendants; and

in all those cases if the husband died before judgment, leaving the wife, the actions survived to her; but if she died leaving him surviving they abated (except that he might, as administrator, continue actions so brought by him and wife to recover such debts.) (*Checchi* v. *Powell*, 6 Barn. & Cress. 253; *Gage* v. *Reed*, 15 Johns. 403; *Williams* v. *Kent*, 15 Wend. 361; *Goulding* v. *Davidson*, 26 N. Y. 606; *Ball* v. *Bullard*, 52 Barb. 141, 143, 144.) And the same rule would apply to rights of action not commenced for such causes. But if judgment was recovered against husband and wife in any such action his liability to pay it was fixed, and his estate was charged after his death with its payment. (*Heard* v. *Stamford*, 3 P. Wms. 409, 411; *Cole* v. *Shurtleff*, 41 Vt. 311; *Burton* v. *Burton*, 5 Harring. 441.) And he was without relief in equity. (*Heard* v. *Stamford*, *supra*.) This liability of the husband continued only during coverture. (*Head* v. *Briscoe*, 5 C. & P. 484.)

This was the general situation at law before the first of the series of statutes known as the married women acts was passed in this State. Those of 1848 and 1849 removed the disability of married women so far as to enable them to acquire, own and dispose of property the same as if unmarried, but as incident to that right she could not alone sue at law (*Morgan* v. *Andrut*, 18 How. 371), until section 114 of the Code of Procedure was given by the amendment of 1849. Then followed the acts of 1860 and 1862, which enlarged their property rights, enabled them to carry on business, appropriate the proceeds of their services, etc., to sue and be sued in all matters relating to their separate property, and to sue for injuries to their person or character the same as if they were single. And although for all torts relating to her property she could sue and be sued alone (*Rowe* v. *Smith*, 55 Barb. 417; affirmed, 45 N. Y. 230; *Baum* v. *Mullen*, 47 N. Y. 577), and for personal wrongs committed against her she could sue alone (*Ball* v. *Bullard*, 52 Barb. 141), yet she could not be sued alone for any personal tort committed by her, but the common law in that respect still remained in force without the aid of the restrictive clause of section 114 of Code of Procedure. (*Tait* v. *Culbertson*, 57 Barb. 9.) The purpose of that section was only to remove disability, and beyond that it was merely declaratory of the common law and did not restrict its operation. But it is said that the husband was joined as defendant with the wife as matter of neces-

sity merely (which involves to some extent the reason for the common law doctrine which required it), and that both the necessity and the reason are gone, and by the force of section 450 of Code of Civil Procedure he cannot be so joined. When the reason upon which a rule of law is founded is clearly defined and is removed the rule itself disappears. (Brown's Legal Maxims [5th ed.], 133, marg. 118; *Berley* v. *Rampacher*, 5 Duer, 186.) But the maxim *cessante ratione legis cessat ipsa lex* cannot be applied to the common-law rule which required the husband to be joined with the wife as defendant in such case. If it might be deemed an arbitrary one, the inquiry into the reason of it involves the consideration of all the rights, obligations, duties, liabilities and disabilities given by the common law to the marital relation. And so far as observed, no writer has yet authentically furnished satisfactorily all the reasons which may have influenced the various conditions of coverture imposed by the common law. It cannot be said that the reasons have ceased to exist in the sense which is required to enable the courts to declare that the rule does not remain. (*Brown* v. *Clark*, 77 N. Y. 369.)

While the common law is not so rigid a system as to wholly disregard changed circumstances of society, and has sufficient elasticity to develop new principles to meet new cases, the courts do not assume to abrogate a well settled principle of it. And whether reasons exist for a change or modification of the common law in any particular is a question peculiarly for the legislature. To justify the conclusions that the provisions of sections 450 of the Code of Civil Procedure either permit a married woman to be sued alone, or require that the husband should not be joined with her in an action like this, that statute must, by fair interpretation of its terms, be sufficient to so permit or require. This the language does not necessarily do if there is any substantial difference in effect between appearing and defending alone, and being sued alone. By the learned opinion at Special Term it appears that the position taken was that there was no liability of the husband in such case. If that is entirely correct, then if the terms of the statute permitted it, it would in effect also require that the wife be a sole defendant, for in such case the right would not survive the necessity to join him. The contention of the defendant's counsel is that the purpose of this section was to sweep away completely the common-law

rule requiring the husband to be joined; that the husband, by that rule, was in no sense liable for the personal torts of the wife, and that he was joined by mere necessity occasioned by disability of the wife, and reference is made to *Capel* v. *Powell*, 17 C. B. [N. S.] 743, decided in 1864, where an action was brought after dissolution of marriage against those who had been husband and wife for a personal tort committed by the latter during coverture. The court held that the action could not be maintained against him; that his liability to be sued in such cases continued only during coverture, and Erle, C. J., in his opinion, said: "Where the husband is joined for conformity, if he dies the action goes on against the wife, but if the wife dies the action abates. It is clear to demonstration, therefore, that there is no cause of action against the husband. He is not liable for the wrong, but is joined only by reason of the universal rule that the wife during coverture cannot be either a sole plaintiff or a sole defendant."

There is no occasion to criticise the decision of the Court of Common Pleas made in that case, nor the opinion of the chief judge so far as related to the necessity of the existence of coverture to permit the husband to be joined, and to the matter of survivorship. They are well established propositions, but further than that it perhaps was not necessary for him to go for the purposes of that case. (See cases above cited and *Head* v. *Briscoe*, 5 C. & P. 484; *Wright* v. *Leonard*, 11 C. B. [N. S.], 265, 266; *Rowing* v. *Manly*, 49 N. Y. 201.) Although the personal tort of the wife is not that of the husband and no imputation for the wrong is against him, the ground upon which his liability to be joined with her as defendant was placed is not very clearly defined. Judge KENT says that the husband is liable for the torts of the wife (2 Kent's Com. 149), and such is generally the expression given by text and judicial writers on the subject. Mr. Bishop, in his work "On the Law of Married Women," says, that to say he is liable for her torts is an inaccurate statement; that the liability is that of the wife, not his, and that he is joined because the suit cannot be maintained against the wife alone. (Vol. 2, § 254; see, also, Cooley on Torts, 115.) Bacon states it, that the husband is "answerable for all her torts and trespasses during coverture, in which cases the action must be joint against them both." (Bac. Abr. Baron & Feme, L.) The fact that "the husband and wife are one person

in law, and her legal existence suspended during the marriage" (1 Bl. Com. 442), may have been a reason of his liability, such as it is. As has been already observed, precisely the same character of liability during the marriage relation existed of the husband for debts contracted by the wife *dum sola* as for her personal torts. It rested on the same doctrine and the effect of survivorship the same. His relation to those debts at common law, and as bearing upon the question under consideration, may perhaps be somewhat illustrated by authority.

In *Miles* v. *Williams* (1 P. Wms. 249, 257), it was held that the discharge of the husband in bankruptcy during coverture discharged the debts of the wife contracted by her before marriage. The bankrupt act, under which he was discharged, provided that "the bankrupt shall be discharged from all debts *by him due and owing* at the time he became bankrupt." In *Lockwood* v. *Salter* (5 Barn. & Adol. 303), decided in 1833, the same was held (S. C. 2 Nev. & M. 255; see Bright on Husband and Wife, 3); but in *Sparks* v. *Bell* (8 Barn. & Cress. 1; S. C. 2 Man. & Ry. 124), decided in 1828, it was held that after judgment against husband and wife, recovered on an ante-nuptial debt of the latter, the discharge of the husband under the insolvent act did not entitle the wife, taken in execution with him, to be discharged from custody unless it appeared that she had no separate property, and the court there said "the debt in question was originally the debt of the wife, by the marriage it became the debt of the husband and wife."

In *Vanderheyden* v. *Mallory*, 1 N. Y. 452, reversing 3 Barb. Ch. 9, it was held that the discharge of the husband under the general bankrupt act of 1841 discharged during coverture the debt of his wife contracted before the marriage. The provision of that act was that the bankrupt shall be entitled to full discharge from all *his* debts. That suit was brought in chancery to reach some separate property of the wife. The court held that it could not be maintained and dismissed the bill. It is difficult to reconcile the theory expressed by the *dictum* of the chief judge in *Capel* v. *Powell*, that the husband is not liable, with the doctrine and consequences applied as appears by adjudications. The solution of the situation seems to be that by the common law the husband during coverture was liable for the torts and ante-nuptial debts of the wife. That such liability did not necessarily rest on him as debtor, nor did it impute to

him any personal wrong on his part, but his liability was as husband and because he was such; and it is not important that such liability was arbitrarily imposed by law, and continued only during coverture, and that it afforded no vested right before judgment against him to recover, after dissolution in any manner of the marriage relation.

That it was nothing short of such liability, and more than a mere necessity to join him as party, is evidenced by the fact that when in such a case a judgment is recovered against him, he and his estate after his death are chargeable with its payment, and without any relief as against the separate estate of the wife; also that his discharge in bankruptcy bars action during coverture. The tort is personal to the wife only; the right of action for it abates with her death, and survives against her alone on the death of the husband or other termination of coverture. The right of the person aggrieved by her tort was at common law to prosecute to judgment the husband while he remained such, and to collect of him the judgment. It is difficult by any qualification to treat that less than a right while the rule of the common law remains. *Hill* v. *Duncan*, 110 Mass. 238, 239. The statute in question (Code Civil Pro. § 450), does not provide either that the husband may not be joined as defendant with the wife or that she may be sued alone. The amendment or annex of 1879 to this section does not restrict the import of the original section, nor does it by relation or implication entitle it to any new or different meaning. While all statutes on this subject are *in pari materia* and to be treated as one, in aid of the interpretation of each, they are not as a whole exceptions to the rule which requires that those in derogation of the common law are to be construed as innovations on it, no further than they by express terms or by fair implication declare. *Perkins* v. *Perkins*, 62 Barb. 531. The common law unity of husband and wife and disabilities by coverture still exist in many respects in this State, and in all respects except so far as the legislative purpose to modify and remove them has been expressed by statute. (*Bertles* v. *Nunan*, 92 N. Y. 152.)

In the provision of the section that "a married woman appears or defends alone," etc., a purpose may be seen to remove her disability, when the husband is joined with her as defendant, to control the defense in her own behalf, which she could not do at common law; although in a proper case she might go

into equity where severalty of husband and wife was recognized and obtain leave to defend. This section (450) gives her the right to do so at law without the aid of a court of equity. (*Janinski* v. *Heidelberg*, 21 Hun. 439.) The interpretation of that section has had consideration in some other cases. In *Hoffman* v. *Lachman*, the Special Term of New York Marine Court; in *Berrien* v. *Steel*, the Special Term in First Department (1 N. Y. Civ. Pro. R., 278, 279 notes); in *Fitzsimmons* v. *Harrington* (id. 360), the Genesee Special Term, and in *Trebing* v. *Vetter* (2 McCarthy Civ. Pro. R. 391). The General Term of Brooklyn in City Court held that the common law rule in question was not removed by the Code of Civil Procedure (§ 450). In *Muser* v. *Miller* (65 How. 283; 3 N. Y. Civ. Pro. R. 388), the Special Term of the New York Superior Court, on a motion to vacate an order of arrest, FREEDMAN, J., held that the common-law rule in that respect was abrogated by operation of that section, and approved the decision and opinion of the Special Term in the case at bar. And the Oneida Special Term in *Lande* v. *Smith* (6 N. Y. Civ. Pro. R. 51), did the same. But *Muser* v. *Miller* has since been overruled in that respect by the General Term of the same court in *Muser* v. *Lewis* (18 Jones & Spencer, 431, and 14 Abbot's N. C. 333), and SEDGWICK, C. J., in delivering the opinion, held that the husband was properly joined as defendant, and that the provisions of the first part of section 450 had no relation to the way in which the wife might be sued, but merely relieved her from the common-law disability of defense where her husband was joined with her as defendant, and permitted her to appear and defend *sui juris* as if she were unmarried.

No legislative intent is found in that section to require that a married woman may be made a sole defendant in an action like this. The statute of Massachusetts (St. 1871, chap. 312), under which the decisions there are made, completely abrogates this common-law rule. (*Hill* v. *Duncan*, 110 Mass. 238; 118 id. 58.)

From the views above given the conclusion follows that the judgment and order appealed from should be reversed.

Present — SMITH, P. J., BARKER and HAIGHT, JJ.

Judgment and order reversed.[1]

[1] Affirmed in 109 N. Y. 441.

WIFE VS. HUSBAND FOR PERSONAL INJURIES. (1)

Abbott v. Abbott.

(67 Maine, 304.—1877.)

Peters, J. The defendants forcibly carried the plaintiff to an insane asylum. The case assumes the act to have been wrongful and wanton. The plaintiff and one of the defendants, at the time, were husband and wife; since then she was divorced. Can an action of tort, for such an injury, instituted after divorce, be sustained by her against her former husband? We have no doubt, that it cannot be maintained.

Precisely the same question was lately before the English court, and the decision and the reasons on which the decision

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1 "Section 27 of the Domestic Relations Law (N. Y. Laws of 1896, ch. 272) provides that 'A married woman has a right of action for an injury to her person, property or character, or for an injury arising out of the marital relation, as if unmarried.' At first glance this provision may seem broad enough to permit a wife to sue her husband in an action for damages for personal injuries. To say that her rights in such cases are coextensive with the rights of unmarried women, is not to say that her rights, in cases of personal injury, include actions against her husband, because the rule of unity can in no wise enter in the case of unmarried women, and the husband's common-law *right of exemption* is a factor to be considered. . . .

"The fact that personal injuries are grouped with injuries to the wife's property cannot justify the conclusion that her rights, in cases of personal injuries, are as broad and inclusive as are her rights in cases of injuries to her property. The powers and rights of a married woman, in respect to her property, are very particularly set forth in section 21 of the Domestic Relations Law, and the intention of the Legislature to abrogate the rule of unity in such cases is clear and unmistakable: 'A married woman has all the rights in respect to property, real or personal, and the acquisition, use, enjoyment and disposition thereof, and to make contracts in respect thereto with any person, *including her husband*, and to carry on any business, trade or occupation, and to exercise all powers and enjoy all rights in respect thereto and in respect to her contracts, and be liable on such contracts, as if she were unmarried.' The Legislature evidently concluded that the expression *any person* was not broad enough to include the husband." (Author's article on Assault and Battery, III. University Law Review, 108; see also id. 67.)

The case of *Abbe* v. *Abbe* (25 App. Div. 483), decided since the passage of the above law, denies the wife the right to sue her husband for personal injuries.

is grounded meet with our unqualified approval. *Phillips* v. *Barnet*, 1 Q. B. D. 436. It is there held that a wife, after being divorced from her husband, cannot sue him for an assault committed upon her during coverture. In the course of the discussion in that case, LUSH, J., says: "Now I cannot for a moment think that a divorce makes a marriage void *ab initio;* it merely terminates the relation of husband and wife from the time of the divorce, and their future rights with regard to property are adjusted according to the decision of the court in each case;" FIELD, J., says: "I now think it clear that the real substantial ground why the wife cannot sue her husband is not merely a difficulty in the procedure, but the general principle of the common law that husband and wife are one person;" and BLACKBURN, J., states the objection to be "not the technical one of parties, but because, being one person, one cannot sue the other."

The theory upon which the present action is sought to be maintained is, that coverture merely suspends and does not destroy the remedy of the wife against her husband. But the error in the proposition is the supposition that a cause of action or a right of action ever exists in such a case. There is not only no civil remedy but there is no civil right, during coverture, to be redressed at any time. There is, therefore, nothing to be suspended. Divorce cannot make that a cause of action which was not a cause of action before divorce. The legal character of an act of violence by husband upon wife and of the consequences that flow from it, is fixed by the condition of the parties at the time the act is done. If there be no cause of action at the time, there never can be any.

The doctrine advocated by the plaintiff finds no support from any of the principles of the common law. According to the oldest authorities, the being of the wife became, by marriage, merged in the being of the husband. Her disabilities were about complete. By the earliest edicts of courts, he had a right to strike her as a punishment for her misconduct, and her only remedy was, that "she hath retaliation to beat him again if she dare." And Chancellor KENT lays down the doctrine, not contradicted or challenged in any of the editions of his commentaries, that, "as the husband is the guardian of the wife, and bound to protect and maintain her, the law has given him a reasonable superiority and control over her person, and he may

even put gentle restraints upon her liberty, if her conduct be such as to require it, unless he renounces that control by articles of separation, or it be taken from him by a qualified divorce." 2 Kent, Com. 180. But there has been for many years a gradual evolution of the law going on, for the amelioration of the married woman's condition, until it is now, undoubtedly, the law of England and of all the American states that the husband has no right to strike his wife, to punish her, under any circumstances or provocation whatever. See, upon this subject, the cases collected in a learned and instructive note to the case of *Commonwealth* v. *Barry*, in 2 Green's Cr. L. Reports, 286. Still, the state of the old common law serves to show the basis upon which the marriage relation subsisted; and we do not perceive that there has been, either by legislative enactment or by the growth of the law in adapting itself to the present condition of society, any change in that relation which can afford the plaintiff a remedy. So to speak, marriage acts as a perpetually operating discharge of all wrongs between man and wife, committed by one upon the other. As said by SETTLE, J., in *State* v. *Oliver*, 70 N. C. 60, "it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive."

We are not convinced that it is desirable to have the law as the plaintiff contends it to be. There is no necessity for it. Practically, the married woman has remedy enough. The criminal courts are open to her. She has the privilege of the writ of *habeas corpus*, if unlawfully restrained. As a last resort, if need be, she can prosecute at her husband's expense a suit for divorce. If a divorce is decreed to her, she has dower in all his estate, and all her needs and all her causes of complaint, including any cruelties suffered, can be considered by the court, and compensation in the nature of alimony allowed for them. In this way, all matters would be settled in one suit as a finality.

It would be a poor policy for the law to grant the remedy asked for in this case. If such a cause of action exists, others do. If the wife can sue the husband, he can sue her. If an assault was actionable, then would slander and libel and other torts be. Instead of settling, a divorce would very much unsettle all matters between married parties. The private matters of the whole period of married existence might be exposed

by suits. The statute of limitations could not cut off actions, because during coverture the statute would not run. With divorces as common as they are now-a-days, there would be new harvests of litigation. If such a precedent was permitted, we do not see why any wife surviving the husband could not maintain a suit against his executors or administrators for defamation, or cruelty, or assault, or deprivations that she may have wrongfully suffered at the hands of the husband; and this would add a new method by which estates could be plundered. We believe the rule, which forbids all such opportunities for lawsuits and speculations, to be wise and salutary and to stand on the solid foundations of the law.

The plaintiff invokes the case of *Blake v. Blake*, 64 Maine, 177, as supporting her right to sue. That was a suit in assumpsit. In matters of contract there may be a cause of action during coverture, not enforceable by the ordinary methods until afterwards. The common law has been so far abrogated by the force of various legislative acts as to allow contracts to be made by husband and wife with each other. And, to a certain extent, contracts between man and wife always were upheld in courts of chancery. That case, therefore, differs from this.

Then, if the husband is not liable, the question arises whether the co-defendants are liable in this action. We think it follows from the previous reasoning that they are not. The true test as to their liability is, whether an action could have been maintained against them at the time of the act complained of. It is clear that no action was then maintainable. If the co-defendants had been then sued, the action must have been in the name of the husband and wife, and the husband would have sued to recover damages for an injury actually committed by himself. Husband and wife must declare that the injury was *ad damnum ipsorum*. She cannot, at common law, sue in her own name alone, nor in his without his consent. She cannot appoint an attorney, ordinarily, but he must do it for her. His conduct and admissions can affect the suit. He can release the cause of action and she cannot. She could do no act to redress an injury to her without his concurrence. Nor has the common law been changed in any of these respects until 1876; which was after this action was commenced. Laws of 1876, c. 112. The damages recoverable in an action

would have belonged to him and not to her. And, at the same time, if she had committed a tort, he would have been civilly liable for it. It is very certain, therefore, that no action could ever have been sustained against them in his name. They merely aided and assisted him. But if there was no injury to him there was none to her. They were one. Without doubt, after the death of the husband, a wife may maintain an action in her own name for a wrong committed upon her while her husband was alive, if no action was instituted nor the cause of action released during his lifetime; and undoubtedly the same right follows after a divorce *a vinculo matrimonii*. But she can only recover for such a wrong as she and her husband could have recovered for in their joint names while the marriage relation subsisted. She succeeds after death or divorce to just such rights as existed before that time. The language of the law is that the right survives to her. But there must be some right in existence to survive. Here there was none. A thing cannot continue after an event which does not exist before. It would not be the survival of a claim, but would be one newly created. *Norcross* v. *Stuart*, 50 Maine, 87; *Marshall* v. *Oakes*, 51 id. 308; *Ballard* v. *Russell*, 33 id. 196; *Laughlin* v. *Eaton*, 54 id. 156; *West* v. *Jordan*, 62 id. 484; *Hasbrouck* v. *Weaver*, 10 Johns. 247; *Snyder* v. *Sponable*, 1 Hill (N. Y.), 567; Bacon Ab., Baron and Feme, K.; *Shaddock* v. *Clifton*, 22 Wis. 114.

Plaintiff nonsuit.

Appleton, C. J., Walton, Dickerson and Virgin, JJ., concurred. Barrows, J., concurred in the result.

LIABILITY OF CORPORATIONS, IN GENERAL.[1]

GOODSPEED v. THE EAST HADDAM BANK.

(22 Connecticut, 530.—1853.)

ACTION on the case, for a vexatious suit, against the defendant, a corporation.

CHURCH, C. J. This action is based upon the provisions of our statute, entitled, "An act to prevent vexatious suits," and

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[1] The old idea that a corporation, being an artificial person created by the sovereign, and endowed with certain powers, and none other, could not commit an actionable tort, has long since been abandoned. To-day, a corporation is liable for its wrongful acts to the same extent and under the same circumstances as a natural person. Actions for libel (*Samuels* v. *Evening Mail Association*, 75 N. Y. 604; *Fogg* v. *Boston & L. R. Co.*, 148 Mass. 513; *Evening Journal Association* v. *McDermott*, 44 N. J. L. 430; *Hewett* v. *Pioneer Press Co.*, 23 Minn. 178; *Ætna Life Ins. Co.* v. *Paul*, 37 Ill. App. 439); for conversion (*Fishkill Savings Inst.* v. *Bostwick*, 19 Hun, 354); for conspiracy (*Morton* v. *Met. Life Ins. Co.*, 34 Hun, 366; *Krulevitz* v. *Eastern R. Co.*, 140 Mass. 575); for assault and battery (*Denver & R. G. R.* v. *Harris*, 122 U. S. 597; *Ramsden* v. *Boston & A. R. Co.*, 104 Mass. 117); for false imprisonment (*Lynch* v. *Met. El. R. Co.*, 90 N. Y. 77); for deceit (*Cragie* v. *Hadley*, 99 N. Y. 131; *Kennedy* v. *McKay*, 43 N. J. L. 288); and for malicious prosecution (*Morton* v. *Met. Life Ins. Co.*, 34 Hun, 366; *Reed* v. *Home Savings Bank*, 130 Mass. 443; *Nat. Bank* v. *Graham*, 100 U. S. 699) have been successfully prosecuted against corporations. This is as it should be. The liability of corporations in tort may properly and logically be determined by the application of the law in relation to master and servant. A corporation, as an artificial person, cannot do anything of itself; it must and always does act through officers or agents, who stand to the artificial body as servant to master. As the master, a natural person, is responsible for the tortious acts of his servant committed within the scope of his employment, so is the corporation, an artificial person, responsible for the tortious acts of its servants committed within the scope of their employment. A remnant of the antiquated conception of the responsibility of corporations for torts seems still to survive so far as actions for slander are concerned. In *Eichner* v. *Bowery Bank*, 24 App. Div. 63, it was held that a corporation was not liable for slander, because "the corporation itself could not talk." (See to same effect Odgers on Libel and Slander, p. 368; Townshend on Slander and Libel, § 265.) Such conclusion, however, is not consonant with the modern conception of corporations, and rests too literally upon the idea that a corporation is an ideal person. A proper application of the law relating to master and servant would avoid such misconception.

is subject to the same general principles as are actions on the case, for malicious prosecutions, at common law.

The plaintiff alleges, that the defendants, the East Haddam Bank, a body politic and corporate, without probable cause, and with a malicious intent, unjustly to vex, harass, embarrass, and trouble the plaintiff, commenced, by a writ of attachment, and prosecuted against him, a certain vexatious suit or action for fraudulent representations, to the injury of said bank, and which action resulted in a verdict and judgment against the bank, and in favor of the present plaintiff.

On the trial of this cause, by the superior court, the defendants moved for a nonsuit, on the ground that the plaintiff, by his evidence had failed to make out a *prima facie* case; which motion the court granted, and judgment of nonsuit was entered against the plaintiff, which he now moves to set aside.

The judgment of the superior court, in granting the nonsuit, as we understand, was founded solely upon the ground, that a corporation aggregate was not, by law, liable for such a cause of action as was set up by the plaintiff, in his declaration; at least, no other ground of nonsuit or objection to the plaintiff's action has been argued before us. And, therefore, irrespective of the evidence detailed in the motion, we confine ourselves to what we suppose to be the sole question in the case.

We assume, that the plaintiff has sustained the damage he claims, by reason of the prosecution of the vexatious suit, and the question is, has he a legal remedy against the bank?

The claim of the defendants is, that the remedy for this injury, is to be sought against the directors of the bank, or the individuals, whoever they might have been, by whose agency the vexatious suit was prosecuted, and not against the corporation. We think, that, to turn the plaintiff round, to pursue the proposed remedy, would be trifling with him and with his just rights, and would be equivalent to declaring him remediless; and, in this case, at least, that there was a wrong where there is no remedy. It is notorious that, ordinarily, the action of bank directors is private,—that their records do not disclose the names of the individuals supporting or opposing any resolution or vote, and if they do, that the offending persons may be irresponsible and insolvent. The language of Tilghman, C. J., in a case very similar to the present, in which it was urged, that a corporation was not liable for a suit, but only the indi-

viduals committing it, is applicable here. "This doctrine," he said, "was fallacious in principle, and mischievous in its consequences, as it tends to introduce actual wrongs and ideal remedies; for a turnpike company might do great injury, by means of laborers having no property to answer damages," etc. 4 Serg. & Rawle, 16. To the same effect is the language of Shaw, C. J., in the case of *Thayer* v. *Boston*, 19 Pick. 511. He says, "The court are of opinion, that this argument, if pressed to all its consequences, and made the foundation of an inflexible, practical rule, would often lead to very unjust results."

Still more explicit is the opinion of the court, in the case of *The Life and Fire Insurance Company* v. *Mechanics' Fire Insurance Company*, 7 Wend. 31. There, as here, it was contended, that the act was unauthorized, and must therefore be considered as the act of the officers of the company, and not of the company itself. And the court says, "This would be a most convenient distinction for corporations to establish: that every violation of their charter or assumption of unauthorized power, on the part of their officers, although with the full knowledge and approbation of the directors, is to be considered the individual act of the officers, and is not to prejudice the corporation itself. There would be no possibility of ever convicting a corporation of exceeding its powers, and thereby forfeiting its charter, or incurring any other penalty, if this principle could be established."

The real nature, as well as the law, of corporations, within the last half century, has been in a progress of development, so that it has grown up, from a few rules and maxims, into a code. In the days of Blackstone, the whole subject of corporations, and the laws affecting them, were discussed within the compass of a few pages; now, volumes are required for this purpose. These institutions have so multiplied and extended within a few years, that they are connected with, and in a great degree influence, all the business transactions of this country, and give tone and character, to some extent, to society itself. We do not complain of this; but we say, that, as new relations, from this cause, are formed and new interests created, legal principles of a practical rather than of a technical or theoretical character must be applied.

And so, in the course of this progress, it has been. It was

said by Lord Coke, "that corporations had neither souls nor bodies;" and by somebody else, "that they had no moral sense;" and from thence, or some other equally insufficient reason, it was inferred, and so repeatedly adjudged, that they could not be subjected in actions of trover, trespass, or disseisin, and indeed, that they could not commit wrongs, nor be liable for torts, with a few exceptions, as we shall see.

Had Lord Coke lived in this age and country, he would have seen, that corporations, instead of being the soulless and unconscious beings he supposed, are the great motive powers of society, governing and regulating its chief business affairs; that they act, not only upon pecuniary concerns; but, as having conscience and motives, to an almost unlimited extent, they are entrusted with the benevolent and religious agencies of the day, and are constituted trustees and managers of large funds promotive of such objects.

The views of the old lawyers, regarding the real nature, power and responsibilities of corporations, to a great extent, are exploded in modern times, and it is believed, that now, these bodies are brought to the same civil liabilities as natural persons, so far as this can be done practically, and consistently with their respective charters. And no good reason is discovered, why this should not be so; nor why it cannot be done, in a case like this, without violating any sensible or useful principle.

And although it was truly said, and for obvious reasons, that corporations could not be punished corporally, as traitors or felons, yet they may be, and have often been, subjected to fines and forfeitures, for malfeasance, and even to the loss of corporate life, by the revocation of their charters. And now it seems to be generally admitted, that they are civilly responsible, in their corporate capacities, for all torts which work injury to others, whether acts of omission or commission; for negligence merely, and for direct violence. *Yarborough* v. *Bank of Eng.*, 16 East, 6; *Beach* v. *Fulton Bank*, 7 Cowen, 436; *Foster* v. *Essex Bank*, 17 Mass. 503; *Riddle* v. *Proprietors of Locks and Canals*, 7 id. 187; *Chestnut Hill Turnpike* v. *Rutter*, 4 Serg. & Rawle, 16; 4 Hammond, 500, 514; 10 Ohio Rep. 159; *Dater* v. *Troy Turnpike Co.*, 2 Hill, 630; 23 Pick. 139; 2 Bl. Com. 476; Ang. & Ames, 392; 2 Kent, Com. 290; 1 Sw. Dig. 75; 15 Ohio Rep. 476; 18 id. 229. And indeed,

no actions are now more frequent, in our courts, than such as are brought against corporations, for torts, either in case or trespass. *Hooker* v. *New Haven & Northampton Canal Co.*, 14 Conn. R. 146, and the cases there cited, and many others since reported. In a late case in England, it has been adjudged, adversely to former opinions, that an action of assault and battery may be sustained against a corporation. *Eastern Counties Railway Co.* v. *Brooks*, 2 Eng. Law & Equity, 406. And it was decided long ago, that a corporation was liable to an action, for a false return to a writ of *mandamus*, alleged to have been made falsely and *maliciously*. 16 East, 8; 14 Eng. Com. Law, 159; 3 Mees. & Wels. 244; Ang. & Ames, ch. 10, sec. 9.

In all the cases, wherein it has been holden, that corporations may be subjected to civil liabilities for torts, the acts charged as such, have been the acts of their constituted authorities, either the directors, or agents, or servants, employed by them. We do not here intend to discuss or decide the frequently suggested question, how far, or when a principal, whether an individual person, or a corporation, becomes responsible for the wilful or malicious act of his servant or agent, as distinguished from his mere negligence, although it has been brought into the argument of this case, because we do not admit, that the present case falls within the operation of the rule of law on this subject, even as the defendants claim it.

The truth is, the action complained of, as vexatious, was instituted by the bank, in the name of the bank, and, as should be presumed, in just the same way and by the same agencies and means, as all other suits by these institutions are commenced and prosecuted, and nothing appears here, showing any different procedure than is usual, in actions by corporations. The action was brought, for the sole benefit of the bank, for the recovery of money to which the bank was entitled, if anybody, and for an injury sustained by the bank, in its corporate capacity. The bank, by its charter, and the general laws, had power to sue for such a cause of action; and what seems to us yet more conclusive, is, that if this suit was originated by the misconduct of directors, or any officer of the company, it has never been repudiated, and may, by the acquiescence of the bank, be considered as sanctioned by it. Ang. & Ames, ch. 10, sec. 9. No act of agency appears here, which

does not appear in all suits brought by corporations, and nothing to show, that any individuals are, or ought to be, made responsible for the institution and prosecution of the groundless suit, as distinct from the corporation itself.

The doctrine, that principals are not responsible for the wilful misconduct of their agents, as seems to have been sanctioned in the cases of *McManus* v. *Cricket*, 1 East, 106; *Wright* v. *Wilcox*, 19 Wend. 343; *Vanderbilt* v. *Richmond Turnpike Co.*, 2 Comstock, 470; but denied by Chief Justice Reeve, in his Domestic Relations, 357, we think has never been applied to such a case as this, but only to the acts of agents or servants, properly so called; or such as act under instructions and a delegated authority,—persons whose duty is to obey, not to control; as attorneys, cashiers, or others employed by the corporation. The president and directors of a bank, instead of being mere servants, are really the controlling power of the corporation,—the representatives, standing and acting in the place of the interested parties. Indeed, they are the mind and soul of the body politic and corporate, and constitute its thinking and acting capacity. In the case of *Burrell* v. *The Nahant Bank*, 2 Met. 163, Shaw, C. J., expresses and defines the true rule of appreciating the character and powers of bank directors. He says: "We think the exception takes much too limited and strict a view of the powers of bank directors. A board of directors is a body recognized by law. By the laws of these corporations, and by the usage, so general and uniform, as to be regarded as part of the law of the land, they have the general superintendence and active management of all the concerns of the bank, and constitute, to all purposes of dealing with others, *the corporation*. We think they do not exercise a delegated authority, in the sense to which the rule applies to agents and attorneys," etc. The same principle is very distinctly recognized, in the cases of *Bank Commissioners* v. *Bank of Buffalo*, 6 Paige's Ch. 502, and *Life and Fire Ins. Co.* v. *Mechanics' Fire Ins. Co.*, 7 Wend. 31. It has been said, that the stockholders constitute the corporation. It may be so, to the extent to which they have the power to act,—and this is only in the choice of directors, and no more. Beyond this, they can only be considered, as the persons for whose ultimate individual interests the corporation acts. The directors derive all their power and authority from the charter and laws, and none from the stockholders.

But the fear is expressed, that, by thus considering and treating the character and acts of the directors of a bank or other corporation, the stockholders are subject to loss, without fault of their own. This may to some extent, be true; but the protection of the law in this matter, is not to be confined to stockholders; the public and strangers have rights also. The stockholders are volunteers, and they have consented to assume the risk of the faithful or unfaithful management of the corporation. If, in this case, one of two innocent persons or classes is to suffer, which should it be, — that one which is brought in to suffer loss, without its consent or power to prevent it, or the one which has created the power and selected the persons to enforce it?

But, after all, the objection to the remedy of this plaintiff against the bank, in its corporate capacity, is not so much, that, as a corporation, it cannot be made responsible for torts committed by its directors, as that it cannot be subjected for that species of tort, which essentially consists in motive and intention. The claim is, that as a corporation is ideal only, it cannot act from malice, and therefore, cannot commence and prosecute a malicious or vexatious suit. This syllogism, or reasoning, might have been very satisfactory to the schoolmen of former days; more so, we think, than to the jurist who seeks to discover a reasonable and appropriate remedy for every wrong. To say that a corporation cannot have motives, and act from motives, is to deny the evidence of our senses, when we see them thus acting, and effecting thereby results of the greatest importance, every day. And if they can have any motive, they can have a bad one,—they can intend to do evil, as well as to do good. If the act done is a corporate one, so must the motive and intention be. In the present case, to say, that the vexatious suit, as it is called, was instituted, prosecuted, and subsequently sanctioned, by the bank, in the usual modes of its action; and still to claim, that, although the acts were those of the bank, the intention was that only of the individual directors, is a distinction too refined, we think, for practical application.

It is asked, how can the malice of a corporation be proved? It must be proved, it is said, as well as alleged, in an action for a malicious prosecution, as a distinct and essential fact; and the declarations and admissions of individual members, whether

directors or others, are not admissible to prove it. True, malice must be proved, and, as we suppose, very much in the same manner as it is proved in other cases, of a similar nature, against individual persons. The want of probable cause of action is proof of malice, and for aught we know, also, the records of the bank may show it. It is enough to say, in this, as in all other cases, that if the plaintiff cannot, in some legitimate way, prove the malice he has alleged, he cannot recover; but we have no right to assume it as a legal principle, that it cannot be proved. We do not know that it has ever been adjudged, that a corporation is civilly responsible for a libel. But, among the great variety and objects of these institutions, it is probable that the newspaper press has come in for its share of the privileges supposed to be enjoyed under corporate powers. Proof of the falsehood of slanderous charges, is evidence of malice, and which must, as in this case, be proved. But, would it be endured, that an association, incorporated for the purpose suggested, could, with impunity, assail the character and break down the peace and happiness of the good and virtuous, and the law afford no remedy, except by a resort to insolvent and irresponsible type-setters, and for no better reason, than that a corporation is only an ideal something, of which malice or intention cannot be predicated? And if, as we have suggested, the directors are, for all practical purposes, *the corporation* itself, acting, at least, as its representatives, we can see no greater difficulty in proving their motives good or bad, than in thus proving the motives of other associated or conspiring bodies. We are sure, that this objection of the defendants, was not discovered, or was not regarded as sufficient, nor the difficulty of proving malice upon a corporation, felt, when the case of *Merrills* v. *The Tariff Manufacturing Co.*, 10 Conn. R. 384, was tried at the circuit, and discussed and decided by this court. That was an action against a corporation, for a malicious injury, and the sole question in this court was, whether, by reason of the malicious intent, the company was liable for aggravated or vindictive damages; and it was holden to be thus liable, in a very elaborate opinion, drawn up, and strongly expressed, by Huntington, J.

The interests of the community, and the policy of the law demand that corporations should be divested of every feature of a fictitious character, which shall exempt them from the or-

dinary liabilities of natural persons, for acts and injuries committed by them and for them. Their immunities for wrongs are no greater than can be claimed by others, and they are entitled to an equal protection, for all their rights and privileges, and no more.

For the reasons suggested, a majority of the court is of opinion, that the nonsuit granted by the superior court should be set aside, and a new trial granted.

Nonsuit set aside, and new trial to be granted.[1]

MUNICIPAL CORPORATIONS.[2]

MAXMILIAN v. THE MAYOR, ETC.

(62 New York, 160.—1875.)

APPEAL by the plaintiff from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the defendants entered upon an order dismissing the complaint, in an action to recover damages for the death of plaintiff's intestate who, on May 26, 1871, while attempting to board a street car in the city of New York, was struck and run over by an ambulance wagon, driven by an employee of the Commissioners of Public Charities and Corrections.

FOLGER, J. It is sought to charge the defendant in this case, upon the rule that the employer must answer for the negligent

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[1] Opinion by Ellsworth, J., omitted.

[2] The exemption of municipal corporations from liability for torts committed in the exercise of governmental and public powers, conferred for purposes pertaining to the administration of general laws made to enforce the general policy of the state, rests upon the rule that sovereignty is not subject to suit, except by its own consent. The state or general government is as capable of wrong as an individual, but the difficulty lies with the remedy, not with the right. (See Cooley on Torts [2d ed.], 141; *City of Galveston* v. *Posnainsky*, 62 Texas, 118, 127.)

"As to what are public and governmental duties, and what are private or corporate duties, the courts are not in harmony, and their decisions do not furnish any definite line of cleavage. It is important, in every case, to determine the liability by a true interpretation of the statutes under which the corporation is created. Indeed, it may occur that the liability of a municipality depends exclusively on the statute.

act of the servant: the rule of *respondeat superior*. And it is clear that upon no other principle can the defendant be charged. Conceding that the ambulance wagon and the horse before it, were the property of the defendant, there is no intimation that the establishment was not, in all respects, such as was fitting for the use for which it was kept, and to which it was in fact put at the time. It was personal property, well adapted to the service in which it was engaged, in itself innoxious. The harm to the plaintiff's intestate resulting alone from the immediate negligent use of it by the driver of the wagon, the servant in whose charge it was; on the ground alone of a responsibility for that negligence, as the negligence of its servant, can the defendant be charged. This rule of *respondeat superior*, is based upon the right which the employer has to select his servants, to discharge them if not competent, or skillful or well behaved, and to direct and control them while in his employ. *Kelly* v. *Mayor*, 11 N. Y. 432. The rule has no application to a case in which this power does not exist. *Blake* v. *Ferris*, 5 N. Y. 48. It results from the rule being thus based, that there can be but one superior at the same time and in relation to the same transaction (*Langher* v. *Pointer*, 5 Barn. & Cres. 560); as the law does not recognize two principals who are unconnected and severally responsible. *Hobbit* v. *L. & N. W. Railway*, 4 Exch. 253; *Pack* v. *The Mayor*, 8 N. Y. 222. And yet there may be sub-agents, servants under a servant; and whether they be appointed by the master or principal directly, or intermediately through the intervention of an agent authorized by him to appoint servants for him, can make no difference. *Quarman* v. *Burnett*, 4 Mees. & Welsb. 499. That a municipal corporation, as is the defendant, may be placed

"At one extreme, the exemption of municipal corporations from liability for torts is clear. Thus, they are not liable for damages consequent upon conduct of fire, police, health, or public park departments, or for the exercise or non-exercise of a discretionary, legislative, or judicial power as distinguished from a ministerial power.

"At the other extreme, municipalities are generally held liable for negligence, in construction, maintenance, or use of their streets, sidewalks, sewers, and levees. They are answerable in damages for trespass on private property. While a city is not ordinarily liable for failure to exercise its corporate power to abate a nuisance of some third party doing damage, it is responsible for wrongful exercise of power to abate a nuisance, and for maintaining a nuisance, of its own.

"Between these extremes, the line of distinction is often obscure." Jaggard on Torts, I., p. 173 *et seq.*, and cases there cited.

by the facts of a certain case under the effect of this rule, and made answerable for the negligent use of its well adapted personal property by its servant or sub-servant, need not be denied. *Lee* v. *Sandy Hill*, 40 N. Y. 442; *Clark* v. *Washington*, 12 Wheat. 40; *Scott* v. *The Mayor*, 37 Law & Eq. 495. The difficulty is not here; it is in determining, in a particular case, whether the negligent employee is the servant of the municipality, for it is not every one who has in charge personal property owned by the municipality, and sets about some lawful act with it within the municipal bounds, that is its servant; nor even if his appointment comes intermediately or immediately from the municipality itself. If the act of the officer or the subordinate of the officer thus appointed, is done in the attempted performance of a duty laid by the law upon him and not upon the municipality, then the municipality is not liable for his negligence therein. Such is the general principle laid down in *Martin* v. *The Mayor*, 1 Hill, 545, and re-asserted in *Lorillard* v. *The Town of Monroe*, 11 N. Y. 392, and in other cases. See, also, *Russell* v. *The Mayor*, 2 Denio, 461; *Bk. Comm.* v. *Mayor*, *etc.*, 43 N. Y. 184–189. There are two kinds of duties which are imposed upon a municipal corporation: One is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises, or is implied, from the use of political rights under the general law, in the exercise of which it is as a sovereign. The former power is private, and is used for private purposes; the latter is public and is used for public purposes. *Lloyd* v. *The Mayor*, 5 N. Y. 374. The former is not held by the municipality as one of the political divisions of the State; the latter is. In the exercise of the former power, and under the duty to the public which the acceptance and use of the power involves, a municipality is like a private corporation, and is liable for a failure to use its power well, or for an injury caused by using it badly. But where the power is intrusted to it as one of the political divisions of the State, and is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for nonuser, nor for misuser by the public agents. *Eastman* v. *Meredith*, 36 N. H. 284. Where the duties which are imposed upon municipalities are of the latter class, they are generally to be performed

by officers who, though deriving their appointment from the corporation itself, through the nomination of some of its executive agents, by a power devolved thereon as a convenient mode of exercising a function of government, are yet the officers, and hence the servants, of the public at large. They have powers and perform duties for the benefit of all the citizens, and are not under the control of the municipality which has no benefit in its corporate capacity from the performance thereof. They are not then the agents or servants of the municipal corporation, but are public officers, agents or servants of the public at large, and the corporation is not responsible for their acts or omissions, nor for the acts or omissions of the subordinates by them appointed. *Fisher* v. *Boston*, 104 Mass. 87. And where a municipal corporation elects or appoints an officer, in obedience to an act of the legislature, to perform a public service, in which the corporation has no private interest and from which it derives no special benefit or advantage in its corporate capacity, such officer cannot be regarded as a servant or agent of the municipality, for whose negligence or want of skill it can be held liable. It has appointed or elected him, in pursuance of a duty laid upon it by law, for the general welfare of the inhabitants or of the community. *Hafford* v. *New Bedford*, 16 Gray, 297. He is the person selected by it as the authority empowered by law to make selections; but when selected and its power exhausted he is not its agent, he is the agent of the public for whom and for whose purposes he was selected. So that it may be, that a driver of an ambulance wagon owned by the defendant, is neither its servant nor under-servant, for whose negligence it is responsible. How this is, is to be arrived at by a consideration of the provisions of law, under which the driver took charge of and conducted the horse and wagon. It is easily gathered from the case that he was not chosen immediately by the defendant, nor by any of its agents falling within the class of its executive officers, nor was he immediately controllable or removable by it or by them. He was immediately selected by, was under the immediate control of and power of removal of, the commissioners of public charities and correction. His payment came immediately from them, though the moneys therefor came out of the municipal treasury. Hence, he was no nearer, at the best for the plaintiff, than a sub-agent of the defendant; and not that, unless the commissioners of charities

and correction were agents of the defendant rather than public officers of the greater public. These commissioners have their direct creation, their direct grant of power and their direct imposition of duty from the act of 1860 (Laws of 1860, chap. 510, p. 1026), though they succeed to the powers and duties of similar officers theretofore existing. By this act that department is created in the city and county of New York, and it is declared that there shall be chief officers thereof, and their name of office is designated. (Sec. 1.) They thereby have their appointment from the comptroller of the city and county, though since then they are made a department of the city and appointable by the mayor. Laws of 1870, chap. 137, p. 366, §§ 29, 30; page 386, § 80. It is not needed that I minutely enumerate all the powers which were conferred upon this department and its chief officers. They were powers of control, management, maintenance and direction, over all the real and personal property which theretofore was of the almshouse department, with certain exceptions immaterial here, and of appointment and removal of subordinate officers, and to require of the supervisors of the county the levy by tax of such moneys as should be needed by them, and of control of the poor and of certain other persons. The duties of this department and its head officers were to care for paupers, for poor and destitute children, for lunatics and strangers, and for certain persons committed for offences. This becomes the practical question: Are the acts, which are to be done by the commissioners of charities and correction, acts to be done by them in their capacity as public officers in the discharge of duties imposed upon them by the legislature for the public benefit; or are they acts done for the defendant, in what may be called its private character, in the management of property or rights voluntarily held by it for its own immediate profit or advantage as a corporation, though inuring ultimately to the benefit of the public? *Oliver* v. *Worcester*, 102 Mass. 489. There can be but one answer. The defendant is in no different position, in kind, from that in which is placed a township the most retired, the most sparse in population, in the State. The latter is under a law which requires its electors to elect officers, whose powers and duties are of the kind which the commissioners of charities and correction have. Those officers may for the time, as do the commissioners permanently, employ

servants. The town has not the selection of those servants, nor the control nor power of removal of them. Nor is it interested, as a municipal division of the State, for its private emolument or advantage, in their acts. The overseers of the poor of a town, and the commissioners of charities and correction, are public officers, though getting their right of office from a circumscribed locality; and the acts which they may do, are to be done in their capacity as public officers, in the discharge of duties laid upon them by the law for the public benefit, and far removed from acts done by city or town, in its municipal character, in the management of its property for its own profit or advantage. It is seen at once that the powers and duties of the commissioners of charities and corrections are not to be exercised and performed for the especial benefit of the defendant. It gets no emolument therefrom, nor any good as a corporation. It is the public, or individuals as members of the community, who are interested in the due exercise of these powers and the proper performance of their duties. They are such powers as are to be held by some officers throughout the State, in every part thereof, such duties as are to be performed in every local political division of the State, not for the peculiar benefit of such division but for the public, in the discharge of its duty to suffering or wayward members of the whole body politic. The territorial boundaries of the defendant are taken by the legislature acting as the organ of the sovereign power, and within them is created a department, and constituted a board of chief officers which, within those boundaries, is to have the power to use the public moneys of that political division of the State, for the due discharge of the duty of the State in that locality to the poor, the crazed, the wicked. It is a public duty laid upon the defendant, as a convenient mode of exercising a function of government, that it should, through its chief executive officer, from time to time appoint the chief officers of this department, and from time to time supply it with the means of performing its special public duties. These chief officers, though in a sense its officers, as having no power unless after appointment by it, and as mainly confined within its territorial boundaries, are yet officers of the State government, in the sense that they perform its function within a designated political division of the State. The defendant may not control them, save in strict accordance with

the provisions of law. It does not select, nor control, nor remove, nor immediately pay their subordinates, their agents, their servants, and may not do so. How then does the principle of *respondeat superior*, apply to its relations to them and to the plaintiff, upon the case which she brings here? Nor does a review of all the various legislative provisions by which, in this division of the State, like duties have been performed by the exercise of like powers, though by officers, predecessors of these, deriving authority in slightly differing ways and to slightly differing extent, lead to a different conclusion as to the relation of the defendant to them. Through all the changes of enactment, it has been a duty laid upon this political division of the State, to provide the officers and the moneys for the care of certain classes of citizens; a duty, from the discharge of which no especial corporate benefit was to be had, and which was but the exercise of general power through local instrumentalities. The driver, the negligent actor, was the servant of the commissioners of the department of charities and correction. He was appointed by them, and put in charge of property of the defendant which was under their especial control. He was under their control only, liable to direction and removal by them only. He received his compensation directly from them, at a rate fixed by them. He could have but one superior liable for his negligent acts. The defendant was not that superior; for he was not its servant by immediate appointment, nor was he its sub-servant; for the commissioners though appointed by the defendant, in obedience to the statute, were selected to perform a public service not peculiarly local or corporate, because that mode of selection was deemed expedient by the legislature in the distribution of the powers of government, and are independent of the defendant in the tenure of their office and the manner of discharging their duties, are not to be regarded as servants or agents of the defendant, for whose acts or negligences it is liable, but as public or State officers with the powers and duties conferred upon them by statute.

There are cases, some of which are cited by the plaintiff, which are supposed by counsel to conflict with these views, but they are to be distinguished, and rest upon principles at harmony with those relied upon here. Where the duty is upon the city itself and not upon public officers appointed by it, where it accepts the duty and the power to perform it, and itself, by its

own agents, sets about the work, or undertakes to set about it by its own agents, then, for negligent omission to do or for doing in a negligent way, it may be liable. Such was *Jones* v. *New Haven*, 34 Conn. 1. The power there given, from which the duty arose which was neglected, was said to be a power or privilege conferred upon the city at its request, and that the duty was not a public one. And so where it authorizes a use of its corporate property, which use itself makes that property harmful to others, it is liable. Such is understood to be one of the grounds on which went *Bailey* v. *The Mayor*, 2 Denio, 433. And the duty of keeping in repair streets, bridges and other common ways of passage, and sewers, and a liability for a neglect to perform that duty, rests upon an express or implied acceptance of the power and an agreement so to do. It is a duty with which the city is charged for its own corporate benefit, to be performed by its own agents, as its own corporate act. *Conrad* v. *Trustees of Ithaca*, 16 N. Y. 158. It is not always easy to say within which class a particular case should be placed. But when it is determined that the power and duty are given and taken for the benefit of the corporation as a corporate body, and the act to be done is to be done by it through agents of its appointment and under its control and power of removal, there is no doubt of its liability for negligent omission or negligent attempt at performance. When the powers created and duly enjoined are given and laid upon officers to be named by the corporation, but for the public benefit and as a convenient method of exercising a function of general government, and the corporation has no immediate control nor immediate power of removal of those officers, nor of their subordinates and servants, then it is not liable for their negligent omission or action. This court is of the opinion that in the light of past decisions upon these points this case falls within the latter class.

The judgment must be affirmed, with costs.

All concur.

Judgment affirmed.

CHARITABLE CORPORATIONS.[1]

Hearns v. Waterbury Hospital.

(66 Connecticut, 98.—1895.)

Hamersley, J. The Waterbury Hospital was incorporated by special Act of the legislature, "for the purpose of establishing and maintaining a hospital in the town of Waterbury." Under this authority it was organized "for the purpose of furnishing medical and surgical care, nurses, medicines, and food, to patients suffering from disease or from injuries." It has no capital stock, and its members can derive no profit from the corporation. These features clearly indicate a "charitable corporation" within the meaning of our law. *Asylum* v. *Phœnix Bank*, 4 Conn. 172; *Bishop's Fund* v. *Eagle Bank*, 7 id. 476; *Town of Hamden* v. *Rice*, 24 id. 350.

To this hospital the plaintiff applied for treatment of a fractured kneecap; and brings this action to recover damages for injuries caused, as he claims, by the unskillful and negligent treatment which he received at the hospital.

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[1] In the case of *Ward* v. *St. Vincent's Hospital*, 39 App. Div. 624 (1899), the plaintiff entered the hospital, maintained by the defendant as a public charitable institution, to undergo an operation, and contracted to pay for services to be rendered. The operation was successfully performed, and the plaintiff, while still under the influence of ether, was carried to her room and placed in a bed from which a hot, uncovered water-bag had not been removed by the nurse in attendance, in consequence of which her right leg was severely burned. The court said: "In the present case, the contract was express. It settled all questions of general duty attached by law, and became the criterion of the defendant's specific duty in this particular case. And it was a contract which the defendant certainly had power to make. Though the defendant is what is termed a charity hospital, it has its 'pay' side. Upon the latter side, it was in the habit of furnishing private rooms and nurses to well-to-do people for a full price. For the breach, then, of that express specific and valid contract, the plaintiff was entitled to the same damages as though the action had been for negligence pure and simple. In either case she was entitled to compensation, that is, to an adequate indemnity for her injuries, no more and no less."

In this case the hospital did no business for profit, and the money received from pay patients went into the general funds which were insufficient to meet expenses without contributions of charitably disposed individuals; and there were no stockholders to whom dividends, if earned, could have been paid.

The complaint, after stating the incorporation of the hospital and the adoption of certain by-laws, alleges that the plaintiff requested of the proper officers admission to the hospital, and promised to pay the defendant such reasonable compensation as it should demand; that the defendant in consideration thereof agreed to treat him with care and skill, and furnish him with surgical care, etc., for that purpose; that the defendant was guilty of negligence in the manner specified, and thereby violated its said agreement and duty; whereby the plaintiff was injured, etc.

The defendant's answer denies the negligence and injury, and sets up a special defense to the action, reciting the purposes of its incorporation, and alleging that its by-laws provided that: "Neither the medical and surgical staff, nor physician or surgeon designated by them, nor any officer of the corporation, shall receive compensation from the hospital in any form for the duties performed in its behalf." To this special defense the plaintiff demurred. The court below overruled the demurrer and gave judgment for the defendant, and the plaintiff appealed from that judgment.

The demurrer to the defendant's answer cannot entitle the plaintiff to judgment if his complaint is insufficient; we therefore pass over the question which might have been raised as to the special defense alleged being a strictly legal way of presenting the defendant's claims, and consider the only question argued before us; namely, does the negligence alleged in the complaint entitle the plaintiff to recover damages from the defendant?

The negligence which caused the injury is stated to have been that of the attending surgeon and attending nurses while in performance of their duties; and in order to confine the issue as closely as possible, it was stipulated by the parties that, solely for the purpose of the disposition of this appeal, and without prejudice to any future proceedings, the court should assume upon the record that the defendant exercised due care in the selection of nurses, physicians and surgeons, by whose alleged negligence or want of skill and attention the plaintiff was injured. Possibly it might be claimed that the complaint raises the further question of the defendant's liability for its own negligence in failing to perform its alleged duty of appointing a house physician, or interne so called; but such claim

has not been made, and we do not think it can properly be made upon this appeal; even if the question were not excluded by the stipulation of the parties, the record fails to show that it was raised on the trial and decided by the court below; it is not specified in the reasons of appeal, and in the argument before us was not discussed.

The only question with which we have to deal is the liability of the defendant for the negligent conduct of physicians and nurses employed by it, and in the selection of whom it has exercised due care. The conclusion we have reached makes it unnecessary to pass upon the question whether the hospital's attending physicians can really be regarded as standing to the corporation in the relation of servant to master, or to discuss the nature and extent of the corporate liabilities of an eleemosynary corporation. All questions essential to the disposition of the case presented by this appeal are settled by deciding upon the liability of the defendant for the negligence of its servants; *i. e.*, when a corporation like the defendant employs a servant who does not represent it in the way that every corporation must be represented by its directors or managers, but is simply employed for a special work in the same manner as if employed by an individual for the same work—is such corporation liable for an injury caused in the course of his employment by such servant, and due solely to his negligent conduct?

This question has never been decided in this state; it has however arisen in other states and in England; and has been so intermingled with the different one of the corporate liability of eleemosynary corporations for their own corporate negligence, that the review we make of cases illustrating the treatment the subject has received from other courts, will necessarily include some cases bearing more directly on the latter question.

The question arose in England in 1824, in the court of Common Pleas, in the case of *Hall* v. *Smith*, 2 Bing. 156. Commissioners for the town of Birmingham ordered a tunnel through a public street; the surveyor and contractor appointed by them to build it failed to put up guard rails or to provide lights. The court held that the commissioners were not liable; not because such a corporation, or *quasi* corporation for public purposes, was not liable for its negligence; not because the surveyor and contractor were not the servants of the corporation (the early case of *Bush* v. *Steinman*, 1 Bos. & Pul. 404, had not then been

overruled); but because the rule of *respondeat superior* did not apply. Best, C. J., said: "The maxim of *respondeat superior* is bottomed on the principle, that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it;" and so the reason of the rule does not apply to trustees for public purposes, acting according to their best judgment and with the best advice.

In 1839, *Duncan* v. *Findlater*, 6 Clark & F. 894, was decided by the House of Lords. It was a Scotch case—an action against the trustees of a turnpike road for injuries caused by the negligence of a surveyor appointed by them. The only question actually decided in this case was that the trustees were not liable for an injury caused by the neglect of a person not standing in the relation of a servant to the trustees. But the language of Lord Cottenham went further, and stated the principle that unpaid trustees for public purposes can in no case be liable in their corporate or *quasi* corporate capacity. This statement was rejected in subsequent cases, and in *Trustees Mersey Docks* v. *Gibbs*, L. R. 1 H. L. 93, was distinctly held unfounded in law.

The same year *Parnaby* v. *Canal Company*, 11 Ad. & E. 223, was decided, and held that when a statute of incorporation authorized a company to construct a canal and did not in special terms impose any duty in reference to its use, the general law imposed upon the company the duty to use reasonable care in making navigation secure. The case is pertinent only because it defines the principle of implied corporate duty corresponding to granted corporate powers; which principle subsequent cases hold applicable to powers granted to trustees for public purposes and corporations for charitable purposes, as well as to corporations organized for profit.

Feoffees of Heriot's Hospital v. *Ross*, 12 Clark & F. 507, decided in 1846, has been frequently cited in American cases. The action was an attempt to apply trust funds, given by a private donor for founding a hospital (for the maintenance of fatherless boys), to be governed in pursuance of statutes established by him, towards the payment of damages caused by a refusal of the trustees of the fund to obey the statutes of the founder in respect to an applicant for admission to the hospital. The Scotch Court of Sessions ordered damages to be assessed against the fund, and upon appeal to the House of

Lords two questions were presented: Did the statutes of the founder give to every eligible person a right to admission on application, without any discretion in the trustees as to selection? And second, can the damages caused by the wrongful refusal of trustees to admit an applicant entitled of right to admission, be recovered from the trust fund? The House refused to consider the first question, and reversed the order of the Court of Sessions on the ground that the wrong, if any, done to the applicant, was done by the individual trustees who voted against his admission, and that they were liable in an action, and the trust fund was not. In *Duncan* v. *Findlater*, *supra*, the claim had been made that the Scotch practice of using trust funds to pay damages for injuries caused by their managers was authorized by Scotch law, and the House of Lords had decided that it was not authorized by Scotch law; and now, within a few years of that decision, when a Scotch court again holds that the condemned practice is authorized by Scotch law, the House makes short work of the case, refuses to consider a doubtful and important question involved, or to discuss an authority except *Duncan* v. *Findlater*, which had not been duly respected. The pith of the case appears in the remarks of each of the law Lords in reference to *Duncan* v. *Findlater*. Lord Brougham says: "It would have been better had the court paid more attention to the high authority of that case as decided in this House, than here appears to have been paid to it." The main significance of *Heriot's Trustees* v. *Ross*, is in the assertion of the supremacy of the House of Lords in determining questions of Scotch law; the uniform severity with which the case has been ignored by the courts at Westminster in the cases which have since dealt elaborately with the question of the liabilities of corporations for public and charitable purposes, indicates that it is not regarded as an authority on the subject in that jurisdiction, and certainly there is nothing in the case that can aid the courts of other jurisdictions.

Holliday v. *St. Leonard's*, 11 C. B. (N. S.) 192, decided in 1861, held that the defendants, the vestry of a parish, were not liable for the negligence of servants in the performance of a public duty with which they were intrusted by statute. The case is decided on the ground that trustees for public purposes are exempt from the application of the rule of *respondeat superior* which would apply to private persons under like cir-

cumstances. (It was afterwards claimed that the opinion of Erle, C. J., seemed to favor the erroneous *dictum* of Lord Cottenham in *Duncan* v. *Findlater*, that the exemption rested on the immunity of such corporations from all corporate liability, and not the exemption from the application of the rule of *respondeat superior* as stated by Best, C. J., in *Hall* v. *Smith*; but when this claim was pressed in argument of *Coe* v. *Wise*, 5 Best & S. 440, Erle, C. J., said, "I certainly never intended so wide a proposition.")

In 1863, the court of Queen's Bench, in the case of *Hartnall* v. *The Ryde Commissioners*, 33 L. J. Q. B. 39, held that trustees for public purposes charged with not having performed a duty cast on them by statute, were liable for special damage, and the court distinguished the case from *Metcalf* v. *Hetherington*, 11 Ex. 257, where such trustees were held not liable, because in that case the duty alleged to have been neglected did not clearly appear to have been imposed.

In 1864, *Coe* v. *Wise*, 5 B. & S. 440, was tried in the Court of Queen's Bench. Commissioners were directed by statute to make a cut, and maintain at its opening a sluice to exclude tidal waters. The sluice was properly made; but owing to want of care in the persons employed to maintain it, it burst and flooded adjoining lands. There was no proof of negligence in employing unskillful agents. A majority of the court (Mellor, J., and Cockburn, C. J.) held the defendant not liable. Blackburn, J., dissented. Mellor, J., places the exemption from liability on the ground that the statute in this case did not impose an absolute duty to maintain the sluice, but that the real duty imposed on the trustees was *bona fide* to employ such agents as they believed to be skillful. He assumes the corporate liability for violation of corporate duty in all cases, irrespective of the objects of the corporation, and classifies the cases maintaining the liability of trustees for public purposes as follows: (1) Individual liabilities, where trustees exceed or abuse powers; *i. e.*, where the wrongful act is individual and not corporate, the individual and not the corporation is liable. (2) Where a duty imposed on trustees has been violated by reason of orders given by them for doing the acts from which damage resulted, *i. e.*, liability follows when the negligence is strictly corporate negligence and not the collateral negligence of servants. (3) Where trustees are authorized to maintain works of a trad-

ing character, *i. e.*, works to be supported by selling the right to use them — in their nature a substitution on a large scale for individual enterprise — in such cases although the *quasi* corporation is organized for public purposes, yet its corporate liability is not confined to negligence resulting from its direct corporate act, but includes negligence resulting from conduct of its servants; apparently on the ground that the duties imposed by statute on such *quasi* corporation towards the persons to whom it sells the use of the works it is authorized to maintain, cannot be distinguished from those of a railroad or canal company in dealing with those who purchase the use of their works; and is not affected by the charitable object of the corporation. There is no such element of trading use in the works maintained by the defendant. Cockburn, C. J., places the exemption from liability on the ground that the negligence complained of is that of servants only. And also that upon proper construction of the statute under which the trustees act, there is no fund at their disposal for the payment of damages resulting from negligence, and that it is absurd to hold that an action will lie where judgment cannot possibly be satisfied. Blackburn, J., dissents, and holds that the defendant is liable on the ground that the jury has found that the injury was in fact caused by want of due care on the part of the defendant in maintaining the sluice. The question whether such a corporation is liable not only for its direct corporate negligence, but also for the negligence of its servants, does not arise. The verdict of the jury that the negligence was the corporate negligence of defendant is conclusive. In referring to the cases which hold that trustees for public purposes are exempt from liability where there has been no direct corporate negligence, but the only negligence is due to the wrongful conduct of persons to whom they stand in the relation of master and servant, he says: "These decisions, or at least the greater part of them, might be supported on the ground that the relation of master and servant did not exist . . . ; but this explanation does not apply to *Holliday* v. *St. Leonard's*, the *ratio decidendi* of which seems to me to express that there is an exception from the general rule that masters are responsible for the negligent acts of their servants, when the master falls within the class somewhat indefinitely styled trustees for public purposes; but the doctrine in question has, as it seems to me, no bearing on the present case, since the drainage commissioners

are not sought to be charged for the collateral negligence of their servants, but for the nonfulfillment of a duty which was, it is alleged, imposed by Act of Parliament on the drainage commissioners themselves." He also holds that the question raised by Cockburn, C. J., as to the power of the trustees to apply the funds in their control to the payment of damages, does not arise in the case, and is not sufficient ground to deny the right of the plaintiff to a judgment.

An appeal was taken from the judgment of the majority of the court to the Exchequer Chamber. In that court the appeal was held to await the decision in *Mersey Docks* v. *Gibbs*, then pending before the House of Lords, and after the decision in that case was announced, the judgment of the Court of Queen's Bench was reversed on the grounds stated in the dissenting opinion of Blackburn, J., as delivered in the court below. *Coe* v. *Wise*, 5 B. & S. 440.

In 1866, *Mersey Docks Trustees* v. *Gibbs*, L. R. 1 H. L. 93, was decided. The Mersey Docks Trustees were a corporate body created by Act of Parliament, charged with the care of the Liverpool docks, and with the collection of the rates levied for their use; the funds so collected, after defraying the expenses of maintenance, were to be applied to the payment of debts incurred in construction, with a view to the reduction of the rates. The purpose was public, and the motive was charitable. Two actions were brought against the trustees by owners of vessels injured in entering the docks. The wrong charged in each action was that the trustees, knowing the entrance of the dock to be unfit for use, neglected to repair it and knowingly suffered it to continue in a condition unfit for use while it was used by vessels with their permission. Judgments were given against the trustees. Upon appeal to the House of Lords, the two cases were heard as one, and the judgments below were sustained. In the House of Lords the unanimous opinion of the common-law judges was submitted by Blackburn, J., and was adopted by the House as the ground of its decision. This is the leading and best-considered English case on the subject; but to understand the bearing of the opinion it must be read in connection with the opinions of Mellor and Blackburn, JJ., in *Coe* v. *Wise*. The judges of the Queen's Bench, who had differed in the latter case, agreed in the opinion in *Mersey Docks* v. *Gibbs*, and that opinion, as given by Blackburn, J., is plainly

drawn on the lines of the opinion of Mellor, J., as well as of his own dissenting opinion in *Coe* v. *Wise*. And immediately after the decision of *Mersey Docks* v. *Gibbs*, the same judges who had participated in that decision (except the judges of Queen's Bench), sitting as judges of the Exchequer Chamber, reversed the judgment of the Queen's Bench in *Coe* v. *Wise*, on the grounds of the dissenting opinion of Blackburn, J., and in the course of argument, Erle, C. J., affirmed the authority of the decision in *Holliday* v. *St. Leonard's* which had been discussed and not dissented from in *Mersey Docks* v. *Gibbs*. Only by considering the two cases of *Coe* v. *Wise* and *Mersey Docks* v. *Gibbs* together, can we ascertain the true bearing of the opinion in the latter case.

The precise questions presented and answered are: Was the duty imposed on the trustees an absolute duty to maintain the docks in a state fit for use? Can the trustees be guilty of negligence without actual knowledge that the docks are unfit for use? Both are answered in the affirmative. In answering the first question the court holds that the rule of corporate duty and liability laid down in *Lancaster Canal Co.* v. *Parnaby* depends on the nature of the corporate powers and duties, and not on the fiduciary or beneficial purpose of the corporation; and these powers and duties must be determined upon a true interpretation of the statute creating it. When the legislature imposes on trustees for public purposes the duty of maintaining works by trading in their use so that they are in their very nature a substitution for private enterprise, it will be presumed, in the absence of something to show the contrary, that the legislature intends "that the body created by statute shall have the same duties, and its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same thing." And so in this case the legislature intended to impose upon the trustees the absolute duty of maintenance to the same extent as the general law imposes such duty on an individual carrying on a similar enterprise. In answering the second question the court holds that although the duty of keeping the dock in a fit state for use could be performed by a corporate body only through servants, yet if the corporation had means of knowing by its servants that the dock was in an unfit state and were negligently ignorant of its state, such negligent ignorance is the neglect of the corporation. In

one of these actions the fact of such corporate negligence is admitted by the demurrer, in the other it is found by the jury. The question whether the negligence of the persons actually in charge of the docks was only the collateral negligence of the servants of the corporation, and whether a charitable corporation is liable for the collateral negligence of its servants, is not involved in the decision.

The trustees, however, while not admitting the rule of construction adopted by the court as determining their duty and liability, mainly relied on the broader claim that such bodies as theirs are, by the general law of the country, trustees for public purposes, and being such, they are not in their corporate capacity liable for damages caused by the neglect of their servants to perform the duties imposed on the corporation; or, at all events, that the duty of such corporations is limited to due care in the choice of officers, and such care being exercised, redress must be sought against the officers alone.

The court treats this claim elaborately and holds that it has no foundation in law; that the cases supporting the principle that one who is a public officer, in the sense that he is a servant of the government and as such manages some branch of government business, is not responsible for the negligence of those in the same employment, have no application, because they are decided on the ground that the government is the principal and the public officer its servant, and therefore not liable on general principles of the law of agency. (This principle is laid down by Story in his work on Agency, § 313.) Here the defendants are not servants of the public in that sense. That the class of cases cited, which depends on the principle that when the legislature directs a thing to be done and damage results merely from doing that thing, the person acting under such authority is not liable, but compensation can be recovered only under special provisions of the statute legalizing the wrong, has no application. That the cases apparently bearing in favor of the defendant's claim were decided either on the ground that the injury was caused by a person not standing in relation of servant to the defendant, or upon the ground that in the case of corporations organized to carry on an enterprise in the nature of a public charity, there is an exception to the rule making a master liable for the collateral negligence of his servant. That in such a case as the present the liability does not depend on

the relation of master and servant, but on the existence of a corporate duty and the liability for a direct corporate negligence in the failure to perform that duty. *Duncan* v. *Findlater* was properly decided on the ground that the relation of master and servant did not in fact exist, and this was all that was actually decided; the *dictum* of Lord Cottenham, that in no case can such a body be liable for negligence in its corporate capacity, has been rejected in subsequent cases, and is unfounded in law. While much that was said in the judgment in *Holliday* v. *St. Leonard's*, is based on the opinion of Lord Cottenham in *Duncan* v. *Findlater*, and open to the same objections, does not support that *dictum;* but the point actually decided was that there is an exception from the general law making a master liable for the negligence of his servant where the servant is employed by a public body—this point which the case decides, does not now arise. And the court significantly says: "It is necessary, in considering these authorities, to bear in mind the distinction between the responsibility of a person who causes something to be done which is wrongful, or fails to perform something which there was a legal obligation on him to perform, and the liability for the negligence of those who are employed in the work." In the case of the latter liability, *i. e.*, the liability of a master for the collateral negligence of his servant, it has been decided that there is an exception from the general law when the servant is employed by a public body, and that point does not arise in this case; in respect to the former liability, *i. e.*, the liability of a corporation for corporate neglect in the performance of a corporate duty, there is no case which decides there is an exception from all liability in favor of public or charitable associations; and the *dictum* of Lord Cottenham in *Duncan* v. *Findlater* is not law.

Levingston v. *Guardians of Lurgan Union*, 2 I. R. C. L. 202, decided in Ireland in 1868, is of interest as showing one bearing given to the decision in the above cases at the time. The action was against the Poor Law Guardians in their corporate capacity. It was held that where a corporation or public trustees acting gratuitously for public purposes, cause damage by a tortious act without having funds with which to compensate the party injured, they are responsible in their corporate capacity. Whitside, C. J., says (page 219): "Upon the ultimate decisions in these two cases, *The Mersey Dock Trustees* v. *Gibbs*, and *Coe*

v. *Wise*, it must, I think, be now taken as established: First, that unless the provisions of the legislature, by express enactment, or necessary implication otherwise determine, an action for such a wrong as that which is the subject of the present suit lies against a corporation, or public trustees acting gratuitously for public purposes; secondly, that they are not exempted by the legislature from this liability, because the legislative provisions which regulate them do not provide funds out of which damages recovered in an action against them can be paid, or because these provisions specially apply their funds to purposes not including the payment of such damages; and, thirdly (what indeed may be considered as, in principle, comprised in the second proposition), that this liability subsists, although no property, whether provided by Act of Parliament, or otherwise, be shown to exist, liable to execution upon a judgment."

In 1871, the Court of Queen's Bench in the case of *Foreman* v. *Mayor of Canterbury*, L. R. 6 Q. B. 214, undertook to overrule the decision of the Court of Common Pleas in *Holliday* v. *St. Leonard's*. The opinion is given by Blackburn, J., and he says that *Holliday* v. *St. Leonard's*, as an authority for the principle that there is an exception to the rule of *respondeat superior* when the servant is employed by a corporation for public or charitable purposes, was overruled by the decision of the House of Lords in *Mersey Docks* v. *Gibbs;* forgetting that in the opinion in that case delivered by himself, and in which the Chief Justice of the Court of Common Pleas who delivered the opinion in *Holliday* v. *St. Leonard's* concurred, he said that the point decided in the latter case "does not arise in the present case, so that it is unnecessary directly to decide anything upon it." *Foreman* v. *Mayor of Canterbury* is not a well-considered case on this point; indeed the point is not at all discussed on principle, and the decision rests wholly on an assumption of the action of the House of Lords which the record proves to be untrue. The authority of *Holliday* v. *St. Leonard's* on this point was distinctly and carefully left unquestioned, both in *Mersey Docks* v. *Gibbs*, and in *Coe* v. *Wise*. The most that can be said is that in *Foreman* v. *Canterbury* the Court of Queen's Bench differs from the Court of Common Pleas; the influence of the decision, however, is to be plainly noticed in subsequent cases.

In *Queen* v. *Williams*, 9 App. Cas. 418, decided in 1884, the

rule in *Mersey Docks* v. *Gibbs* was applied where similar powers and duties had been given by Act of Parliament to the executive government of New Zealand. The action was brought under authority of the Crown Suits Acts of 1881.

In *Gilbert* v. *Trinity House*, L. R. 17 Q. B. D. 795, decided in 1886, the defendant was a private guild or corporation, established some 500 years ago for charitable and public purposes, such as the relief of the poor, maintenance of religious services, promotion of the interests of mariners, etc. In very early days when beacons along the coast were mainly private property, it undertook their maintenance, at first perhaps as a charity, and gradually acquired rights and powers to collect tolls; such funds, however, were devoted wholly to the original charity and relief of poor mariners. Under recent statutes the powers and duties of the corporation in reference to lighthouses and beacons were largely increased. The corporation was sued for damages caused by negligence in the removal of a beacon, leaving a portion of it under water. The broad claim made in behalf of trustees for public purposes, in former cases, was again made in behalf of this private corporation. The question was, "are the defendants liable to be sued at all in respect of injuries caused by reason of the negligent condition in which beacons, or the remains of beacons, vested in them, are kept?" The court held that the recent legislation enlarging the powers of the defendant, did not make it an agent or servant of the government, or alter the character of the corporation; it remained a private corporation as before. The principle of *Mersey Docks* v. *Gibbs* was applied to this corporation, and stated more broadly and with less discrimination than it was stated in that case twenty years before. Day, J., says: "The law is plain that whosoever undertakes the performance of, or is bound to perform, duties — whether they are duties imposed by reason of the possession of property, or by the assumption of an office, or however they may arise — is liable for injuries caused by his negligent discharge of those duties. It matters not whether he makes money as a profit by means of discharging the duties, or whether it be a corporation or an individual who has undertaken to discharge them. It is also immaterial whether a person is guilty of negligence by himself or by his servants. If he elects to perform the duties by his servants, if in the nature of things he is obliged to perform the duties by employing servants, he is responsible for their acts in the same way that he is responsible for his own."

The English rule was recently (1890) applied in New Brunswick to trustees incorporated for the maintenance of a public hospital. *Donaldson* v. *The Commissioners of the General Public Hospital in St. John*, 30 N. B. 279. The action was for injury caused to a person admitted to the hospital, by negligent failure to supply the necessary medical and surgical attention. The questions were raised by a demurrer to the declaration. The court held that the duty the defendant owed the plaintiff, as alleged, was admitted by the demurrer, and a breach of that duty by the negligent failure to supply any medical or surgical attendance which he had the right to have supplied, was also admitted; and therefore the claim that the duty imposed on the defendant was in fact fulfilled by exercising due care in selection of physicians, and in having necessary appliances, etc., was not in the case; for such facts, if they are an answer, should be set forth by way of plea. That admitting the defendant to be a public charitable institution, that fact does not exempt it from this action for negligence; a public charitable institution is liable to be sued for negligence.

The first case in the United States to which our attention has been called, was decided in Virginia in 1867. *City of Richmond* v. *Long's Adm'rs*, 17 Grat. 375. It was an action for the value of a slave lost by negligence on the part of servants of a hospital. Liability was denied on the ground that the managers of the hospital exercised governmental powers; that under the Virginia laws the managers of the hospital were exercising govermental powers, and the government was the principal or master, and therefore the rule of *respondeat superior* did not apply.

Maxmilian v. *Mayor, etc.*, 62 New York, 160 (1875), was an action against the city. The only question decided was that under the New York statute the Commissioners of Public Charities were not the agents or servants of the city, and therefore the city was not responsible for the negligence of a servant employed by the commissioners.

McDonald v. *Massachusetts General Hospital*, 120 Mass. 432, was decided in 1876. It was an action against the hospital for negligent surgical treatment. The court distinctly held that a hospital, being a public charitable institution, is not liable for the negligence of a servant when it has exercised proper care in his selection. But the *ratio decidendi* is not entirely clear;

apparently the decision is based on the authority of *Holliday* v. *St. Leonard's*, and if so, it is an authority for the principle that there is an exception to the rule of *respondeat superior*, when the negligent servant is employed by a public charitable corporation. Subsequently a similar question arose in *Benton* v. *Trustees of City Hospital of Boston*, 140 Mass. 13. The accident was caused by the negligence of the superintendent of a building owned by the city of Boston and used as a hospital under the management of corporate trustees appointed by the city. The court said that if the trustees could be regarded as trustees of a public charity, the case came within *McDonald* v. *Massachusetts General Hospital;* but held that under the statute incorporating them, the trustees were agents for the city, that the city in the performance of the duty of maintaining the hospital was not liable for negligence, because the case came within the principle of *Hill* v. *City of Boston*, 122 Mass. 344, where Judge Gray, in an elaborate opinion and exhaustive review of the cases, defended the Massachusetts doctrine of non-liability of municipal corporations; and also of *Tindly* v. *City of Salem*, 137 Mass. 171, which somewhat extends that doctrine. And in *Donnelly* v. *Boston Catholic Cemetery Asso.*, 146 Mass. 163, the court states that *McDonald* v. *Massachusetts General Hospital* was decided on the ground "that the defendant was a public charitable institution under the laws of the Commonwealth;" and *Benton* v. *Trustees of Boston City Hospital* on the ground that the real duty was imposed by statute on the city for public benefit, that the city would not be liable under the rule stated in *Tindly* v. *Salem* and *Hill* v. *Boston*, and therefore a mere statutory agent without property, intervening between the city and the actual wrongdoer, was free from liability.

In 1880, the question came up in Rhode Island, in *Glavin* v. *Rhode Island Hospital*, 12 R. I. 411. The plaintiff claimed damages, first on the ground of negligence of the corporation in the selection of an interne who was employed as a surgeon, and to whose surgical care the plaintiff was committed. The court held that the defendant was liable for its corporate negligence in the selection of its physicians. Second, on the ground of the negligence of the interne, while acting as a surgeon, in his careless and unskillful treatment of the plaintiff. The court held that the defendant was not liable on this ground; that the

hospital does not undertake to treat the patient through the agency of the surgeon, but only to procure his services, and therefore the relation of master and servant does not exist, and the hospital is only liable for a breach of its duty to use proper care in the selection of the surgeon. Third, on the ground that the plaintiff, being in a critical condition, it was the duty of the interne, under a hospital rule, to send immediately for an attending surgeon, and the duty of the corporation, under a special provision of its charter, to put the rule in execution. The court held that, while the interne acts as surgeon and when so acting, he may not be the servant of the corporation, yet he also is appointed to perform other duties, and when acting in such capacity the relation of master and servant exists; that the corporation undertakes in critical cases to send for one of its staff of surgeons; this duty is imposed upon it in pursuance of the special terms of its charter, and can only be performed by the corporation through an agent; the interne is its agent for that purpose, and his neglect is that of the corporation, and for such neglect the defendant is liable. The broad claim was also made that the defendant, by reason of being a public charitable corporation, was exempt from all liability. The court held that this broad claim was not supported by any cases cited — discussing the English and Massachusetts cases; that the theory of a public policy which forbids the use of corporate funds in any case to compensate for injuries inflicted, is not sound; there is no such public policy, and the establishment of such a policy is a question for the legislature; that the theory that the corporate funds are trust funds and their use to pay a judgment would be a violation of trust is unsound; that the result of the English cases is: (*a*) Where there is a duty, there is a *prima facie* liability for neglect; and a corporation being created for certain purposes which cannot be executed without the use of care or skill, it becomes the duty of the corporation to exercise such care, and funds acquired for the purposes of its creation will be applied to satisfy a judgment for its default in this respect. (*b*) The corporate funds can be applied notwithstanding the trusts for which they are held, because the liability is incurred in carrying out the trusts and is incident to them; that these rules for corporations for public purposes apply equally to corporations like the Rhode Island hospital.

Fire Insurance Patrol v. *Boyd*, 120 Pa. St. 624, was decided

in 1888. This was an action against a corporation organized to aid the city government of Philadelphia in preservation of life and property at fires, for an injury caused by the negligence of its servants employed at a fire. The court held that under the laws of Pennsylvania the defendant, in the performance of its duties, was acting in aid of the municipal government in the performance of a governmental duty, and in such case the rule of *respondeat superior* has no application; for the state and not the defendant is the superior. The court further held that the funds of a public charity cannot be taken to compensate injuries by negligence of agents, and says: "It would be carrying the doctrine of *respondeat superior* to an unreasonable and dangerous length. That doctrine is at best, as I once before observed, a hard rule."

In 1891, the question was somewhat discussed in the New York Court of Common Pleas, in *Harris* v. *The Woman's Hospital*, 27 Abb. N. C. 37. But the case was decided on questions of fact; no actual negligence or want of care was found on the part of the hospital authorities, the surgeons or the nurse.

During the past year the question has arisen in three cases. In Kentucky, in the case of *Williams* v. *Louisville Industrial School*, 23 L. R. A. 200, where the liability of the defendant for injuries committed by its agents was denied, on the sole ground that this corporation was a mere agent of the State exercising governmental functions. In Michigan, in *Downs* v. *Harper*, reported in 25 L. R. A. 602, a hospital for the insane was sued by the representatives of a patient who had escaped from the strong room of the hospital, jumped from a window, and so was killed. The negligence alleged was that of the trustees in the construction of the building, and of the employés in the care of the patient. Judgment was given for the defendant. Perhaps the decision might be sustained on other grounds, but the reasoning of the court fairly tends to support the extreme claim of the defendant in this case. There is, however, a distinction that may have strongly influenced the language of the court. The Harper Hospital was originally a private foundation by deed conveying property to trustees on a specific trust; these trustees were subsequently incorporated under a general statute. It is possible that by the Act of incorporation the corporate powers were limited to administration of the original

trust in accordance with the laws established by the founders; if this were so, the corporate capacity would be reduced to the minimum, and the defendant might be held not liable upon a construction of the terms of its charter, without questioning the liability of an eleemosynary corporation for injuries committed in pursuance of its corporate powers.

The case of *Union Pacific Ry. Co.* v. *Artist*, 60 Fed. Rep. 365, decided by the United States Circuit Court of Appeals, does not deal at all with the relation of a corporation, whether business or eleemosynary, to its corporate funds, nor directly with the nature of the duties imposed on a public or charitable corporation by its charter; the only question considered or decided in respect to a corporation is, that any corporation, when it undertakes an act of charity not within the purposes of its incorporation and which it is under no legal obligation to perform, assumes the same personal duties, neither more nor less, than an individual assumes who undertakes a similar act of charity; and that a corporation in administering a trust fund distinct from its corporate funds, held by it on a specific trust, stands in the same position as an individual who administers a trust fund for a similar purpose. But the case is of peculiar interest as maintaining the proposition that an individual establishing hospital accommodations as a charity, undertakes no duty towards those who accept them as a free gift, except the duty of using reasonable care in providing such accommodations; and that if one is injured through negligence, not of the individual in the performance of his personal duty, but of the servants employed by him, the principal is not liable, because such case does not come within the reason of the rule of *respondeat superior*, and such rule has no application. As this proposition is true of a corporation as well as of an individual, the court held that the railroad corporation which had established hospital accommodations as such a charity, was not liable in a suit to recover for injuries caused through the negligence of the servants it had employed; that the doctrine of *respondeat superior* has no just application, and "it was responsible for the discharge of its own personal duty, and not for the performance of the duties of its employés." This is the most direct application we have found in an American case of the doctrine which in *Hall* v. *Smith and Holliday* v. *St. Leonard's* was applied to corporations established for public and charitable purposes.

It is apparent that there are marked differences in these cases, both as to results and the process by which results are reached. These differences mainly appear in the tests adopted for ascertaining in each case what is a corporate duty and what is a corporate neglect; in the confusion of the *quasi* trust arising from the restriction which binds every corporation to apply its corporate funds to the purposes for which it was organized, with the relation of a strictly legal trustee to his trust funds; and especially in the various means by which courts have sought to escape the patent injustice of applying the extreme doctrine of *respondeat superior* to the personal defaults of employés of charitable institutions. But we think the drift of all the cases clearly indicates a general conviction that an eleemosynary corporation should not be held liable for an injury due only to the neglect of a servant, and not caused by its corporate negligence, in the failure to perform a duty imposed on it by law; and we are satisfied that this general conviction rests on sound legal principles.

The law which makes one responsible for his own act, although it may be done through another, and which is expressed by the primary meaning of the maxim, *qui facit per alium facit per se*, is based on a principle of universal justice. The law which makes one responsible for an act not his own, because the actual wrongdoer is his servant, is based on a rule of public policy.

The liability of a charitable corporation for the defaults of its servants must depend upon the reasons of that rule of policy, and their application to such a corporation. The rule is distinguished as the doctrine of "*respondeat superior*;" although that phrase is used broadly in reference to any relation of principal and agent, thereby causing much confusion. Here we use it in the narrow meaning suggested by its origin. The phrase is taken from the words of the Statute of Westminster Second, Charles II.: "*Si custos gaolæ non habeat per quod justicietur vel unde solvat, respondeat superior suus qui custodiam hujus modi gaolæ sibi commisit.*" As Lord Coke tells us (2 Inst. 382), this law was intended only for those who "having the custody of gaols of freehold or inheritance commit the same to another that is not sufficient." As sheriffs originally profited through the appointment of their sub-officers, the rule of the statute was applied to sheriffs, although they were not included

in its letter. This statute was passed before the first Year Book was kept, at a time when the English law was "without form." It recognized an injustice, and declared a rule of public policy, *i. e.*, an injury done by one who is irresponsible must be answered for by his superior, when for his own convenience and emolument that superior has given the wrongdoer the opportunity of committing the injury. This rule of public policy modified the development of the law of master and servant from the beginning, and in this way infused into the law of agency a sort of fictitious agency depending not on the principle of justice that makes one responsible for his own act, but on a rule of public policy which under certain circumstances estops one from showing that the act in question was not his own. This view is suggested by the opinion of Best, C. J., in *Hall* v. *Smith*, *supra*, and is the occasion of his emphatic declaration that "*respondeat superior*" is bottomed on the principle that he who expects to derive the advantage from an act done for him by another, must answer for any injury which a third person sustains from it.

The reasons for the rule have been differently stated by others. In *Maxmilian* v. *Mayor*, *etc.*, *supra*, the rule is based upon the right which the employer has to select his servants, to discharge them if not competent, and to control them while in his employ.

In Dicey on Parties to Actions, Rule 102, 445, the liability is stated as "analogous to the liability of an owner for injuries committed by animals belonging to him. Neither the master nor owner is liable because he has himself done the particular act complained of. He is responsible because the wrong is the result of his having in the one case employed the incompetent servant, and in the other kept an animal of habits injurious to his neighbors." Here the policy stated seems to be that the master should not only be liable for his negligence in the employment of servants, but should be held as a guarantor that none employed by him should abuse their opportunities. And a similar notion is expressed in Wood on Master and Servant, § 277, *i. e.*, that the penalty of liability is imposed in order to secure in the master "the exercise of proper care and diligence in the selection and retention of his agents." Wharton, Law of Negligence, § 157, gives as the reason of the policy, that "he who puts in operation an agency which he controls, while he

receives its emoluments, is responsible for the injuries it incidentally inflicts;" relying on Lord Brougham's statement in *Duncan* v. *Findlater*, "I am liable for what is done for me and under my orders by the man I employ, for I may turn him from that employ when I please; and the reason that I am liable is this, that by employing him I set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it."

This defendant does not come within the main reason for the rule of public policy which supports the doctrine of *respondeat superior;* it derives no benefit from what its servant does, in the sense of that personal and private gain which was the real reason for the rule. Again, so far as the persons injured are concerned, especially if they be patients at the hospital, the defendant does not "set the whole thing in motion" in the sense in which that phrase is used as expressing a reason for the rule. Such patient, who may be injured by the wrongful act of a hospital servant, is not a mere third party, a stranger to the transaction — he is rather a participant. The thing about which the servants are employed is the healing of the sick. This is set in motion, not for the benefit of the defendant, but of the public; surely, those who accept the benefit, contributing also by their payments to the public enterprise (and not to the private pocket of the defendant), assist as truly as the defendant in setting the whole thing in motion.

But the practical ground on which the rule is based is simply this: On the whole, substantial justice is best served by making a master responsible for the injuries caused by his servant acting in his service, when set to work by him to prosecute his private ends, with the expectation of deriving from that work private benefit. This has at times proved a hard rule, but it rests upon a public policy too firmly settled to be questioned.

We are now asked to apply this rule, for the first time, to a class of masters distinct from all others, and who do not and cannot come within the reason of the rule. In other words, we are asked to extend the rule and to declare a new public policy and say: On the whole substantial justice is best served by making the owners of a public charity, involving no private profit, responsible, not only for their own wrongful negligence, but also for the wrongful negligence of the servants they em-

ploy only for a public use and a public benefit. We think the law does not justify such an extension of the rule of *respondeat superior*. It is perhaps immaterial whether we say the public policy which supports the doctrine of *respondeat superior* does not justify such extension of the rule; or say that the public policy which encourages enterprises for charitable purposes requires an exemption from the operation of a rule based on legal fiction, and which, as applied to the owners of such enterprises, is clearly opposed to substantial justice. It is enough that a charitable corporation like the defendant — whatever may be the principle that controls its liability for corporate neglect in the performance of a corporate duty — is not liable, on grounds of public policy, for injuries caused by personal wrongful neglect in the performance of his duty by a servant whom it has selected with due care; but in such case the servant is alone responsible for his own wrong.

This result is justified by the opinions in *Hall* v. *Smith*, *Holliday* v. *St. Leonard's*, and *Union Pac. Ry. Co.* v. *Artist*, *supra*, substantially on the grounds above stated; and is reached, for one reason or another, by the greater number of courts that have dealt with this particular liability of a corporation for public or charitable purposes.

There is no error in the judgment of the Superior Court.

In this opinion the other judges concurred.

Glavin v. Rhode Island Hospital.

(12 Rhode Island, 411.—1879.)

Action to recover damages for malpractice.

Durfee, C. J. This is an action on the case to recover damages for unskilful and negligent surgical treatment. The declaration sets forth that the plaintiff, having received injury on his hand and fingers for which he was in need of surgical and medical treatment and care, gave himself into the charge of the defendant corporation, who were owners of a large hospital where they were in the habit of receiving persons needing such treatment and care, and of treating and caring for them for

hire; and that in consideration of being so received and treated with skill and care, he promised to pay the defendant corporation a reasonable compensation therefor, and that the defendant corporation, in consideration thereof, received him and promised to supply him with such surgical and medical treatment, skill and attention as were necessary for the care and cure of his injuries. The declaration also sets forth that the corporation, its officers, agents and servants, regardless of its and their duty, neglected properly to care for the plaintiff and his injuries, or to supply such medical and surgical treatment as was needed for their care and cure; but on the contrary conducted so carelessly, improperly and unskilfully, that his hand and fingers by reason thereof became ulcerated and gangrenous and likewise his arm, so that his life was endangered and his arm had to be amputated at or near the shoulder, etc. The declaration also contains counts charging the defendant corporation with a neglect of duty in other ways, and especially in that, regardless of the obligation incumbent on it, it neglected to provide careful, competent and skilful officers, agents and servants to care for, attend to and treat him and his injuries.

On the trial to the jury the plaintiff submitted testimony to show that on the 3d of October, 1873, he had two fingers of his right hand accidentally sawed off by a circular saw in a lumber yard where he was employed; that he was immediately taken to the hospital, where he was received by the superintendent, and committed to the care of the surgical interne, who etherized him and undertook to dress his wound; that a profuse hemorrhage occurred, being occasioned, as the plaintiff claims, by the negligence or unskilfulness of the interne; that the interne, after repeatedly trying in vain to arrest the hemorrhage by ligating the arteries, applied a tourniquet to the plaintiff's arm so tightly as to stop circulation, and kept it applied for nearly seventeen hours, before the arrival of a surgeon who was skilful enough to ligate the arteries; that the plaintiff, in consequence, suffered excruciating pain, his arm being enormously swollen, and that afterward his arm mortified so that he had to have it amputated, and did have it amputated, after leaving the hospital, just below the shoulder joint.

The plaintiff also submitted testimony to show that his injury was such, especially in view of the hemorrhage, that some one of the experienced surgeons, attendant on the hospital, should

have been immediately summoned; but that in fact, no one of them was sent for until after nearly nine hours, and no one came until after nearly seventeen hours, though there were four, subject to call, residing and having their offices within a mile of the hospital. Further testimony was introduced by the plaintiff showing the treatment which he received both while he was in the hospital and after he left; showing the degree of care which was used in selecting the interne, and showing the character of the corporation and the rules and regulations in force in 1873. It appeared that the plaintiff was taken from the hospital by his friends against the advice of the surgeon, and that when he left, October 22, 1873, a bill for board and attendance at $8.00 per week, amounting to $21.71, was presented to him in behalf of the defendant corporation, which was subsequently paid.

For the defendant corporation testimony was introduced to explain the management of the hospital generally, as well as the circumstances of the case of the plaintiff, and to show that there was no want of reasonable care, skill, and diligence, on the part of the defendant corporation. Testimony was also introduced to show that the hospital was administered as a charity; that its income was derived mainly from its endowments and from voluntary contributions; that the physicians and surgeons attendant on the hospital, and the medical and surgical internes, gave their services without compensation, except that the internes, who were required to be constantly in attendance, had their board and lodging in the hospital, and that the bill which was rendered to the plaintiff was designed only to cover board, washing, warmth, and the services of nurses and ward tenders.

After the introduction of the testimony and the argument of the case to the jury, the court instructed the jury that no testimony had been submitted which entitled the plaintiff to a verdict for damages, and directed the jury to return a verdict for the defendant corporation. The ground of the instruction was, that the defendant corporation being the dispenser of a public charity, and being dependent for its support, in a great measure, on voluntary grants and contributions, was, for reasons of public policy, exempt from liability for any negligence or unskilfulness on the part of its trustees, agents, servants, physicians, or surgeons, or of its medical or surgical internes; and that if any patient in the hospital suffered injury in consequence of any such negligence or unskilfulness, his remedy, if any he had,

was to prosecute the person or persons who were directly chargeable with the negligence or unskilfulness, and not to bring his action against the defendant corporation.

The plaintiff contends that this instruction was erroneous, and that he was entitled to recover, *first*, because the defendant corporation delivered him over to an incompetent and unskilful interne, in selecting whom for his place the corporation did not exercise proper care; *second*, because the interne, acting within the scope of his appointment, unskilfully and negligently cared for him; *third*, because the interne caused his hemorrhage by his unskilfulness and negligence, and *fourth*, because the plaintiff being in a critical condition, it was the duty of the interne, under one of the rules of the hospital, to send immediately for some one of the attendant surgeons, and the duty of the corporation, under its charter, having established the rule, to put it in execution.

The court, in giving its charge to the jury, was guided by *McDonald* v. *Massachusetts General Hospital*, 120 Mass. 432; s. c., 21 Am. Rep. 529. In that case a hospital patient sued the corporation for unskilful surgical treatment by a house pupil, a functionary similar to a surgical interne. There was no evidence of any want of care in selecting the house pupil, and the court held that without such evidence the action could not be maintained, and at the same time strongly intimated an opinion that it could not be maintained even with such evidence, for the reason that the corporation could not be held to have agreed to do more than furnish hospital accommodations, which the plaintiff had had, and also for the further reason that any judgment recovered against the corporation could only be satisfied out of funds which being dedicated to the charity could not be lawfully used to pay it.

The Supreme Judicial Court of Massachusetts, in the case above cited, referred to *Holliday* v. *St. Leonard*, 11 C. B. (N. S.) 192, decided by the Court of Common Bench, in 1861, as authority for the point that the corporation was not liable to be sued for the tort of the house pupil without proof of negligence in selecting him. The doctrine enounced in *Holliday* v. *St. Leonard* is that a corporate or *quasi* corporate board or body having a public trust or duty to discharge gratuitously, is not liable for the torts of its servants or employés if it is personally without fault. The plaintiff calls our attention to cases in

which *Holliday* v. *St. Leonard* has been qualified or impugned. *Mersey Docks* v. *Gibbs*, 11 H. L. 686; L. R. 1 H. L. 93; *Forman* v. *Mayor of Canterbury*, L. R. 6 Q. B. 214; *Coe* v. *Wise*, 1 id. 711; 5 B. & S. 440, 458. These cases hold that a board or body having work to do for the public gratuitously are liable for the torts of their servants or employés, the same as a private business corporation, provided they have funds or are in receipt of an income out of which a judgment against them can be satisfied. *Winch* v. *Conservators of the Thames*, L. R. 7 C. P. 458; 9 id. 378. The authority of *McDonald* v. *Massachusetts General Hospital*, in so far as it rests upon *Holliday* v. *St. Leonard*, is seriously impaired by these cases, and the question arises whether it might not have been better decided on the other grounds suggested in the opinion of the court.

The other grounds suggested were two. The first was that the corporation could not be presumed to have agreed to do more than furnish hospital accommodations, leaving the patient to find his own physician or surgeon. In such a case the corporation would plainly not be liable for the torts of the physicians or surgeons, for in such a case they would not be its servants and it would not have assumed any responsibility in their selection. But that is not this case. Here the physicians or surgeons are selected by the corporation or the trustees. But does it follow from this that they are the servants of the corporation? We think not. If A out of charity employs a physician to attend B, his sick neighbor, the physician does not become A's servant, and A, if he has been duly careful in selecting him, will not be answerable to B for his malpractice. The reason is that A does not undertake to treat B through the agency of the physician, but only to procure for B the services of the physician. The relation of master and servant is not established between A and the physician. And so there is no such relation between the corporation and the physicians and surgeons who give their services at the hospital. It is true the corporation has power to dismiss them, but it has this power not because they are its servants, but because of its control of the hospital where their services are rendered. They would not recognize the right of the corporation, while retaining them, to direct them in their treatment of patients.

But though the relation of master and servant cannot be said to exist between the hospital and the physicians and sur-

geons attendant on it, the hospital does nevertheless assume a responsibility in that it uses its own judgment, or that of its trustees, in selecting them, and impliedly therefore undertakes to exercise reasonable care to get such as are skilful and trustworthy in their professions. A patient has the right to rely on the exercise of such care, and consequently if, through the neglect of the hospital to exercise it, he receives an injury, he is entitled to look to the hospital for indemnity, unless the hospital enjoys some extraordinary exemption from liability.

In the case at bar, however, the injury was not received from a physician or surgeon, but from a surgical interne, and it may be that a surgical interne stands on a different footing. There are some cases of minor importance in which the internes are allowed to act as physicians and surgeons, and in such cases I think that their relation to the corporation does not differ from that of a visiting physician or surgeon. But the internes act in still another capacity. The corporation undertakes to furnish physicians and surgeons for all kinds of cases, including the most critical. It has a regular staff of physicians and surgeons. But inasmuch as these are not, like the internes, constantly in attendance at the hospital, they must frequently be sent for. The corporation undertakes to send for them, and of course it must do it through an agent. The internes are the persons appointed to perform this duty for it. A rule of the hospital prescribes that in all cases requiring immediate and important action, in all doubtful cases, and in all cases requiring an immediate operation, the interne shall send for the surgeon of the day, and, if he cannot be found, for one of the other surgeons. Here then we have the relation of principal and agent, or master and servant. If the interne neglects to call the surgeon in the class of cases designated, his neglect is the neglect of the corporation. Now the plaintiff contends that his injury was such that under the rule a surgeon should have been immediately sent for, and that the interne's neglect to do it cost him his arm. He also contends that the corporation did not use proper care in selecting the interne, who was incompetent for his position, and thereby he suffered the injury complained of. He contends that he was entitled to recover on both these grounds, and if the evidence was sufficient to establish them, we think that he was entitled to recover on both grounds, unless the hospital enjoys some peculiar immunity.

This brings us to the important question whether the hospital does enjoy any peculiar exemption from liability. The claim that it enjoys such an exemption rests upon two grounds: to wit, on the ground of public policy, and on the ground that the hospital had no funds except such as are exclusively dedicated to the charitable uses for which it was established, and which therefore cannot be applied to indemnify a patient who has been injured by the negligence or malpractice of a physician or surgeon, or of a medical or surgical interne.

The first ground is the ground on which the plaintiff was nonsuited. The argument is that hospitals, like the Rhode Island Hospital, are a public benefit; but if they are liable for the torts of the physicians or surgeons attendant on them, or of the medical or surgical internes, or of their nurses and other servants, people will be discouraged from voluntarily contributing to their foundation and support, and therefore public policy demands that they shall be exempted from liability. In our opinion the argument will not bear examination. The public is doubtless interested in the maintenance of a great public charity, such as the Rhode Island Hospital is; but it also has an interest in obliging every person and every corporation which undertakes the performance of a duty to perform it carefully, and to that extent therefore it has an interest against exempting any such person and any such corporation from liability for its negligences. The court cannot undertake to say that the former interest is so supreme that the latter must be sacrificed to it. Whether it shall be or not is not a question for the court, but for the legislature.

The second ground is one of the grounds suggested in *McDonald* v. *Massachusetts General Hospital.* No authority was cited in that case except *Holliday* v. *St. Leonard*, previously mentioned. The defendants, however, have referred us to *Feoffees of Heriot's Hospital* v. *Ross*, 12 Cl. & Fin. 507, which is very much in point. Heriot's Hospital was an eleemosynary foundation created under a will for the benefit of fatherless boys. The suit was in behalf of a boy who was alleged to have been illegally refused the benefit of it. The question was whether the action would lie against the trustees as such for damages for the refusal. The House of Lords held that the plaintiff had no right to indemnity out of the trust funds. Lord Cottenham was of the opinion that to give dam-

ages out of the trust fund would be to divert it from its proper purpose. Lord Campbell thought it would be contrary to reason, justice, and common sense to sanction the suit. "Damages are to be paid," he said, "from the pocket of the wrong-doer, not from a trust fund." Lord Brougham strongly expressed the same opinion.

The authority relied on to support the decision was a decision of the House of Lords in *Duncan* v. *Findlater*, 6 Cl. & Fin. 894. There the action was against trustees appointed under a public road act, to charge them in their *quasi* corporate capacity for an injury occasioned by the negligence of the men in making the road, and the House of Lords held that the action was not maintainable. The case resembles *Holliday* v. *St. Leonard*, and like it, in the light of the later decisions, it has no value as a precedent for any case where there are funds which can be applied to the payment of damages.

We have previously, in this opinion, cited the cases which limit the authority of *Holliday* v. *St. Leonard*. It may help us to consider the leading case more in detail. The leading case is *Mersey Docks* v. *Gibbs*, 11 H. L. 686, decided in the House of Lords in 1865. The action was against a *quasi* corporate board charged with the duty of keeping certain docks in order, and authorized in consideration thereof to collect tolls and dock rates. The board had no interest in the rates and tolls, being bound to expend them on the docks or in the payment of a debt incurred in building them. A vessel belonging to the plaintiff was injured in entering the docks in consequence of a neglect to keep them fit for navigation. The House of Lords decided that the action for the injury would lie against the board, the plaintiff being entitled to indemnity out of the public fund. The case was decided with great deliberation the judges being summoned in. Mr. Justice Blackburn, after advisement, delivered the unanimous opinion of all the judges who heard the case. The opinion was that such corporations, though acting without reward, are in their very nature substitutions, on a large scale, for individual enterprise, and that in the absence of anything in the statutes which create them showing a contrary intent, it must be held that their liability was intended to be, to the extent of their corporate funds, the same as that of individual owners of similar works. He also remarked that if the true interpretation of the statute is that it

casts a duty on the corporation, not only to construct the works, but also to use reasonable skill and care in their construction and in their maintenance for use, there is nothing illogical in holding that those who are injured by a neglect of the duty may maintain an action against the corporation, and be indemnified out of the funds vested in it by the statute. The case of *Duncan* v. *Findlater* was cited by Mr. Justice Blackburn in his opinion, and the language there used by Lord Cottenham, which was chiefly relied on as authority for the decision of *Feoffees of Heriot's Hospital* v. *Ross*, was expressly disapproved. It is remarkable, however, that the case of *Feoffees of Heriot's Hospital* v. *Ross*, though cited by counsel, does not seem to have attracted the attention of either Mr. Justice Blackburn or of the three learned lords who delivered concurring opinions.

The language used by Lord Cottenham in *Duncan* v. *Findlater* was criticised by Lord Westbury more pointedly even than by Mr. Justice Blackburn. He said in effect that he supposed Lord Cottenham regarded the funds of statutable boards as being in the nature of trust property, and had the idea that trust property would be protected in equity from seizure and sale on execution for the torts of the trustees. He expressed the opinion that this belief was erroneous. "It is much more reasonable," he says, "in such a case, that the trust or corporate property should be amenable to the individual injured, because there is then no failure of justice, seeing that the beneficiary will always have his right of complaint and his title to relief against the individual corporators who have wrongfully used the name of the corporation."

In all the English cases decided since the decision of *Mersey Docks* v. *Gibbs*, which we have seen, the cases of *Duncan* v. *Findlater*, and *Holliday* v. *St. Leonard*, as authority for the broader doctrines declared in them, are uniformly regarded as overruled.

In view of these later decisions the question here is, whether a charitable corporation, like the Rhode Island Hospital which holds its property for the charity, is more highly privileged than a corporation created for public purposes, which holds its property for such purposes; whether, in fact, because it holds its property for the charity, it is relieved from all responsibility for the torts or negligences of its officers, trustees, agents, or

servants. We have come to the conclusion, after much consideration, that it is not. We understand the doctrine of the cases which we have just been considering to be this; that where there is duty, there there is, *prima facie* at least, liability for its neglect; and that when a corporation or *quasi* corporation is created for certain purposes which cannot be executed without the exercise of care and skill, it becomes the duty of the corporation or *quasi* corporation to exercise such care and skill; and that the fact that it acts gratuitously, and has no property of its own in which it is beneficially interested, will not exempt it from liability for any neglect of the duty, if it has funds, or the capacity of acquiring funds, for the purposes of its creation, which can be applied to the satisfaction of any judgment for damages recovered against it. We also understand that the doctrine is that the corporate funds can be applied, notwithstanding the trusts for which they are held, because the liability is incurred in carrying out the trusts and is incident to them. We do not understand, however, that the corporate property is all equally applicable. For instance, in the case of *Mersey Docks* v. *Gibbs*, it was not decided that the docks themselves could be resorted to, but only the unapplied funds which the board then had or might afterward acquire. So in the case at bar; it may be that some of the corporate property, the buildings and grounds for example, is subject to so strict a dedication that it cannot be diverted to the payment of damages. But however that may be, we understand that the defendant corporation is in the receipt of funds which are applicable generally to the uses of the hospital, and following the decision in *Mersey Docks* v. *Gibbs*, we think a judgment in tort for damages against the corporation can be paid out of them. Indeed, we cannot see why these funds are not as applicable to the payment of damages for tort as to the payment of counsel for defending an action for such damages. Both payments are to be regarded as incident to the administration of the trust.

Petition granted.[1]

[1] Concurring opinion by Potter, J., omitted.

ACTIO PERSONALIS MORITUR CUM PERSONA. [1]

Hegerich v. Keddie.

(99 New York, 258.—1885.)

Appeal from a judgment of the General Term of the Supreme Court entered upon an order, which reversed a judgment in favor of the defendant, entered upon an order sustaining a demurrer to plaintiff's complaint (32 Hun, 141), in an action to recover damages for the death of plaintiff's intestate, alleged to have been caused by the negligence of defendant's testator.

Ruger, Ch. J. A brief reference to some of the elementary principles, applying to civil actions will serve the purpose, at least, of defining the terms used, and the modifications introduced, into the law by the statutes hereinafter referred to. Such actions were primarily divided into two classes, distinguished as actions *ex contractu* and *ex delicto.* The actions known as detinue, trespass, trespass on the case, and replevin were those used in causes of action arising from torts, and were described as actions *ex delicto.* Trespass on the case was the appropriate form of remedy for all injuries to person or property which did not fall within the compass of the other forms of action. (3 Stephens' Com. 449.) At common law, originally, all actions arising *ex delicto* died with the person by whom or to whom the wrong was done. Thus, when the action was founded on any malfeasance, or misfeasance, was a tort, or arose *ex delicto*, such as trespass for taking goods, etc., trover,

[1] For an account of the statutory modifications of this rule in England, see Pollock on Torts, 56, and in New York, see Erwin's Summary of Torts, 11–15.

The rule still applies, in all its strictness, wherever the common law has been adopted, unless modified or changed by express enactment. In New York, in actions to recover for death the result of wrongful act, neglect or default, the maximum amount of recovery ($5,000), fixed by chapter 256 of the Laws of 1849, has been abolished, and "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation." N. Y. Const., Art. I., § 18. For general provisions applicable to such right of action, see N. Y. Code Civ. Pro. §§1902–1904.

false imprisonment, assault and battery, slander, deceit, diverting a water-course, obstructing lights, escape, and many other cases of the like kind, where the declaration imputes a tort done either to the person or property of another, and the plea must be "not guilty," the rule was "*actio personalis moritur cum persona.*" (1 Wms. on Exrs. 668.) It was, however, held in *Hambly* v. *Troth* (Cowp. 371), Lord Mansfield delivering the opinion, that, "if it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, etc., then the person injured has only a reparation for the *delictum*, in damages to be assessed by a jury. But, when, besides the crime, property is acquired which benefits the testator, then an action for the value of the property shall survive against the executor." "So far as the tort itself goes, an executor shall not be liable, and therefore it is that all public and private crimes die with the offender, and the executor is not chargeable; but so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor, therefore, shall be charged." By the statute of 4th Edward III, chapter 7, actions "*de bonis asportatis*" were given to the executors of a deceased person for personal property taken from their testator and carried away, but for all other causes of action arising out of wrongs done either to the person or property the rule of "*actio personalis moritur cum persona*" applied. (1 Wms. Exrs. 672.) Under the clause of the Constitution making the rules of the common law the law of the State, it must be held that these rules still determine the survivability of actions for torts, except where the law has been specially modified or changed by statute.

It had been held in this State prior to the enactment of the Revised Statutes that an action against the representatives of a postmaster for money feloniously abstracted from a letter by his clerk (*Franklin* v. *Low*, 1 Johns. 402), and against a sheriff's representatives for an escape occurring during his life-time (*Martin* v. *Bradley*, 1 Caines, 124), did not lie against such representatives. In the case of *People* v. *Gibbs*, 9 Wend. 29, decided in 1832, it was held that an action against the executors of a sheriff for the default of his deputy in returning process, notwithstanding an action in *assumpsit* for money had and received was by statute authorized therefor, did not lie, inasmuch as the cause of action was founded in tort.

As no reference is made in this case to the Revised Statutes, it is inferred that it arose previous to their enactment, although the case does not disclose that fact. Still the date of the trial, November, 1830, would not necessarily lead to such an inference. The Revised Laws (Vol. 1, p. 311) had theretofore enlarged the scope of the statute of 4th Edward III., and provided for actions by and against executors and administrators for property taken and converted by the testator or intestate during his life-time. Under this condition of the law the provisions of the Revised Statutes were enacted in 1828, and contain the rule by which this controversy must be determined. Section 1 reads as follows: "For wrongs done to the property rights or interests of another for which an action might be maintained against the wrong-doer, such action may be brought *by the person injured*, or after his death, by his executors or administrators against such wrong-doer, and after his death, against his executors or administrators in the same manner and with the like effect in all respects as actions founded upon contract." Section 2. "But the preceding section shall not extend to actions for slander, for libel, or to actions of assault and battery or false imprisonment, nor to actions on the case for injuries to person of the plaintiff or to the person of the testator or intestate of any executor or administrator." It cannot be successfully claimed that the language, "actions on the case for injuries to the person" up to this time did not include, according to universal classification, all actions without regard to the person or persons to whom they accrued, which had as their cause, or were founded upon injuries to the person of another arising from the negligent or careless conduct of a wrong-doer. It must also, upon well-settled principles of construction, be conceded that these terms were used according to their legal and well-understood signification at the time of their employment. If the language of the statute applicable to this case be collocated and read according to its plain meaning and intent, the following sentence would seem to be the result. Actions by and against executors and administrators for wrongs done to the property rights, or interests of their intestate or testator are hereby authorized, but so far as such wrongs have heretofore been remediable by actions on the case for injuries to the person of the plaintiff, or to the person of the intestate or testator of any executor or administrator, they shall not sur-

vive the death of the person to whom or by whom the wrong is done. The wrongs referred to in these sections are such only as are committed upon the "property rights, or interests" of the testator or intestate, and to a cause of action for which the executors and administrators acquire a derivative title alone. The whole scope and design of the statute is to extend a remedy already accrued, to the representatives of a deceased party, and provide for the survival only of an existing cause of action.

Among the questions which have arisen over the construction of these sections the most prominent are probably those relating to the signification of the words "property rights or interests," as used in the first section, and the effect of the enumeration in the second section, of certain specific actions as being excepted from the operation of the prior section. It is inferable from the opinions expressed in *Haight* v. *Hayt*, 19 N. Y. 464, that the court there supposed that the words "property rights or interests," as used in the statute, covered and included all injuries tortiously inflicted by one person to the detriment of another, whether affecting his person or property, and also that the mention of certain actions in the second section manifested an intention on the part of the law makers to exempt all others, founded on tort from abatement by death. The views expressed on those questions seem to have been unnecessary, as the action there, was for a fraudulent representation with respect to incumbrances, whereby a purchaser of land at a public sale was induced, and the purchaser was compelled to pay an incumbrance which he was led to believe did not exist. The injury thus seems clearly to have been one to rights of property alone and was saved from abatement by the first section of the statute. The language and structure of these sections would seem to repel the idea that the exemptions provided by the second section were intended to authorize the survival of all other actions for tort. In the view implied by the language used in that case the first section would be quite unnecessary, as a provision specifying the classes of action which did survive would be superfluous if conjoined with one enumerating all actions not surviving. Such a construction gives the first section no office to perform, and the courts have practically rejected this interpretation in numerous cases, holding that causes of action abated by death which were not named in the second section. Thus it has been held that a cause of action by a master for the

seduction of his servant does not survive (*People ex rel.* v. *Tioga Com. Pleas*, 19 Wend. 73); or for a fraudulent representation by a third person in reliance upon which credit is given to an irresponsible person (*Zabriskie* v. *Smith*, 13 N. Y. 322); or for a breach of a promise to marry (*Wade* v. *Kalbfleisch*, 58 id. 286); or for damages occasioned by the negligent killing of another (*Whitford* v. *Panama R. R. Co.*, 23 id. 465); or for a penalty incurred by trustees under the General Manufacturing Act (*Stokes* v. *Stickney*, 96 id. 323); and for fraud in inducing one to marry another (*Price* v. *Price*, 75 id. 244).

The statute obviously created a great change in the law and applied to a numerous class of cases which had not before been held to survive. Thus it enlarged the rights created by the act of 4 Edward III., so as to include actions for trespass *de bonis asportatis* against representatives as well as by them, and removed the limitation which authorized other actions for wrongs against representatives only when the estate of their testator or intestate was benefited by the act complained of. The change is illustrated by the case of *Benjamin's Exrs.* v. *Smith*, 17 Wend. 208, where it was held that the cause of action accruing to a party against a sheriff for a false return did not abate by the plaintiff's death. This had previously been held otherwise. (*People* v. *Gibbs*, *supra.*) In *People* v. *Tioga Com. Pleas*, 19 Wend. 73, it was held that such actions alone as survived to executors and administrators were assignable, and that a cause of action by a master for the seduction of his servant was not assignable.

Although this action is based upon the theory of a loss of service by the master, it must inferentially have been determined that it did not affect the property rights or interests of the master, in such manner as to cause the right of action to survive. Grover, J., in *Haight* v. *Hayt*, said "that the statute had changed the law so far as property or relative rights are affected by the wrongful act." Judge Rapallo has said that "the rights and interests for tortious injuries to which this statute preserves the right of action have frequently been considered, and it is generally conceded that they must be pecuniary rights or interests by injuries to which the estate of the deceased is diminished." (*Cregin* v. *B. C. R. R. Co.*, 75 N. Y. 194.)

Reference to the law as it stood previous to the revision (and the application of the rule of construction embodied in the

maxim of *noscitur a sociis*) would seem to require such an interpretation of the words "property rights or interests" as will confine their application to injuries to property rights only, and such as were theretofore enforceable by the deceased.

It is stated in 1 Wms. on Exrs. 677, "that no action is maintainable by the executor or administrator upon an implied or express promise to the deceased when the damage consisted entirely in the personal suffering of the deceased without any injury to his personal estate." *Chamberlain* v. *Williamson*, 2 M. & S. 408, is cited in support of this proposition. In that case Lord Ellenborough said:

"Executors and administrators are the representatives of the personal property, that is the debts and goods of the deceased; but not of their wrongs except when those wrongs operate to the temporal injury of their personal estate." Accordingly it was there held "that an executor or administrator cannot have an action for a breach of promise of marriage to the deceased when no special damage to the personal estate can be stated on the record. So with respect to injuries affecting the life and health of the deceased, all such as arise out of the unskilfulness of medical practitioners, the imprisonment of the party brought on by the negligence of his attorney, such cases being in substance actions for injuries to the person."

This view of the law was approved in a similar case in this court. (*Wade* v. *Kalbfleisch*, *supra*.) It was said in *People* v. *Tioga Com. Pleas*, (*supra*), by Cowen, J., that the cases in respect to executors and insolvent assignees, and the like, certainly go very far to direct what we are to consider matter of property or estate, so far that it can be touched by a contract, and made a subject of transfer between parties in any way at law or in equity; if the right be not so entirely personal that a man cannot by any contract place it beyond his control, it is assignable under the statutes of insolvency, or will, on his death, pass to his executors. The reason is because it makes a part of his estate; it is matter of property, and as such it is in its nature assignable. On the contrary, if it be strictly personal, it is beyond the reach of contract. In the same sense we say of many rights they are inalienable. No one would pretend that a man's person could be specifically affected by contract; though he should bind himself by indenture, equity could not enforce the agreement. (*Mary Clark's lease*, 1 Blackf. 122.) So of a man's

absolute personal rights in general, as his claim to safety from violence, and his relative rights as a husband, a father, a master, a trustee, etc." This case was approved in *McKee* v. *Judd*, 12 N. Y. 622, and it was there said by Grover, J., that "demands arising from injuries strictly personal, whether arising upon tort or contract, are not assignable; but that all others are." In *Green* v. *Hudson R. R. R. Co.*, 28 Barb. 9, approved in *Whitford* v. *Panama R. R.* (*supra*), it was held that the husband at common law could not maintain an action for negligence causing the death of his wife; and that continued to be the law in this State until the act of 1847 was amended by chapter 78 of the laws of 1870. It was said by Judge Denio in *Whitford* v. *Panama R. R. Co.*, (*supra*), "It has never been suggested, so far as I know, that the personal representatives of a deceased person could at the common law sustain an action on account of the wrongful act of another, which caused the death of the person whose estate they represent." It would seem unnecessary to cite additional authorities to the effect that as the law stood at the adoption of the statute, neither a husband nor wife had such an interest in the life of their respective consorts as subjected a person, through whose negligent act it was taken, to the charge of injuring any property rights possessed by them.

From the same review, it is quite evident that the authors of the statute, intended explicitly to provide for the abatement of causes of action for personal injuries occurring to the plaintiff, or to his intestate or testator. The assignability and survivability of things in action have frequently been held to be convertible terms, and perhaps furnish as clear and intelligible a rule to determine what injuries to property rights or interests are meant by the statute, as it is possible to lay down. *People* v. *Tioga Co. Com. Pleas*, *supra*; *Zabriskie* v. *Smith*, *supra*.

The rights of property only which are in their nature assignable and capable of enjoyment by an assignee are those referred to in the statute. Such rights as arise out of the domestic relations clearly do not possess the attributes of property, and are not assignable by the possessor. (Id.)

The provisions of the Revised Statutes were, however, modified by chapter 450 of the laws of 1847, as amended by subsequent statutes, giving an action against persons and corporations, to the representatives of a deceased person, for the benefit of the husband or widow and next of kin, to recover damages for

the pecuniary injuries suffered by them where death was caused by the wrongful act, neglect or default of another and the act, neglect or default was such as would (if death had not ensued) have entitled the party injured to maintain an action therefor, and in respect thereof against the person who or the corporation which caused the same, although the death was caused under such circumstances as in law amounted to a felony.

We are now to consider the effect which these statutes produced upon the law as it previously existed. The cause of action here provided for has been held not to be a devolution, but a new one calling for the application of another rule of damage and distinguished by many other attributes. *Whitford* v. *Panama R. R. Co., supra; Haight* v. *Hayt*, 19 N. Y. 464; *McDonald* v. *Mallory*, 77 id. 546; *Littlewood* v. *Mayor, etc.*, 89 id. 24; *Blake* v. *Midland R. R. Co.*, 18 A. & E. 93; *Leggott* v. *Gt. N. Ry. Co.*, L. R. 1 Q. B. D. 604; *Russell* v. *Sunbury*, 37 Ohio St. 372; *Yertore* v. *Wiswall*, 16 How. Pr. 8. That it is founded upon the wrongful act of the party causing the death, and gives a right of action therefor to the representatives of the deceased, for the pecuniary consequences suffered by the husband, wife or next of kin from such wrongful act, is also established by the same authorities.

The cause of action is obviously the wrongful act, and the pecuniary injuries resulting afford simply a rule to determine the measure of damages. However much the husband, widow or next of kin may suffer pecuniarily by the act causing death, it constitutes no cause of action, independent of evidence, that it was occasioned by the wrongful or negligent conduct of another. Proof that it occurred in consequence of the contributory negligence of the deceased person, or without the fault of the defendant, furnishes a perfect answer to such an action and a conclusive reason why the death produced by the wrongful act is the cause of action. The cause of action here provided for does not purport to be in any respect a derivative one, but is an original right conferred by the statute upon representatives for the benefit of beneficiaries, but founded upon a wrong already actionable by existing law in favor of the party injured, for his damages. The description of the actionable cause, seems to have been inserted merely to characterize the nature of the act which is intended by the statute to be made actionable, and to define the kind and degree of delinquency with which the

defendant must be chargeable in order to subject him to the action. *Whitford* v. *Panama R. R. Co.*, *supra.*

It will be observed also that the statute, although creating a new cause of action, and passed for the express purpose of changing the rule of the common law in respect to the survivability of actions, and conferring a right upon representatives which they did not before possess, does not undertake, either expressly or impliedly, to impair the equally stringent rule which precluded the maintenance of such actions against the representatives of the offending party.

The plain implication from its language would, therefore, seem to be at war with the idea that the legislature intended to create a cause of action enforceable against, as well as by representatives. The cause of action thereby given is not to the estate of the deceased person, but to his or her representatives as trustees, not for purposes of general administration, but for the exclusive use of specified beneficiaries. *Dickins* v. *N. Y. Cent. R. R. Co.*, 23 N. Y. 158; *Yertore* v. *Wiswall*, 16 How. Pr. 8.

The wrong defined indicates no injury to the estate of the person killed, and cannot either logically or legally be said to affect any property rights of such person, unless it can be maintained that a person has a property right in his own existence. The property right, therefore, created by this statute is one existing in favor of the beneficiaries of a recovery only, and depends for its existence upon the death of the party injured. It had no previous life and cannot be said to have been injured by the very act which creates it. Whatever claim a wife or children have at law upon the husband and father for support perishes with the life of such person, and thereafter their claims upon his estate are governed by statutory rules.

If, therefore, we consider this cause of action as a property right, it is as such, a right based upon a tort, and, except as otherwise provided by the statute creating it, must be governed by the existing rules of law applicable to such causes of action. The case of *Littlewood* v. *Mayor, etc.*, 89 N. Y. 24, holding that such causes of action may be settled and discharged by the injured party during his life-time, would seem to preclude the idea that the husband or widow and next of kin had any right of property in the cause of action created by the death of the party injured during his life-time. The question presented by

the decision herein was, we think, determined adversely to the plaintiff by the case of *Cregin* v. *Brooklyn Crosstown R. R. Co.*, 75 N. Y. 192. It was there held when an injury is done to the person of the plaintiff (and necessarily, by the terms of the statute, to that of his testator or intestate), "that the pecuniary damage sustained thereby cannot be so separated as to constitute an independent cause of action, for the cause of action is single and consists of the injury to the person. The damages are the consequences merely of that injury, and when, by the terms of the statute, such a cause of action abates, the character of the damages cannot save it." The conclusions reached in that case tend necessarily to support the doctrine that the causes of action given by the act of 1847 and its amendments abate by the death of the person injured. It also holds that, so far as the personal estate and rights of property of the deceased person are injured by the wrongful act causing death, the cause of action therefor survives to his representatives by force of section 1 of the Revised Statutes, before referred to. Such an action exists independently of the Statute of 1847, and has been upheld in favor of representatives to the extent of giving damages for medical attendance and inability of the injured party to attend to business, for the time intermediate his injury and death, when the accident occurred while traveling as a passenger upon the defendant's railroad. The action was there based upon the theory of a breach of contract to carry the passenger safely. *Bradshaw and wife* v. *Lancashire & Yorkshire Ry. Co.*, L. R. 10 C. P. 189.

We have carefully considered the case of *Needham* v. *Grand T. R. R. Co.*, 38 Vt. 294, but inasmuch as the statutes in that State affecting the question are so different from our own, little analogy exists between the question there presented and the one under consideration. The case of *Yertore* v. *Wiswall*, (*supra*) is entitled to great respect from the learning and ability of the court by which it was decided. But, although agreeing with some of the propositions entertained by it, we are unable to concur in the conclusion reached, that the cause of action there considered, survived.

The complaint in the present action describes a cause of action arising out of the death alone, and suggests no injury to the estate or property of the deceased. Such a cause of action is abated by the death of the wrong-doer.

The judgment of the General Term should, therefore, be reversed, and that of the Special Term affirmed.

All concur; Finch, J., in result.

Judgment accordingly.

MASTER AND SERVANT. THE RELATION.

SINGER MANUFACTURING CO. v. RAHN.

(132 United States, 518.—1889.)

THIS action was brought by Katie Rahn against the Singer Manufacturing Company to recover damages for personal injuries done to the plaintiff by carelessly driving a horse and wagon against her, when crossing a street in Minneapolis. The complaint alleged that the driver of the wagon was the defendant's servant and engaged in its business. The answer denied this, and alleged that the driver, one Corbett, was engaged in selling sewing-machines on commission, and not otherwise, for the defendant. The replication denied the allegations of the answer.

At the trial before a jury, after the plaintiff had introduced evidence to maintain the issues on her part, the defendant put in evidence the contract between itself and Corbett, headed "Canvasser's Salary and Commission Contract," and at the close of the case requested the court to instruct the jury that that contract made Corbett an independent contractor for whose negligence, if any, the defendant could not be held liable. The court declined and instructed the jury that that contract established the relation of servant and master between Corbett and the defendant, and that the defendant was responsible for his negligence while engaged in its service.

The jury returned a verdict in favor of the plaintiff, and judgment was rendered thereon; and the defendant tendered a bill of exceptions, and sued out this writ of error.

GRAY, J. The general rules that must govern this case are undisputed, and the only controversy is as to their application to the contract between the defendant company and Corbett, the driver, by whose negligence the plaintiff was injured.

A master is liable to third persons injured by negligent acts done by his servant in the course of his employment, although the master did not authorize or know of the servant's act or neglect, or even if he disapproved or forbade it. *Philadelphia & Reading Railroad* v. *Derby*, 14 How. 468, 486. And the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, "not only what shall be done, but how it shall be done." *Railroad Co.* v. *Hanning*, 15 Wall. 649, 656.

The contract between the defendant and Corbett, upon the construction and effect of which this case turns, is entitled "Canvasser's Salary and Commission Contract." The compensation to be paid by the company to Corbett, for selling its machines, consisting of "a selling commission" on the price of machines sold by him, and "a collecting commission" on the sums collected of the purchasers, is uniformly and repeatedly spoken of as made for his "services." The company may discharge him by terminating the contract at any time, whereas he can terminate it only upon ten days' notice. The company is to furnish him with a wagon; and the horse and harness to be furnished by him are "to be used exclusively in canvassing for the sale of said machines and the general prosecution of said business."

But what is more significant, Corbett "agrees to give his exclusive time and best energies to said business," and is to forfeit all his commissions under the contract, if while it is in force he sells any machines other than those furnished to him by the company; and he further "agrees to employ himself under the direction of the said Singer Manufacturing Company, and under such rules and instructions as it or its manager at Minneapolis shall prescribe."

In short, Corbett, for the commissions to be paid him, agrees to give his whole time and services to the business of the company; and the company reserves to itself the right of prescribing and regulating not only what business he shall do, but the manner in which he shall do it; and might, if it saw fit, instruct him what route to take, or even at what speed to drive.

The provision of the contract, that Corbett shall not use the name of the company in any manner whereby the public or any individual may be led to believe that it is responsible for his

actions, does not and cannot affect its responsibility to third persons injured by his negligence in the course of his employment.

The Circuit Court therefore rightly held that Corbett was the defendant's servant, for whose negligence in the course of his employment, the defendant was responsible to the plaintiff. *Railroad Co.* v. *Hanning*, above cited; *Linnehan* v. *Rollins*, 137 Mass. 123; *Regina* v. *Turner*, 11 Cox Crim. Cas. 551.

Judgment affirmed.

MASTER'S LIABILITY TO THIRD PERSONS. [1]

MORIER v. ST. PAUL, MINNEAPOLIS & MANITOBA RY. CO.

(31 Minnesota, 351.—1884.)

MITCHELL, J. All the evidence in this case tends to prove that some section-men, under the charge of a section-foreman,

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[1] REASON OF THE MASTER'S LIABILITY.—"Blackstone (I. 417) . . . has no other reason to give than the fiction of an 'implied command.' It is currently said, *Respondeat superior;* which is a dogmatic statement, not an explanation. It is also said, *Qui facit per alium facit per se;* but this is in terms applicable only to authorized acts, not to acts that, although done by the agent or servant 'in the course of the service,' are specifically unauthorized or even forbidden. Again, it is said that a master ought to be careful in choosing fit servants; but if this were the reason, a master could discharge himself by showing that the servant for whose wrong he is sued was chosen by him with due care, and was in fact generally well conducted and competent: which is certainly not the law.

"A better account was given by Chief Justice Shaw of Massachusetts (*Farwell* v. *Boston & Worcester Railroad Co.*, 4 Met. 49). 'This rule,' he said, 'is obviously founded on the great principle of social duty, that every man in the management of his own affairs, whether by himself or his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it.' This is, indeed, somewhat too widely expressed, for it does not in terms limit the responsibility to cases where at least negligence is proved. But no reader is likely to suppose that, as a general rule, either the servant or the master can be liable where there is no default at all. And the true principle is otherwise clearly enounced. I am answerable for the wrongs of my servant or agent, not because he is authorized by me, or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others." Pollock on Torts, 67.

were, in the employment of defendant, engaged in repairing its railroad track near defendant's [plaintiff's] farm, on the 21st of October, 1882. While engaged in such work, they usually returned to their boarding-house for dinner, but on this day, their work being at some distance, they took their dinner with them. At noon, when they quit work to eat, they built a fire, or rekindled one which some other person had kindled, on defendant's right of way, for the purpose of warming their coffee. After eating dinner, they resumed their work, negligently leaving the fire unextinguished, which spread in the grass and ran on to plaintiff's land and burned his hay. There is no evidence that the defendant was boarding these men, or that it was any part of its duty to prepare or cook their meals. Neither is there anything tending to show that the defendant either knew of or authorized the kindling of a fire for any such purpose, either on this or on any other occasion. Nor is there any evidence that it was the duty of these section-men to exercise any supervision over the right of way, or to extinguish fires that might be ignited on it. So far as the evidence goes, their employment was exclusively in repairing the railroad track.

The doctrine of the liability of the master for the wrongful acts of his servant is predicated upon the maxims, *respondeat superior* and *qui facit per alium facit per se*. In fact, it rests upon the doctrine of agency. Therefore, the universal test of the master's liability is whether there was authority, express or implied, for doing the act; that is, was it one done in the course and within the scope of the servant's employment? If it be done in the course of and within the scope of the employment, the master will be liable for the act, whether negligent, fraudulent, deceitful, or an act of positive malfeasance. Smith on Master & Servant, 151. But a master is not liable for every wrong which the servant may commit during the continuance of the employment. The liability can only occur when that which is done is within the real or apparent scope of the master's business. It does not arise when the servant steps outside of his employment to do an act for himself, not connected with his master's business. Beyond the scope of his employment the servant is as much a stranger to his master as any third person. The master is only responsible so long as the servant can be said to be doing the act, in the doing

of which he is guilty of negligence, in the course of his employment. A master is not responsible for any act or omission of his servant which is not connected with the business in which he serves him, and does not happen in the course of his employment. And in determining whether a particular act is done in the course of the servant's employment, it is proper first to inquire whether the servant was *at the time* engaged in serving his master. If the act be done while the servant is at liberty from the service, and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time when the injury was inflicted, acting for himself, and as his own master, *pro tempore*, the master is not liable. If the servant step aside from his master's business, *for however short a time*, to do an act not connected with such business, the relation of master and servant is for the time suspended. Such, variously expressed, is the uniform doctrine laid down by all authorities. 2 Thompson on Negligence, 885, 886; Sherman & Redf. on Negligence, §§ 62, 63; Cooley on Torts, 533 *et seq.*; *Little Miami R. Co.* v. *Wetmore*, 19 Ohio St. 110; *Storey* v. *Ashton*, L. R., 4 Q. B. 476; *Mitchell* v. *Crassweller*, 13 C. B. 237; *McClenaghan* v. *Brock*, 5 Rich. (Law) 17.

It would seem to follow, as an inevitable conclusion, from this, that on the facts of this case the act of these section-men in building a fire to warm their own dinner was in no sense an act done in the course of and within the scope of their employment, or in the execution of defendant's business. For the time being they had stepped aside from that business, and in building this fire they were engaged exclusively in their own business, as much as they were when eating their dinner; and were for the time being their own masters, as much as when they ate their breakfast that morning, or went to bed the night before. The fact that they did it on defendant's right of way is wholly immaterial, in the absence of any evidence that defendant knew of or authorized the act. Had they gone upon the plaintiff's farm and built the fire, the case would have been precisely the same. It can no more be said that this act was done in the defendant's business, and within the scope of their employment, than would the act of one of these men in lighting his pipe, after eating his dinner, and carelessly throwing the burning match into the grass. See *Williams* v. *Jones*, 3 Hurl. & C. 256. The fact that the section-foreman assisted in or even directed

the act does not alter the case. In doing so he was as much his own master and doing his own business as were the section-men. Had it appeared that it was part of his duty to look after the premises generally, and extinguish fires that might be ignited on them, his omission to put out the fire might possibly, within the case of *Chapman* v. *N. Y. C. R. Co.*, 33 N. Y. 369, be considered the negligence of the defendant. But nothing of the kind appears, and the burden is upon plaintiff to prove affirmatively every fact necessary to establish defendant's liability.

Order reversed, and new trial granted.

Palmeri v. The Manhattan Railway Co.

(133 New York, 261.—1892.)

Appeal by the defendant from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the plaintiff entered upon a verdict, in an action to recover damages for unlawful imprisonment.

Gray, J. Quite recently we had occasion to consider a case where the ticket agent of a railroad company directed the arrest, by police officers, of a person in the railroad station, whom he suspected of being a counterfeiter, and the company was, thereafter, sued for false imprisonment. In that case the facts were, briefly stated, that the ticket agent had been notified by the police authorities to watch for men of a certain description, suspected of passing counterfeit bills. Upon a certain occasion two men came into the station and one of them tendered a bill in payment for tickets. The agent suspected them of being the counterfeiters wanted by the police and thought the bill looked "queer;" but, nevertheless, took it and gave back the change with the tickets, saying nothing to them. He then sent for a police officer, to whom he pointed out the men, who were then on the station platform. The bill was subsequently pronounced to be genuine and the man was discharged. We held that the company was not responsible in damages, because the agent was not, in what he did, acting within the scope and line of his duty. His acts were not such as could be deemed to be

performed in the course of his employment; or such as were demanded for the protection of his employer's interests, but rather those of a citizen desirous of aiding the police in the detection and arrest of persons suspected of being engaged in the commission of a crime. His duty, as the particular agent of the company, was to have refused to accept and change the bill tendered in payment for passage tickets, if he supposed it was not genuine, and, when he did accept it, his only purpose could have been to further the efforts of the police authorities by such a step and could not possibly be considered as something which his employers, or his employment, required of him. I refer to the case of *Mulligan* v. *New York & Rockaway Beach Ry. Co.*, 129 N. Y. 506. In the present case, however, the acts of the ticket agent were of a different character.

The plaintiff purchased a ticket of the agent at the elevated railroad station and passed through to take the cars, after some altercation about the amount of the change. The ticket agent immediately afterwards came out upon the platform of the station, charged her with having given him a counterfeit piece of money and demanded another quarter in place of the one given him. She insisted upon her money being genuine and refused to give another quarter, or to hand back the change. He became angry and called her a counterfeiter and a common prostitute. He placed his hand upon her and told her not to stir until he had procured a policeman to arrest and to search her. He detained her in the station for a while, but let her go when he failed to get an officer. This action was then brought to recover damages, because of injury sustained from the unlawful imprisonment, or the restraint imposed upon the plaintiff's person, accompanied by the slanderous words publicly spoken concerning her. The jury believed her story and the judgment, which she has recovered, the appellant seeks to avoid; principally upon the ground that the ticket agent was acting outside of the scope of his employment in doing the acts complained of. The appeal must fail. This is not like the *Mulligan* case. Here the agent was acting for his employers and with no other conceivable motive, losing his temper and injuring and insulting the plaintiff upon the occasion. He believed that plaintiff had passed a counterfeit piece of money upon him and thus had obtained a passage ticket and good money in change. What he did was in the endeavor to protect and to recover his em-

ployer's property and if, in his conduct, he committed an error which was accompanied by insulting language and the detention of the person, the defendant, as his employer, is legally responsible in an action for damages for the injury. For all the acts of a servant or agent, which are done in the prosecution of the business intrusted to him, the carrier becomes civilly liable, if its passengers or strangers, receive injury therefrom. The good faith and motives of the servant are not a defense, if the act was unlawful. Once the relation of carrier and passenger entered upon, the carrier is answerable for all consequences to the passenger of the wilful misconduct or negligence of the persons employed by it, in the execution of the contract which it has undertaken towards the passenger. This is a reasonable and necessary rule, which has been upheld by this court in many cases; of which *Weed* v. *P. R. R. Co.*, 17 N. Y. 362; *Hamilton* v. *Third Ave. R. R. Co.*, 53 id. 25; *Stewart* v. *B. & C. R. R. Co.*, 90 id. 588; and *Dwinelle* v. *N Y. C. & H. R. R. Co.*, 120 id. 117, are sufficient instances.

What materially distinguishes the present from the *Mulligan* case is that there the servant of the company was not acting for the protection of the company's interests; but went quite outside of the line of his duty, to perform a supposed service to the community, by procuring the arrest of criminals, whom he knew the authorities were endeavoring to apprehend. That did not enter into the transaction of his employer's business; whereas here the ticket agent clearly was engaged about the company's affairs; but, in the belief of the jury, unlawfully detained the plaintiff and insulted her by slandering her character. It is needless to consider the case of *Mali* v. *Lord*, 39 N. Y. 381, so much relied upon by the appellant. There is no parallel between the case of a clerk in a store, who has a person arrested and searched, upon suspicion of a theft, and whose general employment could not warrant such an act; and the present case of an agent, who is considered to be invested by the carrier with a discretion and a duty in matters of his employment, from which an authority is inferable to do whatever is necessary about it. Though injury and insult are acts in departure from the authority conferred, or implied, nevertheless, as they occur in the course of the employment, the master becomes responsible for the wrong committed. Judge Andrews in *Rounds* v. *D., L. & W. R. R. Co.*, 64 N. Y. 129, points out

the distinguishing principle of these cases and refers to *Mali* v. *Lord* in the course of his opinion.

The offer by defendant, upon plaintiff's cross-examination, to show that she was a habitual litigant, was properly excluded. It had nothing to do with the issue, and, if true, would not prove her unworthy of belief; any more than it would follow, from her admission of its truth, that the litigations, which such a tendency had encouraged, were not upon meritorious grounds. The testimony of the witness Murphy, a bystander upon the occasion, as to the ticket agent's conversation with him, I think was admissible as occurring simultaneously and as illustrating somewhat the transaction; but, even if questionable, the defendant appears to have objected to the testimony after it was in, and obtained no ruling by motion to strike out. When, subsequently, upon it appearing to the court that the plaintiff did not hear the conversation, an objection to the testimony continuing was made, it was considered proper by the judge and was at once sustained.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.[1]

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1. The master is as liable for the wilful, as for the negligent act of his servant, provided the wrongful act was committed in the business of the master, and within the scope of the servant's employment. In the case of a common carrier an apparently greater responsibility must be assumed, but, after all, this is only because the servant or agent engaged in executing the contract of carriage cannot, during the transportation, act without the scope of his employment. "A common carrier is bound, so far as practicable, to protect his passengers, while being conveyed, from violence committed by strangers and co-passengers, and he undertakes absolutely to protect them against the misconduct of its own servants engaged in executing the contract." *Stewart* v. *Brooklyn & Crosstown R. R. Co.*, 90 N. Y. 588, 591. This stringent responsibility, however, is assumed only towards passengers, not strangers, and applies only to such servants as are engaged in the execution of the contract of carriage.

Shea v. The Sixth Avenue Railroad Co.

(62 New York, 180.—1875.)

Appeal by the defendant from a judgment of the General Term of the Court of Common Pleas for the city and county of New York, affirming a judgment in favor of the plaintiff, in an action to recover damages for personal injuries. The defendant's demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, was sustained and judgment entered dismissing the complaint. On appeal the judgment was reversed, and the demurrer overruled with leave to answer. The defendant failed to answer, and the damages were assessed by a sheriff's jury, and judgment entered thereon.

Miller, J. The plaintiff's complaint alleges that one of the cars of the defendant was standing at the corner of Barclay and Church streets in New York city, in such a position as to block up the passage across Church street. That the plaintiff being desirous of crossing said street, stepped upon the front platform of said car, for the purpose of passing over the same. That thereupon the driver of said car who was the servant and agent and then in the employment of the defendant, forcibly, wilfully, and violently seized the plaintiff, threw her from the said car upon the highway, in consequence of which the leg of the plaintiff was broken, and the plaintiff was otherwise severely bruised and injured.

The averments in the complaint show that the defendant's car blocked up the street, so as to prevent the crossing of the same by foot passengers who might have occasion to pass over. The right of every individual to a free and unrestricted use of a public highway or a street, for the purpose of passing and repassing is well settled. When such a right is obstructed or infringed upon, I think that it is equally clear that a person who desires to pass across the street would have the right either to remove the obstruction, or if necessary to pass over the same.

While there are occasions when it is indispensable for the cars on street railroads to stop at localities on their route, and sometimes necessarily obstruct a free passage across the street,

there is no good reason why a person who desires to cross should wait unreasonably long for the cars to pass, or be compelled at some inconvenience to seek another place for that purpose. Such person has an undoubted right to cross over the platform of the car while thus interfering with his passage for the purpose of getting beyond it, and he is not a trespasser or wrongdoer in so doing. To render such an act a trespass would, I think, be in direct conflict with the principle that public highways and streets are open to all who choose or may desire to use them, and for the benefit of the entire community. The fact that street railroads have rules and regulations, preventing persons from being on the platform, does not, I think, interfere with the right to pass over the same. These rules are intended mainly for the passengers who travel in the cars, and have no application to those who merely use them as a means of avoiding the obstructions which they create to the public, when stopping at places on public streets and thoroughfares. If such a right to pass did not exist, it would rest with these companies to determine in their own discretion, when, where, and for what length of time they shall interfere with the travel of the public, and in fact the entire extent of the obstruction which they are at liberty to interpose in this manner.

The plaintiff, then, was lawfully on the car, when the driver seized and threw her from the same, and the question arises whether the act of the driver was one for which the defendant was responsible. It is insisted by the defendant's counsel, that as the defendant gave the driver no express authority to do the act, no authority to do an unlawful act will be presumed, and to sustain this position, reliance is placed upon the case of *Isaacs* v. *Third Ave. R. R. Co.*, 47 N. Y. 122. In the case cited, it appeared that the plaintiff was a passenger in the defendant's car, and desiring to alight passed out upon the platform, and requested the conductor to stop the car, to which he replied that "the car was stopped enough," she answered that "she would not get out until the car had come to a full stop," whereupon he took her by the shoulder with both hands and threw her out, and her leg was broken, by falling upon the pavement. It was held that the act was a wanton and wilful trespass, not in the performance of any duty to, or of any act authorized by the defendant, and that the defendant was not liable. It is laid down, in the case cited, that if an act is done by a servant in

the business of the master, and within the scope of his employment, the master is liable to third persons for abuse of the authority conferred, and injuries resulting from an error of judgment or mistake of facts by the servant, as well as those resulting from a negligent or reckless performance of his duties. It is said in the opinion of the court, that "an act was done by the conductor completely out of the scope of his authority, which there can be no possible ground, warranted by the evidence, for supposing the defendant authorized, and which it never could be right under any circumstances for the defendant to do." Several grounds are stated, showing that the act was not done by the conductor while engaged in the performance of any duty to the defendant, or of any act authorized by it, but that it was a criminal act, a wanton and wilful trespass, and not the natural or necessary consequence of anything which the defendant had ordered to be done.[1]

The case at bar is not analogous to the case cited, and the rule there laid down has no application here. The demurrer admits all the facts alleged in the complaint, and concedes that the defendant's driver was acting as "the servant and agent, and in the employment of the defendant," when the act complained of was done. It may also be assumed, from his position that the driver had instructions to keep the platform of the car clear from all passengers, as well as all other intruders, who might be there without right and contrary to the regulations of the company. This no doubt was his regular duty, and it was necessarily intrusted to his judgment to decide whether a person was on the platform in violation of the rules of the company, and he was authorized to remove such person. If without comprehending the precise nature of the legal rights of the defendant, or that the obstruction of the street by the stopping of the cars conferred any privilege upon persons who desired to cross,

[1] The Court of Appeals, in *Stewart* v. *Brooklyn & Crosstown R. R. Co.*, 90 N. Y. 588, 594, offers what may be regarded as an apology for such erroneous decision, saying: "That case (*Isaacs* v. *Third Ave. R. R. Co.*,) was discussed by counsel and determined by this court upon the assumption that the rule of the master's liability for the assault of a servant committed upon a person to whom the master owed no duty was applicable to that case. The mind of the court was not called to the fact that the rule applicable to such a case does not apply to the case of an assault committed upon a passenger by a servant intrusted with the execution of a contract of a common carrier."

and supposing and believing that the plaintiff had no such right, and was a trespasser unlawfully there, the driver did the act complained of, it was an error of judgment, a mistake committed in the course of his employment, for the consequences of which the defendant is liable. If it was an abuse of authority conferred which induced him to seize and eject the plaintiff, the same rule is applicable. *Isaacs* v. *Third Ave. R. R. Co.*, *supra*; *Higgins* v. *Watervliet Turnpike Co.*, 46 N. Y. 23, 29; *Jackson* v. *Second Ave. R. R. Co.*, 47 id. 274; *Meyer* v. *Second Ave. R. R. Co.*, 8 Bosw. 305.

The averment in the complaint, that the driver "forcibly, wilfully, and violently, seized the plaintiff, and threw her from the said car," cannot I think be considered as charging that the act was malicious, but it is merely an allegation that he acted knowingly and recklessly, in the performance of his duty, using more force and violence than was necessary to accomplish his purpose, for which as we have seen, within the cases cited, the defendant would be answerable.

The order and judgment of the General Term was right, and must be affirmed with costs.

All concur; except Folger, J., dissenting.

Judgment affirmed.

THE RELATION MUST BE SHOWN TO EXIST.

Higgins v. The Western Union Telegraph Co.

(156 New York, 75.—1898.)

Appeal by the defendant from a judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of the plaintiff entered upon a verdict, in an action to recover damages for injuries alleged to have been caused by the negligence of the defendant.

O'Brien, J. The plaintiff sustained a personal injury on the 7th day of December, 1891, while engaged in using the elevator in defendant's building at the corner of Broadway and Dey street in the city of New York. The negligent act to which

the injury is to be attributed was committed by a general servant of the defendant, whose duty it was to manage and operate the elevator.

The question in this case is whether the defendant is responsible under the doctrine of *respondeat superior* for the negligence of its servant under the circumstances of the case. There is practically no dispute with respect to the facts, and, briefly stated, they are these: It seems that some months before the accident the building referred to was injured by fire, and the company entered into a contract with a contractor and builder to restore the building. The contractor, among other things, was to furnish elevators, and they had been placed in the building some time before the accident. The builder had not, however, yet completed his contract, and had not turned over the elevators to the defendant. They were still, for all practical purposes, the property of the contractor. From the time he first placed them in the building they were subject to his use in carrying materials and workmen from the lower to the upper floors. There can be no doubt that he had the right to use them for that purpose until such time as he should complete his contract and turn the building over to the defendant.

On the day of the accident the plaintiff, a mason or plasterer, was in the service of the contractor, and was directed by him to do some plastering in the elevator shaft. For the purpose of doing this work they used the elevator as a platform, upon which the plaintiff stood. It was necessary to move the elevator up and down to enable the plaintiff to do his work, and the contractor, instead of employing one of his own men for that purpose, found it more convenient and economical to procure a man who was in the employment of the defendant. It should be stated that, although the elevator had not yet been turned over to the defendant, it was, nevertheless, permitted to use them for the purpose of taking passengers up and down during some portions of the day. On the day of the accident the defendant's servant, who had charge of the elevator for the purpose of carrying passengers, suspended that work about noon, and the contractor, during the rest of the day, used the elevator as a platform for the purpose stated.

There is no question in this case with respect to the fact that Algar, the person who took charge of the elevator, and whose negligence caused the accident, was in the general service and

pay of the defendant; but the question is whether, at the time of the accident, he was engaged in doing the defendant's work or the work of the contractor. The work of plastering the elevator shaft was that of the contractor. Algar, who was called upon by the contractor to move the elevator while the plaintiff was standing upon it, was not at the time taking any orders from the defendant. His orders came from the plaintiff, who was in the employ of the contractor, and who directed him to move the elevator up and down, as it became necessary, to enable him to do the work. The hand of Algar that moved the lever which controlled the elevator was directed by the mind and brain of the plaintiff. To hold the elevator steady it was necessary to bring the lever to the center of the guard and put it in a catch. To move the elevator up or down the lever was taken from the catch and moved forward or backward accordingly. On the occasion of the accident Algar did not put the lever in the catch, and did not have his hand upon the lever, but was sitting in a chair reading a newspaper. It was this negligence which caused the accident, since, without any instructions from the plaintiff to move the car, and without warning, it started up, throwing him down, with his head between the door and the top of the elevator, inflicting injuries of a somewhat serious character.

The general rule is that a party injured by the negligence of another must seek his remedy against the person who caused the injury, and that such person alone is liable. The case of master and servant is an exception to the rule, and the negligence of the servant, while acting within the scope of his employment, is imputable to the master. *Engel* v. *Eureka Club*, 137 N. Y. 100. But the doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrong-doer and the person sought to be charged for the result of the wrong, at the time and in respect to the very transaction out of which the injury arose. The fact that the party to whose wrongful or negligent act an injury may be traced was, at the time, in the general employment and pay of another person, does not necessarily make the latter the master and responsible for his acts. The master is the person in whose business he is engaged at the time, and who has the right to control and direct his conduct. Servants who are employed and paid by one person may, nevertheless, be *ad hoc* the servants of an-

other in a particular transaction, and that, too, when their general employer is interested in the work. *Wyllie* v. *Palmer*, 137 N. Y. 248.

In this case, as already observed, the contractor had the right to use the elevator, and for that purpose could have employed his own servants. Instead of doing so he borrowed the defendant's servant, who, for the time being, became the servant of the contractor, engaged in doing his work and subject to his order. He put the elevator and the conductor to a use different from that employed by the defendant. The defendant used the elevator for the purpose of carrying passengers. The contractor was using it as a platform upon which the plaintiff might stand in doing his work. Now, does the fact that Algar, who was guilty of the negligent act that produced the injury, was in the general employ and pay of the defendant, make it liable for the result of this accident? I think not, and for the reason that the conductor, while moving the elevator up and down as directed by the plaintiff, was not engaged in the defendant's work, but in the work of the contractor.

This distinction in the law of master and servant is made quite clear by the decisions in this court. *Wyllie* v. *Palmer*, *supra*; *McInerney* v. *D. & H. C. Co.*, 151 N. Y. 411.

Beyond the scope of his employment the servant is as much a stranger to his master as any third person, and the act of the servant, not done in the execution of the service for which he was engaged, cannot be regarded as the act of the master. And if the servant step aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended, and an act of the servant during such interval is not to be attributed to the master. Here the relation of master and servant between the conductor of the elevator and the defendant was suspended during the time that he was doing the work of the contractor in moving the plaintiff up and down in the shaft.

I am unable to distinguish this case in principle from the cases in this court already cited; and the best considered cases in other jurisdictions are to the same effect. *Murray* v. *Currie*, L. R. (6 Com. Pleas) 26; *Rourke* v. *White Moss Colliery Co.*, L. R. (2 Com. Pleas Div.) 205. In the latter case Lord Cockburn stated the rule in these words: "But when one person

lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him."

The true test in such cases is to ascertain who directs the movements of the person committing the injury. It seems to me that the conductor in this case, whose negligence caused the injury, was not, at the time, engaged in the defendant's work, but in the work of the contractor, under the direction of the plaintiff. Hence, the decision in this case cannot be sustained without disturbing the rule of law as determined in the cases cited.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur (PARKER, CH. J., and MARTIN, J., in result), except GRAY and VANN, JJ., not sitting.

Judgment reversed.

INDEPENDENT CONTRACTOR.

BERG v. PARSONS.

(156 New York, 109.—1898.)

APPEAL by the defendant from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the plaintiff entered upon a verdict, in an action brought to recover damages for injury to property, alleged to have been caused by the carelessness of a contractor employed by the defendant.

See dissenting opinion by Gray, J., for a statement of the facts of this case.

MARTIN, J. The doctrine of *respondeat superior* is based upon the relation of master and servant or principal and agent. As no such relation existed between the parties, I find no ground upon which the judgment in this action can be sustained.

The rule that where the relation of master and servant or

principal and agent does not exist, but an injury results from negligence in the performance of work by a contractor, the party with whom he contracts is not responsible for his negligence or that of his servants, is well established by the authorities in this State. *Blake* v. *Ferris*, 5 N. Y. 48; *Pack* v. *Mayor, etc.*, 8 N. Y. 222; *Kelly* v. *Mayor, etc.*, 11 N. Y. 432; *McCafferty* v. *S. D. & P. M. R. R. Co.*, 61 N. Y. 178; *King* v. *N. Y. C. & H. R. R. R. Co.*, 66 N. Y. 181; *Town of Pierrepont* v. *Loveless*, 72 N. Y. 211; *Ferguson* v. *Hubbell*, 97 N. Y. 507; *Herrington* v. *Village of Lansingburgh*, 110 N. Y. 145; *Roemer* v. *Striker*, 142 N. Y. 134.

In *Blake* v. *Ferris* the defendant had a license to construct, at his own expense, a sewer in a public street. He engaged another person to construct it for a stipulated price. The sewer was left at night in a negligent manner by the workmen who were employed in its construction. It was held that the immediate employer of the servant, through whose negligence the injury occurred, was responsible, but that the primary principal or employer was not.

In *Pack* v. *Mayor, etc.*, which was an action for damages caused by the alleged negligence of a contractor in blasting rocks, which resulted in injury to the plaintiff's house, in personal injury to his wife, and in killing one of his children, it was held that, as the work was being prosecuted under a contract with a person who was to perform it, the corporation was not liable, but that a recovery for such an injury could be had only against the person actually guilty of the wrongful act, or against one to whom he stands in the relation of servant or agent, and that the contractor in such a case was not the servant or agent of the corporation.

The *Kelly* case was also an action for damages occasioned by negligence in blasting. In that case there was a contract between the city and a contractor to grade a certain street, and it was held that the city was not liable for damages occasioned by negligence in the performance of the work, but that the contractor was alone liable, although the contract provided that the work should be done under the direction and to the satisfaction of the officers of the corporation.

The *McCafferty* case was for an injury to the plaintiff's store and property by alleged negligence in blasting rocks necessary for the construction of the defendant's road. There the corpo-

ration had let the work of constructing the road by contract, and the negligence was that of the contractor or his employees, and this court held that the defendant was not liable, and that there was no distinction between real and personal property, so far as its negligent use and management were concerned, or of negligent acts upon it by others.

In the *King* case the owner of real property was held not liable for injuries resulting from negligence on the part of a contractor or his employees engaged in performing a lawful contract for specific work upon the premises of the defendant, and the rule that the law will not impute to one person the negligent acts of another, unless the relation of master and servant or principal and agent exists, was again asserted.

The same doctrine was held in the *Town of Pierrepont* case, where the *Blake* and *Pack* cases were followed, and it was declared that a contractor or his employees did not stand in the relation of servants to a person who was the owner of the property and with whom the contract was made, and that the latter was not answerable for their negligence.

In *Ferguson* v. *Hubbell*, where the injury for which a recovery was sought resulted from the act of a contractor, it was again decided that the contractor was, in no sense, the servant of the defendant, and that the doctrine of *respondeat superior* did not apply.

The *Herrington* case was for damages occasioned by carelessness in blasting. The work was done by contractors, and the court followed its previous decisions and held that the defendant was not liable, but that the injury was occasioned by the negligence of the contractors, and that they alone were responsible.

The *Roemer* case was also for negligence in blasting and excavating on the defendant's premises which adjoined the premises of the plaintiff. The work was done by a contractor, and the owner was held not liable.

It seems to me that the principle of these decisions is decisive of the case at bar, and is directly adverse to the contention of the respondent. The only authorities in this state cited as sustaining the doctrine contended for, are *Blake* v. *Ferris*, 5 N. Y. 48, and *Storrs* v. *City of Utica*, 17 N. Y. 104. The *Blake* case we have already referred to, which is a direct authority against the doctrine it is cited to sustain. In the

Storrs case the facts were different, and the principle of the decision has no application. There the doctrine of the *Blake*, *Kelly* and *Pack* cases were expressly endorsed in the opinion of Judge Comstock, who said: "Now, in these two cases of *Pack* v. *The Mayor*, *etc.*, and *Kelly* v. *The Mayor*, *etc.*, the general doctrines so well set forth in *Blake* v. *Ferris* were applied with entire precision and accuracy." While the learned judge doubted the propriety of the application of that doctrine to the case of *Blake* v. *Ferris*, he expressly recognized its correctness and its applicability to a case like this. The decision of the court in the *Storrs* case was placed upon the sole ground that it was the duty of the corporation to keep its streets in a safe condition for public travel, and for a failure to discharge that duty the corporation was liable. The question of the negligent manner in which the work was performed was entirely excluded by the opinion in that case.

There are certain exceptional cases where a person employing a contractor is liable, which, briefly stated, are: Where the employer personally interferes with the work, and the acts performed by him occasion the injury; where the thing contracted to be done is unlawful; where the acts performed create a public nuisance; and where an employer is bound by a statute to do a thing efficiently and an injury results from its inefficiency. Manifestly, this case falls within none of the exceptions to which we have referred. There was no interference by the defendant. The thing contracted to be done was lawful. The work did not constitute a public nuisance, and there was no statute binding the defendant to efficiently perform it. In none of those exceptional cases does the question of negligence arise. There the action is based upon the wrongful act of the party, and may be maintained against the author or the person performing or continuing it. In the case at bar the work contracted for was lawful and necessary for the improvement and use of the defendant's property. Consequently no liability can be based upon the illegality of the transaction, but it must stand upon the negligence of the contractor or his employees alone. It seems very obvious that, under the authorities, the defendant was not responsible for the acts of the contractor or his employees, and that the court should have granted the defendant's motion for a nonsuit. If a contrary rule were established it would not only impose upon the own-

ers of real property an improper restraint in contracting for its improvement, but would open a new and unlimited field for actions for the negligence of others which has not hitherto existed in this state, and practically overrule a long line of decisions in this court which firmly establish a contrary doctrine.

It follows that the judgment should be reversed.

GRAY, J. (dissenting): The question is whether, in a case like the present one, where the work contracted for is obviously and necessarily hazardous, it is an assumption inconsistent with the doctrine of exemption for the acts of an independent contractor that a legal duty is imposed upon him who employs the contractor to use a reasonable amount of care, in the selection of one who is both competent and careful and that for a failure to perform that duty he may be held for the damages occasioned by negligence.

The plaintiff and the defendant were owners of adjoining pieces of real estate in the city of New York. Upon the plaintiff's property there was a dwelling house. The defendant's property was vacant and was covered with a mass of rock, which extended above the curb. The defendant made a contract with one Tobin to excavate his plot to the depth of ten feet below the curb line, preparatory to building thereon. In the performance of the contract, Tobin appears to have proceeded unskilfully and with considerable recklessness and, in the work of blasting, he caused some damage to the plaintiff's house, both within and without. For the damage so sustained the plaintiff brought the present action. The complaint charged, and the case went to the jury upon the theory, that the defendant had failed to exercise proper care, or a due regard, for the safety of the plaintiff's premises in the selection of a competent and careful contractor to do the dangerous work of excavating the earth and rock. The defense was, in substance, that the person employed by the defendant for the purpose was an independent contractor, having the entire control and management of the work, and that as the result of inquiries, showing him to be a competent, skilful and careful contractor, the defendant had made the contract with him. Upon the trial, the evidence showed that the defendant had committed to one Squier the supervision of the construction of the building upon his land and that he acted for him in all

pertinent matters. Squier was a builder of very considerable experience and had had much to do with contracts in the building of houses in the city. He had never heard of Tobin, before giving him the contract for the work in question. That work was shown to have been plainly of a hazardous nature; inasmuch as it necessitated the blasting out of a ledge of rock, which extended close up to the wall of the plaintiff's adjoining house. There was evidence to the effect that it was quite possible to do this work of excavation without causing injury to the adjoining building and that work of that description was being constantly done in the city, with safety to adjoining premises. The way that Tobin performed his contract warranted a belief that he was incompetent and reckless. He was the lowest bidder for the work. The evidence showed him to be an illiterate person and of intemperate habits; whose appearance and surroundings might permit inferences adverse to his fitness to do responsible work of such a nature. There was testimony concerning two previous jobs of a similar nature, from which it might be inferred that Tobin was either reckless, or lacked skill. Squier testified, for the defendant, to having inquired of the representative of a real estate operator about Tobin; who spoke of him as a good and careful blaster, and he visited two places, to which Tobin had referred him, to see work that he had done. That inquiry satisfied him. He denied any knowledge of Tobin's habits; but he made no inquiry concerning them. A witness testified to having employed Tobin upon rock excavation and to having found him satisfactory in his work. While there was evidence of some care having been exercised by the defendant's agent, was it of that conclusive nature which precluded criticism? As the case stood, it could not be said as matter of law that the defendant had discharged his whole duty towards the plaintiff, in the matter of the selection and employment of a proper person to perform the required work. There was a fair question upon the evidence, whether, in initiating a work which, under the particular circumstances, was necessarily fraught with some danger to the adjoining property, the defendant had exercised a reasonable degree of prudence in the employment of Tobin. The plaintiff was not obliged to show that the defendant knew about the characteristics and previous conduct of Tobin; but, there being evidence, in the testimony of the witnesses, affect-

ing his capacity and habits, previously to the employment, it became a question whether defendant's inquiries were sufficient and such as a prudent man would have made, who realized the hazards involved to the adjoining property and who intended to proceed about the employment of a contractor, as he would have expected to be done by if the positions were reversed. The plaintiff recovered a verdict for the amount of the expense to which he had been put in repairing the damage done to his house. It is, of course, evident from that verdict that the evidence had failed to satisfy the jury that the defendant had proceeded in the matter with a due regard for his neighbor's rights, or that Tobin was the kind of man to be intrusted with a job demanding both skill and a sense of responsibility.

If there was evidence raising a question as to whether the defendant had exercised reasonable care in contracting out this work to Tobin, then I think it was properly submitted to the determination of the jury. What is there in the doctrine, behind which the defendant seeks to shelter himself, which should interfere with the trial and submission of the issue which was tendered by the complaint and accepted by the answer; namely, whether proper care had been exercised by the defendant in committing the work to Tobin? The argument for the defendant is, as Tobin was performing his work as an independent contractor, that he and his men were not under the supervision or control of the defendant and that, as no relation of master and servant existed, the defendant could come under no liability for Tobin's negligent acts.

The doctrine, which exempts a person from liability for damages caused by the negligence of an independent contractor employed by him, is well established in this state. It rests upon a basis of justice and of reason and was a departure from the general doctrine of the responsibility of the master for the servant's acts; which the courts, both in England and this state, have agreed upon within comparatively recent years. *Quarman* v. *Burnett*, 6 M. & W. 499; *Reedie* v. *Railway Co.*, 4 Exch. 254; *Blake* v. *Ferris*, 5 N. Y. 48; *Storrs* v. *City of Utica*, 17 ib. 104.

Formerly, the rule *respondeat superior* was deemed controlling and the legal relation of master and servant, to which it was applicable, received the broad extension, within which the employer of another became responsible for the other's acts,

upon the principle *qui facit per alium facit per se.* That, as a maxim, handed down from the Roman Code, meant that the agency of the servant was an instrument of his employer. Any man having authority over another's actions, who commands him to do an act, or who may be deemed to have impliedly commanded him, in the ordinary course of his employment, or business, becomes responsible for his acts, as for his own. The injustice, however, of applying this principle to a situation where a person is engaged in doing a piece of work, under an employment or a contract, in the performance of which he uses his own means and his own servants, without any control upon the part of the general employer, became apparent. It was evident that the relation of master and servant did not exist, when the relation between the parties was governed by such an engagement or contract. Whereas, under the operation of the rule, *respondeat superior*, the injured person might hold the master responsible and disregard the servant, who was the immediate author of the injury; under the introduction of the reasonable modification of that rule, the independent contractor, and not the general employer, became responsible for negligent acts, committed in person, or by those under his orders.

The principle of the decision below, in the present case, in my judgment, in no respect weakens the doctrine of the exemption of the general employer from liability for damages caused by the negligence of the independent contractor; nor, in any wise, threatens its stability. Nor does it affect it, otherwise than by establishing a reasonable safeguard against too broad a claim for exemption. It seems to me a proposition, as clear as it is reasonable, that the assumption that there has been an exercise of due care in the selection of a competent and careful contractor, is a part of the foundation for the doctrine. I do not think that it would do to hold that a person, by the mere act of employing a contractor to do some work of a nature in itself obviously hazardous to others, thereby discharges himself of all responsibility. Something more is required of him. With that due regard for his neighbor's rights, which is obligatory upon all, in the use which they make of their own property, he should be held to the exercise of reasonable care and of some deliberation in the selection of a contractor. We are referred to decisions of the courts of other

states, where this duty on the part of a general employer seems to have been distinctly recognized (*Norwalk Gas Light Co.* v. *Borough of Norwalk*, 63 Conn. 495; *Brannock* v. *Elmore*, 114 Mo. 55), and while precisely a similar case to this may not be found in our reports, the reasonableness of the proposition commends and sustains it. As I have suggested, it may be assumed as an inherent element of the employer's claim for exemption. See Wharton on Negligence, sec. 181; Story on Agency, 9th ed. sec. 454 a, at p. 556, note; *Cuff* v. *R. R. Co.*, 35 N. J. Law, 17; *Ardesco Oil Co.* v. *Gilson*, 63 Pa. St. 146; *Sturges* v. *Theological Education Society*, 130 Mass. 414. In the text books and cases just referred to, it will be observed that the assumption I mention is recognized as one associated with the employment of an independent contractor. I do not think it needs much argument to vindicate the entire propriety of the assumption. The exemption from liability should not be so broad as to exclude the consideration of the manner in which the independent contractor was selected for the particular work. When we consider the hazards incident to the work of blasting, in a city block, there ought to be no question, where the work is obviously and necessarily of a dangerous nature, as to the propriety of imposing upon the owner of the property to be improved thereby a legal duty to exercise proper care in the selection of his contractor. If that be true, then the question of the exercise of due care becomes one of fact upon the evidence. If there is evidence proving, or tending to prove, that the contractor was an incompetent, or a reckless, or an unfit person to be entrusted with the job and that it was possible for the defendant to have discovered these facts by inquiry, then it is for the jury to render their verdict upon the issue between the parties. It is not essential that the defendant be shown to have known of the acts of incompetency, or of the conduct from which unfitness may be inferred. It is sufficient if it appear that no sufficient inquiry had been made, and that a careful inquiry might have revealed the incompetency or the unfitness. The circumstances of the selection of the contractor might be such as to justify a belief that there was a failure to exercise care and prudence in the matter.

The conclusion, therefore, which I reach after a careful consideration of the question is that the defendant, in employing a contractor to blast out the rock upon his premises, a work ob-

viously dangerous to the adjoining owner, owed a legal duty to the plaintiff to carefully select one who was both competent and careful and that for a failure to perform that duty, under the circumstances of this case, he became responsible for any injury to the plaintiff's property resulting from the contractor's negligence. I think that there was evidence adduced, from which the jury might infer that the defendant had not proceeded with that care and due regard for the plaintiff's rights, which were incumbent upon him. It may not have been strong; but it cannot be said that there was none giving rise to inferences. Minds might differ upon the question; but that only goes to show the necessity of leaving it to the arbitrament of a jury. The learned justices below have thought that there was a question for the jury upon the evidence. I think that they were right and that there are no errors calling for a reversal of this judgment.

PARKER, CH. J., O'BRIEN and VANN, JJ., concur with MARTIN, J., for reversal; BARTLETT and HAIGHT, JJ., concur with GRAY, J., for affirmance.

Judgment reversed and a new trial granted, with costs to abide the event.

MASTER'S LIABILITY TO SERVANT.

PANTZAR v. TILLY FOSTER IRON MINING CO.

(99 New York, 368.—1885.)

APPEAL from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the plaintiff, entered upon a verdict, in an action to recover damages for personal injuries, alleged to have been caused by the negligence of the defendant.

RUGER, CH. J. The general principles upon which this action depends have been so frequently discussed in recent cases that anything more than a brief summary would be unprofitable. Thus it has been held that a master owes the duty to his servant of furnishing adequate and suitable tools and implements

for his use, a safe and proper place in which to prosecute his work, and, when they are needed, the employment of skillful and competent workmen to direct his labor and assist in the performance of his duties. *Bartonshill Coal Co.* v. *Reid*, 3 Macq. 275; *Laning* v. *N. Y. C. R. R. Co.*, 49 N. Y. 522; *Brydon* v. *Stewart*, 2 Macq. 34; *Booth* v. *B. & A. R. R. Co.*, 73 N. Y. 40. That "no duty belonging to the master to perform, for the safety and protection of his servants can be delegated to any servant of any grade so as to exonerate the master from responsibility to a servant who has been injured by its non-performance." *Mann* v. *Pres. etc.*, *D. & H. C. Co.*, 91 N. Y. 500; *Booth* v. *B. & A. R. R. Co.*, *supra*. And that when the general management and control of an industrial enterprise or establishment is delegated to a superintendent with power to hire and discharge servants, to direct their labors and obtain and employ suitable means and appliances for the conduct of the business, such superintendent stands in the place of the master, and his neglect to adopt all reasonable means and precautions to provide for the safety of the employees constitutes an omission of duty on the part of the master, rendering him liable for any injury occurring to the servant therefrom. *Corcoran* v. *Holbrook*, 59 N. Y. 517.

The case shows that the defendant was the owner of a coal mine in Putnam county, New York, conducted under the management of a superintendent. He was invested by them with full power of control over the same, and ample discretion and authority in directing the work, and using all suitable measures and precautions for carrying on the business of mining, and securing the safety of the workmen employed in the prosecution of the enterprise.

The action under review was brought by a servant of the defendant to recover damages for personal injuries received by him through the fall of a mass of rock, while working in a pit in which the mining operations in question were carried on. The plaintiff, at the time of the accident, was upon a wall in the course of construction, for the purpose of furnishing a place behind which to deposit the refuse material of the mine, and, as claimed by defendant, also with a view of supporting the overhanging cliff from which the rock injuring plaintiff fell. At the time of the accident this wall had been raised to the height of about sixty feet, and was still some fifty feet below

the surface of the ground. While thus engaged with a number of other workmen a large mass was detached and fell from the brow of the projecting cliff under which the work was in progress, and caused the death of some and the serious injury of others, among whom was the plaintiff. The evidence as to the condition of the rock at the time of the accident was conflicting, and raised questions of fact peculiarly within the province of the jury to determine. On the part of the defendant, it tended to show that the cliff was composed of gneiss, a mineral naturally marked by seams, joints and foliations, and that it was in the frequent and continued habit of causing it to be examined for the purpose of discovering, if possible, appearances indicating immediate danger, and that no such indications had been observed before the accident. On the other hand, the plaintiff's evidence showed that a large crack, parallel with and about ten feet back from the upper angle of the face of the cliff, had long existed and was plainly visible; that the attention of the superintendent and foreman had been called to it and they were warned of its dangerous character; that they had instituted an experiment to determine whether it was growing or not, and that such experiment did show that it was increasing in width, and still took no precautions to support the rock while the workmen were engaged under it, although such precautions were practicable and frequently adopted in other mines. In some cases braces of timbers extending across from the side of the pit to the rock liable to fall were used, and in others the overhanging rock had been blasted off. It was also shown that a wall, such as that in process of construction, would, when completed, have furnished a support to the projecting mass. The plaintiff's evidence also tended to show that the rock broke off at the place where the crack had been observed, and that with the fall, the crack disappeared. It must, therefore, be assumed from the verdict of the jury, that it was determined that the rock fell from a cause of which the defendant had notice, and that precautions which would have prevented the injury were not adopted, although they were practicable and of easy and safe application.

The evidence tended to show that the wall, then in course of construction, was not a safe and suitable protection for the laborers engaged in working upon it. It obviously required a long time to complete it, and its main design seemed to be to

furnish a place for the deposit of refuse material. During the course of its erection it certainly afforded no protection to those working below the cliff, and the jury was authorized to infer from the fact that it was not completed after a lapse of several years, that it was not originally designed as a means of present protection from the dangers of falling rock.

The degree of vigilance and care required of a master in the adoption of means of protection toward his servants has been much discussed by elementary writers as well as in reported cases, and the conclusions reached applicable to such a case as the present are not disputed. To accept the rule extracted from *Leonard* v. *Collins*, 70 N. Y. 90, and adopted in the appellant's brief, is to inquire whether "the master did everything which in the exercise of reasonable and ordinary care and prudence he ought to have done." "Did he omit any precaution which a prudent and careful man would take or ought to have taken," it is difficult to see how the defendant can claim exemption from liability.

But one exception was taken by the defendant in the case and that was to the denial by the court of its motion to nonsuit at the close of the plaintiff's evidence. It might very well be said that the broad question argued before us by the learned counsel for the defendant was not properly in the case as it was based to some extent upon evidence given subsequent to the taking of the exception; but as we think the judgment must in any event be affirmed, no injustice is done the plaintiff, by considering all of the evidence taken on the trial in determining the validity of this exception. The motion for a nonsuit was placed upon grounds stated concisely as follows: 1st. That the accident causing plaintiff's injury was incident to the hazardous nature of his employment and from a risk assumed by him in entering upon it. 2d. That it did not occur through an omission on the part of the defendant or its agents to perform any duty which it owed to the plaintiff. 3d. That there being no proof of the incompetency of the superintendent when originally employed, the defendant was not liable for an accident caused through an omission of duty on his part causing injury to a fellow-servant. It may be said with reference to the ground last stated that it is disposed of by reference to the general proposition laid down at the outset of this opinion, and the other grounds involved questions of fact upon which the

evidence was quite sufficient to take the case to the jury. The motion assumes that the injury to the plaintiff occurred solely from a hazard incident to the nature of the employment, and not from a cause which could have been foreseen and guarded against by the exercise of proper care and prudence on the part of the master. This, however, was the very question which was disputed before the jury and decided by it adversely to the appellant.

The defendant's contention is based upon the evidence showing that it is the nature of gneiss rock to disintegrate and fall from time to time at unexpected intervals through the action of the elements operating upon it; but it does not follow from this fact that the master is excused from using proper precautions to protect his workmen from danger known to the master arising from such a cause. The very fact that the material was likely to fall upon and injure the defendant's servants at unexpected times imposed upon defendant the duty of inspection and frequent and careful examinations, and upon the discovery of any indications of danger, to adopt all suitable precautions to protect its servants from injury. The rule that the servant takes the risk of the service pre-supposes that the master has performed the duties of caution, care and vigilance which the law casts upon him. *Booth* v. *B. & A. R. R. Co.*, *supra*. It is those risks alone which cannot be obviated by the adoption of reasonable measures of precaution by the master, that the servant assumes.

It was for an omission to observe the dangerous appearances to which the evidence shows its attention had been called and its neglect to adopt suitable and proper means of protection that the defendant has been held liable by the jury. The evidence tends to show that the plaintiff was ignorant of the dangerous condition of the rock, and that his duties did not call him to any place from which it could be observed. He, therefore, had a right to rely upon the performance of the duty owing by the master of adopting proper and suitable measures of precaution to guard him against the consequence of any danger arising from the obviously unsafe condition of the rock, and is not justly censurable for an omission to discover the impending danger himself in time to avoid it. The master, however, had notice that the rock was in motion and was liable to fall at any moment and was, therefore, chargeable with the duty in the exercise of reasonable care and prudence of taking immedi-

ate steps to avoid the danger and of warning the men working under it, of the hazard to which they were exposed.

We, therefore, think that there was evidence sustaining the verdict of the jury and that the judgment should be affirmed.

All concur.

Judgment affirmed.

SERVANT'S LIABILITY TO MASTER.

GRAND TRUNK RAILWAY CO. v. LATHAM.

(63 Maine, 177. — 1874.)

ONE Benson and wife recovered judgment against the Grand Trunk Railway Co., in an action to recover damages for maltreatment by and misconduct of defendant's intestate, a conductor upon and in charge of the train upon which the Bensons were passengers. The deceased was informed that the company would hold him responsible, and advised him to settle, but he requested the company to defend the suit which was done. That suit, including the verdict, costs, fees of counsel and of witnesses, cost the company $792.20. The company then brought this action against the deceased conductor's representative to recover that amount, and obtained a verdict therefor.

APPLETON, C. J. A judgment was recovered against the plaintiff corporation for the misconduct of the defendant's intestate — a servant in their employ. This suit is brought to recover compensation for the loss and injury by them sustained in consequence of such misconduct.

The presiding justice instructed the jury that an employer might recover in an action against his servant for all loss and damage caused by the servant's breach of duty, and that it was the duty of Latham (the defendant's intestate), in the exercise of his vocation as conductor, to treat all passengers civilly and respectfully; and if he failed to do so, and in consequence of such failure his employer sustained loss and damage, he is liable for all the loss and damage so sustained.

Every servant is bound to take due care of his master's property entrusted to him. If guilty of gross negligence, whereby

it is injured, he is liable to an action. So, too, if guilty of fraud or misfeasance, whereby damage has accrued to his master.

A servant is liable to an action at the suit of his master, when a third person has brought an action, and recovered damages against the master, for injuries sustained in consequence of the servant's negligence or misconduct; and in such action against the servant, the verdict against the master, in the action brought against him, is evidence as to the *quantum* of damages, though not, according to some of the English authorities, as to the fact of the injury. Smith's Master and Servant, 66.

The evidence shows that Latham was notified of the pendency of the suit against the plaintiffs; that he was present and a witness at the trial; that he was advised and requested to settle; and that the defense was made by the plaintiffs at his request, and that he was fully informed that he would be held responsible for the amount recovered against the plaintiffs. The principles established in *Veazie* v. *Penobscot R. R. Co.*, 49 Maine, 119, and in *Portland* v. *Richardson*, 54 Maine, 46, are applicable to the case at bar.

The defendant's counsel requested the court to instruct the jury that the plaintiffs could not recover for counsel fees and disbursements in conducting the suit against the plaintiffs; or, necessarily, the amount of the judgment paid by them, but the only actual damages to Mrs. Benson, (the plaintiff in that suit) caused by the improper conduct of Latham, if there was any.

This instruction the court declined to give.

The defendant's intestate had been guilty of gross misconduct. It was his duty to settle the suit brought against his employer for damages caused by such misconduct. Instead of so doing he requested that a defense should be made. Having requested the plaintiff to defend, and being present at the trial as a witness, he cannot object to the costs and expenses which accrued in consequence of complying with his request.

The instruction, as requested, should not have been given. It is unnecessary to consider the other portion of the requested instruction, for it is not the duty of the court to dissect a request and eliminate its errors. It is sufficient, therefore, that the request, in its totality, was erroneous. It is not, therefore, important to discuss the residue.

Exceptions overruled.

WALTON, DICKERSON, BARROWS and PETERS, JJ., concurred.

SERVANT'S LIABILITY TO THIRD PERSONS.

HARRIMAN v. STOWE.

(57 Missouri, 93. — 1874.)

WAGNER, J. The plaintiff, a married woman, in conjunction with her husband, brought this action for damages against the defendant for injuries sustained by her in falling through a hatchway which, it was alleged, was constructed by defendant, and by him negligently, carelessly and wrongfully left insecure and unprotected.

The answer denied the allegation of negligence, and as a further defense, set up that the house where the hatchway was built was the property of defendant's wife, and that defendant in doing the work was acting as her agent. There was a replication as to negligence and carelessness, but it was admitted that the property belonged to defendant's wife.

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But it is urged with great pertinacity here that the defendant, in doing the work, was acting as the agent of another, and that, therefore, he is responsible to his principal only and not to the plaintiff.

The well-settled principle of law is, that where an agent is employed to perform or superintend work, the principal is responsible to third persons for injuries caused by the neglect or non-feasance of the agent in doing the work. *Morgan* v. *Bowman*, 22 Mo. 538. And this principle obtains, though the agent exceeds his powers or disobeys his instructions, provided he does the act in the course of his employment. *Douglas* v. *Stephens*, 18 Mo. 362; *Minter* v. *Pacific Railroad*, 41 Mo. 503; *Garretzen* v. *Duenckle*, 50 Mo. 104.

In such cases the doctrine of *respondeat superior* applies, and the liability is cast upon the master who employed the agent and caused the work to be done. *Barry* v. *St. Louis*, 17 Mo. 121; *Clark* v. *H. & St. Jo. R. R.*, 36 Mo. 202.

Judge Story says the distinction ordinarily taken, is between acts of misfeasance, or positive wrongs, and non-feasance, or mere omissions of duty by private agents. The law on this subject as to principals and agents is founded upon the same

analogies as exist in the case of masters and servants. The master is always liable to third persons for the misfeasances and negligences and omissions of duty of his servant, in all cases within the scope of his employment. So the principal in like manner, is liable to third persons for the like misfeasances, negligences and omissions of duty of his agent, leaving him to his remedy over against the agent in all cases where the tort is of such a nature that he is entitled to compensation. The agent is personally liable to third persons, for his own misfeasances and positive wrongs, but he is not in general liable to third persons for his own non-feasances or omissions of duty, in the course of his employment. His liability in these latter cases, is solely to his principal, there being no privity between him and such third persons; and the privity exists only between him and his principal. Therefore, the general maxim as to all such negligences and omissions of duty is, in cases of private agency, *respondeat superior*, Story on Agency, § 308, and such is the general doctrine. 2 Kent Com. (10 ed.) 878, note; Pars. Cont. (5 ed.) 66; *Calvin* v. *Holbrook*, 2 Comst. 126; *Denny* v. *Manhattan Co.*, 2 Denio, 118; 1 Bl. Com. 413.

The true distinction, as stated by Story, is between acts of misfeasance, or positive wrongs, and non-feasance, or mere omissions of duty. In the latter case, the master or principal is alone liable to third persons; whilst in the former, the responsibility rests upon both the principal and agent. Thus, in *Wright* v. *Wilcox*, 19 Wend. 343, Cowen, J., speaking for the court, says: "In a case of strict negligence by a servant, while employed in the service of his master, I see no reason why an action will not lie against both jointly. They are both guilty of the same negligence, at the same time and under the same circumstances; the servant in fact and the master constructively, by the servant, his agent." Lord Holt, in his celebrated judgment in *Lane* v. *Colton*, 12 Mod. 488; s. c. Ld. Raymond, 646, 655, says that for the neglect of the servant, third persons can have no remedy against him, but that the master is alone chargeable; but for a misfeasance, or actual tort, an action will lie against the servant, because he is a wrong-doer. The same views are confirmed in numerous adjudged cases. *Cary* v. *Webster*, 1 Strange, 480; *Montfort* v *Hughes*, 3 E. D. Smith, 591; *Snydam* v. *Moore*, 8 Barb. 358; *Phelps* v. *Wait*, 30 N. Y. 78.

The present case seems to be one, not of mere non-feasance

or omission, but of strict negligence or wrong. The agent undertook and proceeded to build the trap-door, but did it so negligently as to cause the injury; under such circumstances the action would be maintainable against the agent and the principal also. The answer states, and the pleadings admit, that the house, upon which the work was done, was the property of defendant's wife, and that he was acting as her agent. But it is not averred, nor does the case anywhere show, that it was her separate estate. If she simply owned the fee simple, as is inferable from the pleading, then the defendant, in constructing the trap-door, was acting for himself as well as for his wife, for the uses, rents and profits of the wife's realty belong to the husband during coverture.

Under any view that we can take of the case, we think that the action was properly brought, that the judgment was right and should be affirmed; the other judges concur.

MODIFICATION OF RESPONDEAT SUPERIOR. [1]

FARWELL v. THE BOSTON & WORCESTER R. R. Co.

(4 Metcalf, 49.— 1842.)

ACTION of trespass upon the case.

The plaintiff, an engineer in the employment of the defendants, ran his engine off at a switch on the road, which had been

[1] "When the service to be rendered requires for its performance the employment of several persons, . . . , there is necessarily incident to the service of each the risk that the others may fail in the vigilance and caution essential to his safety. And it has been held in numerous cases, both in this country and in England, that there is implied in his contract of service in such cases, that he takes upon himself risks arising from the negligence of his fellow-servants, while in the same employment, provided always the master is not negligent in their selection or retention, or in furnishing adequate materials and means for the work; and that if injuries then befall him from such negligence, the master is not liable." *Chicago Railway Co.* v. *Ross*, 112 U. S. 377.

The doctrine was first promulgated in England in 1837 (*Priestley* v. *Fowler*, 3 M. & W. 1, although the question as to the liability of a master to a servant for the negligence of a fellow-servant was not directly involved), and

left in a wrong condition by one Whitcomb, a switch-man and also a servant of the defendants, thereby sustaining personal injuries to recover for which this action was brought.

Shaw, C. J. 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 merchandise 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.

It is laid down by Blackstone, that if a servant, by his negligence, does any damage to a stranger, the master shall be answerable for his neglect. But the damage must be done while he is actually employed in the master's service; otherwise, the servant shall answer for his own misbehavior. 1 Bl. Com. 431; *M'Manus* v. *Crickett*, 1 East, 106. This rule is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it. If done by a servant, in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so

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first distinctly announced in 1850 (*Hutchinson* v. *York, Newcastle & Berwick Railway Co.*, 5 Exch. R. 343.

The doctrine was first announced in this country, in South Carolina, in 1841 (*Murray* v. *S. C. Railroad Co.*, 1 McMullan, 385), in Massachusetts, in 1842 (*Farwell* v. *Boston & Worcester R. R. Co.*, 4 Met. 49), and in New York, in 1849 (*Coon* v. *The Utica & Syracuse R. R. Co.*, 6 Barb. 231).

For a statement of the reason for the rule, see Shearman & Redfield on Negligence (5th ed.), §179.

far the act of the master, that the latter shall be answerable *civiliter*. But this presupposes that the parties stand to each other in the relation of strangers, between whom there is no privity; and the action, in such case, is an action sounding in tort. The form is trespass on the case, for the consequential damage. The maxim *respondeat superior* is adopted in that case, from general considerations of policy and security.

But this does not apply to the case of a servant bringing his action against his own employer to recover damages for an injury arising in the course of that employment, where all such risks and perils as the employer and the servant respectively intend to assume and bear may be regulated by the express or implied contract between them, and which, in contemplation of law, must be presumed to be thus regulated.

The same view seems to have been taken by the learned counsel for the plaintiff in the argument; and it was conceded, that the claim could not be placed on the principle indicated by the maxim *respondeat superior*, which binds the master to indemnify a stranger for the damage caused by the careless, negligent or unskilful act of his servant in the conduct of his affairs. The claim, therefore, is placed, and must be maintained, if maintained at all, on the ground of contract. As there is no express contract between the parties, applicable to this point, it is placed on the footing of an implied contract of indemnity, arising out of the relation of master and servant. It would be an implied promise, arising from the duty of the master to be responsible to each person employed by him, in the conduct of every branch of business, where two or more persons are employed, to pay for all damage occasioned by the negligence of every other person employed in the same service. If such a duty were established by law—like that of a common carrier, to stand to all losses of goods not caused by the act of God or of a public enemy—or that of an inn-keeper, to be responsible, in like manner, for the baggage of his guests; it would be a rule of frequent and familiar occurrence, and its existence and application, with all its qualifications and restrictions, would be settled by judicial precedents. But we are of opinion that no such rule has been established, and the authorities, as far as they go, are opposed to the principle. *Priestley* v. *Fowler*, 3 Mees. & Welsb. 1; *Murray* v. *South Carolina Railroad Company*, 1 McMullan, 385.

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. To say that the master shall be responsible because the damage is caused by his agents, is assuming the very point which remains to be proved. They are his agents to some extent, and for some purposes; but whether he is responsible, in a particular case, for their negligence, is not decided by the single fact that they are, for some purposes, his agents. It seems to be now well settled, whatever might have been thought formerly, that underwriters cannot excuse themselves from payment of a loss by one of the perils insured against, on the ground that the loss was caused by the negligence or unskilfulness of the officers or crew of the vessel, in the performance of their various duties as navigators, although employed and paid by the owners, and, in the navigation of the vessel, their agents. *Copeland* v. *New England Marine Ins. Co.*, 2 Met. 440–443, and cases there cited. I am aware that the maritime law has its own rules and analogies, and that we cannot always safely rely upon them in applying them to other branches of law. But the rule in question seems to be a good authority for the point, that persons are not to be responsible, in all cases, for the negligence of those employed by them.

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, & *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.

In applying these principles to the present case, it appears that the plaintiff was employed by the defendants as an engineer, at the rate of wages usually paid in that employment, being a higher rate than the plaintiff had before received as a machinist. It was a voluntary undertaking on his part, with a full knowledge of the risks incident to the employment; and the loss was sustained by means of an ordinary casualty, caused by the negligence of another servant of the company. Under these circumstances, the loss must be deemed to be the result of a pure accident, like those to which all men, in all employments, and at all times, are more or less exposed; and like similar losses from accidental causes, it must rest where it first fell, unless the plaintiff has a remedy against the person actually in default; of which we give no opinion.

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 distinction, 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.

A case may be put for the purpose of illustrating this distinction. Suppose the road had been owned by one set of proprietors whose duty it was to keep it in repair and have it at all times ready and in fit condition for the running of engines and cars, taking a toll, and that the engines and cars were owned by another set of proprietors, paying toll to the proprietors of the road, and receiving compensation from passengers for their carriage; and suppose the engineer to suffer a loss from the negligence of the switch-tender. We are inclined to the opinion that the engineer might have a remedy against the railroad corporation; and if so, it must be on the ground, that as between the engineer employed by the proprietors of the engines and cars, and the switch-tender employed by the corporation, the engineer would be a stranger, between whom and the corporation there could be no privity of contract; and not because the engineer would have no means of controlling the conduct of the switch-tender. The responsibility which one is under for the negligence of his servant, in the conduct of his business, towards third persons, is founded on another and distinct principle from that of implied contract, and stands on its own reasons of policy. The same reasons of policy, we think, limit this

responsibility to the case of strangers, for whose security alone it is established. Like considerations of policy and general expediency forbid the extension of the principle, so far as to warrant a servant in maintaining an action against his employer for an indemnity which we think was not contemplated in the nature and terms of the employment, and which, if established, would not conduce to the general good.

In coming to the conclusion that the plaintiff, in the present case, is not entitled to recover, considering it as in some measure a nice question, we would add a caution against any hasty conclusion as to the application of this rule to a case not fully within the same principle. It may be varied and modified by circumstances not appearing in the present case, in which it appears, that no wilful wrong or actual negligence was imputed to the corporation, and where suitable means were furnished and suitable persons employed to accomplish the object in view. We are far from intending to say that there are no implied warranties and undertakings arising out of the relation of master and servant. Whether, for instance, the employer would be responsible to an engineer for a loss arising from a defective or ill-constructed steam-engine: Whether this would depend upon an implied warranty of its goodness and sufficiency, or upon the fact of wilful misconduct, or gross negligence on the part of the employer, if a natural person, or of the superintendent or immediate representative and managing agent, in case of an incorporated company—are questions on which we give no opinion. In the present case, the claim of the plaintiff is not put on the ground that the defendants did not furnish a sufficient engine, a proper railroad track, a well-constructed switch, and a person of suitable skill and experience to attend it; the gravamen of the complaint is, that that person was chargeable with negligence in not changing the switch, in the particular instance, by means of which the accident occurred, by which the plaintiff sustained a severe loss. It ought, perhaps, to be stated, in justice to the person to whom this negligence is imputed, that the fact is strenuously denied by the defendants, and has not been tried by the jury. By consent of the parties, this fact was assumed without trial, in order to take the opinion of the whole court upon the question of law, whether, if such was the fact, the defendants, under the circumstances, were liable. Upon this question, supposing

the accident to have occurred, and the loss to have been caused, by the negligence of the person employed to attend to and change the switch, in his not doing so in the particular case, the court are of opinion that it is a loss for which the defendants are not liable, and that the action cannot be maintained.

Plaintiff nonsuit.

WHO ARE FELLOW-SERVANTS?[1]

LANING v. THE NEW YORK CENT. R. R. Co.

(49 New York, 521.—1872.)

FOLGER, J. Viewing the case as the jury would have been warranted in doing, it comes in the main to this.

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[1] In *Chicago, Milwaukee & St. Paul Railway Co.* v. *Ross*, 112 U. S. 377, the court held that the company was liable to the plaintiff, an engineer, for injuries received in a collision caused by the negligence of the conductor of the train. In *Baltimore & Ohio Railroad Co.* v. *Baugh*, 149 U. S. 368, it was held that the engineer and fireman of a locomotive, running without any train attached, were fellow-servants, and that the latter could not recover from the company for injuries caused by the former's negligence. In *New England Railroad Co.* v. *Conroy*, 175 U. S. 323, 343, the court say: "In so far as the decision in the *case of Ross* is to be understood as laying it down, as a rule of law to govern in the trial of actions against railroad companies, that the conductor, merely from his position as such, is a vice-principal, whose negligence is that of the company, it must be deemed to have been overruled, in effect if not in terms, in the subsequent case of *Baltimore & Ohio Railroad* v. *Baugh*," and hold that the conductor of a freight train is not a vice-principal unless special and unusual powers have been conferred upon him, quoting (p. 337) with approval the following language of Mr. Justice Brown in *Northern Pacific Railroad* v. *Hambly*, 154 U. S. 349: "To hold the principal liable whenever there are gradations of rank between the person receiving and the person causing the injury, or whenever they are employed in different departments of the same general service, would result in frittering away the whole doctrine of fellow service. Cases arising between persons engaged together in the same identical service, as, for instance, between brakemen of the same train, or two seamen on the same ship, are comparatively rare. In a large majority of cases there is some distinction either in respect to grade of service, or in the nature of the employments. Courts, however, have been reluctant to recognize these distinctions unless the superiority of the person causing the injury was such as to put him rather in the category of principal than of agent, as, for example, the superintendent of a factory or railway, and the employments were so far different that, although paid by the same master, the two servants were brought no further in contact with each other than as if they had been employed by different principals."

The plaintiff with others, he and they being fellow-servants of the defendant, were engaged in the course of their ordinary service, in the performance of a work for the defendant, to do which it was necessary that there should be put up a scaffold for them to stand upon.

One Westman, the foreman of these men, directed one Churchill and another to put up the scaffold. There is some dispute in the testimony as to who the other was; but the jury might properly have found that one Foreman was the person who, by direction of Westman, helped Churchill. Churchill had been in the employ of the defendant for some months, engaged in different kinds of subordinate service. It is not shown for what particular service, if for any particular service, he was hired by Coleby, who was the agent of the defendant to hire these men. Nor was it shown that he was not skillful and competent to do that for which he was hired, and in fact to do all that was put upon him to do before the task of building this scaffold. Foreman is not shown to have been hired by the defendant. Coleby testified that he did not know him and that his name was not upon the pay-rolls of the defendant. The plaintiff testified that the day of the accident was the first day on which he had seen him there. Churchill could not say that Foreman had worked there after the accident; but there was testimony that he was at work on that day, with Churchill, in putting up this scaffold. The jury could rightly find, or infer from what was testified, that Foreman was in fact at work on that day in the defendant's business and that, by the direction of Westman, Foreman and Churchill put up this scaffold. See *Althorf* v. *Wolfe*, 22 N. Y. 355. The scaffold fell with some of the men upon it, and the plaintiff was seriously injured by the fall, he being among those upon it by direction of Westman.

The scaffold fell from a defect in its construction; this defect was mainly from building it with timbers too small in size, and too poor in quality, being cross-grained and hence weak.

There was no lack of good and proper material, which could have been as readily got at. Indeed, there was an abundant supply of proper material; but the insufficient timbers which were used were taken from the mass by Churchill and Foreman, either from a lack of skill to select better, or from a lack of faculty to perceive the necessity of using stronger, or from a lack of strength to handle and lift larger and heavier timbers,

or from these three causes combined. It was, at all events, from the unskillfulness and incompetency of Churchill and Foreman for this particular work, that the scaffold was so unsafely built that it fell.

The plaintiff knew that the scaffold was built by some of those there engaged at work. He did not know who were the individuals that built it, nor the manner in which it was built, not having seen it while they were building it, nor until by the direction of the foreman he stepped upon it.

Westman, the foreman, was a competent man in skill and natural judgment. It does not appear that, at the time he was hired for the defendant, he had acquired any habit which detracted from his competency. At the time of this work, however, he was not temperate in strong drink. The testimony tended to show that he was drunk on the day, and near the time of the accident. The testimony does not show directly, though it is an inference which a jury might make fairly, that his condition in that respect was a cause of the injury to the plaintiff; for they might well infer that, if his faculties had been without confusion from strong drink, he would not have put these lads, deficient in judgment and strength, to a work requiring discretion and power, or would have inspected the result of their work before using it.

The plaintiff well knew the habits of Westman in this particular, and knew that he was drunk on this day, not only at the time of the accident, but before, and that he had been drunk on days before that. The testimony tended to show that Coleby had knowledge of Westman's habits. The jury might so have found.

Such being the fact, if the plaintiff has ground of action against the defendant for this injury and the resultant damage, it must be found in the want of skill, and in the incompetency of Churchill and Foreman and in the use of them by Westman for the work of erecting the scaffold. Indeed, it may be stated yet more narrowly, and it must be found alone, in the use of these two young men for this work by Westman. For it is not shown that Churchill was hired for this kind of work, or for work of this importance to others. The employment of him was not like that of one to act as an engineer for the peculiar duty of managing an engine, or as a switchman to attend to a switch, but it was general. The proof shows that the

labor he performed was miscellaneous, not altogether that of a mechanic; and the particular work to which he went was not because he was hired for that specifically, but because he was set at that by his immediate superior. From the time of his hiring until this occurrence, it does not appear that he was incompetent to do that for which he was employed and at which he was put. It does not appear that Foreman was hired at all by the defendant, or by Colby, their agent to hire men. Coleby, who hired the men, and had hired Churchill, neither hired him for this purpose, nor did he set him at this work; on the contrary, Coleby testified that this scaffold was built without his knowledge, and that he had instructed Westman, the plaintiff, and the others who were to risk themselves upon the scaffold, to build the first two, and showed them where they should get the lumber for the purpose, and in this he is not contradicted. It is not possible then to contend that the defendant was negligent in the fact of taking generally into its employment Churchill, or suffering Foreman to labor without special hiring, though for some kinds of service they were without skill and were incompetent, so long as they should not be put at that which they were not competent and skillful to do. The negligence was in putting them to the service of erecting this scaffold. It begins there, and dates no farther back. And it is upon the basis of that negligence that the defendant must be found liable, if liable at all. And conceding that there was negligence in directing these lads to the work of putting up this scaffold, that negligence cannot be traced farther back than to Westman. For he, thus put in charge of this gang of men, to supervise and direct them in this work, was supplied by Coleby, his immediate superior, with other competent men in numbers enough, and with fit material. It would not have been Coleby's negligence if Westman had not used the fit material. It was not Coleby's negligence that Westman did not use the competent men.

With the reservation however, from these last two statements, of any negligence of Coleby, in continuing in the employ of the defendant a man of Westman's habits after notice or knowledge thereof.

Nor, with the same reservation, was it the negligence of the defendant, or of any of its agents, other than Westman.

We have thus presented to us this case. One servant of a

common master is injured by the negligent act of a fellow-servant of a rank one step higher. The act of negligence in the fellow-servant is the result of an incompetency which did not exist when he entered the employment of the master. It is not permanent, but occasional, and produced by evil habits, the existence of which was known before and at the time of the injury, both to the servant injured and to the hiring agent of the master.

Most of the principles of law which are to be applied to these facts, and to determine the relative rights of the servant injured and the master, are settled in this State, and must be conceded.

A master is not liable to those in his employ for injuries resulting from the negligence, carelessness or misconduct of a fellow-servant engaged in the same general business. Nor is the liability of the master enlarged when the servant who has sustained an injury is of a grade of the service inferior to that of the servant or agent whose negligence, carelessness or misconduct has caused the injury, if the services of each, in his particular labor, are directed to the same general end. And though the inferior in grade is subject to the control and directions of the superior whose act or omission has caused the injury, the rule is the same. Nor is it necessary, to exempt the master from liability, that the sufferer and the one who causes the injury should be at the time engaged in the same particular work. If they are in the employment of the same master, engaged in the same common work and performing duties and services for the same general purposes, the master is not liable.

These rules seem to have been laid down with care, after due consideration, to be sustained by reason, to have been assented to by more than a bare majority of this court, in at least two instances, at some interval of time, and should be adhered to in any case the facts of which bring it within the purview of them. See *Wright* v. *N. Y. C. R. Co.*, 25 N. Y. 562; *Warner* v. *Erie Railway*, 39 id. 468, and the cases cited in them.

The cases cited hold, further, that the master is liable to a servant for his (the master's) own personal negligence, or want of care and prudence, and for his own personal act or misconduct occasioning injury and damage to the servant. And such negligence, want of care and prudence, act or misconduct, may be shown in the mismanagement of the master's affairs in the selection and employment of incompetent and unfit agents and

servants, or the furnishing of improper and unsafe machinery, implements, facilities or materials for the use or labor of the servant. Id.

And to charge a master with liability to one servant for an injury on the ground that he has selected and employed another unskillful and incompetent servant, it must appear that the injury complained of was the result of the want of skill and competency of the other. 25 N. Y., *supra*.

So far, we doubt not that the learned counsel for the appellant and respondent respectively would agree. But just here arise points of difference.

The appellant claims, as we understand its position to be, that it acts through a board of directors, and acts immediately in no other way; and that when the board of directors, itself composed of discreet, prudent and honorable men, has selected and employed skillful and competent general servants, agents or superintendents, it has done its whole duty to the servants of lower rank, who shall in turn be selected and employed by those of general powers and duties. The negligence, it is claimed, of these general servants, agents and superintendents, is not the negligence of the corporate body, nor of the board of directors through which in the first instance the corporate body acts; but that it is, so far as the servant of the corporate body in any rank is concerned, the negligence of a fellow-servant, for which the master is not liable. And it is claimed that the rule we have above extracted (to wit: that the negligence, want of care and prudence, act or misconduct of the master, may be shown in the selection and employment of incompetent and unfit agents and servants) is only applicable when such selection or employment is by the master in person, and not through a general or superior agent; and that such rule is to be governed by the other rule extracted above (and which the defendant claims to be), that the master is liable to a servant only for *his own personal* negligence or want of care and prudence, and for his own personal act or misconduct occasioning injury and damage to the servant. And, indeed, taking another rule above given, in the full scope of the general language in which it is laid down, unrestricted by the considerations and the circumstances of cases which must always affect and limit most general rules in some degree, it is to be confessed that it seems that they have literal show of authority for their position. It is said that if

two servants are in the employ of the same master, engaged in the same common enterprise, and performing duties and services for the same general purposes, the master is not liable. 25 N. Y., *supra*, p. 565. Now, it is apparent that the agent who selects a machine to be used in the business of the master, speaking generally, is in the employment of the same master. He is engaged in the same common enterprise, and performing a duty and a service for the same general purposes of the master. And so of the agent who selects and hires men to act in that business. It is necessary for that business, to aid the common enterprise, and to advance those general purposes, that machines should be had and men hired, and the agent who attends thereto performs a service to that end. The position has also in its favor a judicial assertion more specific than this. In *Wright* v. *N. Y. Cent. R. Co.*, *supra*, the learned judge who delivered the opinion, after intimating (p. 571) that it is at least debatable whether the defendant in that case was responsible to the other of its servants for the proper performance of the delegated power in the selection and hiring of engineers by Upton, the agent of the defendant, who was charged with that duty, goes on to say: That in the exercise of power there in question (which was to select one from a body of engineers to run an engine on a particular trip), Upton was acting as the servant of the company, in concert with every other person having any duty to perform, in respect to that particular purpose; and after saying (p. 572) that the cases cited show that for the negligence of a foreman or a superintendent the master is no more liable than for the negligence of any other servant, he remarks that it can make no difference in principle that the negligence is in the selection of the materials, the implements or the agents for the performance of a given work, instead of directing the time, mode or manner of doing the work. And this proposition has more significance, from the fact that the decision of this court in the case, reversed the judgment of the Supreme Court therein, in giving which the court held: "That the power to employ servants may be delegated by the principal, and this must generally be so when the principal is a corporation. When the principal so acts by agent, he will, upon general principles, be liable for the negligence of the agent. This agent will not be regarded simply as a fellow-servant of those whom he employs in the general business." *Wright* v. *N. Y. C. R. Co.*, 28 Barb. 80, 86.

If we adopt the statement in 25 N. Y., and apply it to the facts of the case at bar, we must say that the defendant is no more liable for the negligence of Coleby in continuing the employment of Westman, though he was incompetent from drink, than for the negligence of any other servant; nor any more liable for the negligence of Westman, in directing to the putting up of this scaffold of two incompetent men, though that negligence was the result of his own temporary incompetency, his liability to recurrence whereof was known to Coleby, the agent of the defendant to employ and dismiss servants. And upon this the learned counsel for the appellant relies to sustain the position taken by it. They cite to us no other case which so holds. *Warner* v. *Erie Railway*, 39 New York, *supra*, was the case of a structure originally sufficient, but rendered unsafe by gradual decay, which decay, under the careful inspection of competent agents, in modes deemed sufficient by skillful and practical men, had not been discovered. *Wilson* v. *Merry*, L. R. 1 Scotch App. 326, was the case of a negligent act of a competent servant. *Gallagher* v. *Piper*, 16 C. B. (N. S.) 692, was also a case of negligence, not of incompetence. *Hard* v. *Vt. Can. R. Co.*, 32 Vt. 473, was the same.

While the reports of this State seem to be meager in authority in this particular point, the question has been somewhat discussed and decided in other States. See *Gilman* v. *East R. Co.*, 13 Allen, 433; *Noyes* v. *Smith*, 28 Vt. 59; *Hard* v. *Vt. & Can. R. Co.*, *supra*; *Frazier* v. *Penn. R. Co.*, 38 Penn. St. 104; *Walker* v. *Bolling*, 22 Ala. 294.

It is well maintained, in these cases, that if the position of the appellant is upheld in its full extent, it will, in most cases, relieve a corporate body, and any employer who acts through general superintendents, from liability to servants for injuries occasioned by imperfect and defective machinery, by unsafe mechanical means and appliances of any kind, and by all incompetent and unskillful sub-agents furnished without due care. And this statement of the learned judge in *Wright* v. *N. Y. C. R. Co.* was not necessary to the disposition of the case. Sufficient reasons for the judgment of the court had already been found in the fact that the injury complained of did not result from the incompetency or unskillfulness of the fellow-servant, whose act, it was claimed, had occasioned it, and, perhaps, in the fact that the plaintiff knew the perils of the service and continued in it,

voluntarily assuming the risks; and in the further fact that the servant complained of was competent, and that there was no negligence in selecting him for the work. We may decline, then, to be bound by it, so far as this question is concerned. We should not hold as there enunciated, unless it is the clear result of former decisions. The duty of the master to the servant, as it is sometimes put (25 N. Y. 556), or his implied contract with his servant, as it is differently intimated (*Farwell* v. *B. & W. R. Co.*, 4 Metc. 49), leads to another conclusion. That duty or contract is to the result that the servant shall be under no risks from imperfect or inadequate machinery, or other material means and appliances, or from unskillful or incompetent fellow-servants of any grade. It is a duty or contract to be affirmatively and positively fulfilled and performed. And there is not a performance of it until there has been placed for the servant's use perfect and adequate physical means, and for his helpmeets fit and competent fellow-servants; or due care used to that end. That some general agent, clothed with the power, and charged with the duty to make performance for the master, has not done his duty at all, or has not done it well, neither shows a performance by the master, nor excuses the master's non-performance. It is for the master to do, by himself or by some other. When it is done, then and not until then his duty is met or his contract kept. The servant then takes the risk of the negligence, recklessness or misconduct of his fellow in the use of the material and implements furnished, and of their failure from latent defects not revealed by practical tests, and from deterioration by the usual wear and tear. It is not enough to satisfy the affirmative duty or contract of the master that he selects one, or more than one general agent of approved skill and fitness. If the general agent goes forward and carelessly places by the side of a servant another unskilled and incompetent, the duty of the master has not yet been met, his contract is yet unperformed. Corporate bodies must, of the necessity of their being, act through agents, and in the large enterprises and business pursuits of the times, the necessity is almost as stringent upon very many other employers. But they may not avoid the duty which they owe to their servants of furnishing them with sound mechanical contrivances, and accompanying them with competent fellows, by conferring upon superior servants the duty of selecting and purchasing or hiring.

The duty being that of the principals, and theirs the contract; it is theirs to fulfil and perform, and if it is not done, or insufficiently done, the failure to do is theirs. As is well said, "if a master's personal knowledge of defects be necessary to his liability, the more he neglects his business and abandons it to others, the less will he be liable." Byles, J., in *Holmes* v. *Clark*, *infra*. We hold, therefore, that a master is liable to his servant for an injury caused by the incompetency or want of skill of a fellow-servant, whether it existed when the fellow-servant was hired, or has come upon him since the hiring, the fellow-servant having been in the first instance hired, or afterward continued in service, with notice or knowledge or the means of knowledge of this lack. The duty of the master to his servant is to use reasonable care to provide and employ none but competent and skillful servants, and to discharge from his service on notice thereof any who fail to continue such.

And applying this rule to the case in hand, we are of the opinion that the defendant was negligent toward the plaintiff, in retaining Westman in its service, after his habit of drinking to drunkenness was known to Coleby, its general agent for hiring and discharging men of the class of Westman.

Here, however, comes in another rule, which affects the relations of master and servant. A servant has no cause of action against a master for an injury resulting from the negligence of the master, where the servant's negligence contributed to the taking place of the injury. And where a servant knows as fully as the master of the existence of that which is at last the producing cause of the injury, and continues, without promise of amendment of the defect, of his own accord in the master's employ, exposed to the effects when they shall come, it may constitute contributory negligence on his part to remain thereafter in the service. *Assop* v. *Yates*, 2 H. & N. 768; *Hayden* v. *S. Mnfg. Co.*, 29 Conn. 548; *Skip* v. *E. C. Ry. Co.*, 24 Eng. L. & Eq. 396; *Mad. Riv. & L. E. R. Co.* v. *Barber*, 5 Ohio St. 541. And see *Bassett* v. *Nor. & Wor. R. Co.*, 9 L. R. 551.

The learned counsel for the respondent cites *Snow* v. *Hous. R. Co.*, 8 Allen, 441, as a contradiction of the principle maintained in these cases. But an examination of it shows that the plaintiff therein was not a servant of the defendant therein. He was in the employ of the Western Railroad Company, which company, by contract with the defendant there, used its

road and track for making up trains, etc., at the place where the plaintiff was injured. And the learned chief justice, in delivering the opinion of the court, says: "It does not appear that he (the plaintiff) was employed in any duty or service for or on behalf of the defendants; on the contrary, it is stated that he was in the employment of another corporation. . . . On these facts it is difficult to see how the doctrine applicable to a claim for damages occasioned by the carelessness of a fellow-servant against a common employer can have any bearing on the rights of the parties to this action."

The court, in that case, recognizes the existence of the rule now under notice, but concludes that it does not apply to the facts of that case. See page 450 of the report. In *Gilman* v. *East R. Co.*, *supra*, cited by the learned counsel, the question now under consideration was not passed upon, and was expressly ignored as not raised on the trial. See page 445 of the report. We have read the other cases cited by the learned counsel on this point, and apprehend that no ruling will be found in them different from that above expressed by us. While all of them hold that it is the duty of the master to provide safe and sufficient machinery and appliances, and skilled and competent agents and servants, none of them assert that if the servant, who knows as well as the master of a lack in these respects, is injured thereby, he is not open to the imputation of a contributory negligence; and the reason why is simple but sufficient. It is at his option ordinarily, to accept or to remain in the service or to leave it; and if he remains without promise of a change or other like inducement, it is for the jury to say whether or not he voluntarily assumes the risks of defective machinery and of incompetent servants, whereof he has full and equal knowledge.

The case does not show but that Westman, when first he came into the employ of the defendant, was competent in all respects. His incompetence and unfitness subsequently occurring were temporary and occasional, the result of evil habit. They had come to the knowledge of Coleby, who had power to act, so that it was negligent for the defendant to retain Westman in its employ. But it is apparent that the plaintiff knew as well, and indeed far better than any one else, the habits of Westman, and his particular condition on that day. The strength of the affirmative testimony on both of these points is from the plaintiff's mouth. The plaintiff knew that the building of

this scaffold was going on. He knew that neither of the persons who had built the other two safe scaffolds was engaged in the erection of the third, which fell; for those men were occupied where he was, a short distance away from it. He knew that men, under the direction of Westman, were putting it up, and as they were not of the three persons who had together built the two scaffolds, he knew that Westman had taken others for the third. He knew that Westman was drunk on that day and at that time. If it was negligence in Coleby and the defendant to suffer Westman, in that state, to remain in the control and direction of men and work, was it not negligence in the plaintiff to remain in the defendant's employ, subject to Westman's direction and liable to evil results from work done under his supervision, likely to be an insufficient and negligent supervision from his perceptions being clouded and dulled by drink? But, in this case, whether the plaintiff was so negligent as to be contributory to the injury which he received, was a question for the jury. For Laning had testified that Coleby had said to him, that if Westman did not do better he would have to discharge him. It has been held that there is a formal distinction between the case of a servant who knowingly enters into a contract to work on defective machinery and that of one who, on temporary defect arising, is induced by the master, after the defect has been brought to the knowledge of the latter, to continue to perform his service under promise that the defect shall be remedied. See 10 W. R., *infra*. And the fact that after Laning had entered the services of the defendant, he acquired knowledge of the intemperate habit of Westman, was a fact in the case to be submitted to the jury, to be considered by them, together with this promise of Coleby and all the other facts and circumstances, in determining the question whether the plaintiff himself helped to bring about the accident for which he seeks to charge the defendant. *Holmes* v. *Clark*, 10 W. R. 405. Knowledge in such a case is not of itself, in point of law, an answer to the action. Id. It has, indeed, been carried farther than the circumstances of this case require. *Hoey* v. *Dub. & Belfast Ry. Co.*, 18 W. R. 930; Ir. Com. Pl. And see *Huddleston* v. *Lowell Machine Shop*, 106 Mass. 282; *Britton* v. *G. W. Cotton Co.*, L. R. 7 Exch. 130.

It is now to be seen what was the action of the court below on this question, and what exception the defendant has taken to bring that action under review.

The defendant, when the plaintiff rested, and also when the proofs were closed, moved that the plaintiff be nonsuited on the ground that the negligence of him and his fellow-employees contributed to the accident. But there was enough in the testimony to justify the court in denying, as it did, that motion.

Two of the requests to charge, made by the defendant at the trial, were addressed to the question of the plaintiff's knowledge of Westman's habit, and the contributing negligence of the plaintiff by reason thereof; but each of them is based upon the idea that the knowledge of the plaintiff of the incompetency of Westman was a bar to a recovery, and not merely a fact to go to the jury with the other evidence; from all of which they were to determine whether the plaintiff was to be charged with negligence contributory to the injury. These requests were therefore properly refused.

The court upon this subject charged the jury that the plaintiff's knowledge of the fact of Westman's intemperance would not exonerate the defendant from responsibility; yet, it called upon the plaintiff to exercise more caution, care and judgment than he otherwise would have done, and that he was bound to exercise ordinary care and caution in view of that fact. The defendant excepted to so much thereof as instructed the jury that knowledge of the fact in the plaintiff did not exonerate the defendant. In our view the learned judge at circuit was correct in that; the charge was to the effect that in this case knowledge was not of itself, in point of law, an answer to the action. See cases above cited.

* * * * * * * *

The requests to charge, which were refused, assumed as proven what was yet to be determined *pro* or *con.* by the jury, or rested upon propositions of law which we think were not sound, or upon propositions of law which though sound in themselves did not comprehend all the facts of this case, or assumed as established as fact in the case what was not in the testimony.

The declarations of Coleby, the admission of which in evidence was objected to by the defendant, were properly received. He was the agent of the defendant, with the power and the duty of hiring and discharging servants. He had the power to discharge Westman for any fault amounting to incompetency. His neglect to do so, after knowledge on his part of a reason

why he should, was the neglect of the defendant, and it was competent to prove by his own declarations that he had such knowledge, made as they were to the plaintiff in the case. They were part of the *res gestæ*, and had a bearing upon the question of the contributory negligence of the plaintiff.

There is one other point made by the defendant, which requires notice.

The verdict for the plaintiff was for the sum of $10,000. A motion was made at Special Term to set aside this verdict as one against evidence, and that the damages are excessive. The motion was denied. From the order of Special Term denying it, the appeal was taken to the General Term, where a new trial was denied, and judgment ordered for the plaintiff on the verdict. The defendant claims here that the General Term was of the opinion that the damages were excessive, but also of the opinion that it had no power to reduce them, and no power to do aught but grant a new trial for that reason, which for that reason alone it declined to do. The defendant claims that the General Term having the power to reverse the judgment and order a new trial, unless the plaintiff should stipulate to reduce his recovery to a sum which the court should name, and to order that, if he did so stipulate, the judgment should be affirmed for that sum, it erred in not exercising that power.

It is true that it was a matter of discretion with the court at General Term, whether it would make such order, and if it had exercised that discretion and refused to make it, no error would exist. But if having the power so to do, it failed to use it on the ground that the power was not in it, there is error which may be reviewed and corrected.

The claim of error here under notice is to be sustained, if at all, not upon any thing shown in the order of the court at General Term, nor upon the judgment entered thereon, nor upon anything which appears in the record. The opinion delivered at General Term, if it can be used, shows plainly that if the court there had deemed that it had the power to reduce the damages, still leaving a recovery, it would have exercised it, but that it was of the opinion that it could effect that end only by granting a new trial for that reason, and that the excess of damages was not of itself quite sufficient to warrant an order for a new trial.

But we are not authorized to review a judgment, and to re-

verse it for an alleged error which does not appear upon the record, and is not shown or to be arrived at, save by expressions appearing in the opinion of the court.

The judgment must be affirmed, with costs to the respondent.

All concur except ALLEN, J., dissenting and RAPALLO, J., not voting.

Judgment affirmed.

VICE-PRINCIPALS.[1]

CRISPIN v. BABBITT.

(81 New York, 516.– 1880.)

APPEAL by the defendant from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of

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[1] "At an early day, American judges divided sharply upon the question of the liability of a master to his servants, for the negligence of a servant of superior grade and in control of other servants. The question was passed upon, almost at the same time, in the East and the West: the Massachusetts court holding strongly in favor of masters, and the Ohio court strongly against them. A long conflict of opinions followed; and . . . , in 1887, there was no general settled rule. Although entire unanimity has not yet been reached on some material points, several fundamental principles are fully agreed upon. It is now universally held, in American courts, that a master always *may* have, and sometimes *must* have, a servant, who acts as his representative or *alter ego* towards other servants; and that for the negligence of such representative, *while acting as such*, the master is responsible to the other servants, precisely as if it were his own. By general consent such representative, while acting as such, is called a 'vice-principal.' And a vice-principal is not a 'fellow-servant.'" Shearman & Redfield on Negligence (5th ed.), § 226.

"The true test, it is believed, whether an employee occupies the position of a fellow-servant to another employee, or is the representative of the master, is to be found, not from the grade or rank of the offending or injured servant, but it is to be determined by the character of the act being performed by the offending servant, by which another employee is injured; or, in other words, whether the person whose *status* is in question is charged with the performance of a duty which properly belongs to the master." McKinney, Fellow-Servants, § 23. See also *Hawkins* v. *N. Y., L. E. & W. R. R. Co.*, 142 N. Y. 416; *Ford* v. *Railroad Co.*, 110 Mass. 240; *Anderson* v. *Bennett*, 16 Or. 515; *Beesley* v. *F. W. Wheeler & Co.*, 103 Mich. 196.

See note on Superior Servants and Vice-Principals in VIII. Harvard Law Rev. 57.

the plaintiff entered upon a verdict, in an action brought to recover damages for personal injuries.

The plaintiff, in the employment of the defendant, was assisting to draw a boat into dry dock, out of which it became necessary to pump the water after the boat had been docked. While the plaintiff, with others, was lifting the fly wheel of the engine, used for pumping purposes, off its center, one John L. Babbitt (not the defendant herein) carelessly let the steam on, thus starting the wheel and throwing the plaintiff on to the gearing wheel, where he received his injuries. It appeared that said Babbitt had general charge of the business, being at one time styled general superintendent and manager, and at another time business and financial man.

At the close of the case, the defendant requested the court, among other things, to charge the following:

13. That although John L. Babbitt may, as financial agent or superintendent, or overseer or manager, have represented defendant and stood in his place, he did so only in respect of those duties which the defendant had confided to him as such agent, superintendent, overseer or manager.

The court so charged.

14. That as to any other acts or duties performed by him in or about the defendant's works at Whitesboro, or in or about the defendant's business at said works, he is not to be regarded as defendant's representative, standing in his place, but as an employee or servant of the defendant, and as a fellow-servant of the plaintiff.

The court refused, saying, "I will leave that as a question of fact for the jury."

17. That if John L. Babbitt did let on the steam while plaintiff was engaged at the wheel, he was not, in so doing, acting in the defendant's place, but his act in so doing was his own act, and not the act of the defendant.

The court refused, leaving it to be determined as a question of fact by the jury, and to the refusals to charge the defendant excepted.

Rapallo, J. The liability of a master to his servant for injuries sustained while in his employ, by the wrongful or negligent act of another employee of the same master, does not depend upon the doctrine of *respondeat superior*.

If the employee whose negligence causes the injury is a fellow-servant of the one injured, the doctrine does not apply. (*Conway* v. *Belfast, &c., Ry. Co.*, 11 Irish C. L. 353.)

A servant assumes all risk of injuries incident to and occurring in the course of his employment, except such as are the result of the act of the master himself, or of a breach by the master of some term, either express or implied, of the contract of service, or of the duty of the master to his servant, viz: to employ competent fellow-servants, safe machinery, etc. But for the mere negligence of one employee, the master is not responsible to another engaged in the same general service.

The liability of the master does not depend upon the grade or rank of the employee whose negligence causes the injury. A superintendent of a factory, although having power to employ men, or represent the master in other respects, is, in the management of the machinery, a fellow-servant of the other operatives. *Albro* v. *Agawam Canal Co.*, 6 Cush. 75; *Conway* v. *Belfast Ry. Co.*, *supra*; Wood's Master and Servant, § 438. See, also, §§ 431, 436, 437. On the same principle, however low the grade or rank of the employee, the master is liable for injuries caused by him to another servant, if they result from the omission of some duty of the master, which he has confided to some inferior employee. On this principle the *Flike case* (53 N. Y. 549) was decided. Church, Ch. J., says, at page 553: "The true rule, I apprehend, is to hold the corporation liable for negligence in respect to such acts and duties as it is required to perform as master, without regard to the rank or title of the agent intrusted with their performance. *As to such acts*, the agent occupies the place of the corporation, and the latter is liable for the manner in which they are performed."

The liability of the master is thus made to depend upon the character of the act in the performance of which the injury arises, without regard to the rank of the employee performing it. If it is one pertaining to the duty the master owes to his servants, he is responsible to them for the manner of its performance. The converse of the proposition necessarily follows. If the act is one which pertains only to the duty of an operative, the employee performing it is a mere servant, and the master, although liable to strangers, is not liable to a fellow-servant for its improper performance. (Wood's Master and Servant, § 438.) The citation which the court read to the jury

from 21 Am. Rep. 2, does not conflict with, but sustains this proposition; it says: "Where the master places the entire charge of his business in the hands of an agent, the neglect of the agent *in supplying and maintaining suitable instrumentalities for the work required is a breach of duty for which the master is liable.*" These were masters' duties. In so far as the case from which the citation is made goes beyond this, I cannot reconcile it with established principles. In England, by a late act of Parliament, the rules touching the point now under consideration have been modified in some respects, but in this State no such legislation has been had.

The point is sharply presented in the present case, by the 13th, 14th and 17th requests to charge. 13th. That although John L. Babbitt may, as financial agent or superintendent, overseer or manager, have represented defendant, and stood in his place, he did so only in respect of those duties which the defendant had confided to him as such agent, superintendent, overseer or manager.

This the court charged.

14th. That as to any other acts or duties performed by him in and about the defendant's works or business at said works, he is not to be regarded as defendant's representative, standing in his place, but as an employee or servant of the defendant, and a fellow-servant of the plaintiff.

This the court refused to charge, but left as a question of fact to the jury, and defendant's counsel excepted. I think this was a question of law, and that the court erred in submitting it to the jury, but should have charged as requested.

The court was further specifically requested to charge that in letting on the steam John L. Babbitt was not acting in defendant's place. This, I think, was a sound proposition, as applied to the present case. It was the act of a mere operative for which the defendant would be liable to a stranger, but not to a fellow-servant of the negligent employee. As between master and servant it was servant's, and not master's duty to operate the machinery.

The judgment should be reversed.[1]

[1] The dissenting opinion by Earl, J., concurred in by Danforth and Finch, JJ., omitted.

The principle enounced in this case has since been frequently approved. See *Hawkins* v. *N. Y., L. E. & W. R. R. Co.*, 142 N. Y. 416, 420.

The Berea Stone Co. v. Kraft.

(31 Ohio St. 287. — 1877.)

The defendant in error brought this action against the plaintiff in error to recover damages alleged to have been caused by the negligence of the company, its servants and agents.

At the time of the injury, the company was engaged in loading stone from its quarry on cars, under the superintendence of one Stone, foreman of the quarry, using for the purpose a derrick, wire rope, chains and hooks. The hooks were designed for raising hard stone, they being unsafe and dangerous to hoist or raise soft stone, and of that fact Stone and the company were cognizant. While Kraft was engaged in loading some soft stone on cars, his co-worker being temporarily absent, the foreman, with the assistance of another workman, used the hooks instead of the chains. When the stone was swung over the car, Kraft attempted to steady it; the hooks gave way, breaking out a piece of the stone, which fell inflicting the injury complained of.

At the close of the case, the defendant below requested the court to charge:

1. That a corporation is liable to an employee for negligence or want of proper care in respect to such acts and duties as it is required to perform as master or principal, without regard to the rank or title of the agent intrusted with their performance.

2. That if the injury was caused by the negligence of the defendant's foreman, when he was doing the work of a co-laborer with the plaintiff, and not when in the discharge of his duties as foreman and representative of the defendant, the plaintiff cannot recover, unless the plaintiff shows that the defendant did not exercise reasonable care and prudence in the selection of a foreman.

The court refused, and the defendant excepted. On error, the district court affirmed the judgment of the court of common pleas entered on a verdict in favor of the plaintiff.

Boynton, J. The errors assigned for which a reversal of the judgment is sought, are the refusal of the court to give to the jury the instructions requested, and the order overruling the

motion for a new trial. That a corporation is liable to an employee for negligence, or want of proper care in respect to such acts and duties as it is required to perform as master or principal, without regard to the rank of the agent intrusted with their performance, may, as matter of law, be very clear. But the proposition has no application to the case. It is true that the negligence charged as the cause of the injury, consisted in the selection, use, and employment of unsafe, insecure, and dangerous implements and machinery for the purpose of loading stone upon cars for transportation. But upon the trial, no question was made, or doubt raised, of the fact that the company had supplied suitable and proper machinery and implements for loading stone, both hard and soft; but its liability was asserted on the ground of its negligent and careless use or employment of machinery and apparatus for hoisting stone, safe and suitable for the special purpose or use for which such machinery was designed, but unsafe and dangerous for the use to which it was applied. The request obviously had reference to the duty of a master to furnish, so far as the exercise of due care will accomplish it, suitable and safe instrumentalities for carrying forward his work, and these having, admittedly, been furnished, and the request having no other bearing, it was properly refused.

The second request was evidently founded on a misconception of the negligent act which gave rise to the company's liability. It was founded on the hypothesis that the want of care charged, and resulting in the injury to the defendant in error, consisted in the negligent or careless attachment of the hooks to the stone to be raised; hence it was contended that when Stone, the foreman, assisted in attaching or fastening the hooks to the stone, he was performing, not the duty of foreman, but the work of a common laborer, for the negligent performance of which the company was not liable. This was clearly a misapprehension of the ground upon which the liability of the company was asserted. The petition, as above stated, alleged negligence in the selection, use, and employment of unsafe, insecure, and dangerous implements and machinery. This was the full scope of the averment. No act of negligence was charged, and no liability claimed to exist, except such as originated in, and grew out of the selection, use, and employment of such implements and machinery for loading stone. The mode or manner of attaching or fastening the hooks to the stone was not the subject of com-

plaint, nor set up as a ground for the recovery of the damages claimed.

But if this construction is too limited, if the liberality with which pleadings under the code are to be construed, would require us to hold that the language of the petition charging negligence in the "use of unsafe and dangerous implements," is sufficiently broad and comprehensive to include the act and mode of attaching the hooks to the stone, and is not to be confined and restricted to the sense that the hooks, being unsuitable for such service, were misapplied to an improper use, we still think the court did not err, as the proposition embraced in the request is not correct as a rule of law. Where the master, or one placed by him in the charge of men engaged in his service, personally assists or interferes in the labor being performed under his direction and control, and is, while performing such labor, or interfering with its performance, guilty of negligence resulting in an injury to one engaged in such service, there is no sound principle of law that will excuse or exonerate the master from liability. *Ormand* v. *Holland*, 96 Eng. Com. Law, 102; Shear. & Red. on Neg. § 89, *et seq.;* Wharton on Neg. § 205.

The ground of the liability of the master for the negligent conduct of his servant, in all cases where the liability arises, is, that the servant's act is the act of the master. The implied obligation of the servant to assume all risks incident to the employment, including that of injury occasioned by the negligence of a fellow-servant, has no application where the servant by whose negligent conduct or act the injury is inflicted, sustains the relation of superior in authority to the one receiving the injury. The claim that Stone was a fellow-servant engaged in the same service with Kraft, is not supported by the proof. It is true that he was in the service of the same master, and engaged in the same general employment, but he was intrusted with duties and responsibilities of entirely a different nature, and wholly independent of those of Kraft. Occupying to the latter, the relation, substantially, of principal, he was in no just or proper sense a fellow-servant, nor engaged in what may properly be denominated a common service. The relation existing between them was such as brings the case clearly within the rule established by repeated adjudications of this court, and now firmly settled in the jurisprudence of the state, that where

one servant is placed by his employer in a position of subordination to, and subject to the orders and control of another, and such inferior servant, without fault, and while in the discharge of his duties, is injured by the negligence of the superior servant, the master is liable for such injury. *Little Miami R. R. Co.* v. *Stevens*, 20 Ohio, 415; *C., C. & C. R. R. Co.* v. *Keary*, 3 Ohio St. 201; *Mad River & Lake Erie R. R. Co.* v. *Barber*, 5 Ohio St. 541; *Whalon* v. *Mad River & Lake Erie R. R. Co.*, 8 Ohio St. 249; *The Pittsburgh, Fort Wayne & Chicago Railway Co.* v. *Devinney*, 17 Ohio St. 197.

The fact, if it be true, that Stone's negligence in assisting in fastening the hooks to the stone to be raised, may have caused the injury, and that he was then performing the duty of a common workman, and not those strictly pertaining to the duties of foreman, in nowise relieves the company from liability. If the act done by him, had been done under his direction as he did it, by one of the employees of the company, its liability could not be doubted, and for the reason, that the negligent act, although committed by the hand of another, was, in law, the act of the foreman, and consequently the act of the master. And it could be no less the act of the master when performed by the foreman in person.

In support of the claim that a new trial ought to have been granted on the ground that the evidence was insufficient to sustain it, it is contended: 1. That the evidence fails to show that the injury was occasioned by negligence; 2. That there is a fatal variance between the allegations and proof; and, 3. Contributory negligence by the plaintiff. We have carefully examined the evidence, and think neither of these objections can be sustained. We have the most doubt on the subject of contributory negligence. But, on the whole, our minds are not so clearly satisfied that the finding of the jury was wrong as to lead us to disturb the judgment. On the subject of the company's negligence, there is no doubt that the verdict was right. Where safe and unsafe instrumentalities are at hand, with which to perform a particular work, the adoption of the latter to the exclusion of the former, is clearly negligence. This is what the company did in the present case, and in so doing occasioned the injury to the plaintiff below.

Motion overruled.

NEGLIGENCE OF MASTER AND FELLOW-SERVANT CONCURRING.

Cone v. Delaware, L. & W. R. R. Co.

(81 New York, 206.—1880.)

Appeal by the defendant from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the plaintiff entered upon a verdict, in an action to recover damages for personal injuries.

While the plaintiff, in the employment of the defendant, was about his business as repairer, examining a car standing on a side track, another car, a few feet away on the same track and attached to an engine, took motion therefrom, and the plaintiff was caught between the two cars and injured. It appeared that the engineer had temporarily left his engine and that the engine took motion in consequence of steam escaping into the cylinder through a leaky valve; that such defect had been known for some time by defendant's master mechanic as also by the engineer, but not by the plaintiff; and that if the engineer had opened the cylinder cocks, the engine would not have started in consequence of such leakage.

Danforth, J. As between the plaintiff and the defendant, it was the duty of the latter to furnish its employees for use in the prosecution of its business, good and suitable machinery, and keep it in repair. *Wright* v. *N. Y. C. R. R. Co.*, 25 N. Y. 562; *Laning* v. *N. Y. C. R. R. Co.*, 49 id. 521; *Flike* v. *B. & A. R. R. Co.*, 53 id. 549; *Corcoran* v. *Holbrook*, 59 id. 519. It was also its duty to furnish for the management of such machinery, careful and trustworthy servants; and if these conditions were fulfilled, the plaintiff, although injured by the negligence of his fellow-servant, could maintain no action against their common principal. *Wright* v. *N. Y. C. R. R. Co.*, *supra*; *Coon* v. *S. & U. R. R. Co.*, 5 N. Y. 492. But that is not the case here. The plaintiff was not injured by the negligence of his co-employee, while managing good and suitable machinery. The defendant failed to supply machinery of that character. The engine in question was, in many important particulars, in

bad condition; its fire-box was burned out, its stay-bolts had given way, its cylinders needed boring out, its valves facing; it leaked badly, and its flues were defective; and coming nearer to the immediate cause of the injury inflicted upon the plaintiff, it was found that its throttle-valve leaked and the thread upon the screw which serves to hold the reverse bar in place, and thus controls the motion of the engine, was so worn as to be useless. As a natural and necessary consequence of the defects last mentioned, the steam escaped from the boilers into the cylinders, the engine was put in motion, and as might have been expected, the accident occurred of which the plaintiff now complains. But more than this, the master mechanic, and also the general superintendent of the road, the superior officers directly representing the defendant, had been notified of these defects, but nevertheless directed the engine to be kept in use, "for" (as one of them said) "they were short of power, and had nothing to put in its place." So far this is the plaintiff's case, and is conclusive against the defendant unless answered, and what is its defense? Why, as I understand it, it is that the engine was furnished with cylinder cocks; that these cocks if opened would have allowed the steam to escape, thus preventing its accumulation in the cylinder, and its pressure upon the piston; that the engineer omitted to open the cocks, and was, therefore, guilty of negligence; that it was this negligence which caused the injury, and so the defendant is exonerated! But the cylinder cocks were part of a perfect machine, they were not added to supply the defects, or any of them to which I have above called attention. Therefore the defendant's contention comes to this: We concede that we failed in our duty, we did not supply a suitable machine, but our servant, the engineer, could, notwithstanding, have so managed that the defect should cause no harm.

If this doctrine is accepted it will loosen the rule of responsibility which now bears none too closely upon corporate conduct. It will seldom happen that unusual care on the part of an engineer would not prevent an accident. In this case he might have opened the cocks, or blocked the wheels, or with extreme care so separated the engine from its train that the two should occupy separate tracks. It now seems that it would have been well to have done one or the other of these things. His omission to do so may have been negligence toward the defendant,

but it does not remove the responsibility which attached to it, to furnish good and suitable machinery, or place it upon a subordinate whose duty is to be measured by the degree of skill necessary for its management, and who is not called upon to make good the want of corporate care and attention.

The case is not one for the application of the doctrine of equivalents. Nor could the jury be permitted to inquire whether the exercise of extra diligence or skill on the part of the defendant's servant, the engineer, would not have neutralized the defendant's own negligence. This would require them to determine the "comparative negligence" of master and servant, and "strike a balance of negligence," which, even as between plaintiff and defendant, is not permitted. *Wilds* v. *H. R. R. R. Co.*, 23 How. 492. Neither upon principle nor authority can it be held that negligence of the servant in using imperfect machinery excuses the principal from liability to a co-employee for an injury which could not have happened had the machinery been suitable for the use to which it was applied. Had the injury resulted solely from the servant's negligence, the case would have been different. *Wright* v. *N. Y. C. R. R. Co.*, *supra.* And so the trial judge held. But the jury found that it did not, and the judgment rendered upon the verdict was properly affirmed.

The reasons given, therefore, by the learned judge at General Term (15 Hun, 172) are sufficient, and to them nothing more need be added.

The judgment appealed from should be affirmed with costs.

All concur.

Judgment affirmed.

SPECIFIC TORTS.

ASSAULT AND BATTERY.

ASSAULT.

Beach v. Hancock.

(27 New Hampshire, 223.—1853.)

Trespass for an assault.

Plaintiff and defendant being engaged in an angry altercation, the latter stepped into his office and got a gun, which he pointed in a threatening manner at plaintiff, standing three or four rods away. He snapped the gun, which was not loaded, two or three times, but the plaintiff did not know that it was not loaded.

The court instructed the jury that an assault had been committed, and that in assessing damages it was their duty to consider the effect trivial damages would have in encouraging disturbances of the peace. The defendant excepted to such instructions.

By Court, Gilchrist, C. J. Several cases have been cited by the counsel of the defendant, to show that the ruling of the court was incorrect. Among them is the case of *Regina* v. *Baker*, 1 Car. & Kir. 254. In that case the prisoner was indicted under the statute of 7 Wm. IV and 1 Vict. c. 85, for attempting to discharge a loaded pistol. Rolfe, B., told the jury that they must consider whether the pistol was in such a state of loading that under ordinary circumstances it would have gone off, and that the statute under which the prisoner was indicted would then apply. He says, also: "If presenting a pistol at a person, and pulling the trigger of it, be an assault at all, certainly in the case where the pistol is loaded, it must be taken to be an attempt to discharge the pistol with intent of doing some bodily injury."

From the manner in which this statement is made, the opin-

ion of the court must be inferred to be, that presenting an unloaded pistol is an assault. There is nothing in the case favorable to the defendant. The statute referred to relates to loaded arms.

The case of *Regina* v. *James*, 1 Car. & Kir. 529, was an indictment for attempting to discharge a loaded rifle. It was shown that the priming was so damp that it would not go off. TINDAL, C. J., said: "I am of opinion that this was not a loaded arm within the statute of 1 Vict. c. 85; and that the prisoner can neither be convicted of the felony nor of the assault. It is only an assault to point a loaded pistol at any one, and this rifle is proved not to be so loaded as to be able to be discharged."

The reason why the prisoner could not be convicted of the assault is given in the case of *Regina* v. *St. George*, 9 Car. & P. 483, where it was held that on an indictment for a felony, which includes an assault, the prisoner ought not to be convicted of an assault which is quite distinct from the felony charged, and on such an indictment the prisoner ought only to be convicted of an assault which is involved in the felony itself.

In this case, PARKE, B., said: "If a person presents a pistol which has the appearance of being loaded, and puts the party into fear and alarm, that is what it is the object of the law to prevent."

So if a person present a pistol, purporting to be a loaded pistol, at another, and so near as to have been dangerous to life if the pistol had gone off, *semble* that this is an assault, even though the pistol were in fact not loaded. *Regina* v. *St. George*, *supra*.

In the case of *Blake* v. *Barnard*, 9 Car. & P. 626, which was trespass for an assault and false imprisonment, the declaration alleged that the pistol was loaded with gunpowder, ball, and shot, and it was held that it was incumbent on the plaintiff to make that out. Lord ABINGER then says, "If the pistol was not loaded, it would be no assault," and the prisoner would be entitled to an acquittal, which was undoubtedly correct under that declaration, for the variance. *Regina* v. *Oxford*, id. 525. One of the most important objects to be attained by the enactment of laws and the institutions of civilized society is, 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 it surely 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 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.

CHAPMAN v. STATE.

(78 Alabama, 463.—1885.)

Ante, page 15.

STEPHENS v. MYERS.

(4 Carrington & Payne, 349.—1830.)

ASSAULT. The declaration stated that the defendant threatened and attempted to assault the plaintiff. Plea—not guilty.

It appeared, that the plaintiff was acting as chairman, at a parish meeting, and sat at the head of a table, at which table the defendant also sat, there being about six or seven persons between him and the plaintiff. The defendant having, in the course of some angry discussion, which took place, been very vociferous, and interrupted the proceedings of the meeting, a motion was made, that he should be turned out, which was carried by a very large majority. Upon this, the defendant said, he would rather pull the chairman out of the chair, than be

turned out of the room; and immediately advanced with his fist clenched toward the chairman, but was stopped by the church-warden, who sat next but one to the chairman, at a time when he was not near enough for any blow he might have meditated to have reached the chairman; but the witnesses said, that it seemed to them that he was advancing with an intention to strike the chairman.

TINDAL, C. J., in his summing up, said:—It is not every threat, when there is no actual personal violence, that constitutes an assault, there must, in all cases, be the means of carrying the threat into effect. The question I shall leave to you will be, whether the defendant was advancing at the time, in a threatening attitude, to strike the chairman, so that his blow would almost immediately have reached the chairman, if he had not been stopped; then, though he was not near enough at the time to have struck him, yet, if he was advancing with that intent, I think it amounts to an assault in law. If he was so advancing that, within a second or two of time, he would have reached the plaintiff, it seems to me it is an assault in law. If you think he was not advancing to strike the plaintiff, then only can you find your verdict for the defendant; otherwise you must find it for the plaintiff, and give him such damages as you think the nature of the case requires.

Verdict for the plaintiff—Damages, 1 s.

BATTERY.[1]

KIRLAND v. THE STATE.

(43 Indiana, 146.—1873.)

BUSKIRK, J. This was a prosecution for an assault and battery commenced before a justice of the peace. The affidavit

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[1] INSTANCES OF LAWFUL USE OF FORCE OR VIOLENCE.—"To use or attempt, or offer to use, force or violence upon or towards the person of another is not unlawful in the following cases:

"1. When necessarily committed by a public officer in the performance of a legal duty; or by any other person assisting him or acting by his direction;

charges the appellant with having, at Marion county, on the 28th day of February, 1873, unlawfully, and in a rude, insolent and angry manner, touched, etc., Charles Bein.

The appellant was tried and found guilty by the justice. The case was appealed. It was tried on appeal in the Marion Criminal Court, where the State again obtained a verdict. The appellant moved for a new trial, which was overruled, and the judgment was rendered on the verdict.

The error assigned is the overruling of the motion for a new trial. A reversal of the judgment is asked mainly upon the ground that the court gave an erroneous instruction to the jury.

The instruction complained of as erroneous is as follows:

"2. To constitute a battery, the touching need not be of great force; a mere touching is sufficient, if it be unlawful and be done in a rude, or an insolent, or an angry manner. But this touching must be unlawful. A man may defend the possession of his estate and of his chattels by such reasonable force as may be necessary to that end; and if, in this case, you believe from the evidence, that at the time of the alleged assault

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"2. When necessarily committed by any person in arresting one who has committed a felony, and delivering him to a public officer competent to receive him in custody;

"3. When committed either by the party about to be injured or by another person in his aid or defense, in preventing or attempting to prevent an offense against his person, or a trespass or other unlawful interference with real or personal property in his lawful possession, if the force or violence used is not more than sufficient to prevent such offense;

"4. When committed by a parent or the authorized agent of any parent, or by any guardian, master, or teacher, in the exercise of a lawful authority to restrain or correct his child, ward, apprentice or scholar, and the force or violence used is reasonable in manner and moderate in degree;

"5. When committed by a carrier of passengers, or the authorized agents or servants of such carrier, or by any person assisting them, at their request, in expelling from a carriage, railway car, vessel or other vehicle, a passenger who refuses to obey a lawful and reasonable regulation prescribed for the conduct of passengers, if such vehicle has first been stopped and the force or violence used is not more than sufficient to expel the offending passenger, with a reasonable regard to his personal safety;

"6. When committed by any person in preventing an idiot, lunatic, insane person, or other person of unsound mind, including persons temporarily or partially deprived of reason, from committing an act dangerous to himself or to another, or in enforcing such restraint as is necessary for the protection of his person or for his restoration to health, during such period only as shall be necessary to obtain legal authority for the restraint or custody of his person." N. Y. Penal Code, § 223.

and battery, Charles Bein was trespassing upon the lands of the defendant, and engaged in carrying away without right the corn of the defendant, the defendant had the right, after requesting Bein to depart, and a refusal on his part to leave the property and premises, to use such reasonable force as was necessary to eject him from the premises and protect his personal property; and if the defendant, in thus protecting his property and possession, touched Bein or assaulted him only so much as was reasonably necessary to secure the object aforesaid, he is not guilty, and you should so find. But if the jury believe from the evidence, that defendant rented the fields referred to in the evidence, no certain time being fixed for the termination of the lease, to Charley Bein, to be cultivated in corn, upon the shares, to be gathered by Bein, one-half to be delivered to defendant, and the other to be retained by the renter or tenant for his share, the mere fact that an agreement was made in the fall after, by which it was agreed that the tenant (Bein) take for his share of the corn the south field, and defendant the north field as his share, except three acres in the south field, this would not terminate the lease of itself, unless it was agreed between the parties that the lease should terminate. Nor would such facts authorize the defendant to forcibly eject Bein from the field because he was gathering more corn for his own use than he was entitled to by such agreement; and if, under such circumstances, the defendant struck or beat Bein, while he was gathering corn in the field, or while Bein was driving his team in the field in the act of gathering the corn, the defendant struck and beat his horses in a rude and angry manner with a stick, the defendant is guilty of an assault and battery."

The Statute says: "Every person who in a rude, insolent or angry manner, shall unlawfully touch another, shall be deemed guilty of an assault and battery," etc. 2 G. & H. 459.

It is quite clear, therefore, that no assault and battery can be committed, unless one person touches another person unlawfully, and in a rude, or insolent, or angry manner. The affidavit charges that the appellant thus touched Charles Bein. To sustain this charge, the evidence must show the unlawful touching, etc., of Charles Bein. The charge excepted to, however, instructs the jury, that, if the defendant struck Charles Bein's horses with a club, in a rude and angry manner, while Bein was driving his team, in the act of gathering corn, etc., the defendant is guilty

of an assault and battery. In this instruction the court deems the touching of Bein wholly immaterial and unimportant; to strike Bein's horses is to strike him, that is, if they were struck with a club, and it was done while he was driving his team in the field, in the act of gathering corn. To strike the horses of Bein was in no legal or logical sense to strike him. True, if the blow touched both Bein and his horse, the touching would be an assault and battery on Bein, not because of the touching of his horse, however, but for the reason that it touched him.

And if the appellant struck and drove Bein's horse, or any other horse, against him violently, unlawfully, and in a rude, etc., manner, then he would be guilty, not because he struck the horse, but for the reason that he struck Bein by running or pushing the horse against him. If Bein was so connected with his horses when they were struck, that the blow took effect on his person as well as that of the horses, then the person striking the blow would be guilty.

Bishop, in his work on Criminal Law, in sec. 72, vol. 2, says: "The slightest unlawful touching of another, especially if done in anger, is sufficient to constitute a battery. For example, spitting in a man's face, or on his body, or throwing water on him, is such. And the inviolability of the person, in this respect, extends to everything attached to it."

Russell, on Crimes, vol 1. p. 751, says: "The injury need not be effected directly by the hand of the party. Thus there may be an assault by encouraging a dog to bite. . . . And it seems that it is not necessary that the assault should be immediate; as where the defendant threw a lighted squib into a market-place, which, being tossed from hand to hand, by different persons, at last hit the plaintiff in the face, and put out his eye, it was adjudged that this was actionable as an assault and battery. And the same has been holden where a person pushed a drunken man against another."

Greenleaf on Evidence, in discussing the question of battery, says: "A battery is the actual infliction of violence on the person. This averment will be proved by evidence of any unlawful touching of the person of the plaintiff, whether by the defendant himself, or by any substance put in motion by him. The degree of violence is not regarded in the law; it is only considered by the jury, in assessing the damages in a civil action, or by the judge in passing sentence upon indictment. Thus,

any touching of the person in an angry, revengeful, rude, or insolent manner; spitting upon the person; jostling him out of the way; pushing another against him; throwing a squib or any missile, or water upon him; striking the horse he is riding, whereby he is thrown; taking hold of his clothes in an angry or insolent manner, to detain him, is a battery. So, striking the skirt of his coat or the cane in his hand, is a battery. For anything attached to his person partakes of its inviolability."

Blackstone defines a battery as follows:

"3. By battery, which is the unlawful beating of another. The least touching of another's person willfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner." 3 Cooley's Blackstone, 120.

Note 4 by Judge Cooley, on same page, reads as follows: "A battery is an unlawful touching the person of another by the aggressor himself, or any other substance put in motion by him. 1 Saund. 29, b. n. 1; id. 13 and 14, n. 3. Taking a hat off the head of another is no battery. 1 Saund. 14. It must be either willfully committed, or proceed from want of due care: Stra. 596; Hob. 134; Plowd. 19; otherwise it is *damnum absque injuria*, and the party aggrieved is without remedy: 3 Wils. 303; Bac. Ab. assault and battery, B.; but the absence of intention to commit the injury constitutes no excuse, where there has been a want of due care. Stra. 596; Hob. 134; Plowd. 19. But if a person unintentionally push against another in the street, or if without any default in the rider a horse runs away and goes against another, no action lies. 4 Mod. 405. Every battery includes an assault: Co. Litt. 253; and the plaintiff may recover for the assault only, though he declares for an assault and battery. 4 Mod. 405."

Counsel for appellee have referred us to the following adjudged cases as supporting the instruction under examination; *Respublica* v. *De Longchamps*, 1 Dallas, 111; *The State* v. *Davis*, 1 Hill S. C. 46; *Dubuc De Marentille* v. *Oliver*, Penning, 379; *The United States* v. *Ortega*, 4 Wash. C. C. 531.

The case referred to in Dallas was a prosecution under the laws of nations for an assault and battery upon the Minister of the French Government resident in this country. It was

proved upon the trial that the defendant struck with a cane the cane of the French Minister. The court say: "As to the assault, 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. As, therefore, anything attached to the person, partakes of its inviolability, De Longchamps' striking Monsieur Marbois' cane, is a sufficient justification of that gentleman's subsequent conduct."

The case referred to in Pennington, *supra*, was a civil action for a trespass committed by the defendant on the property of the plaintiff, by striking with a large club the plaintiff's horse, which was before a carriage in which the plaintiff was riding. The court say: "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 a 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 of him or the like."

The above case being an action of trespass for an injury to the horse of the plaintiff and not a prosecution for an assault, or an assault and battery upon the person of the plaintiff, we think that but little importance should be attached, or weight given to the loose remark of the judge, that the striking of a horse attached to a carriage was an assault upon the person riding in the carriage.

The case of *The State* v. *Davis*, *supra*, was a prosecution for an assault upon an officer, in releasing from his custody a negro. The facts will sufficiently appear from the quotation which we make from the opinion of the court. The court say:

"The general rule is, that any attempt to do violence to the person of another, in a rude, angry, or resentful manner, is an assault; and raising a stick or fist, within striking distance, pointing a gun within the distance it will carry, spitting in one's face, and the like, are the instances usually put by way of illus-

tration. No actual violence is done to the person in any one of these instances; and I take it as very clear that that is not necessary to an assault. It has, therefore, been held that beating a house in which one is, striking violently a stick which he holds in his hand, or the horse on which he rides, is an assault; the thing in these instances partaking of the person's inviolability. *Respublica* v. *De Longchamps*, 1 Dall. 114; *Wambough* v. *Shank*, Penning. 229, cited in 2 part Esp. Dig. 173.

"What was the case here? Laying the right of property in the negro out of the question, the prosecutor was in possession, and legally speaking, the defendants had no right to retake him with force. As far as words could go, their conduct was rude and violent, in the extreme. They broke the chain with which the negro was confined to the bed-post, in which the prosecutor slept, and cut the rope by which he was confined to his person, and are clearly within the rule. The rope was as much identified with his person, as the hat or coat which he wore, or the stick which he held in his hand. The conviction was therefore right."

We are inclined to the opinion that the chain and rope so connected together the prosecutor and negro, as to make the identification as complete as the hat or coat on the person or the stick in the hand. The ruling in the above case was based upon the close and intimate connection which existed between the prosecutor and the negro; but no such identity or connection between the prosecutor and his horses in the case in judgment is shown.

The case of *The United States* v. *Ortega*, *supra*, was a prosecution instituted by the United States, for the purpose of vindicating the law of nations and of the United States, offended, as was alleged, in the person of a foreign minister, by an assault committed on him by the defendant. The proof was, that the defendant seized hold of the breast of the coat of Mr. Salmon, the prosecuting witness, and retained his hold while he enumerated his cause of grievance, and until a third person came up and compelled him to release his hold.

The court said: "It was argued by the counsel for the defendant, that, to constitute an assault, it must be accompanied by some act of violence. The mere taking hold of the coat, or laying the hand gently upon the person of another, it is said, does not amount to this offense; and that nothing more is

proved in this case, even by Mr. Salmon. It is very true that these acts may be done, very innocently, without offending the law. If done in friendship, for a benevolent purpose, and the like, the act would certainly not amount to an assault. But these acts, if done in anger, or a rude and insolent manner, or with a view to hostility, amount, not only to an assault, but to a battery. Even striking at a person, though no blow be inflicted, or raising the arm to strike, or holding up one's fist at him, if done in anger, or in a menacing manner, are considered by the law as assaults."

It is very obvious that the above cases do not support the position assumed by the counsel for appellee, but are in entire accord with the elementary writers from whom we have quoted.

The most accurate and complete definition of a battery that we have met with is that given by Saunders, and which has been adopted by most subsequent writers, and that is: "A battery is an unlawful touching the person of another by the aggressor himself, or any other substance put in motion by him." By this definition, it is an essential prerequisite that the person must either be touched by the aggressor himself or by the substance put in motion by him. There must be a touching of the person. One's wearing apparel is so intimately connected with the person, as in law to be regarded, in case of a battery, as a part of the person. So is a cane when in the hand of the person assaulted.

But in the case under consideration, 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 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.

The law was correctly stated by the court in the first charge given to the jury. It was as follows: "Before you will be justified in finding the defendant guilty, the evidence must sat-

isfy you beyond a reasonable doubt that the defendant, at, etc., . . . in a rude, or an insolent, or an angry manner, touched Charles Bein."

In placing a construction upon the instruction complained of, it is our duty to look at all the instructions given on the same subject; and, if the instructions taken together present the law correctly and are not calculated to mislead the jury, we should affirm the judgment.

On the other hand, if the two charges are inconsistent with each other, if they were calculated to confuse and mislead the jury, or if they must have left the jury in doubt or uncertainty as to what was the law as applicable to the facts of the case, then the judgment should be reversed. *Somers* v. *Pumphrey*, 24 Ind. 231. The above rules have been applied by this court in civil cases. The rule laid down in criminal causes is as follows: "An erroneous instruction to the jury in a criminal case cannot be corrected by another instruction, which states the law accurately, unless the erroneous instruction be thereby plainly withdrawn from the jury." *Bradley* v. *The State*, 31 Ind. 492.

Construing these charges together, how do they stand? The jury are first told that, to justify a finding of guilty, they must be satisfied beyond a reasonable doubt that the defendant touched Charles Bein; and then, in the second charge, the court continues, that the defendant might lawfully employ reasonable force, etc., in defense of his possession or property, but that under circumstances hypothetically put by the court, Charles Bein had the right to be on the defendant's premises gathering corn, "and if under such circumstances, etc., while Bein was driving his team in the field in the act of gathering the corn, the defendant struck and beat his horses in a rude and angry manner, with a stick, the defendant is guilty of an assault and battery."

Plainly, then, the charge is that the evidence must show the touching of Charles Bein by the defendant, but that if Bein is driving his team, etc., and the defendant strikes his horses (that is Bein's horses) with a stick, in a rude and angry manner, then, such touching of the horses is, in law, a touching of Bein, and the defendant is guilty of an assault and battery. Logically the charge states the law thus: Generally, to sustain a charge of assault and battery on A., it is essential to prove a touching

of A. by the defendant, but under certain circumstances, such as if A. is driving his team, etc., and the defendant touches the horses of A., then, in that case, such touching of the horses is a touching of A., and if such touching of the horses is unlawfully done, and made, etc., then the defendant may be found guilty of an assault and battery on A.

There was evidence tending to prove that the defendant struck Charles Bein. He and his two sons, Edward and Frank, so swear. The defendant swears he did not.

The following is briefly the evidence tending to prove the assault and battery upon the horses:

Charles Bein testified: "He hit my horses on the head with a big club about three feet long. . . . He struck my horses two or three times. . . . He was mad. . . . I was loading corn out of the piles; was loading up corn when he struck the horses."

Same witness on cross-examination testifies: "When he struck the horses, he struck them on the head, and they stopped, etc. Don't know who held the lines. Maybe my little boy held one and me the other. . . . He struck the horse next to me. . . . The team was made to stand when defendant struck the horses. . . . I was not in the wagon when he struck them."

Edward Bein testified: "Kirland hit the horses on the head, and they stopped. We were just going to drive out. My father was then standing on the ground near the wagon. Defendant put his hands on the horses to unhitch them from the wagon; tried to unhitch the traces. Just before that he struck the horses, when father was standing on the other side of the wagon."

Frank Bein testified, "At the time the horses were struck, father was in the wagon."

The defendant testifies, that he "didn't touch the horses, except that he attempted to unhitch them from the wagon."

It is apparent that there was evidence in the case to which the second instruction was applicable. The verdict being general we are unable to determine whether he was convicted for touching the person of Bein, or for striking his horses. It may be that the jury found the defendant guilty of striking the horses of Bein, for the defendant admitted that he attempted to unhitch the horses from the wagon, and consequently must

have touched them, while he positively denies that he touched the person of the prosecuting witness. Besides, there was evidence tending to impeach the character of Bein. The jury may, therefore, have doubted, reasonably, the guilt of the defendant in the striking of Bein, and found him guilty only of having "in a rude and angry manner struck the horses of Bein with a stick," while "he was driving his team in the act of gathering corn."

The second instruction was inapplicable to the evidence and was calculated to mislead the jury, and being erroneous, the judgment should be reversed.

The judgment is reversed; and the cause is remanded, for a new trial in accordance with this opinion.

CONSENT.[1]

Barholt v. Wright.

(45 Ohio State, 177.—1887.)

In an action to recover damages for an assault and battery, the judge charged the jury that if the parties went out to fight by agreement, and the plaintiff received the injuries complained

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[1] To constitute assault and battery, the force or violence attempted or used must be against the will of the person assaulted. Therefore, to one assenting, the maxim *volenti non fit injuria* applies. This, however, is not true in all cases, because there are some things to which a man may not consent, *e. g.*, a breach of the peace. "The State is wronged by this, and forbids it on public grounds. If men fight, the State will punish them. If one is injured, the law will not listen to an excuse based on a breach of the law. There are three parties here, one being the State, which, for its own good, does not suffer the others to deal on a basis of contract with the public peace. The rule of law is therefore clear and unquestionable, that consent to an assault is no justification. The exception to this general rule embraces only those cases in which that to which assent is given is matter of indifference to public order; such as slight batteries in play or lawful games, such unimportant injuries, as even when they constitute technical wrongs, may well be overlooked and excused by the party injured, if not done of deliberate malice. But an injury, even in sport, would be an assault, if it went beyond what was admissible in sports of the sort, and was intentional." Cooley on Torts, 2d ed., 187.

of from the defendant in the course of it, he could not recover. Verdict for defendant.

A motion for a new trial, assigning error in the charge, was overruled and a bill of exceptions taken. Upon error the circuit court reversed the judgment and ordered a new trial; the defendant now prosecutes error to reverse that judgment.

Minshall, J. It would seem at first blush contrary to certain general principles of remedial justice to allow a plaintiff to recover damages for an injury inflicted on him by a defendant in a combat of his own seeking; or where, as in this case, the fight occurred by an agreement between the parties to fight. Thus in cases for damages resulting from the clearest negligence on the part of the defendant, a recovery is denied the plaintiff, if it appear that his own fault in any way contributed to the injury of which he complains. And a maxim, as old as the law, *volenti non fit injuria*, forbids a recovery by a plaintiff where it appears that the ground of his complaint had been induced by that to which he had assented; for, in judgment of law, that to which a party assents is not deemed an injury. Broom, Leg. Max. 268.

But as often as the question has been presented, it has been decided that a recovery may be had by a plaintiff for injuries inflicted by the defendant in a mutual combat, as well as in a combat where the plaintiff was the first assailant, and the injuries resulted from the use of excessive and unnecessary force by the defendant in repelling the assault. These apparent anomalies rest upon the importance which the law attaches to the public peace as well as to the life and person of the citizen. From considerations of this kind it no more regards an agreement by which one man may have assented to be beaten, than it does an agreement to part with his liberty and become the slave of another. But the fact that the injuries were received in a combat in which the parties had engaged by mutual agreement, may be shown in mitigation of damages. 2 Greenleaf Ev. § 85; *Logan* v. *Austin*, 1 Stewart, 476. This, however, is the full extent to which the cases have gone. We will notice a few of them. In *Boulter* v. *Clark*, an early case, an offer was made, under the general issue, to show that the plaintiff and the defendant fought by consent. The offer was denied; the Chief Baron saying, "the fighting being unlawful, the consent of the plaintiff to

fight, if proved, would be no bar to his action." Buller's Nisi Prius, 16. A number of earlier cases were cited, and among them that of *Mathew* v. *Ollerton*, Comb. 218, where it is said, "that if a man license another to beat him, such license is void, because it is against the peace." It will be found upon examination that this case was not for an assault and battery; it was on an award that had been made by the plaintiff on a submission to himself. The remark, however, made in the reasoning of the court, is evidence of the common understanding of the law at that early day. In 1 Stephen's Nisi Prius, 211, it is said: "If two men engage in a boxing match, an action can be sustained by either of them against the other, if an assault be made; because the act of boxing is unlawful, and the consent of the parties to fight cannot excuse the injury." So in *Bell* v. *Hansley*, 3 Jones, N. C. 131, it was held that "one may recover in an action for assault and battery, although he agreed to fight with his adversary; for such agreement to break the peace being void, the maxim *volenti non fit injuria* does not apply." The following cases are to the same effect: *Stout* v. *Wren*, 1 Hawks, 420; *Adams* v. *Waggoner*, 33 Ind. 531; *Shay* v. *Thompson*, 59 Wis. 540; *Logan* v. *Austin*, 1 Stewart, 476. And so it was held in *Commonwealth* v. *Collberg*, 119 Mass. 350, that where two persons go out to fight with their fists, by consent, and do fight with each other, each is guilty of an assault, although there is no anger or mutual ill-will. *Champer* v. *State*, 14 Ohio St. 437, is not in conflict with this, as will be explained hereafter.

No case has been cited that can be said to be to the contrary. What is said by Peck, J., in *Smith* v. *State*, 12 Ohio St. 466, that "an assault upon a consenting party would seem to be a legal absurdity," must be applied to the facts of that case. The judge was discussing the sufficiency of a count in an indictment for an assault with intent to commit a rape, without an averment that it was made forcibly and against the will of the female. The absence of consent is essential to the crime of rape, or of an assault with intent to commit a rape, where the female has arrived at the age at which consent may be given. Intercourse, because illicit, does not amount to an assault where the female consents, however wrong it may be in morals. This is all that was meant by the learned judge in using the language quoted from his opinion.

In all such cases the consent of the female would, without

doubt, be a bar to any right she would otherwise have to maintain an action for an assault and battery. It is said by Judge Cooley in his work on Torts, p. 163, that, "consent is generally a full and perfect shield when that is complained of as a civil injury which was consented to. . . . A man may not even complain of the adultery of his wife, which he connived at or assented to. If he concurs in the dishonor of his bed, the law will not give him redress, because he is not wronged. These cases are plain enough, because they are cases in which the questions arise between the parties alone." "But," he adds, "in case of a breach of the peace it is different. The State is wronged by this and forbids it on public grounds. . . . The rule of law is therefore clear and unquestionable, that consent to an assault is no justification. The exception to this general rule embraces only those cases in which that to which assent is given is matter of indifference to public order." See also, to like effect, Pollock on Torts, 139.

Neither is the case of *Champer* v. *State*, 14 Ohio St. 437, at variance with the principle upon which the plaintiff below seeks a recovery. The case seems to have been somewhat misapprehended by the courts of some of the States, as well as by some text-writers. By the statutes of this state a distinct offense is made of an affray or agreement to fight; and the effect of the holding is that where such an offense is committed, the indictment must be for an affray, and not for an assault and battery. The civil right of either party to recover of the other for injuries received in an affray, is not affected by the statute nor by the decision just referred to. Such seems to have been the view taken by Boynton, J., in the subsequent case of *Darling* v. *Williams*, 35 Ohio St. 63.

The case of *Fitzgerald* v. *Cavin*, 110 Mass. 153, is to the effect that consent is no bar to that which occasions bodily harm if the act was intentionally done.

It is upon the same principle of public policy that one, who is the first assailant in a fight, may recover of his antagonist for injuries inflicted by the latter, where he oversteps what is reasonably necessary to his defense, and unnecessarily injures the plaintiff; or that, with apparent want of consistency, permits each to bring an action in such case, the assaulted party for the assault first committed upon him, and the assailant, for the excess of force used beyond what was necessary for self-

defense. *Dole* v. *Erskine*, 35 N. H. 503, criticising *Elliott* v. *Brown*, 2 Wend. 499; Cooley on Torts, 165; *Darling* v. *Williams*, 35 Ohio St. 63; *Gizler* v. *Witzel*, 82 Ill. 322. And see also *Commonwealth* v. *Collberg*, *supra*.

It would seem that under the code the right of each combatant to damages might be determined and measured in the same action. Swan's Plead. Prec. 259, n. *a*.

And upon like principle it has been ruled that the doctrine of contributory negligence has no application to an action to recover damages for an assault and battery. *Ruter* v. *Foy*, 46 Iowa, 132; *Steinmetz* v. *Kelly*, 72 Ind. 442; *Whitehead* v. *Mathaway*, 85 Ind. 85. Negligence of the plaintiff contributing to the injury of which he complains, is taken into consideration only in those cases, where the liability of the defendant arises from want of care on his part, occasioning injury to the plaintiff; it does not apply to the commission of an intentional wrong.

A question was made as to the admissibility of the evidence of an agreement to fight, under the issue made by the pleadings—the answer being a general denial. If the evidence had been competent for any purpose, other than in mitigation of damages, it would have been under the issue as made. It was insisted on in denial of the right of action, and not as an avoidance of it; so that it was not necessary to be pleaded as new matter. If it had been so pleaded it would have been subject to a demurrer. We think the court erred in its charge to the jury. The injury inflicted, the loss of a finger, was a severe one; it amounted in fact to a mayhem. "Where the injury," (a mayhem,) says the author of a recent and quite valuable work on criminal procedure, "takes place during a conflict, it is not necessary to a conviction that the accused should have formed the intent before engaging in the conflict. It is sufficient if he does the act voluntarily, unlawfully, and on purpose." Maxwell's Crim. Proc. 260. It was permissible to the defendant to show the agreement to fight in mitigation of damages, but not as a bar to the action.

Judgment affirmed.

JUSTIFICATION: DEFENSE OF PERSON AND PROPERTY.

SCRIBNER v. BEACH.

(4 Denio, 448.—1847.)

TRESPASS for assault and battery. Plea, not guilty, with notice of "*son assault demesne*," and that the assault was committed in defense of defendant's property.

It appeared that the affair which gave rise to the action happened in August, 1842, on a piece of land in Catskill, of which the defendant had been in possession about three years before. He removed to Herkimer county and the plaintiff succeeded to the occupancy of the land, and had burned a coal pit upon it, and was engaged in taking the coal to market. While he was absent for that purpose, the defendant came to the pit and commenced raking out the coal with a rake he found there, having a wagon in readiness to take the coal away. While thus engaged the plaintiff came there and asked the defendant what he was doing. Defendant said if he came there he would show him. Upon this the plaintiff took hold of the rake with a view of taking it from the defendant, who letting go, with one hand knocked the plaintiff down. As he arose he again took hold of the rake, but the defendant pulled it away, and with it aimed a blow at the plaintiff's head, which the latter sought to prevent by putting up his hand. The rake struck his arm near the wrist and fractured the bone.

The defendant offered to show that he had title to the land upon which the coal pit was burned, which was uncultivated and unimproved; and that the coal was made from his wood cut upon that land. The plaintiff's counsel objected to this evidence, and the objection was sustained and the evidence excluded. Verdict for the plaintiff $150. The defendant moves for a new trial on a case.

By the Court, JEWETT, J. Self defense is a primary law of nature, and it is held an excuse for breaches of the peace and even for homicide itself. But care must be taken that the resistance does not exceed the bounds of mere defense, prevention or recovery, so as to become vindictive; for then, the defender

would himself become the aggressor. The force used must not exceed the necessity of the case. *Elliott* v. *Brown*, 2 Wend. 497; *Gates* v. *Lounsbury*, 20 John. R. 427; *Gregory* v. *Hill*, 8 T. R. 299; *Baldwin* v. *Hayden*, 6 Conn. R. 453; 3 Bl. Com. 3 to 5; 1 Hawk. P. C. 130; *Cockroft* v. *Smith*, 2 Salk. 642; *Curtis* v. *Carson*, 2 New Hamp. R. 539.

A man may justify an assault and battery in defense of his lands or goods, or of the goods of another delivered to him to be kept. Hawk. P. C. b. 1, c. 60, § 23; *Seaman* v. *Cuppledick*, Owen's R. 150. But in these cases, unless the trespass is accompanied with violence, the owner of the land or goods will not be justified in assaulting the trespasser in the first instance, but must request him to depart or desist, and if he refuses, he should gently lay his hands on him for the purpose of removing him, and if he resist with force, then force sufficient to expel him may be used in return by the owner. *Weaver* v. *Bush*, 8 Term R. 78; Butler's N. P. 19; 1 East, P. C. 406. It is otherwise, if the trespasser enter the close with force; in that case the owner may without previous request to depart or desist, use violence in return, in the first instance, proportioned to the force of the trespasser, for the purpose, only, of subduing his violence.

"A civil trespass," says Holroyd, J., "will not justify the firing a pistol at the trespasser, in sudden resentment or anger. If a person takes forcible possession of another's close, so as to be guilty of a breach of the peace, it is more than a trespass; so if a man with force invades and enters the dwelling house of another. But a man is not authorized to fire a pistol on every invasion or intrusion into his house; he ought, if he has a reasonable opportunity, to endeavor to remove the trespasser without having recourse to the last extremity." *Mead's Case*, 1 Lewin, C. C. 185; Roscoe's Ev. 262. The rule is, that in all cases of resistance to trespassers, the party resisting will be guilty in law of an assault and battery, if he resists with such violence that it would, if death had ensued, have been manslaughter. Where one manifestly intends and endeavors, by violence or surprise, to commit a known felony upon a man's person, (as to rob, or murder, or to commit a rape upon a woman,) or upon a man's habitation or property, (as arson or burglary,) the person assaulted may repel force by force; and even his servant, then attendant on him, or any other person present,

may interpose for preventing mischief; and in the latter case, the owner, or any part of his family, or even a lodger with him, may kill the assailant, for preventing the mischief. Foster's Crown Law, 273.

The resumption of the possession of land and houses by the mere act of the party is frequently allowed. Thus, a person having a right to the possession of lands, may enter by force, and turn out a person who has a mere naked possession, and cannot be made answerable in damages to a party who has no right, and is himself a *tort-feasor*. Although if the entry in such case be with a strong hand, or a multitude of people, it is an offense for which the party entering must answer criminally. *Hyatt* v. *Wood*, 4 John. R. 150; *Sampson* v. *Henry*, 13 Pick. 36.

In respect to personal property, the right of reception exists, with the caution that it be not exercised violently, or by breach of the peace; for should these accompany the act, the party would then be answerable criminally. But the riot, or force, would not confer a right on a person who had none; nor would they subject the owner of the chattel to a restoration of it, to one who was not the owner. *Hyatt* v. *Wood*, *supra*. In the case of personal property, improperly detained or taken away, it may be taken from the house and custody of the wrong-doer, even without a previous request; but unless it was seized or attempted to be seized forcibly, the owner cannot justify doing anything more than gently laying his hands on the wrong-doer to recover it. *Weaver* v. *Bush*, *supra*; Com. Dig. Pleader, 3 M. 17; *Spencer* v. *McGowen*, 13 Wend. 256.

In one branch of the defense the defendant set up *son assault demesne*. That was overthrown by evidence showing a manifest disproportion between the battery given and the first assault. Even a wounding was proved. The defendant also relied upon a defense of his possession of certain personal property, which he insisted was invaded by the plaintiff, and in the defense of which he committed the assault. To sustain this defense he proposed to prove, that the coal pit was on new and unimproved land to which he had title, and that the wood from which the coal was made was cut from this land without any authority from him; but this evidence was rejected. The object of strife between the parties was the possession of the *rake*, not the coal. The plaintiff is not shown to have committed a single act tending to disturb the defendant in his possession of

the latter. The ownership of the coal, therefore, was not a material fact. But admitting that the defendant had a legal title to the coal, and that the plaintiff's object in regaining possession of the rake was to use it as a means of retaking the possession of the coal, still, the defendant could not justify the *wounding* merely in defense of his possession. *Gregory* v. *Hill*, *supra*. Unless the plaintiff first attempted forcibly to take the coal, of which there was no proof, I think the evidence was immaterial, and was properly overruled.

New trial denied.

RIGHT OF RECOVERY BY PARTY USING EXCESSIVE FORCE.

ELLIOTT v. BROWN.

(2 Wendell, 497.—1829.)

ERROR from the New York Common Pleas.

Brown sued Elliott for an assault and battery. Plea not guilty, and subjoined notice of *son assault demesne.*

At the trial, the plaintiff proved that the defendant, a small, elderly man, struck him in the face, or put his fist in his face; whereupon, as appeared by the evidence on the part of the defendant, the plaintiff, a large, powerful man, threw the defendant violently to the ground, doing him serious injury. The testimony was conflicting as to who struck the first blow.

The judge charged the jury that they must determine who commenced the affray by committing the first personal violence; that the defendant had been much hurt, but yet the inquiry must be, who committed the first act of violence; and if they found that it was the defendant, their verdict must be for the plaintiff; but that in such case the injuries sustained by the defendant ought to be considered in mitigation of damages. Counsel for the defendant requested the court to charge the jury, that though they should believe that the defendant had put his fist in the plaintiff's face, yet if the plaintiff provoked it and followed it up by unnecessary violence, he became a trespasser, and the defendant would stand justified. The judge

replied, that if one man commences an assault upon another, and he in defending himself does violence to the person assaulting him, not necessary to his own defense, he thereby gives a cause of action for such violence on his part, yet he loses not his own cause of action, which accrued to him from the first assault and battery which had been committed on him; to which the defendant excepted.

The jury, after retiring, returned and requested to be instructed what amount of damages would carry costs. The judge told them their inquiry ought to be, whether or not an assault and battery had been committed by the defendant upon the plaintiff; if they found that it had not been committed, their verdict should be for the defendant, otherwise for the plaintiff, to whom they should award such damages as the wrong required, without reference to the costs; that it was his duty to give them all proper information in matters of law necessary to aid them in the determination of the facts, but that the information sought was not necessary for that purpose. The defendant again excepted.

By the Court, SAVAGE, CH. J. The first question is an important one, and it is rather strange that no case is to be found, as far as my researches have extended, where the point has been adjudicated. It has been decided by this court, though I cannot find the decision reported, that there cannot be a recovery by both parties in cross-action. The party who first recovers, may plead that recovery in the suit against himself for the same affray. Had the parties been reversed in this case, upon the same testimony which was given, the court would no doubt have charged the jury, that although Elliott might have committed the first assault, yet if Brown used more violence than was necessary to his own defense, he became a trespasser and was liable to pay damages to the plaintiff. Such unquestionably is the law. It was so laid down by Holt, Ch. J., in *Cockroft* v. *Smith*, Salk. 642, where he says: "That for every assault, he did not think it reasonable a man should be banged with a cudgel; that the meaning of the plea (*son assault demesne*) was, that he struck in his own defense." The facts of the case are not given, but from what appears in 1 Ld. Raym. 177, it was an action for mayhem, in biting off the plaintiff's finger, and the first assault by the plaintiff was tilting the form

on which the defendant sat, whereby the defendant fell; or, according to 11 Mod. 43, in a scuffle the plaintiff ran his finger towards the defendant's eyes, whereupon the defendant bit off a joint. It was held in that case a good defense. But the principle is laid down by the court, though they say contrary to common practice, that for a small assault there must not be an unequal return; but the question should be, what was necessary for a man's defense; not who struck first. This case of *Cockroft* v. *Smith* is referred to by all subsequent writers.

The same principle was recognized in South Carolina, in the case of *The State* v. *Wood*, 1 Bay, 351. The defendant was indicted for an assault and battery on a woman. He proved that she struck him first with a cowskin, whereupon he gave her several severe blows with a large stick and left her speechless on the ground. The court directed a verdict against the defendant. They agree that the general rule of law is, that it is a justification to the defendant that the prosecutor or plaintiff gives the first blow; but the resistance ought to be in proportion to the injury offered. Where a man disarms the aggressor, or puts it out of his power to do further injury, he ought to desist from further violence; and if he commits any further outrage, he becomes the aggressor. The case in Salk. 642, is cited as sound law. So the master of a vessel has a right to use proper chastisement for disobedience of orders; but if it be excessive, and out of proportion to the offense, he becomes a trespasser. 15 Mass. R. 347, 365. And so in all cases where the right of chastisement is given by law, if unnecessary severity is used, an action or an indictment lies. The plaintiff in this case had no greater rights than those who are permitted by law to chastise others under their control. Admitting that the defendant gave the first blow, this authorized the plaintiff to resist force by force, and to disarm or disable his adversary; but it did not authorize an athletic, gigantic man to crush almost to death a little, feeble old man. There can be no manner of doubt, then, that had Elliott sued Brown, he would have been entitled to recover exemplary damages; and from former decisions, should this recovery be sustained, it is a bar to any action which Elliott may bring. Can the law tolerate such injustice? How can the plaintiff be in any better situation in the eye of the law and of reason by being plaintiff, than he would be in were he the defendant? If the law is as stated in the court

below, any person who is assaulted ever so lightly, and that too upon his own provocation, may turn upon his assailant and beat him as much as he pleases without killing him, and yet recover damages from the man whom he has thus abused. The law is not chargeable with such injustice. It is true that both parties may be guilty of a breach of the peace, and may be liable to punishment by indictment at the suit of the people, whose laws they have both offended; but a civil action cannot surely be sustained by each of them against the other. The judge should have told the jury, that although the defendant might have given the first blow, yet if the plaintiff had used not only more force than was necessary for self-defense, but had unnecessarily abused the defendant, that then he was not entitled to recover damages; but was liable to pay damages, should Elliott prosecute him.

On the other point, the judge's direction to the jury was strictly correct. It is the duty of the jury to ascertain what damages the plaintiff has sustained; and also how much the defendant ought to be punished; and if the jury consider the costs as part of the amount which the defendant should pay, and wish to give no greater damages than barely enough to carry costs, or to give such a sum as will not carry costs, they have a right so to do. I think, therefore, it would have been proper to have given the jury the information they wanted. But without deciding whether the refusal of the judge to state the law relating to costs to the jury was erroneous, I am of opinion that the judgment should be reversed on the first point.

Dole v. Erskine and Chase.

(35 New Hampshire, 503.—1857.)

Trespass for assault and battery.

Chase pleaded not guilty, and that, on the day of the alleged trespass, the plaintiff and defendant Erskine were engaged in fighting and breaking the peace, and that he interfered to prevent such breach of the peace, using no more force than necessary for that purpose.

Erskine pleaded not guilty, and that plaintiff commencing

the assault he defended himself, using no more force than necessary, and that although he did assault the plaintiff, yet the plaintiff in defending himself used unnecessary and excessive force.

The commissioner, to whom the case was referred, at the February term, 1856, reported that Chase was not guilty; that Erskine committed the first assault; and that the plaintiff used more force than necessary, in repelling Erskine's first assault.

At the September term, 1856, in an action by Erskine against Dole, for the same trespass set forth in the present case, judgment in favor of Erskine was entered upon a verdict. In that action the court instructed the jury that if they found Erskine committed the first assault, he was entitled to recover damages only for the excessive force used in repelling such assault.

It was agreed that if the Supreme Court should determine in favor of Dole in this action, the cause should be remitted to the Common Pleas for further proceedings, with right to the defendants to controvert the findings of the commissioner, etc.

Eastman, J. The only reported decision that we have been able to find, where the question presented was the same as that raised in the case before us, is that of *Elliott* v. *Brown*, 2 Wendell, 499. In that case it was held that the party first attacked, in a personal rencounter between two individuals, is not entitled to maintain an action for an assault and battery if he uses so much personal violence towards the other party, exceeding the bounds of self-defense, as could not be justified under the plea of *son assault demesne*, were he a party defendant in a suit.

If the rule laid down in that case is sound law, this suit cannot be sustained, for the commissioner to whom the action was referred has reported, that, although the defendant committed the first assault, yet the plaintiff used more force than was necessary or justifiable in repelling that assault.

The ground upon which the decision in *Elliott* v. *Brown* was placed, is, that there cannot be a recovery in cross-actions for the same affray, but that the party who first recovers may plead that recovery in a suit against himself. No authority is cited to sustain that position, and it appears to us that it is not well founded.

If an assault is made upon a party, it may be repelled by

force sufficient for self-defense, even to the use of violence; and if no more force is used than what is necessary to repel the attack, the party assaulted may, under the plea of *son assault demesne*, show the facts and have judgment. To this extent the law is well settled. 2 Greenl. Ev., sec. 95, and authorities cited. If the affray stops there, the party first assailed, being justified in what he has done in self-defense, may have his action for the injury that he has received. He has himself done nothing more than what the law permits; but the other party, in commencing and following up the assault, is liable not only for a breach of the peace, but for all the personal injuries that he has inflicted.

But if the person assaulted uses excessive force, beyond what is necessary for self-defense, he is liable for the excess, and the facts may be shown under the replication of *de injuria*. *Curtis* v. *Carson*, 2 N. H. 539; *Hannen* v. *Edes*, 15 Mass. 349; *Cockcroft* v. *Smith*, Salk. 642; Bul. *Nisi Prius*, 18.

Up to the time that the excess is used, the party assaulted is in the right. Until he exceeds the bounds of self-defense he has committed no breach of the peace, and done no act for which he is liable; while his assailant, up to that time, is in the wrong, and is liable for his illegal acts. Now, can this cause of action which the assailed party has for the injury inflicted upon him, and which may have been severe, be lost by acts of violence subsequently committed by himself? Can the assault and battery, which the assailant himself has committed, be merged in or set off against the excessive force used by the assailed party? Unless this be so, and the party first commencing the assault and inflicting the blows, and thus giving to the other side a cause of action, can have the wrong thus done and the cause of action thus given, wiped out by the excessive castigation which he receives from the other party, then each party may sustain an action; the one that is assailed, for the assault and battery first committed upon him, and the assailant, for the excess of force used upon him beyond what was necessary for self-defense.

We think that these are not matters of set-off; that the one cannot be merged in the other, and that each party has been guilty of a wrong for which he has made himself liable to the other. There have, in effect, been two trespasses committed; the one by the assailant in commencing the assault, and the

other by the assailed party in using the excessive force; and, upon principle, we do not see why the one can be an answer to the other, any more than an assault committed by one party on one day can be set off against one committed by the other party on another day. The only difference would seem to consist in the length of time that has elapsed between the two trespasses. In a case where excessive force is used, the party using it is innocent up to the time that he exceeds the bounds of self-defense. When he uses the excessive force, he then for the first time becomes a trespasser. And wherein consists the difference, except it be that of time, between a trespass committed by him then, and one committed by him on the same person the day after?

In *Elliott* v. *Brown*, it is conceded that both parties may be indicted and both be criminally punished, notwithstanding it was there held that a civil action can be maintained only against him who has been guilty of the excess. If this be so, and each party can be criminally punished, then each must have been guilty of an assault and battery upon the other; and if thus guilty, why should not a civil action be maintained by each? It would seem that the fact that both are indictable shows that each is in the wrong as to the other, and that each has a cause of action against the other, and that such cause of action may be successfully prosecuted, unless one is to be set off against the other. That torts are not the subjects of set-off is entirely clear.

We arrive then at the conclusion that the causes of action existing in such cases cannot be set off, the one against the other, nor merged, the one in the other, but that each party may maintain an action for the injury received; the assailed party, for the assault first committed upon him, and the assailant for the excess above what was necessary for self-defense.

This rule, it appears to us, will do more justice to the parties and more credit to the law than the other, for by it the party who has commenced the assault, and who has been the moving cause of the difficulty, is made to answer in money, instead of having his assault merged in the one which he has provoked, and which has been inflicted upon him by his antagonist.

We think, also, that the view of the case which we have taken derives much strength from the fact that no precedent can be found of any pleading sustaining the defendant's views. It is

remarkable that such a plea cannot be found in any of the books, if the defense has ever been regarded by the courts as good law.

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Our opinion therefore is, that, upon the facts stated, the plaintiff would be entitled to judgment. But according to the provisions of the transfer, the case must be sent to the Common Pleas for further proceedings.

EFFECT OF PROVOCATION UPON DAMAGES.

GOLDSMITH v. JOY.

(61 Vermont, 488.—1889.)

TRESPASS for assault and battery upon plaintiff's intestate, who at the time of the affray was suffering from Bright's disease and subsequently died of it. It was claimed that his death was materially hastened by the assault.

In instructing the jury, the court, among other things, said: "Mere words made use of by one person to another are no legal excuse whatever for the infliction of personal violence. It makes no difference how violent the language used may be, no man has the right to use personal violence upon another when he is induced to simply by the use of words. That is no defense to the action. But when you come to the question of whether a particular case is one that deserves the awarding of exemplary damages, then you are to consider all the circumstances in the case, the provocation, if any, that the defendant had, and everything that is calculated on the one hand to aggravate his act, and on the other hand to palliate his act, are to be considered.

"As I have already said on the main question of compensatory damages, there is no defense here whatever. No matter what was said, no matter how much provocation the defendant had, he is bound to answer for the compensatory damages at any event. As to exemplary damages, in the exercise of a wise discretion you will not allow them unless you are satisfied that the

act of the defendant was high-handed, wanton and inexcusable, and in determining that question you are to take into view all the provocation that he had." Verdict and judgment for plaintiff. Exceptions by defendant.

TYLER, J. The court instructed the jury that there was no defense to the claim for actual or compensatory damages; that words were no legal excuse for the infliction of personal violence; that no matter how great the provocation, the defendant was bound in any event to answer for these damages.

It is a general and wholesome rule of law that whenever, by an act which he could have avoided and which cannot be justified in law, a person inflicts an immediate injury by force, he is legally answerable in damages to the party injured.

The question whether provocative words may be given in evidence under the general issue to reduce actual damages in an action of trespass for an assault and battery has undergone wide discussion.

The English cases lay down the general rule that provocation may mitigate damages. The case of *Frazer* v. *Berkeley*, 7 C. & P. 789, is often referred to, in which Lord ABINGER held that evidence might be given to show that the plaintiff in some degree brought the thing upon himself; that it would be an unwise law if it did not make allowance for human infirmities; and if a person commit violence at a time when he is smarting under immediate provocation, that is matter of mitigation.

TINDAL, Ch. J., in *Perkins* v. *Vaughan*, 5 Scott's N. R. 881, said: "I think it will be found that the result of the cases is that the matter cannot be given in evidence where it amounts to a defense, but that where it does not amount to a defense, it may be given in mitigation of damages." *Linford* v. *Lake*, 3 H. & N. 275; Addison on Torts, § 1393, recognizes the same rule.

In this country, 2 Greenl. on Ev., § 93, states the rule that a provocation by the plaintiff may be thus shown if so recent as to induce a presumption that violence was committed under the immediate influence of the passion thus wrongfully excited by the plaintiff. The earlier cases commonly cited in support of this rule are *Cushman* v. *Ryan*, 1 Story, 100; *Avery* v. *Ray*, 1 Mass. 12; *Lee* v. *Woolsey*, 19 Johns. 241; and *Maynard* v. *Berkeley*, 7 Wend. 560. The Supreme Court of Massachusetts has

generally recognized the doctrine that immediate provocation may mitigate actual damages of this kind. *Mowry* v. *Smith*, 9 Allen, 67; *Tyson* v. *Booth*, 100 Mass. 258; *Bonino* v. *Caledonio*, 144 Mass. 299. It is also said in 2 Sedgwick (7th ed.), 521: "If, making due allowance for the infirmities of human temper, the defendant has reasonable excuse for the violation of public order, then there is no foundation for exemplary damages, and the plaintiff can claim only compensation. It is merely the corollary of this, that when there is a reasonable excuse for the defendant, arising from the provocation or fault of the plaintiff, but not sufficient entirely to justify the act done, there can be no exemplary damages, and the circumstances of mitigation must be applied to the actual damages. If it were not so the plaintiff would get full compensation for damages occasioned by himself. The rule ought to be and is, practically, mutual. Malice and provocation in the defendant are punished by inflicting damages exceeding the measure of compensation, and in the plaintiff by giving him less than that measure."

In *Burke* v. *Melvin*, 45 Conn. 243, PARK, Ch. J., held that the whole transaction should go to the jury. "They could not ascertain what amount of damages the plaintiff was entitled to receive by considering a part of the transaction. They must look at the whole of it. They must ascertain how far the plaintiff was in fault, if in fault at all, and how far the defendant, and give damages accordingly. The difference between a provoked and an unprovoked assault is obvious. The latter would deserve punishment beyond the actual damages, while the damages in the other case would be attributable, in a great measure, to the misconduct of the plaintiff himself." In *Bartram* v. *Stone*, 31 Conn. 159, it was held that in an action for assault and battery the defendant might prove, in mitigation of damages, that the plaintiff, immediately before the assault, charged him with a crime, and that his assault upon the plaintiff was occasioned by "sudden heat," produced by the plaintiff's false accusation. See also *Richardson* v. *Hine*, 42 Conn. 206.

In *Kiff* v. *Youmans*, 86 N. Y. 324, the plaintiff was upon defendant's premises for the purpose of committing a trespass, and the defendant assaulted him to prevent the act, and the only question was whether he used unnecessary force. DANFORTH, J., said: "It still remains that the plaintiff provoked the trespass, was himself guilty of the act which led to the disturb-

ance of the public peace. Although this provocation fails to justify the defendant, it may be relied upon by him in mitigation even of compensatory damages. This doctrine is as old as the action of trespass, and is correlative to the rule which permits circumstances of aggravation, such as time and place of an assault, or insulting words, or other circumstances of indignity and contumely to increase them."

In *Robison* v. *Rupert*, 23 Pa. St. 523, the same rule is adopted, the court saying: "Where there is a reasonable excuse for the defendant, arising from the provocation or fault of the plaintiff, but not sufficient to entirely justify the act done, there can be no exemplary damages, and the circumstances of mitigation must be applied to the actual damages."

In *Ireland* v. *Elliott*, 5 Ia. 478, the court said: "The farthest that the law has gone, and the farthest that 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, to be shown in mitigation of damages."

In *Thrall* v. *Knapp*, 17 Ia. 468, the court said: "The clear distinction is this: *contemporaneous* provocation of words or acts are admissible, but *previous* provocations are not, and the test is, whether, 'the blood has had time to cool.'" . . . "The law affords a redress for every injury. If the plaintiff slandered defendant's daughters, it would entirely accord with his natural feeling to chastise him; but the policy of the law is against his right to do so, especially after time for reflection. It affords a peaceful remedy. On the other hand the law so completely disfavors violence, and so jealously guards alike individual rights and the public peace that, if a man gives another a cuff on the ear, though it costs him nothing, no, not so much as a little *diachylon*, yet he shall have his action." Per Lord Holt, 2 Ld. Raym. 955. The reasoning of the court seems to make against his rule that provocations such as happen at the time of the assault may be received in evidence to reduce the amount of the plaintiff's recovery.

In *Moreley and Wife* v. *Dunbar*, 24 Wis. 183, Dixon, Ch. J., held, that notwithstanding what was said in *Birchard* v. *Booth*, 4 Wis. 85, circumstances of provocation attending the transaction, or so recent as to constitute a part of the *res gestæ*, though not sufficient entirely to justify the act done, may constitute an

excuse that may mitigate the actual damages; and, where the provocation is great and calculated to excite strong feelings of resentment, may reduce them to a sum which is merely nominal. But in *Wilson* v. *Young*, 31 Wis. 574, it was held by a majority of the court that provocation could go to reduce compensatory damages only so far as these should be given for injury to the feelings, DIXON, Ch. J., however, adhering to the rule in *Moreley* v. *Dunbar*, that it might go to reduce all compensatory damages; but in *Fenelon* v. *Butts*, 53 Wis. 344, and in *Corcoran* v. *Harron*, 55 Wis. 120, it was clearly held that personal abuse of the assailant by the party assaulted may be considered in mitigation of *punitory*, but not of *actual* damages, which include those allowed for mental and bodily suffering; that a man commencing an assault and battery under such circumstances of provocation is liable for the actual damages which result from such assault.

In *Donnelly* v. *Harris et al.*, 41 Ill. 126, the court instructed the jury that words spoken might be considered in mitigation of damages. WALKER, Ch. J., in delivering the opinion of the Supreme Court remarked: "Had this modification been limited to exemplary damages it would have been correct, but it may well have been understood by the jury as applying to actual damages, and they would thus have been misled. To allow them the effect to mitigate actual damages would be virtually to allow them to be used as a defense. To say they constitute no defense, and then say they may mitigate all but nominal damages, would, we think, be doing by indirection what has been prohibited from being done directly. To give to words this effect, would be to abrogate, in effect, one of the most firmly established rules of the law." See also *Ogden* v. *Claycomb*, 52 Ill. 366. In *Gizler* v. *Witzel*, 82 Ill. 322, the court said in reference to the charge of the court below: "The third instruction tells the jury among other things that the plaintiff, in order to recover, should have been guilty of no provocation. This is error. It is wholly immaterial what language he may have used, so far as the right to maintain an action is concerned, and even if he went beyond words and committed a technical assault, the acts of the defendant must still be limited to a reasonable self-defense."

In *Norris* v. *Casel*, 90 Ind. 143, this precise question was not raised, but the court said in reference to the instructions of the

court below, that the first part of the charge that the provocation by mere words, however gross and abusive, cannot justify an assault was correct, and that a person who makes such words a pretext for committing an assault, commits thereby not only a mere wrong, but a crime, and the person so assaulted is not deprived of the right of reasonable self-defense, even though he used the insulting language to provoke the assault against which he defends himself; but whatever may have been his purpose in using the abusive language, it cannot be made an excuse for the assault.

Johnson v. *McKee*, 27 Mich. 471, was a case very similar to the one at bar, and was given to the jury under like instructions. The Supreme Court said: "In regard to provocation, the court charged in effect, that if plaintiff provoked defendant, and the assault was the result of that provocation, he could recover nothing beyond his actual damages and outlays, and would be precluded from claiming any damages for injured feelings or mental anxiety. In other words he would be cut off from all the aggravated damages allowed in cases of willful injury, and sometimes loosely called exemplary damages. As there is no case in which a party who is damaged and is allowed to recover anything substantial, cannot recover his actual damages, the rule laid down by the court was certainly quite liberal enough, and if any one could complain it was not the defendant."

The court said in *Prentiss* v. *Shaw*, 56 Me. 712: "We understand the rule to be this: a party shall recover as a pecuniary recompense the amount of money which shall be a remuneration, as near as may be, for the actual, tangible, and immediate result, injury, or consequence of the trespass to his person or property. . . . If the assault was illegal and unjustified, why is not the plaintiff in such case entitled to the benefit of the general rule, before stated, that a party guilty of an illegal trespass on another's person or property, must pay all the damages to such person or property, directly and actually resulting from the illegal act. . . . Where the trespass or injury is upon personal or real property it would be a novelty to hear a claim for a reduction of the actual injury based on the ground of provocation by words. If, instead of the owner's arm, the assailant had broken his horse's leg, . . . must not the defendant be held to pay the full value of the horse thus rendered useless?" The learned judge admits that the law has

sanctioned, by a long series of decisions, the admission of evidence tending to show, on one side, aggravation, and on the other, mitigation of the damages claimed, but he holds the law to be that mitigating circumstances can only be set against exemplary damages, and cannot be used to reduce the actual damages directly resulting from the defendant's unlawful act.

In a learned article on damages in actions ex delicto, 3 Am. Jur. 287, it is said: "If the law awards damages for an injury, it would seem absurd, even without resorting to the definition of damages, to say that they shall be for a part only of the injury."

"It is a reasonable and a legal principle that the compensation should be equivalent to the injury. There may be some occasional departures from this principle, but I think it will be found safest to adhere to it in all cases proper for a legal indemnification in the shape of damages." Ch. J. Shippen, 4 Dall. 207.

Jacobs v. *Hoover*, 9 Minn. 204, *Cushman* v. *Waddell*, Baldwin, 57, and *McBride* v. *McLaughlin*, 5 Watts, 375, are strong authorities in support of the rule that provocative language used by the plaintiff at the time of the battery should be given in evidence only in mitigation of exemplary damages, and that unless the plaintiff has given the defendant a provocation amounting in law to a justification he is entitled to receive compensation for the actual injury sustained.

If provocative words may mitigate, it follows that they may reduce the damages to a mere nominal sum and thus practically justify an assault and battery. But why under this rule may they not fully justify? If in one case, the provocation is so great that the jury may award only nominal damages, why, in another, in which the provocation is far greater, should they not be permitted to acquit the defendant and thus overturn the well-settled rule of law, that words cannot justify an assault. On the other hand if words cannot justify they should not mitigate. A defendant should not be heard to say that the plaintiff was first in the wrong by abusing him with insulting words and therefore, though he struck and injured the plaintiff, he was only partly in the wrong and should pay only part of the actual damages.

If the right of the plaintiff to recover actual damages were in any degree dependent on the defendant's intent, then the

plaintiff's provocation to the defendant to commit the assault upon him would be legitimate evidence bearing upon that question, but it is not. Even lunatics and idiots are liable for actual damages done by them to the property or person of another, and certainly a person in the full possession of his faculties should be held liable for his actual injuries to another unless done in self-defense or under reasonable apprehension that the plaintiff was about to do him bodily harm. The law is that a person is liable in an action of trespass for an assault and battery, although the plaintiff made the first assault, if the defendant used more force than was necessary for his protection, and the symmetry of the law is better preserved by holding that the defendant's liability for actual damages begins with the beginning of his own wrongful act. It is certainly in accordance with what this court held in *Howland* v. *Day & Dean*, 56 Vt. 318, that, "The law abhors the use of force either for attack or defense, and never permits its use unnecessarily."

Exemplary damages are not recoverable as matter of right, but as was stated by WHEELER, J., in *Earl and Wife* v. *Tupper*, 45 Vt. 275, they are given to stamp the condemnation of the jury upon the acts of the defendant on account of their malicious or oppressive character. *Boardman* v. *Goldsmith*, 48 Vt. 403, and cases cited; Mayne on Dam. 5865; *Voltz* v. *Blackmer*, 64 N. Y. 440.

The instructions to the jury upon this branch of the case were in substantial accordance with the law as above stated. As exemplary damages were awardable in the discretion of the jury, the charge was also correct that the influence of an example in a case of this kind depended on the character and standing of the parties involved.

We find no error in the charge, and the judgment is affirmed. (1)

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[1] See also *Scott* v. *Central Park, etc., R. R. Co.*, 53 Hun, 414; *Kosters* v. *Brooklyn, B. & W. E. R. R. Co.*, 10 Misc. 18, affirmed without opinion in 151 N. Y. 630.

FALSE IMPRISONMENT.

WHAT IS FALSE IMPRISONMENT. [1]

BIRD v. JONES.

(7 Adolphus & Ellis (N. S.), 742.—1845.)

ACTION of trespass for an assault and false imprisonment. Pleas—as to the assault, *son assault demesne;* as to the imprisonment, that the plaintiff, before the imprisonment, assaulted the defendant, upon which the defendant gave him into custody. Replication—*de injuria* to each plea. Verdict for the plaintiff. Defendant obtained a rule *nisi* for a new trial, on the ground of misdirection of the chief justice at the trial, the jury being instructed that an imprisonment had taken place before the plaintiff assaulted the defendant.

COLERIDGE, J. In this case, in which we have unfortunately been unable to agree in our judgment, I am now to pronounce the opinion which I have formed: and I shall be able to do so very briefly, because, having had the opportunity of reading a judgment prepared by my brother PATTERSON, and entirely agreeing with it, I may content myself with referring to the statement he has made in detail of those preliminary points in which we all, I believe, agree, and which bring the case up to that point upon which its decision must certainly turn, and with regard to which our difference exists.

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[1] MALICE AND PROBABLE CAUSE.—The gravamen of the wrong is unlawfulness of detention. "At common law, trespass, not case, lay for false imprisonment. Accordingly, liability proceeded, not on the theory of evil motive or of negligence, but of acting at peril. Therefore, to entitle the plaintiff to recover, it is not necessary for him to allege or prove either malice or want of probable cause." Jaggard on Torts, I., 418.

"Malicious motives and the absence of probable cause do not give a party arrested an action for false imprisonment. They may aggravate his damage, but have nothing whatever to do with his cause of action." *Marks* v. *Townsend*, 97 N. Y. 590. See also *Burns* v. *Erben*, 40 N. Y. 463.

This point is, whether certain facts, which may be taken as clear upon the evidence, amount to an imprisonment. These facts, stated shortly, and as I understand them, are in effect as follows:

A part of a public highway was inclosed, and appropriated for spectators of a boat race, paying a price for their seats. The plaintiff was desirous of entering this part, and was opposed by the defendant: but after a struggle, during which a momentary detention of his person took place, he succeeded in climbing over the enclosure. Two policemen were then stationed by the defendant to prevent, and they did prevent, him from passing onwards in the direction in which he declared his wish to go: but he was allowed to remain unmolested where he was, and was at liberty to go, and was told that he was so, in the only other direction by which he could pass. This he refused for some time, and, during that time, remained where he had thus placed himself.

These are the facts: and, setting aside those which do not properly bear on the question now at issue, there will remain these: that the plaintiff, being in a public highway and desirous of passing along it, in a particular direction, is prevented from doing so by the orders of the defendant, and that the defendant's agents for the purpose are policemen, from whom, indeed, no unnecessary violence was to be anticipated, or such as they believed unlawful, yet who might be expected to execute such commands as they deemed lawful with all necessary force, however resisted. But, although thus obstructed, the plaintiff was at liberty to move his person and go in any other direction, at his free will and pleasure: and no actual force or restraint on his person was used, unless the obstruction before mentioned amounts to so much.

I lay out of consideration the question of right or wrong between these parties. The acts will amount to imprisonment neither more nor less from their being wrongful or capable of justification. And 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 pass-

ing; 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 whithersoever 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.

In Com. Dig. *Imprisonment* (G), it is said: "Every restraint of the liberty of a free man will be an imprisonment." For this the authorities cited are 2 Inst. 482; *Hobert & Stroud's Case*, Cro. Car. 210. But, when these are referred to, it will be seen that nothing was intended at all inconsistent with what I have ventured to lay down above. In both books, the object was to point out that a prison was not necessarily what is commonly so called, a place locally defined and appointed for the reception of prisoners. Lord Coke is commenting on the statute of Westminster 2d, (1 Stat. 13, Ed. I, c. 48,) "*in prisona*," and says, "Every restraint of the liberty of a free man is an imprisonment, although he be not within the walls of any common prison." The passage in Cro. Car. is from a curious case of an information against Sir Miles Hobert and Mr. Stroud, for escaping out of the Gate House Prison, to which they had been committed by the king. The question was, whether, under the circumstances, they had ever been there imprisoned. Owing to the sickness in London, and through the favor of the keeper, these gentlemen had not, except on one occasion, ever been within the walls of the Gate House: the occasion is somewhat singularly expressed in the decision of the court, which was "that their *voluntary* retirement to the close stool" in the Gate House "made them to be prisoners." The resolution, however, in question is this: "that the prison of the King's Bench is not any local prison confined only to one place, and that *every place* where any person is restrained of his liberty is a prison; as if one take sanctuary and depart thence, he shall be said to break prison."

On a case of this sort, which, if there be difficulty in it, is at least purely elementary, it is not easy nor necessary to enlarge: and I am unwilling to put any extreme case hypothetically: but I wish to meet one suggestion, which has been put as avoid-

ing one of the difficulties which cases of this sort might seem to suggest. If it be said that to hold the present case to amount to an imprisonment would turn every obstruction of the exercise of a right of way into an imprisonment, the answer is, that there must be something like personal menace or force accompanying the act of obstruction, and that, with this, it will amount to imprisonment. I apprehend that is not so. 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.

Knowing that my lord has entertained strongly an opinion directly contrary to this, I am under serious apprehension that I overlook some difficulty in forming my own: but, if it exists, I have not been able to discover it, and am therefore bound to state that, according to my view of the case, the rule should be absolute for a new trial.

Patterson, J. This was an action of trespass for an assault and false imprisonment. The pleas were: as to the assault, *son assault demesne;* as to the imprisonment, that the plaintiff, *before* the imprisonment, assaulted the defendant, wherefore the defendant gave him into custody. The replication was *de injuria* to each plea. This puts in issue, as to the first plea, who committed the first assault; and, as to the second, whether the imprisonment was before or after the assault, if any, committed by the plaintiff. Supposing the defendant to have made the first assault, and the plaintiff to have followed, and such continuous assaulting to have taken place, the plaintiff must succeed on the issue as to the first plea. Supposing a continuous imprisonment to be established, and an assault by the plaintiff, but which took place in trying to escape from that imprisonment, the plaintiff must succeed on the issue as to the second plea. If, on the other hand, the plaintiff did assault the defendant *before* the imprisonment, then he must fail upon the issue as to the second plea, even if his assault was justifiable, because in that case he should have replied such justification, as, for

instance, defense of his close, or that he was in the exercise of a right of way which the defendant obstructed, or other matter of justification.

Now the facts of this case appear to be as follows. A part of Hammersmith Bridge which is ordinarily used as a public footway was appropriated for seats to view a regatta on the river, and separated for that purpose from the carriage way by a temporary fence. The plaintiff insisted on passing along the part so appropriated, and attempted to climb over the fence. The defendant, being clerk of the Bridge Company, seized his coat, and tried to pull him back: the plaintiff, however, succeeded in climbing over the fence. The defendant then stationed two policemen to prevent, and they did prevent, the plaintiff from proceeding forwards along the footway; but he was told that he might go back into the carriage way, and proceed to the other side of the bridge, if he pleased. The plaintiff would not do so, but remained where he was above half an hour: and then, on the defendant still refusing to suffer him to go forwards along the footway, he endeavored to force his way, and, in so doing, assaulted the defendant; whereupon he was taken into custody.

It is plain from these facts that the first assault was committed by the defendant when he tried to pull the plaintiff back as he was climbing over the fence: and, as the jury have found the whole transaction to have been continuous, the plaintiff would be entitled to retain the verdict which he has obtained on the issue as to the first plea. Again, if what passed *before* the plaintiff assaulted the defendant was in law an imprisonment of the plaintiff, that imprisonment was undoubtedly continuous, and the assault by the plaintiff would not have been *before* the imprisonment as alleged in the second plea, but during it, and in attempting to escape from it: and the plaintiff would, in that case, be entitled to retain the verdict which he has obtained on the issue as to the second plea. But, if what so passed was not in law an imprisonment, then the plaintiff ought to have replied the right of footway and the obstruction by the defendant, and that he necessarily assaulted him in the exercise of the right, and, not having so replied, is not entitled to the verdict. So that the case is reduced to the question, whether what passed before the assault by the plaintiff was or was not an imprisonment of the plaintiff in point of law.

I have no doubt that, in general, if one man compels another to stay in any given place against his will, he imprisons that other just as much as if he locked him up in a room: and I agree that it is not necessary, in order to constitute an imprisonment, that a man's person should be touched. I agree, also, that the compelling a man to go in a given direction against his will may amount to imprisonment. But I cannot bring my mind to the conclusion that, if one man merely obstructs the passage of another in a particular direction, whether by threat of personal violence or otherwise, leaving him at liberty to stay where he is or to go in any other direction if he pleases, he can be said thereby to imprison him. He does him wrong, undoubtedly, if there was a right to pass in that direction, and would be liable to an action on the case for obstructing the passage, or of assault, if, on the party persisting in going in that direction, he touched his person, or so threatened him as to amount to an assault. But imprisonment is, as I apprehend, a total restraint of the liberty of the person, for however short a time, and not a partial obstruction of his will, whatever inconvenience it may bring on him. The quality of the act cannot, however, depend on the right of the opposite party. If it be an imprisonment to prevent a man passing along the public highway, it must be equally so to prevent him passing further along a field into which he has broken by a clear act of trespass.

A case was said to have been tried before Lord Chief Justice TINDAL involving this question: but it appears that the plaintiff in that case was compelled to *stay* and hear a letter read to him against his will, which was doubtless a total restraint of his liberty while the letter was read.

I agree to the definition in Selwyn's Nisi Prius, title *Imprisonment*, "False imprisonment is a restraint on the liberty of the person without lawful cause; either by confinement in prison, stocks, house, etc., or even by forcibly detaining the party in the streets, against his will." He cites 22 Ass. fol. 104, B, pl. 85, per THORPE, C. J. The word there used is "arrest," which appears to me to include "detaining," as Mr. Selwyn expresses it, and not to mean merely the preventing a person from passing.

Upon the whole, I am of opinion that the only imprisonment proved in this case was that which occurred when the plaintiff

was taken into custody *after* he had assaulted the defendant, and that the second plea was made out; I therefore think that the rule for a new trial ought to be made absolute.

Rule absolute. (1)

JUSTIFICATION: VOID WARRANT, OFFICER.

SAVACOOL v. BOUGHTON.

(5 Wendell, 170. — 1830.)

DEMURRER to replication. The plaintiff declared in *trespass* for an assault, battery and false imprisonment. The defendant *pleaded*, 1. The general issue; 2. A justification, for that he as a *constable*, by virtue of an execution issued by a *justice of the peace*, on a judgment rendered against the plaintiff in *assumpsit* for $7.38, arrested the plaintiff and committed him to jail; and 3. A similar justification, setting forth the judgment. The plaintiff *replied* to the second and third pleas *precludi non*, because, previous to the rendition of the judgment set forth by the defendant, the justice who rendered the same *did not issue any process* for the appearance of him (the plaintiff) in the suit in which the judgment was rendered, and that he (the plaintiff) did not direct or authorize the justice *to enter a judgment by confession* in favor of the plaintiffs in the suit, against him (the plaintiff in this cause,) nor did the parties in the said suit *appear* before the justice and *join issue*, pursuant to the provisions of the $50 act; and this, etc., wherefore, etc. To this replication the defendant demurred, and the plaintiff joined in demurrer.

By the Court, MARCY, J. What an officer is required to show to justify himself in the execution of process, is not very clearly settled. There is considerable contrariety of authority on the subject. Where it appears on the face of the process that the court or magistrate that issued it had not jurisdiction of the subject-matter of the suit, or of the person of the party against whom it is directed, it is *void*, not only as respects the court

[1] Opinions by Williams, J., and Lord Denman, C. J., omitted.

or magistrate and the party at whose instance it is sued out, but it affords no protection to the officer who has acted under it.

Where the court issuing the process has *general jurisdiction*, and the process is regular on its face, the officer is not, though the party may, be affected by an irregularity in the proceedings. Where a judgment is vacated for an irregularity, the party is liable for the acts done under it; but the officer has a protection by reason of his regular writ. 1 Lev. 95; 1 Sid. 272; 1 Strange, 509.

More strictness has been required in justifying under process of courts of limited jurisdiction. Many cases may be found wherein it is stated generally that when an inferior court exceeds its jurisdiction, its proceedings are entirely void, and afford no protection to the *court*, the *party*, or the *officer* who has executed its process.

This proposition is undoubtedly true in its largest sense where the proceedings are *coram non judice*, and the process by which the officer seeks to make out his justification shows that the court had not jurisdiction; but I apprehend that it should be qualified where the subject-matter of the suit is within the jurisdiction of the court, and the alleged defect of jurisdiction arises from some other cause. A court may have jurisdiction of the subject-matter, but not of the person of the parties. If it does not acquire the latter, its proceedings derive no validity from the former. A justice of the peace who should give judgment against a person on a promissory note under fifty dollars, without having issued process of any kind against him, or taken his confession, or without his voluntary appearance in court, would exceed his jurisdiction and be responsible to the party injured; so would the party who procured the court to exceed its authority. But would the officer to whom an execution on this judgment had been issued be liable for acts done in obedience to it, if nothing appeared to show that the justice had not jurisdiction of the defendant's person? This is the question presented by the demurrer in this case.

A distinction has long existed in cases of this kind between the court which exceeds its jurisdiction and the party at whose instance it takes place, and a mere ministerial officer who executes the process issued without authority. This prevails, as we have seen, where a judgment has been obtained in a court

of *general jurisdiction* which is subsequently set aside for irregularity. The officer has a protection that the party has not, and that whether the court from which the process issues is a court of general or limited jurisdiction. The right of a mere ministerial officer to justify under his process where the court or party cannot, was considered but not settled in the case of *Smith* v. *Bancker and others*, decided in 1734. This case is found in 2 Strange, 993; 2 Barnard, 331; Cunn. 89, 127; cases temp. Hardwicke, 62; 2 Kelyn. 144, pl. 123. The reports agree as to the facts, but not as to some points in the opinion of the court. Process was issued from the chancellor's court of Oxford against Smith, who was arrested and committed to jail. The proceedings were instituted without proving what was requisite to give the court jurisdiction. The plaintiff who procured the proceedings, the vice-chancellor who held the court, and the officers who executed the process, were all sued by the defendant Smith for false imprisonment. They united in their plea of justification and were all pronounced guilty. Sir John Strange makes the court say that some of the defendants, namely, the officer and gaoler, might have been excused if they had justified without the plaintiff and vice-chancellor. The court of common pleas in England, in their opinion in the case of *Perkin* v. *Proctor and Green*, 2 Wilson, 382, say that Lord Hardwicke denied that such could have been the case. It appears from the case as reported in Hardwicke's Cases, 69, that the point of the officer's liability was not settled; for it is there said that there was no need of giving a distinct opinion as to the action lying against them.

In *Hill* v. *Bateman*, 2 Strange, 710, the distinction in favor of the officer is clearly taken. The plaintiff had been fined under the game laws, and was immediately sent to bridewell, without any attempt to levy the penalty upon his goods. This the justice had not a right to do, and was held liable for the imprisonment; but the constable was justified, because the matter was within the jurisdiction of the justice. I understand by this case that the justice had not authority, or in other words, had not jurisdiction, to issue process to commit the party until he had attempted to levy the fine upon his goods; but that after he had made that attempt without success, he had authority to commit him. The process, though unauthorized by the circumstances of the case, would, under other circumstances, have been proper.

The issuing of the process was a matter within the justice's jurisdiction. This was enough for the officer's justification. It is further said in this case, if the justice makes a warrant which is plainly out of his jurisdiction, it is no justification. This I understand to mean a warrant which appears on its face to be such as the justice could in no case issue.

The views I have of this case are confirmed by that of *Shergold* v. *Holloway*, 2 Strange, 1002. There the justice issued a warrant on a complaint for not paying wages, and the defendant, a constable, arrested Shergold on it. He was sued for this arrest. The court said the justice had no authority in any instance to proceed by warrant; a summons being the only process. The constable could not therefore justify; he was presumed to know that under no circumstances could a warrant be issued in such a case; therefore the court say there was "no pretense for such a jurisdiction." This decision would doubtless have been different if it had appeared that under any state of things a proceeding by warrant was allowable in such a case; for then the court would assume for the officer's protection that such a state of things did exist, or at least, he should not be required to judge whether it did or not. His duty and his protection both depend upon the assumption that the justice had determined correctly, that those circumstances had happened which called for a warrant, if under any circumstances a warrant could issue. In the case of *Moravia* v. *Sloper*, Willes, 30, the same distinction which has been noticed in the cases before referred to is still more distinctly put forth. It is there said that "though in case of an officer who is obliged to obey the process of the court, and is punishable if he does not, it may not be necessary to set forth that the cause of action arose within the jurisdiction of the court, it has always been holden, except in one case (the correctness of which Ch. J. Willes controverted in another part of his opinion), and we are all clearly of opinion that it is necessary in the case of a plaintiff himself."

Lord Kenyon says, in the case of *The King* v. *Danser*, 6 T. R. 242, "a distinction indeed has been made with respect to the persons against whom an action may be brought for taking the defendant's goods in execution by virtue of the process of an inferior court, where the cause of action does not arise within its jurisdiction; the *plaintiff* in the cause being consid-

ered a trespasser, but not the *officer* of the court." A court of admiralty, I apprehend, will not be considered a court of general jurisdiction. In relation to its proceedings, BULLER, J., says, in the case of *Ladbroke* v. *Crickett*, 2 T. R. 653, if upon their face "the court had jurisdiction, the officer was bound to execute the process, and could not examine into the foundation of them; and that will protect him."

There are several cases in our own reports which are supposed to militate against the distinction recognized in the foregoing cases; I apprehend, however, that most of them may be reconciled with those decisions which support it. The decision in the case of *Borden* v. *Fitch*, 15 Johns. R. 121, was, that a court must not only have jurisdiction of the subject-matter, but of the person of the parties, to render its proceedings valid; and if it has not jurisdiction of the person, its proceedings are absolutely void. It will be recollected that the person who wished to avail himself of the proceedings of the court whose jurisdiction was impeached, was a party to them. There was no occasion or opportunity afforded by that case of considering the question involved in this, the liability of the officer who, as a minister of the court, has executed its process issued on such proceedings.

The case of *Cable* v. *Cooper*, 15 Johns. Rep. 152, deserves a more minute consideration. One Brown was committed on a *ca. sa.* to the custody of the defendant, who was sheriff of Oneida county, and discharged by a supreme court commissioner under the *habeas corpus* act. The defendant, when prosecuted for the escape of Brown, offered to justify by showing the discharge; but a majority of the court decided that the proceedings under the *habeas corpus* act before the commissioner were *coram non judice* and therefore void. The principle of this decision is, that the power to discharge under that act does not apply to the case of a prisoner who "*is convict or in execution by legal process.*" Brown was in execution by legal process, and this was well known to the defendant, for he had the *ca. sa.* and held the prisoner. Whatever appeared upon the face of the discharge, he knew, if he rightly understood the powers of the commissioner, it was no authority for him to release Brown. If the discharge did not relate to the imprisonment on the *ca. sa.*, it was certainly no authority to release him from confinement thereon; and if it did relate to that imprisonment, then it

showed on its face a want of jurisdiction in the officer who granted it; for he could not discharge a person in execution by legal process. Again, the sheriff who held the prisoner might well be regarded as a party to the proceeding before the commissioner for the discharge; for the *habeas corpus* must have been directed to him, and his return thereto showed the true cause of Brown's detention.

The cases of *Smith* v. *Shaw*, 12 Johns. R. 257, and *Suydam & Wyckoff* v. *Keys*, 13 id. 444, have a tendency to obliterate or at least confound the distinction which the other cases seem to me to raise in favor of the officer. I am free to confess that the reasoning and conclusion of the judge who delivered the dissenting opinion in the former case are more satisfactory to me than those contained in the opinion adopted by a majority of the court. Smith, in that case, was not looked upon in the light of a mere ministerial officer. He was superior in authority to Hopkins and Findley, who had illegally imprisoned the plaintiff, and his liability was put expressly upon the ground that he had ratified and confirmed their acts, and exercised other restraint over the plaintiff than merely continuing the original imprisonment. If he had only refused to discharge the prisoner, he would not, as is strongly intimated by the court, have been held liable. This case was not considered by the court as presenting the question which arises in the one now before us, and therefore it can afford but little authority to guide our present determination.

It seems to me somewhat difficult to reconcile the decision in the case of *Suydam & Wyckoff* v. *Keys*, with the doctrine I am endeavoring to establish, or with the principles of some other cases which have been decided here. The defendant was a collector of a tax which had been voted by a school district in Orange county, and assessed by the trustees. They had authority to assess, but were confined in their assessments to the *resident inhabitants* of the district. The plaintiffs having property in the district, but actually resident in New York, were included among the persons assessed, and designated on the warrant issued to the defendant as *inhabitants of the district.* He took their property by virtue of this warrant, and was held liable in an action of trespass. It appears to me the defendant, acting merely as a ministerial officer, should have been allowed the protection of his warrant, which did not show upon the face

of it an excess or want of jurisdiction in the trustees. I cannot distinguish this case from a whole class of cases, beginning with the earliest reports and coming down to this, holding that such a warrant is a protection to the officer executing it, unless it is to be distinguished from cases otherwise similar, by the fact that the want of jurisdiction in the trustees to make the assessment on the plaintiffs was to be presumed to be within the knowledge of the officer, and that he was bound to act on this knowledge, in opposition to the statements of his warrant. The decision, however, is not put on such ground, but upon the broad principle that the officer must see that he acts within the scope of the legal powers of those who commanded him. This principle requires a ministerial officer to look beyond his precept, and examine into extrinsic facts beyond the fact of jurisdiction of the subject-matter generally, or under certain circumstances. Such, I apprehend, was not the doctrine applied to the case of *Warner* v. *Shed*, 10 Johns. R. 138. There the officer was justified by his process, as that showed the justice's jurisdiction of the subject-matter. "He was not bound," the court say, "to examine into the validity of the proceedings and of the process." The collector's warrant in the former case, as well as the constable's *mittimus* in the latter, showed jurisdiction of the subject-matter in the officers issuing the process. In the former case, it appeared upon the face of the process that the plaintiffs were resident inhabitants, and as such they were liable to be assessed; and I should think that the collector was no more bound to examine into the fact of residence which had been passed on by the trustees, than the constable was to look into the proceedings of the special sessions under whose authority he acted.

I find still greater difficulty in reconciling the case of *Suydam & Wyckoff* v. *Keys* with that of *Beach* v. *Furman*, 9 Johns. R. 229. The court assume, though they do not directly decide, that Sarah Furman was not, by reason of being a female, liable to be assessed to work on the highways, yet they held that the justice who issued, at the instance of the overseer of the highways, the warrant on which her property was taken and sold for this illegal assessment, and the constable who executed it, both protected, because they acted ministerially and in obedience to the commissioners and overseer of highways, who had jurisdiction over the subject-matter, the assessment of highway la-

bor. Let us compare this case with that of *Suydam & Wyckoff* v. *Keys*, and see if they can stand together. The commissioners had jurisdiction of the subject-matter, the assessment of labor. The trustees had jurisdiction of the subject-matter, the assessment of a district tax. The commissioners assessed a person who, by reason of her sex, was not liable to be assessed, as the court in giving their opinion conceded. The trustees assess persons who, by reason of their residence out of the district, were not liable to be assessed; the justice and constable who enforce the commissioners' assessment by taking the property of the person illegally assessed are protected; the constable who enforces the illegal assessment of the trustees, by taking the property of the persons illegally assessed, is held liable as a trespasser. I think these cases cannot well stand together, and if one must be given up, I do not hesitate to say it should be *Suydam & Wyckoff* v. *Keys*.

The remark of this court in the case of *Gold* v. *Bissell*, 1 Wendell, 213, "that where a warrant cannot legally issue without oath, but is so issued, all the parties concerned in the arrest under such process are trespassers," was not intended, I presume, to apply to an officer who had no knowledge, from the warrant or otherwise, that it had not been duly sued out. A remark somewhat similar is made by TRIMBLE, J., in *Elliott* v. *Peirsall*, 1 Peters' U. S. Rep. 340; but the decision of that case did not call for any such distinction as is raised in the one now under consideration. I have felt that the case of *Wise* v. *Withers*, 3 Cranch, 331, is a direct authority against giving to the officer the protection that is now claimed for him. The plaintiff in that case was a magistrate in the District of Columbia, and, as such, not subject to do military duty. He was fined for neglect of such duty, and a warrant for the collection of the fine issued to the defendant, who seized his property thereon; for this act he was prosecuted. The only point much considered in that case was that which involved the question as to the plaintiff's exemption from military duty; but that which related to the defendant's protection under his warrant was only glanced at in the argument of the counsel and in the decision by the court. The distinction contended for in this case was scarcely raised there, and the attention of the court does not appear to have been drawn to a single case in which it has ever been noticed. The chief justice, in the opinion of the court,

merely observes, that it is a principle that a decision of such a tribunal, (a tribunal of limited jurisdiction), clearly *without* its jurisdiction, cannot protect the officer who executes it. I would, with deference, ask whether there is not an error in the application of the principle which the chief justice lays down to the case then before the court? He must mean, by a decision being clearly *without the jurisdiction of the court*, a sentence or judgment on a matter not within its cognizance. Was the subject-matter of that cause beyond the cognizance of a court-martial? It appears to me that it was not. The power and duty of the court was to punish and fine delinquents; consequently, it had jurisdiction over the subject-matter, but not over the person. There was nothing in the process which the ministerial officer executed to apprise him that the court had not jurisdiction of the *person*. It seems to me that it was not a case to which the principle laid down by the court was applicable; but it would have been such a case if there had been a want of jurisdiction over the subject-matter. I can scarcely consider, therefore, the determination of the Supreme Court of the United States in the case of *Wise* v. *Withers* a deliberate decision on the question now before us. If it was to be viewed in that light, we should be called upon, by the great learning and high character of that court, to hesitate long and examine carefully before we decided a point conflicting with such decision.

There is certainly high authority for the distinction which I am disposed to recognize in this case; and, in my judgment, the same principle which gives protection to a ministerial officer who executes the process of a court of *general jurisdiction* should protect him when he executes the process of a court of *limited jurisdiction*, if the *subject-matter* of the suit is within that jurisdiction, and nothing appears on the face of the process to show that the *person* was not also within it.

The following propositions, I am disposed to believe, will be found to be well sustained by reason and authority:

That where an inferior court has not jurisdiction of the subject-matter, or having it has not jurisdiction of the person of the defendants, all its proceedings are absolutely void; neither the members of the court, nor the plaintiff, (if he procured or assented to the proceedings), can derive any protection from them when prosecuted by a party aggrieved thereby.

If a mere ministerial officer executes any process, upon the

face of which it appears that the court which issued it had not jurisdiction of the subject-matter or of the person against whom it is directed, such process will afford him no protection for acts done under it.

If the subject-matter of a suit is within the jurisdiction of a court, but there is a want of jurisdiction as to the *person* or place, the officer who executes process issued in such suit is no trespasser, unless the want of jurisdiction appears by such process. Bull. N. P. 83; Willes, 32, and the cases there cited by Lord Ch. J. Willes.

I am therefore of opinion that the execution issued by the justice to the defendant, it being on proceedings over the subject-matter of which he had jurisdiction, and the execution, not showing on its face that he had not jurisdiction of the plaintiff's person, was a protection to the defendant for the ministerial acts done by him in virtue of that process.

Judgment on demurrer for the defendant, with leave to the plaintiff to amend his replication on payment of costs.

VOID WARRANT, STRANGER.

Emery v. Hapgood.

(7 Gray, 55.—1856.)

Action for an assault and false imprisonment. Trial before Bigelow, J., who made the following report:

"The plaintiff put in evidence a warrant issued by Timothy Pearson, Esq., a justice of the peace for this county, directing the commitment of the plaintiff to jail for a contempt committed while said Pearson was acting as a magistrate in trying certain complaints against said plaintiff, for violating, in Lowell, the laws respecting the sale of intoxicating liquors. The plaintiff also put in two complaints made by said Ephraim Hapgood, before said Pearson, against the plaintiff, for an alleged violation, in Lowell, of the law respecting the sale of intoxicating liquors, both dated March 31, 1853, with the warrants issued thereon, and a record of judgments of guilty rendered thereon by said Pearson.

"The evidence tended to show that after said Emery had been tried and convicted on one of said complaints by said Pearson, and when said Pearson was about proceeding to try said Emery on the other complaint, the alleged contempt was committed by the plaintiff; that said Hapgood, the present defendant, was the complainant in both said cases, and was present at all the proceedings before said Pearson; that, after said warrant for commitment for contempt was issued and delivered to the officer, he hesitated about serving it, and was told by Hapgood to serve it—that if he did not, he, the officer, would be prosecuted—that if he would serve it, he, said defendant, would indemnify and save the officer harmless against all damage on account thereof, and that, in consequence of these statements and promises by the defendant, the officer was induced to commit the plaintiff to jail on said warrant for contempt, which otherwise he would not have done.

"Upon these facts, the plaintiff contended that said Pearson was acting without any authority as a magistrate in all the foregoing proceedings; that said warrant for contempt was bad on its face; and that the defendant was liable as a trespasser.

"The defendant contended, first, that it did not appear by said complaints and warrants against said Emery, for the unlawful sale of liquor, that said Pearson was acting without authority; secondly, that if he was, the warrant for contempt was good on its face, and did not show any want of authority on the part of said Pearson; and that therefore neither the officer, nor the defendant Hapgood, could be held liable as trespassers for serving said warrant.

"But the court overruled these objections, and instructed the jury that said Pearson had no legal authority to issue said warrants; that, in issuing them, he had exceeded his jurisdiction; and the defendant, if he instigated and induced the officer to commit the plaintiff thereon when otherwise he would not have committed him, was liable in this action.

"The court also ruled that the defendant would be liable, though the warrant for contempt was sufficient on its face, if he so instigated and induced the officer to commit the plaintiff thereon, knowing that said Pearson had no authority or jurisdiction to hear and try said Emery on said complaints for illegal sale of liquor.

"The jury returned a verdict for the plaintiff. If the fore-

going rulings were wrong, the verdict is to be set aside; otherwise, judgment is to be entered on the verdict."

Bigelow, J. The want of jurisdiction in the magistrate to try and determine the complaint originally made by the defendant against the plaintiff, and the invalidity of the commitment of the plaintiff for contempt, are fully settled in *Piper* v. *Pearson*, 2 Gray, 120. In that case the proceedings before the magistrate were similar to those in the case at bar.

The only question therefore arising in this case is, whether, upon the facts proved, the defendant is liable as a trespasser. In deciding this question, it is unnecessary to determine upon the regularity of the form of the warrant of commitment. This is not an action against an officer for serving the warrant, or against a person acting by or under his authority or sanction. If it were, it would be essential to consider whether the warrant was bad on its face, and disclosed the want of jurisdiction in the magistrate who issued it. For reasons founded on public policy, and in order to secure a prompt and effective service of legal process, the law protects its officers, and those acting under them, in the performance of their duties, if there is no defect or want of jurisdiction apparent on the face of the writ or warrant under which they act. The officer is not bound to look beyond his warrant. He is not to exercise his judgment touching the validity of the process in point of law; but if it is in due form, and is issued by a court or magistrate apparently having jurisdiction of the case or subject-matter, he is to obey its command. In such case, he may justify under it, although in fact it may have been issued without authority, and therefore be wholly void.

But such is not the rule applicable to strangers or third persons, who are not required, in the exercise of a public duty, to assume the responsibility of executing legal process. If they interfere of their own motion, without authority or command from the officers of the law, to cause a writ or warrant to be enforced, they act at their peril; and if the process, though regular on its face and apparently good, was unauthorized, or was issued by a tribunal having no jurisdiction, or acting beyond the scope of its power, they are liable for the consequences arising from the enforcement of unlawful process. It is upon this ground, that a party is held responsible, at whose suit exe-

cution is made, when the officer serving it incurs no liability. The rule is, that if a stranger voluntarily takes upon himself to direct or aid in the service of a bad warrant, or interposes and sets the officer to do execution, he must take care to find a record that will support the process, or he cannot set up and maintain a justification. *Barker* v. *Braham*, 3 Wils. 376; *Parsons* v. *Loyd*, 3 Wils. 341; *Bryant* v. *Clutton*, 1 M. & W. 408; *West* v. *Smallwood*, 3 M. & W. 418; *Codrington* v. *Lloyd*, 8 Ad. & El. 449; *Carratt* v. *Morley*, 1 Ad. & El. N. R. 18; *Green* v. *Elgee*, 5 Ad. & El. N. R. 114.

In the present case, the defendant was a volunteer in urging the officer to serve a void warrant upon the plaintiff; and, under the instructions given to the jury, it is found by their verdict that the plaintiff would not have been committed to jail but for his interference and instigation. He was, in a legal sense, a stranger to the warrant. It was not his duty, or within his province, to cause it to be enforced. After having made and signed the original complaint, and testified in its support before the magistrate, his duty and responsibility were at an end. *Barker* v. *Stetson*, 7 Gray, 53. He cannot therefore shelter himself under the authority of the officer, and claim immunity on the ground that the warrant was regular, and disclosed no want of jurisdiction in the magistrate. But it being apparent by the record that the warrant was illegally issued and void, the defendant is responsible for the trespass which he caused to be committed upon the plaintiff.

Judgment on the verdict.

VOID AND IRREGULAR PROCESS DISTINGUISHED.

FISCHER v. LANGBEIN.

(103 New York, 84.—1886.)

APPEAL from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the defendants entered upon an order dismissing the complaint, in an action for false imprisonment, brought against the defendants who had acted as attorneys for defendants in the following proceedings:

The plaintiff, a member of an unincorporated association, commenced proceedings for dissolution, and applied for an injunction restraining the disposition of the funds of the association. Some forty-two members of the association, through the defendants as attorneys, opposed the motion. The plaintiff, by his attorney, charged that the opposing members, being Germans and unfamiliar with our language, were misled into swearing to affidavits submitted upon the motion. The matter was then referred to determine the truth of the charge, a provision being inserted in the order, by consent, that the plaintiff should pay the fees of the referee if his charge were found to be false. The referee so found, and the plaintiff failing to take up the report, the defendants obtained an order directing the plaintiff to pay the fees of the referee within three days, or show cause why he should not be committed for contempt, the injunction vacated, and all proceedings stayed until the fees were paid. Upon the return of the order, the court directed a commitment to issue, which was done. The General Term reversed the order of commitment, on condition "that the plaintiff shall stipulate not to bring any action on account of his imprisonment." The plaintiff failing so to do, the order was affirmed, and on appeal to the Court of Appeals was reversed. *Fischer* v. *Raab*, 81 N. Y. 235.

Ruger, Ch. J. It cannot be disputed but that an attorney who causes void or irregular process to be issued in an action, which occasions loss or injury to a party against whom it is enforced, is liable for the damages thereby occasioned. In the case of void process the liability attaches when the wrong is committed and no preliminary proceeding is necessary to vacate or set it aside, as a condition to the maintenance of an action. Process, however, that a court has general jurisdiction to award, but which is irregular by reason of the non-performance by the party procuring it, of some preliminary requisite, or the existence of some fact not disclosed in his application therefor, must be regularly vacated or annulled by an order of the court, before an action can be maintained for damages occasioned by its enforcement. *Day* v. *Bach*, 87 N. Y. 56. In such cases the process is considered the act of the party and not that of the court, and he is, therefore, made liable for the consequences of his act.

Void process is such as the court has no power to award, or has not acquired jurisdiction to issue in the particular case, or which does not in some material respect comply in form with the legal requisites of such process, or which loses its vitality in consequence of non-compliance with a condition subsequent, obedience to which is rendered essential. Irregular process is such as a court has general jurisdiction to issue, but which is unauthorized in the particular case by reason of the existence or non-existence of some fact or circumstance rendering it improper in such a case. In all cases where a court has acquired jurisdiction in an action or proceeding, its order made or judgment rendered therein, is valid and enforceable and affords protection to all persons acting under it, although it may be afterward set aside or reversed as erroneous. *Simpson* v. *Hornbeck*, 3 Lans. 53. Errors committed by a court upon the hearing of an action or proceeding which it is authorized to hear, but not affecting any jurisdictional fact, do not invalidate its orders or authorize a party to treat them as void, but can be taken advantage of only by appeal or motion in the original action. *Day* v. *Bach*, *supra*.

There is no claim made that the order and commitment under which the imprisonment complained of in this case was effected, was void or even irregular, except for the alleged erroneous determination made by the Special Term upon the merits of the application. This determination consisted in holding that a contempt had been committed by the plaintiff, while upon appeal this court held otherwise. All of the facts constituting the alleged contempt were undisputed and were presented to the Special Term for its consideration upon the hearing. After hearing the parties it decided that a contempt had been committed and ordered the imprisonment complained of. It was conceded on that hearing that the plaintiff had disobeyed an order of the court, and the only question presented for its consideration was whether such disobedience "defeated, impaired, impeded or prejudiced" a right or remedy of the defendants. Upon the appeal to this court it was held that the case did not clearly show that any right or remedy of the defendants had been defeated, impaired, impeded or prejudiced by the disobedience alleged, and the order adjudging the plaintiff guilty of a contempt was, for that reason, reversed as erroneous. *Fischer* v. *Raab*, 81 N. Y. 235. A simple question of law was thus

presented to the court as to whether all of the elements constituting the offense of contempt appeared on the application for the commitment. Whether they did or did not in no sense constituted a jurisdictional question. The court concededly had jurisdiction of the parties and the subject-matter of the application, and we think authority to determine whether a contempt had been committed or not; and the question for its consideration was whether the facts of the case brought it within the statutory definition of a contempt. An erroneous decision of that question in no sense affected the jurisdiction of the court over the subject-matter of the application. In a similar case it was said by this court that the fact that a justice of the peace "had jurisdiction of the person of the plaintiff and of the subject-matter then pending, did not give him judicial authority to adjudge her guilty of a contempt, and to imprison her therefor. To have that authority there must have arisen before him, facts which gave him power to consider of the question whether there had been a contempt committed by her. When facts arose which gave him that power he had a right to adjudicate upon them, and is not liable to an action though he may have held erroneously as matter of law." *Rutherford* v. *Holmes*, 66 N. Y. 368, 370.

In the present case the court made an order, upon the application of the plaintiff, referring a certain disputed question of fact to a referee to hear and determine, and in case such report was against the plaintiff, that he should pay the referee's fees incurred thereon. The plaintiff cannot question the validity of this order, for it was made at his request and upon his stipulation to pay the fees in the event provided for. The order was, therefore, lawful and such as the court had a right to make under the circumstances. The report of the referee being against the plaintiff, he was required to pay the fees and take it up; but this he neglected and refused to do. For this refusal he was adjudged guilty of contempt.

The disobedience of its order by the plaintiff gave the court jurisdiction of the subject-matter and called upon it to determine whether a contempt had been committed or not. The right to adjudicate upon this question did not depend upon the fact whether the plaintiff was guilty of a contempt, but whether a case had been made calling for an adjudication upon that question.

The power of the court to entertain jurisdiction of an action or proceeding does not depend upon the existence of a sustainable cause of action, but upon the performance by the party of the prerequisites authorizing it to determine whether one exists or not. In *Harman* v. *Brotherson*, 1 Den. 537, the defendant, a judicial officer, had awarded a *capias* upon affidavits which did not disclose such a cause of action as subjected the defendant to arrest therefor. He was, however, arrested and imprisoned, and in an action against the judge for false imprisonment it was held that he was exempted from liability by reason of the judicial character of his determination. In *Landt* v. *Hilts*, 19 Barb. 283, a county judge was prosecuted for false imprisonment for granting an order of arrest, which was afterward vacated upon the ground that the affidavit upon which it was founded did not show a sufficient cause for arresting the party. It was held, however, that the "decision and the order protected the party applying for it and the attorney and all persons acting in obedience to the order;" that the affidavit presented "a state of facts which called upon the officer to pass judicially upon the question and to determine whether a case for an order was made out or not." "It presents, to say the least, a colorable case, and that is enough to protect the officer who issued it." It was further said, "that the doctrine, that the judicial officer is protected whenever he has jurisdiction and enough is shown to call upon him for a decision, even though he err grossly and even intentionally, has long been firmly established. Upon the same principle of public policy parties who in good faith institute the proceedings and act under and in accordance with judicial determination should be protected from accountability as trespassers whenever the officer is entitled to protection." This case is largely and approvingly quoted from in *Marks* v. *Townsend*, 97 N. Y. 590, 599. In *Miller* v. *Adams*, 7 Lans. 133, affirmed in this court (52 N. Y. 409), the defendant was prosecuted for false imprisonment in procuring an attachment for contempt against a third party for not appearing before the judge in supplemental proceedings in obedience to an order requiring him to do so.

The affidavit upon which the attachment was issued was held upon appeal to be defective and not to show the existence of the contempt alleged. It was held, however, that it constituted a protection as well to the officer issuing it as to the party pro-

curing it; that the officer issuing the attachment had "jurisdiction of the matter and acted judicially in making the order, and it is entirely clear that he cannot be made answerable as a trespasser for an error in judgment."

It seems to us that the case of *Williams* v. *Smith*, 108 Eng. C. L. 596, is indistinguishable in principle from this. As concisely stated by Justice ERLE it was as follows: "The master of the rolls decided on the facts that Williams was guilty of contempt in not obeying the order. Such is the judgment of the master of the rolls on the very facts between the parties. The legal inference which that learned judge drew from the facts which were presented to him on the part of Williams was that he was guilty of a contempt. Upon appeal the lords justices were of opinion that the master of the rolls came to an erroneous conclusion, and they reversed his decision. That is a totally different thing from setting aside the attachment for irregularity in the proceedings." It was held that the decision of the master of the rolls was a judicial determination that protected the parties acting under it as well as the officers making it.

The rule to be deduced from these authorities seems to be that when a court is called upon to adjudicate upon doubtful questions of law or determine as to inferences to be drawn from circumstances, reasonably susceptible of different interpretations or meanings, and calling for the exercise of the judicial function in their determination, its decision thereon does not render an order or process based upon it, although afterward vacated or set aside as erroneous, void, or subject the party procuring it to an action for damages thereby inflicted. Where the jurisdiction of the court is made to depend upon the existence of some fact of which there is an entire absence of proof, it has no authority to act in the premises, and if it, nevertheless, proceeds and entertains jurisdiction of the proceeding, all of its acts are void and afford no justification to the parties instituting them as against parties injuriously affected thereby. But if the facts presented to the court call upon it for the exercise of judgment and reason upon evidence which might in its consideration affect different minds differently, a judicial question is presented which, however decided, does not render either party or the court making it, liable for the consequences of its action.

It is further claimed that the defendants made themselves

liable in this action by refusing to consent to the discharge of the plaintiff by the sheriff after he had complied, as it is alleged, with the terms of the commitment, and for opposing before the Special Term proceedings taken for his discharge.

These proceedings all took place before it was finally determined that the plaintiff was not guilty of a contempt in refusing to obey the order referred to, and so far as anything appearing in this record shows, when the defendants naturally believed that the plaintiff was rightfully imprisoned thereunder. The relief claimed was denied by the courts before whom they were taken, and it must here be assumed that it was rightfully denied for the reason that the plaintiff had not complied with the terms of the order entitling him to a discharge.

If the defendants were not liable for damages for the original imprisonment, it is quite certain that they were not responsible for the action of the sheriff or the court in continuing it. No obligation rested upon the defendants to consent to, or procure the discharge of the plaintiff, as the right to such relief depended solely upon his compliance with the terms of the order committing him.

Some claim is made that the commitment was void for not containing the statement that the disobedience referred to as the contempt had defeated, impaired, impeded or prejudiced some right or remedy of the defendants in the action. Not only the order and affidavit upon which it was founded, but the commitment itself, stated in detail the proceedings which it was claimed the disobedience in question, affected and presented all of the facts upon which the judgment of the court in awarding the commitment was based, and fully complied with the requirements of the rule in respect to the contents of a commitment.

The judgment of the court below should be affirmed, with costs.

All concur.

Judgment affirmed.

ERRONEOUS PROCESS.

Day v. Bach.

(87 New York, 56.—1881.)

Andrews, Ch. J. The complaint alleges the wrongful taking and conversion by the defendants, of certain goods and chattels, the property of the plaintiff's assignor, of the value of $1,800, for which sum it demands judgment. The ground of the action, as disclosed on the trial, was the seizure of the property by the sheriff, under an attachment issued upon the application of the defendants, in an action brought by them against the plaintiff's assignor and others, which was afterward vacated. The attachment was issued on the ground that the defendants in the attachment suit were about to assign, dispose of, and secrete their property, with intent to defraud their creditors. The defendants moved upon affidavits to vacate the attachment. The motion was denied by the Special Term, but on appeal the General Term reversed the order of the Special Term, and vacated the attachment. Pending the appeal to the General Term, most of the attached property was sold as perishable, by order of the court. The sum of $421.50 was realized on the sale, and after the attachment was vacated, and before the commencement of this action, this sum was paid over by the sheriff to the present plaintiff, to whom also was delivered (with trifling exceptions), the part of the attached property remaining unsold.

The question whether the taking of the property under the attachment was a conversion by the attaching creditors, depends upon two considerations: *first*, whether the attachment was lawfully issued; and *second*, assuming that it was lawful process, and would have afforded a justification to the defendants while it was in force, whether it ceased to be a protection for acts done under it, after it was vacated? That the attachment was lawfully issued does not admit of question. The court had jurisdiction of the action, and of the parties. The affidavits presented to the court on the application for the attachment, showed the existence of the jurisdictional facts, and set forth circumstances tending to establish the fraudulent intent alleged. The proper undertaking was given, and there was a full com-

pliance with all the formal requirements, to justify the issuing of the process. The original seizure under the attachment was, therefore, a seizure under lawful process, and so long as it remained in force, was a complete justification both to the officer, and the defendants. That cannot be a trespass at the time, which is done by the authority of regular process, duly issued by a court having jurisdiction.

We do not understand that this principle is controverted; but it is claimed that the attachment having been vacated, the defendants cannot longer justify under it, and that they stand, in respect to the seizure, mere naked trespassers, as though the attachment has never been issued.

There can be no doubt of the general principle, that void or irregular process, furnishes no justification to the party for acts done under it, with this limitation: that if the process is irregular only, so that it is merely voidable, and not void, it must be set aside or vacated before trespass can be brought. On the other hand, it is equally well settled that if the process was erroneous only, it protects the party for acts done under it while in force, and he may justify under it after it has been set aside. The doctrine of trespass by relation, in such case, has no application. The distinction between void or irregular and erroneous process, is taken in the early case of *Turner* v. *Felgate*, 1 Lev. 95, which was trespass against the party for taking goods on execution. The judgment was afterward reversed (as stated in the report) as unduly obtained, and restitution awarded. The court held the action would lie, saying: "For by the vacating of the judgment, it is as if it had never been; and is not like a judgment reversed for error." The same distinction is taken in *Parsons* v. *Loyd*, 3 Wilson, 341. The plaintiff was arrested on a *capias ad respondendum* tested in Trinity term, and returnable in Hilary term (Michaelmas term intervening). The writ was set aside for irregularity, and the plaintiff brought his action for false imprisonment against the party who issued the writ, who justified under the process. The court held that the writ was no justification. Lord Chief Justice De Gray said: "There is a great difference between erroneous process and irregular (that is to say void) process, the first stands valid and good until it be reversed; the latter is an absolute nullity from the beginning; the party may justify under the first until it be reversed; but he cannot justify under the latter, because it was

his own fault that it was irregular and void at first." The point that a party may justify under lawful process, set aside for error only, was distinctly adjudicated in *Prentice* v. *Harrison*, 4 Ad. & El. (N. S.) 852, and *Williams* v. *Smith*, 14 C. B. (N. S.) 596. In *Williams* v. *Smith*, WILLES, J., said: "It by no means follows that because a writ or attachment has been set aside, an action for false imprisonment lies against those who procured it to be issued. If that were so, the absurd consequence would follow, that every person concerned in enforcing the execution of a judgment would be held responsible for its correctness. Where an execution is set aside on the ground of an erroneous judgment, the plaintiff or his attorney is no more liable to an action than the sheriff who executes the process is." The same rule manifestly applies where the process is against property, and the alleged trespass is the seizure under it.

The authorities seem to establish these propositions: *First*, that a void writ or process furnishes no justification to a party, and he is liable to an action for what has been done under it at any time, and it is not necessary that it should be set aside before bringing the action (*Brooks* v. *Hodgkinson*, 4 Hurlst. & N. 712); *second*, if the writ is irregular only and not absolutely void, as for instance where an execution is issued on a judgment more than a year old, without a *sci. fa.*, no action lies until it has been set aside; but when set aside, it ceases to be a protection for acts done under it, while in force (*Chapman* v. *Dyett*, 11 Wend. 31; *Blâncheway* v. *Burt*, 4 Ad. & El. [N. S.] 707; *Riddle* v. *Pakeman*, 2 Cr. M. & R. 30); *third*, if the process was regularly issued, in a case where the court had jurisdiction, the party may justify what has been done under it, after it has been set aside for error in the judgment or proceeding; and an action for false imprisonment, in case of arrest, or of trespass for property taken under it, will not lie. Where, however, property has been taken, the party against whom the writ issued, is entitled to restitution from the party who sued out the writ, of any property or money of the defendant in his hands. *Jackson* v. *Cadwell*, 1 Cow. 644; *Clark* v. *Pinney*, 6 id. 297 *Kissock* v. *Grant*, 34 Barb. 144; *Williams* v. *Smith*, (*supra*); *Reynolds* v. *Harris*, 14 Cal. 667.

The application of these principles to this case is decisive against this action. The court had jurisdiction of the action, and the affidavits presented a case for the exercise by the court

of its judgment upon the facts presented. There was no irregularity. The attachment was set aside by the General Term, on the ground that the affidavits on which the motion to vacate was made, answered the charges in the affidavits on which the attachment issued. The court corrected what it deemed the erroneous conclusion of the Special Term, upon the controverted facts. It was, therefore, a reversal for error, and the setting aside of the attachment on this ground, did not deprive the defendants of their justification.

It is insisted that assuming the action cannot be maintained for the conversion of the property, nevertheless, the attachment having been set aside, the defendants are liable for its value. But the facts proved do not establish any liability on the part of the defendants to account to the plaintiff for the value of the property. When a warrant of attachment is vacated, it is made the duty of the sheriff, except where it is otherwise expressly prescribed by law, to deliver to the defendant, or to the person entitled thereto, on reasonable demand, the attached property in his hands, or the proceeds, if the property has been sold. (Code, § 709.) This has been done. It does not appear that the defendants purchased any of the property on the sale, or had or retained any part of it. The sale by the sheriff having been made under the order of the court, the money derived therefrom stood as a substitute for the property. This the plaintiff has received; and the defendants, having had neither the property, nor its value, are not responsible therefor to the plaintiff. If there is any remedy on the undertaking, this is still open to him. So also, if the attachment was procured by fraud and falsehood, an action in the nature of an action for malicious prosecution may perhaps lie. But the case was not tried upon this theory, and counsel for the plaintiff properly admits, that the case does not present this question.

For the reasons stated, we think the court below properly reversed the judgment, and the order for a new trial should be affirmed, and judgment absolute given for the defendants, upon the stipulation, with costs.

All concur.

Order affirmed, and judgment accordingly.

JUSTIFICATION: ARREST WITHOUT WARRANT, FELONY.[1]

ALLEN v. WRIGHT.

(8 Carrington & Payne, 522.—1838.)

THE declaration stated that the defendant, on the 19th of March, 1838, assaulted the plaintiff, and forced and compelled her to go into the public street, and through several lanes, etc., to the police station-house in Tower street, Lambeth, and there imprisoned and kept her, without any reasonable or probable cause, for twenty hours, contrary to law and against her will; and that on the 20th of March, he again assaulted her, and compelled her to go from the station-house to Union Hall Police Office, and there kept and detained her for six hours, whereby she was not only hurt and injured in her body and mind, but also exposed and injured in her credit and circumstances. The defendant pleaded, first, "Not guilty;" and secondly, a special plea to the following effect: — that the plaintiff was a lodger in the defendant's house, and was supplied with a feather-bed, which, during a portion of the time, was made by the plaintiff and a servant of the defendant; that the plaintiff, while she

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[1] "A *peace officer* may, without a warrant, arrest a person:

"1. For a crime, committed or attempted in his presence.

"2. When the person arrested has committed a felony, although not in his presence.

"3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it." N. Y. Code Crim. Pro., § 177.

"A *private citizen* may arrest another:

"1. For a crime committed or attempted in his presence.

"2. When the person arrested has committed a felony, although not in his presence." N. Y. Code Crim. Pro., § 183.

"My understanding of the law is, that if a felony has in fact been committed by the person arrested, the arrest may be justified by any person without warrant, whether there is time to obtain one or not. If an innocent person is arrested upon suspicion by a private individual, such individual is excused if a felony was in fact committed and there was reasonable ground to suspect the person arrested. But if no felony was committed by any one, and a private individual arrest without a warrant, such arrest is illegal, though an officer would be justified if he acted upon information from another which he had reason to rely on." *Holley* v. *Mix*, 3 Wendell, 350, 353. See also *Burns* v. *Erben*, 40 N. Y. 463.

was such lodger, demeaned herself in an improper, irregular, and disreputable manner, and particularly in receiving the visits of, and cohabiting with one G. D.; and that, after a certain time, she refused to allow the servant to assist in making the bed, and always locked the door of the room when she went out. It then averred that while the plaintiff continued as lodger, as aforesaid, 70 lbs. weight of feathers were stolen from the bed; and that the defendant, having good and probable cause of suspicion, and vehemently suspecting the plaintiff to be the person who stole them, caused her to be apprehended, etc., etc.

From the evidence on the part of the plaintiff, it appeared that she resided for some time in the house of the defendant with a gentleman named Davidson, who passed with her by the name of Gordon. They left in the evening of Friday, the 16th of March, between six and seven o'clock; and, after they were gone that same evening, a friend of the gentleman, paid the defendant for him several claims for damage to furniture, etc., and at that time nothing was said about any loss of feathers from the bed. On the evening of Monday, the 19th of March, about ten o'clock, the defendant and his wife were observed by a policeman on duty, watching the house, No. 12, in the Waterloo Road. The defendant addressed the policeman, and told him he wished to ascertain whether a young woman named Gordon was living there. The policeman inquired what he wanted her for, and was told of the damage sustained which had been paid for, and also that there was a large quantity of feathers missing out of the bed. The policeman knocked at the door, and gained admittance to the house, together with the defendant. The plaintiff inquired who wanted her, and on being told, said she could not see Mr. Wright that night. It was then about twenty minutes past ten. The policeman and Mr. Wright followed the servant upstairs. They saw the plaintiff, and the policeman asked the defendant if that was the person. He said, yes, it was, and then charged her with stealing the feathers out of the bed in his house while she was lodging there. The policeman told her that she must go with him to the station-house. She at first objected, but afterwards went, and the defendant made his charge to the inspector, and she was locked up in a cell, where she remained till between ten and eleven the next morning. A duplicate for a bed was found upon her. After the plaintiff had been locked up, the policeman went

back with the defendant's wife to the plaintiff's lodgings, but nothing belonging to the defendant was found there. The plaintiff was taken on the next day before Mr. Trail, at Union Hall, who discharged her. The defendant wished him to remand her, but he would not.

It was also proved, that the gentleman with whom the plaintiff lived, supplied her with adequate means of support; and a witness stated, that he had examined the bed, and found it to be a very old one, and expressed it as his opinion that the quantity of feathers in it was sufficient for its size.

Tindal, C. J., after stating the complaint in the declaration and the defendant's answer to it, said:—That is an answer which it is incumbent on him to make out to your satisfaction, because he has taken the law into his own hands by not acting as any prudent person would have done, viz. going before a magistrate and taking out a warrant. At all events, the defendant acted in a very indiscreet manner (as there was no reason to conclude that the plaintiff had any intention to abscond) in not taking the usual and cautious step of having the case investigated by a magistrate before imprisoning the party. The only two points upon which you must be satisfied before you can find a verdict for the defendant, are, 1st, that a felony had actually been committed; that some person or other had stolen, according to the evidence, about half the feathers from the bed; and 2nd, that the circumstances were such, that you yourselves, or any reasonable person, acting without passion and prejudice, would have fairly suspected the plaintiff of being the person who did it. If you think the circumstances were such, you will find your verdict for the defendant; if you do not, you will find your verdict for the plaintiff, and give her such reasonable damages as you think she is entitled to.

Verdict for the plaintiff—Damages, 5 l.

ARREST WITHOUT WARRANT, MISDEMEANOR. [1]

Fox v. Gaunt.

(3 Barnewall & Adolphus, 798.—1832.)

Trespass for an assault and false imprisonment. The defendant pleaded the general issue, and several other pleas, in justification: one of which was, that an evil-disposed person and common cheat, to the defendant unknown, had obtained goods from him on false pretences; that the plaintiff afterwards, and just before the time when, etc., passed by the defendant's shop, and was pointed out to him by the defendant's servant as the person who had so obtained the goods, whereupon the defendant having good and probable cause of suspicion, and vehemently suspecting and believing that the plaintiff was the person who had committed the offense, for the purpose of having him apprehended and examined touching the same, at the time when, etc., gave charge of him to a peace officer, and requested such officer to take and keep him in custody till he should be carried before a justice, and to carry him before such justice, to be examined

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[1] "There are many loose general statements in the books as to the right of officers to make arrests without warrant. That they have a right to arrest for breaches of the peace committed in their presence is conceded by all. It is equally clear that they cannot arrest for a past offense, not a felony, upon information or suspicion thereof, although expressions may be found which would seem to assume such power. How far or when they may interfere by an arrest to prevent a threatened breach of the peace is not equally clear. We are of opinion that a threat or other indication of a breach of the peace will not justify an officer in making an arrest, unless the facts are such as would warrant the officer in believing an arrest necessary to prevent an immediate execution thereof, as where a threat is made coupled with some overt act in attempted execution thereof. In such cases the officer need not wait until the offense is actually committed. To justify such arrest the party must have gone so far in the commission of an offense that proceedings might thereafter be instituted against him therefor, and this without reference to any past similar offense of which the person may have been guilty before the arrival of the officer. The object of permitting an arrest under such circumstances is to prevent a breach of the peace where the facts show danger of its being immediately committed." *Quinn* v. *Heisel*, 40 Mich. 576.

See also *Phillips* v. *Trull*, 11 Johns. 486; *Griffin* v. *Coleman*, 4 Hurl. & N. 265.

touching the premises, and dealt with according to law; on which occasion the peace officer, at the defendant's request, did so take him, etc., and brought him before a justice to be examined, etc.; and the justice, not being satisfied of the plaintiff's identity, discharged him out of custody, etc. Replication, *de injuria.* At the trial, the defendant had a verdict on the special plea. A rule *nisi* was obtained for judgment *non obstante veredicto*, on the ground that a private person could not justify giving another into custody on suspicion of a misdemeanor.

Lord Tenterden, C. J. The instances in Hawkins are where the party is caught in the fact, and the observation there added, assumes that the person arrested is guilty. Here, the case is only of suspicion. The instances in Hale, of arrest on suspicion after the fact is over, relate to felony. In cases of misdemeanor, it is much better that parties should apply to a justice of peace for a warrant, than take the law into their own hands, as they are too apt to do. The rule must be made absolute.

Littledale, Parke and Taunton, JJ., concurred.

Rule absolute.

INJURIES IN FAMILY RELATIONS.[1]

SEDUCTION: THEORY OF ACTION BY PARENT.(1)

Hewitt v. Prime.

(21 Wendell, 79.—1839.)

Action on the case for the seduction of a minor daughter of the plaintiff, whilst she was a member of her father's family.

[1] "It seems that prior to the statute of laborers (23 Edw. III., 1349) no action at law lay for any injury involved in such relations. The preamble of this statute recites the mortality consequent on the pestilence of that time, and referred to 'the grievous incommodities which of lack, especially of plowmen and laborers, may hereafter come.' Among other provisions, it imposed heavy penalties on every person who procured, harbored, or retained the servant of another during the time he had contracted to serve. From this statute arose the actions commonly called '*per quod* actions,' because of the peculiar wording of the pleadings. The action lay under the statute by the employer against a third person who interfered with the relationship of his servant, '*per quod servitium amisit.*' This was easily adapted so as to be used by a father for the seduction of his child, and by a husband for abuse by a stranger of his wife (in the form of pleading, '*per quod consortium amisit.*')." Jaggard on Torts, I., 447.

[2] "The common law gave the father an action for the seduction of his daughter, but regarded it as an action for trespass for assaulting his servant, whereby he lost her services; later, an action on the case was allowed, and it is now well settled that the action may be brought in either form.

"The action was based upon the relation of master and servant, and not upon that of parent and child, and the measure of damages was such only as a master would recover for a disabling injury to his servant. The extent of the recovery has been enlarged by the courts from the necessity of the case, rather than from the principles which govern the action, until compensation is awarded to the parents as such, for the shame and mortification which that wrong brings upon him and his family. No action could be maintained by the father for the injury in his parental capacity, but in the struggle between substantial justice to the parent and the precedents in actions for seduction, the courts have clung to the latter and striven to attain the former, until the anomaly has been produced of requiring the action to be prosecuted by the father for an injury inflicted upon him in his relation as master, and permitting a recovery in his relation as parent." XXI. Am. & Eng. Enc. of Law, 1009.

In addition to the testimony of the daughter, the plaintiff proved by a practising physician that, about the time of her pregnancy, the defendant had applied to the physician for drugs to produce an abortion, and, upon one occasion, stated that the female gotten with child was the plaintiff's daughter. The jury found for the plaintiff, and the defendant asks for a new trial.

By the Court, NELSON, CH. J. The witness, (the physician), I think, was not privileged. It is very doubtful whether the communication made to him by the defendant can be considered as consulting him professionally, within the meaning of the statute; and it is certain, that the information given was not essential to enable him to prescribe for the patient, if the daughter of the plaintiff should be considered a patient in respect to the transaction. 2 R. S. 406, § 73.

The judge ruled in the course of the trial that no *actual loss of service, expense or damage*, prior to the commencement of the suit, need be shown; that the proof of the seduction was sufficient under the circumstances; pregnancy having ensued, and the daughter being a minor and a part of her father's family at the time. It is now fully settled both in England and here, *Maunder* v. *Venn*, 1 Mood. & Malk. 323, Peake's N. P. 55, 233, 2 Stark. Ev. 721, 9 Johns. R. 387, 2 Wendell, 459, 7 Carr. & Payne, 528, that *acts of service* by the daughter are not necessary; it is enough if the parent has a right to command them, to sustain the action. If it were otherwise, says Littledale, J., in *Maunder* v. *Venn*, no action could be maintained for this injury in the higher ranks of life, where no actual services by the daughter are usual. After this, I do not perceive how we can consistently maintain, that proof of actual *loss of service* is indispensable to uphold the action. If it may be sustained upon the mere right to claim them, or in the language of the cases, upon the supposed services, where none were ever rendered in fact, the ground of it, in the supposed case, precludes the possibility of any actual loss. Such is the spirit of the more recent cases, as will be seen by a reference to those above cited.

It was conceded by Hullock, sergeant, for the defendant in *Revill* v. *Salterfit*, 1 Holt, 450, that in most of these cases, the condition of service was regarded as a mere conveyance to the action. It was the form, he said, through which the injury was presented to the court; and having obtained its admission,

upon legal principles, it brought along with it all the circumstances of the case.

The ground of the action has often been considered technical, and the loss of service spoken of as a fiction, even before the courts ventured to place the action upon the *mere right to claim* the services; they frequently admitted the most trifling and valueless acts as sufficient. In the case of *Clark* v. *Fitch*, 2 Wendell, 459, there was no proof of actual loss. And *Martin* v. *Payne*, 9 Johns. R. 387, was decided upon the ground that none were necessary. The only actual *liability* of the father that appeared in the former case, were for the expenses of the lying in, which have never been regarded as the foundation of the suit; they are received in evidence only by way of enhancing the damages. It is apparent from a perusal of the modern cases, and elementary writers in England, upon this subject, that the old idea of *loss of menial services*, which lay at the foundation of the action, has gradually given way to more enlightened and refined views of the domestic relations: these are, that the services of the child are not alone regarded as of value to the parent. As one of the fruits of more cultivated times, the value of the society and attentions of a virtuous and innocent daughter, is properly appreciated; and the loss sustained by the parent from the corruption of her mind and the defilement of her person, by the guilty seducer, is considered ground for damages, consistent even with the first principles of the action. The loss of these qualities, even in regard to menial services, would necessarily greatly diminish their value.

The action then, being fully sustained, in my judgment, by proof of the act of seduction in the particular case, all the complicated circumstances that followed come in by way of aggravating the damages. It is not necessary that these should transpire before suit brought; if they are the natural consequences of the guilty act, they are but the incidents which attend, and give character to it.

Upon these views I concur with the learned judge who reviewed the case below, in denying a new trial.

New trial denied.

SEDUCTION, MINOR DAUGHTER.

Martin v. Payne.

(9 Johnson's Rep., 387.—1812.)

Action of trespass on the case, for debauching and getting with child the daughter of the plaintiff.

At the time of the seduction, she was nineteen years of age, and lived with and worked for her uncle, from whom she was to receive one shilling per day, expending same in clothes and necessaries for herself, as she saw fit. There was no agreement for her continuance in her uncle's house for any particular time; but she went to reside with him, on the terms stated, with the consent of her father. During the period of such residence, she occasionally visited her father's house, remaining there a week at a time. Immediately after she was debauched, she returned to her father, who supported her, and was at the expense of her lying in, etc. It did not appear that the father had done any act dispensing with his daughter's service, other than consenting to her remaining at her uncle's house.

The cause was submitted to the jury, against the objection of the defendant, and a verdict was returned in favor of the plaintiff.

Spencer, J. The case of *Dean* v. *Peel*, 5 East, 49, is against the action. It was there held that the daughter being in the service of another, and having no *animus revertendi*, the relationship of master and servant did not exist. In the present case, the father had made no contract hiring out his daughter, and the relation of master and servant did exist, from the legal control he had over her services; and although she had no intention of returning, that did not terminate the relation, because her volition could not affect his rights. That is the only case which has ever denied the right of the father to maintain an action for debauching his daughter whilst under age; and I consider it as a departure from all former decisions on this subject. It has frequently been decided, that where the daughter was more than twenty-one years of age there must exist some kind of service; but the slightest acts have been held to con-

stitute the relation of master and servant, in such a case. In *Bennet* v. *Alcott*, 2 Term Rep. 166, the daughter was thirty years of age, and Buller, Justice, held that even milking cows was sufficient. But where the daughter was over twenty-one, and in the service of another, as in *Postlethwaite* v. *Parks*, 3 Burr. 1878, the action is not maintainable. In *Johnson* v. *M'Adam*, cited by Topping in *Dean* v. *Peel*, Wilson, J., said that where the daughter was under age he believed the action was maintainable, though she was not part of the father's family when she was seduced, but when she was of age, and no part of the father's family, he thought the action not maintainable. In *Fores* v. *Wilson*, Peake's N. P. Cas. 55, which was an action for assaulting the maid of the plaintiff, and debauching her, *per quod*, etc. Lord Kenyon held that there must subsist some relation of master and servant, yet a very slight relation was sufficient, as it had been determined that when daughters of the highest and most opulent families have been seduced, the parent may maintain an action on the *supposed* relation of master and servant, though everyone must know that such a child cannot be treated as a menial servant.

Put the case of a gentleman's daughter at a boarding-school, debauched and gotten with child, on what principle can the father maintain the action, but on the *supposed* relation of master and servant, arising from the power possessed by the father to require menial services; for in such a case, there is no actual existing service constituting the relation of master and servant. Would it not be monstrous to contend that, for such an injury, the law afforded no redress? The case supposed is perfectly analogous to the one before us: here the father merely permitted his daughter to remain with her aunt; he had not divested himself of his power to reclaim her services, nor of his liability to maintain and provide for her. She was his servant *de jure* though not *de facto*, at the time of the injury, and being his servant *de jure*, the defendant has done an act which has deprived the father of his daughter's services, and which he might have exacted but for that injury. We are of opinion that the action is maintainable under the circumstances of this case, and, therefore, deny the motion for a new trial.

Motion denied.

SEDUCTION, ADULT DAUGHTER.

SUTTON v. HUFFMAN.

(32 New Jersey Law, 58.—1866.)

BEDLE, J. The exception in this case being so general, and the charge depending so much upon its application to the facts, it becomes necessary, in order to determine its correctness, to state the evidence pretty fully. The action was brought by Adam Huffman, for the seduction of his daughter and servant, Margaret Ann, by Emanuel Sutton. As the result of it, a child was born on the eleventh day of April, 1861. The daughter, at the time of the seduction, was about twenty-two years of age, and the act occurred, not at her father's house, but at her brother Gilbert's, who lived about a mile from the father's. Gilbert was an unmarried son of the plaintiff, and lived upon a farm called the Sutton farm, which appears to have been owned by the defendant's father. In the spring of 1859, Gilbert left his father's house to commence farming for himself, and first occupied what is called the Cranmer farm. Margaret Ann went with him, she then being under the age of twenty-one years. He remained upon said farm one year, and then moved upon the Sutton farm. The plaintiff testified that Gilbert rented the Cranmer farm, moved on it, and was single, and had no housekeeper; and that he told him he could have Margaret Ann whenever they could spare her. That she did not go there to receive wages; that she was with Gilbert a good part of the time there, and was at home some; that she came home very often on Saturdays and staid over Sunday, and sometimes would be at home nearly two weeks; that while Gilbert lived on the Sutton farm, she was about half the time there and the other half at her father's house; that she had part of her clothing at Gilbert's, but the chief part was at the plaintiff's house; that she had to have part at each place; that when she was at her father's, she did whatever her mother told her; that she milked, churned, got the meals, did housework, washing and sewing; that the plaintiff did not pay her any wages, except such clothes as she needed, and he found her all her clothing, both while she was on the Cranmer farm and the Sutton farm; that her

mother would send her shirts to make, and dresses for her sister. (The father's family consisted of his wife and ten children, eight boys and two daughters—Margaret Ann, and her sister, who was nine years old.) That the child was born at the plaintiff's house, the physician's bill was paid by him, and he furnished her with everything necessary for her comfort during sickness, and considered himself bound to do it. These leading facts were also substantially testified to by Gilbert and Margaret Ann. In addition to them, Margaret Ann and Gilbert swear that Gilbert did not pay her any wages, and there was no agreement that he should. Margaret Ann testified that she always went to Gilbert's with the intention of returning to her father's, and that she was subject to the control and direction of her father while on the Cranmer and Sutton farms. The defendant sought to show, by the declarations of Margaret Ann and Gilbert, that Gilbert was to give her one dollar per week and half the poultry. Other evidence was offered by defendant to show that while on the Cranmer farm she had certain nice dresses there; also that Margaret Ann and Gilbert would sometimes go to the store and each purchased things and be charged to Gilbert, the particulars of which do not appear; also that some shoemaking was done for her and charged to Gilbert. This evidence, together with some other of a general character, was offered, undoubtedly, to show that the relation of master and servant did not exist between the plaintiff and his daughter, but that she had left her father's house to do for herself.

A general exception was allowed to the whole charge upon the relationship of master and servant, which charge includes the observations of the justice both upon the facts and the law. I will refer to such parts of the charge only as are objected to upon legal grounds.

The court charged that "it is necessary for the plaintiff to prove that she stood to him in the relation of servant, and that the defendant seduced and debauched her.

"*And first.* Did the relation of master and servant exist between the father and daughter? This form of issue is adapted to the cause of loss of service merely, and was no doubt, in its origin, used to recover only the damages sustained by such loss and the expenses of the accompanying sickness. But in cases of this kind, the loss of service has long ceased to be considered the true *gravamen* of the action. The real damages sought to

be recovered, are those occasioned, not by two or three months' illness of the daughter, but the permanent disgrace inflicted upon her and her family, and thus subjecting the father to permanent sorrow. Notwithstanding this change in the object of the action, the form still continues, *and though the amount of service may be very small, still the fact must be proved in order to sustain it.* In its present scope, this action is the only civil remedy for this kind of trespass. Your doubts, if you entertain any upon the first point, may be solved by answering two questions.

"*First.* Did Margaret render any habitual service at or about the time she was debauched?

"*Second.* Was she emancipated?

"As to the first question, if you believe her father, brother and herself, you cannot doubt that she did serve him at his home occasionally, in the usual way of service by daughters at home, and by sewing for the family while at her brother's. The service need not be of any particular kind, quality, or amount. Was *any* service lost by the injury, is the question. It need not be menial service, which in law means within walls, or house service, nor need it be continuous, or from day to day, nor need the daughter live in the family if she serves out of it. *In short, any accustomed service lost by the injury* will sustain the action, provided it be *service due*, and not a mere voluntary courtesy, and service will be regarded as due, unless the child is emancipated.

"*Second.* Was Margaret emancipated? The arrival at twenty-one years does not emancipate a child; if the parent continues to exercise authority and the child to submit to it, the emancipation does not occur; and this is the case with most unmarried daughters, whose parents are able to support them."

After referring to the evidence generally, and reflecting upon it, the court then stated to the jury that emanicipation was a *question of intention*, and further said: "With these suggestions, I leave it with you to determine, whether Margaret or her father, or either of them, intended that she should be free of his control, and without title to his support and protection at *the time of the injury.* I do not think that the fact that she received wages, or by agreement between her and Gilbert, was to receive wages, if that was so, of much, if any, importance to the question. This was a matter between her and Gilbert, and

does not affect her position toward her father, unless she engaged her whole time to Gilbert, and that for a period that would indicate her intention to be free from her father. The proof will hardly sustain this view. You have that testimony before you, and must give it such weight as you think it deserves. It consists altogether of hearsay of what Gilbert and Margaret said. It is only important with the view of impeaching them, and not of proving the fact against the plaintiff; as against him it is hearsay."

It is first objected that the question, "did the relation of master and servant exist between the father and daughter?" does not specify the time when such relation should exist. This objection is more technical than real. Immediately before putting that question, the court charges that "it is necessary for the plaintiff to prove that she stood to him in the relation of servant, and that the defendant seduced and debauched her." The jury could not have understood from this language otherwise, than that the daughter must be the servant at the time of the seduction. The expression cannot fairly be construed to mean anything else; and besides that, the court in submitting the question of emancipation to the jury, expressly applies it "at the time of the injury." If the defendant desired it more definite than stated, he should have requested it at the trial.

The other objections amount in brief to this: that Margaret, at the time of the seduction, was over the age of twenty-one years, and in the actual service of her brother for wages, and that, therefore, she could not then be the servant of her father, so as to sustain this action. In the first place, it is not proved that she did receive wages from her brother. As was correctly remarked by the judge at the circuit, the proof of what Gilbert and Margaret had said about that was "only important with the view of impeaching them, and not of proving the fact against the plaintiff; as against him it is hearsay;" but then if there had been competent evidence of the fact that she received wages, that in itself was not necessarily inconsistent with the relation of master and servant between her and her father. *Brown* v. *Ramsay*, 5 Dutcher, 121. It was not necessary that she should be in the *actual service* of the father at the time of the seduction, if the relation of master and servant then existed. It is true, that loss of service in fact, though very slight, must be shown, where the daughter is over twenty-one years, the law

not presuming service, as in a daughter under age, yet the loss of service, in most cases where there is no personal violence, occurs months after the seduction. If the relation of master and servant existed at the time, and the service lost afterwards was due the parent by virtue of such relationship that existed at the seduction, it is sufficient to sustain the action. If, by reason of the act, the master could not have the benefit of a service due him, by virtue of a relation then existing, even if he did not choose to exact it before, he is entitled to his action. The receipt of wages by the daughter would be a fact as bearing upon the question of emancipation, but beyond that it would not be inconsistent with the child being unemancipated, unless, as remarked by the judge, "she engaged her whole time to Gilbert, and that for a period that would indicate her intention to be free from her father." It does not so appear in the case, and the court wisely said, "the proof made will hardly sustain that view." As this case stands upon the evidence, the receipt of wages, if proved, would not be inconsistent with Margaret being unemancipated and the servant of the plaintiff.

When the daughter went to her brother's she was under the age of twenty-one years; while there she attained the age of twenty-one. The attaining that age is not *ipso facto* an emancipation of the child. That is the well-settled law of this state. *Overseers of Alexandria* v. *Overseers of Bethlehem*, 1 Harr. 122; *Ridgeway* v. *English*, 2 Zab. 409; *Brown* v. *Ramsay*, 5 Dutch. 117.

It is true that the father may then refuse to further support and provide for the child, and the child may then refuse to serve or submit to the control of the parent, but unless either the parent or child has in fact effected the emancipation, the reciprocal rights and duties of the parent and child, as to service and support, are presumed to exist as before the age of twenty-one. Whether emancipation has occurred, is a question of fact, to be determined by the circumstances of the case, according to the intention of the parties. Such circumstances in favor of a continuance of the relation, may consist of a tacit consent on the part of the child to serve as before, and on the part of the parent to provide as before. The conduct of each to the other may exist as before without any special contract, or understanding, and emancipation would not be accomplished. The parent or child, or either of them, may stand upon their

rights to dissolve the relation at that time, if they wish, and if they do, in fact, the relation of master and servant is ended, but if they do it not in fact, and they tacitly continue—the child to submit to the authority of the parent, and to serve him in such way as is usual for children, and the parent to exercise authority and provide for the child as before—the child is unemancipated, and third parties are bound to respect it. *Lipe* v. *Eisenlerd*, 32 N. Y. 229.

The question of emancipation, as one of fact, was distinctly left by the judge to the jury, and I find nothing in the charge inconsistent with the rule of law as laid down. The facts, as they appear in the case, would justify the jury in finding the daughter not emancipated. If she was not emancipated, then the action would be sustained by proof of loss of any service to which the plaintiff was entitled. Upon that point the judge charged "that any service lost by the injury is the question;" and further, "in short, any accustomed service lost by the injury will sustain the action, provided it be service due, and not a mere voluntary courtesy, and service will be regarded as due unless the child is emancipated." If the child was not emancipated, service performed will be regarded as due the parent. The parent can sustain the action for the services of an unemancipated child over twenty-one years. *Brown* v. *Ramsay*, 5 Dutcher, 118.

In the absence of proof that the parent and child, in the performance of service by the child, had contracted with each other, as strangers, the law holds that service done by an unemancipated child is done because it is due to the parent. The service, as already stated, need not be rendered on the day of the injury. If the injury had occasioned any loss of service due by virtue of the relation, though the loss has been sustained long after the injury, it is sufficient. The charge upon this question was entirely correct. It was objected that the question, "did Margaret render any habitual service at or about the time she was debauched?" should have been confined to the time of the debauchment. This objection is already sufficiently answered, for the case does not proceed upon the idea that actual service is necessary at that time. The fact of habitual service about the time she was debauched, was important, as showing the relation of the child to the parent—how they were accustomed to act towards each other. If before the seduction,

and after, as was proved by the plaintiff, she did serve her father when at home, in the usual way of a daughter, and did also serve him at her brother's, by sewing for her father's family, it showed a recognition on her part of the continuance of the relationship that existed before she was of age. These acts of service, covering the time she was at Gilbert's, or about the time of the seduction, were of the utmost importance upon that subject.

The two questions—one as to the habitual service, and the other as to emancipation—cover the whole case upon the relation of master and servant. The judge expressly stated, their doubts, if they had any upon that question, could be solved by answering those two questions, and those questions were correctly put and explained to accomplish that end. I see no error in the charge, and the judgment must, therefore, be affirmed.

Affirmed.

Chief Justice Beasley, and Justices Elmer and Vredenburgh concurred.

VOLENTI NON FIT INJURIA.

Paul v. Frazier.

(3 Massachusetts, 71.—1807.)

The declaration was in case for that the defendant at, etc., begun to court the plaintiff under a pretence of a design to marry her, and having under that pretence gained her affections, got her with child and afterwards utterly forsook her; whereby she hath been greatly injured in her reputation, hurt in her peace of mind, etc., to her damage $2,000.

The defendant pleaded not guilty, and upon issue joined the plaintiff obtained a verdict for $1,000. Upon defendant's motion the court below arrested the judgment, and from that decision the plaintiff appeals.

Parsons, C. J. This is an action of the case to recover damages against the defendant for seducing the plaintiff under a

false pretence of courtship and intention of marriage, and for getting her with child, whereby her reputation has suffered, and her peace of mind been injured. After a verdict for the plaintiff on the issue of not guilty, the defendant moves to arrest the judgment. And we are of opinion that judgment must be arrested. An action of this nature is not given by statute; and there is no principle of the common law, on which it can be sustained. Fornication and adultery are offences in this commonwealth created by statute. And the declaration amounts to a charge against the defendant for deceiving the plaintiff and persuading her to commit a crime, in consequence of which she has suffered damage. She is a partaker of the crime, and cannot come into court to obtain satisfaction for a supposed injury to which she was consenting.

It has been regretted at the bar that the law has not provided a remedy for an unfortunate female against her seducer. Those who are competent to legislate on this subject will consider, before they provide this remedy, whether seductions will afterwards be less frequent, or whether artful women may not pretend to be seduced in order to obtain a pecuniary compensation. As the law now stands, damages are recoverable for a breach of promise of marriage: and if seduction has been practised under color of that promise, the jury will undoubtedly consider it as an aggravation of the damages. So far the law has provided; and we do not profess to be wiser than the law.

SEDUCTION: BREACH OF MARRIAGE PROMISE. [1]

TUBBS v. VAN KLEEK.

(12 Illinois, 446.—1851.)

TRUMBULL, J. This was an action for a breach of a promise of marriage. Jury trial, and a verdict of a thousand dollars in

[1] "It has been much questioned, whether, in an action to recover damages for the breach of a promise of marriage, damages for seduction may be recovered. It has been distinctly held in Kentucky and Pennsylvania, that in such action seduction cannot be given in evidence in aggravation of the damages. *Weaver* v. *Bachert*, 2 Barr, 80; *Bucks* v. *Shain*, 2 Bibb, 341; see,

favor of the plaintiff below. It was proven, on the trial, that the plaintiff had given birth to a child, and the court, at her instance, instructed the jury as follows:

"That if the jury believe, from the evidence, that the defendant entered into a marriage contract with the plaintiff, and under the pretense and promise of marriage, seduced and begot the plaintiff with child, that circumstance, and violation of faith, should be taken into consideration by the jury, in estimating the damages."

The giving of this instruction is assigned for error, which is the only question in the case.

There is some conflict in the authorities, as to whether seduction committed under promise of marriage, is admissible in evidence, to aggravate the damages in an action for the breach of such promise, but the weight of authority, as well as the reason of the thing, appear to be decidedly in favor of the admission of such evidence. The only cases, to which reference has been made, as establishing a contrary doctrine, are those of *Bucks* v. *Shain*, 2 Bibb, 343, and *Weaver* v. *Bachert*, 2 Pa. State R. 80.

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also, *Perkins* v. *Hersey*, 1 R. I. 493. On the other hand, the rule adopted in Massachusetts, New York, and several other States, is, that where seduction has been practised under color of a promise of marriage, the jury may consider it to aggravate the damages in an action on the contract. *Paul* v. *Frazier*, 3 Mass. 73; *Whalen* v. *Layman*, 2 Blackf. 194; *King* v. *Kersey*, 2 Carter, 402; *Tubbs* v. *Van Kleek*, 12 Ill. 446; *Wells* v. *Padgett*, 8 Barb. 323; *Green* v. *Spencer*, 3 Miss. 318; *Conn* v. *Wilson*, 2 Overton, 233." *Espy* v. *Jones*, 37 Ala. 379, 382.

In *Sheahan* v. *Barry*, 27 Mich. 217, evidence of seduction in aggravation was objected to as incompetent, but the court (p. 219) said: "A subsequent refusal to marry the person whose confidence has been thus deceived cannot fail to be aggravated in fact by the seduction. The contract is twice broken. The result of an ordinary breach of promise is the loss of the alliance and the mortification and pain consequent on the rejection. But in case of seduction there is added to this a loss of character, and social position, and not only deeper shame and sorrow, but a darkened future. All of these spring directly and naturally from the broken obligation. The contract involves protection and respect, as well as affection, and is violated by the seduction as it is by the refusal to marry. A subsequent marriage condones the first wrong; but a refusal to marry makes the seduction a very grievous element of injury, that cannot be lost sight of in any view of justice."

In New York, seduction under promise of marriage is a crime. See Penal Code, §§ 284–286.

In the first of these cases, the promise to marry was made at a period subsequent to the seduction, and, as was well remarked by the court, the seduction could not have been the consequence of the promise. In such a case, when an action was brought for the breach of the marriage promise, it would clearly be erroneous to allow damages on account of an injury inflicted before the promise was made, and which could not have resulted from it. The case of *Weaver* v. *Bachert*, is based upon that of *Bucks* v. *Shain*, and so far as it goes, is an authority against the admission of proof of seduction in an action for a breach of marriage promise, but the reasoning of the court in that case, is by no means satisfactory. The decision is placed upon the ground that illicit intercourse is an act of mutual imprudence, and that *volenti non fit injuria;* also upon the further ground, that the father has a distinct action for the seduction of his daughter, and that to allow the daughter to recover also, would be to subject the seducer to the payment of double damages.

It is possible, but hardly probable, that a case may arise where both parties are equally culpable, but the instruction under consideration, does not suppose such a case. It is based upon the presumption, that the jury believe from the evidence that the defendant, under pretense of marriage, enticed the plaintiff from the path of rectitude and duty; and in such a case, to say that both parties were equally in fault, would be to confound the innocent with the guilty, and to visit the same condemnation on the party defrauded, as on him committing the fraud; nor is it true, that illicit intercourse is usually an act of mutual imprudence. In a vast majority of cases, the female is imposed upon, and the consequences attending such intercourse are visited upon her with ten-fold severity. In this case, the parties are not presumed to be *in pari delicto*, but the instruction presupposes a cheat on the part of the man. It is like the case, where a man promised to marry a woman, on condition that she would go to bed with him that night, which she did. It was objected, in an action, by the woman upon this promise, that it was *turpis contractus*, but Lord Mansfield said he thought the objection would not lie, "because the parties were not *in pari delicto*, but this was a cheat on the part of the man." *Morton* v. *Fenn*, 26 E. C. L. R. 80. So a bond given to a woman in consideration of past cohabitation, has been held good at law. *Turner* v. *Vaughan*, 2 Wilson, 339. In answer to the

objection, that the bond was given for an immoral consideration, Cline, Justice, said: "I am in a court of law, and not in an ecclesiastical court; if a man has lived with a girl, and afterwards gives her a bond, it is good."

It is also a mistaken notion, to say that a father has a distinct cause of action for the seduction of his daughter. No action lies by the father simply for the seduction, but he may have an action for the loss of service occasioned by the lying-in of his daughter, and it is only by a fiction of law, invented by the courts, that he is allowed damages in that action for the seduction. The damages, even then, are only such as he may have sustained in the disgrace brought upon his family, in his wounded feelings, or otherwise, and nothing is allowed on account of the suffering and disgrace of the daughter. It does not follow, therefore, that the seducer will be made to pay double damages for the same injury. He pays to the father for the injury done him; if the daughter is permitted to recover, it is for the injury done her, and it often happens that by one act, a wrong may be done several persons, for which, each has a right of action. Suppose a female is so unfortunate as to have no father, or person sustaining towards her that relation, which will authorize his bringing a suit for loss of service; according to the doctrine of the Pennsylvania court, her seducer under promise of marriage, is answerable to no one for the fraud he has practised upon her. Sooner than establish such a principle, it would be well to adopt the language of Chief Justice Wilmot, in the case of *Tullidge* v. *Wade*, 3 Wilson, 19, which was an action by the father for loss of service, where he said: "The jury have done right in giving liberal damages; and if A B brings another action against defendant, for breach of promise of marriage, so much the better; he ought to be punished twice;" but we are not driven to such extremities, the weight of authority is in harmony with the reason and justice of the case. The courts of Massachusetts, Missouri, Tennessee and Indiana, have all held, that in an action by a female for a breach of promise of marriage, her seduction by the defendant, under promise of marriage, may be given in evidence in aggravation of damages. *Paul* v. *Frazier*, 3 Mass. 72; *Green* v. *Spencer*, 3 Missouri, 318; *Conn* v. *Wilson*, 2 Overton, 233; *Whalen* v. *Layman*, 2 Blackf. 194.

The reason for these decisions is manifest. A party is al-

ways entitled to such damages as are the natural and proximate result of the act complained of. 2 Greenleaf's Ev., sec. 256.

Whatever damages, therefore, the plaintiff suffered in consequence of defendant's refusal to marry her, she is legitimately entitled to recover in this action. How are these damages to be estimated, unless we look at the circumstances of the parties, and the situation in which the plaintiff is left, by the defendant's refusal to perform his contract?

All the authorities, not excepting the case in Pennsylvania, admit that parties in this action may show their circumstances, or condition in life, as matters of aggravation or mitigation. Why, then, may not a female show the situation in which she is left, by the violation of his promise on the part of a man, who has agreed to marry her? Had he performed his contract, she would have been saved from disgrace, in part at least, and her child legitimated. The direct consequence of his breach of contract is the disgrace and ruin of her whom, by means of that contract, he has seduced, and upon every principle of right and justice, he should be held responsible for the injury which his own breach of contract has occasioned.

The court in Pennsylvania asks the question: "If, then, a woman cannot make her seduction a ground of recovery directly, how can she make it so indirectly?" The answer to such a question is obvious. It is everyday's practice, to give in evidence, by way of aggravating damages, circumstances which would not of themselves constitute distinct causes of action. Cases of this kind are too common to need illustration. 2 Greenleaf's Ev., secs. 55, 267. The injury done a female by the violation of a contract to marry her is not the same in all cases, and whenever such contract has been used by the party making it to inflict the most aggravated of injuries upon the woman, it is right that such injuries should be taken into consideration by the jury, in estimating the damages which he should pay for the violation of his promise. A man who, under pretense and promise of marriage, gains the affections of an innocent girl, seduces and then abandons her, inflicts an injury, for the recompense of which money is wholly inadequate. Such a man, if he deserves the name, is entitled to no sympathy at the hands of either juries or courts, but should be made to respond in heavy damages, the only recompense which the law allows, for the commission of an act, occasioning to the person injured,

more real suffering and distress, and bringing upon her greater disgrace, than any other which man can commit.

Let the judgment be affirmed.

Judgment affirmed.[1]

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[1] In the course of his dissenting opinion, Treat, C. J., says: "There is not a single case to be found in the English Reports that countenances such a doctrine. . . . It is a legitimate inference, from the silence of the English Reports, that the principles of the common law do not sanction such a recovery. The notion seems to have originated in this country, and some of the courts, as I cannot but think, more influenced by sympathy for the party debauched or by indignation against the seducer, than by a stern adherence to the well established rules and distinctions of the common law, have seen proper to adopt it."

ENTICEMENT.

Bennett v. Bennett.

(116 New York, 584.—1889.)

Appeal by the defendant from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the plaintiff entered upon a verdict, in an action by a wife to recover damages for enticing away her husband.

Vann, J. The plaintiff, a married woman, brought this action to recover damages from the defendant for enticing away her husband, and depriving her of his comfort, aid, protection and society. The defendant insists that neither at common law nor under the act concerning the rights and liabilities of husband and wife can such an action be maintained. It was provided by that statute that any married woman might, while married, sue and be sued in all matters having relation to her sole and separate property, and that she might maintain an action in her own name, for damages against any person or body corporate, for any injury to her person or character, the same as if she were sole. (Laws of 1860, chap. 90, p. 158, § 7, as amended by chap. 172, Laws of 1862, p. 343.) An injury to the person, within the meaning of the law, includes certain acts, which do not involve physical contact with the person injured.

Thus criminal conversation with the wife has long been considered as a personal injury to the husband. *Delamater* v. *Russell*, 4 How. 234; *Straus* v. *Schwarzwaelden*, 4 Bosw. 627. And the seduction of a daughter a like injury to the father. *Taylor* v. *North*, 3 Code Rep. 9; *Steinberg* v. *Lasker*, 50 How. 432. The Code of Civil Procedure, in defining "personal injury," includes under that head, libel, slander, "or other actionable injury to the person." (§ 3343, sub. 9.)

It is well settled that a husband can maintain an action against a third person for enticing away his wife and depriving him of her comfort, aid and society. *Hutcheson* v. *Peck*, 5 Johns. 196; *Barnes* v. *Allen*, 1 Abb. Ct. App. Dec. 111. The basis of the action is the loss of *consortium*, or the right of the husband to the conjugal society of his wife. It is not necessary that there should be proof of any pecuniary loss in order to sustain the action. *Hermance* v. *James*, 32 How. 142; *Rinehart* v. *Bills*, 82 Mo. 534. Loss of services is not essential, but is merely matter of aggravation, and need not be alleged or proved. *Bigaouette* v. *Paulet*, 134 Mass. 125.

According to the following cases a wife can maintain an action in her own name and for her own benefit against one who entices her husband from her, alienates his affection and deprives her of his society. *Jaynes* v. *Jaynes*, 39 Hun, 40; *Breiman* v. *Paasch*, 7 Abb. N. C. 249; *Baker* v. *Baker*, 16 id. 293; *Warner* v. *Miller*, 17 id. 221; *Churchill* v. *Lewis*, id. 266; *Simmons* v. *Simmons*, 21 id. 469.

There appears to be no reported decision in this state holding that such an action will not lie, except *Van Arnum* v. *Ayers*, 67 Barb. 544. That case was decided at Special Term in 1877, and the learned justice who wrote the opinion therein, as a member of the General Term when the case now under consideration was affirmed, concurred in the result, and stated that, owing to recent authorities, he thought the right of action should be upheld. Some of the cases rest mainly upon the statute already alluded to, and sustain the action upon the theory that enticing away the wife is such an injury to the personal rights of the husband as to amount to an injury to the person, while others proceed upon the ground that the loss of *consortium* is an injury to property in the broad sense of that word, "which includes things not tangible or visible, and applies to whatever is exclusively one's own." *Jaynes* v. *Jaynes*, *supra*,

sustains the action upon either ground, although prominence is given to the latter. Several of the cases justify the action generally without allusion to any statute. If the wrong in question is an injury to property simply, it would not abate upon the death of the plaintiff, but could be revived in the name of the personal representatives, a consequence which suggests the precarious nature of that basis for the action. *Cregin* v. *Brooklyn Crosstown R. R. Co.*, 75 N. Y. 192; 83 id. 595.

In other states the rule varies. In Ohio and Kansas recovery by the wife is permitted, while in Indiana the right thus far has been denied, but by a court so evenly divided in opinion as to leave the ultimate rule in that state uncertain. *Clark* v. *Harlan*, 1 Cin. 418; *Westlake* v. *Westlake*, 34 Ohio St. 621; *Mehrhoff* v. *Mehrhoff*, 26 Fed. Rep. 13; *Logan* v. *Logan*, 77 Ind. 558. In England the point does not appear to have been directly passed upon, but in one case the judges approached it so nearly and differed so widely in their discussions that it is cited as an authority upon both sides of the question. *Lynch* v. *Knight*, 9 H. L. 577. The lord chancellor (Campbell) in delivering the leading opinion, said: "If it can be shown that there is presented to us a concurrence of loss and injury from the act complained of, we are bound to say that this action lies. Nor can I allow that the loss of *consortium*, or conjugal society, can give a cause of action to the husband alone." Lord Cranworth was strongly inclined to think that this view was correct, but did not feel called upon to express a decided opinion, as it was agreed that the judgment of the court should be placed upon another ground. Lords Brougham and Wensleydale thought that the action would not lie. In that case, it is to be observed, the husband joined the wife in bringing the action "for conformity," as there was no enabling statute authorizing her to sue in her own name.

While this action was tried, decided at the General Term and argued in this court upon the theory that the acts of 1860 and 1862, concerning the rights and liabilities of husband and wife were still in force, in fact they have no application, because the sections heretofore regarded as applicable were repealed by the general repealing act of 1880. (Laws of 1880, chap. 245, §§ 36, 38.)

The judgment in this action, therefore, cannot be affirmed upon the ground that the wrong complained of may be redressed

under those statutes. Can it be sustained upon the theory that the right of action belongs to the wife according to the general principles of the common law and that she may now maintain it, being permitted to sue in her own name? The Code of Civil Procedure (§ 450), provides that a married woman "appears, prosecutes or defends, in an action or special proceeding, alone or joined with other parties as if she were single." The capacity of the plaintiff to sue cannot be questioned under this statute, but whether she has a cause of action to sue upon is the important inquiry. Can she maintain an action for any personal injury, even for assault and battery, since the repealing act, already cited, went into effect? Admitting her power to assert her rights in court, what right has she to assert? Has she such a legal right to the conjugal society of her husband as to enable her to recover against one who wrongfully deprives her of that right?

It is urged that the novelty of the action is a strong argument that it cannot be upheld. The same point was urged in almost the first action brought by a husband, against one who had enticed away his wife, and the answer made by the court in that we repeat as applicable to this: "The first general objection is that there is no precedent of any such action as this, and that, therefore, it will not lie. But this general rule is not applicable to the present case. It would be if there had been no special action on the case before. A special action on the case was introduced for this reason, that the law will never suffer an injury and a damage without a remedy, but there must be new facts in every special action on the case." *Winsmore* v. *Greenbank*, Willes, 577, 580.

Moreover, the absence of strictly common-law precedents is not surprising, because the wife could not bring an action alone, owing to the disability caused by coverture, and the husband would not be apt to sue, as by that act he would confess that he had done wrong in leaving his wife.

The actual injury to the wife from the loss of *consortium*, which is the basis of the action, is the same as the actual injury to the husband from that cause. His right to the conjugal society of his wife is no greater than her right to the conjugal society of her husband. Marriage gives to each the same rights in that regard. Each is entitled to the comfort, companionship and affection of the other. The rights of the one and the obli-

gations of the other spring from the marriage contract, are mutual in character and attach to the husband as husband and to the wife as wife. Any interference with these rights, whether of the husband or of the wife, is a violation not only of a natural right, but also of a legal right arising out of the marriage relation. It is a wrongful interference with that which the law both confers and protects. A remedy, not provided by statute, but springing from the flexibility of the common law and its adaptability to the changing nature of human affairs, has long existed for the redress of the wrongs of the husband. As the wrongs of the wife are the same in principle and are caused by acts of the same nature as those of the husband, the remedy should be the same. What reason is there for any distinction? Is there not the same concurrence of loss and injury in the one case as in the other? Why should he have a right of action for the loss of her society unless she also has a right of action for the loss of his society? Does not the principle that "the law will never suffer an injury and a damage without a remedy" apply with equal force to either case? Since her society has a value to him capable of admeasurement in damages, why is his society of no legal value to her? Does not she need the protection of the law in this respect at least as much as he does? Will the law give its aid to him and withhold it from her?

It appears from the cases already cited that, according to the weight of authority, the wife can maintain such an action when there is a statute enabling her to sue. The modern elementary writers take the same position. "To entice away or corrupt the mind and affection of one's consort is a civil wrong, for which the offender is liable to the injured husband or wife. The gist of the action is not the loss of assistance, but the loss of *consortium* of the wife or husband, under which term are usually included the person's affection, society or aid." Bigelow on Torts, 153. "We see no reason why such an action cannot be supported where, by statute, the wife is allowed to sue for personal wrongs suffered by her." (Cooley on Torts, 227.)

The question remains whether a married woman can now maintain an action in this state for an injury to her person? Had a married woman a right of action at common law for a personal injury, but without power to assert it, owing to her coverture, or did the right itself belong to the husband? If the right was his, she seems to have no remedy for such wrongs

since the repeal of the statutes of 1860 and 1862. If, however, the right was hers but, owing to the legal fiction of the unity of husband and wife, she could not assert it, she may now have a remedy under section 450 of the Code.

At common law the husband and the wife were treated as one person, and marriage operated as a suspension, in most respects, of the legal existence of the latter. From this supposed unity of husband and wife sprang all disabilities of married women. She could not make a binding contract or commence an action, because either would imply that she had a separate existence. He could not enter into a covenant with her, because it would be only a covenant with himself. They could not give evidence for each other, because no one was then permitted to testify in his own behalf, nor against each other, because no one could be compelled to accuse himself. But marriage only suspended her personal rights, it did not annihilate them nor transfer them all absolutely to her husband. While it was an absolute gift to him of her goods and chattels, it was only a qualified gift to him of her choses in action, depending upon the condition that he reduce them to possession during coverture, as otherwise upon his death they belonged to her. Bright's Husband and Wife, vol. 1, pp. 34, 36; Clancy on Women, 109; Reeve's Domestic Relations (4th ed.), 1; 2 Kent's Com. (11th ed.) 116.

"It is common doctrine upon which the decisions in all the states of our Union and of England are in harmony, that, on the death of the husband, the wife's choses in action, not reduced by him to possession, survive to her. She takes them, not as his heir, personal representative or administratrix, but they revert to her in her own right. And we have seen that this doctrine applies as well to the wife's post-nuptial choses in action as to her ante-nuptial ones." Bishop's Married Women, § 171. "The husband shall not have them unless he and his wife recover them." Co. on Lit. 351, b.

Under the head of choses in action, torts committed upon a married woman, either before or during coverture, are included. "Although the husband is . . . entitled to all the property which the wife acquires during the coverture, yet, if damages be claimed for an injury to her person or reputation during her coverture, those damages belong to her, and she must be joined with the husband in the suit. When damages for such an in-

jury are collected they belong to the husband, but in case of his death before they are reduced to possession they survive to the wife, in the same manner as if the injury had been received before marriage." Reeve's Dom. Rel. 87.

"The wife has capacity to be a recipient of wrong as well as of property, the same as though she were sole. If she is slandered, or an assault and battery is committed upon her, or any trespass or other actionable wrong, she may, on becoming discovert, sue the wrong-doer the same as though she had been sole when she received the injury; though if the suit is brought in the lifetime of her husband, he must be made a party plaintiff with her, in consequence of the general rule of law which places the wife under the protection of her husband. When the result of the wrong becomes money, in the form of damages paid by the wrong-doer, the wife, though she can receive, cannot hold it, and the title glides to the husband, making the money his." Bishop on Mar. Wom. § 705. The authorities are uniform in supporting the position of these writers. *Latourete* v. *Williams*, 1 Barb. 9; *Klein* v. *Hentz*, 2 Duer, 633; *Ball* v. *Bullard*, 52 Barb. 142; *Beach* v. *Ranney*, 2 Hill, 309; *Smith* v. *Scudder*, 11 S. & R. 325; *Checchi* v. *Powell*, 6 Barn. & Cress. 253; *Bond* v. *Simmons*, 3 Atk. 20.

The cause of action for a personal injury to a married woman, whether committed before or after marriage, belonged to her at common law, or else it would not survive to her upon the death of her husband. If it was his it would either abate or pass to his personal representatives. On the other hand, if she dies, as Lord Bacon said: "The action dies with her." Bacon's Abr., Baron and Feme, K. Unless the right was hers, subject only to the disability to sue without her husband, why should it cease upon her death? Why should it not survive to the husband if the right itself was his? So in the case of an absolute divorce such rights of action remain the property of the wife. *Legg* v. *Legg*, 8 Mass. 99; *Lodge* v. *Hamilton*, 2 S. & R. 491. If the injury was to the wife only, the action was brought in the name of both husband and wife, and was, in effect, her action. If the injury was in part to her and in part to him, for the former both joined, but for the latter he sued alone. *Johnson* v. *Dicken*, 25 Mo. 580; *Hooper* v. *Haskell*, 56 Me. 251; *Laughlin* v. *Eaton*, 54 id. 156.

It is clear, therefore, that at common law the right of action

for a tort committed upon a married woman belonged to her, and it is in the light of this principle that the full significance of section 450 of the Code becomes apparent. This section recognizes the separate existence of the wife to the broad extent of authorizing her to sue generally in her own name. By enabling her to prosecute as if she were single, it removed the only obstacle in the way of a personal assertion of her right in this regard. She had a right of action for any actionable injury before, but she could not set the law in motion unless her husband joined. When the legislature provided that she could sue in her own name, without this inconvenient formality, it cut off the right of the husband, and permitted her to prosecute and recover for herself.

This view is confirmed by considering the history of legislation in relation to married women since 1848. Did the legislature suppose that, in repealing the sections in question of the acts of 1860 and 1862, they were restoring the rule of the common law and were depriving married women of substantial rights? (Endlich's Interpretation of Statutes, § 475.)

Every step in legislation, unless this is an exception, has been in the direction of the complete abrogation of the common-law unity of husband and wife. No step backward has been taken in that regard, unless this must be construed to be such.

The bar, the public and the courts have thus far all proceeded upon the theory that a married woman can still sue in her own name and for her own benefit for any injury to her person. It is a matter of common knowledge that, since the repealing act of 1880, in nearly every county of the state such actions have repeatedly been brought and tried, recoveries had and paid, and other actions brought that are now pending, upon the theory, adopted by both parties, that the right of a married woman to sue for personal injuries still exists. Even the exhaustive brief of the learned counsel for the appellant contains no suggestions to the contrary. This practical construction by the bar, the public, the legislature and the courts is of great value, because a contemporaneous is generally the best construction of a statute. Sedgwick on Stat. and Con. Law, 227.

The disastrous consequences that would result from the opposite construction cannot be lost sight of, because for nearly nine years the people have conducted their business, the lawyers have advised their clients and the courts have administered

justice without exception, so far as known, in unquestioned reliance upon the unchanged rights of married women, with reference to torts committed upon them. If such a radical change was effected by the repealing act, why was it not sooner discovered? By section 1906 of the Code of Civil Procedure an action for slander by the use of words imputing unchastity can be maintained by a woman without proof of special damage, and "if the plaintiff is married, the damages recovered are her separate property."

Was this section left simply as a landmark to show how far the tide of legislation had gone in the direction of emancipating married women before it began to flow back toward the old level of the common law? Is it not rather part of a harmonious system designed to permit married women to seek redress in their own names and for their own benefit, for any violation of their rights, whether of person or property? According to the Code of Procedure, when a married woman was a party, her husband was a necessary party with her, unless the action concerned her separate property, or it was between herself and husband. Code Pro. § 114; Laws of 1849, chap. 438, § 114. It was not by virtue of that Code, but owing to the acts of 1860 and 1862, that a married woman could sue for personal injuries.

From 1849 until 1877, section 114 of the old Code remained unchanged in this respect. When section 450 of the new Code was enacted it was a substitute for section 114, and the revisers, in reporting the new section said: "It is believed that no argument is necessary in support of the proposition that what is left of that section by the various married women's acts should be swept away."

The object of the repealing act of 1880, as well as that of its precursor of 1877, as is evident from an attentive study of their provisions, was to do away with statutes and parts of statutes regarded as obsolete. Laws of 1877, chap. 417; Laws of 1880, chap. 245.

Owing to the enactment of the Code of Civil Procedure and other statutes revising and changing existing laws without repealing or referring to them, the legislature sought to repeal statutes and sections no longer regarded as operative. Its intention was to formally do away with that which had already been practically done away with, rather than to make further

changes. If the legislature had intended to make a radical alteration in its long established policy of legislation affecting the rights of married women, it would not ordinarily be buried in the midst of an act designed to erase useless provisions from the statute book. One would not expect that such a decided change, affecting nearly every family in the state, would be so obscurely made.

These views are not in conflict with *Fitzgerald* v. *Quann*, 109 N. Y. 441, which holds that in an action against the wife for a tort committed by her, as the husband is still liable, he is a proper party defendant.

At common law the husband was liable for the torts of his wife, whereas her choses in action, including the right to recover for torts inflicted upon her, never vested in him, although he was entitled to the proceeds when collected. As a party plaintiff, therefore, he was joined "for conformity," but it was "more than a mere necessity to join him as a party defendant." *Fitzgerald* v. *Quann*, 33 Hun, 657, 658. His joinder in the one case was a mere formality, while in the other it was on account of his liability. While he had no cause of action in the former, there was a cause of action against him in the latter.

We regard the language of section 450, when construed in connection with the common-law rules already alluded to, as strong enough to relieve a married woman of the formality of having her husband unite with her in bringing an action for an injury inflicted upon her, but not strong enough to relieve him of his absolute liability.

We think the judgment appealed from should be affirmed upon the ground that the common law gave the plaintiff a right of action, and that the Code gave her an appropriate remedy.

All concur except Haight and Parker, JJ., dissenting, and Follett, Ch. J., not sitting.

Judgment affirmed. [1]

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[1] Concurring opinion by Bradley, J., omitted.

DEFAMATION.[1]

THE LAW DISTINGUISHES BETWEEN SPOKEN AND WRITTEN DEFAMATION.

Thorley v. Kerry.

(4 Taunton, 355.—1812.)

Mansfield, C. J. This is a writ of error, brought to reverse a judgment of the Court of King's Bench, in which there was no argument. It was an action on a libel published in a letter, which the bearer of the letter happened to open. The declaration has certainly some very curious recitals. It recites that the plaintiff was tenant to Archibald Lord Douglas of a messuage in Petersham, that being desirous to become a parishioner and to attend the vestry, he agreed to pay the taxes of the said house; that the plaintiff in error was church-warden, and that the defendant in error gave him notice of his agreement with Lord Douglas, and that the plaintiff in error, intending to have it believed that the said earl was guilty of the offences and misconducts thereinafter mentioned (offences there are none, misconduct there may be),[2] wrote the letter to the said earl which

[1] Defamation, accomplished by means of libel or slander, is the generic name for injury to reputation. "It does not seem to be definitely settled whether the right of reputation must be respected at peril,—as is true, for example, of the right of personal security, or of freedom of locomotion. Moreover, malice is an essential ingredient of the wrong. Accordingly, while the right to reputation is a natural, as distinguished from an acquired, one, it can scarcely be accurately called an absolute right." Jaggard on Torts, 475.

Libel is defamatory matter, made known to a third person by means of writing or its equivalent, addressed to the eye or its equivalent, and is a criminal as well as a civil wrong.

Slander is defamatory matter, made known to a third person by means of the tongue or its equivalent, addressed to the ear or its equivalent, and is a civil wrong only.

[2] The letter in question substantially charged the plaintiff with hypocrisy, malice, uncharitableness and falsehood.

is set forth in the pleadings. There is no doubt that this was a libel, for which the plaintiff in error might have been indicted and punished; because, though the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt, and ridicule; for all words of that description an indictment lies; and I should have thought that the peace and good name of individuals were sufficiently guarded by the terror of this criminal proceeding in such cases. 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 and 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 a 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 shows 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 a 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.

Judgment affirmed.

ACTIONABLE SLANDER.[1]

Pollard v. Lyon.

(91 United States, 225.—1875.)

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 the 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 ten thousand dollars."

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

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[1] "Slander is an actionable wrong when special damage can be shown to have followed from the utterance of the words complained of, and also in the following cases:

"Where the words impute a criminal offense.

"Where they impute having a contagious disease which would cause the person having it to be excluded from society.

"Where they convey a charge of unfitness, dishonesty, or incompetence in an office, profession or trade, in short, where they manifestly tend to prejudice a man in his calling.

"Spoken words which afford a cause of action without proof of special damage are said to be actionable *per se:* the theory being that their tendency to injure the plaintiff's reputation is so manifest that the law does not require evidence of their having actually injured it." Pollock on Torts, 206.

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 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.

Definitions of slander will afford very little aid in disposing of any question involved in this record, or in any other, ordinarily arising in such a controversy, unless where it becomes necessary to define the difference between oral and written defamation, or to prescribe a criterion to determine, in cases where special damage is claimed, whether the pecuniary injury alleged naturally flows from the speaking of the words set forth in the declaration. Different definitions of slander are given by different commentators upon the subject; but it will be sufficient to say that oral slander, as a cause of action, may be divided into five classes, as follows: (1.) Words falsely spoken of a person which impute to the party the commission of some criminal offence involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. (2.) Words falsely spoken of a person which impute that the party is infected with some contagious disease, where, if the charge is true, it would exclude the party from society; or, (3.) Defamatory words falsely spoken of a person, which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment. (4.) Defamatory words falsely spoken of a party which prejudice such party in his or

her profession or trade. (5.) Defamatory words falsely spoken of a person, which, though not in themselves actionable, occasion the party special damage.

Two propositions are submitted by the plaintiff to show that the court below erred in sustaining the motion in arrest of judgment, and in deciding that the declaration is bad in substance: (1.) That the words set forth in the declaration are in themselves actionable, and consequently that the plaintiff is entitled to recover, without averring or proving special damage. (2.) That if the words set forth are not actionable *per se*, still the plaintiff is entitled to recover under the second paragraph of the declaration, which, as she insists, contains a sufficient allegation that the words spoken of her by the defendant were, in a pecuniary sense, injurious to her, and that they did operate to her special damage.

Certain words, all admit, are in themselves actionable, because the natural consequence of what they impute to the party is damage, as if they import a charge that the party has been guilty of a criminal offence involving moral turpitude, or that the party is infected with a contagious distemper, or if they are prejudicial in a pecuniary sense to a person in office or to a person engaged as a livelihood in a profession or trade; but in all other cases the party who brings an action for words must show the damage he or she has suffered by the false speaking of the other party.

Where the words are intrinsically actionable, the inference or presumption of law is that the false speaking occasions loss to the plaintiff; and it is not necessary for the plaintiff to aver that the words alleged amount to the charging of the described offence, for their actionable quality is a question of law, and not of fact, and will be collected by the court from the words alleged and proved, if they warrant such a conclusion.

Unless the words alleged impute the offence of adultery, it can hardly be contended that they impute any criminal offence for which the party may be indicted and punished in this district; and the court is of the opinion that the words do not impute such an offence, for the reason that the declaration does not allege that either the plaintiff or the defendant was married at the time the words were spoken. Support to that view is derived from what was shown at the argument, that fornication as well as adultery was defined as an offence by the provincial

statute of the 3d of June, 1715, by which it was enacted that persons guilty of those offences, if convicted, should be fined and punished as therein provided. Kilty's Laws, ch. xxvii., sects. 2, 3.

Beyond all doubt, offences of the kind involve moral turpitude; but the second section of the act which defined the offence of fornication was, on the 8th of March, 1785, repealed by the legislature of the State. 2 Kilty, ch. xlvii., sect. 4.

Sufficient is remarked to show that the old law of the province defining such an offence was repealed by the law of the State years before the territory, included within the limits of the city, was ceded by the State to the United States; and inasmuch as the court is not referred to any later law passed by the State, defining such an offence, nor to any act of Congress to that effect passed since the cession, our conclusion is that the plaintiff fails to show that the words alleged impute any criminal offence to the plaintiff for which she can be indicted and punished.

Suppose that is so: still the plaintiff contends that the words alleged, even though they do not impute any criminal offence to the plaintiff, are nevertheless actionable in themselves, because the misconduct which they *do* impute is derogatory to her character, and highly injurious to her social standing.

Actionable words are doubtless such as naturally imply damage to the party; but it must be borne in mind that there is a marked distinction between slander and libel, and that many things are actionable when written or printed and published which would not be actionable if merely spoken, without averring and proving special damage. *Clements* v. *Chivis*, 9 Barn. & Cress. 174; *McClurg* v. *Ross*, 5 Binn. 219.

Unwritten words, by all, or nearly all, the modern authorities, even if they impute immoral conduct to the party, are not actionable in themselves, unless the misconduct imputed amounts to a criminal offence, for which the party may be indicted and punished. Judges as well as commentators, in early times, experienced much difficulty in extracting any uniform definite rule from the old decisions in the courts of the parent country to guide the inquirer in such an investigation; nor is it strange that such attempts have been attended with so little success, as it is manifest that the incongruities are quite material, and, in some respects, irreconcilable. Nor are the decisions of the

courts of that country, even of a later period, entirely free from that difficulty.

Examples both numerous and striking are found in the reported decisions of the period last referred to, of which only a few will be mentioned. Words which of themselves are actionable, said Lord Holt, must either endanger the party's life, or subject him to infamous punishment; that it is not enough that the party may be fined and imprisoned, for a party may be fined and imprisoned for a common trespass, and none will hold that to say one has committed a trespass will bear an action; and he added that at least the thing charged must "in itself be scandalous." *Ogden* v. *Turner*, 6 Mod. 104.

Viewed in any proper light, it is plain that the judge who gave the opinion in that case meant to decide that words, in order that they may be actionable in themselves, must impute to the party a criminal offence affecting the social standing of the party, for which the party may be indicted and punished.

Somewhat different phraseology is employed by the court in the next case to which reference will be made. *Onslow* v. *Horne*, 3 Wil. 186. In that case, DeGray, C. J., said the first rule to determine whether words spoken are actionable is, that the words must contain an express imputation of some crime liable to punishment, some capital offence or other infamous crime or misdemeanor, and that the charge must be precise. Either the words themselves, said Lord Kenyon, must be such as can only be understood in a criminal sense, or it must be shown by a colloquium in the introductory part that they have that meaning; otherwise they are not actionable. *Holt* v. *Scholefield*, 6 Term, 694.

Separate opinions were given by the members of the court in that case; and Mr. Justice Lawrence said that the words must contain an express imputation of some crime liable to punishment, some capital offence or other infamous crime or misdemeanor; and he denied that the meaning of words not actionable in themselves can be extended by an innuendo. 4 Co. 17 *b*.

Prior to that, Lord Mansfield and his associates held that words imputing a crime are actionable, although the words describe the crime in vulgar language, and not in technical terms; but the case does not contain an intimation that words which do not impute a crime, however expressed, can ever be made

actionable by a colloquium or innuendo. *Colman* v. *Godwin*, 3 Doug. 90; *Woolnoth* v. *Meadows*, 5 East, 463.

Incongruities, at least in the forms of expression, are observable in the cases referred to, when compared with each other; and when those cases, with others not cited, came to be discussed and applied in the courts of the States, the uncertainty as to the correct rule of decision was greatly augmented. Suffice it to say, that it was during the period of such uncertainty as to the rule of decision when a controversy bearing a strong analogy to the case before the court was presented for decision to the Supreme Court of the State of New York, composed, at that period, of some of the ablest jurists who ever adorned that bench.

Allusion is made, in the opinion given by Judge Spencer, to the great "uncertainty in the law upon the subject;" and, having also adverted to the necessity that a rule should be adopted to remove that difficulty, he proceeds, in the name of the court, to say, "In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject the party to an infamous punishment, then the words will be in themselves actionable;" and that rule has ever since been followed in that State, and has been very extensively adopted in the courts of other States. *Brooker* v. *Coffin*, 5 Johns. 190; 1 Am. Lead. Cas. (5th ed.) 98.

When he delivered the judgment in that case, he was an associate justice of the court; Chancellor Kent being the chief justice, and participating in the decision. Fourteen years later, after he became chief justice of the court, he had occasion to give his reasons somewhat more fully for the conclusion then expressed. *Van Ness* v. *Hamilton*, 19 Johns. 367.

On that occasion he remarked, in the outset, that there exists a decided distinction between words spoken and written slander; and proceeded to say, in respect to words spoken, that the words must either have produced a temporal loss to the plaintiff by reason of special damage sustained from their being spoken, or they must convey a charge of some act criminal in itself and indictable as such, and subjecting the party to an infamous punishment, or they must impute some indictable offence involving moral turpitude; and, in our judgment, the rule applicable in such a case is there stated with sufficient fullness, and with great clearness and entire accuracy.

Controverted cases involving the same question, in great numbers, besides the one last cited, have been determined in that State by applying the same rule, which, upon the fullest consideration, was adopted in the leading case,—that in case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject the party to an infamous punishment, then the words will be in themselves actionable.

Attempt was made by counsel in the case of *Widrig* v. *Oyer*, 13 Johns. 124, to induce the court to modify the rule by changing the word "or" into "and;" but the court refused to adopt the suggestion, and repeated and followed the rule in another case reported in the same volume. *Martin* v. *Stillwell*, 13 id. 275. See also *Gibbs* v. *Dewey*, 5 Cowen, 503; *Alexander* v. *Dewey*, 9 Wend. 141; *Young* v. *Miller*, 3 Hill, 22; in all of which the same rule is applied.

Other cases equally in point are also to be found in the reported decisions of the courts of that State, of which one or two more only will be referred to. *Bissell* v. *Cornell*, 24 Wend. 354. In that case, the words charged were fully proved; and the defendant moved for a nonsuit, upon the ground that the words were not in themselves actionable; but the circuit judge overruled the motion, and the defendant excepted. Both parties were subsequently heard in the Supreme Court of the State, Nelson, C. J., giving the opinion of the court, in which it was held that the words were actionable; and the reason assigned for the conclusion is, that the words *impute an indictable offence involving moral turpitude.*

Defamatory words to be actionable *per se*, say that court, must impute a crime involving moral turpitude punishable by indictment. It is not enough that they impute immorality or moral dereliction *merely*, but the offence charged must be also indictable. At one time, said the judge delivering the opinion, it was supposed that the charge should be such, as, if true, would subject the party charged to an infamous punishment; but the Supreme Court of the State refused so to hold. *Widrig* v. *Oyer*, 13 Johns. 124; *Wright* v. *Page*, 3 Keyes, 582.

Subject to a few exceptions, it may be stated that the courts of other States have adopted substantially the same rule, and that most of the exceptional decisions are founded upon local statutes defining fornication as a crime, or providing that words

imputing incontinence to an unmarried female shall be construed to impute to the party actionable misconduct.

Without the averment and proof of special damage, says Shaw, C. J., the plaintiff, in an action on the case for slander, must prove that the defendant uttered language the effect of which was to charge the plaintiff with some crime or offence punishable by law. *Dunnell* v. *Fiske*, 11 Met. 552.

Speaking of actions of the kind, Parker, C. J., said that words imputing crime to the party against whom they are spoken, which, if true, would expose him to disgraceful punishment, or imputing to him some foul and loathsome disease which would expose him to the loss of his social pleasures, are actionable, without any special damage; while words perhaps equally offensive to the individual of whom they are spoken, but which impute only some defect of moral character, are not actionable, unless a special damage is averred, or unless they are referred, by what is called a *colloquium*, to some office, business or trust which would probably be injuriously affected by the truth of such imputations. *Chaddock* v. *Briggs*, 13 Mass. 252.

Special reference is made to the case of *Miller* v. *Parish*, 8 Pick. 385, as authority to support the views of the plaintiff; but the court here is of the opinion that it has no such tendency. What the court in that case decided is, that whenever an offence is imputed, which, if proved, may subject the party to punishment, though not ignominious, but which brings disgrace upon the party falsely accused, such an accusation is actionable; which is not different in principle from the rule laid down in the leading case, — that if the charge be such, that, if true, it will subject the party falsely accused to an indictment for a crime involving moral turpitude, then the words will be in themselves actionable.

Early in her history the legislature of Massachusetts defined the act of fornication as a criminal offence, punishable by a fine, and which may be prosecuted by indictment; and, if the person convicted does not pay the fine, he or she may be committed to the common jail or to the house of correction. None of the counts in that case contained an averment of special damage; but the court held, that, inasmuch as the words alleged imputed a criminal offence which subjected the party to punishment involving disgrace, the words were actionable; and it is not doubted that the decision is correct. Exactly the same ques-

tion was decided by the same court in the same way twenty-five years later. *Kenney* v. *Laughlin*, 3 Gray, 5; 1 Stat. Mass. 1786, 293. Other State courts, where the act of fornication is defined by statute as an indictable offence, have made similar decisions; but such decisions do not affect any question involved in this investigation. *Vandcrip* v. *Roe*, 23 Penn. St. 182; 1 Am. Lead. Cas. (5th ed.) 103; *Simons* v. *Carter*, 32 N. H. 459; Sess. Laws (Penn. 1860,) 382; Purdon's Dig. 1824, 313.

That the words uttered import the commission of an offence, say the court, cannot be doubted. It is the charge of a crime punishable by law, and of a character to degrade and disgrace the plaintiff, and exclude her from society. Though the imputation of crime, said Bigelow, J., is a test, whether the words spoken do amount to legal slander, yet it does not take away their actionable quality if they are so used as to indicate that the party has suffered the penalty of the law, and is no longer exposed to the danger of punishment. *Krebs* v. *Oliver*, 12 Gray, 242; *Fowler* v. *Dowdney*, 2 M. & Rob. 119.

Courts affix to words alleged as slanderous their ordinary meaning: consequently, says Shaw, C. J., when words are set forth as having been spoken by the defendant of the plaintiff, the first question is, whether they impute a charge of felony or any other infamous crime punishable by law. If they do, an innuendo, undertaking to state the same in other words, is useless and superfluous; and, if they do not, an innuendo cannot aid the averment, as it is a clear rule of law that an innuendo cannot introduce a meaning to the words broader than that which the words naturally bear, unless connected with proper introductory averments. *Alexander* v. *Angle*, 1 Crompt. & Jer. 143; *Goldstein* v. *Foss*, 2 Younge & Jer. 146; *Carter* v. *Andrews*, 16 Pick. 5; *Beardsley* v. *Tappan*, 2 Blatch. 588.

Much discussion of the cases decided in the Supreme Court of Pennsylvania is quite unnecessary, as we have the authority of that court for saying that the leading cases establish the principle, that words spoken of a private person are only actionable when they contain a plain imputation, not merely of some indictable offence, but one of an infamous character, or subject to an infamous or disgraceful punishment; and that an innuendo cannot alter, enlarge, or extend their natural and obvious meaning, but only explain something already sufficiently averred, or make a more explicit application of that which

might otherwise be considered ambiguous to the material subject-matter properly on the record, by the way of averment or colloquium. *Gosling* v. *Morgan*, 32 Penn. St. 275; *Shafter* v. *Kinster*, 1 Binn. 537; *McClurg* v. *Ross*, 5 id. 218; *Andres* v. *Koffenheafer*, 3 S. & R. 255.

State courts have in many instances decided that words are in themselves actionable whenever a criminal offence is charged, which, if proved, may subject the party to punishment, though not ignominious, and which brings disgrace upon the complaining party; but most courts agree that no words are actionable *per se* unless they impute to the party some criminal offence which may be visited by punishment either of an infamous character, or which is calculated to affect the party injuriously in his or her social standing. *Buck* v. *Hersey*, 31 Me. 558; *Mills* v. *Wimp*, 10 B. Monr. 417; *Perdue* v. *Burnett*, Minor, 138; *Demarest* v. *Haring*, 6 Cow. 76; Townsend on Slander, sect. 154; 1 Wendell's Stark. on Slander, 43; *Redway* v. *Gray*, 31 Vt. 297.

Formulas differing in phraseology have been prescribed by different courts: but the annotators of the American Leading Cases say that the Supreme Court of the State of New York, in the case of *Brooker* v. *Coffin*, appear "to have reached the true principle applicable to the subject;" and we are inclined to concur in that conclusion, it being understood that words falsely spoken of another may be actionable *per se* when they impute to the party a criminal offence for which the party may be indicted and punished, even though the offence is not technically denominated infamous, if the charge involves moral turpitude, and is such as will affect injuriously the social standing of the party. 1 Am. Lead. Cas. (5th ed.) 98.

Decided support to that conclusion is derived from the English decisions upon the same subject, especially from those of modern date, many of which have been very satisfactorily collated by a very able text-writer. Addison on Torts (3d ed.), 765. Slander, in writing or in print, says the commentator, has always been considered in our law a graver and more serious wrong and injury than slander by word of the mouth, inasmuch as it is accompanied by greater coolness and deliberation, indicates greater malice, and is in general propagated wider and farther than oral slander. Written slander is punishable in certain cases, both criminally and by action, when the mere speaking of the words would not be punishable in either way.

Villiers v. *Mousely*, 2 Wils. 403; *Saville* v. *Jardine*, 2 H. Bl. 532; Bac. Abr. Slander, B.; *Keiler* v. *Sessford*, 2 Cr. C. C. 190.

Examples of the kind are given by the learned commentator; and he states that verbal reflections upon the chastity of an unmarried female are not actionable, unless they have prevented her from marrying, or have been accompanied by special damage; but, if they are published in a newspaper, they are at once actionable, and substantial damages are recoverable. 2 Bl. Com. 125, n. 6; *Janson* v. *Stuart*, 1 Term, 784.

Comments are made in respect to verbal slander under several heads, one of which is entitled defamatory words not actionable without special damage; and the commentator proceeds to remark that mere vituperation and abuse by word of mouth, however gross, is not actionable unless it is spoken of a professional man or tradesman in the conduct of his profession or business. Instances of a very striking character are given, every one of which is supported by the authority of an adjudged case. *Lumby* v. *Allday*, 1 Crompt. & Jer. 301; *Barnet* v. *Allen*, 3 H. & N. 376.

Even the judges holding the highest judicial stations in that country have felt constrained to decide, that to say of a married female that she was a liar, an infamous wretch, and that she had been all but seduced by a notorious libertine, was not actionable without averring and proving special damage. *Lynch* v. *Knight*, 9 H. of L. Cas. 594.

Finally, the same commentator states that words imputing to a single woman that she gets her living by imposture and prostitution, and that she is a swindler, are not actionable, even when special damage is alleged, unless *it is proved*, and the proposition is fully sustained by the cases cited in its support. *Welby* v. *Elston*, 8 M. G. & S. 142; Addison on Torts (3d ed.), 788; Townsend on Slander, sects. 172 and note, 516–518.

Words actionable in themselves, without proof of special damage, are next considered by the same commentator. His principal proposition under that head is that words imputing an indictable offence are actionable *per se* without proof of any special damage, giving as a reason for the rule that they render the accused person liable to the pains and penalties of the criminal law. Beyond question, the authorities cited by the author support the proposition, and show that such is the rule of decision in all the courts of that country having jurisdiction in

such cases. *Heming* v. *Power*, 10 Mees. & Wels. 570; *Alfred* v. *Farlow*, 8 Q. B. 854; *Edsall* v. *Russell*, 5 Scott, N. R. 801; *Brayne* v. *Cooper*, 5 Mees. & Wels. 250; *Barnet* v. *Allen*, 3 H. & N. 378; *Davies* v. *Solomon*, 41 Law Jour. Q. B. 11; *Roberts* v. *Roberts*, 5 B. & S. 389; *Perkins* v. *Scott*, 1 Hurlst. & Colt. 158.

Examined in the light of these suggestions 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 that 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. *Scott*, 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. *Wilcox*, 8 East, 3; *Knight* v. *Gibbs*, 1 Ad. & Ell. 46; *Ayre* v. *Craven*, 2 id. 8; *Roberts* v. *Roberts*, 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 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 substan-

tial or material advantage has resulted from the speaking of the words. Addison on Torts (3d ed.), 805; *Wilby* v. *Elston*, 8 C. B. 148.

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*, 3 S. & R. 256; *Buys* v. *Gillespie*, 2 Johns. 117.

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.

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. 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. *Pomfreicht*, 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 sufficient 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 Term. 133; Addison on Torts, 805; Hilliard on Remedies (2d ed.), 622; *Beach* v. *Ranney*, 2 Hill, 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.

SLANDER WITH SPECIAL DAMAGE.

Terwilliger v. Wands.

(17 New York, 54.—1858.)

Appeal from a judgment of the General Term of the Supreme Court, affirming a judgment of the Trial Term dismissing the complaint, in an action for slander charging the plaintiff, a man, with lewd and unchaste conduct. The plaintiff alleged, by way of special damage, that in consequence of the speaking of the words, he had suffered great pain of body and mind, that he became sick and disabled, and unable to attend to his business.

At the close of the evidence, the defendant moved for a nonsuit, upon two grounds, 1st. That the words were not spoken by the defendant to the plaintiff, nor authorized by him to be communicated to the plaintiff; and 2d. That there was no evidence that the damages, if any were proved, were occasioned by the speaking of the words by the defendant. The motion was granted, and the plaintiff excepted and appealed from the judgment entered upon the nonsuit.

Strong, J. The words spoken by the defendant not being actionable of themselves, it was necessary in order to maintain the action to prove that they occasioned special damages to the plaintiff. The special damages must have been the natural, immediate and legal consequence of the words. Stark. on Sland. by Wend. 2d ed. 203; 2 id. 62, 64; *Beach* v. *Ranney*, 2 Hill, 309; *Crain* v. *Petrie*, 6 id. 523; *Kendall* v. *Stone*, 1 Seld. 14. Where words are spoken to one person and he repeats them to another, in consequence of which the party to whom they are spoken sustains damages, the repetition is, as a general rule, a wrongful act, rendering the person repeating them liable in like manner as if he alone had uttered them. The special damages in such a case are not a natural, legal consequence of the first speaking of the words, but of the wrongful act of repeating them, and would not have occurred but for the repetition; and the party who repeats them is alone liable for the damages. *Ward* v. *Weeks*, 7 Bing. 211; *Hastings* v. *Palmer*, 20 Wend. 225; *Keenholts* v. *Becker*, 3 Denio, 346; *Stevens* v. *Hartwell*, 11 Metc. 542. These views dispose of this case as to

the right of action in respect to all the words but those spoken to the witness Neiper, as none of them were spoken by the defendant in the presence of the plaintiff, or communicated to the plaintiff by the witnesses to whom they were spoken by the defendant; and there is no proof as to the circumstances under which they were repeated by those witnesses. In the absence of evidence of those circumstances, the general rule, that a repetition of slanderous words is wrongful, applies; hence any damages which resulted from repeating them are a consequence of that wrong, and not a natural, immediate and legal effect of the original speaking of the words by the defendant.

In regard to the words spoken by the defendant to Neiper, it is proved that they were communicated by the latter to the plaintiff, and that Neiper was at the time an intimate friend of the plaintiff. This friendly relation, it is claimed on the part of the plaintiff, rendered the communication of Neiper to him proper; and, being so, it is insisted that the defendant is responsible for the consequences, in the same manner as if the words had been spoken directly to the plaintiff. There are several cases in which it is suggested that circumstances may exist which will justify the repetition of slanderous words, and that when repeated under such circumstances, and damages ensue, the first speaker may be liable in like manner as he would be if the injury had arisen from the words without the repetition. *Ward* v. *Weeks*, 7 Bing. 211; *Keenholts* v. *Becker*, 3 Denio, 346; *Olmsted* v. *Brown*, 12 Barb. 657; *McPherson* v. *Daniels*, 10 Barn. & Cress. 263. Occasions may doubtless occur where the communication of slanderous words by a person who heard them will be innocent; and it is certainly reasonable that when repeated on such an occasion and damages result, the first speaker should be held responsible for the damages, as flowing directly and naturally from his own wrong. It is not necessary in the present case to decide whether the proposition is law; for, assuming it to be so, and that illness and inability to labor constitute such special damages as will support an action, the evidence in this case wholly fails to show that the damages were a consequence of the words spoken by the defendant to Neiper. The proof is that they were mainly the result of the repetition of the words spoken to the witness Wands, and reports of other persons. It was not until a considerable time after the plaintiff was informed by Neiper what the defendant had said to the

latter that he began to be ill; and his illness commenced immediately after the communication to him of what had been said by La Fayette Wands. At that time the plaintiff had been informed of charges made by Fuller to the same effect, and it is a fair conclusion upon the proof that he then knew what the witness Wands says was the fact, that "the story was all over the country." Under these circumstances it is impossible to conclude that what the defendant stated to Neiper produced the damages. 1 Stark. on Sland. 205; *Vicars* v. *Wilcocks*, 8 East, 1; *Crain* v. *Petrie*, 6 Hill, 522.

But there is another ground upon which the judgment must be affirmed. The special damages relied upon are not of such a nature as will support the action. The action for slander is given by the law as a remedy for "injuries affecting a man's reputation or good name by malicious, scandalous and slanderous words, tending to his damage and derogation." 3 Bl. Com. 123; Stark. on Sland. Prelim. Obs. 22–29; 1 id. 17, 18. It is injuries affecting the reputation only which are the subject of the action. In the case of slanderous words actionable *per se*, the law, from their natural and immediate tendency to produce injury, adjudges them to be injurious, though no special loss or damage can be proved. "But with regard to words that do not apparently and upon the face of them import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened." 3 Bl. Com. 124. As to what constitutes special damages, Starkie mentions the loss of a marriage, loss of hospitable, gratuitous entertainment, preventing a servant or bailiff from getting a place, the loss of customers by a tradesman; and says that in general whenever a person is prevented by the slander from receiving that which would otherwise be conferred upon him, though gratuitously, it is sufficient. 1 Stark. on Sland. 195, 202; Cook's Law of Def. 22–24. In *Olmsted* v. *Miller*, 1 Wend. 506, it was held that the refusal of civil entertainment at a public house was sufficient special damage. So in *Williams* v. *Hill*, 19 Wend. 305, was the fact that the plaintiff was turned away from the house of her uncle and charged not to return until she had cleared up her character. So in *Beach* v. *Ranney*, was the circumstance that persons, who had been in the habit of doing so, refused longer to provide fuel, clothing, etc. 2 Stark. on Ev. 872, 873. These instances are sufficient to illustrate the

kind of special damage that must result from defamatory words not otherwise actionable to make them so; they are damages produced by, or through, impairing the reputation.

It would be highly impolitic to hold all language, wounding the feelings and affecting unfavorably the health and ability to labor, of another, a ground of action; for that would be to make the right of action depend often upon whether the sensibilities of a person spoken of are easily excited or otherwise; his strength of mind to disregard abusive, insulting remarks concerning him; and his physical strength and ability to bear them. Words which would make hardly an impression on most persons, and would be thought by them, and should be by all, undeserving of notice, might be exceedingly painful to some, occasioning sickness and an interruption of ability to attend to their ordinary avocations. There must be some limit to liability for words not actionable *per se*, both as to the words and the kind of damages; and a clear and wise one has been fixed by the law. The words must be defamatory in their nature; and must in fact disparage the character; and this disparagement must be evidenced by some positive loss arising therefrom directly and legitimately as a fair and natural result. In this view of the law words which do not degrade the character do not injure it, and cannot occasion loss. In Cook's Law of Def. (p. 24), it is said "in order to render the consequence of words spoken special damage, the words must be in themselves disparaging; for if they be innocent the consequence does not follow naturally from the cause." In *Kelly* v. *Partington*, 5 Barn. & Adolp. 645, which was an action for slander, the words in the declaration were, "She secreted 1*s*. 6*d*. under the till, stating these are not times to be robbed." It was alleged as special damage that by reason of the speaking of the words a third person refused to take the plaintiff into service. The plaintiff recovered one shilling damages, and the defendant obtained a rule *nisi* for arresting the judgment on the ground that the words, taken in their grammatical sense, were not disparaging to the plaintiff and therefore that no special damage could result from them. Denman, C. J., said: "The words do not of necessity import anything injurious to the plaintiff's character, and we think the judgment must be arrested unless there be something on the face of the declaration from which the court can clearly see that the slanderous matter alleged is

injurious to the plaintiff. Where the words are ambiguous, the meaning can be supplied by *innuendo;* but that is not the case here. The rule for arresting the judgment must therefore be made absolute." LITTLEDALE, J., said: "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 Comyns' Digest, title, 'Action on the Case for Defamation,' (D. 730), 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 the 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 were spoken." TAUNTON, J., said: "The expression ascribed to the defendant 'these are not times to be robbed' seems to be saying the times are so bad I must hide my money. If Stenning refused to take the plaintiff into his service on this account he acted without reasonable cause; and in order to make words actionable, they must be such that special damage may be the fair and natural result of them." PATTESON, J., said: "I have always understood that the special damage must be the natural result of the thing done, etc. It is said that the words are actionable, because a person after hearing them, chose in his caprice to reject the plaintiff as a servant. But if the matter was not in its nature defamatory, the rejection of the plaintiff cannot be considered the natural result of the speaking of the words. To make the speaking of the words wrongful they must in their nature be defamatory. *Vicars* v. *Wilcocks*, 8 East, 1." It necessarily follows from the rule that the words must be disparaging to character, that the special damage to give an action must flow from disparaging it. In the case last cited the plaintiff actually suffered damage from the defendant's words by their bringing her into disrepute, but the words were not calculated to produce such a result and therefore the action would not lie. In the present case the words were defamatory, and the illness and physical prostration of the plaintiff may be assumed, so far as this part of the case is concerned, to have been actually produced by the slander, but this consequence was not, in a legal view, a natural, ordinary one, as it does not prove that the plaintiff's character was injured. The slander may not have

been credited by or had the slightest influence upon any one unfavorable to the plaintiff; and it does not appear that anybody believed it or treated the plaintiff any different from what they would otherwise have done on account of it. The cause was not adapted to produce the result which is claimed to be special damages. Such an effect may and sometimes does follow from such a cause but not ordinarily; and the rule of law was framed in reference to common and usual effects and not those which are accidental and occasional.

It is true that this element of the action for slander in the case of words not actionable of themselves—that the special damages must flow from impaired reputation—has been overlooked in several modern cases, and loss of health and consequent incapacity to attend to business held sufficient special damage. *Bradt* v. *Towsley*, 13 Wend. 253; *Fuller* v. *Fenner*, 16 Barb. 333; but these cases are a departure from principle and should not be followed. If such consequences were sufficient, it would not be necessary to allege in the complaint or prove that the words were spoken in the presence of a third person; if spoken directly to the plaintiff, in the presence of no one else, he might himself, under the recent law allowing parties to be witnesses, prove the words and the damages and be permitted to recover. It has been regarded as unnecessary to an action that the words should be published by speaking them in the presence of some person other than the plaintiff, both in the case of words actionable and those not actionable. 1 Stark. on Sland. 360; 2 id. 12; Cook's L. of Def. 87.

Where there is no proof that the character has suffered from the words, if sickness results it must be attributed to apprehension of loss of character, and such fear of harm to character, with resulting sickness and bodily prostration, cannot be such special damage as the law requires for the action. The loss of character must be a substantive loss, one which has actually taken place.

It is not necessary to decide whether the doctrine which has some support in the courts, that a husband may maintain an action for the slander of his wife producing sickness which prevents her attending to her ordinary business, if it conflicts with the principle now advanced, may be maintained upon some ground of exception to the general rule. It is doubtless true that in such cases the law regards more the loss of the wife's

services, which alone entitles the husband to sue, than the influence of the words upon her character, and the husband has no control over the effect of the words; whereas, in other cases, the injury to character, as shown by the special damages, is principally regarded, and unusual extraordinary consequences may be assumed to be in some measure under the control of the party complaining. Still, the objection that special damages of that nature are not a fair, ordinary, natural result of such a wrong, remains, and this objection appears to be alike applicable and entitled to the same force whether the action be brought by the husband or the party slandered. *Olmstead* v. *Brown*, 12 Barb. 657; *Keenholts* v. *Becker*, 3 Denio, 346.

Roosevelt, J., dissented; all the other judges concurring.

Judgment affirmed.

ACTIONABLE LIBEL. (1)

Pfitzinger v. Dubs.

(64 Federal Reporter, 696.—1894.)

Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Before Woods and Jenkins, Circuit Judges, and Bunn, District Judge.

Bunn, District Judge. This is an action brought by the plaintiff in error, a minister of the gospel, and a citizen of Buffalo, N. Y., against the defendants, citizens of Chicago, Ill., for printed libel. The defendants are, respectively, editor, manager,

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[1] "It is enough to make a written statement *prima facie* libellous that it is injurious to the character or credit (domestic, public, or professional) of the person concerning whom it is uttered, or in any way tends to cause men to shun his society, or to bring him into hatred or contempt, or ridicule. When we call a statement *prima facie* libellous, we do not mean that the person making it is necessarily a wrong-doer, but that he will be so held unless the statement is found to be within some recognized ground of justification and excuse." Pollock on Torts, 206.

and publisher of a German religious newspaper published at Chicago, Ill., called the Deutsche Allgemeine Zeitung. On the 22d day of September, 1893, they published in the said paper a communication of and concerning the plaintiff, purporting to be a letter from one H. Horn, of Syracuse, N. Y., in the German language, and which, translated into English, is as follows:

"From the State of New York.

"Dear Bro. Dubs: The Lord be with you. In the D. A. Z. there was recently asked, among other questions, one directed to L. Heinmiller, of Buffalo, New York. As it appears, L. Heinmiller will not answer this question. Why he will not answer it, he knows best. The question is, why does the preacher, L. Heinmiller, of Buffalo, N. Y., compare M. Pfitzinger with a rotten egg, if he has unwavering confidence in M. Pfitzinger? Who the questioner is, I do not know. Perhaps Bro. Heinmiller knows to how many other persons he has made this comparison, and since he does not answer the question I thought it my duty to answer this question myself, for there is a great deal connected with the question that I will not mention just at this time. Well, for the answer to this question: At the time when Pfitzinger was preparing to get me down, and I was preparing to meet him, I opportunely met L. Heinmiller. It was at the time when his brother, G. Heinmiller, was on the way from Germany to the conference at Indianapolis, and passing through Syracuse, and preaching in the evening at the Salem church. After the Divine service, when we, I and Heinmiller, had greeted each other, he at once said to me, 'Bro. Horn, do you think you can get Bro. Pfitzinger down?' I answered: 'I can and will prove my case.' Then Bro. Heinmiller replied: 'Bro. Horn, you cannot get Pfitzinger down any lower than he is. He is low enough. You cannot get him down any lower.' I was amazed to hear such a remark from the man, and said, 'Heinmiller, what do you say?' He said: 'It is a fact, he is low enough; you can't get him down any lower; you can't spoil a rotten egg. . . .' I was still more amazed, and said: 'Why, Heinmiller! how you do talk!' He said: 'That is true.' I was so amazed that I scarcely knew what to say, and wished him good night. This is what Bro. Heinmiller said to me of Pfitzinger, and, as it seems, he has made the same comparison to other persons. I hope that Bro. Heinmiller will

not deny this, for a time will come when he cannot deny it. I I think still more of Bro. Heinmiller. Still so much. When the conference in Indianapolis was held, and Pfitzinger got no office, I thought, so Bro. Heinmiller really knew why he spoke to me in such a manner of Pfitzinger, for what he knew his brother, G. Heinmiller, also knew; and what he knew and believed, those who were chosen as delegates to the Indianapolis conference also knew and believed. Brother Heinmiller, a word to you: Say also freely and openly that you have asserted to others that you have unwavering confidence in Pfitzinger, that you have been drawn into this current, your inner conviction is exactly the opposite, judging from your expressions.

"H. Horn, Syracuse, N. Y."

The declaration contains two counts,—the first charging that the article is a libel upon the plaintiff as an individual; the second, that the same words are a libel upon him in his special character as a minister of the gospel,—each count having appropriate colloquium, inducement, and innuendoes. No special damage is averred in either count, but only general damages are claimed. There were innuendoes contained in the declaration setting out this letter, showing the sense in which the most offensive portion of the charge would be understood, and the true meaning thereof to be that the plaintiff was totally unfit to be and remain a minister of the gospel, and that he had already fallen to the lowest possible degree of moral, physical, and intellectual filthiness and degradation. There were general and special demurrers put in to the declaration. Upon hearing, the general demurrer was sustained by the court; and, the plaintiff, choosing to stand by the declaration, judgment was entered against him, dismissing the action on the ground that, there being no averment of special damage, and the declaration not charging any specific character of dishonesty, crime, or immorality, the publication was not libelous, and the action could not be sustained.

The only question in the case is whether the demurrer was properly sustained, — that is to say, whether the words set out in the declaration are actionable, being published of and concerning the plaintiff in a public newspaper; and that depends upon the question whether the words are fairly capable of the construction put upon them by the plaintiff in his declaration.

If they are, then the question of the meaning should have been submitted to the jury. It is only where the words are incapable of a construction injurious to the plaintiff's character that the court is justified in taking the case from the jury. Townsh. Sland. & L. (4th ed.) p. 576; *Byrnes* v. *Matthews*, 12 N. Y. St. Rep. 74. The question of the meaning of the words is one of fact, for the jury, unless the court can see at a glance that they are incapable of a construction injurious to the plaintiff's character, and the court should understand the words in the same manner that other persons reading the published article would naturally understand them. That is to say, they are to be taken in their usual acceptation and meaning. Under the first count, if the words, taken in their usual and ordinary sense, as they would be understood by persons reading them, tend to injure or degrade the plaintiff morally or socially, then they are actionable *per se*. It is not essential that the words should impute dishonesty, crime, or immorality of any specific kind or character. If they tend to degrade or dishonor him, or injure his character, or hold him up to scorn, contempt, or ridicule, or render him of less esteem in the community, morally or socially, then the words are actionable when printed. Of course, the rule is different in slander, or mere spoken words, where it is necessary that some offense known to the law should be imputed. One of the leading cases in New York upon the subject is that of *Cooper* v. *Greeley*, 1 Denio, 347. There the words which Horace Greeley had published of and concerning Fenimore Cooper, were these:

"At all events, having published the letter excepted to as a matter of intelligence, without any sort of feeling towards Mr. Cooper, but such as his conduct in the case seemed to excite, we have at all times stood ready to publish cheerfully any correction or contradiction he might choose to send us. He chooses to send none, but a suit for libel instead. So be it then. Walk in, Mr. Sheriff! There is one comfort to sustain us under this terrible dispensation. Mr. Cooper will have to bring his action to trial somewhere. He will not like to bring it to trial in New York, for we are known here; nor in Otsego, for he is known there."

The declaration was demurred to, and the contention was that the words were not libelous. Of course, the charge is very indefinite. No particular crime or immorality is alleged.

But it was contended by the plaintiff that the words contained a charge that he was in bad repute in the county of Otsego, in consequence of being known in that county, and that on that account he would not like to bring a libel suit to trial there. The words were held to be libelous, and their true meaning to be fixed by the innuendo, and the demurrer was overruled.

In *White* v. *Nicholls*, 3 How. 266, the United States supreme court lay down the rule thus:

"With regard to that species of defamation which is effected by writing or printing or by pictures and signs, and which is technically denominated a 'libel,' although in general the rules applicable to it are the same which apply to verbal slander, yet in other respects it is treated with a sterner rigor than the latter, because it must have been effected with coolness and deliberation, and must be more permanent and extensive in its operation than words, which are frequently the offspring of sudden gusts of passion, and soon may be buried in oblivion. *Rex* v. *Beare*, 1 Ld. Raym. 414. It follows, therefore, that action may be maintained for defamatory words, published in writing or in print, which would not have been actionable if spoken. Thus, to publish of a man, in writing, that he had the itch, and smelt of brimstone, has been held to be a libel. Pr. Wilmot, C. J., in *Villers* v. *Monsley*, 2 Wils. 403. In *Cropp* v. *Tilney*, 3 Salk. 225, Holt, C. J., thus lays down the law: 'That scandalous matter is not necessary to a libel, it is enough if the defendant induces an ill opinion to be had of the plaintiff, or make him contemptible and ridiculous.' And Bayley, J., declares in *McGregor* v. *Thwaites*, 3 Barn. & C. 33, 'that an action is maintainable for slander either written or printed, provided the tendency of it be to bring a man into hatred, contempt, or ridicule.'"

In a very recent case decided by the supreme court of Wisconsin, and reported in 58 N. W. 245 (*Kay* v. *Jansen*), the complaint alleged that the plaintiff was the mother of Duncan Kay, who was committed to the Wisconsin Industrial School for Boys, August 15, 1893, and was still an inmate thereof; that plaintiff was a tenant of defendant at that time, and up to September 1, 1893; that defendant, knowing these facts, published on two large placards on either side of his express wagon, and for many days carried the same through the principal streets of Waupun, a false and scandalous libel of and concerning the plaintiff as follows: "We know the tree by the fruit,"—mean-

ing, according to the innuendo, that the son of the plaintiff was at the Wisconsin Industrial School for Boys, at Waukesha; he was therefore vagrant or a criminal, or incorrigible or vicious in conduct; and that she, the plaintiff, was likewise a vagrant or a criminal, or incorrigible or vicious in conduct. The court held that a general demurrer to the complaint was properly stricken out, the words placed upon the placards being, under the facts stated by way of innuendo, fairly susceptible of the opprobrious meaning ascribed to them in the innuendo. This case is in line with the former case by the same court. *Buckstaff* v. *Viall*, 84 Wis. 129, 54 N. W. 111. In that case the plaintiff whose name was Buckstaff, was a state senator residing in Oshkosh. In a newspaper article published in that city, the defendant had referred to the plaintiff as "Senator Bucksniff," and spoke of the "divine favor of Senator Bucksniff," "the legislative god of Winnebago county;" "His majesty Bucksniff;" "We are sensible, O dearly-beloved Bucksniff, of thy great wisdom and power, and humbly beseech thee," etc.; "Know, then, O divine senator, compared with whom all other senators are merely cyphers," etc. The declaration was demurred to, and the demurrer overruled, and the supreme court sustained the ruling, holding the article grossly libelous; and yet no specific charge of crime or immorality was made. The court held that the nickname itself was a term of reproach, as being in the similitude of, and suggesting the name of "Pecksniff," one of Charles Dickens' most hated and offensive characters. It was held that the whole article, in its general scope and meaning, was calculated to injure the plaintiff in his reputation and character, both as a citizen and senator, by bringing him into shame, disgrace, hatred, scorn, ridicule, and contempt.

In *Hake* v. *Brames*, 95 Ind. 161, words quite as indefinite and uncertain in their meaning were held libelous. Defendant had written a letter in which he said of the plaintiff:

"I know this same Brames. I was unfortunate enough to have him in my employ at one time as a bookkeeper. He is a liar. I would not believe him under oath."

Each of these sets of words was held libelous, although charging no crime, and the court quotes with approval from Folkard's Starkie on Slander (section 154) as follows:

"As to those libels which by holding a person up to scorn or ridicule, and, still more, to any stronger feeling of contempt or

execration, impair him in the enjoyment of general society, and injure those imperfect rights of friendly intercourse and mutual benévolence, which man has with respect to man, it is chiefly in this branch of libels, that the action for words spoken and for words written substantially differ."

So in *Rice* v. *Simmons*, 2 Har. (Del.) 417, it was said that:

"To make a publication libelous, it need not contain a direct and open charge. Though the law requires the imputation of something that will dishonor or degrade a man, or lessen his standing in society, it does not require that such imputation should be in express terms. If it did, it would extend but little protection to reputation. The character of a libel is to be judged by the effect it produces upon the mind. It does not always happen that you can at once put your finger upon the libelous matter, and the attempt to show in what it consists may depend much upon inferential reasoning, while yet the impression may be distinct upon the mind of every reader, and all the damage result to character that would arise from a plain and direct charge."

In *Solverson* v. *Peterson*, 64 Wis. 198, 25 N. W. 14, it was held that to state, in writing, of a man, that he "has turned into an enormous swine, which lives on lame horses, and that he will probably remain a swine the rest of his days," is libelous *per se*.

In *State* v. *Smily*, 37 Ohio St. 30, it was held by the supreme court of that state that where one falsely and maliciously publishes of and concerning another, that his house had been searched, under legal process, for the discovery of goods secretly stolen, and supposed to be secreted therein, he was guilty of libel, and that, where the language complained of as libelous will bear the meaning ascribed to it by the innuendo, whether such was the meaning intended is a question of fact, for the jury. In *Massuere* v. *Dickens*, 70 Wis. 83, 35 N. W. 349, the defendant had published the plaintiff as a "skunk," with accompanying epithets. The article was held libelous *per se*, though containing no more specific charges of immorality.

In *Cerveny* v. *News Co.*, 139 Ill. 345, 28 N. E. 692, the supreme court of Illinois held it libelous to publish that a man failed of an election because he was an anarchist. The court say:

"An action for libel may be sustained for words published which tend to bring the plaintiff into public hatred, contempt, or ridicule, even though the same words, spoken, would not have been actionable. And it would seem so apparent that an individual may be brought into hatred, contempt, or ridicule, within the meaning of the law, by professing vicious, degrading, or absurd principles, that it can need no discussion."

In *Price* v. *Whitely*, 50 Mo. 439, the following publication was held to be libelous:

"I found an imp of the devil, in the shape of Jim Price, sitting upon the mayor's seat; and now, sir, that imp of the devil, and cowardly snail, that shrinks back into his shell at the sight of the slightest shadow, had the bravery to issue an execution against me."

Here the charge is quite as general as could well be, and yet it was held calculated to injure the plaintiff in the eyes of the community, and therefore libelous.

In *Gaither* v. *Advertiser Co.* (Ala.), 14 South. 788, a publication to the effect that plaintiff was discharged from the superintendency of an office of the Farmers' Alliance because of a loss in the business, and that the books of such office, when balanced, showed a net profit of $5,000 on a much smaller business, and that the showing simply proved plaintiff to be a man of small business capacity, was held to be libelous *per se*, as reflecting on plaintiff's business capacity, though it could not be construed, by means of an innuendo, to charge dishonesty in conducting the office. In *Pledger* v. *State*, 3 S. E. 320, the supreme court of Georgia held that a newspaper article charging a real-estate agent with objecting to a negro tenant, who was thereby compelled to sell out his business at a loss, and advising colored people not to patronize the said agent, but to leave the "old skunk to himself, to stink himself to death," was libelous. In *Hayner* v. *Cowden*, 27 Ohio St. 292, it was held that words charging a minister of the gospel with drunkenness were actionable *per se*, without alleging special damage, when spoken of him in his official capacity. The same ruling was made in *Chaddock* v. *Briggs*, 13 Mass. 248. In *Ritchie* v. *Sexton*, 64 Law T. (N. S.) 210, defendant had written a letter containing this passage:

"Supposing, for example, I sent a question, based on hearsay evidence, to the effect that I heard from a gentleman, whom I

would not think of doubting, that you were in a state of delirium tremens, or suppose I had added to that further stories I had heard, that you were utterly intoxicated in the streets."

It was held that the words were fairly capable of being reasonably understood in a libelous sense, and that, therefore, there was a question to go to the jury.

In *Teacy* v. *M'Kenna*, 4 Ir. Com. Law, 374, the plaintiff declared upon a letter published in defendant's paper, in which it was alleged that the plaintiff, being an hotel and job coach proprietor by trade, and a Presbyterian in religion, had, from mere motives of intolerance, refused the use of his hearse for the funeral of his own deceased servant because the body was about to be interred in a Roman Catholic burial ground. It was held, on demurrer, that the court could not so clearly see that the letter could not be, in any view, libelous, as to justify them in withdrawing the case from the jury.

In view of these authorities, and many others which the court has examined, we have no hesitation in holding that it was error to withhold this case from the jury. Moreover, we think the publication of the letter declared upon to be grossly libelous *per se*, whether published, as charged in the first count, of the plaintiff as an individual citizen, or, as in the second count, as a minister of the gospel. The whole tenor and scope of the article, from first to last, is calculated to injure and degrade the plaintiff's character, and to hold him up to ridicule and contempt, and it was hardly necessary to introduce innuendoes to show the injurious character of the charges. The words, with the entire context, are to be taken and construed in their ordinary and natural meaning, as they would be most likely to be understood by persons reading the article; and if, in so construing them, they are not grossly libelous, it is difficult to conceive what language could be so. Take these words in connection with what precedes and follows:

"After the divine service, when we, I and Heinmiller, had greeted each other, he at once said to me: 'Bro. Horn, do you think you can get Bro. Pfitzinger down?' I answered: 'I can, and will prove my case.' Then Bro. Heinmiller replied: 'Bro. Horn, you cannot get Pfitzinger down any lower than he is. He is low enough. You cannot get him down any lower.' I was amazed to hear such a remark from the man and said: 'Heinmiller, what do you say?' He said, 'It is a fact, he is

low enough; you can't get him down any lower, you can't spoil a rotten egg. . . .' I was still more amazed, and said: 'Why, Heinmiller, how you talk.' He said, 'That is true.' I was so amazed that I scarcely knew what to say."

It needed no innuendo to show the meaning of such language. "Bad egg" is a well-known and commonly understood colloquium in this country for a bad or worthless person, and is so defined in the Century Dictionary (page 1853). The context also shows plainly the sense in which the words were used here. Where words have a well-understood meaning, an innuendo to show the injurious sense in which they are used is unnecessary. And the court should not be the only one that cannot understand and apply the proper meaning. The remarks of the English judges in the case of *Hoare* v. *Silverlock*, 12 Adol. & E. (N. S.) 624, seem quite as applicable to this case. The plaintiff, being the daughter of a deceased naval officer, had applied to the Royal Navy Benevolent Society for pecuniary assistance. Referring to this, defendants published of her that they were sorry to see her case had been reopened, and that the officer who reopened it had not heard her former application, and had thus missed hearing . . . the recantation of some who were her warmest friends, and who, in giving up their advocacy of her claims, had stated that they had realized the fable of the frozen snake. There was a verdict for the plaintiff. Upon a motion in arrest of judgment Lord Denman said:

"The third count (as above) is certainly good. . . . They are words well understood. There is no doubt they are commonly known in a libelous sense. It must have been left to the jury to say whether they were used in that sense or not."

Coleridge, J., said:

"As to the necessity of innuendo the jury and court, in such a case as this, are in an odd predicament, if they, alone of all persons, are not to understand the allusions complained of. Suppose the libel had said plaintiff had acted like a Judas; must the history of Judas have been given by innuendo? We ought to attribute to court and jury an acquaintance with ordinary terms and allusions, whether historical or figurative or parabolical."

And Earl, J., said:

"We cannot arrest the judgment unless we can see, on reading the whole passage complained of, that there could be no

ground for the construction they have adopted. Nothing is easier than to bring persons into contempt by allusion to names well known in history, or by mention of animals to which certain ideas are attached; and I may take judicial notice that the words 'frozen snake' have an application very generally known indeed, which application is likely to bring into contempt a person against whom it is directed."

The publication of such an article as the one in the case at bar can be accounted for only upon one or other of two grounds, —either that the publishers were declaring the truth, and only the truth, of and concerning the plaintiff, for the good of others, and with a commendable zeal to impress such truth upon the minds of their readers by strong and apt language, or that they were trying by the vilest means to degrade and blacken the plaintiff's character for virtue and morality, and to bring him into disgrace and contempt with the community as a citizen, or with his church and congregation as a minister of the gospel; and as, by the demurrer, the falsity as well as malice of the publication is admitted, the latter interpretation is the only one that is open to adoption by the court, even if the declaration contained no innuendoes showing the injurious character and meaning of the language. But in view of these innuendoes, charging the meaning to be libelous, it seems quite clear the case should not have been withheld from the consideration of the jury. The judgment is reversed, and the case remanded to the circuit court for further proceedings in accordance with this opinion.

PUBLICATION.

Pullman v. Walter Hill & Co.

(1 Queen's Bench Division, 524.—1891.)

Motion by the plaintiffs for a new trial.

The plaintiffs were members of the firm of R. & J. Pullman, and were owners of certain property which they had contracted to sell to the firm of Day & Martin in 1887. The plaintiffs remained in possession for some time, and agreed to let a hoard-

ing, erected upon the property, to the defendants, advertising agents, for the display of advertisements. In 1889, a dispute arose between the plaintiffs and Day & Martin, who were building upon the land, as to which of the two were entitled to the rent of the hoarding; and on September 14, 1889, the defendants wrote the following letter:

"Messrs. Pullman & Co.,
"17 Greek Street, Soho,
"*Re* Boro' Road.

"Dear Sirs,—We must call your serious attention to this matter. The builders state distinctly that you had no right to this money whatever; consequently it has been obtained from us under false pretences. We await your reply by return of post.

"Yours, faithfully,
(Signed) "Walter Hill & Co., Limited."

This letter was dictated by the defendants' managing director to a shorthand clerk, who transcribed it by a type-writing machine. This type-written letter was then signed by the managing director, and, having been press-copied by an office boy, was sent by post in an envelope addressed to Messrs. Pullman & Co., 17 Greek street, Soho. The letter was opened by a clerk of the firm in the ordinary course of business, and was read by two other clerks. The plaintiffs brought this action for libel. The defendants contended that there was no publication, and that, if there were, the occasion was privileged. The learned judge held that there was no publication, that the occasion was privileged, and that there was no evidence of malice. He therefore nonsuited the plaintiffs.

Lord Esher, M. R. Two points were decided by the learned judge: (1) That there had been no publication of the letter which is alleged to be a libel; (2) that, if there had been publication, the occasion was privileged. The question whether the letter is or is not a libel is for the jury, if it is capable of being considered an imputation on the character of the plaintiffs. If there is a new trial, it will be open to the jury to consider whether there is a libel, and what the damages are. The learned judge withdrew the case from the jury.

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 shows 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 showing it to a third person; the writer cannot say to the person to whom the letter is addressed, "I have shown it to you and to no one else." I cannot, therefore, feel any doubt that, if the writer of a letter shows 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 type-writer.

Then arises the question of privilege, and that is, whether the occasion on which the letter was published was a privileged occasion. An occasion is privileged when the person who makes the communication has a moral duty to make it to the person to whom he does make it, and the person who receives it has an interest in hearing it. Both these conditions must exist in order that the occasion may be privileged. An ordinary instance of a privileged occasion is in the giving a character of a servant. It is not the legal duty of the master to give a character to the servant, but it is his moral duty to do so; and the person who receives the character has an interest in having it. Therefore, the occasion is privileged, because the one person has a duty and the other has an interest. The privilege exists as against the person who is libeled; it is not a question of privilege as between the person who makes and the person who receives the communication; the privilege is as against the person who is libeled. Can the communication of the libel by the defendants in the present case to the type-writer be brought within the rule of privilege as against the plaintiffs—the per-

sons libeled? What interest had the type-writer in hearing or seeing the communication? Clearly, she had none. Therefore, the case does not fall within the rule.

Then again, as to the publication at the other end—I mean when the letter was delivered. The letter was not directed to the plaintiffs in their individual capacity; it was directed to a firm of which they were members. The senders of the letter no doubt believed that it would go to the plaintiffs; but it was directed to a firm. When the letter arrived it was opened by a clerk in the employment of the plaintiffs' firm, and was seen by three of the clerks in their office. If the letter had been directed to the plaintiffs in their private capacity, in all probability it would not have been opened by a clerk. But mercantile firms and large tradesmen generally depute some clerk to open business letters addressed to them. The sender of the letter had put it out of his own control, and he had directed it in such a manner that it might possibly be opened by a clerk of the firm to which it was addressed. I agree that under such circumstances there was a publication of the letter by the sender of it, and in this case also the occasion was not privileged for the same reasons as in the former case. There were, therefore, two publications of the letter, and neither of them was privileged. And, there being no privilege, no evidence of express malice was required; the publication of itself implied malice. I think the learned judge was misled. I do not think that the necessities or the luxuries of business can alter the law of England. If a merchant wishes to write a letter containing defamatory matter, and to keep a copy of the letter, he had better make the copy himself. If a company have deputed a person to write a letter containing libelous matter on their behalf, they will be liable for his acts. He ought to write such a letter himself, and to copy it himself, and, if he copies it into a book, he ought to keep the book in his own custody.

I think there ought to be a new trial.

Lopes, L. J. I also am of opinion that there should be a new trial. The first question is, whether there has been any publication of the alleged libel? What is meant by publication? The communication of the defamatory matter to a third person. Here a communication was made by the defendants' managing director to the type-writer. Moreover, the letter was directed to the plaintiffs' firm, and was opened by one of

their clerks. The sender might have written "private" outside it, in order to prevent its being opened by a clerk. The defendants placed the letter out of their own control, and took no means to prevent its being opened by the plaintiffs' clerks. In my opinion, therefore, there was a publication of the letter, not only to the type-writer, but also to the clerks of the plaintiffs' firm. Assuming, then, that there was publication, the question next arises, whether the occasion was privileged. A confusion is often made between a privileged communication and a privileged occasion. It is for the jury to say whether a communication was privileged; but the question whether an occasion was privileged is for the judge, and that question only arises when there has been publication to a third party. If the judge holds that the occasion was privileged, there is an end of the plaintiffs' case, unless express malice is proved. Was the voluntary placing of the letter in the hands of the type-writer a privileged occasion? The rule, I think, is this—that, when the circumstances are such as to cast on the defendant the duty of making the communication to a third party, the occasion is privileged. So again, when he has an interest in making the communication to the third person, and the third person has a corresponding interest in receiving it. It is impossible to say that in the present case either of those doctrines applies. What duty had the defendants to make the communication to the type-writer? What interest had the defendants in making the communication to the type-writer, and what interest had the type-writer in receiving it? Clearly the defendants had neither duty nor interest, nor had the type-writer any interest. Every ground of defense, therefore, fails. It is said that our decision will cause great inconvenience in merchants' offices and will work great hardship. It is said that business cannot be carried on, if merchants may not employ their clerks to write letters for them in the ordinary course of business. I think the answer to this is very simple. I have never yet heard that it is in the usual course of a merchant's business to write letters containing defamatory statements. If a merchant has occasion to write such a letter he must write it himself, and make a copy of it himself, or he must take the consequences.

Order for new trial. [1]

[1] Concurring opinion by KAY, L. J., omitted.

LANGUAGE TO BE NATURALLY CONSTRUED.

MORE v. BENNETT.

(48 New York, 472.—1872.)

APPEAL from a judgment of the General Term of the Supreme Court, reversing an order of Special Term which set aside a nonsuit of the Trial Term and granted a new trial, in an action for an alleged libel, contained in a letter addressed to the editor of the New York Herald and published in a certain edition of that paper.

HUNT, C. The plaintiff has received a scant measure of justice in the disposition of this case. The defendant was allowed to amend his answer by striking out those parts which admitted the publication of the libel, and substantially admitted it to be a libel. The plaintiff was refused permission to amend his complaint by adding a statement, the presence of which was held necessary to enable him to prove that the publication was libelous. For want of such a statement the plaintiff was thereupon nonsuited, and an allowance of $500 was granted to his adversary upon a trial which, to judge from the report, could not have occupied more than two hours. The nonsuit was set aside at the Special Term, but was affirmed upon an appeal to the General Term of the first district.

The complaint charged the publication of a letter written by Mrs. Kimball, set forth at length, in which she charged, among other things, that letters of her deceased husband were returned to her, after having been in the hands of a prostitute; that in the hands of this prostitute were other relics sacred to a wife; that the police had called upon this woman and she refused to give up anything belonging to the writer. The letter added: "She (the prostitute) is, I understand, under the patronage or protection of a Mr. More, agent of the Central railroad." The plaintiff alleges that this charge respecting himself was false and malicious; that it tended to blacken and injure his reputation and expose him to public contempt. He was nonsuited on the ground that he did not allege that the publication intended to charge that the prostitute was under his protection

for illicit purposes, and that therefore his complaint stated no cause of action.

In my judgment no man can read this statement without understanding it to contain a charge that this woman was the kept mistress of the plaintiff. To state that Anne Smith is a prostitute, and she is under the patronage or protection of Mr. More, is a charge that she is kept, protected or patronized for the purposes of prostitution. That a loose woman is under the patronage of a man named, is a technical statement that she is supported by him, for the purpose of sexual indulgence. When read in a book or newspaper, it would naturally have this only meaning. Add to this that the charge was false, made to blacken the character of More, and the statement is plainly within the law of libel. No one would understand the statement as meaning that the prostitute was an inmate of a reformatory institution, and that Mr. More was one of its supporters and thus protected and patronized her. Such a meaning to the words is possible, but it is most unnatural and forced. That any intelligent man would so understand the charge would exhibit a degree of charity and kindness of heart not often found in this censorious world.

In *Cooper* v. *Greeley*, 1 Denio, 358, the rule is thus laid down by JEWETT, J.: "It is the duty of the court in an action for a libel to understand the publication in the same manner that others would naturally do. The construction which it behooves a court of justice to put on a publication which is alleged to be libelous, is to be derived as well from the expression used as from the whole scope and apparent object of the writer." To this rule he cites various authorities. I understand the principle there to be correctly laid down, to wit, the scope and object of the whole article is to be considered, and such construction put upon its language as would naturally be given to it. That case afforded a good illustration of the rule. Mr. Cooper had sued Mr. Greeley for a libel. The defendant in his newspaper, in commenting on the proceeding says: "There is one comfort to sustain us under this terrible dispensation. Mr. Cooper will have to bring his action to trial somewhere. He will not like to bring it in New York, for we are known here, nor in Otsego, for he is known there." Another action was brought for the libel contained in the last sentence quoted, which it was alleged intended to charge that the plaintiff was in such bad

repute in Otsego county that he would not like to bring a suit there. The question came up on demurrer, and the declaration was held good. The opinion to which I have referred is an elaborate one, reviewing all the cases upon the subject.

In the case of *Stone* v. *Cooper*, 2 Denio, 293, an award had been made against another editor, who, in speaking of it, said, in his paper: "The money will be forthcoming on the last day allowed by the award, but we are not disposed to allow him to put it into Wall street for shaving purposes before that period." On demurrer, this was held not to be libelous, on the ground that it fairly meant that the money was to be used in Wall street in buying, at a discount, existing securities, and that such purchase was neither illegal nor disreputable. Both cases were decided upon the principle that the language is to be construed fairly and naturally. It is not enough that a critic or a malignant may torture the expressions into a charge of a criminal or disgraceful act. Nor is it enough, on the other hand, that a possible and far-fetched construction may find an inoffensive meaning in the language. The test is whether, to the mind of an intelligent man, the tenor of the article and the language used naturally, import a criminal or disgraceful charge. In this case, the letter is censorious and fault-finding. Its object seems to have been to show the injuries the writer had received from those who had been near her late husband at the time of his death. In addition to what has been already stated, it alleged that money was contributed unnecessarily and misapplied; that the watch, the horse, and other articles of her husband had never been accounted for to her; that she was then trying to get even her little dog from the police; that her own private letters had been scattered among others indiscriminately, and returned to her after being in the hands of a prostitute; that in the hands of this prostitute are other relics sacred to a wife, which she can only obtain through a long litigation; that the police have called upon this woman, who refuses to give up to her anything belonging to her husband; and that she (this woman, this prostitute, who has done these things) is understood to be under the patronage or protection of a Mr. More, of the Central railroad, who has also employed the orderly of her late husband. The suggestion that this language does not, of itself, impute a charge that Mr. More keeps this prostitute as his mistress, because she may be under his protection as a

member of some reformatory institution managed by him, is extravagantly far-fetched, and is hostile to the whole tenor of the communication. The charge that she is under the patronage of Mr. More is the culmination of the accusations preceding, and was plainly intended to charge a criminal patronage or protection. Every man or woman who read it must have understood such to be its meaning.

Words which are, of themselves, actionable; which, in their natural construction, tend to injure the memory of the dead, or the reputation of one alive, and expose him to hatred, contempt or ridicule, need no averment that they were intended to impute such offence. It is only where the words do not, of themselves, fairly charge the offence, that extrinsic averments are necessary. *Cooper* v. *Greeley*, 1 Denio, 361; *Croswell* v. *Weed*, 25 Wend. 621. In my opinion, the complaint was sufficient, and the cause of action was fairly made out. I am for reversal and new trial.

All concur, LEONARD, C., not sitting.

Judgment reversed.

INTENT OF SPEAKER.

McKINLEY v. ROB.

(20 Johnson, 351.—1823.)

ACTION for slander.

The declaration charged that the defendant, on June 15, 1821, in a certain conversation, falsely, etc., spoke of and concerning the plaintiff, and of and concerning the truth of the evidence given by the plaintiff, on a complaint made by him, on oath, before a justice of the peace, on March 20, 1820, against one Slyter, for perjury, etc., the following words: "He (meaning the plaintiff) had sworn false;" (meaning that the plaintiff had sworn false, and committed perjury, in giving his evidence before the justice.) The defendant pleaded the general issue, with notice of justification.

The defendant's counsel, in opening his defense to the jury, among other things, stated, that if the jury, from the evidence

to be introduced on the part of the defendant, should be satisfied, that the evidence given by the plaintiff, before the justice, was not strictly and literally true, though the plaintiff might have testified through misapprehension or mistake, the defendant's justification would be made out, and he be entitled to a verdict. The judge ruled that, in his opinion, the defendant would fail in making out a justification, unless he proved, that the plaintiff wilfully swore false; and in his charge to the jury, the judge, among other things, stated, that the defendant, in order to make out a justification, was bound to prove, that the plaintiff had, in giving his evidence before the justice, wilfully and corruptly sworn false; that if the plaintiff, in giving that evidence, had, by mistake, misrepresented a fact, it was no justification to the defendant; and that it required the same evidence to sustain such a justification, as to maintain an indictment for perjury. The jury found a verdict for the plaintiff, for $500 damages.

A motion was made to set aside the verdict, and for a new trial.

Woodworth, J. The day stated in the declaration is not material. There was no record of the complaint; and if there had been, the declaration does not profess to set it out according to its tenor, or *in haec verba*, but refers to it as matter of description, for the purpose of informing the defendant that the words referred to a *complaint* previously made. In *Brooks* v. *Bemiss*, 8 Johns. Rep. 455, the defendant gave notice that he would offer in evidence a record of the trial of an indictment, of the term of June, 1810. When produced, it appeared to be 1809, and the court held that the variance was not material.

There is no foundation for the second point, for the plaintiff did prove the words to have been spoken in reference to the oath of the plaintiff on the complaint. The declaration avers, that the words were spoken concerning the evidence given on the complaint, which I understand as the evidence given when application was made to the justice, and upon which the warrant issued; it says nothing respecting the subsequent examination. The case states, "*that the plaintiff proved the words as laid;*" and if so, he must have proved, that the words spoken had reference to the *complaint*. Whether the plaintiff gave testimony on the examination of Slyter or not, is immaterial.

The plaintiff does not charge the speaking of words relating to that, nor does it appear that any proof was given of the speaking of words by the defendant relating to the evidence given on the examination.

The charge to the jury was correct. The words spoken, in judgment of law, imputed the crime of perjury, inasmuch as they alleged the false swearing to have been before a magistrate, having competent authority to administer the oath, and take cognizance of the complaint. There was no qualification or explanation by the defendant, at the time, that the plaintiff, through misapprehension or mistake, may have sworn false. It was too late, at the trial, to say, in substance, "The plaintiff has sworn false, but it may have proceeded from mistake, and may not have been corrupt. I did not intend by the words more than this." The defense, to be available, must be as broad as the charge; the evidence relied on was no justification. When a defendant has made a charge, that clearly imputes a crime, he cannot, afterwards, be permitted to say, I did not intend what my words legally imply. The intent must be collected from the expressions used, when they have a certain and definite meaning. The jury cannot rightfully indulge in conjectures that are not warranted by the legal import of the words spoken. But if it is doubtful whether the words impute a crime, or may be satisfied by ascribing to them a meaning which renders them not actionable, then the intent may become a fair subject of inquiry before a jury. This distinction is recognized by Lord Ellenborough in 3 Camp. Rep. 460, and by this court in 12 Johns. Rep. 257. The charge of the judge would not have been correct, if the principle of these cases had been applied to the words spoken by the defendant. We are of opinion, that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

INNUENDO.[1]

Vickers v. Stoneman.

(73 Michigan, 421.—1889.)

Error to circuit court in an action for slander. Judgment for plaintiff. Defendant brings error.

Champlin, J. This is an action on the case to recover damages for verbal slander. The declaration contains no matters of inducement, and no averment of collateral circumstances, but proceeds in two counts to set out the cause of action, as follows:

"On February 20, A. D. 1887, at Waverly, in the county of Van Buren aforesaid, in a certain discourse which the said defendant then and there had with the said plaintiff, in the presence and hearing of divers good and worthy persons, did speak, publish, and declare, to, of, and concerning the said plaintiff these false, scandalous, and defamatory words, to-wit:

"'He (meaning the said plaintiff) poisoned my cattle; they were poisoned with Paris green; they were poisoned from a pail that had bran and poison in it, and Vickers (meaning the said plaintiff) put it there.'"

"Thereby meaning and intending to charge that he, the said plaintiff, committed the crime of willfully and maliciously administering poison to the cattle of him, the said defendant, Edmund Stoneman, whereby said cattle were poisoned and killed.

"And whereas, also, the said defendant, with malice towards the said plaintiff aforesaid, afterwards, to-wit, on the same day and year, and at the same place aforesaid, in a certain other discourse which the said defendant then and there had, in the presence and hearing of divers other good people, of and concerning the said plaintiff, did falsely and maliciously speak, publish, and declare, in the presence and hearing of those people, these other false, scandalous, malicious, and defamatory words, of and concerning the said plaintiff, to-wit:

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[1] For an explanation of the use and meaning of *averment*, *colloquium* and *innuendo*, see *Van Vechten* v. *Hopkins*, 5 Johns. Rep. 211, 220, or Erwin's Summary of Torts, 77.

"'He (meaning the said plaintiff) poisoned my cattle; they were poisoned with Paris green; they were poisoned from a pail that had bran and poison in it, and Vickers (meaning the said plaintiff) put it there.'

"Thereby meaning and intending to charge that he, said plaintiff, committed the crime of willfully and maliciously administering poison to the cattle of him, the said defendant, whereby the said cattle were poisoned and killed.

"By reason of the speaking, publishing, and uttering of which said false, scandalous, malicious, and defamatory words the said plaintiff is greatly prejudiced in his good name, fame, and reputation."

Then follows the claim for general damages. The plea was the general issue.

Upon the trial, the plaintiff having produced a witness by whom he proposed to prove the slanderous words, the defendant's counsel objected, for the reason that it was irrelevant and inadmissible under the pleadings; that the declaration sets out no cause of action, because the words charged in the declaration do not amount to a charge of crime, and are not actionable *per se*, and no special damages are claimed. The circuit judge overruled the objection and admitted the testimony. This is one of the main grounds of error relied on.

The words laid in the declaration as slanderous are not actionable in themselves. They do not charge a crime, as the statute requires the poisoning to be done willfully and maliciously in order to punish it as a felony. But the pleader seeks to bring the words charged within the offense created by the statute by the use of an *innuendo*, the office of which is to explain doubtful words and phrases, and annex to them their proper meaning. It is, however, well settled that an *innuendo* cannot extend the sense of the words used beyond their natural meaning, unless something is put upon the record by way of introductory matter, with which they can be connected; in which case, words which are equivocal, or ambiguous, or fall short in their natural sense of stating a slanderous charge, may have fixed to them a meaning extending beyond their ordinary import, which renders them certain or defamatory by means of a proper *innuendo*. In this declaration there is nothing of an introductory character explaining the occasion, or stating circumstances which would connect the slanderous words with the relation of

the parties, or the situation of the subject-matter, showing in what connection the slanderous words were used, and so by the use of the *innuendo* make their meaning certain. Thus it is laid down in 1 Chit. Pl. p. 422, in speaking of the office of the *innuendo:*

"It is only explanatory of some matter already expressed; it serves to *point out*, where there is precedent matter; but never for a new charge; it may *apply* what is already *expressed*, but cannot add to, or enlarge, or change the sense of the previous words."

It is also laid down in Starkie on Slander, at page 421, that—

"The most important rule of law relating to this species of averment is that its office is merely to explain by pointing out the defendant's allusion, and that it can in no case be allowed to introduce new matter; and the reason for this is a most substantial one, for were it otherwise there would be no sufficient and distinct averment of the existence of those facts which in point of law are essential to render the words actionable."

And after giving illustrations from adjudicated cases, upon page 422, this author says:

"An innuendo, therefore, cannot extend the sense of the words beyond their own meaning, unless something be put upon the record for it to explain."

In this case it is the innuendo alone which charges the crime. It extends the meaning of the words used beyond their own import, and is directly within the decision of *Holt* v. *Scholefield*, 6 Term R. 691. And to the same effect are *Van Vechten* v. *Hopkins*, 5 Johns. 220; *McClaughry* v. *Wetmore*, 6 id. 83; *Thomas* v. *Croswell*, 7 id. 271; *Andrews* v. *Woodmansee*, 15 Wend. 232; *Miller* v. *Maxwell*, 16 id. 1; *Vaughan* v. *Havens*, 8 Johns. 109; *Beardsley* v. *Tappan*, 1 Blatchf. 588; *Patterson* v. *Edwards*, 7 Ill. 720; *Cramer* v. *Noonan*, 4 Wis. 231; *Taylor* v. *Kneeland*, 1 Doug. 67; *Bourreseau* v. *Journal Co.*, 63 Mich. 430, (30 N. W. Rep. 376), per MORSE, J. In Massachusetts, a more liberal rule of pleading prevails in actions of libel and slander, and in England, under the common-law procedure act of 1852, (15 & 16 Vict. chap. 76,) the declaration in this case would have been good. But under our practice the rules of pleading remain the same as they were in 1855; and under the decision of this Court then made in *Lewis* v. *Soule*, 3 Mich. 514, the declaration in this case is bad, and the objection to the

introduction of testimony under it ought to have been sustained. As this disposes of the case at the present time, we do not think it advisable to discuss the other errors assigned.

The judgment will be reversed, and a new trial ordered.[1]

JUSTIFICATION: TRUTH.[2]

JOANNES v. JENNINGS.

(6 Thompson & Cook, 138.—1875.)

(Reported in 4 Hun, 66, without opinion.)

APPEAL by the defendants from a judgment in favor of the plaintiff, entered upon the verdict of a jury and from an order denying a motion for a new trial, in an action to recover damages for a libel alleged to have been published of and concerning the plaintiff in the New York Times.

DAVIS, P. J. At the close of the case a certificate of the clerk of the Circuit Court is inserted, which contains an entry in these words: "Motion for a new trial on the judge's minutes denied." No grounds upon which the motion was made are stated; and it does not appear whether it was made on questions of law or of fact, or for excessive damages, or on some alleged irregularity. It is not error to deny a general motion which states no ground whatever; nor ought this court, where such a motion is made, to entertain questions not suggested to the court below, but raised here for the first time. The practice that was pursued in this case is, however, very common. It is, nevertheless, wrong, because of its injustice to the judge before whom the case was tried, who is entitled to have the grounds of such a motion specifically pointed out, so that he may have the opportunity to correct any error that, on

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[1] Concurring opinion by Campbell, J., omitted. All concurred for a reversal of the judgment.

[2] In New York, in a civil action to recover damages for injury to the reputation, the defendant may prove mitigating circumstances although he has pleaded or attempted to prove a justification. Code of Civ. Pro. § 535.

reflection, may appear to have occurred, or to consider the alleged irregularity or the impropriety of the verdict on any ground. It is also unjust to the successful party, because no opportunity is given him to know on what ground the motion will be attempted to be sustained on appeal. The existing practice ought to be corrected.

In this case, however, we have looked into the evidence, and are satisfied that there is no reason for disturbing the verdict on any question of fact, nor because of excessive damages. The jury doubtless found, and were quite justified in doing so, that the publication, so far as submitted to them, was made for the purpose of the annoyance and ridicule of the plaintiff. The damages, therefor, were in their sound discretion; and if they concluded that when a public journal of acknowledged influence and character descends to such an attack, the injury may be measured in some degree by the strength of the assailant, the court are not at liberty, for that reason, to interfere. The defendants have no reason to complain of the manner in which the facts of the case were submitted to the jury by the learned judge. He brought their attention to the only question which, in the absence of proof of express malice in publishing the affidavit, was proper for their consideration, and he submitted that question to them with great clearness and equal fairness.

None of the exceptions to the charge, or to the refusals to charge as requested, seem to call for consideration except one.

At the close of the charge the defendants' counsel asked the court to charge that, if the statements preceding the affidavits, which do not flow from the affidavit and the speech itself, be true, "then no action will lie upon them." In response to this request the court charged: "If you find from the evidence that even although the statements which precede the affidavit do not legitimately flow from the affidavit, still they were true; then the defendants would be entitled to a verdict, *unless you find they were published for a malicious purpose.*"

The learned judge doubtless had in his mind the provision of the constitution, under which, in a criminal case, this charge would have been correct. Section 8 of article 1 of our State constitution provides, that "In all criminal prosecutions or indictments for libel the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged

as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted."

This provision it will be observed is limited by its express terms to *criminal* prosecutions and indictments. The former constitution did not, in this connection, contain the word "criminal," and it was thought by learned and able jurists that the provision of that constitution was applicable to civil actions for libel. See *Dolloway* v. *Turrill*, 26 Wend. 383, and opinions of Senators Root and Verplanck, pages 399–402. All doubt, however, was removed by the insertion of the word "criminal," as it now appears in the constitution of 1846.

In civil actions where the truth of the alleged libel is pleaded in justification, it may be proved as a complete bar to the suit; and in such case the motives with which the publication was made are not material.

This was so laid down both by the Supreme Court and by the Court of Errors in the celebrated case of *Root* v. *King*, 7 Cow. 613; *S. C.* 4 Wend. 113. The rule is the same in slander; and as it was tersely stated by Bronson, J., in *Baum* v. *Clause*, 5 Hill, 196: "Our laws allow a man to speak the truth although it be done maliciously." The defendants had pleaded in justification the truth of the statements which preceded the affidavit, and had given evidence which justified the submission of the question of their truth to the jury. The charge allowed the jury even if they found the statement to be true, still if they also found that they were "published for a malicious purpose," to give the plaintiff a verdict for damages. We cannot, to a legal certainty, see that the verdict was not given upon such findings. Hence there was a fatal error which entitles the defendants to a new trial.

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

Judgment reversed and new trial ordered.

JUSTIFICATION: PRIVILEGE.

PERKINS v. MITCHELL.

(31 Barbour, 461.—1860.)

By the Court, EMOTT, J. . . .

The complaint states that the plaintiff at the time of the publication was a merchant; that the defendant, on the 4th of December, 1858, published of the plaintiff a false, malicious and defamatory libel, which is then set out at length. It consisted of a certificate signed by the defendant and another person, stating that they, being physicians, "have examined and are acquainted with the plaintiff's health and mental condition, and are of opinion that he is insane and a fit person to be sent to the lunatic asylum." To this is added an affidavit signed by the defendant alone, to the effect that he is acquainted with the plaintiff, and that the plaintiff "is disordered in his senses, and has been so for some time past;" and that he is "so disordered in his senses as to endanger the persons of the people, if left unrestrained, and that it is dangerous to permit him longer to go at large." The complaint proceeds to allege that the defendant "presented the said certificate and affidavit to the said justices of the peace," meaning, I presume, two persons whose names appear at the foot of the affidavit as having administered the oath to the defendant; that they, in consequence thereof, issued a warrant by which the plaintiff was forcibly taken and confined in the lunatic asylum for four days. The complaint concludes with the ordinary allegation of damage to the plaintiff from the publication of the libel, both in his character and his business. The defendant demurred to this complaint; his demurrer was overruled in the city court, and he has appealed to this court from the order overruling it.

It is clearly libelous to publish of another that he is "insane and a fit person to be sent to the lunatic asylum;" or that "he is so disordered in his senses as to endanger the persons of other people, if left unrestrained, and that it is dangerous to permit him longer to go at large." There is no definition of libel which has ever been received by the courts which will not include such a charge. It is a censorious and ridiculing writing,

and if untrue it will ordinarily be inferred to have been made with a mischievous and malicious intent towards the individual named; which are the conditions of Gen. Hamilton's celebrated definition in the *Croswell case*, 3 John. Cas. 337, 354; 9 John. 215. It sets the plaintiff in an odious light, and exposes him to public contempt and aversion, which is Blackstone's rule. 3 Com. 125; 4 id. 150. It is unnecessary to multiply definitions; upon this point, the case is clear. See Lord Coke in 5 Rep. 125; Ld. Holt, 3 Salk. 226; and 1 Starkie on Slander, 153. Nor is the libelous character of the language destroyed or diminished by the fact that the defendant is a physician, and makes the statement as a professional opinion. It is rather an aggravation of such a charge that it is backed by the professional skill and authority of a medical man. Can it be doubted that if a physician should, without cause or justification, wantonly write and publish a statement that a man was insane, dangerous and unfit to be at large, and that such was his opinion as a medical man, he would be liable to an action for a libel. There is no rule of law which will protect an individual in the utterance of libelous charges against another, merely because the utterer occupies a professional position and possesses professional skill and experience. To give to a statement made by a physician, which would otherwise be criminatory and libelous, a privileged character, he must not only utter it as a medical man, but it must be made in the discharge of a duty, and to a person who has or is engaged in a corresponding duty in reference to the subject matter. *Harrison* v. *Bush*, 32 Eng. L. and E. Rep. 173; *Van Wyck* v. *Aspinwall*, 17 N. Y. 190.

It is also erroneous to suppose that a complaint alleging such a publication as that under consideration without lawful authority or justification is defective unless it aver special damage to the plaintiff. We do not purpose to consider how far the present complaint contains averments of special damage, or to what extent the arrest and detention of the plaintiff can be pleaded or proved as damages resulting from the publication of the libel. It is sufficient to say that the only cases in which it is necessary in order to sustain an action for defamation, to allege the manner in which the publication has injured the plaintiff, are cases where it is of such a character that the court cannot see that its tendency and effect would be to defame or degrade the plaintiff, or to render him odious or contemptible.

This is the rule given by Chancellor Walworth in the court of errors, in *Cooper* v. *Stone*, 2 Denio, 299, and recognized by all the cases. The obvious import and effect of such a charge as that now before us is degrading and injurious, and we need no averments to point out its tendency. We must therefore look to another part of the case to sustain this demurrer.

The question upon which the case must ultimately turn is whether the affidavit and certificate of which the plaintiff complains were privileged communications. The defendant contends that they were, and that the facts and circumstances which confer upon them that character sufficiently appear in the complaint. It was upon this ground that the demurrer was mainly, if not entirely, founded.

The authorities, both in England and in the courts of this state, clearly recognize two classes of privileged communications. In one the party is protected from civil or criminal responsibility for his statements, whether spoken or written, although untrue, unless he is proved to have been actuated by a malicious design in making them. To this class of cases belong complaints preferred in the proper quarter against public officers; statements in regard to the character of a servant, given by a master upon inquiry; confidential communications upon matters of business, between parties having a mutual interest; statements made in the discharge of a public or official duty; and other publications of a similar nature. The occasion of the speech or writing, and the position of the person by whom it is uttered, in these instances, repel the presumption or inference of malice which the law justly and wisely attaches to a false and injurious accusation where it is gratuitously made. But the party injured may nevertheless prove, if he is able to do so, that the charge which has been published even upon such an occasion, was not only false in fact, but malicious in motive. If he can establish express malice he may recover as in other cases, notwithstanding the conditional privilege. See *Thorn* v. *Blanchard*, 5 John. 508; *O'Donaghue* v. *McGovern*, 23 Wend. 26; *Vanderzee* v. *McGregor*, 12 Wend. 545; *Somerville* v. *Hawkins*, 3 Eng. L. and E. Rep. 503; *Harrison* v. *Bush*, 32 id. 173; *Van Wyck* v. *Aspinwall*, 17 N. Y. 190; *Lewis* v. *Chapman*, 16 id. 369. In *White* v. *Nichols*, 3 How. 266, 284, Mr. Justice Daniel endeavors to show that this is the extent to which words spoken or

written are protected by any occasion, and that there is no case in which an action for slander or libel will not lie for a false and criminatory statement, however or whenever made, provided the person making it is shown to have been actuated by express malice towards the party accused. The case in which this opinion was delivered was an action for a libel contained in a communication to the secretary of the treasury, asking the removal of a collector of customs. It was therefore a case belonging to the class just referred to, and in which the privilege of the party only will protect him for an unfounded statement if his motive be honest and not malicious. But the reasoning of Judge Daniel's opinion, and the propositions which he deduces where he goes beyond the case in hand, are clearly unsustained by principle or authority. There is another class of communications to which much greater immunity is attached in the law, and for which a party is protected from any action for damages on account of their defamatory character or effect. These are words spoken or written in the due course of parliamentary or judicial proceedings. In the case of judicial proceedings, which is all that is material now, words spoken or written by a party, by counsel, by a judge, a juror or a witness, although false, defamatory and malicious, are not actionable if they were uttered in the due course of the proceeding, in the discharge of a duty, or the prosecution or defense of a right, and were pertinent and material to the matter in hand.[1] It is unquestionable that a person who institutes a

[1] "Words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore if spoken elsewhere, would import malice and be actionable in themselves, are not actionable, if they are applicable and pertinent to the subject of inquiry. . . . And in determining what is pertinent, much latitude must be allowed to the judgment and discretion of those who are intrusted with the conduct of a cause in court, and a much larger allowance made for the ardent and excited feelings, with which a party, or counsel who naturally and almost necessarily identifies himself with his client, may become animated, by constantly regarding one side only of an interesting and animated controversy, in which the dearest rights of such party may become involved." *Hoar* v. *Wood*, 3 Met. 193.

"The law is well settled that a counsel or party conducting judicial proceedings is privileged in respect to words or writings used in the course of such proceedings reflecting injuriously upon others, when such words and writings are material and pertinent to the questions involved; and that, within such limit, the protection is complete, irrespective of the motive

groundless proceeding, whether civil or criminal, against another, upon false or defamatory charges, is liable to an action for the injury he occasions. But that the action must be for the malicious complaint, indictment or action, and not for the words. See Cowen, J., in *O'Donaghue* v. *McGovern*, 23 Wend. 26; Starkie on Slander, 193. This doctrine is also to be found in the chancellor's opinion in *Hastings* v. *Lush*, in the court of errors, 22 Wend. 410, and the distinction between this and the other class of privileged cases is very clearly pointed out by him. Where the words are uttered by counsel, or a witness, or a judge, the protection is, if possible, yet more absolute. Unless such persons can be connected directly with the prosecution, as instigating or promoting it with malicious motives, they are entitled to entire immunity for what they say and do in their several places, and in the discharge of their respective duties in a cause. There is but one limitation to their protection, and that is that they should not go beyond the cause and the parties, or what is pertinent and material to them. *Ring* v. *Wheeler*, 7 Cowen, 725, and *Gilbert* v. *The People*, 1 Denio, 41, are instances of the application both of the rule and its limitation; and in the latter case Judge Beardsley defines the doctrine with precision, and recognizes the absolute and unqualified protection of what is said or written in a judicial proceeding, if it be pertinent and material, against an action and against the allegation or proof of malice in the party uttering it. In the case of witnesses who are compellable to appear and to testify, it would indeed be intolerable that their motives and feelings should be scrutinized, and they subjected to liability for statements which they could not avoid making under the direction of the court before whom they appear. Persons testifying in a court of justice are not liable to an action for any statements which they make under the examination to which they are subjected, and in reply to questions permitted by the court or magistrate.

The principles which have now been stated are sustained by the whole series of authorities, from the earliest to the latest. *Lake* v. *King*, 1 Saund. 120, 132, is a case where the proceeding was in parliament, and although somewhat questioned in some

with which they are used; but that such privilege does not extend to matter, having no materiality or pertinency to such questions." *Marsh* v. *Ellsworth*, 50 N. Y. 309.

later cases, the decision was recognized as law by Lord Mansfield, in *Astley* v. *Young*, 2 Burr. 810. That was a case of an alleged libel contained in an affidavit in a proceeding in the king's bench. Lord Mansfield put it to the counsel to "show that a matter given in evidence in a court of justice may be prosecuted in a civil action as a libel," and judgment was given for the defendant on demurrer, on the ground of the privileged character of the publication. In the celebrated case of *Rex* v. *Baillie*, 21 State Trials, 1, which was also before Lord Mansfield, Mr. Erskine, in his memorable speech, asserted the rule broadly. "A man," he said, "cannot be guilty of a libel, who presents grievances before a competent jurisdiction, although the facts he presents should be false; he may indeed be indicted for a malicious prosecution, and even then a probable cause would protect him, but he can by no construction be considered as a libeler." Lord Mansfield, in giving judgment, recognizes "the distinction taken at the bar as sound and well founded," and adds, "in a proceeding in a court of justice of the parties nothing can be a libel;" and alluding to an affidavit in a judicial proceeding, as in the case of *Astley* v. *Young*, which he cites, he says, "it was not the subject matter of an action or a prosecution, if it was really so used in the course of a judicial proceeding." There is a case of *Hodgson* v. *Scarlett*, reported in 1 B. & Ald. 232, which was an action against that noted barrister, afterwards Lord Chief Baron Abinger, for words spoken in an address to the jury in the trial of a cause. In this case the opinions of some of the judges are somewhat qualified and hesitating, as if proof of express malice would take away the privilege. But the point was not distinctly presented, and it may be inferred, I think, from the expressions used by these judges, that proof of the pertinency of a statement used on such an occasion would rebut any proof of malice. The term maliciously is used in a legal sense, as implying that the party had traveled out of his way and his duty, from private enmity, to asperse another whose character was in nowise concerned. In *Ring* v. *Wheeler*, 7 Cowen, 725, already referred to, the question arose on a motion in arrest of judgment, and the court held that they were bound to infer, after verdict, that the words were false, were uttered wilfully and maliciously, and were irrelevant, and therefore refused to arrest the judgment. In *Allen* v. *Crofoot*, 2 Wend. 515, a verdict was set aside which

had been recovered for words spoken by the defendant before a magistrate, in answer to a question by the plaintiff, who had been arrested by a warrant upon a sworn complaint. The court held, Mr. Justice Marcy giving the opinion, that whether the words were or were not spoken in the course of the proceeding upon the defendant's complaint, or under circumstances to induce him to believe that it was necessary for him to repeat the charge contained in his complaint, should have been submitted to the jury. In *Garr* v. *Selden*, in the court of appeals, 4 Comst. 91, the alleged libel was an affidavit made by the defendant in resisting a motion to strike out a notice annexed to his plea, in an action brought against him by the plaintiff. The court held that if the affidavit were pertinent to the motion, the law did not permit a party to question its truth or innocency in an action for libel, or to allege in that form of action, that it was false or malicious.

These cases leave no room to doubt that in England and in the courts of this state, the rule has been very steadily adhered to which protects parties and witnesses for statements pertinently made by them in the assertion of their rights, or the discharge of their duties as such. I see no reason why this protection should be confined to the trial of issues in suits or indictments, or to oral examinations, so as to exclude affidavits even if voluntarily made, if otherwise regular and pertinent. The phrase employed by the judges and the text writers, in speaking of this sort of privileged communications, is "judicial proceedings." This is not confined to trials of civil actions or indictments but includes every proceeding before a competent court or magistrate in the due course of law or the administration of justice, which is to result in any determination or action of such court or officer. Thus in *Allen* v. *Crofoot*, *supra*, the proceeding was a preliminary examination before a justice of the peace on a complaint for larceny or burglary. In *Astley* v. *Young*, 2 Burr. 807, also cited above, the statement complained of was contained in an affidavit made to resist an application to the court of king's bench to compel the justices of Wiltshire to license an innkeeper. In *Captain Baillie's* case the libelous charges were in a memorial submitted to the governor of Greenwich hospital. It is very clear, I think, that the privilege or protection extended by the law to this class of cases must be commensurate with the liability of the party commencing or

instigating the proceeding to an action for a malicious prosecution, and that of the person testifying, to an indictment for perjury. Nor is the privilege to be confined to testimony obtained as it were upon compulsion, by legal process. We are in the daily habit of receiving and acting upon statements made in affidavits sworn to by parties who have not been compelled to testify. It is necessary, in many cases, to the due and efficient administration of justice, that such affidavits should be made and the persons making them should be protected; otherwise we should constantly be compelled to issue process and take examinations which we now receive more easily and speedily by the voluntary action of the parties. There might be cases where the necessity of resorting to proceedings apparently *in invitum* to obtain evidence of facts which courts and magistrates receive in affidavits, would seriously hinder if not entirely defeat the ends of justice. I am of opinion that whenever a person testifies, either voluntarily or under process of subpœna, to matters pertinent and material in a proceeding before a court or magistrate of competent authority, he is entitled to unqualified protection against any action for defamation by the words thus uttered.

Having thus determined the principles upon which the rights of these parties depend, we are prepared to consider whether the complaint contains enough to show that the certificate and affidavit for making which this action was brought were privileged and entitled to immunity. We are probably bound to take judicial notice of the character of the proceeding by which the plaintiff was confined. By title 3 of chapter 20, part 1st of the Revised Statutes, (1 R. S. 634), as amended by the acts of 1838, 1842 and 1844, it is made the duty of the committee of a lunatic who is possessed of property, or his relatives if he have no property, to provide for his confinement if he is disordered in his senses to such an extent as to endanger his own person or property or that of others. If the committee, or the relatives, of such a person neglect to confine him, it is made the duty of the overseers of the poor of the city or town where he belongs to apply to any two justices of the peace of such town, who may, if satisfied that such person ought not to go at large, commit him to some proper place of restraint. Section 8 of the statute authorizes two justices of the city or town to issue their warrant for the apprehension and confinement of a mad

person, on their own view or upon the oath and information of others without the application of the overseers. Section 22 of chapter 135 of the laws of 1842 requires the evidence of two reputable physicians, under oath, to the fact of the insanity of any person, before any magistrate or officers shall order the confinement of such person. The argument for the defendant proceeds upon the theory, first that a statement made in the course of a proceeding taken under and according to this statute as evidence to the magistrates of the lunacy of the plaintiff, was a privileged communication, and second that the alleged libels set out in the complaint sufficiently appear to have been uttered by the defendant while testifying or furnishing evidence in such a proceeding. The first proposition I am prepared to agree to. It is not, in my judgment, libelous or actionable as such, for a physician to furnish evidence, either voluntarily or under a subpœna, that another is insane, in a proceeding duly taken under any of the clauses of this statute. If the physicians in this case were parties to a conspiracy to deprive the plaintiff of his liberty, or to set on foot a malicious and groundless prosecution under the forms of law, they may be liable to an action for that. But no action of libel can be maintained for an assertion of the insanity of the plaintiff, contained in an affidavit made in a proceeding properly and legally instituted under this statute.

To sustain the present demurrer, however, it is necessary that it should appear distinctly by the complaint, that the occasion of uttering the alleged libel was such as I have just mentioned. The complaint must state all the facts which the defendant would be obliged to plead in setting up his privilege, in order to show that the plaintiff has no cause of action in the publication of a charge which in itself is clearly libelous. In this respect I think the defendant's counsel is mistaken in his view of the case. The complaint alleges, as has been already noticed, the publication of a paper consisting of a certificate purporting to be signed by the defendant and another person, and an affidavit signed by the defendant alone, and purporting to be sworn to before two persons who describe themselves as justices of the peace. It proceeds to state that the defendant "presented the said certificate and affidavit to the said justices of the peace," who thereupon issued a warrant, of which a copy is annexed. There is, however, no statement that these persons

were justices of the peace, nor that they resided in the city or town with the plaintiff, which is necessary to give them jurisdiction to act. It does not appear how the proceeding was instituted; whether by the overseers of the poor or by two justices of the peace of their own motion. It is not stated whether the defendant voluntarily furnished the documents set out in the complaint, or whether they were made under the summons or at the request of the magistrates. One portion of the alleged libel is a certificate not under oath, and we have not been shown, nor have I been able to discover, any part of the statute requiring or authorizing such a paper. If the evidence given by the defendant was furnished voluntarily, I apprehend it was necessary for him to satisfy himself, and to show to the court, that the proceeding was regular and the magistrates had jurisdiction of the case. Where a man is called to testify, or even makes an affidavit, in a cause depending in a court of competent, general or ordinary jurisdiction and proceeding according to the course of the common law, he may not be required to know or to prove that all the facts existed, or all the steps had been taken, which were necessary to confer jurisdiction in the particular case. But where a man intervenes voluntarily in a special proceeding not known to the common law, and not resulting in a judgment according to its forms, he must see that jurisdiction is acquired, and that there is in reality a proceeding in court, before he can claim the privilege of a witness for libelous charges against another. I am of opinion that the complaint in this action does not contain enough to show that the libelous publication which it sets forth was uttered in the course of a judicial proceeding duly instituted before a magistrate who had jurisdiction, and that therefore the demurrer was properly overruled, and the order appealed from should be affirmed, with costs.

Byam v. Collins.

(111 New York, 143.—1888.)

Appeal from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the defendants, who were husband and wife, entered upon the verdict of a jury. (See 39 Hun, 204.)

Earl, J. The general rule is that in the case of a libellous publication the law implies malice and infers some damage. What are called privileged communications are exceptions to this rule. Such communications are divided into several classes, with one only of which we are concerned in this case, and that is generally formulated thus: "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 criminating matter which, without this privilege, would be slanderous and actionable; and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation." The rule was thus stated in *Harrison* v. *Bush*, 5 Ellis & Black (Q. B.) 344, and has been generally approved by judges and text-writers since. In *Toogood* v. *Spyring*, 1 Cr. M. & R. (Ex.) 181, an earlier case, it was said that the law considered a libellous "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;" and that statement of the rule was approved by Folger, J., in *Klench* v. *Colby*, 46 N. Y. 427, and in *Hamilton* v. *Eno*, 81 N. Y. 116. In *White* v. *Nicholls*, 3 How. (U. S.) 266, 291, it was said that the description of cases recognized as privileged communications must be understood as exceptions to the general rule, and "as being founded upon some apparently recognized obligation or motive, legal, moral or social, which may fairly be presumed to have led to the publication, and, therefore, *prima facie* relieves it from that just implication from which the general law is deduced."

Whether within the rule as defined in these cases a libellous

communication is privileged, is a question of law; and when upon any trial it has been held as matter of law to be privileged, then the burden rests upon the plaintiff to establish as matter of fact that it was maliciously made, and this matter of fact is for the determination of the jury.

It has been found difficult to frame this rule in any language that will furnish a plain guide in all cases. It is easy enough to apply the rule in cases where both parties, the one making and the one receiving the communication, are interested in it, or where the parties are related, or where it is made upon request to a party who has an interest in receiving it, or where the party making it has an interest to subserve, or where the party making it is under a legal duty to make it. But when the privilege rests simply upon the moral duty to make the communication, there has been much uncertainty and difficulty in applying the rule. The difficulty is to determine what is meant by the term "moral duty," and whether in any given case there is such a duty. In *Whiteley* v. *Adams*, 15 C. B. (N. S.) 392, Erle, Ch. J., said: "Judges who have had, from time to time, to deal with questions as to whether the occasion justified the speaking or the writing of defamatory matter, have all felt great difficulty in defining what kind of social or moral duty, or what amount of interest will afford a justification;" and in the same case, Byles, J., said the application of the rule "to particular cases has always been attended with the greatest difficulty; the combinations of circumstances are so infinitely various."

The rule as to privileged communications should not be so extended as to open wide the flood-gates of injurious gossip and defamation by which private character may be overwhelmed and irreparable mischief done, and yet it should be so administered as to give reasonable protection to those who make and receive communications in which they are interested, or in reference to which they have a real, not imaginary, duty. Every one owes a moral duty, not, as a volunteer in a matter in which he has no legal duty or personal interest, to defame another unless he can find a justification in some pressing emergency. In *Coxhead* v. *Richards*, 2 Mann., G. & S. 569, 602, Coltman, J., said: "The duty of not slandering your neighbor on insufficient grounds is so clear that a violation of that duty ought not to be sanctioned in the case of voluntary communications except

under circumstances of great urgency and gravity. It may be said that it is very hard on a defendant to be subject to heavy damages when he has acted honestly and when nothing more can be imputed to him than an error in judgment. It may be hard, but it is very hard on the other hand to be falsely accused. It is to be borne in mind that people are but too apt rashly to think ill of others; the propensity to tale-bearing and slander is so strong amongst mankind, and when suspicions are aroused, men are so apt to entertain them without due examination, in cases where their interests are concerned, that it is necessary to hold the rule strictly as to any officious intermeddling by which the character of others is affected;" and in the same case Cresswell, J., said: "If the property of the shipowner on the one hand was at stake, the character of the captain was at stake on the other; and I cannot but think that the moral duty not to publish of the latter defamatory matter which he did not *know* to be true, was quite as strong as the duty to communicate to the shipowner that which he *believed* to be true."

One may not go about in the community and, acting upon mere rumors, proclaim to everybody the supposed frailties or bad character of his neighbor, however firmly he may believe such rumors, and be convinced that he owes a social duty to give them currency that the victim of them may be avoided; and, ordinarily, one cannot with safety, however free he may be from actual malice, as a volunteer, pour the poison of such rumors into the ears of one who might be affected if the rumors were true. I cite a few cases by way of illustration. In *Godson* v. *Home*, 1 B. & B. 7, one Noah solicited the plaintiff to be his attorney in an action. The defendant, apparently a total stranger, wrote to Noah to deprecate his so employing the plaintiff, and this was held to be clearly not a confidential or privileged communication. In *Storey* v. *Challands*, 8 C. & P. 234, one Hersford was about to deal with the plaintiff when he met the defendant who said at once, without his opinion being asked at all, "if you have anything to do with Story you will live to repent it, he is a most unprincipled man," etc., and Lord Denman directed a verdict for the plaintiff because the defendant began by making the statement without waiting to be asked. In *York* v. *Johnson*, 116 Mass. 482, the defendant, a member of a church, was appointed with the plaintiff and other members of the church on a committee to prepare a Christmas festi-

val for the Sunday school. He declined to serve, and being asked his reason by Mrs. Newton, a member of the committee, said that a third member of the committee, a married man, had the venereal disease, and being asked where he got it said he did not know, but that "he had been with the plaintiff," who was a woman, and it was held that this was not a privileged communication. There was no question of the defendant's good faith and reasonable grounds of belief in making the communication, and yet Devens, J., in the opinion said: "The ruling requested by the defendant that the communication made by him to Mrs. Newton was a privileged one and not actionable except with proof of express malice, was properly refused. There was no duty which he owed to Mrs. Newton that authorized him to inform her of the defamatory charges against the plaintiff, and no interest of his own which required protection justified it. He had declined to serve upon the same committee with Mrs. York; but he was under no obligation to give any reason therefor, however persistently called upon to do so; and even if Mrs. Newton had an interest in knowing the character of Mrs. York, as a member of the same church, it was an interest of the same description which every member of the community has in knowing the character of other members of the same community with whom they are necessarily brought in contact, and would not shield a person who uttered words otherwise slanderous."

Having thus stated the general principles of law applicable to a case like this, I will now bring to mind the facts of this case so far as they pertain to the defamatory letter. The plaintiff was a lawyer and had been engaged in the practice of his profession at Caledonia for several months and resided there at the date of the letter. Miss Dora McNaughton and the defendant also resided there. The plaintiff was on terms of social intimacy with Dora and was paying her attention with a view to matrimony, and some time subsequently married her. Mrs. Collins was about twenty-five years old, two years and a half younger than Dora, and was married November 2, 1875; and prior to that she had always resided within a mile and a half from the residence of Dora and they had been very intimate friends. Dora had a father and no brother, and Mrs. Collins had a brother. During the time of this intimacy and at some time before the marriage of Mrs. Collins, Dora repeatedly re-

quested of her that if she "knew anything about any young man she went with, or in fact any young man in the place, to tell her because her father did not go out a great deal and had no means of knowing, and people would not be apt to tell him," that she, Mrs. Collins, had a brother and would be more apt to hear what was said about young men, and Dora wished her to tell what she knew. Their intimacy continued after the marriage of Mrs. Collins until January before the letter was written, when a coldness sprang up between them. They became somewhat estranged and their intimacy ceased. Mrs. Collins testified that when she wrote the letter she thought just as much of Dora as if she had belonged to her family; that she had heard the defamatory rumors and believed them, and, therefore, did not wish her to marry the plaintiff. It must be observed that the request of Dora to Mrs. Collins for information about young men was not made when she was contemplating marriage to any young man, and that the request was not for information about any particular young man or about any young man in whom she had any interest; but it was for information about the young men generally with whom she associated. Nor literally construing the language, did Dora wish for information as to the gossip and rumors afloat about young men. What she asked for was such facts as Mrs. Collins *knew* and not for her opinion about young men or her estimation of them. But if we assume that the request was for information as to all the rumors about young men which came to the knowledge of Mrs. Collins, the case of the defendant is not improved. At that time the plaintiff was not within Dora's contemplation, as she did not know him until long after. The request was not for information as to any young man who might pay her attention with a view to matrimony; it was for information about all the young men in her circle. Mrs. Collins was not related to her and was under no duty to give the information, and Dora had no sufficient interest to receive the information. Mrs. Collins was under no greater duty to give the information to Dora than to any of the other young ladies of her acquaintance in the same circle. She could properly tell what she knew about young men, but could not defame them, even upon request, by telling what she did not know, what nobody knew, but what she believed upon mere rumors and hearsay to be true. The mere fact that she was requested or even urged to give the informa-

tion, did not make the defamatory communication privileged. *York* v. *Johnson*, *supra*.

But there is no proof that this letter was written to Dora in pursuance of any request made by her four years before its date, and there was no evidence which authorized the jury to find so if they did so find. On the contrary, it is clear that Dora would not, at the time, have gone to Mrs. Collins for any information as to the plaintiff if she had desired any, and that she did not wish for the information from her; and that this was known to Mrs. Collins the language of the letter clearly shows. In the defendant's answer it is alleged that Mrs. Collins' letter was prompted by her friendship for Dora and by the solicitation of "mutual friends to interfere in the matter and break off the relations which seemed to exist between the plaintiff and Dora," and there is no averment that it was written in pursuance of any request coming from Dora. The letter itself as well as the evidence of Mrs. Collins, shows unmistakably that it was thus prompted. Mrs. Collins did not testify that she wrote the letter in pursuance of any request of Dora, and the action was not tried upon that theory, and no question as to the request was submitted to the jury. The trial judge charged the jury broadly that if the relations of Dora and Mrs. Collins were of such an intimate character as to warrant the latter in warning the former "against a person whom she had reason to believe was not a fit person, and if Mrs. Collins acted fairly, in good faith, conscientiously, although mistakenly, there can be no recovery against her," upon the count in the complaint for libel; and then the court said: "Did Mrs. Collins in writing that letter act fairly, act judiciously, not in the matter of good taste, but did she with the facts which had been brought to her mind act in a conscientious and proper manner? If she did, if she acted as an ordinarily prudent person would act under the same circumstances, if she had probable ground for her belief, she was justified in writing the letter." Mrs. Collins then appears as a mere volunteer, writing the letter to break up relations which she feared might lead to the marriage of the plaintiff to Dora. If she had (not?) been the mother of Dora, or other near relative, or if she had been asked by Dora for information as to the plaintiff's character and standing, she could with propriety have given any information she possessed affecting his character, provided she acted in good

faith and without malice. But a mere volunteer having no duty to perform, no interest to subserve, interferes with the relations between two such people at her peril. The rules of law should not be so administered as to encourage such intermeddling, which may not only blast reputation but possibly wreck lives. In such a case the duty not to defame is more pressing than the duty to communicate mere defamatory rumors not known to be true.

Some loose expressions may doubtless be found in text books and judicial opinions supporting the contention of the defendant that this letter was, in some sense, a privileged communication. But, after a very careful research, I believe there is absolutely no reported decision to that effect. The case which is as favorable to the defendant as any, if not more favorable than that of any other, is that of *Todd* v. *Hawkins*, 8 Car. & P. 88. In that case, a widow being about to marry the plaintiff, the defendant, who had married her daughter, wrote her a letter containing imputations on the plaintiff's character, and advising a diligent and extensive inquiry into his character, and it was held that the letter was written on a justifiable occasion, and that the defendant was justified in writing it, provided the jury was satisfied that, in writing it, he acted *bona fide*, although the imputations contained in the letter were false or based upon the most erroneous information; and if he used expressions, however harsh, hasty or untrue, yet *bona fide*, and believing them to be true, he was justified in so doing. The letter was held privileged solely upon the ground of the near relationship existing between the widow and the defendant, her son-in-law, which justified his voluntary interference. But the judge expressly stated that if the widow and defendant had been strangers to each other, there would have been a mere question of damage. A case nearer in point is that of "*The Count Joannes* v. *Bennett*, 5 Allen, 169. There it was held that a letter to a woman containing libellous matter concerning her suitor, cannot be justified on the ground that the writer was her friend and former pastor, and that the letter was written at the request of her parents, who assented to all its contents. The decision was put upon the ground that, in writing the letter, the defendant had no interest of his own to serve or protect; that he was not in the exercise of any legal or moral duty; that the proposed marriage did not even involve any

sacrifice of his feelings or injury to his affections, and did not, in any way, interfere with or disturb his personal or social relations; that the person to whom the letter was addressed was not connected with him by the ties of consanguinity or kindred, and that he had no peculiar interest in her. Some years before the same learned court decided the case of *Krebs* v. *Oliver*, 12 Gray, 239, wherein it was held that statements that a man has been imprisoned for larceny, made to the family of a woman whom he is about to marry, by one who is no relation of either, and not in answer to an inquiry, are not privileged communications. In the opinion, it is said: "A mere friendly acquaintance or regard does not impose a duty of communicating charges of a defamatory character concerning a third person, although they may be told to one who has a strong interest in knowing them. The duty of refraining from the utterance of slanderous words, without knowing or ascertaining their truth, far outweighs any claim of mere friendship."

I am, therefore, of opinion that the letter was in no sense, upon the facts as they appear in the record, a privileged communication.

There was, also, error in the court below as to the verbal slanders alleged in the second cause of action; and what I have already said applies, in part, to these slanders. There was no substantial denial of these slanders in the answer, and there is no dispute in the evidence that they were uttered, and there can be no claim upon the evidence that they were justified. The trial judge charged the jury that the words were slanderous. But he said to them that "there is not that presumption of malice in the case of oral slanders that there is in the case of a deliberate writing." This was excepted to by plaintiff's counsel, and was clearly erroneous. In the case of oral defamation, as in the case of written, if the words uttered were not privileged, the law implies malice.

The judge further charged the jury, in substance, that the words, if uttered under the circumstances testified to by Mrs. Collins, were privileged. She testified, in substance, that she uttered the words to Mr. Cameron in confidence, after the most urgent solicitation on his part that she should tell him what she knew about the plaintiff. But defamatory words do not become privileged merely because uttered in the strictest confidence by one friend to another, nor because uttered upon the

most urgent solicitation. She was under no duty to utter them to him, and she had no interest to subserve by uttering them. He had no interest or duty to hear the defamatory words, and had no right to demand that he might hear them; and under such circumstances there is no authority holding that any privilege attaches to such communications.

There was no evidence that would authorize a jury to find that Cameron sought the interview with Mrs. Collins as an emissary from or an agent of the plaintiff, or that at the plaintiff's solicitation or instigation he obtained the slanderous communications from her, and he did not profess or assume to act for him on that occasion. He was the mutual friend of the parties, and seems to have sought the interview with her either to gratify his curiosity, or to prevent the impending litigation between the parties. But even if he obtained the interview with her at the solicitation of the plaintiff, and as his friend, she could not claim that her slanderous words uttered at such interview were privileged.

The trial judge, therefore, erred in refusing to charge the jury that there was no question for them as to the second cause of action but one of damages.

Therefore, without noticing other exceptions to rulings upon the trial, for the fundamental errors herein pointed out, the judgment should be reversed and a new trial granted.

* * * * * * * *

All concur with Earl, J., for reversal, except Danforth, J., dissenting.

Judgment reversed.[1]

King v. Patterson.

(49 New Jersey Law, 417. — 1887.)

Error to the Supreme Court upon the rulings and charge of the trial judge in an action to recover for defamatory matter, affecting the financial condition of the plaintiff below, Emma Patterson, published by King and others, the defendants below,

[1] Dissenting opinion by Danforth, J., omitted.

who conducted a mercantile agency in the city of New York. The defense was that the publication was a privileged communication.

Depue, J. Defamatory words uttered in a privileged communication are not actionable unless there be proof of actual malice. If such words are uttered *bona fide* on a privileged occasion, in an honest belief that they are true, the party injured is remediless. *Spill* v. *Maule*, L. R. 4 Exch. 232; *Clark* v. *Molyneux*, 3 Q. B. Div. 237. A wrong or malicious motive is essential to the action where the communication is privileged.

On the other hand, where the publication imputes a crime, so as to be actionable *per se*, or is actionable only on averment and proof of special damages, if the publication is not justified by proof of its truth or by the privileged occasion of publication, the law conclusively presumes malice such as is essential to the action. In such cases good faith and an honest belief in the truth of the publication will be no defense. The absence of a malicious motive may protect against exemplary damages, but will not bar the action. In a legal sense, malice, as an ingredient of actions for slander or libel, signifies nothing more than a wrongful act done intentionally, without just cause or excuse. Cooley on Torts, 209, and note. A defamatory publication, under the pretext of a privileged communication, where the privilege does not exist, is a publication without just cause or excuse, and in a legal sense malicious and therefore actionable, though it be made without a malicious motive.

The burden of proving that the occasion of publication was privileged is on the defendant. The issue whether the words were published from a malicious motive, so as to take from them the protection of the occasion, arises only when it has been shown that the occasion of speaking or publishing is one that is privileged. Where the occasion is privileged it is for the plaintiff to establish that the statements complained of were made from an indirect or improper motive, and not for a reason which would otherwise render them privileged. *Clark* v. *Molyneux*, *supra*; Pollock on Torts, 227, 234.

The fundamental question in this case, upon which the issue hinges, is whether the notification sheet of November 5th, 1884, containing the false statement on which the action is founded,

was published and issued under such circumstances and in such a manner as to bring it within the class of communications which the law denominates privileged communications.

The occasions which give rise to the privilege of speaking or publishing words which otherwise would be defamatory and actionable are various. Thus, memorials to officers of state respecting the conduct of magistrates and officers, comments by electors upon the character of candidates for office, communications in matters of public interest in which the public generally is concerned, communications in the interest of third persons or for the protection of the party's own interest, communications respecting the character of servants or the credit and responsibility of tradesmen, or made in the performance of social, moral, or legal duties, come within the class of privileged communications. Whether the privilege is available as a defense depends upon the circumstances of the particular case, the situation of the parties, the persons to whom, the circumstances under which, and the manner in which the communication was made. A publication which in one case would be justifiable, in another case would be without justification. A criticism of the public acts of a candidate for office may be inserted in a public newspaper or be proclaimed by a circular, but such publicity given to comments derogatory to the character of a servant or to the financial standing of a trader would be illegal. A person, with a view of obtaining information on a subject in which he has a personal interest, or in offering a reward for bills of exchange lost out of his possession, may in some cases justifiably insert in a newspaper an advertisement containing imputations upon the character of others, as in *Delany* v. *Jones*, 4 Esp. 191, and *Finden* v. *Westlake*, 1 Moody & M. 461. He may justifiably advertise in that public manner the discharge of an agent whose employment had been that of a general collection agent, as in *Hatch* v. *Lane*, 105 Mass. 394, but such publicity to the discharge of his cook or his butler would be without justification. In some instances a voluntary imparting of information will be justified; in other cases the privilege applies only to information in response to inquiries. The subject may be one that is privileged, and a communication on that subject be unprivileged if the restraints and qualifications imposed by law upon the publicity to be given the communication be not observed. If such restraints and qualifications are disregarded,

the communication is unprivileged and actionable, though made from the best of motives. In such cases good faith and honest belief will be no defense. The act of communicating defamatory matter to persons with respect to whom there is no privilege is an act without legal justification or excuse, and therefore actionable.

When the restraints and qualifications imposed by law upon the publicity to be given to the publication are shown to have been observed, it is then, as was said by the court in *Laughton* v. *Bishop of Sodor and Man*, L. R. 4 P. C. 509, "all we have to examine is whether the defendant stated no more than he believed or might reasonably believe; if he stated no more than this he is not liable." Expressions of similar import are frequent in judicial opinions, but they have uniformly been preceded or accompanied by a judicial determination that the manner of publication was such as to make the communication privileged. No judicial precedent has ever treated good faith and honest belief, standing alone, as a justification of defamatory words.

The plaintiff was engaged in the retail clothing business, at Red Bank, in the county of Monmouth. The defendants conduct a mercantile agency in the city of New York. Their business consists in collecting information as to the credit and financial standing of dealers throughout the country. Four times a year they publish a book of ratings called the "reference book," and twice in each week a notification sheet called the "mercantile agency notification sheet." In the notification sheet of November 5th, 1884, there was published this information: "New Jersey. Red Bank. Patterson, Emma. Chattel mortgage, Samuel Ludlow, $1385. Clothing." The publication was false, and for the injury to the plaintiff's business occasioned by it this suit was brought.

The suit is an action by a trader for false statement concerning her credit, and the defense that the publication was privileged must be decided upon those legal rules that give a privilege to communications of that character.

The trial judge charged that 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 may contain criminatory matter, which, with-

out this privilege, would be slanderous or libelous and actionable.

This instruction was taken from the opinion of the Queen's Bench in *Harrison* v. *Bush*, 5 El. & B. 344. It conforms to the rule adopted in *Whiteley* v. *Adams*, 15 C. B. (N. S.) 392, and in *Laughton* v. *Bishop of Sodor and Man*, L. R. 4 P. C. 495, in every respect material to this suit, and accords with the decision of the Court of Exchequer in *Toogood* v. *Spyring*, 1 C. M. & R. 181. In the latter case the defendant, a tenant of the Earl of Devon, required some work to be done on the premises occupied by him, 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 became intoxicated, and some circumstances occurred which induced the plaintiff to believe that he had broken open the cellar door, and so obtained access to his cider. The court held that the communication of these facts to Brinsdon, the agent of the Earl, who, in virtue of his employment, had a duty to perform in the premises, was privileged, but that a communication at another time to one Taylor, a third person, who had no interest in the subject-matter, and no duty to perform in reference to it, was not privileged. The judgment of the court in *Toogood* v. *Spyring*, sanctions the rule adopted by the trial judge in this case.

The defendants were engaged of their own volition and for their own profit in the business of collecting and disseminating information as to the character, credit and pecuniary responsibility of traders throughout the United States. Their course of business was to transmit a copy of the record book and the semi-weekly notification sheet, containing the information they collected, to each of their subscribers, who paid the required annual subscription and signed a contract to hold such communications as confidential, without regard to the existence or non-existence of an interest by the subscribers in the information communicated. The number of subscribers to whom the record book and notification sheets were sent does not appear in the case. Mr. Dun, the principal proprietor, testified that it was impossible for him to say how many copies were issued, as there were a number of branch offices, and of the number of their subscribers he had no knowledge. Enough appeared to show that the defendants' business of collecting and disseminat-

ing information is extensive, and that the number of subscribers to whom such information is communicated is very large. It appeared that one Myers, a creditor of the plaintiff, saw the notification sheet of November 5th, 1884, in the hands of Lisberger & Weiss, merchants doing business in Philadelphia, and that Lyons, another creditor, saw another copy of it on the desk of Simons & Co., in New York city. In consequence of the information contained in this sheet, Myers and Lyons went to Red Bank and demanded payment or security for their debts. The plaintiff's credit was thereby destroyed, and her business was broken up. Myers and Lyons were not subscribers of the defendants. Lisberger & Weiss had, some two years before, sold goods to the plaintiff, but the account was closed at that time. It did not appear that Simons & Co. ever had dealings with the plaintiff. Neither of these persons had, at the time the sheet was published, any business interest in the credit or financial standing of the plaintiff.

The trial judge applied the rule of law he adopted by an instruction in these words: "Had, then, Lisberger & Weiss an interest in knowing the financial condition and solvency of the plaintiff? Or had Simon & Co., in New York, such interest? Or had either party, the defendants, or Lisberger & Weiss, or Simon & Co., a duty with reference to the condition of the business affairs as between themselves? If they had, then such communication, made *bona fide*, with the guard by contract and other stipulation between the parties appearing in evidence, would be privileged. If there was no such interest or duty between the defendants and these subscribers, then they may be liable, as the publication was not privileged as to them, or to others who obtained it through them. If a request was made, either express or implied, by Lisberger & Weiss, or by Simon & Co., for such communication as to the plaintiff, then, if they had no interest in the matter, the book or sheet sent to them, or either of them, affecting her credit, would not be privileged. If made without such request, then the communication voluntarily sent by them must be at their risk as to the harm that may be done thereby. I think it is enough to hold, in this case, that the agency has the protection of the privilege in every case where the subscriber has a direct and personal interest in the person who is the subject-matter of inquiry, and that in all other cases they must stand as others, on the truthfulness of

their report, and their protection under the contracts with subscribers not to divulge the secrets of their business."

In this discussion my citations will be limited to such cases as are regarded as leading cases, or are germane to the case before the court, with a view to distinguish or apply such decisions to the case in hand.

In *Capital and Counties Bank* v. *Henty & Sons*, 7 App. Cas. 741, the defendants, who were brewers, had printed a circular in these words: "Messrs. Henty & Sons hereby give notice that they will not receive in payment checks drawn on any of the branches of the Capital and Counties Bank." This circular they sent by post to persons residing in various places in Sussex and neighboring counties, who were either tenants of or purchasers of beer from the defendants. The circular became known to other persons, and there was a run on the bank. The bank sued Henty & Sons for a libel, with an innuendo that the circular imputed insolvency. It appeared in the case that the practice of the defendants had been to collect from time to time, through their travelers, moneys due from their tenants and customers, and to accept payment by checks on local banks. Among the checks which, in the ordinary course of business, were likely to come into the hands of these persons, and which they might be likely from time to time to offer in payment to the defendants, some might be drawn upon the different branches of the plaintiff's bank. The circular, as was said by Lord Selborne, related to the defendants' mode of conducting business between them and their tenants and customers, as to which it was proper that their debtors should be informed, and as the defendants were entitled to decide for themselves what checks they would accept or decline from their debtors, such a communication to their tenants and customers, if made *bona fide*, was privileged. The case, however, was decided in the House of Lords on the question whether the proof was sufficient to sustain the innuendo that the circular imputed insolvency. The court held that the words of the circular, in their natural meaning, were not libelous; that the inference suggested by the innuendo was not the inference which reasonable persons would draw, and that the circumstances attending the publication did not show that the circular had a libelous tendency. Speaking of the fact that some of the persons who received the circular did in fact show it to strangers, Lord Selborne said: "I do

not think that any such communication by them to strangers, unauthorized by the defendants themselves, could properly be evidence in support of the innuendo." He added: "If it had been publicly placarded by the defendants, on the walls of Chichester or other towns, or had been advertised by them in newspapers, or sent by them through the post to persons with whom they had no business relations, this might have been evidence of a malicious intention, beyond what was expressed by the mere words of the document."

The case cited is distinguished from that in hand in the circumstance that the circular in that case did not bear on its face a construction imputing insolvency, and was sent only to persons having an interest in the subject; whereas in this case the statement in the notification sheet plainly affected the plaintiff's financial standing, and was sent to all subscribers promiscuously, without regard to their interest in that subject.

In *Lawless* v. *Anglo-Egyptian Oil Co.*, L. R. 4 Q. B. 262, an action for libel was brought against a corporation for publishing a report made to the company by auditors in their audit of the managers' account, reflecting upon the plaintiff. The report was submitted at a general meeting of the shareholders of the company, and under a resolution of the meeting was printed and circulated among the shareholders. The court held that inasmuch as it was the interest of all the shareholders to be informed of the report, the printing and such publication of it were privileged on the ground, as was said by MELLOR, J., "that to print the report was a necessary and reasonable mode of communicating it to all the shareholders, who must be more or less numerous." It will be observed that the *gravamen* of the action was the publication to the shareholders, persons immediately interested in the report, and that no other publicity had been given to the defamatory matter except to the printer by whom it had been printed. In *P., W. & B. R. Co.* v. *Quigley*, 21 How. 202, a report made to stockholders in writing, and printed, with respect to the capacity and skill of one of the company's employees, the superintendent of the company's railroad, was held to be a privileged communication; but it was also held that the privilege did not extend to the preservation of the report in a book for distribution among the persons belonging to the corporation or the members of the community.

These cases are simply illustrations of the principle that a

communication made upon a subject-matter in which the party communicating has a duty is privileged when made to persons having a corresponding interest in it, and they illustrate how carefully the privilege is restricted within the bounds reasonably necessary to effect the communication to the parties actually interested. So strictly is this limitation within reasonable bounds enforced, that in *Williamson* v. *Freer*, L. R. 9 C. P. 393, the transmission unnecessarily, by a post-office telegram, of libelous matter which would have been privileged if sent in a sealed letter, was held to avoid the privilege, although the post-office clerks through whose hands it would pass were prohibited, under severe penalties, from disclosing telegrams passing through their hands, the principle of the decision being that publication was thus made to persons in respect of whom there was not any privilege. Pollock on Torts, 234.

The defendant's dissemination of the notification sheets among their subscribers as a class, being intentional and in the regular course of their business as it was conducted, it is not necessary to consider whether *Thompson* v. *Dashwood*, 11 Q. B. Div. 43, in which it was held that a communication intended to be made on a privileged occasion was privileged where, by the sender's negligence in putting letters in wrong envelopes, the communication was sent to a stranger to the occasion, was correctly decided. It will be observed that in *Thompson* v. *Dashwood* the misdirected letter was sent to the plaintiff's brother, and in fact caused no special injury to the plaintiff. It may also be remarked that Mr. Pollock, in his recent Treatise on Torts, disapproves of this case as a decision by no means universally accepted by the profession as good law, and as contrary to the earlier decisions. Pollock on Torts, 216, 234. A defendant intends to send a communication derogatory to the plaintiff's character or circumstances to A, where it would do no harm. By inadvertence he sends it to B, which produces the injury complained of. It is obvious that it would be a plain transgression of legal principle to excuse the act he did because he intended to do an act from which no injury to the plaintiff would have resulted, and thus visit upon an innocent sufferer the consequences of the heedless act of the wrong-doer which occasioned the injury.

I turn now to the judicial precedents directly in point.

In *Beardsley* v. *Tappan* the defendant conducted a mercantile agency for furnishing information to subscribers, under

rules and regulations for maintaining the personal and confidential character of communications to subscribers similar to those in the defendant's contract with their subscribers. The plaintiff sued in an action for libel, for communicating false information with respect to the plaintiff's financial condition. The words in question had been entered in the defendant's record book by his clerks and had been read by them to clerks of subscribers sent by their employers to make inquiries. The trial judge instructed the jury that no person other than the merchant himself, asking for information, had in law a right to read or hear said words, and that the reading of said words by any person in defendant's employ, with his permission, or the reading of said words by defendant himself, or by any person in his employ, to the clerk of a merchant subscriber requesting information concerning the plaintiff, was an unlawful publication, not at all within or protected by the rule of law as to privileged communications. The plaintiff having obtained a verdict, Mr. Justice Nelson, in denying a motion for a new trial on the ground of misdirection, held that the principle upon which privileged communications rest imported confidence and secrecy between individuals, and was inconsistent with the idea of a communication made by a society or congregation of persons, or by a private company or a corporate body. The facts and the charge of the trial judge are reported in 1 Am. Lead. Cas. 205, and the opinion of Mr. Justice Nelson in 5 Blatchf. C. C. 497. The judgment was reversed in the Supreme Court of the United States, no opinion having been expressed on this subject.

The charge of the trial judge and the reasoning of Mr. Justice Nelson place unreasonable restrictions upon the doctrine of privileged communications. Agents to collect information, clerks to record it and to communicate it to subscribers, on the one hand, and confidential clerks to receive the information in the interest and by the authority of subscribers, on the other hand, are absolutely necessary to the usefulness, if not the existence, of these institutions. The employment of clerks who obtain thereby such information as their duties necessitate — like the intervention of the printer where printing a report is, in the judgment of the court, a reasonable method of communicating to a large body of interested persons, as the share-

holders of a corporation—does not take from the transaction its character as a privileged communication.

Other cases have placed the subject on more reasonable grounds. In *Ormsby* v. *Douglass*, 37 N. Y. 477, the defendant kept a mercantile agency, to obtain information respecting the credit and responsibility of persons in trade, and furnish the same to subscribers. A subscriber who held a note against the plaintiff personally applied at the defendant's office for information concerning the plaintiff. The record books were examined by the defendant's clerks, and the information was given. The statement complained of was made orally to one interested in the information, upon personal application at the defendant's office. The Court of Appeals of New York held the communication to be privileged. On the other hand, the same court held that a communication made by a person engaged in the business of a mercantile agent, to subscribers, which was not confined to such of them as made inquiries of him, but was printed by his procurement and distributed by him to subscribers who had no special interest in being informed of the condition of the plaintiff's firm, was not privileged. *Taylor* v. *Church*, 4 Seld. 452.

The question was again considered in that state, by the new Court of Appeals, in *Sunderlin et al.* v. *Bradstreet*, 46 N. Y. 188. The suit was against the proprietors of a mercantile agency. The defendants published a semi-annual volume containing the names of persons and firms doing business in various parts of the United States and Canada, and information in reference to their financial condition, and also a weekly sheet of corrections, which was sent to their subscribers in the city of New York and in the country by mail. In this weekly sheet they published that the plaintiffs had failed. The publication was false. The question was whether the publication was a privileged communication. Mr. Justice Allen, in the opinion of the court, said: "A communication is privileged within the rule when made, in good faith, in answer to one having an interest in the information sought; and it will be privileged if volunteered, when the party to whom the communication is made has an interest in it, and the party by whom it is made stands in such relation to him as to make it a reasonable duty, or at least proper, that he should give the information. . . . In the case at bar it is not pretended that

but few, if any, of the persons to whom the ten thousand copies of the libelous publication were transmitted had any interest in the character or pecuniary responsibility of the plaintiffs, and to those who had no such interest there was no just occasion or propriety in communicating the information. The defendants, in making the communication, assumed the legal responsibility which rests upon all who, without cause, publish defamatory matters of others; that is, of proving the truth of the publication, or responding in damages to the injured party. The communication of the libel to those not interested in the information was officious and unauthorized, and therefore not protected, although made in the belief of its truth, if it were, in point of fact, false. . . . In those cases in which the publication has been held privileged the courts have held that there was a reasonable occasion or exigency which for the common convenience and welfare of society, fairly warranted the communication as made. But neither the welfare nor convenience of society will be promoted by bringing a publication of matters, false in fact, injuriously affecting the credit and standing of merchants and traders, broadcast through the land, within the protection of privileged communications." The court held that information communicated, not merely to persons interested in it, but published to all persons who might be subscribers to the scheme of publication, was not privileged.

The decisions in the federal Circuit Courts are in coincidence with those of the courts of New York. *Erber* v. *Dun*, 12 Fed. Rep. 526; *Trussell* v. *Scarlett*, 18 id. 214; *Locke* v. *Bradstreet Co.*, 22 id. 771. Against these authorities I find neither judicial decision nor *dictum*.

I concur in the result reached in *Sunderlin* v. *Bradstreet*, and in the reasoning upon which the judgment was founded. The defendants can claim no additional privilege in virtue of the business in which they are engaged. Their business is a lawful business, but, as was said by the court in *Sunderlin* v. *Bradstreet*, "in its conduct and management it must be subjected to the ordinary rules of law, and its proprietors and managers held to the liability which the law attaches to like acts by others." The publication of defamatory matter affecting third persons, in a business prosecuted for personal gain, can be tolerated only on grounds of public convenience. The rights of individuals ought not to be made to yield to the exigencies

of such a business more than public interests require. Public interests will be adequately conserved by extending the immunity of privileged communications only so far as to embrace communications to subscribers who have a special interest in the information. This restriction lays no unreasonable restraint upon the business of these agencies in collecting and communicating information in the interest of the public. Society is organized and courts are established for the protection of the rights of individuals. Unrestrained by those legal principles which control the acts and conduct of other persons under like circumstances, these agencies, in the vastness of their operations, are capable of becoming instruments of injustice and oppression so grievous that public policy would require their entire suppression.

Nor can the defendants acquire a larger measure of immunity by reason of their contracts with their customers to hold the information as confidential. The contract of the defendants with their subscribers is *inter sese*. In fact it affords no protection against injury by false reports. The manner in which these reports are disseminated renders protection to the public under the terms of the subscriber's contracts a delusion. Each of the subscribers has a printed copy to retain in his possession. Myers testified that although not one of the defendants' subscribers, he nevertheless had seen their reports twice a week right along—sometimes only once a week and sometimes twice a week; that during the last ten years he had seen their notification sheets thousands of times, and that any reputable merchant could get hold of their sheets, whether he is a subscriber or not. Others of the plaintiff's creditors who were not defendants' subscribers testified that they had frequently seen the defendants' notification sheets, and some that they had seen the sheet of November 5th, 1884. The injury to the plaintiff from the false report resulted from the manner in which the defendants disseminated their publications. It has been held that damage occasioned by the unauthorized repetition by a third person of defamatory words uttered orally is too remote to support an action against the original utterer of them, where the words are actionable only by reason of special damage. *Ward* v. *Weeks*, 7 Bing. 211. This case and the cognate case of *Vicars* v. *Wilcocks* have been criticized. 2 Smith's Lead. Cas. (8th ed.) 552. The principle held in that case, if sound, has

never been applied to written or printed libels, nor is it applicable to defamatory matter published in that manner. The correct principle to apply to such publications is that the original publisher is answerable in law for all the consequences of his wrongful act which were reasonably to be foreseen, and which were the result, in the usual order of things, of such wrongful act. *Hughes* v. *McDonough*, 14 Vroom, 460; Pollock on Torts, 463.

The rule adopted by the learned judge, in defining the qualifications and limitations upon publications affecting credit and financial standing, which would make such publications privileged communications, was correct. His application of the rule to the facts of this case was as favorable to the defendants as they were entitled to have. His ruling with respect to the liability of the defendants for damages resulting from their wrongful acts was also correct.

The other exceptions have been examined. It is sufficient to say we find in them no error which would justify a reversal.

The judgment should be affirmed.

Van Syckel, J., (dissenting). The alleged libelous publication was a printed communication published by a commercial agency in the city of New York, of which the defendants below were members. The publication was contained in what is known as a "notification sheet," by which the agency communicated to its subscribers information affecting the financial standing of merchants and traders in various parts of the country. The plaintiffs below complained that in one of such notification sheets it was falsely stated that she had put a chattel mortgage on her stock of merchandise.

The case shows that every subscriber to the commercial agency was required to enter into and did enter into a written agreement with the agency that all communications made by the agency, either verbally or through notification sheets, should be strictly confidential, and should be exclusively confined to the business of such subscribers' establishments. The information furnished is declared in this contract to be furnished to subscribers on request, for use in their business, as an aid to them in determining the propriety of giving credit.

The trial court ruled that the agency had the protection of privilege in every case where the subscriber had a direct and

personal interest in the person who is the subject-matter of inquiry, and that in all other cases they must stand, as others, on the truthfulness of their report and their protection under the contracts with subscribers not to divulge the secrets of their business.

Malice, express or implied, is absolutely essential to support an action for defamation. If a man writes and publishes of another that which is false and defamatory, the law will usually imply malice on his part without any evidence of express malice. But there are many occasions on which one may publish of another that which proves to be untrue, when the legal implication of malice will not arise. In such cases the publication is not actionable unless express malice can be shown. This leads to the consideration of the much discussed doctrine of privilege.

The term "privileged," as applied to a communication alleged to be libelous, means simply that the circumstances under which it was made are such as to repel the legal inference of malice, and to throw upon the plaintiff the burden of offering some evidence of its existence beyond the mere falsity of the charge. Mr. Justice SELDEN, in *Lewis* v. *Chapman*, 16 N. Y. 369.

Baron PARKE, in *Wright* v. *Woodgate*, 2 C., M. & R. 573, has clearly defined the term. He says: "The proper meaning of a privileged communication 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 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."

This rule is founded in public policy, and has been liberally applied.

In *Waller* v. *Lock*, 45 L. T. (N. S.) 243, JESSEL, Master of the Rolls, says: "If an answer is given in the discharge of a social or moral duty, or if the person who gives it thinks it to be so, that is enough; it need not even be an answer to an inquiry, but the communication may be a voluntary one."

He further observes, in the same case: "It appears to me that if you ask a question of a person whom you believe to have the means of knowledge, about the character of another with whom you wish to have any dealings whatever, and he answers *bona fide*, this is a privileged communication."

In *Toogood* v. *Spyring*, 1 C., M. & R. 181, 184, Baron PARKE says: "If such publications . . . be 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. . . . 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.

To the like effect is the expression of Lord ELLENBOROUGH, in *Delany* v. *Jones*, 1 Esp. 193: "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, it is not libelous."

In *Laughton* v. *The Bishop*, L. R. 4 P. C. 504, the House of Lords ruled that "a communication made *bona fide* upon any subject-matter, in which the party communicating has an interest, or in reference to which he has or believes he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter which, without that privilege, would be defamatory and actionable.

Mr. Justice SELDEN, in *Lewis* v. *Herrick*, *supra*, states the doctrine even more broadly: "Where the circumstances show that the defendant may reasonably be supposed to have had a just and worthy motive for making the charge, then the law ceases to infer malice from the mere falsity of the charge, and requires from the plaintiff other proof of its existence."

Weatherstone v. *Hawkins*, 1 T. R. 1105, was an action by a discharged servant against his former master for words spoken by him to one Rogers, who applied for information about the servant's character. There was a count, also, for libelous words contained in a letter written by defendant to one Collier after Rogers had declined to employ plaintiff. This letter accused plaintiff of embezzlement. This letter was not written in reply to a request by Collier for information, nor under an injunction of secrecy; its sole purpose seems to have been to vindicate the defendant for uttering the previous defamatory words to Rogers, and thus to prevent a suit by plaintiff. Lord MANSFIELD, in deciding the case, said: "I have held, more than once, that an

action will not lie by a servant against his former master for words spoken by him in giving the character of a servant. The general rules are laid down as Mr. Wood has stated, but to every libel there may be a necessary and implied justification from the occasion, so that what, taken abstractedly, would be a publication, may, from the occasion, prove to be none—as, if it were read in a judicial proceeding. Words may also be justified on account of the subject-matter or other circumstances. In this case, instead of plaintiff's showing it to be false and malicious, it appears to be incidental to the application by Rogers to the master of the servant. And the letter was written to the brother-in-law of the plaintiff for the express purpose of preventing an action being brought."

Hewer v. *Dawson*, Buller, N. P. 8, was an action for saying of the plaintiff, who was a tradesman, "he cannot stand it long; he will be a bankrupt soon." Special damage was laid in the declaration that one Lane had refused to trust the plaintiff for a horse. Lane, the person named in the declaration, was the only witness called for the plaintiff. It appeared in his testimony that the words were not spoken maliciously, but in confidence and friendship to Lane, and by way of warning him, and that in consequence of that advice he did not trust the plaintiff with the horse. Chief Justice Pratt said that "though the words were otherwise actionable, yet, if they should be of opinion that the words were not spoken in malice, but in the manner before mentioned, they ought to find the defendant not guilty."

It did not appear that the defendant was applied to for the information or that he had any interest in the transaction other than a friendly disposition to warn Lane of the risk.

McDougall v. *Claridge*, 1 Campb. 267, was for a libel on the plaintiff in his profession as a solicitor. The libel was a letter written by defendant to bankers at Nottingham, charging the plaintiff with improper conduct in the management of their affairs. It appeared, however, that the letter was intended as a confidential communication, and that the defendant was himself interested in the affairs which he supposed had been misconducted. Lord Ellenborough held that the action would not lie; that 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 of the persons whom he addressed.

In the case of *Toogood* v. *Spyring*, *supra*, Baron PARKE decided that if a former master, when applied to, gives the character of a discharged servant in the presence of a third person not interested, the communication, if made *bona fide*, is privileged.

In the subsequent case of *Kine* v. *Sewell*, 3 M. & W. 302, he expressed his conviction that the law had been properly laid down in the previous case.

Lawless v. *Anglo-Egyptian Cotton Company*, L. R. 4 Q. B. 262, was an action against a joint-stock company, the directors of which had published in the form of a printed circular, issued and sent to all the stockholders, the report of an auditing committee appointed to make an investigation into the finances of the company. The report contained defamatory statements concerning the plaintiff, who had been manager of the association. It was held that under these circumstances the presumption of malice did not arise, and the plaintiff was therefore nonsuited.

The following cases show that in the authorities heretofore cited the rule has been correctly enunciated: *Bank* v. *Henty*, L. R. 7 App. Cas. 741; *Thompson* v. *Dashwood*, L. R. 11 Q. B. 43; *Tuson* v. *Evans*, 12 Ad. & El. 733; *Phila., W. & B. R.* v. *Quigley*, 21 How. 202; *Finden* v. *Westlake*, M. & M. 461; *Hatch* v. *Lane*, 105 Mass. 394; *Brow* v. *Hathaway*, 13 Allen, 239; *Somerville* v. *Hawkins*, 10 C. B. 580.

These cases show that all that is necessary to entitle such communications to the claim of privilege is that the relation of the parties should be such as to afford a reasonable ground for supposing an innocent motive for giving the information and to deprive the act of the appearance of an officious intermeddling with the affairs of others. *Van Wyck* v. *Aspinwall*, 17 N. Y. 190; *Klinck* v. *Colby*, 46 N. Y. 427.

The cases heretofore cited have been considered without reference to mercantile agency cases.

The trial judge adopted the rule laid down in *Sunderlin* v. *Bradstreet*, 46 N. Y. 188, and in *Erber* v. *Dun*, 12 Fed. Rep. 526, both of which are commercial agency cases.

In other cases of this character a different view has been held.

In *Trussell* v. *Scarlett*, 18 Fed. Rep. 214, Judge MORRIS ruled that a notification sheet of R. G. Dun & Co., sent to a sub-

scriber, containing a charge of bankruptcy against plaintiff, was a privileged communication. To this case Dr. Wharton has appended a note maintaining the view that if the agency confines itself to the confidential communication of such information to its customers, then, if it acts *bona fide*, and without malice or recklessness, these communications are privileged, and the defendant, if sued for libel, would be entitled to a verdict.

The same opinion was entertained by Judge Nelson in *Locke* v. *Bradstreet*, 22 Fed. Rep. 771; by Judge Dewey in *Billings* v. *Russell*, 8 Bostw. Law Rep. (N. S.) 699; and by the Wisconsin court in *State* v. *Lonsdale*, 48 Wis. 348.

The underlying principle of the many cases cited, in my judgment, condemns *Sunderlin* v. *Bradstreet*, and *Erber* v. *Dun*, and extends the rule of privilege to all communications, spoken or written, *bona fide*, in the performance of what may reasonably be considered a duty to the public or to an individual, and also to communications required by a common interest, or by the relation in which the persons, between whom the communication is made, stand to each other. A false, defamatory publication must, when no other adequate motive appears, be attributed to malice; but, whenever the attending circumstances are such as to lead a reasonable and just mind to reject the presumption of actual malice, an essential requisite to the support of the action for libel disappears.

It is this consideration of what justly may and what may reasonably be presumed to actuate the conduct of men, that has led the judicial mind to introduce and apply the doctrine of privilege. The conceded instances in which this protection is accorded are not rare. Words spoken by a member in a legislative assembly; by one upon the subject-matter before a religious meeting; by counsel in the conduct of a cause; by one in response to inquiries by a friend concerning a physician, a lawyer or a tradesman; and by a former master to one who desires to know the character of a servant. Words thus spoken are not actionable *per se;* the presumption of malice is excluded, because it is not reasonable to suppose that it is present. No case has been cited, and I think none exists, where the plaintiff has been permitted to make an issue of the fact, whether the person applying to a former master in regard to the character of a servant, had in truth an interest in knowing. It has been deemed sufficient to put the case within the rule of privi-

lege, that application was made and the answer given *bona fide*. Nor has any consideration been given to the magnitude of the interest which elicited the inquiry, or whether the interest was present or prospective. Nor, in the case of master and servant, has the master ever been held to any accountability for failing to use reasonable care to inform himself that the inquiry was made in good faith.

Where inquiry is made of the master by one person at the solicitation of another, and where a tradesman inquires as to the responsibility of persons he may hope will sometime offer to deal with him, although he has no direct present interest in them, communications in reply seem to be clearly within the principle of the protecting rule.

It is now almost universally conceded that mercantile agencies are of great utility and advantage, if not absolutely essential, to those engaged in conducting the business and commerce of the country over the wide field where their enterprise leads them. The strict rule applied in the court below, if it does not tend to suppress, will go far to destroy the purpose and utility of these institutions.

It may be said that in New York the rule in *Sunderlin* v. *Bradstreet* has been productive of no such result. But there the pledge of secrecy has hitherto saved the agencies from a disastrous flood of civil suits and criminal prosecutions, which they could not have survived. Experience there furnishes proof, not of the wisdom of the rule, but that it is wise not to enforce it. There is no consideration of public policy which commends the application to them of an illiberal rule.

If immunity is accorded to the master making statements concerning his servant, when in fact the inquiry is made by one who does not intend to employ the servant, and if malice is not presumed to exist where a merchant makes inquiry of his neighbor or friend concerning the pecuniary responsibility of those with whom he may in the future have transactions, how can the doctrine of privilege be restricted, in this controversy, to cases where the subscriber has a present, direct and personal interest in the person who is the subject of inquiry?

Business interests are so ramified at this day that large enterprises cannot be successfully conducted without a comprehensive survey of the whole field of industry. The manufacturer must have some knowledge of the financial condition of those

who are his rivals in business, as well as of those who may be induced to purchase his productions, in order that he may act judiciously in fixing his limit of production. The dealer in brewer's grains, in order to determine the extent of his purchases, must know something of the business of the consumers, their pecuniary ability to purchase, and the probable volume of business in the district of country over which his transactions extend. In fact, every man who has merchandise to sell is to some extent interested in knowing how every man in the country stands in credit.

Though one is not a customer to-day, he may be to-morrow. Orders are given by letter, by telegram, by telephone, or in person, requiring immediate response. It involves the use of the mercantile agency sheets, the loss of the customer, or the risk of selling blindly.

The subscribers to the commercial agency in effect say to it: "We have an interest in knowing the financial condition of all business men whose standing you report; we assure you of our good faith by being willing to pay you for that information, and we pledge ourselves to receive it as a confidential communication." These circumstances, repellent of the presumption of malice, constitute the substance and essence of privileged communications.

How, under these conditions, can the obligation be imposed upon the agency to make sure that the subscriber has a present interest in the persons reported, without narrowing the privilege which has operated as a shield in the many cases referred to?

Business methods have changed; every department of human activity is marked by progress. There must be a correct apprehension of legal principles as they apply to a progressive state of society, if we would keep pace with the march of events, and render the common law as true and unerring a guide in jurisprudence to-day as it has been in the past. It is the pride of the common law that it is sufficiently broad and elastic to adapt itself to the exigencies of the times, and to adjust itself to the new and ever varying conditions that may arise in the progress of the age.

The rule that a business man may inquire of his friend or his neighbor as to the responsibility of one who has applied for credit, answered well enough fifty years ago, but it is altogether inadequate to the present requirements of trade and commerce.

The law of *Sunderlin* v. *Bradstreet* would even suppress the prevalent practice in business circles of employing a credit clerk, to ascertain and report the standing of business men in the district which he canvasses. No man could safely answer his inquiries, and the clerk could not report to his employer, without being liable to prosecution. The old adjudications, relied upon to support the more narrow rule, are the declarations of judges whose vision did not take in the widely different conditions which prevail in the affairs of men to-day. This doctrine utterly disables the agency to become capable of imparting even the information which it is conceded may lawfully be given. If the agency may furnish only to one having a direct interest, how would any one dare give the information to the agency, for, until some one having such interest has applied to the agency, the communication is within the prohibited class?

In my opinion, the defendants, in furnishing information to subscribers under the conditions imposed, are not subject to the presumption that they were moved by malice, and I therefore vote to reverse the judgment below.

For affirmance — The Chancellor, Chief Justice, Depue, Knapp, Parker, Brown, Cole, McGregor, Patterson.

For reversal—Dixon, Magie, Van Syckel, Clement, Whitaker.

MALICE IN DEFAMATION.

Bromage v. Prosser.

(4 Barnewall & Cresswell, 247.—1825.)

This was an action for words spoken of the plaintiffs in their trade and business as bankers.

In submitting the case to the jury, the judge told them that malice was the gist of the action; that it did not appear from the evidence, that the defendant was actuated by any ill will against the plaintiffs; and that if the words were not spoken maliciously, the defendant was not answerable; that they ought,

therefore, to find their verdict for the defendant, if they thought that the words were not spoken maliciously, otherwise for the plaintiffs. The jury found a verdict for the defendant. A rule *nisi* for a new trial was obtained on the ground that the judge had improperly left to the jury the question of malice, for it was to be inferred in this case from the act of the defendant, inasmuch as the occasion did not justify the speaking of the words.

Bayley, J., now delivered the judgment of the court. This was an action for slander. The plaintiffs were bankers at Monmouth, and the charge was, that in answer to a question from one Lewis Watkins, whether he, the defendant, had said that the plaintiffs' bank had stopped, the defendant's answer was, "it was true, he had been told so." The evidence was, that Watkins met defendant and said, "I hear that you say the bank of Bromage & Snead, at Monmouth, has stopped. Is it true?" Defendant said, "Yes, it is; I was told so." He added, "it was so reported at Crickhowell, and nobody would take their bills, and that he had come to town in consequence of it himself." Watkins said, "You had better take care what you say; you first brought the news to town, and told Mr. John Thomas of it." Defendant repeated, "I was told so." Defendant had been told at Crickhowell, there was a run upon plaintiffs' bank, but not that it had stopped, or that nobody would take their bills, and what he said went greatly beyond what he had heard. The learned Judge considered the words as proved and he does not appear to have treated it as a case of privileged communication; but as the defendant did not appear to be actuated by any ill will against the plaintiffs, he told the jury that if they thought the words were not spoken *maliciously*, though they might unfortunately have produced injury to the plaintiffs, the defendant ought to have their verdict; but if they thought them spoken *maliciously* they should find for the plaintiff: and the jury having found for the defendant, the question upon a motion for a new trial was upon the propriety of this direction. If in an ordinary case of slander, (not a case of privileged communication,) want of malice is a question of fact for the consideration of a jury, the direction was right; but if in such a case the law *implies* such malice as is necessary to maintain the action, it is the duty of the

Judge to withdraw the question of malice from the consideration of the jury; and it appears to us that the direction in this case was wrong. That *malice*, in some sense, is the gist of the action, and that, therefore, *the manner and occasion of speaking the words* is admissible in evidence to show they were not spoken *with malice*, is said to have been agreed (either by all the Judges, or at least by the four who thought the truth might be given in evidence on the general issue,) in *Smith* v. *Richardson*, Willes, 24, and it is laid down (1 Com. Dig. action upon the case for defamation, G 5,) that the declaration must show a *malicious intent* in the defendant, and there are some other very useful elementary books in which it is said that malice is the gist of the action, but in what sense the words *malice* or *malicious intent* are here to be understood, whether in the *popular* sense, or in the sense the *law* puts upon those expressions, none of these authorities state.

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 willfully stand mute, I am said to do it *of malice*, because it is intentional and without just cause or excuse. Russell on Crimes, 614 N. 1. And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not, and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? And I apprehend the law recognizes the distinction between these two descriptions of malice, malice in fact and malice in law, in actions of slander. In an ordinary action for words, it is sufficient to charge that the defendant spoke them *falsely*, it is not necessary to state that they were spoken *maliciously*. This is so laid down in Styles, 392, and was adjudged upon error in *Mercer* v. *Sparks*, Owen, 51; Noy. 35. The objection there was, that the words were not charged to have been spoken maliciously, but the court answered, that the

words were themselves malicious and slanderous, and therefore, the judgment was affirmed. But in actions for such slander as is *prima facie* excusable on account of the cause of speaking or writing it, as in the case of servants' characters, confidential advice, or communications to persons who ask it, or have a right to expect it, malice in fact must be proved by the plaintiff, and in *Edmonson* v. *Stevenson*, Bull. N. P. 8, Lord MANSFIELD takes the distinction between these and ordinary actions of slander. In *Weatherstone* v. *Hawkins*, 1 Term Rep. 110, where a master who had given a servant a character, which prevented his being hired, gave his brother-in-law, who applied to him upon the subject, a detail by letter of certain instances in which the servant had defrauded him; Wood, who argued for the plaintiff, insisted that this case did not differ from the case of common libels, that it had the two essential ingredients, slander and falsehood; that it was not necessary to prove express malice; if the matter is slanderous, malice is implied, it is sufficient to prove publication; the motives of the party publishing are never gone into, and that the same doctrine held in action for words, no express malice need be proved. Lord MANSFIELD said the general rules are laid down as Mr. Wood has stated, but to every libel there may be an implied justification from the occasion. So as to the words, instead of the plaintiff's showing it to be false and malicious, it appears to be incidental to the application by the intended master for the character; and Buller, J., said, this is an exception to the general rule, on account of the occasion of writing. In actions of this kind, the plaintiff must prove the words "malicious" as well as *false*. Buller, J., repeats in *Pasley* v. *Freeman*, 3 T. R. 61, that for words spoken confidentially upon advice asked, no action lies, unless express malice can be proved. So in *Hargrave* v. *Le Breton*, 3 Burr. 2425, Lord MANSFIELD states that no action can be maintained against a master for the character he gives a servant, unless there are extraordinary circumstances of express malice. But in an ordinary action for a libel or for words, though evidence of malice may be given to increase the damages, it never is considered as essential, nor is there any instance of a verdict for a defendant on the ground of want of malice. Numberless occasions must have occurred (particularly in cases where a defendant only repeated what he had heard before, but without naming the author,) upon which, if that were a tenable ground,

verdicts would have been sought for and obtained, and the absence of any such instance is a proof of what has been the general and universal opinion upon the point. Had it been noticed to the jury how the defendant came to speak the words, and had it been left to them as a previous question, whether the defendant understood Watkins, as asking for information for his own guidance, and that the defendant spoke what he did to Watkins, merely by way of honest advice to regulate his conduct, the question of malice in fact would have been proper as a *second* question to the jury, if their minds were in favor of the defendant upon the first; but as the previous question I have mentioned was never put to the jury, but this was treated as an ordinary case of slander, we are of opinion, that the question of malice ought not to have been left to the jury. It was, however, pressed upon us with considerable force, that we ought not to grant a new trial, on the ground that the evidence did not support any of the counts in the declaration, but upon carefully attending to the declaration and the evidence, we think we are not warranted in saying that there was no evidence to go to the jury to support the declaration; and had the learned Judge intimated an opinion that there was no such evidence, the plaintiff might have attempted to supply the defect. We, therefore, think that we cannot properly refuse a new trial, upon the ground that the result upon the trial might have been doubtful. In granting a new trial, however, the court does not mean to say that it may not be proper to put the question of malice as a question of fact, for the consideration of the jury; for if the jury should think that when Watkins asked his question, the defendant understood it as asked, in order to obtain information to regulate his own conduct, it will range under the cases of privileged communication, and the question of malice in fact will then be a necessary part of the jury's inquiry; but it does not appear that it was left to the jury in this case, to consider whether this was understood by the defendant as an application to him for advice, and if not, the question of malice was improperly left to their consideration. We are, therefore, of opinion, that the rule for a new trial must be absolute.

Rule absolute.[1]

[1] "It may be conceded that it [the publication complained of] belongs to the class of qualified privilege. In such cases it is common to say that the plaintiff must prove express malice. I apprehend, however, that the more

FRAUD AND DECEIT.

COMMON-LAW ACTION. (1)

Cowley v. Smyth.

(46 New Jersey Law, 380.—1884.)

Action against a director of a bank to recover damages for false representations as to the insolvency and condition of the

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accurate statement of the law is that in such cases there is no *prima facie* presumption of malice from publication. There must be some evidence beyond the mere fact of publication, but there is no requirement as to what the form of the evidence shall be. It may be intrinsic, from the style and tone of the article. 'If the communication contains expressions which exceed the limits of privilege, such expressions are evidence of malice, and the case shall be given to the jury:' Trunkey, J., in *Neeb* v. *Hope*, 111 Pa. 145, 154. Or it may be extrinsic, as by proof of actual malice, or that the statement was knowingly false, or that it was made without probable cause, or in any way that fairly and reasonably tends to overcome the *prima facie* presumption of protection under the privilege. One of such ways is by the counter-presumption of innocence. 'Probable cause that would justify such publication [charging larceny] would justify a prosecution for the alleged crime:' *Neeb* v. *Hope*, 111 Pa. 153. And the reason for it is that the presumption of innocence cannot be overcome by mere rumor, or idle report, or careless and insufficient examination set up as probable cause. So, where the alleged libel charges an indictable offense, the presumption of innocence ought and must stand as *prima facie* evidence of falsity and want of probable cause, and therefore of malice, even in cases of a claim of privilege." Mitchell, J., in *Conroy* v. *Pittsburgh Times*, 139 Pa. St. 334, 338.

[1] "The wrong called Deceit consists in leading a man into damage by wilfully or recklessly causing him to believe and act on a falsehood. It is a cause of action by the common law (the action being an action on the case founded on the ancient writ of deceit, which had a much narrower scope): and it has likewise been dealt with by courts of equity under the general jurisdiction of the Chancery in matters of fraud. The principles worked out in the two jurisdictions are believed to be identical, though there may be a theoretical difference as to the character of the remedy, which in the Court of Chancery did not purport to be damages but restitution. Since 1875, therefore, we have in this case a real and perfect fusion of rules of

bank, whereby plaintiff was induced to leave in the bank moneys on deposit, and lost same through the failure of the bank.

The certificate from the Circuit presents the following charge to the jury for the opinion of this court:

1. That if the defendant made the representations as matter of his own knowledge, and so positively asserted that he knew the fact to be as he represented, and the fact was not as he represented, although he may not have known them to be false, and the plaintiff acted upon the representations, they not being true, and suffered damage, the plaintiff may recover.

2. That if he asserted the fact as to the condition of the bank of his own positive knowledge, and did not in fact know what its condition was, then the plaintiff, acting upon that, and being injured, would be entitled to recover.

Depue, J. This action is an action on the case for deceit. There is a distinction between relief, either affirmative or defensive, in courts of equity, on the ground of fraud, and the remedy for fraud in a court of law. Courts of equity grant affirmative relief by way of reformation or cancellation of instruments, and even defensive relief in proceedings to enforce an obligation or liability, on the ground of constructive fraud, such as would afford no relief in law, especially by action for deceit. 2 Pom. Eq. § 872; *Arkright* v. *Newbold*, L. R. 17 Ch. Div. 302, 317, 330; *Redgrave* v. *Hurd*, 20 id. 1, 12. *Reese River Silver Mining Co.* v. *Smith*, L. R. 4 H. of L. Cas. 64, in which Lord Cairns held that "if persons make assertions of facts of which they are ignorant, whether such assertions are true

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common law and equity which formerly were distinct, though parallel and similar." Pollock on Torts, 236.

In *Holcomb* v. *Noble*, 69 Mich. 396, which was an action on the case to recover damages for misrepresentations as to the value and quality of certain lands, the court said: "It is admitted that in equity an actual design to mislead is not necessary if a party is actually misled by another in a bargain. . . . There is no reason for a difference in action in such cases between courts of law and courts of equity. Where an equitable cause of grievance exists, it in no way differs from a legal one unless a different remedy is needed. A court of law cannot cancel a contract, and for such a purpose the equitable remedy must be sought. But where the relief desired is compensation for the wrong, the equitable remedy is much less appropriate, and an action in equity for mere damages will generally be denied, but denied only because the legal remedy is better. If there could be no legal remedy, there can be no doubt that equity would act."

or untrue, they become, in a civil point of view, as responsible as if they had asserted that which they knew to be untrue," is an instance of equitable relief by way of rescission. The bill was filed by a subscriber for stock to be relieved from a subscription induced by false representations as to the property of the corporation. In that case, as appears in the report in L. R. 2 Ch. App. 604, the directors issued the prospectus containing the false statement on the faith of representations of the vendor of the property and without any knowledge of their untruth, and a subscriber for stock, who was misled by the representations, was relieved in equity from his subscription. The doctrine of equitable estoppel, or estoppel *in pais*, which has been adopted by courts of law from the courts of equity, also presents considerations which do not apply to an action for deceit. The theory on which that doctrine is founded is that a party should not be allowed to retract an admission or affirmation which was intended to influence the conduct of another, if the retraction would materially injure the latter. *Phillipsburg Bank* v. *Fulmer*, 2 Vroom, 52, 55; *Campbell* v. *Nichols*, 4 id. 81, 87. The cases which hold that an agent who, without competent authority, induces another to contract with him as the agent of a third party, is liable in damages without regard to his moral innocence in the supposition that he had the authority he assumed to have, also rest on a special ground —on the ground of an implied warranty of authority. *Randall* v. *Trimen*, 16 C. B. 786; *Collen* v. *Wright*, 8 E. & B. 647, 656; *Richardson* v. *Williamson*, L. R. 6 Q. B. 276, 279; *Weeks* v. *Propert*, L. R. 8 C. P. 427. The observation of Lord Hatherly that "if a man misrepresents a fact, to that fact he is bound if any other person, misled by such misrepresentation, acts upon it and thereby suffers damage," was made with respect to cases of this kind. *Beattie* v. *Lord Ebury*, L. R. 7 H. of L. Cas. 102, 130.

The action of deceit, to recover damages for a false and fraudulent representation, differs in principle from the cases that have been referred to. In such an action a false representation, without a fraudulent design, is insufficient. There must be moral fraud in the misrepresentation to support the action. *Pasley* v. *Freeman*, 3 T. R. 51, and *Haycraft* v. *Creasy*, 2 East, 92, are the leading cases on this subject. Both of these cases were decided by a divided court. In *Pasley* v. *Freeman* the ques-

tion arose on a motion in arrest of judgment. The count in the declaration which gave rise to the motion averred that the defendant, "intending to deceive and defraud the plaintiffs, did wrongfully and deceitfully encourage the plaintiffs to sell and deliver to one J. C. F. divers goods . . . upon trust, and did for that purpose . . . falsely, deceitfully and fraudulently assert and affirm to the plaintiffs that the said J. C. F. . . . was a person safely to be trusted and given credit to, and did thereby falsely, deceitfully and fraudulently cause and procure the plaintiffs to sell and deliver the said goods . . . upon trust and credit to the said J. C. F." The count also contained an averment that J. C. F. was not a person safely to be trusted and given credit to, and that the defendant well knew the same. The court held that a false affirmation, made with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit, and that as a matter of pleading, *fraudulenter* without *sciens*, or *sciens* without *fraudulenter*, would be sufficient, but that the fraud must be proved. *Haycraft* v. *Creasy* was before the court on a rule for a new trial, after a verdict for the plaintiff. In that case the defendant, to an inquiry by the plaintiff concerning the credit of another, made the representation that the party might safely be credited, and that he spoke this from his own knowledge and not from hearsay. The court (Gross, Lawrence and Le Blanc, JJ., Lord Kenyon dissenting,) held that the action could not be maintained, it appearing that the representation was made by the defendant *bona fide* and with a belief of the truth of it. Gross, J., said, "It is true that he [the defendant] asserted his own knowledge upon the subject; but consider what the subject matter was of which that knowledge was predicated. It was concerning the credit of another, which is a matter of opinion. When he used these words, therefore, it is plain that he meant only to convey his strong belief in her credit, founded upon the means he had of forming such opinion and belief. There is no reason for us to suppose that, at the time of making those declarations, *he meant to tell a lie and mislead the plaintiff*. Lawrence, J., said, "The question is whether, if a person asserts that he knows such a one to be a person of fortune, and the fact be otherwise, although the party making the assertion believed it to be true, an action will lie to recover damages for an injury sustained in

consequence of such misrepresentation. . . . Stress has been laid on the defendant's assertion of his own knowledge of the matter; but persons in general are in the habit of speaking in this manner without understanding knowledge in the strict sense of the word in which a lawyer would use it. . . . In order to support the action the representation must be made *malo animo*. It is not necessary that the party should gain anything for himself by it. If he make it with a malicious intention that another should be injured by it, he shall make compensation in damages. But there must be *something more than misapprehension or mistake*." Le Blanc, J., said, "By *fraud* I understand *an intention to deceive*. Whether it be from any expectation of advantage to the party himself, or from ill will towards the other, is immaterial. The question here is whether the defendant's *saying that which, critically and accurately speaking, was not true, but not having said it with intention to deceive, brings this case within Paisley* v. *Freeman. I think not.*"

The Court of Queen's Bench departed from the doctrine of *Haycraft* v. *Creasy* in two cases, and held that an action at law might be maintained for false representations, though there was neither fraud nor negligence. *Fuller* v. *Wilson*, 3 Q. B. 57; *Evans* v. *Collins*, 5 id. 804. But *Wilson* v. *Fuller* was reversed on error, 3 Q. B. 68, 1009, and the question was finally set at rest in the English courts in *Taylor* v. *Ashton*, 11 M. & W. 401, and *Ormrod* v. *Huth*, 14 id. 651. In *Taylor* v. *Ashton* the suit was against the directors of a banking company for publishing a false report of the condition of the bank. The report had been prepared by the officers of the company, and adopted at a meeting of the directors. The judge charged the jury that they must be satisfied that a fraud—that is, a *moral fraud*—had been committed by the defendants. The jury, under this instruction, found for the defendants, stating, at the same time, that the defendants had been guilty of gross and unpardonable negligence in publishing the report. On motion for a new trial the court held that an untrue representation made for a fraudulent purpose would sustain an action for deceit; that it was not necessary to show that the defendants knew the representation to be false if it was made for a fraudulent purpose, and that the proper question was left to the jury. In delivering the judgment of the court, Parke, B., said, "It was con-

tended that it was not necessary that moral fraud should be committed in order to render these persons liable; . . . that the jury found the defendants not guilty, but, at the same time, expressed their opinion that the defendants had been guilty of gross negligence, and that that, accompanied with a damage to the plaintiff, . . . would be sufficient to give him a right of action. From this proposition," the learned judge added, "we entirely dissent, because we are of opinion that, independently of contract, no one can be made responsible for a representation unless it be *fraudulently* made." In *Ormrod* v. *Huth* the action was in case for false representations. The suit arose upon a sale of cotton by sample—the cotton delivered not being equal in quality with the sample. The plaintiff's counsel contended that the delivery of samples not corresponding with the bulk was a false representation of the quality of the cotton, which must be considered, in point of law, as fraudulent, as being *the statement of a fact which the party making it did not know to be true.* The judge directed the jury that unless they could see grounds for inferring that the defendants or their brokers were acquainted with the fraud that had been practiced in the packing, or had acted in the transaction against good faith or with a fraudulent purpose, the defendants were entitled to a verdict. On error the Court of Exchequer Chamber sustained the charge of the judge. Tindal, C. J., delivering the opinion of the court, said that "the rule to be deduced from all the cases appears to us to be that where, upon the sale of goods, the purchaser is satisfied without requiring a warranty, he cannot recover upon a mere representation of the quality, . . . unless he can show that the representation was bottomed in fraud. If, indeed, the representation was false to the knowledge of the party making it, this would, in general, be conclusive evidence of fraud; but if the representation was honestly made, and believed at the time to be true by the party making it, though not true in point of fact, we think it does not amount to fraud in law." The English courts have considered these decisions as a finality, and it is now there settled that there can be no fraud without dishonest intention—no such fraud as was formerly termed legal fraud. 1 Benj. on Sales (Corbin's ed.), § 638.

The American cases, as might be expected of a subject so prolific of decisions, are not altogether harmonious. Mr. Pom-

eroy, speaking of the cases I have cited from the Queen's Bench as holding that a representation, false in fact, if acted upon, would support an action, and that the defendant's liability was independent of his knowledge or ignorance of its actual falsity, says, "This theory admitted the possibility of fraud at law where there was no moral delinquency. It denied that moral wrong was an essential element in the legal conception of fraud. The same view was for a time accepted and adopted by a considerable number of decisions in different American states. These cases have, however, been overruled, and the theory itself abandoned in England, and generally, if not universally, throughout the states of our own country. It is now a settled doctrine of the law that there can be no fraud, misrepresentation or concealment without some moral delinquency. There is no actual legal fraud which is not also a moral fraud." 2 Pom. Eq. § 884. The English and American cases are fully cited in the notes to *Pasley* v. *Freeman*, 2 Sm. Lead. Cas. 176–186. They have placed the law on this subject where it was put by *Pasley* v. *Freeman* and *Haycraft* v. *Creasy*, and have, I think, upon principle as well as by the great weight of authority, established the law on the rational basis that in the action for deceit, moral fraud is essential to furnish a ground of action.

The principle on which the action for deceit is founded being ascertained, the next consideration is with respect to the proof and the proper instructions upon the evidence; for, whatever the character of the evidence may be—whether it consists of knowledge of the falsity of the representation or some other fraudulent device intended for the purpose of deception—the evidence must be submitted to the jury under proper instructions. And I think much of the apparent conflict in the cases has arisen from the failure to discriminate between the issue to be proved and the force and effect of the evidence presented.

The simplest form in which the question of the sufficiency of proof arises is where the proof is that the representation was false to the defendant's knowledge. The *scienter* as well as the falsehood being proved, proof of the fraudulent intent is regarded as conclusive. Evidence that the defendant intended no fraud will not be received, and the jury will be instructed to find for the plaintiff, though they should be of opinion that the defendant was not instigated by a corrupt motive of gain

for himself, or by a malicious motive of injury to the plaintiff. *Foster* v. *Charles*, 6 Bing. 396; *S. C.* 7 id. 105; *Polhill* v. *Walter*, 3 B. & Ad. 114; and *Mylne* v. *Marwood*, 15 C. B. 778, are cases of this kind. In each of these cases the proof was that the representation was false to the knowledge of the defendant. The jury added to its finding an expression of opinion that there was no fraudulent intent, but the court nevertheless entered judgment for the plaintiff on the ground that a wilful falsehood was a fraud. The language of Lord Campbell in *Wilde* v. *Gibson*, 1 H. of L. Cas. 605, 633, was directed to cases of this aspect; and Jessel, M. R., in a case where it was proved that the representation was untrue to the defendant's knowledge, refused to receive evidence that he in fact believed it to be true. *Hine* v. *Campion*, L. R. 7 Ch. Div. 344.

In other cases of actionable frauds, the probative force and effect of the evidence to establish the fraudulent intent will depend upon the circumstances of the particular case. This question is presented in a complex form where the defendant has added to a representation—which turns out to be untrue, but was not false to his knowledge—an affirmation that he made the representation as of his own knowledge. In such cases the force and effect of the evidence will depend, in a great measure, upon the nature of the subject concerning which the representation was made. If it be with respect to a specific fact or facts susceptible of exact knowledge, and the subject matter be such as that the affirmation of knowledge is to be taken in its strict sense, and not merely as a strong expression of belief, the falsehood in such a representation lies in the defendant's affirmation that he had the requisite knowledge to vouch for the truth of his assertions, and that being untrue, the falsehood would be wilful and therefore fraudulent. But where the representation is concerning a condition of affairs not susceptible of exact knowledge, such as representations with respect to the credit and solvency of a third person, or the condition or credit of a financial institution, the assertion of knowledge, as was held in *Haycraft* v. *Creasy*, "is to be taken *secundum subjectam materiam*, as meaning no other than a strong belief founded upon what appeared to the defendant to be reasonable and certain grounds." In such a case the question is wholly one of good faith. The form of the affirmation will cast the burden of proof on the defendant, but when the evidence is in, the issue

is whether the defendant *honestly* believed the representation to be true. In support of such an issue the defendant may, by way of exculpation, resort to evidence not admissible in actions for other kinds of deceit. He may, as in *Haycraft* v. *Creasy*, give evidence that the person whose ability he affirmed lived in a style, and with such appearances of property and means, as gave assurances of affluence. He may give in evidence the information he had upon the subject, *Shrewsbury* v. *Blount*, 2 M. & G. 475, and show the general reputation for trustworthiness of the person whose credit he affirmed. *Sheen* v. *Bumpsted*, 2 H. & C. 193. In fine, he may avail himself of any evidence which may tend to show good faith or probable grounds for his belief, leaving the question to be determined, upon all the evidence, whether his conduct was *bona fide*—whether, at the time he made the representation, he honestly believed that his representation was true.

The Massachusetts cases cited to support the instruction certified to the court admit the distinction I have referred to. In *Tryon* v. *Whitmarsh*, 1 Metc. 1, which was an action for false and fraudulent representations as to the credit of third persons, whereby the plaintiffs were induced to give them credit, a verdict for the plaintiffs was set aside for the reason that the judge should have instructed the jury that the defendant would not be liable if they were of opinion, from the evidence, that he gave an honest opinion, and believed that the persons recommended were trustworthy. In *Hazard* v. *Irwin*, 18 Pick. 96, the false representation was by a vendor, on the sale of an engine, with respect to its condition. He made the representation as of his own knowledge. The condition of the engine was a fact the vendor could easily have ascertained. The court, (Shaw, C. J.,) cited *Haycraft* v. *Creasy*, and distinguished it from the case in hand in that the subject matter of the representation was "one of fact in respect to which a person can have precise and accurate knowledge, and in respect to which, if he speaks of his own knowledge, and has no such knowledge, his affirmation is essentially false. In *Page* v. *Bent*, 2 Metc. 371, the false representation was in relation to the nature and amount of the assets assigned by the defendants. The condition and amount of the assets were peculiarly within the knowledge of the defendants. The court, (Shaw, C. J.,) said, "The principle is well settled that if a person make a representation

of a fact as of his own knowledge, and such representation is untrue, . . . it is a fraud and deceit for which the party making it is responsible. . . . But in a matter of opinion, judgment or estimate, if he states a thing of his own knowledge, if he in fact believes it, and it is not intended to deceive, it is not a fraud, although the matter misstated is not true. The reason is that it is apparent from the subject matter that what is thus stated as knowledge must be considered and understood by the party to whom it is addressed as an expression of strong belief only, because it is a subject of which knowledge, in its strict sense cannot be had." In *Stone* v. *Denny*, 4 Metc. 151, the action was on a false representation on a sale of property made by the defendant, on a schedule exhibited which he represented as correct of his own knowledge. Dewey, J., in his opinion, referred to the Massachusetts cases and said, "From an examination of those cases and others bearing upon the question, I apprehend, however, that it will be found that no real change has been sanctioned in the great and leading principles of law applicable to cases of deceit, and that now, as formerly, to charge a party in damages for a false representation, . . . it must appear that it was made with a fraudulent intent, or was a wilful falsehood." The illustration he gives is "of one asserting as of his own knowledge a matter of which he has no knowledge, nor any sufficient ground for making the assertion." The subsequent observation of the learned judge, "That if one positively affirms a fact as of his own knowledge, and his affirmation is false, his representation is deemed fraudulent," is unobjectionable as applied to the facts of that case, where, because of the subject matter of the representation, the affirmation of knowledge was to be taken in its strict sense, and not as only a strong expression of belief.

The principle adjudged in *Haycraft* v. *Creasy* is applicable to actions against directors for false and fraudulent representations concerning the financial condition of the institutions in their charge. It was so applied in *Taylor* v. *Ashton*, which has become a leading case in the English law. The affairs of such an institution must necessarily be entrusted to executive officers and subordinate agents, and the directors generally cannot know, and have not the requisite ability to learn, by their own efforts, the exact condition of the affairs of the company, and it has been found that no vigilance on their part has been

adequate to protect these institutions from frauds and peculations covered up and concealed by false entries and false reports. A representation by a director that the institution is in a sound and solvent condition within his own knowledge possesses the legal characteristics of the like representation as to the credit and financial ability of a third person, such as was before the court in *Haycraft* v. *Creasy*, and it must be subject to the same legal rule.

The facts on which this case was founded were these: the plaintiff was a depositor in the bank. About the 1st of August, 1878, there was a rumor in circulation affecting the condition of the bank. The defendant was one of the directors of the bank, and a member of the finance committee. The plaintiff, having heard the rumor, went to the defendant and told him of the rumor in circulation, and that he was a depositor and did not want to lose his money, and proposed to take it out. The defendant said, "It can't be so, unknown to me and Mr. Monks. We are on the finance committee. There can be nothing wrong with that bank unknown to me and Mr. Monks. Don't believe any of these false reports; believe me; take my word for it. The bank is good, paying six per cent.—the best in the state. If all that is in Jersey tells you the bank is bad, don't believe it till I tell you." He also said "there was a surplus of over $6,000 after the dividends were paid." The bank continued to pay all demands down to November 1st, 1878, when it went into the hands of a receiver. It was insolvent on the 1st of August, 1878, when these representations were alleged to have been made.

The defendant was a director of the bank from June 8th, 1869, until its suspension in November, 1878, and a member of the finance committee from November 19th, 1877. The duties of the finance committee were to attend to all applications for loans, and to look after the investing of the company's funds. The general charge and government of the bank devolved upon the executive committee, of which the defendant was not a member. There was no evidence that the defendant had actual knowledge of the condition of the bank. On the contrary, the proof was that at a regular meeting of the directors, on the 31st of May, 1877, the president read his statements, showing a surplus of $6,000, and a motion was adopted declaring a dividend of six per cent. The next regular meeting was on the

19th of November, 1877. It appears by the minutes that a statement of the assets and liabilities was read in detail, and a dividend of six per cent. per annum was declared for the six months ending October 31st, 1877. On May 30th, 1878, another meeting of directors was held, at which the minutes of the last meeting were read and approved, and a dividend at the rate of six per cent. for the six months ending April, 1878, was declared. All these dividends were credited, and were paid to such of the depositors as presented their books. The defendant was present at each of these meetings of the directors.

On these facts the defendant was not entitled to the nonsuit he asked for; but he was entitled to a different instruction to the jury. The case cannot be distinguished from *Haycraft* v. *Creasy* and *Taylor* v. *Ashton*, and it should have been left to the jury to say whether, upon the evidence, the defendant made the representations with a fraudulent purpose to deceive, or whether he made them in good faith and in the honest belief that they were true.

There will be a certificate accordingly.

ESSENTIAL ELEMENTS.

Brackett v. Griswold.

(122 New York, 454.—1889.)

Appeal from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the plaintiff.

This action was brought by Samuel Bonnell, Jr., plaintiff's intestate, against the defendants, trustees of the Iron Mountain Company, of Lake Champlain, upon a complaint containing three causes of action. The first is founded on the alleged failure of the trustees to file a report as required by law, and to enforce in behalf of the plaintiff, a creditor of the company, the statutory liability arising from such failure imposed by the twelfth section of the act of 1848. The second cause of action is framed under the fifteenth section, and sought to charge the defendants on the ground that the report of the company, made and filed January 13th, 1870, in assumed compliance with the

twelfth section, was false in representing that the capital stock of $2,000,000 had been paid up in full. The third cause of action set forth a conspiracy between the defendants to form a sham corporation to defraud the public and the plaintiff, whereby the plaintiff was deceived and defrauded into giving credit to the company to his injury.

The third count alleged, in great detail, a fraudulent combination between the original defendants and John A. Griswold to organize the "Iron Mountains Company of Lake Champlain" with a nominal capital of $2,000,000, and to issue the whole stock to the "Kingdom Iron Ore Company" in pretended payment of about 1,300 acres of undeveloped mining land in the county of Essex, owned by the latter company, worth not to exceed the sum of $50,000, which lands they were to cause to be conveyed to the new corporation, and in which, it is alleged, the defendants and John A. Griswold, as stockholders in the "Kingdom Iron Ore Company," were interested. It is alleged that this device of purchasing the lands by the new corporation for a sum vastly exceeding their value was resorted to to enable the defendants to represent to the public that the whole capital stock of the new corporation had been paid in full, and that, as a part of the fraudulent scheme, persons of known financial and business ability, engaged in the mining and manufacture of iron, were to be made trustees of the company.

It appears from the complaint and evidence, that on the 12th of March, 1870, the "Iron Mountains Company" issued to the "Birmingham Iron Foundry," of Connecticut, its two notes, payable, respectively, at four and six months in the aggregate for $5,511.66, in consideration of machinery theretofore sold by the foundry company to the "Iron Mountains Company," which notes the payee, before maturity, transferred to Bonnell in exchange for coal. The foundry company, when it applied to Bonnell to take the notes in exchange for coal, represented to him that they were good, but advised him to inquire of one Ellis, the treasurer of the "Iron Mountains Company," whose office was in the city of New York. Bonnell inquired of Ellis as to the responsibility of the company, and was informed by him that the company was good and the notes would be promptly paid at maturity. Upon receiving this information he consented to take the notes in payment for coal to be delivered, and afterwards took them, but up to that time

he supposed the notes were made by the "Iron Mountains Company of Missouri," but before the transaction was completed ascertained that they were the notes of the New York corporation. The complaint alleges that the "Birmingham Iron Company and the plaintiff were induced to become creditors of said company by said representations so made by said defendants and said John A. Griswold, before mentioned, which he relied upon, and also confiding in the general reputation of said company, produced by said representations and report made to the public at large, and believing, in consequence of the premises that said company was possessed of an actual paid up capital of $2,000,000, and also induced thereto by the fact that said trustees were represented as being interested in said company and were men of large means," etc. There is no evidence of the circumstances under which the notes were taken by the "Birmingham Iron Foundry," except that they were taken for machinery sold. Bonnell testified that when he took the notes he did not know who were stockholders or officers in the "Iron Mountains Company," except that Ellis was treasurer, nor the amount of its capital stock and had never seen the "prospectus," nor any report of the company; in short, that he knew nothing whatever in respect to its property or condition, its officers or stockholders, or of any of the representations made by the defendants or the company.

The complaint avers the insolvency of the company, that the notes have never been paid, and it appears from the evidence that the company was adjudicated a bankrupt in August, 1871, and that its whole property purchased of the Kingdom Company was sold in 1876, on a foreclosure of the trust mortgage, for about $5,000.

Andrews, J. The death of the original plaintiff has eliminated from the complaint the causes of action founded on the statutory liability of the trustees for a failure to make a report, or for making a false report, imposed by the twelfth and fifteenth sections of the general manufacturing corporations act of 1848. So, also, by the death of some of the original defendants, and the discontinuance of the action against others, the action has become one against Chester Griswold alone on the cause of action stated in the third, or conspiracy count in the complaint. This cause of action was substantially one for fraud and deceit

by means of false pretenses, and the right of recovery is governed by the principles applicable to actions of that character. That this is the nature of the action was decided in the case of *Arthur* v. *Griswold*, 55 N. Y. 400, which was also an action against the present defendant and others, the complaint in which set forth a cause of action similar to that alleged in the third count of the complaint in this action. The allegation that there was a conspiracy to commit the fraud does not affect the substantial ground of action. The *gravamen* is fraud and damage, and not the conspiracy. The means by which a fraud is accomplished are immaterial except so far as they tend, in connection with the damage suffered, to show an actionable injury. The allegation and proof of a conspiracy in an action of this character is only important to connect a defendant with the transaction and to charge him with the acts and declarations of his co-conspirators, where otherwise he could not have been implicated. But a mere conspiracy to commit a fraud is never of itself a cause of action, and an allegation of conspiracy may be wholly disregarded and a recovery had, irrespective of such allegation, in case the plaintiff is able otherwise, to show the guilty participation of the defendant. In other words, the principles which govern an action for fraud and deceit are the same, whether the fraud is alleged to have originated in a conspiracy, or to have been solely committed by a defendant without aid or co-operation. Whenever it becomes necessary to prove a conspiracy in order to connect the defendant with the fraud, no averment of the conspiracy need be made in the pleadings to entitle it to be proved. These principles are well settled. The opinion of Chief Justice NELSON in *Hutchins* v. *Hutchins*, 7 Hill, 104, contains an elaborate consideration of the subject, and no other authority need be cited.

The question in this case turns upon the point whether the evidence proved or tended to prove a cause of action against the defendant for false and fraudulent representations within the rules governing the common-law action for fraud and deceit. There is no doubt or question as to what elements are requisite to sustain an action for false pretenses. The essential constituents of such an action have been understood from the time such actions were first maintained. They are tersely stated by CHURCH, Ch. J., in *Arthur* v. *Griswold*, *supra*, viz.: "Representation, falsity, *scienter*, deception and injury." There must

have been a false representation, known to be such, made by the defendant, calculated and intended to influence the plaintiff, and which came to his knowledge, and in reliance upon which he, in good faith, parted with property or incurred the obligation which occasioned the injury of which he complains. All these circumstances must be found to exist, and the absence of any one of them is fatal to a recovery. It is not necessary that the false representation should have been made by the defendant personally. If he authorized and caused it to be made it is the same as though he made it himself. Nor is it necessary that it should have been made directly to the plaintiff. If it was made to the public at large for the purpose of influencing the action of any individual who may act upon it, any person so acting upon it and sustaining injury thereby may maintain an action. It is on this ground that promoters or directors of corporations have been held liable for false representations in a prospectus or reports, or other papers issued by the corporation with their sanction, by which individuals have been induced to purchase the stock or become creditors of the corporation, and the fact that the false report or prospectus purports to be the act of the corporation and not of the promoters or directors, does not relieve them from personal responsibility.

In view of the settled principles governing the action for fraud and deceit by means of false pretenses, there is, upon the evidence presented in this case, an insuperable difficulty in maintaining the present judgment. There is no evidence that Bonnell, in purchasing the notes, relied upon any representations made by the defendant. On the contrary, it affirmatively appears that at that time he was wholly ignorant of the alleged fraudulent scheme under which the "Iron Mountains Company" was organized, and had no knowledge or information of any of the acts or representations of the defendant or the other parties to the alleged conspiracy set forth in the complaint. He knew nothing of the property of the company nor of the amount of its capital stock, nor did he know who were the directors or persons interested, and never saw or heard of the report of 1870, or of the prospectus prepared by Remington. The trial judge submitted the question of conspiracy to the jury, and whether the defendant Chester A. Griswold was a party to it and knew of the prospectus, and also, whether he knew, when he signed the report of 1870, that the statement that the capi-

tal stock of $2,000,000 had been paid in full, was false and untrue. It is insisted by the defendant's counsel that the evidence was insufficient to authorize a finding against the defendant Chester A. Griswold on these questions. At the time of these transactions he was a young man, twenty-four years of age, employed by the firm of John A. Griswold & Co., at Troy, and had little, if any, knowledge of mining or mining property, and was made a trustee of the Iron Mountains Company without his knowledge, at the time, and signed the report of January, 1870, at the request of his father, who was largely interested in mining property and in the manufacture and sale of iron. It is claimed that the facts show that the defendant relied wholly upon the statements of his father and Remington, and acted under his father's directions in good faith, believing the representations made in the prospectus and in the report of 1870 to be true. We deem it unnecessary to consider this contention. The jury have found adversely to the defendant upon these questions of fact. But this does not relieve the case of the difficulty that, assuming the facts to be as found, the plaintiff's case, as proved, fails on the ground that Bonnell, when he took the notes, did not know of the illegal conspiracy or false representations, and consequently was not influenced thereby in making the purchase.

In order to recover in an action for fraud and deceit the fraud and injury must be connected. The one must bear to the other the relation of cause and effect, not, perhaps, in so close a sequence as in actions on contract. But, nevertheless, it must appear in an appreciable sense that the damage flowed from the fraud as the proximate and not the remote cause. In the statutory action against the trustees of a manufacturing corporation organized under the act of 1848, for making a false report, the statute dispenses with the necessity of showing any privity or relation between the act done and the debt sought to be recovered. The liability to creditors is made absolute, and exists irrespective of the fact whether they knew of the falsity of the report or relied upon the statements therein. But the statutory action abated by the death of Bonnell, and the plaintiff can now only pursue his common-law remedy and must abide by the conditions which attend it. The court, in the main charge to the jury, without referring to the rule that in an action for fraud or deceit it must appear that the fraud

produced the injury, charged that if the jury found "that there was a conspiracy; that defendant was really a member of it, doing whatever was necessary to do to carry it out, and the object was to get credit for the corporation with the expectation that the debts would not be paid, then he would be liable. If he was not a member of the conspiracy and did not adopt it, then you will render a verdict for the defendant." Subsequently on the request made by the defendant's counsel to charge, "that except the plaintiff relied upon the representations, they did not deceive him or cause him damage," the court replied, "I hold that all he need rely on is that defendant (the company) was duly incorporated and that there was a good company." This was excepted to and the exception was, we think, well taken. It is undoubtedly true that Bonnell took the notes on the assurance of the "Birmingham Iron Foundry," and of Ellis, the treasurer of the "Iron Mountains Company," that the company was good and the notes would be promptly paid at maturity. But neither was the "Birmingham Iron Foundry" nor Ellis the agent of the defendant, nor were they authorized by him to make any representations to Bonnell, and their statements did not bind him, nor was he responsible for them. Ellis is not charged to have been a co-conspirator, and it does not appear that he had any interest as stockholder or otherwise in the "Iron Mountains Company." That his declarations were inadmissible to charge the defendant is clear from the decision in *Arthur* v. *Griswold*, *supra*, where a similar question was decided. It was not enough to entitle the plaintiff to recover that it appeared that Bonnell took the notes believing that the company was good, or because the company was represented to him to be good, unless the representation was traced to the defendant. The complaint states, among other things, that Bonnell took the notes, "confiding in the general reputation of the company produced by the representations," etc. That a corporation or an individual is reputed to be solvent, although in fact insolvent, by reason of which a person purchases individual or corporate securities, is not alone a ground for maintaining an action for fraud against the debtor. Nor is the case, in its legal aspect, strengthened by proof that this reputation was attributable to false appearances put on by the corporation or the individual, or that there was a holding out by them by general representations, or otherwise, that the

corporation or individual was solvent and responsible. The law exacts of every individual reasonable care to protect himself before he is permitted to charge another as the author of an injury. In case of false pretenses there must be a specific representation shown upon which the plaintiff relied. General reputation of solvency is quite an insufficient ground of reliance by a person who purchases securities in the market, although that reputation may have sprung from the conduct of the defendant. The case of *Peek* v. *Gurney*, L. R. 6 E. & I. App. 377, applies with great stringency the rule that to sustain an action for fraudulent representations, a close relation must be shown between the representations and the injury claimed, and, also, that the representations must have been made to influence the conduct of the plaintiff, or of a class of persons in which he was included. That case was much considered, and it was held that false representations contained in a prospectus, issued to induce subscriptions to shares on the organization of a limited company, would not sustain an action in favor of one who was not a party to the original subscription, but who, afterwards, having seen the prospectus, and relying upon it, purchased shares in the market. The judges were of the opinion that, as the prospectus was intended on its face to influence only original subscribers, it was not available to sustain the plaintiff's action, and that the representation, although the remote cause of the injury, was not so connected with it as to constitute, as to the plaintiff, an actionable fraud.

We think the case was submitted to the jury upon a false theory.

The judgment should, therefore, be reversed, and a new trial granted.

All concur.

Judgment reversed.

MATTER OF OPINION.

Hickey v. Morrell.

(102 New York, 454.—1886.)

Appeal from a judgment of the General Term of the New York Common Pleas, affirming a judgment of the Trial Term, in an action to recover for fraudulent representations.

Danforth, J. As to the character of this action the parties are agreed. It is for "falsely and fraudulently" and "with intent to deceive and defraud the plaintiff," representing, among other things, that the defendant's warehouse was "fire-proof on the exterior," whereby the plaintiff was induced to deliver to him, to be stored therein, certain property of value, which while there was destroyed by fire communicated from the outside "to the wooden cornice and wooden window frames" of the warehouse and thence to the property in question.

The answer admitted that defendant was proprietor of the warehouse; that it and the articles described in the complaint were destroyed by fire, but denied the other matters above referred to as making out a cause of action, and set up that "the property was received and stored by him as a warehouseman, and in no other capacity, and under the special contract that the goods were stored at the owner's risk of fire." There was no controversy as to the evidence. The question was determined upon that introduced by the plaintiff and in view of the law as it stood at the time of the bailment. The appellant refers to the statute (Laws of 1871, chap. 742, § 8), "in relation to storage and other purposes;" imposing liabilities upon persons for any fire resulting from their willful and culpable negligence, and which, among other things, requires "the closing of iron shutters" at the completion of the business of each day by the occupant of the building having use or control of the same. But the complaint contains no allegation of negligence, and so the action could not stand on that ground either at common law or by statute. Another statute also referred to, relating to buildings in the city of New York, (Laws of 1874, chap. 625, § 5), is of some importance in its bearing upon the

point chiefly pressed upon us, and as likely to have been in contemplation of both parties. It is there provided that buildings of a certain description—within which the storehouse in question comes—shall have doors and blinds and shutters made of fire-proof metal on every window and opening above the first story. The plaintiff's testimony went to show that she was induced to store her goods with the defendant by representations contained in a circular issued by him, the object of which, as therein stated, was to call "the special attention of persons having valuable articles, merchandise, or other property for storage, to his new first-class storage warehouse, in the erection of which," it is said, among other things, "no expense has been spared in supplying light, ventilation and protection against the spread of fire, the exterior being fire-proof, and the interior being divided off by heavy brick walls, iron doors, and railings appropriate and convenient in every way for the various kinds of articles to be stored." The learned counsel for the respondent argues that the only statements of fact in the paragraph quoted, are those which relate to the interior as divided by heavy brick walls, iron doors and railings; that as to those, the defendant had knowledge, and concedes that their non-existence would make him guilty of a misrepresentation. This is a very narrow view of the subject, and could prevail, if at all, only by conceding that the defendant purposely avoided mention of those things which, if stated, would make his solicitations less attractive, and display him as the owner of a building combustible on the outside, and so of little security to its contents, if they happened to be of the same character.

We think the appellant's ground of complaint a just one. It was proven that in fact the window frames in the warehouse were of wood; that at the outside of the windows there were no shutters; that the cornices were of wood, covered with tin. The fire occurred in the evening. It originated in other buildings across the street, and from them communicated to the wooden window frames on the defendant's building. An architect and a builder, examined as experts, testified that a building constructed as was the one in question, "with wooden window frames and sashes, and no outside shutters," could not be deemed fire-proof, and that in October, 1881, it was practical to erect a storage warehouse which would be fire-proof on the exterior. At the close of the plaintiff's evidence she was nonsuited,

upon the ground that the statement in the circular as to the character of the exterior of the building, was a mere expression of an opinion, and not the statement of a fact. Upon the same ground the judgment was affirmed at the General Term. In such a circular, obviously intended as an advertisement, high coloring and exaggeration as to the advantages offered, must be expected and allowed for, but when the author descends to matters of description and affirmation, no misstatement of any material fact can be permitted, except at the risk of making compensation to whoever, in reliance upon it, suffers injury. Here the allegation is that the exterior of the building is fire-proof. It necessarily refers to the quality of the material out of which it is constructed, or which forms its exposed surface. To say of any article it is fire-proof conveys no other idea than that the material out of which it is formed is incombustible. That statement, as regards certain well-known substances usually employed in the construction of buildings, while it might in some final sense be deemed the expression of an opinion, could in practical affairs be properly regarded only as a representation of a fact. To say of a building that it is fire-proof excludes the idea that it is of wood, and necessarily implies that it is of some substance fitted for the erection of fire-proof buildings. To say of a certain portion of a building it is fire-proof suggests a comparison between that portion and other parts of the building, not so characterized, and warrants the conclusion that it is of a different material. In regard to such a matter of common knowledge, the statement is more than the expression of opinion; no one would have any reason to suspect that any two persons could differ in regard to it. But when we look at the words accompanying this statement, viz: "No expense has been spared in supplying protection against the spread of fire," all possibility of doubt seems removed. This danger is pointed out as the one thing which, more than another, the owner had in view, and guarded against, and the rest of the sentence shows with what result, viz., "the exterior being fire-proof," and the interior divided off by heavy brick walls, iron doors and railings. Thus the expenditure of money is said to have been limited only by the accomplishment of the desired object, and the statement of the material used is in connection with the representation as to the quality of the exterior. No one reading of inside walls and railings of incombustible mate-

rial, and of an exterior fire-proof, could suppose that a precaution against fire, made necessary by statute, had been omitted, or that a builder who called attention to such matters as an inducement to patronage, could have regarded wooden window frames as in any sense fire-proof. The language of the circular is very emphatic. In effect it says the buildings, as a whole, have been erected at an immense cost, from which assertion alone, in view of the business to which they were devoted, one would expect strength and adaptation of materials and skill in construction, affording security at least against all the ordinary dangers to which property might be exposed when put in store; but this general statement is followed by the declaration that no expense has been spared in supplying "protection against the spread of fire," and this assurance is made prominent by the display of capital letters, and justified by the explanation which relates to an existing state of things, viz., "the exterior being fire-proof," and still further emphasized by the more moderate and qualified statement as to the interior; that is not said to be fire-proof, but only "divided off by heavy brick walls and iron doors and railings," describing at the same time its arrangement and the substance of its walls and partitions. As to this, therefore, the statement would be true, although the floors, lintels, stairs, landings, ties, joists, ceilings and other parts were of wood, but no such discrimination is suggested as to the exterior. The strength of the walls might indeed be impaired by the necessary openings for doors and windows, but for the purpose of preventing mischief by fire, or as the defendant put it, "the spread of fire," the exterior is pronounced fire-proof. Had he only said of the exterior as he did of the interior, "the wall is of brick," the intending customer would have been put to an inquiry as to the window frames and doors. He said much more. We think, therefore, that the defendant must be regarded as stating a fact and not as expressing a mere opinion, when he described the exterior, that is the whole exterior, of his buildings as fire-proof. Such statement is not to be classed with those relating to value, or prospective profits, or prospects of business, or assertions in regard to a speculative matter, concerning any of which men may differ. It relates to something accomplished; to an existing fact, as distinguished from one yet to come into existence; it was made after calling to mind the use to which the buildings were to be put, the fact that the

attention of the builder had been especially directed to "protection against the spread of fire," which could be effected only by the use of proper materials; and the statement was made with knowledge that such materials had not been used.

Nor is it like the safe case cited by the respondent. (*Walker* v. *Milner*, 4 Fost. & F. 745.) There the action was upon a warranty that "the safe in question was thief proof," "that nothing can break into it." It was broken into. There was no suggestion of fraud or deceit, and the jury were required to discriminate between what was represented and what was warranted, and unless satisfied there was a warranty, to find for the defendant. The safe-maker's prospectus was put in evidence; it stated that the safes would insure the safety of valuable property contained in them. The court said: "The words cited from the circular could hardly be understood in the sense of a warranty or assurance of perfect safety, but only as importing a representation of a high degree of strength." They were promissory merely. Then plaintiff's counsel referred to a later prospectus in which the safes in question were only spoken of "as of the strongest security," and relied on this as implying a withdrawal of the previous warranty.

But Cockburn, J., observed that, "Assuming later prospectuses to have been issued after the burglary, it was only dictated by common honesty. For, after it had been found by actual experience that the safe was not absolutely secure against all possible attempts, it would have been fraudulent to continue previous description."

In the case at bar the plaintiff alleges fraud. A jury might find that an exterior of a city building, partly of wood, although to no greater extent than the one in question, was not fire-proof within the meaning and intent of the circular; they might also find that when the circular was issued, this fact was known to the defendant, and then the doctrine, suggested by Cockburn, J., in the case cited, would have some application. Nor do the other cases referred to seem to support respondent's contention. They exclude the idea of fraud, and relate to matters of mere opinion. As, whether a certain valve will consume smoke and save fuel? (*Prideaux* v. *Bunnett*, 1 C. B. [N. S.] 613.) Whether certain pictures were the work of the old masters, or copies? (*Jendwine* v. *Slade*, 2 Esp. 572.) Whether land was of the value certified to? (*Gordon* v. *Butler*, 105 U. S. 553.) But in none

of them is it denied that if the person making the statement or expressing the opinion had at the time knowledge of its falsity, the action would lie.

It is certainly well settled upon principles of natural justice that for every fraud or deceit which results in consequential damage to a party, he may have an action. Here the complaint states not only a false representation with a fraudulent intent, but that the falsehood was conscious and wilful; that by it the plaintiff was induced to deliver her property to be stored in the building and thereby incurred loss. The evidence may be so viewed as to sustain these allegations.

The learned counsel for the respondent has stated in the broadest and most unqualified terms, as a proposition not to be disputed, "that no man is liable for the expression of his opinion or judgment." But this is true only when the opinion stands by itself and is intended to be taken as distinct from anything else, and where the proposition is found in the books it is so restricted. Thus it is said: "Matters of opinion, stated merely as such, will not in general form the ground to a legal charge of fraud." (Leake, on Contracts, 355, giving many instances and also exceptions to the rule.) Statements of value have been held insufficient to sustain an action where, as is said, they were "mere matters of opinion," (*Simar* v. *Canaday*, 53 N. Y. 306); but at the same time it is shown that under certain circumstances they are to be regarded as affirmations of fact, and then if false an action can be maintained upon them. The same rule applies where A. desiring credit of B. for a certain amount, the latter asks C. as to the solvency of A., and he replies, "he is good, as good as any man in the country for that sum." No doubt this involves opinion, but it is held that if the recommendation was made in bad faith and with knowledge that A. was insolvent, C. would be liable. (*Upton* v. *Vail*, 6 I. R. 181); and so as to every representation concerning a matter of fact by which one man is induced to change his position to his injury or the benefit of another. It may be so expressed as to bind the person making it to its truth whether it take the form of an opinion or not, or it may appear that it was not intended to be acted upon. In the latter case no obligation is incurred.

In the circular issued by the defendant there are many words of commendation, which, however strong, could not be relied

upon as the basis of contract. The ones at first referred to are not of that character. They relate to the present and describe a portion of the building in its existing state as "being fireproof." This is not a matter of opinion, for it defines a state or condition, and if part of that portion was of wood, may properly be regarded as a "false statement of a fact." Whether the defendant knew the component parts of his own buildings, and, if so, whether the statement was made with intent to deceive, and whether it was an inducement to the contract, the learned counsel for the respondent has fully argued. At present it is unnecessary to discuss those questions, for it seems to us they are, as the case stands, properly for the jury, and upon the only point which appears to have been considered by the court below we are obliged to differ from them.

That the issues may be more fully tried, the judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except ANDREWS and MILLER, JJ., not voting, and EARL, J., dissenting.

Judgment reversed.

SILENCE AND ARTIFICE.

STEWART v. WYOMING RANCHE CO.

(123 United States, 383. — 1888.)

GRAY, J. The original action was brought by the Wyoming Cattle Ranche Company, a British corporation, having its place of business at Edinburgh in Scotland, against John T. Stewart, a citizen of Iowa. The petition contained two counts.

The first count alleged that in July, 1882, the defendant, owning a herd of cattle in Wyoming Territory, and horses going with that herd, and all branded with the same brand, and also 80 short-horn bulls, and 700 head of mixed yearlings, offered to sell the same with other personal property for the sum of $400,000; and at the same time represented to the plaintiff and its agent, that there had already been branded 2800 calves as the increase of the herd for the current season, and that the

whole branding of calves and increase of the herd for that season would amount to 4,000, and that, exclusive of the branding for that year, the herd consisted of 15,000 head of cattle, and that there were 150 horses running with it and branded with the same brand; that had the representation that 2,800 calves had been branded been true, it was reasonable from that fact to estimate that the whole branding for that year would be 4,000 head, and that the whole herd exclusive of the increase for that year was 15,000 head; that the defendant, when he made these representations, knew that they were false and fraudulent, and made them for the purpose of deceiving the plaintiff and its agent, and of inducing the plaintiff to purchase the herd; and that the plaintiff, relying upon the representations, and believing them to be true, purchased the herd and paid the price.

The second count alleged that the defendant had failed to deliver the bulls and yearlings as agreed.

At the trial the following facts were proved: The defendant, being the owner of a ranche with such a herd of cattle, gave in writing to one Tait the option to purchase it and them at $400,000, and wrote a letter to Tait describing all the property, and gave him a power of attorney to sell it. He also wrote a letter describing the property to one Majors, a partner of Tait. A provisional agreement for the sale of the property, referring to a prospectus signed at the same time, was made by Tait with the plaintiff in Scotland, a condition of which was that a person to be appointed by the plaintiff should make a favorable report. One Clay was accordingly appointed, and went out to Wyoming and visited the ranche; certain books and schedules made by one Street, the superintendent of the ranche, were laid before him; and he and the defendant rode over the ranche together for several days.

Clay testified that, in the course of his interviews with the defendant, the latter made to him the false representations alleged in the petition, and requested him to rely on these representations, and not to make inquiries from the foreman and other persons; and that, relying on the representations, he made a favorable report to the plaintiff, which thereupon completed the purchase. The plaintiff also introduced evidence tending to prove the other allegations in the petition. The defendant testified that he never made the representations alleged.

The jury returned a general verdict for the plaintiff in the

sum of $55,000, upon which judgment was rendered, and the defendant sued out this writ of error.

No exception was taken to the judge's instructions to the jury upon the second count. The only exceptions contained in the bill of exceptions allowed by the judge, and relied on at the argument, were to the following instructions given to the jury in answer to the plaintiff's requests:

"14. I am asked by the plaintiff to give a number of instructions, a portion of which I give, and a portion of which I must necessarily decline to give. My attention is called to one matter, however, and as I cannot give the instruction as it is asked for, and as the matter it contains is, as I think, of the first importance, I will state my own views upon that particular point.

"I am asked to say to the jury, if they believe from the evidence that, while Clay was making the inspection, Stewart objected to Clay making inquiries about the number of calves branded, of the foreman and other men, and thereby prevented Clay from prosecuting inquiries which might have led to information that less than 2,000 calves had been branded, the jury are instructed that such acts on the part of Stewart amount in law to misrepresentations.

"In reference to that point, I feel it my duty to say this to the jury, that if the testimony satisfies you that after all the documents in question that have been introduced in evidence here went into the hands of the home company in Scotland, where it had its office and where it usually transacted its business, if it was not satisfied with what appears in those papers, and if it did not see proper to base its judgment and action on the information that those papers contained, but nevertheless sent Clay to Wyoming to investigate the facts and circumstances connected with the transaction, to ascertain the number of cattle and the number of horses and the condition of the ranche, and the number of calves that would probably be branded; if the company sent him there as an expert for the purpose of determining all those things for itself and for himself, and relied upon him, and he was to go upon the ranche himself, and exercise his own judgment, and ascertain from that, without reference to any conversation had with Stewart, then it would make no difference. But whilst he was in pursuit of the information for which he went there, Stewart would have no right to throw unreasonable obstacles in his way to

prevent his procuring the information that he sought and that he desired. If the testimony satisfies you that when they did go there together, and whilst Clay was making efforts to procure the information which he did, and whilst he was in pursuit of it, and while he was on the right track, Stewart would have no right to throw him off the scent, so to speak, and prevent him, in any fraudulent and improper way, from procuring the information desired, and, if he did that, that itself is making, or equal to making, false and fraudulent representations for the purpose in question. But if Stewart did none of these things, then, of course, what is now said has no application.

"15. In determining whether Stewart made misrepresentations about the number of cattle, or the loss upon his herd, or the calf brand of 1882, the jury will take into consideration the documents made by Stewart prior to and upon the sale, namely, the power of attorney to Tait, the descriptive letter, the optional contract, letter to Majors, schedules made by Street, provisional agreement and prospectus, and his statements to Clay, if the jury finds he made any, upon Clay's inspection trip; and if the jury find that in any of these statements there were any material misrepresentations on which plaintiff relied, believing the same, which have resulted to the damage of the plaintiff, the plaintiff is entitled to recover for such damage.

"16. If the jury find from the evidence that Stewart purposely kept silent when he ought to have spoken and informed Clay of material facts, or find that by any language or acts he intentionally misled Clay about the number of cattle in the herd, or the number of calves branded in the spring of 1882, or by any acts of expression or by silence consciously misled or deceived Clay, or permitted him to be misled or deceived, then the jury will be justified in finding that Stewart made material misrepresentations; and must find for the plaintiff, if the plaintiff believed and relied upon the representations made by the defendant."

The judge, at the beginning and end of his charge, stated to the jury the substance of the allegations in the petition as the only grounds for a recovery in this action; and, at the defendant's request, fully instructed them upon the general rules of law applicable to actions of this description, and gave, among others, the following instructions:

"5. In order to recover on the ground of false representa-

tions, such false representations must be shown to be of a then existing matter of fact material to the transaction; and no expression of opinion or judgment or estimation, not involving the assertion of an unconditional fact, can constitute actionable false representation, and in such case the jury must find for the defendant on the first count in the petition."

"8. In order to justify a recovery, it must be shown by proof that the plaintiff's agent relied upon the alleged false representations, and made them the ground and basis of his report, but that he was so circumstanced as to justify him in so relying upon and placing confidence in said representations; and if it appears that he had other knowledge, or had received other representations and statements, conflicting therewith, sufficient to raise reasonable doubts as to the correctness of such representations, then there can be no recovery on the first count."

The judge, of his own motion, further instructed the jury that they were to decide upon the comparative weight of the conflicting testimony of Clay and of the defendant, and added, "It seems to me that the first count must hinge upon that one point, because, if there was no statement made by Stewart to Clay with reference to the number of calves that were branded, during this trip of inspection of the ranche, then it seems to me that the whole theory which underlies the claim of the plaintiff must be an erroneous one."

Taking all the instructions together, we are of opinion that they conform to the well-settled law, and that there is no ground for supposing that the jury can have been misled by any of the instructions excepted to.

In an action of deceit, it is true that silence as to a material fact is not necessarily, as matter of law, equivalent to a false representation. But mere silence is quite different from concealment; *aliud est tacere, aliud celare;* a suppression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are

words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff.

The case of *Laidlaw* v. *Organ*, 2 Wheat. 178, is much in point. In an action by the buyer of tobacco against the sellers to recover possession of it, there was evidence that before the sale the buyer, upon being asked by Girault, one of the sellers, whether there was any news which was calculated to enhance its price or value, was silent, although he had received news, which the seller had not, of the Treaty of Ghent. The court below, "there being no evidence that the plaintiff had asserted or suggested anything to the said Girault, calculated to impose upon him with respect to the said news, and to induce him to think or believe that it did not exist," directed a verdict for the plaintiff. Upon a bill of exceptions to that direction, this court, in an opinion delivered by Chief Justice MARSHALL, held that while it could not be laid down, as a matter of law, that the intelligence of extrinsic circumstances which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor, yet, at the same time, each party must take care not to say or do anything tending to impose upon the other, and that the absolute instruction of the judge was erroneous, and the question whether any imposition was practiced by the vendee upon the vendor ought to have been submitted to the jury.

The instructions excepted to in the case at bar clearly affirmed the same rule. The words and conduct relied on as amounting to false representations were those of the seller of a large herd of cattle ranging over an extensive territory, and related to the number of the herd itself, of which he had full knowledge, or means of information, not readily accessible to a purchaser coming from abroad; and the plaintiff introduced evidence tending to show that the defendant, while going over the ranche with the plaintiff's agent, made positive false representations as to the number of calves branded during the year, and also fraudulently prevented him from procuring other information as to the number of calves and consequently as to the number of cattle on the ranche.

In giving the fourteenth instruction, the judge expressly declined to say, that if the defendant prevented the plaintiff's

agent from prosecuting inquiries which might have led to information that less than 2,000 calves had been branded, such acts of the defendant would amount in law to misrepresentations; but on the contrary submitted to the jury the question whether the defendant fraudulently and improperly prevented the plaintiff's agent from procuring the information demanded; and only instructed them that if he did, that was making, or equal to making, false and fraudulent representations for the purpose in question.

So the clear meaning of the sixteenth instruction is, that the jury were not authorized to find material misrepresentations by the defendant, unless he purposely kept silent as to material facts which it was his duty to disclose, or by language or acts purposely misled the plaintiff's agent about the number of cattle in the herd or the number of calves branded, or, by words or silence, knowingly misled or deceived him, or knowingly permitted him to be misled or deceived, in regard to such material facts, and in one of these ways purposely produced a false impression upon his mind.

The defendant objects to the fifteenth instruction, that the judge submitted to the jury the question whether the defendant made misrepresentations about the number of cattle, and about the loss upon the herd, as well as about the calf brand of 1882. It is true that the principal matter upon which the testimony was conflicting was whether the defendant did make the representation that 2,800 calves had been branded in that year. But the chief importance of that misrepresentation, if made, was that it went to show that the herd of cattle which produced the calves was less numerous than the defendant had represented; and the petition alleged that the defendant made false and fraudulent representations, both as to the number of calves branded and as to the number of the whole herd. So evidence of the loss of cattle by death, beyond what had been represented by the defendant, tended to show that the herd was less in number than he represented.

The remaining objection argued is to an instruction given by the judge to the jury in response to a question asked by them upon coming into court after they had retired to consider their verdict. It is a conclusive answer to this objection, that no exception was taken to this instruction at the time it was given, or before the verdict was returned. The fact that neither of

the counsel was then present affords no excuse. Affidavits filed in support of a motion for a new trial are no part of the record on error, unless made so by bill of exceptions. The absence of counsel, while the court is in session, at any time between the impaneling of the jury and the return of the verdict, cannot limit the power and duty of the judge to instruct the jury in open court on the law of the case as occasion may require, nor dispense with the necessity of seasonably excepting to his rulings and instructions, nor give jurisdiction to a court of error to decide questions not appearing of record.

Judgment affirmed.

KNOWLEDGE AND INTENTION.

CHATHAM FURNACE CO. v. MOFFATT.

(147 Massachusetts, 403.—1888.)

C. ALLEN, J. It is well settled in this Commonwealth that the charge of fraudulent intent, in an action for deceit, may be maintained by proof of a statement made, as of the party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make any further proof of an actual intent to deceive. The fraud consists in stating that the party knows the thing to exist, when he does not know it to exist; and if he does not know it to exist, he must ordinarily be deemed to know that he does not. Forgetfulness of its existence after a former knowledge, or a mere belief of its existence, will not warrant or excuse a statement of actual knowledge. This rule has been steadily adhered to in this Commonwealth, and rests alike on sound policy and on sound legal principles. *Cole* v. *Cassidy*, 138 Mass. 437; *Savage* v. *Stevens*, 126 Mass. 207; *Tucker* v. *White*, 125 Mass. 344; *Litchfield* v. *Hutchinson*, 117 Mass. 195; *Milliken* v. *Thorndike*, 103 Mass. 382; *Fisher* v. *Mellen*, 103 Mass. 503; *Stone* v. *Denny*, 4 Met. 151; *Page* v. *Bent*, 2 Met. 371; *Hazard* v. *Irwin*, 18 Pick. 95. And though this doctrine has not always been fully maintained elsewhere, it is supported by

the following authorities, among others. *Cooper* v. *Schlesinger*, 111 U. S. 148; *Bower* v. *Fenn*, 90 Penn. St. 359; *Brownlie* v. *Campbell*, 5 App. Cas. 925, 953, by Lord Blackburn; *Reese River Mining Co.* v. *Smith*, L. R. 4 H. L. 64, 79, 80, by Lord Cairns; *Slim* v. *Croucher*, 1 De G. F. & J. 518, by Lord Campbell. See also *Peek* v. *Derry*, 59 L. T. (N. S.) 78, which has been published since this decision was announced.

In the present case, the defendant held a lease of land, in which there was iron ore. The mine had formerly been worked, but operations had ceased, and the mine had become filled with water and débris. The defendant sought to sell this lease to the plaintiff, and represented to the plaintiff, as of his own knowledge, that there was a large quantity of iron ore, from 8,000 to 10,000 tons, in his ore bed, uncovered and ready to be taken out and visible when the bed was free from water and débris. The material point was, whether this mass of iron ore, which did in truth exist under ground, was within the boundaries of the land included in the defendant's lease, and the material part of the defendant's statement was, that this was in his ore bed; and the representations were not in fact true in this, that while in a mine connecting with the defendant's shafts there was ore sufficient in quantity and location relative to drifts to satisfy these representations, if it had been in the land covered by the defendant's lease, that ore was not in the defendant's mine, but was in the adjoining mine; and the defendant's mine was in fact worked out.

During the negotiations, the defendant exhibited to the plaintiff a plan of the survey of the mine, which had been made for him, and the plaintiff took a copy of it. In making this plan, the surveyor, with the defendant's knowledge and assent, did not take the course of the first line leading from the shaft through which the mine was entered, but assumed it to be due north; and the defendant never took any means to verify the course of this line. In point of fact, this line did not run due north, but ran to the west of north. If it had run due north, the survey, which was in other respects correct, would have correctly shown the mass of iron ore in question to have been within the boundaries of the land covered by the defendant's lease; but in consequence of this erroneous assumption the survey was misleading, the iron ore being in fact outside of those boundaries. It thus appears that the defendant knew that

what purported to be a survey was not in all respects an actual survey, and that the line upon which all the others depended had not been verified, but was merely assumed; and this was not disclosed to the plaintiff. The defendant took it upon himself to assert, as of his own knowledge, that this large mass of ore was in his ore bed, that is, within his boundaries; and in support of this assertion he exhibited the plan of the survey, the first line of which had not been verified, and was erroneous. Now this statement was clearlyof a thing which was susceptible of knowledge. A real survey, all the lines of which had been properly verified, would have shown with accuracy where the ore was situated. It was within the defendant's knowledge that the first line of the plan had not been verified. If under such circumstances he chose to take it upon himself to say that he knew that the mass of ore which had been discovered was in his ore bed, in reliance upon a plan which he knew was not fully verified, it might properly be found that the charge of fraudulent misrepresentation was sustained, although he believed his statement to be true.

The case of *Milliken* v. *Thorndike*, 103 Mass. 382, bears a considerable resemblance to the present in its facts. That was an action by a lessor to recover rent of a store, which proved unsafe, certain of the walls having settled or fallen in shortly after the execution of the lease. The lessor exhibited plans, and, in reply to a question if the drains were where they were to be according to the plans, said that the store was built according to the plans in every particular; but this appeared by the verdict of the jury to be erroneous. The court said, by Mr. Justice Colt, that the representation "was of a fact, the existence of which was not open and visible, of which the plaintiff [the lessor] had superior means of knowledge, and the language in which it was made contained no words of qualification or doubt. The evidence fully warranted the verdict of the jury."

In respect to the rule of damages, the defendant does not in argument contend that the general rule adopted by the judge was incorrect, but that it does not sufficiently appear what considerations entered into his estimate. No requests for rulings upon this subject were made, and there was no error in the course pursued by the judge.

Exceptions overruled.

Hadcock v. Osmer.

(153 New York, 604. — 1897.)

Appeal from a judgment of the Appellate Division of the Supreme Court, affirming a judgment of the Trial Term in favor of the plaintiff, in an action by the plaintiff, as executor, to recover for fraudulent representations.

Vann, J. Prior to the 15th of September, 1888, Deloss Brown, as principal, and Joseph Brown, as surety, were indebted to the defendant on a past-due note for over $300 and payment thereof had repeatedly been demanded. After trying in vain to borrow money to pay the note, Deloss told the defendant that he did not know where they could get it, and asked if he must have it. The defendant said yes, and, upon being further asked by Deloss where the money could be had, recommended him to call on one Benjamin Hadcock. He did so and was told by Benjamin that he could not lend the money, but that his brother Emmanuel, who was stopping with him, could let him have it. Deloss reported to the defendant that he thought he could get the money of "the Hadcocks," and that they would let him have it "some time in October." When the time came around, the Messrs. Brown started to see if they could get the money of Emmanuel Hadcock, but first went to the defendant and asked him to go along. He said that he could not, when Deloss declared there was no use of their going alone, and thereupon the defendant wrote and delivered to the Browns a paper, of which the following is a copy: "Mr. Hadcock: The Browns are good for what money you let them have. [Signed] L. Osmer." The Hadcocks did not know the Browns, but, as they knew the defendant, on the strength of this paper Emmanuel Hadcock lent them $400, taking their note therefor, and on the same day they used the most of the money to pay their debt to the defendant. Both of the Browns were insolvent at this time, and while the defendant may have believed they were good, he did not know whether they were good or not, and did not try to find out. Upon the trial of this action, which was brought to recover damages for false representations by means of said paper,

there was but slight dispute as to the representations, their falsity or the injury resulting therefrom, but the defendant insisted that as he did not know that his representations were false, there could be no recovery against him. Through his counsel, he asked the trial court to charge the jury "that there can be no recovery in an action of deceit unless it appears that the defendant made the representations, knowing them to be false, with intent to deceive and that the plaintiff suffered damages in consequence thereof." The court refused to so charge, except with the modification, "that if he made the statement that they were good, as a fact, not as an opinion, without knowing whether it was true or not, then it was false in the sense that he made a statement of fact as though he knew it to be true, which he did not know to be true. That, together with what I have already said in my charge in regard to it, will enable the jury to understand what I mean." Exception was taken to the refusal to charge as requested and to the charge as made. In the body of the charge, the court after instructing the jury as to the difference between the assertion of a fact and the expression of an opinion, told them in substance that if the defendant made the representation, either knowing it to be untrue, or, without knowing whether it was untrue or not, stating it as an existing fact, intending that it should be taken and acted upon as such, they might infer an intent to defraud; "because," as the court continued, "a man has no right to state a thing as a fact, which misleads the other party to his damage, unless he knows whether it is true or untrue; and if he states it, knowing and understanding that he does not know whether it is true or not, he just as much misleads the other man as though he stated it with the knowledge that it was untrue."

An action to recover damages for deceit cannot be maintained without proof of fraud as well as injury. Actionable deceit cannot be practiced without an actual intention to deceive, resulting in actual deception and consequent loss. But while there must be a furtive intent, it may exist when one asserts a thing to be true which he does not know to be true, as it is a fraud to affirm positive knowledge of that which one does not positively know. Where a party represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or not

and it is actually untrue, he is guilty of falsehood, even if he believes it to be true, and if the statement is thus made with the intention that it shall be acted upon by another, who does so act upon it to his injury, the result is actionable fraud. *Kountze* v. *Kennedy*, 147 N. Y. 124, 130; *Rothschild* v. *Mack*, 115 N. Y. 1, 7; *Marsh* v. *Falker*, 40 N. Y. 562, 573; *Bennett* v. *Judson*, 21 N. Y. 238; Addison on Torts, 1007; 1 Bigelow on Fraud, 514. Such seems to be the case now before us, as the facts are presumed to have been found by the jury. The plaintiff's testator did not ask for information in regard to the solvency of those who wished to borrow money of him, but the defendant volunteered to give it. He was interested in the result of the loan, for the bulk of the proceeds was for his benefit. On being told that the loan would not be made without his presence, he armed the proposed borrowers with a written statement over his own signature, containing a positive assertion of a material fact, with the intention that it should be acted upon and should induce the loan of the money. Yet he did not know the assertion, thus positively made for such an important purpose, to be true, and he did not investigate or seek to discover whether it was true or not, although he had dealt some with the Browns and had some information as to their circumstances. He intended, as the jury has found upon sufficient evidence, that the lender should understand him as communicating his actual knowledge and not as expressing his opinion, judgment or belief. Knowing that he did not know what he said he did, and what he intended to cause another to believe he did, he took the responsibility of its truth, and honesty of belief in the supposed fact, under such circumstances, cannot relieve him from the imputation of falsehood and fraud. As was said by Judge Peckham, in *Rothschild* v. *Mack*, *supra*: "He either knew or he did not know of the financial condition of the makers of the note. If he did know it, then he knew that the note, as to both makers and indorsers, was without value. If he did not know its condition, he yet assumed to have actual knowledge of the truth of his statement. . . . He certainly meant to convey the impression of actual knowledge of the truth of the representations he made as to the value of the note, and he either knew such representations were false or else he was conscious that he had no actual knowledge while assuming to have it and intending to convey such impression. If damage ensue this makes

an actionable fraudulent representation." The language of Chief Judge Andrews, in *Kountze* v. *Kennedy*, *supra*, is equally applicable: "One who falsely asserts a material fact, susceptible of accurate knowledge, to be true of his own knowledge, and thereby induces another to act upon the fact represented to his prejudice, commits a fraud which will sustain an action for deceit. This is not an exception to, but an application of, the principle that actual fraud must be shown to sustain such an action. The purpose of the party asserting his personal knowledge is to induce belief in the fact represented, and if he has no knowledge, and the fact is one upon which special knowledge can be predicated, the inference of fraudulent intent in the absence of explanation naturally results." The rule is the same in other states and in England. Thus, in *Chatham Furnace Co.* v. *Moffatt*, 147 Mass. 403, the court said: "The charge of fraudulent intent, in an action for deceit, may be maintained by proof of a statement made, as of the party's own knowledge, which is false, provided the thing stated is not merely matter of opinion, estimate or judgment, but is susceptible of actual knowledge, and in such case it is not necessary to make any further proof of an actual intent to deceive. The fraud consists in stating that the party knows the thing to exist, when he does not know it to exist, and if he does not know it to exist he must ordinarily be deemed to know that he does not. Forgetfulness of its existence after a former knowledge, or a mere belief of its existence, will not warrant or excuse a statement of actual knowledge." See, also, *Bullitt* v. *Farrar*, 42 Minn. 8; *Hexter* v. *Bast*, 125 Pa. St. 52; *Wells* v. *McGeoch*, 71 Wis. 196; *Swayne* v. *Waldo*, 73 Ia. 749; *Craig* v. *Ward*, 1 Abb. Ct. App. Dec. 454; *Evans* v. *Edmonds*, 13 C. B. 777.

The charge of the learned trial judge was within these rules, and the exceptions under consideration furnish no ground for a reversal of the judgment.

The court was further asked to charge that "there can be no recovery in this case in any event, unless it be proven or be found that there was an actual purpose or intent on the part of the defendant, on the 15th day of September, 1888, to defraud Emmanuel Hadcock of his property." The court so charged, but added: "Of course, that is in connection with what I have already charged, that it was not necessary it should have been determined, when he made the paper, before they got the money, as to which of the Hadcocks it was to go, but there

must have been an intention to cheat and defraud the person to whom this paper should be delivered, the one or the other." The defendant excepted to the modification and now argues that it was reversible error.

In the course of his charge the trial judge had said: "If it was understood by the defendant that there was a proposition to borrow of one or more Hadcocks, and he sent out a general paper addressed to Mr. Hadcock, why then you can say whether it was not fairly intended to be delivered to such person of the family as would loan the money; and, if that is true, it is not essential that it should appear to you that it had been determined, at the time the paper was drawn, that the loan should be from one or the other. If you find that fairly the meaning, intention and design of the parties was that whoever loaned the money should have this paper presented to him, then it may be fairly said that the representation was made to whoever did loan the money to those persons." While the defendant had at first suggested that the money might be borrowed of Benjamin Hadcock, he was finally told that "the Hadcocks" would probably make the loan. Since the brothers Hadcock lived together as members of the same family and the paper was addressed generally to "Mr. Hadcock," it was properly left to the jury to find whether it was not the intention of the defendant that the paper should be delivered to such member of the Hadcock family as would make the loan, which was the primary object of giving the writing. As a general recommendation of credit, knowingly given to an insolvent person, will support an action for deceit in favor of any one acting thereon to his injury, so, as we think, a letter addressed simply to "Mr. Hadcock," would justify any man of that name in acting upon it, at least when it was delivered to him with the apparent authority of the writer and there was no direction from the latter as to which one of the Hadcocks it should be given. Moreover, the evidence warranted the inference that the Browns had implied authority from the defendant to deliver the letter to either one of the Hadcocks and hence to the plaintiff's testator.

We agree with the conclusion reached by the learned Appellate Division and think that their judgment should be affirmed, with costs.

All concur except O'Brien, J., who takes no part, and Gray, J., absent.

Judgment affirmed.

RELIANCE UPON REPRESENTATION, AND DAMAGE.

Taylor v. Guest.

(58 New York, 262.—1874.)

Appeal from an order of the General Term of the Supreme Court, reversing a judgment in favor of the defendant entered upon the report of a referee. (See 45 How. Pr. 276.)

Andrews, J. The cause of action set forth in the complaint is, that the defendant undertook, as the broker and agent of the plaintiff, to sell the bonds, and that he accounted to the plaintiff, as upon a sale, at sixty per cent of their par value, when in fact he sold them at seventy-five per cent of that value. It is alleged that when the plaintiff delivered the bonds to the defendant to be sold, the defendant represented that sixty per cent was the highest price he could obtain for them, and that the plaintiff relying upon that representation, authorized a sale at that price; that this representation was false and fraudulent, and that at the time it was made the defendant had received and accepted a bid for them at seventy-five per cent, on which he subsequently delivered them, and received the purchase-money; but which fact he fraudulently concealed from the plaintiff.

The complaint is based upon the theory that the relation of principal and agent existed between the parties to the transaction, and not that of vendor and purchaser. The referee found that the defendant was not the agent of the plaintiff to sell the bonds, but that the plaintiff by his agents agreed to sell them to the defendant at sixty cents on the dollar, and that they were sold to him at that price; and that the subsequent sale to *Drew*, was made by the defendant as owner, and not as the broker or agent of the plaintiff. The finding of the referee is conclusive against the plaintiff upon the cause of action set out in the complaint. The evidence was conflicting in respect to the question whether the defendant was the buyer of the bonds from the plaintiff, or merely his agent to sell them, and this court cannot review the finding of the referee upon that question.

The plaintiff seeks to maintain the judgment of the General

Term, which reversed the judgment entered upon the report of the referee, on the ground that, conceding that the defendant was the purchaser of the bonds, he was, upon the facts found in the report, guilty of deceit in the purchase, occasioning damage to the plaintiff, for which judgment should have been given him. This ground of action is entirely distinct from the one on which the plaintiff relied when he commenced his action; but assuming that if maintained by proof, the referee should have rendered judgment upon it, we are to consider whether the facts found by him establish a cause of action for deceit against the defendant. In determining this question we can look only to the facts contained in the report. We can look into the case to see whether there is any evidence to sustain the findings, but not to ascertain whether any additional fact was proved, which if found, would in connection with the fact contained in the report have made out a cause of action and required a different judgment. *Fabbri* v. *Kalbfleisch*, 52 N. Y. 28, and cases cited. The case is not brought within the exceptions which exist when the appeal is from an order granting a new trial on the facts, or when there was a request to make additional findings, which was denied.

The referee, in respect to the fraud alleged, found that the agent of the defendant, who was concerned in the negotiation on his behalf for the purchase of the bonds, knowing that one *Drew* had offered the defendant seventy-five per cent for them, to induce the plaintiff to sell them to the defendant for sixty per cent, told the plaintiff's agent who made the sale, and during the negotiation, that the latter sum was the highest price at which the bonds could be sold. This false representation, made fraudulently and with an intent to deceive, made the defendant liable in an action for deceit if, believing it to be true and relying upon it, the plaintiff parted with the bonds for the price agreed upon, and when, except for the false representation he would not have sold them, and might have realized a larger price. Fraud without damage or damage without fraud will not sustain the action for deceit (3 Bulstr. 95); and a false and fraudulent representation made by one party to induce a contract entered into by the other, is not actionable unless the party to whom it was made believed the representation to be true and acted upon the faith of it to his damage. *Scott* v. *Lara*, Peake's Cases, 226; *Allen* v. *Addington*, 7 Wend. 11; 11 id. 375; *Meyer*

v. *Amidon*, 45 N. Y. 169; *Oberlander* v. *Spiess*, id. 175; *Lefler* v. *Field*, 52 id. 621. In a legal sense a person is not damaged by a false representation by which he is not influenced. It is incumbent upon the party claiming to recover in an action for deceit, founded upon false representations, to show that he was influenced by them. It does not require very strong proof to establish it. In most cases it may be inferred from the circumstances attending the transaction. But in all cases it is a fact which should be averred in the complaint, and must be maintained by evidence. There is an absence in the report in this case, of any finding, that the plaintiff relied upon the false representation of the defendant's agent, in making the sale, or that it was one of the moving considerations thereto; nor is it a legal inference from the facts found.

The order of the General Term should be reversed, and the judgment on the report of the referee affirmed.

All concur except RAPALLO, J., dissenting, and JOHNSON, J., who took no part.

Order reversed, and judgment accordingly.

MALICIOUS PROSECUTION.[1]

ESSENTIAL ELEMENTS.

Vanderbilt v. Mathis.

(5 Duer, 304. — 1856.)

This action was brought to recover damages, on the allegations that the defendant, on Nov. 27, 1854, before a commissioner of the United States falsely, maliciously and without reasonable or probable cause, charged that the plaintiff had committed perjury; that upon such charge the plaintiff was brought before the commissioner, and, after examination, was discharged.

The jury returned a verdict in favor of the plaintiff, and the court ordered that the defendant have twenty days to make and serve a case, with leave to turn the same into a bill of exceptions or special verdict, and that the same be heard, in the first instance, at the General Term.

[1] Malicious prosecution distinguished from false imprisonment. — "False imprisonment is a radically different wrong from malicious prosecution. Recovery of damages in an action for false imprisonment is no bar to an action for malicious prosecution. False imprisonment is a direct injury to the freedom of the person, and, at common law, was an action of trespass. Malicious prosecution may be entirely independent of personal interference, and always gives rise to an action on the case. The very statement of the facts in the case of false imprisonment shows the acts involved to be illegal. The ground of malicious prosecution is the procuring to be done what upon its face is, or may be, a legal act, from malicious motives, and without probable cause. That there should have been an original legal proceeding of some kind, and that the plaintiff should have succeeded in it, is an essential element peculiar to malicious prosecution. The coincidence of malice and want of probable cause is also peculiar to malicious prosecution. Malice is never properly an essential element of false imprisonment; and probable cause, only when there has been an arrest without warrant, and then as matter of the defendant's, and not of the plaintiff's, case. Accordingly, advice of an attorney is no defense to false imprisonment; warrant of arrest, in perfect form, is not to malicious prosecution." Jaggard on Torts, 630.

By the Court, Bosworth, J. To maintain an action for malicious prosecution, three facts, . . . , 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. *Vanduzer* v. *Linderman*, 10 J. R. 110; *Murray* v. *Long*, 1 Wend. 140; 2 Stark. Ev. 494; *Willans* v. *Taylor*, 6 Bing. 173.

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*, 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 *Vanduzer* v. *Linderman*, 10 J. R. 110, the court said: "No action lies, merely for bringing a suit against a person, without sufficient ground. To maintain 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 in-

struction 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.

TERMINATION. (1)

Bump v. Betts.

(19 Wendell, 421. — 1838.)

Action on the case for malicious prosecution.

The defendant, in the absence of the plaintiff, obtained an attachment against his property on the allegation that the plaintiff had departed the county in which he had resided, with the intent to defraud his creditors, obtained a judgment against him in the proceeding thus commenced, sued out an execution and sold the property of the plaintiff. The plaintiff gave evidence going to show that the demand on which the judgment was obtained had been paid by him previous to the institution of the proceedings. On a motion for a nonsuit, the judge ruled that the judgment obtained by the defendant remaining unreversed, rebutted the presumption of want of probable cause arising from the fact of payment; that there was no malice shown, and that the plaintiff must be nonsuited. A nonsuit was accordingly entered, and a motion was now made to set it aside.

By the Court, Nelson, Ch. J. This action lies against any person who maliciously and without probable cause prosecutes another, whereby the party prosecuted sustains an injury either in person, *property,* or reputation. 1 Selw. 806; Saund. Pl. & Ev. 651; 2 Chitty's Pl. 248, n. r. 12 Mod. 208; 1 Salk. 12; 1 T. R. 493, 551.

As a general rule, the plaintiff must aver in his declaration, and prove on the trial the determination of the former suit in his favor, Saund. Pl. & Ev. 858; 2 Chitty's Pl. 245, n. *e,* though the omission of the averment would be cured after verdict. 1 Saund. 228, *b.* n. 1. See also 3 Camp. 61, n. 1. The reason for this proof is obvious, for otherwise he might recover in

1 "The real foundation of the action is the malicious prosecution without probable cause, and the termination of the criminal proceeding is a mere technical matter in no way concerning the merits of the action and is a mere condition precedent to its maintenance." *Robbins* v. *Robbins,* 133 N. Y. 597, 600.

this action, and still be convicted, or have judgment against him in the former suit. Doug. 215. But it does not apply where the malicious prosecution complained of arises out of proceedings on *attachment* in the absence of the party defendant, in which no opportunity is afforded him to defend the suit. A judgment against him under such circumstances, cannot be deemed conclusive evidence of probable cause, or want of malice, as in cases of personal service of process. The rule was first laid down in reference to these cases, and when thus confined, is a sound one, but altogether inapplicable in respect to alleged malicious suits under this new statute remedy given to a plaintiff. The reason of the rule ceasing, the rule itself should give way, and must, or this mode of redress for a wrong more likely to be committed in *ex parte* proceedings than in litigated cases, must be denied. It is obvious the damage to the party in the former instance, will usually be much more serious than in the latter: in the one case there will be a recovery against him for such amount as his adversary, on an *ex parte hearing*, thinks proper to demand; whilst in the other he is subjected only to the costs of a defense.

New trial granted, costs to abide the event.

Cardival v. Smith.

(109 Massachusetts, 158.—1872.)

The declaration alleged that the defendant, in a civil action, maliciously and without probable cause procured the arrest of the plaintiff and his holding to bail on a writ returnable at a certain term of the Superior Court; that the plaintiff duly appeared, but the defendant did not appear, nor was said writ ever entered. To this the defendant demurred on the ground that no determination of the former suit was shown. The demurrer was sustained and the plaintiff appealed.

Gray, J. The general rules of law governing actions for malicious arrest and prosecution have long been well settled. In the words of Lord Camden, "this is an action for bringing a suit at law; and courts will be cautious how they discourage

men from suing; when a party has been maliciously sued and held to bail, malice, and that it was without any probable cause, must be alleged and proved." *Goslin* v. *Wilcock*, 2 Wils. 302, 307. "The new action must not be brought before the first be determined; because till then it cannot appear that the first was unjust." Bul. N. P. 12.

When the prosecution alleged to have been malicious is by complaint in behalf of the government for a crime, and in pursuance thereof an indictment has been found and presented to a court having jurisdiction to try it, an acquittal by a jury must be shown; and a *nolle prosequi* entered by the attorney for the government is not sufficient; for the finding of the grand jury is some evidence of probable cause, and another indictment may still be found on the same complaint. Bul. N. P. 14; *Bacon* v. *Towne*, 4 Cush. 217; *Parker* v. *Farley*, 10 Cush. 279; *Bacon* v. *Waters*, 2 Allen, 400. But if it is commenced by complaint to a magistrate who has jurisdiction only to bind over or discharge, his record, stating that the complainant withdrew his prosecution and it was thereupon ordered that the accused be discharged, is equivalent to an acquittal. *Sayles* v. *Briggs*, 4 Met. 421, 426. If the accused, after being arrested, is discharged by the grand jury's finding no indictment, that shows a legal end to the prosecution. *Jones* v. *Given*, Gilb. 185, 220; Buller, J., in *Morgan* v. *Hughes*, 2 T. R. 225, 232; *Freeman* v. *Arkell*, 2 B. & C. 494; *S. C.* 3 D. & R. 669; *Michell* v. *Williams*, 11 M. & W. 205; *Bacon* v. *Waters*, 2 Allen, 400. And if the prosecutor, after procuring the arrest, fails to enter any complaint, this with the attending circumstances is sufficient to be submitted to the jury as evidence of want of probable cause. *Venafra* v. *Johnson*, 10 Bing. 301; *S. C.* 3 Moore & Scott, 847, and 6 C. & P. 50; *McDonald* v. *Rooke*, 2 Bing. N. C. 217; *S. C.* 2 Scott, 359.

When the suit complained of is a civil action, wholly under the control of the plaintiff therein, it would seem that a discharge thereof by him, without any judgment or verdict, is a sufficient termination of the suit; and that, for instance, if one maliciously causes another to be arrested and held to bail for a sum not due, or for more than is due, knowing that there is no probable cause, and, after entering his action, becomes nonsuit, or settles the case upon receiving part of the sum demanded, an action for a malicious prosecution may be maintained against

him. *Nicholson* v. *Coghill*, 4 B. & C. 21; *S. C.* 6 D. & R. 12; *Watkins* v. *Lee*, 5 M. & W. 270; *Ross* v. *Norman*, 5 Exch. 359; *Bicknell* v. *Dorion*, 16 Pick. 478, 487; *Savage* v. *Brewer*, id. 453. In *Arundell* v. *White*, 14 East, 216, it was held that an entry in the minute book of the sheriff's court in London, opposite the entry of a suit in that court, that it was withdrawn by the plaintiff's order, was sufficient evidence of a termination of that suit to sustain an action for malicious prosecution. In *Pierce* v. *Street*, 3 B. & Ad. 397, the declaration, after setting out the suing out of a writ in an ordinary action at law against the plaintiff, and an arrest and holding to bail thereon, and alleging that it was done maliciously and without probable cause, averred that no proceedings were thereupon had in that action, and that the plaintiff therein did not declare against the defendant nor prosecute his suit against him with effect, but voluntarily permitted the action to be discontinued for want of prosecution thereof, whereupon and whereby, and according to the practice of the court, the suit became determined. At the trial of the action for malicious arrest, it appeared that no declaration was delivered or filed in the former action, and that this action was not commenced until a year after the return day of that. It was objected that, there being no judgment of court, there was no evidence of the determination of the suit, to satisfy the averment in the declaration. But Lord Lyndhurst, C. B., thought there was, and overruled the objection; and his ruling was confirmed by the court of Queen's bench; Lord Tenterden, C. J., saying, "The length of time which had elapsed shows that the suit was abandoned altogether;" and Parke, J., "When the cause is out of court, it must be considered as determined." Our own statutes expressly provide that, if no declaration is inserted in the writ, or filed before or at the return term, it shall be a discontinuance of the action. Gen. Sts. c. 129, § 9.

But the present case does not require us to consider what disposition must be shown of a civil action which has once been entered in court, in order to constitute a full determination thereof. A plaintiff cannot be compelled to enter his action, and, until he does, may judge for himself whether he will proceed with it or not. If he does not enter it, it never comes before the court, nor becomes the subject of any judgment, nor appears on its records, unless the defendant, upon filing a com-

plaint at the return term, obtains judgment for his costs. If the defendant does not make such a complaint, the action is not the less finally abandoned and determined by the neglect of the plaintiff to proceed with it. *Clark* v. *Montague*, 1 Gray, 446, 448; *Lombard* v. *Oliver*, 5 Gray, 8; *Jewett* v. *Locke*, 6 Gray, 233. The only cause assigned for the demurrer being that the declaration shows no determination of the former suit in favor of the defendant therein by a judgment of court, it must be

Overruled.

WANT OF PROBABLE CAUSE. (1)

HARKRADER v. MOORE.

(44 California, 144.—1872.)

THE fourth instruction referred to in the opinion was: "That if the defendant wrongfully, and without reasonable and prob-

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1 "Probable cause has been defined, a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief, that the person accused is guilty of the offense with which he is charged. (*Munns* v. *Nemours*, 3 Wash. C. C. 37.) However innocent the plaintiff may have been of the crime laid to his charge, it is enough for the defendant to show, that he had reasonable grounds for believing him guilty at the time the charge was made." *Foshay* v. *Ferguson*, 2 Denio, 617, 619.

"In an action for a malicious prosecution, the question of probable cause is a question of law for the court. If the facts are in dispute, or the question depends upon a chain of circumstances connected with the conduct of the parties, the facts and the inferences to be deduced from them must be found by the jury; but when they are found by the jury, the judge is then to decide whether they establish probable cause or the want of it; and the burden of proof being on the plaintiff, if at the close of the plaintiff's case there is no evidence of the want of probable cause, it is the duty of the judge to nonsuit the plaintiff." *Apgar* v. *Woolston*, 43 N. J. Law, 57, 62.

"The onus is on the plaintiff to show affirmatively, by circumstances or otherwise, that the defendant had no ground for the prosecution—no such reasonable ground of suspicion sufficiently strong in itself, as to warrant a cautious man in believing the person arrested is guilty of the offense with which he is charged. . . .

"What these circumstances may be, cannot be specified, but we would think, among them, the good character of the party accused would stand

able cause, made the charge against the plaintiff, then the charge was malicious without proof that it was dictated by angry feelings or vindictive motives."

By the Court, WALLACE, C. J. This action was brought to recover damages for an alleged malicious prosecution of the plaintiff by the defendant, who, upon his affidavit made before a Justice of the Peace, charging the plaintiff with having stolen a parcel of fence rails of the alleged value of one hundred dollars, obtained from the Justice a warrant for the arrest of the plaintiff, upon which warrant the latter was arrested and imprisoned, but subsequently, upon being examined before the Justice, it appearing that there was no sufficient cause to believe him guilty, he was discharged from custody and all proceedings against him were dismissed.

The defendant, in his answer, denied that he instituted the proceedings maliciously or without probable cause, and averred that he had reasonable grounds and probable cause to believe, and did believe, that the charge of larceny made against the plaintiff was true, and that the affidavit in that behalf was made in good faith and only for the purpose of promoting the ends of justice and of the public welfare.

Upon trial before a jury the plaintiff obtained a verdict, upon which verdict judgment was rendered, and a motion of defendant for a new trial having been denied, this appeal is brought from the judgment and the order denying a new trial.

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out prominently. All must admit that is, and must be, a strong fact, if known to the accuser, to ward off suspicion, and therefore, for this purpose, it is entirely competent for the plaintiff in the action, in his opening proofs, to show that his character was good, and known to be so by the defendant, when he made the accusation. As the onus of proving a negative—the absence of probable cause—is thrown upon the plaintiff, slight evidence will usually suffice for such purpose. But the evidence of an uniform good character up to the time of the charge, is something more than slight evidence, and the plaintiff should have the benefit of it. If known to the prosecutor, what single fact is better calculated to weaken a belief, he being a prudent and cautious man, in the guilt of the suspected party. On the other hand, his bad character may be shown by the defense, as good ground for augmenting a suspicion against him. We know, in no actions save criminal prosecutions and actions for defamation, can the character of the party, as a general rule, be inquired into, but in such a case as this, there seems to be great propriety in permitting it, for the reasons here given." *Israel* v. *Brooks*, 23 Ill. 526, 528. See also *McIntire* v. *Levering*, 148 Mass. 546.

1. As to probable cause: It appears by the agreed statement found in the record that the evidence upon the part of the defendant tended to show that the rails, with the stealing of which the plaintiff had been charged, were the property of one Kettenburg and one Salcum, and in charge of the defendant Moore, as their agent, and "that the plaintiff herein took said rails and converted them to his own use without the knowledge or consent of the said Kettenburg or Salcum, or of said Moore; and that after the rails were taken away the plaintiff, Harkrader, denied to defendant that he had taken the rails."

The Court having instructed the jury that if there was probable cause for the prosecution of the plaintiff he could not recover in this action, the defendant, thereupon, requested an instruction that if the jury should find certain enumerated facts, these would, of themselves, amount to probable cause, and would entitle the defendant to a verdict. These facts were, "that the defendant had the possession and the control of the rails as the agent of the owner, and that plaintiff took said rails and converted them to his own use without the knowledge or consent of the owners or of said defendant, and that plaintiff afterwards denied to defendant that he had taken said rails and endeavored to conceal his act of taking said rails." The Court refused to so instruct, and the defendant excepted.

We are of opinion that there was no error in refusing the instruction as requested. The gravamen of the action is that the defendant instituted the proceedings without probable cause —that is, without having at the time such knowledge or information of the circumstances as would superinduce in the mind of an ingenuous and unprejudiced person of ordinary capacity a reasonable belief that the plaintiff was guilty of the charge. The defense must be that *he did believe* and *had reasonable grounds to believe at the time* that the accusation he made was well founded. "Probable cause does not depend on the actual state of the case, in point of fact, but upon the honest and reasonable belief of the party prosecuting. It must appear that the defendant knew of the existence of those facts which tended to show reasonable and probable cause, because without knowing them he could not act upon them; and also that he believed the facts amounted to the offense which he charged, because otherwise he will have made them the pretext for prosecution without even entertaining the opinion that he had a right to prosecute." 2 Greenleaf, Ev., sec. 455.

In *Delegal* v. *Highley*, 3 Bing. N. C. 959, which was an action for causing a false and malicious charge to be made against the plaintiff before a magistrate without any reasonable or probable cause, the defendant pleaded that he had caused the charge to be made "upon and with reasonable cause," etc., and then set forth the several facts and circumstances in which the charge against the plaintiff originated and upon which the proceedings had been instituted. To this plea a demurrer was interposed, and an objection taken was that it contained no allegation that the defendant at the time he caused the charge to be made had been informed or knew or in any manner acted on those facts and circumstances. "And," (said Tindal, C. J., in delivering the opinion of the Court) "we are of opinion that the plea is bad not only in form, but in substance, on the ground of objection. The gravamen of the declaration is that the defendant laid the accusation without any reasonable or probable cause operating on his mind at the time; and under the plea of not guilty the plaintiff must have failed at the trial if he had not proved that the facts of the case had been communicated to him, or at all events so much of the facts as would have been sufficient to induce a belief of the plaintiff's guilt on the mind of any reasonable man previous to the charge being laid before the magistrate. This was held by the Court of King's Bench in the course of last term, upon a motion for a new trial in the case of *Docorra* v. *Hilton*. And if the defendant, instead of relying on the plea of not guilty, elects to bring the facts before the Court in a plea of justification, it is obvious that he must allege as a ground of defense that which is so important in proof under the plea of not guilty, viz: that the knowledge of certain facts and circumstances which were sufficient to make him or any reasonable person believe the truth of the charge which he instituted before the magistrate, existed in his mind at the time the charge was laid, and was the reason and inducement for his putting the law in motion. Whereas, it is quite consistent with the allegations in this plea that the charge was made upon some ground altogether independent of the existence of the facts stated in the plea; and that the defendant now endeavors to support the propriety of the charge, originally without cause, by facts and circumstances which have come to his knowledge for the first time since the charge was made.

The instruction as requested, ignoring, as it did, the actual belief of the defendant *at the time he caused the arrest of the plaintiff*, and having no reference to the circumstances, or to the appearances of guilt of the plaintiff, then known to the defendant, and under which he laid the charge against the plaintiff, was properly refused.

2. The Court also refused to instruct the jury that if they believed from the evidence "that at the time of the alleged prosecution, the facts of which the defendant, Moore, then had knowledge, were sufficient to warrant a reasonable man in the belief that the alleged charge was true, the plaintiff cannot recover in this action."

This instruction as requested was obnoxious to the same objection as the last, in that it omitted all reference to the actual state of mind or belief of the defendant at the time; though the facts or circumstances of which he knew or was informed "were sufficient to warrant a reasonable man in the belief that the alleged charge was true," still the defendant may not, in fact, have believed the charge to be true; and if he did not so believe, there could, as to him, be no probable cause for setting the prosecution on foot.

But the proposed instruction is in another respect objectionable. It sought to submit to the jury the question of the existence of probable cause. To inquire whether or not such facts as were known to the defendant were sufficient to warrant him as a reasonable man in the belief that the plaintiff was guilty, is to inquire not only what particular facts were known to him, but also, and at the same time, to determine their legal sufficiency or insufficiency as constituting probable cause. The authorities are substantially uniform that the question of probable cause, however presented, is a question of law, and, therefore, one to be determined by the Court. When the facts in reference to the alleged probable cause are admitted, or established beyond controversy, then the determination of their legal effect is absolute, and the jury are to be told that there was or was not probable cause, as the case may be. When, however, the facts are controverted, and the evidence is conflicting, then the determination of their legal effect by the Court is necessarily hypothetical, and the jury are to be told that if they find the facts in a designated way, then that such facts, when so found, do or do not amount to probable cause. But in neither case

are the jury to determine whether or not the established facts do or do not amount to probable cause.

3. The Court instructed the jury at the instance of the plaintiff "that the plaintiff's discharge by the examining magistrate is prima facie evidence of the want of probable cause for the charge, and the burden is upon the defendant to prove to the satisfaction of the jury the existence of probable cause." The views already expressed in reference to the preceding point show this instruction to be erroneous. If the Court was of opinion that the discharge of the plaintiff, under the undisputed circumstances appearing, established the want of probable cause, the jury should have been so instructed; if, however, there were other and disputed facts, the ascertainment of the truth of which by the jury in the one way or in the other would affect the question of probable cause, the disputed facts should have been called to their attention, and the legal effect of those disputed facts, when found either way as bearing upon the question of probable cause, should have been explained to them.

4. Malice in fact must be shown in order to support the action, and the fourth instruction, as given, would seem to mean that such malice must necessarily be inferred from the want of probable cause. It certainly does not follow that a wrongful accusation made—that is, an accusation made against a really innocent man—and without reasonable or probable cause, is malicious in fact by necessary conclusion; and while the jury *may* find the fact of malice from the circumstances of the want of probable cause, or from other circumstances established in the case, they are not to be told that a wrongful charge made, without probable cause, is *per se* malicious in fact.

Judgment reversed and cause remanded for a new trial.

MALICE.

Pullen v. Glidden.

(66 Maine, 202.—1877.)

The plaintiff was arrested upon a charge of forgery made by the defendant, and after examination was acquitted and discharged. He thereupon brought this action for malicious prosecution. Verdict for defendant; exceptions by plaintiff.

Libbey, J. This is an action for malicious prosecution. The presiding judge instructed the jury that there was not probable cause for the prosecution. Upon the question of malice he instructed the jury as follows: "In regard to the other branch of the case necessary to be established by the plaintiff, it is that there was malice; that the prosecution was malicious; now what is malice? There are several kinds of malice; but the two kinds of malice that may perhaps be considered in this charge are malice in law and malice in fact. Now what is malice in law? Malice in law is such malice as is inferred from the commission of an act wrongful in itself, without justification or excuse. This is not the kind of malice required in this case. The malice required to be proved in this case is malice in fact. Malice in fact is where the wrongful act was committed with a bad intent from motives of ill-will, resentment, hatred, a desire to injure, or the like. Did such kind of malice exist in the mind of the defendant when he commenced the prosecution in question? Did he do it from bad intent, from evil motives, or did he not? Malice may be inferred from want of probable cause, or it may be inferred and proved by other evidence in the case." Again: "If you should find that there was no malice, such as I have described, the plaintiff could not maintain this action."

The plaintiff complains that this instruction required the jury to find malice in its more restricted, popular sense, when proof of malice in its enlarged, legal sense was all that the law requires.

To maintain his case it was necessary for the plaintiff to prove malice in fact as distinguished from malice in law. Malice in

law is where malice is established by legal presumption from proof of certain facts, as in action for libel, where the law presumes malice from proof of the publication of the libelous matter. Malice in fact is to be found by the jury from the evidence in the case. They may infer it from want of probable cause. But it is well established that the plaintiff is not required to prove express malice in the popular signification of the term, as that defendant was prompted by malevolence, or acted from motives of ill-will, resentment, or hatred towards the plaintiff. It is sufficient if he prove it in its enlarged, legal sense. "In a legal sense any act done willfully and purposely, to the prejudice and injury of another, which is unlawful, is, as against that person, malicious." *Commonwealth* v. *Snelling*, 15 Pick. 337. "The malice necessary to be shown in order to maintain this action, is not necessarily revenge, or other base and malignant passion. Whatever is done willfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is in legal contemplation, malicious." *Wills* v. *Noyes*, 12 Pick. 324. See also, *Page* v. *Cushing*, 38 Maine, 523; *Humphries* v. *Parker*, 52 Maine, 502; *Mitchell* v. *Wall*, 111 Mass. 492.

We think from a fair construction of the instruction upon this point, the jury must have understood that, in order to find for the plaintiff, they must find that the defendant, in prosecuting the plaintiff, was actuated by express malice, in the popular sense of the term. In this respect it was erroneous.

Exceptions sustained.

APPLETON, C. J., DICKERSON, DANFORTH, VIRGIN and PETERS, JJ., concurred.

ABUSE OF PROCESS.

WOOD v. GRAVES.

(144 Massachusetts, 365 — 1887.)

C. ALLEN, J. The three counts of the declaration are treated by the counsel for the defendants as being counts respectively for malicious prosecution, for false imprisonment, and for abuse of criminal process; and the trial appears to have proceeded on

that ground. No question as to the form of the declaration has been raised. The court correctly ruled, upon the request of the defendants, that, upon the evidence, the plaintiff could not maintain an action for malicious prosecution, the prosecution not having been brought to a termination. The principal questions arise upon the other requests by the defendants for instructions.

The court declined to rule that, upon the evidence, the plaintiff could not maintain an action for false imprisonment against either of the defendants. No action would lie for false imprisonment by reason of what was done in pursuance of the warrant of the Governor in the extradition of the plaintiff from Massachusetts to New Hampshire, or of what was done in pursuance of any lawful precept issued upon the indictment in New Hampshire; but if acts were done in excess of what was authorized, and if the process of the law was abused, the remedy might be by an action for false imprisonment. The court therefore properly declined to adopt the language of the defendants' second request, and all the rights of the defendants in respect to this were saved by the course of the instructions in relation to the wrongful use of process already commenced.

There is no doubt that an action lies for the malicious abuse of lawful process, civil or criminal. It is to be assumed, in such a case, that the process was lawfully issued for a just cause, and is valid in form, and that the arrest or other proceeding upon the process was justifiable and proper in its inception. But the grievance to be redressed arises in consequence of subsequent proceedings. For example, if after an arrest upon civil or criminal process the person arrested is subjected to unwarrantable insults and indignities, is treated with cruelty, is deprived of proper food, or is otherwise treated with oppression and undue hardship, he has a remedy by an action against the officer, and against others who may unite with the officer in doing the wrong. It is sometimes said that the protection afforded by the process is lost, and that the officer becomes a trespasser *ab initio*. *Esty* v. *Wilmot*, 15 Gray, 168; *Malcom* v. *Spoor*, 12 Met. 279. This rule, however, is somewhat technical, and is hardly applicable to others than the officer himself. But the principle is general, and is applicable to all kinds of abuses outside of the proper service of lawful process, whether civil or criminal, that for every such wrong there is a remedy, not only against the officer whose duty it

is to protect the person under arrest, but also against all others who may unite with him in inflicting the injury. Perhaps the most frequent form of such abuse is by working upon the fears of the person under arrest for the purpose of extorting money or other property, or of compelling him to sign some paper, to give up some claim, or to do some other act, in accordance with the wishes of those who have control of the prosecution. The leading case upon this subject is *Grainger* v. *Hill*, 4 Bing. N. C. 212, where the owner of a vessel was arrested on civil process, and the officer, acting under the directions of the plaintiffs in the suit, used the process to compel the defendant therein to give up his ship's register, to which they had no right. He was held entitled to recover damages, not for maliciously putting the process in force, but for maliciously abusing it, to effect an object not within its proper scope. In *Page* v. *Cushing*, 38 Maine, 523, the same doctrine was held applicable to the abuse of criminal process. *Holley* v. *Mix*, 3 Wend. 350, is to the same effect, and it was held that an action for false imprisonment will lie against an officer and a complainant in a criminal prosecution, where they combine and extort money from a person accused, by operating upon his fears, though the person was in the custody of the officer under a valid warrant, issued upon a charge of felony. The case of *Baldwin* v. *Weed*, 17 Wend. 224, was an action for false imprisonment. The plaintiff had been indicted in New York; he was arrested in Vermont, and carried to New York for trial. The defendant Weed procured the requisition, was present at the arrest, and caused the plaintiff to be put into irons, with the purpose to secure two small debts. The plaintiff executed to Weed a bond for the delivery of property much in excess of the debts. The action for malicious prosecution failed, but the court (Nelson, C. J.) declared that an action of trespass, assault and false imprisonment should have been brought, and was the appropriate remedy for the excess of authority and abuse of the process; and intimated to the plaintiff to amend his pleadings accordingly. See also *Carleton* v. *Taylor*, 50 Vt. 220; *Mayer* v. *Walter*, 64 Penn. St. 283. On similar grounds an officer becomes responsible in damage for abuse of process, or as trespasser *ab initio* by reason of such abuse, who omits to give an impounded beast reasonable food and water while under his care, *Adams* v. *Adams*, 13 Pick. 384; or who stays too

long in a store where he has attached goods, *Rowley* v. *Rice*, 11 Met. 337; *Williams* v. *Powell*, 101 Mass. 467; *Davis* v. *Stone*, 120 Mass. 228; or who keeps a keeper too long in possession of attached property, *Cutter* v. *Howe*, 122 Mass. 541; or who places in a dwelling-house an unfit person as keeper, against the owner's remonstrance. *Malcom* v. *Spoor*, *ubi supra*.

In various other cases, where it has been said that the only remedy was by an action for malicious prosecution, the whole grievance complained of consisted in the original institution of the process, and no abuse in the mere manner of serving it was alleged. Such cases are *Mullen* v. *Brown*, 138 Mass. 114; *Hamilburgh* v. *Shepard*, 119 Mass. 30; *Coupal* v. *Ward*, 106 Mass. 289; and *O'Brien* v. *Barry*, 106 Mass. 300. The case of *Hackett* v. *King*, 6 Allen, 58, was trover for the conversion of property which the plaintiff conveyed to the defendant under alleged duress. In *Taylor* v. *Jaques*, 106 Mass. 291, the question arose in another form, the action being on a promissory note, in defence to which the defendant alleged that his signature was procured by duress.

In examining the instructions of the learned judge to the jury in the present case, no error is found. He made a careful discrimination between the remedy for a malicious prosecution and that for a malicious abuse of process in the manner of executing it. He instructed them explicitly that no damages should be given for anything which occurred before the process was used at all by the officer, but only for what occurred after it began to be used upon the plaintiff, and after it began to be wrongfully used for the purpose of collecting the defendants' debt, and so used with their participation, by their direction, or under their influence. He told them also, in effect, that it must be proved that the defendants, by influence which they were able to exert, or otherwise, actively used the prosecution as a means of getting their debt; and this he afterwards explained and enforced by saying that it must be an influence which they brought to bear in some way upon those in charge of the proceedings. Under these instructions, the jury could not properly hold the defendants responsible for merely setting the criminal law in motion, and arresting the plaintiff, and holding him in custody until his discharge; but only for some distinct act or omission, which amounted to a misuse or abuse of the process after it had issued, some indignity or oppression

beyond the mere fact of arrest and detention, some separate pressure to compel him to make the settlement.

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[*Judgment for plaintiff was reversed, because of improper admission of evidence, and a new trial ordered.*] (1)

MALICIOUS PROSECUTION: CIVIL ACTIONS. (2)

FERGUSON v. ARNOW.

(142 New York, 580.—1894.)

APPEAL from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the plaintiff, in an action for malicious prosecution.

EARL, J. A party who brings an action for malicious pros-

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[1] See also *Mayer* v. *Walter*, 64 Pa. St. 283; *Dishaw* v. *Wadleigh*, 15 App. Div. 205; *Herman* v. *Brookerhoof*, 8 Watts, 240.

[2] "In some cases an action may be maintained for the malicious institution of a civil suit, but the authorities are not entirely agreed what cases are embraced within the rule. The case of the malicious institution of proceedings in bankruptcy is undoubtedly one. If these are instituted maliciously, and without probable cause, and terminate without an adjudication of bankruptcy, an action will lie for the damages sustained. . . . The case of a civil suit begun maliciously, and without probable cause, by the arrest of the party, is another. So is the case of a suit commenced by an attachment of property. . . . Still another case in which an action will lie for the malicious institution of unfounded proceedings not criminal in their nature, is where they are taken to have the party declared insane, and put under guardianship." Cooley on Torts (2d ed.), 217.

An action for the institution of a civil suit, maliciously and without probable cause, seems to have been maintainable at common law until the enactment of the statute of Marlbridge (52 Hen. III.), which awarded costs to successful defendants *pro falso clamore*. Since that time English courts have not sustained such an action. But in this country, because the recovery of costs is not a recompense for attorney's fees, something which and other incidental expenses a successful party recovers under the English practice, many American courts have allowed the action. It seems to be generally agreed, however, that where a party has been subjected to some special grievance, as by interference with his person or property, in a civil action, maliciously and without probable cause, he may maintain a subsequent action to recover damages. See IX. Harvard Law Rev. 538; XIV. Am. & Eng. Enc. of Law (1st ed.), 32, and cases cited.

ecution against a plaintiff who has been unsuccessful in a civil action, should not be permitted to recover without very clear and satisfactory proof of all the fundamental facts constituting his case. Such actions should not be encouraged.

The costs awarded to a successful defendant in a civil action are the indemnity which the law gives him for a groundless prosecution. Public policy requires that parties may freely enter the courts to settle their grievances, and that they may do this without imminent exposure to a suit for damages in case of an adverse decision by judge or jury.

Among other things the plaintiff was bound to show in this action a want of probable cause for the action the defendants brought against him, and in this we think he utterly failed, and the trial judge upon the undisputed evidence should have nonsuited him.

There was a highway in front of the defendants' land which had existed from some time prior to 1804. In 1888 and 1889 it was about four rods wide. The highway commissioner of the town claimed that as originally laid out it was five rods wide, and that it had been encroached upon by the veranda of the defendants' house and by their fences, and he gave them notice of the encroachments, requiring their removal. This they refused and then he caused them to be removed, the plaintiff being one of the principal actors engaged under the commissioner in the removal. The defendants then commenced an action of trespass against the plaintiff and others to recover damages for the removal of the veranda and fences, and in that action they obtained an order for the arrest of the defendants therein, and they were arrested and released upon giving the proper undertaking. The action was put at issue by the answer of the defendants, and it was subsequently brought to trial at a Circuit Court. There evidence was given upon both sides, and the case was submitted to a jury who rendered a verdict for the defendants. Thereafter this plaintiff commenced this action for malicious prosecution of that action, and he recovered a judgment which is brought under review by this appeal.

The three defendants other than Thomas C. Arnow are women, and do not appear to have had anything to do personally with the prosecution of the action against the plaintiff. The defendants had inherited the land from their father, with

the veranda and fences there, and they had all known the highway for many years, and had not themselves encroached thereon and did not know of any encroachment thereon by others. The veranda and most if not all of the fences had stood where they were when removed by the plaintiff for at least forty years. The defendants had never heard of any complaint of any encroachment until about 1888. The highway as fenced out was of the usual width, and the claimed width was very unusual. There was no record of the laying out of the highway and no recorded survey thereof. There was a record of the alteration thereof, made in 1804, which simply recited that the highway was five rods wide. But the defendants had never even seen that. They undoubtedly believed that their piazza and fences did not encroach upon the highway, and seemed to have abundant reason for so believing. Under all these circumstances, and others not here alluded to, the defendants commenced the action of trespass, acting under the advice of their counsel. If upon such evidence as we have here an action for malicious prosecution could be maintained, then such an action could be maintained for the unsuccessful prosecution of many of the actions which come upon appeal to this court, and a large proportion of unsuccessful actions could be followed by such an action, and litigation be thus interminably prolonged.

The fact that an order of arrest in the trespass action was obtained against the plaintiff has no bearing upon the question of probable cause. If the want of probable cause had been established, that fact would have bearing upon the question of malice. For the arrest the plaintiff had his indemnity in the undertaking given upon the granting of the order of arrest.

We regard this as a plain case, and, without a further reference to the law or the facts, our conclusion is that the judgment should be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

TRESPASS.

RIGHT TO UNDISTURBED POSSESSION.

Hay v. The Cohoes Co.

(2 New York, 159.—1849.)

The declaration alleged, among other things, that the defendants, by their agents and servants, wrongfully and unjustly blasted and threw large quantities of earth, gravel, slate and stones, upon the dwelling house and premises of the plaintiff, to his damage. Plea, not guilty. On the trial, the plaintiff gave evidence tending to prove his declaration. The defendants moved for a nonsuit on the ground that it was incumbent on the plaintiff to aver and prove negligence, unskillfulness, or wantonness on the part of the defendants, and this the plaintiff had failed to do. The motion was granted, and an exception taken. On error brought, the Supreme Court reversed the judgment and granted a new trial (3 Barb. 42), from which decision the defendants appealed to this court.

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

In Rolle's Abridgment, 565, it is said that if A erects a new house upon the confines of his land, and next adjoining the land of B, and B afterwards digs his land so near the land of A that it falls, no action can be sustained by A. The purpose of B in the case cited, in digging upon his own land, was lawful, and so for aught that appears were the means taken to accomplish it. The right of A to occupy and use his land in a particular manner was qualified and limited by a similar right in B. No action consequently could be sustained. "A man however cannot dig his land so near mine," the reporter adds, "as to cause mine to slide into the pit." In the last case, the injury would consist in depriving the owner of a part of the soil to which his right was absolute. No degree of care in the excavation by the pit owner, would, I apprehend, justify the transfer of a portion of another man's land to his own.

So in all that class of cases where the mode of enjoyment is

turned into an absolute right by custom, grant, or prescription, the party is entitled to protection against any alteration of the adjacent premises by which he may in any way be injured. *Lasala* v. *Holbrook*, 4 Paige, 173, and cases cited. In *Panton* v. *Holland*, 17 John. 92, the parties were owners of contiguous building lots, in the city of New York. The defendant in order to lay a foundation for a dwelling house, dug below the foundation of the plaintiff's house, in consequence of which, it settled and the walls cracked. Held that the defendant was not liable without proof of negligence. In other words, the plaintiff was bound to show that the means adopted by the defendant were illegal. *Clark* v. *Foot*, 8 John. 421, is to the same effect. If with the same purpose in view, the defendant had placed earth upon or transported it across the plaintiff's lot, the means, *per se*, would be wrongful.

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 centre *usque ad coelum*. 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. *Pragnall*, Cro. Car. 510, nor abstract any portion of the soil, Rol. Abr. 565, note; 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. Without determining the other questions discussed upon the argument, we think, upon the ground above stated, that the judgment of the Supreme Court should be affirmed.

Judgment affirmed.

TRESPASS UPON LAND: INJURY TO POSSESSION. [1]

CHANDLER v. WALKER.

(21 New Hampshire, 282.—1850.)

TRESPASS *quare clausum*, for cutting and carrying away a quantity of timber from lot No. 6, in the second range of lots in Chatham, in January, 1848. Plea, the general issue.

The plaintiff had, without title, been in possession of a lot of land for thirteen years, part of which was cleared, and the re-

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[1] "The common law provided remedies for injuries to possession and property, and based them upon possession rather than on the right of the property. The action of detinue at common law lay where a party claimed the specific recovery of goods and chattels, or deeds and writings detained from him. For the same purpose, however, trover, one of the actions on the case not requiring the exactness of description necessary for detinue, came into more general use. It claims damages, and is based on the innocent fiction that the defendant, having found the goods, converted them to his own use. Replevin could only be brought where there had been a taking by trespass, whether under color of legal process or otherwise. Trespass, in its largest and most extensive sense, signifies any transgression or offense against the laws of nature, of society, or of the country in which we live, whether it relates to a man's person or his property. Trespass was used at common law as the name of an action where the injury to the person or property was direct, as trespass *vi et armis*, for assault and battery or for false imprisonment. Ejectment was a species of personal action of trespass for the recovery of both land and of damages for detention of possession. Trespass on the case was an action arising from the statute of Westminster II., and lay for consequential injuries. Waste was a wrong as well as a remedy." Jaggard on Torts, 655.

"The forms of action brought not ownership but possession to the front in accordance with the habit of thought which, strange as it may now seem to us, found the utmost difficulty in conceiving rights of property as having full existence or being capable of transfer and succession unless in close connection with the physical control of something which could be passed from hand to hand, or at least a part of it delivered in the name of the whole. An owner in possession was protected against disturbance, but the rights of an owner out of possession were obscure and weak. To this day it continues so with regard to chattels. . . . The disturbed possessor had his action of trespass (in some special cases replevin); if at the time of the wrong done the person entitled to possess was not in actual legal possession, his remedy was detinue, or, in the developed system, trover. An owner who had neither possession nor the immediate right to possession could redress himself by a special action on the case, which did not acquire any technical name." Pollock on Torts, 275.

mainder was a wood-lot occupied by him as a part of his farm, from which he cut his wood and timber. The lot was not fenced in on that side where the woods were, but there was a spotted line up to which he cut.

The jury returned a verdict for the whole amount of the damages, and the defendants moved to set aside and for a new trial for alleged error in the rulings. The questions arising upon the motion were reserved, and assigned to this court for determination.

Eastman, J. The *gist* of the action of trespass *quare clausum* is the disturbance of the possession. At common law it is not properly an action to try titles, and the question of title does not necessarily arise. It may, however, and often does, where the real ownership is in dispute, and it becomes material to show in whom the rightful possession is. In South Carolina and Alabama, the action of trespass is expressly given by statute to try and settle titles to real estate. But where the matter is not regulated by statute, the decision of an action of trespass settles nothing in regard to the title beyond the action tried. Whenever the question of title is not raised, so that there is no conflict as to the true ownership, and no title, possession, or right of possession is shown on the part of the defendant, *actual* possession by the plaintiff is all that is required to sustain the action. And as against a wrong doer, — one who has no right whatever to be upon the property, — constructive possession, accompanied with the right, is also sufficient. 1 Chitty's Pleading, 195; 5 East, 485; *Hall* v. *Davis*, 2 Carr. & Payne, 33; *Revett* v. *Brown*, 5 Bingh. 9; *State* v. *Newton*, 5 Blackf. 455; *Brandon* v. *Grimke*, 1 Nott. & McCord, 356; *Read* v. *Shepley*, 6 Verm. Rep. 602; *Anderson* v. *Nesmith*, 7 N. H. Rep. 167. In addition to the above authorities, there are numerous others which sustain the same positions; and the language of courts is substantially the same. We will instance a few of them. "Actual possession *without a legal title*, is sufficient against a wrongdoer." 1 Chitty's Pleading, 196; *Graham* v. *Peat*, 1 East, 244; *Chambers* v. *Donaldson*, 11 East, 74; *Myrick* v. *Bishop*, 1 Hawks's Rep. 485; *Richardson et al.* v. *Murrill et al.*, 7 Missouri Rep. 333. This form of action is used for the violation of the plaintiff's possession; if he be in the actual occupancy he can maintain the action *without* title. *Johnson* v. *McIlwain*, 1

Rice's Rep. 375; *Cahoon* v. *Simmons*, 7 Iredell, 189. The plaintiff is bound only to show that the land was in his possession, either actual or constructive, at the time of the alleged trespass. *Dolloff* v. *Hardy*, 26 Maine Rep. 554. And possession alone, although for a less term than twenty years, is sufficient to maintain an action of trespass *quare clausum*, except against one who can exhibit a legal title. *Moore et al.* v. *Moore*, 21 Maine, Rep. 35. Possession of land is sufficient to enable a party to maintain trespass against all who can show no better title, and an entry and survey are sufficient evidence of possession against all who can show no better title. *Wendell* v. *Blanchard*, 2 N. H. Rep. 456; *Sinclair* v. *Tarbox*, 2 N. H. Rep. 135; *Concord* v. *McIntire*, 6 N. H. Rep. 527. So entirely does this action depend upon the disturbance of the possession, that the owner of land cannot maintain it while the premises are in the actual occupation of the tenant. *Holmes* v. *Seely*, 19 Wendell, 507; *Anderson* v. *Nesmith*, 7 N. H. Rep. 167; *Robertson* v. *George*, 7 N. H. Rep. 306. Perhaps it may be maintained by the owner where the entry is accompanied with a *permanent* injury to the freehold. *Robertson* v. *George*, 7 N. H. Rep. 306. But for the cutting of grass it can only be maintained by the tenant in possession. *Bartlett* v. *Perkins*, 13 Maine Rep. 87. Actual possession, then, without title, or constructive possession with, is sufficient to maintain this form of action against a wrongdoer.

There is no pretense of title, possession, or right of possession, on the part of the defendants in this case. They stand in the position of mere wrongdoers; and if they can succeed, it must be because the plaintiff has failed to show himself in possession, either actual or constructive. Producing no paper title, and showing no legal right of ownership to the property, the plaintiff stands solely upon his possession. Was that such as would give him a right to maintain this suit? The case finds that lots 6 and 7 were adjoining each other; No. 6 being the northerly lot, and the plaintiff's buildings being upon lot No. 7. On the north side of No. 6 was an ancient spotted line. The easterly part of that lot was cleared up to and along that line, and a fence made as far as the clearing went. This clearing was occupied as a pasture. The southerly part of this lot was cultivated; and the northwesterly part, where the trespass was committed, was wood and timber land; and the jury have found

that the plaintiff had occupied that part of said lot for the last thirteen or fourteen years, up to said spotted line as a part of his farm, and as a wood and timber lot attached, and belonging to the same. The lot was not inclosed on the north, except at the easterly end, where the pasture was, but it was occupied for all the ordinary purposes of a farmer's wood lot, up to a definite and known line, just as much as though fenced. Whether such an occupancy, had it continued uninterrupted for twenty years, would have been sufficient to have gained title by adverse possession, does not necessarily arise in this case. It appears, however, to have been open, visible, and marked by definite boundaries.

But this controversy is not between parties standing in the same position. This action is not a writ of entry by which the title is to be determined. The plaintiff shows the ordinary and common possession of like property in most instances, while the defendants show no possession or title whatever, either in themselves or others. Many wood-lots are not fenced for a long series of years; and where the possession is known, and marked, and uninterrupted, it is not necessary that the property should be inclosed, in order to maintain an action of trespass *quare clausum* against a mere wrongdoer. Some cases are very direct upon this point. *Catteris* v. *Cowper*, 4 Taunton's Rep. 546, is one of them. In that case, it being proved, that the defendant had entered the land and taken the produce, the question was made whether the plaintiff had proved such a possession of the *locus in quo* as would enable him to maintain the action. The *locus in quo* was a piece of waste land lying between the farm which the plaintiff rented, and the river Ouse. It bore grass, which everyone cut who pleased, until within two years before the action; and the plaintiff's only title was, that two years before he had taken possession, and twice mowed the grass, and had since pastured a cow there. The defendant's testimony was, that the first time the plaintiff cut the grass he boasted that he had cut hay off of land for which he had paid neither rent nor taxes; that in a former year the plaintiff bought the hay cut by another man off from this same land; and that a few years before the trial, in repairing the boundary-fence of his farm, he excluded, by his fence, the land in question, and had frequently shown to other persons the boundaries of his farm as excluding this land. The court held the defendant's

evidence insufficient to disprove the plaintiff's title, and that there was sufficient evidence of possession on the part of the plaintiff to maintain the action against a wrongdoer. The marginal note to this case is as follows: "Mere prior occupancy of land, however recent, gives a good title to the occupier, whereupon he may recover as plaintiff, against all the world except such as can prove an older and better title in themselves." In *Barnstable* v. *Thatcher et al.*, 3 Metcalf, 239, it was held, that an entry upon a piece of waste cranberry land, and putting up stakes about it, and notices upon the stakes that possession had been taken, was a sufficient possession, without any other title, to maintain trespass, except against the right owner, or the person having the prior right of possession. And it is further said, in that case, that "to maintain an action of trespass, it is not necessary to have such a possession as amounts in law to a disseisin." To the same effect is *Cook* v. *Rider*, 16 Pick. 186. In *Townsend* v. *Kerns et al.*, 2 Watts, 180, it is said, that trespass is emphatically an action founded on possession, and the defendant cannot rely upon the plaintiff's want of title. In *Machin* v. *Geortner*, 14 Wendell, 239, the plaintiff proved that he occupied the *locus in quo* as a wood-lot, cutting thereupon his wood, and rails for fencing, and some saw-logs; but the lot was not fenced, nor was there any clearing upon it, nor did he produce any title to it. The defendant thereupon moved for a nonsuit, because the plaintiff had failed to prove himself in *actual* possession of the *locus in quo*. The motion was overruled; the court holding, that proof that the premises were used as a wood-lot, was sufficient evidence of actual possession to maintain the action against a person showing no rights. And in *Penn et al.* v. *Preston*, 2 Rawle, 14, the court say, "possession of a farm draws to it the possession of the woodland belonging to it, *though not inclosed;* and the party in posssession may maintain trespass against a wrongdoer for destroying timber on such woodland."

Looking, then, at the nature of this form of action, the purposes for which it is used, and the authorities upon the subject, as applicable to the facts presented in this case, we cannot doubt that the rulings of the court below, and the instructions given to the jury, were correct.

In examining the case, we have not considered the question whether the declaration was broad enough to cover the *locus*

in quo, or not, because that question, not being raised at the trial, but it appearing that the case was tried mainly upon the fact of possession, it is too late to take that exception now. If an objection on account of variance between the declaration and the proof be not taken at the trial, it will be considered as waived. *McConihe* v. *Sawyer*, 12 N. H. Rep. 396.

Judgment on the verdict.

JUSTIFIABLE ENTRIES.

NEWKIRK v. SABLER.

(9 Barbour, 652.—1850.)

ACTION for assault and battery.

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, to the house of one Roosa, 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 him or struck at him, and a fight ensued, in which the plaintiff received the injuries complained of.

The judge substantially charged the jury that the plaintiff had the right to remove his team and wagon from the defendant's premises, provided he did so with the least possible injury to the premises, and in nowise wantonly and unnecessarily destroyed the defendant's fences. Defendant excepted.

Verdict for plaintiff. Defendant appealed.

By the Court, PARKER, J. I think 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 license or authority of law, is a trespass. 3 Bl. Com. 209; 18 John. 385. 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 Black. 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 the purchaser. 10 Co. 46. Where the owner of the soil sells the chattel being on his land. As if he sell a tree, a crop, a horse, or a fanning mill, which remain within his close; he at the same time passes to the vendee, as incident to such sale, a right to go upon the premises and take away the subject of his purchase, without being adjudged a trespasser. 1 Cowen's Tr. 367; Bac. Abr. Trespass F.; 11 East, 366; 2 Roll. Abr. 567 m. n. 1. And if a man, in virtue of his license, erects a building on another's land, this license cannot be revoked so entirely as to make the person who erected it a trespasser, for entering and removing it after the revocation. In some cases, the motive will excuse the entry. If J. S. go into the close of J. N. to succor the beast of J. N., the life of which is in danger, an action of trespass will not lie; because, as the loss of J. N., if the beast had died, would have been irremediable, the doing of this is lawful. But if J. S. go into the close of J. N. to prevent the beast of J. N. from being stolen, or to prevent his corn from being consumed by hogs, or spoiled, the action of trespass lies; for the loss, if either of those things had happened, would not have been irremediable. Bac. Abr. Trespass F. And if a stranger chase the beast of A which is *damage feasant* therein, out of the close of B, trespass will lie; for by doing this, although it seem to be for his benefit, B is deprived of his right to distrain the beast. Bro. Tresp. pl. 421; Keilw. 46, 13.

In some cases the entry will be excused by necessity. As if a public highway is impassable, a traveler may go over the adjoining land. 2 Show. 28; Lev. 234; 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. Doug. 747; 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. VI., 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 cannot be excused for entering to take them away, on the ground of necessity, because he might have prevented it. Bac. Abr. Trespass F.

Sometimes 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 thereinto and take it away, trespass will not lie, because J. S. was himself the first wrongdoer. 2 Roll. Abr. 566, pl. 9; 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. Rep. 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. Rep. 406, a mare and 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 the 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. Stat. 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 Black. 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. 8 T. R. 88, 299; 1 Saund. 296, note 1; 1 Salk. 641; 1 Bing. 158; 3 Black. Com. 5.

The defendant cannot 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 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.

TRESPASS AB INITIO. (1)

ALLEN v. CROFOOT.

(5 Wendell, 506. — 1830.)

CROFOOT sued Allen, in a justice's court, in trespass, for entering his house and obtaining copies of papers for the purpose of commencing a suit against him. The defendant pleaded the

1 "A license, whether given by the owner himself, or by the law, may be lost by abusing it. . . . But, as respects the consequences of the abuse, a distinction which is of high importance is to be taken between the two classes of cases. The distinction is this: That if the authority was con-

general issue and license to enter the house. The jury returned a verdict for the plaintiff, and the justice gave judgment accordingly. The defendant appealed to the Common Pleas, and at the trial the following facts appeared: There had been an arbitration between one Parsons and Crofoot, and an award had been made in favor of the former. Allen was the attorney for Parsons, and on receiving from Crofoot the sum of money awarded, delivered up to him his bond and the award. At the time of payment, something was said about further claims that Parsons had against Crofoot, which the latter said he would not pay. Allen thinking he had done wrong in delivering up the bond and award, went to Crofoot's house in his absence to take copies of the bond and award, under the pretense that he was subpœnaed as a witness and wanted to refresh his memory as to the transactions, when in fact his object was to obtain copies for the purpose of commencing a suit against Crofoot, which was subsequently commenced. It further appeared, that when he went to Crofoot's house, he knocked at the door and was bidden to come in; and that he was on terms of intimacy with Crofoot, and in the habit of resorting to his house. The court charged the jury, that if they should be of 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. The jury found a verdict for the plaintiff, and the defendant sued out the present writ of error.

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ferred by the law, an abuse not only terminates it, but revokes it; and it is presumed, from the misbehavior of the licensee, that he entered originally with the intent to do the wrong he has actually committed, and not in good faith under the license. The wrong-doer is thereupon held responsible as a trespasser *ab initio;* a trespasser in the entry itself, as in everything done afterward. . . . In these cases the law has given an authority which the owner cannot resist, and as no choice is allowed him in respect to the person who is to exercise it, it is but reasonable that the law which confers the authority should withdraw it wholly when it is abused. But when the party himself grants a license, which he might, at his option, have withheld, there is no reason why the remedy for an abuse should be broader than the abuse itself. The licensee is therefore not a trespasser in his entry, but be is liable on the special case for exceeding his license, or for any misconduct after entry." Cooley on Torts (2d ed.), 371.

By the Court, SAVAGE, CH. J. The plaintiff in error seeks to reverse the judgment in the common pleas on two grounds.

1. It is said the common pleas had no jurisdiction because the penalty of the appeal bond was not in double the amount of the judgment. The judgment was entered according to the justice's return for $50 damages and the costs of suit. As no sum is mentioned for costs, and the only sum mentioned is the $50, this court cannot say that the judgment was entered for a greater sum. The penalty, therefore, is correct. The bond was incorrect in not containing the latter condition mentioned in the statute; but the plaintiff below had no reason to complain on that account, as the bond is more favorable to him in its present form than if that condition was contained in it. There is now an absolute undertaking to pay, whereas by the condition omitted, the surety would be obligated to pay the debt before the justice, with interest and costs, or surrender the body of the defendant.

2. 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 that 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*, 4 Co. 290, 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; 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, it is not necessary to inquire. A better reason is given for it in Bacon's 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 at the door and was told to walk in; 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 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, 12 Johns. R. 408, and that possession of property obtained fraudulently confers no title. Under such circumstances no change of property takes place, 15 Johns. R. 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 as *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 farther 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 common pleas.

TRESPASS TO GOODS.

Dexter v. Cole.

(6 Wisconsin, 319.—1857.)

The plaintiff declared in trespass, charging the defendant with taking and driving away twenty-two sheep, the property of the plaintiff, to his damage one hundred dollars. Plea, gen-

eral issue. The cause was tried before a justice of the peace and a jury, and it appeared from the evidence that the defendant, a butcher at Milwaukee, was driving some sheep he had purchased toward the city, upon the highway, when they became mixed with a small lot of twenty-two sheep belonging to plaintiff, which were running at large upon the highway. The defendant then drove the whole flock into a yard near the road, for the purpose of parting them, and threw out a number which he did not claim, and pursued his way with the remainder to his slaughter-house at Milwaukee, where they were killed. The evidence tended to show, and the jury found it did show, by the verdict rendered, that some four of plaintiff's sheep remained in the flock, were driven to Milwaukee, and there slaughtered by the defendant. Verdict for plaintiff.

The cause was removed to the county court by a writ of *certiorari*, the defendant alleging the following errors:

1. That from all the testimony in the case, it does not appear that the defendant ought to be charged as a trespasser.
2. That there is no testimony that the defendant ever took and converted the sheep to his own use.
3. That from the testimony it appears that the action should have been trover, and not trespass, there being no proof of the unlawful taking.
4. The testimony is uncertain and insufficient to found a verdict upon in any form of action.
5. The verdict is against the evidence.

The county court reversed the judgment, and the plaintiff brought this writ of error.

By the Court, COLE, J. We have no doubt but the action of trespass would lie in this case. In driving off the sheep, the defendant in error without doubt unlawfully interfered with the property of Dexter; and it has been frequently decided, that to maintain trespass *de bonis asportatis*, it was not necessary to prove actual forcible dispossession of property; but that evidence of any unlawful interference with, or exercise of acts of ownership over, property, to the exclusion of the owner would sustain the action. *Gibbs* v. *Chase*, 10 Mass. 128; *Miller* v. *Baker*, 1 Met. 27; *Phillips and Brown* v. *Hall et al.*, 8 Wend. 610; *Morgan* v. *Varick*, id. 587; *Wintringhouse* v. *La Foy*, 7 Cowen, 735; *Reynolds* v. *Shuler*, 5 id. 325; 1 Chitty

Pl., 11th Amer. ed., 170, and cases cited in the notes. Neither is it necessary to prove that the act was done with a wrongful intent; it being sufficient if it was without a justifiable cause or purpose, though it were done accidentally, or by mistake. 2 Green. Ev., section 622; *Grulle* v. *Snow*, 19 J. R. 381. There is nothing inconsistent with these authorities in the case of *Parker* v. *Walrod*, 13 Wend. 296, cited upon the brief of the counsel for the defendant in error.

Upon the other point in the case, we think there was some evidence to support the verdict of the jury, and therefore the judgment of the justice should not be reversed because the proof was insufficient. It was the province of the jury to weigh the evidence and determine what facts were established by it, and the county court ought not to reverse the judgment, because the proof was not sufficient in its opinion to justify the finding of the jury.

The judgment of the county court is therefore reversed and the judgment of the justice affirmed.

TRESPASS TO PERSON.

Sullivan v. Dunham.

(161 New York, 290.—1900.)

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 15, 1898, unanimously affirming a judgment entered upon a verdict in favor of the plaintiff.

On the 10th of June, 1895, Annie E. Harten, the plaintiff's intestate, a young lady nineteen years of age, while traveling on a public highway near the village of Irvington, in the county of Westchester, was killed by a blow from a section of a tree which fell upon her, after it had been hurled more than four hundred feet by a blast. The defendants, Dinkel and Jewell, as copartners, 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 three hundred feet from the nearest point of the highway in question, there was a large living elm tree, from sixty to seventy 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 four hundred and twelve 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.

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. Pro. § 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.

This case was followed immediately by *Tremain* v. *Cohoes Co.*, 2 N. Y. 163, 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.

The *Hay* case was reviewed by the Commission of Appeals in *Losee* v. *Buchanan*, 51 N. Y. 476, 479, where it was held that one who, without negligence and with due care and skill, operates a steam boiler upon his own premises, is not liable to his neighbor for the damages caused by the explosion thereof. That was not a case of intentional but of accidental explosion.

A tremendous force escaped, so to speak, from the owner, but was not voluntarily set free. The court, commenting upon the *Hay* case, said: "It was held that the defendant was liable for the injury, although no negligence or want of skill in executing the work was alleged or proved. This decision was well supported by the clearest principles. The acts of the defendant in casting the rocks upon plaintiff's premises were direct and immediate. The damage was the necessary consequence of just what the defendant was doing, and it was just as much liable as if it had caused the rocks to be taken by hand, or any other means, and thrown directly upon plaintiff's land."

The *Hay* case was expressly approved and made the basis of judgment in *St. Peter* v. *Denison*, 58 N. Y. 416, where a blast, set off by a contractor with the state in the enlargement of the Erie canal, threw a piece of frozen earth against the plaintiff when he was at work upon the adjoining premises for the owner thereof. In holding the contractor liable the court said: "Even if it should be conceded that the defendant had the right, from being a contractor with the state, to do all that which the state might do, in the progress of the work; I do not think that this would justify him, in the state of facts which this case presents, in casting material upon the premises of a private owner, upon which the plaintiff was lawfully engaged. The state could not intrude upon the lawful possession of a citizen, save in accordance with law. Unless authorized by law so to do, the casting of a stone from the bed of the canal upon the land of an adjoining proprietor, either by the state or an individual, was a trespass. *Hay* v. *Cohoes Co.*, 2 N. Y. 159. . . . Nor can the defendant protect himself from liability, for that his act of blasting out the rock with gunpowder was necessary; and hence, that the effects of it upon the adjacent premises were an unavoidable result of a necessary act. The case of *Hay* v. *Cohoes Co.*, *supra*, shows that unless there is a right to the use of the adjacent lands for the purposes of the work, it matters not that the mode adopted of carrying on the work was necessary. . . . It follows, then, that the defendant having no right to invade the premises, which, for the purposes of this case, were the possession of the plaintiff, it matters not whether or no he made his invasion without negligence. *Tremain* v. *Cohoes Co.*, 2 N. Y. 163; *Pixley* v. *Clark*, 35 id. 520."

This case is analogous to the one before us, because the per-

son injured did not own the land upon which he stood when struck, but he had a right to stand there the same as the plaintiff's intestate had a right to walk in the highway. We see no distinction in principle between the two cases.

In *Mairs* v. *Manhattan Real Estate Association*, 89 N. Y. 498, 505, the defendant was held liable without proof of negligence for making an excavation upon his own land, through which, during a heavy rain, water found its way into the cellar of the adjoining owner, although the excavation was made under a license from the municipal authorities. RAPALLO, J., speaking for all the judges, said: "The rights of the parties in such a case do not depend upon the same principles as in cases where the wrong complained of consists of an interference with a public highway to the injury of the traveling public, but upon the principle of *Hay* v. *Cohoes Co.*, 2 N. Y. 159, *St. Peter* v. *Denison*, 58 N. Y. 416, and *Jutte* v. *Hughes*, 67 N. Y. 267, in which it is held that where one is making improvements on his own premises, or without lawful right, trespasses upon or injures his neighbor's property by casting material thereon, he is liable absolutely for the damage, irrespective of any question of care or negligence. A license from the municipal authorities cannot affect the question of responsibility in such cases."

When the injury is not direct, but consequential, such as is caused by concussion, which, by shaking the earth, injures property, there is no liability in the absence of negligence. Thus in *Benner* v. *Atlantic Dredging Co.*, 134 N. Y. 156, a contractor with the United States government, in doing work required by his contract, injured property by concussion only and without casting any material upon the premises of the plaintiff. It was held that there could be no recovery without proof of negligence. The Second Division of this court in deciding that case said: "This is not a case of taking private property, or of direct, but is of consequential injury. The plaintiff's house was 3,000 feet distant from the place of the explosions. The injuries to it were caused by the shaking of the earth or pulsations of the air, or both, resulting from the explosion. There was no physical invasion of the plaintiff's premises by casting stones or earth or other substances upon them, as in *Hay* v. *Cohoes Co.*, 2 N. Y. 159, *Tremain* v. *Cohoes Co.*, 2 N. Y. 163, and *St. Peter* v. *Denison*, 58 N. Y. 416, and, hence, no going outside of the authority actually conferred and conferable as in

those cases. . . . One cannot confine the vibration of the earth or air within enclosed limits, and hence it must follow that if in any given case they are rightfully caused, their extension to their ultimate and natural limits cannot be unlawful, and the consequential injury, if any, must be remediless."

The facts were similar in *Booth* v. *R. W. & O. T. R. R. Co.*, 140 N. Y. 267, where it was "not claimed that any rock or materials were thrown by the blasts upon the plaintiff's lot." While it did not appear in what particular way the injury was produced, it was inferred "that it was caused by the jarring of the ground or the concussion of the atmosphere created by the explosions, or by both causes combined." It was held that the charge of the trial judge, that "it made no difference whether the work was done carefully or negligently," was erroneous, and the judgment was reversed for that reason. All the judges concurred in saying, "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.*, 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. . . . 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 nearby 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, causing an injury to the plaintiff's house. . . . 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 *Hay* case has been repeatedly cited by this court, but has never been overruled or even criticised, so far as we have discovered. *Radcliff* v. *Mayor*, 4 N. Y. 195, 199; *Pixley* v. *Clark*, 35 N. Y. 520, 523; *Jutte* v. *Hughes*, 67 N Y. 267, 273; *Heeg* v. *Licht*, 80 N. Y. 579, 583; *Bohan* v. *Port Jervis Gas Light Co.*, 122 N. Y. 18, 26. It has been several times distinguished from cases to which it clearly did not apply, such as that class where the injury was not direct but consequential, of which illustrations have already been given. It has also been distinguished, if that word may be used to point out differences between cases which rest upon wholly different principles, in that line of authorities which hold that where the work is not bound to produce injury and is done wholly by an independent contractor, with no control by the owner, the former only is liable. We cite, as an example of this class, *McCafferty* v. *Spuyten Duyvil & P. M. R. R. Co.*, 61 N. Y. 178, where it was held that the defendant was not chargeable with the negligent acts of another in doing work upon his lands unless he stands in the character of employer to the one guilty of the negligence, or unless the work as authorized by him would necessarily produce the injuries complained of, or they are occasioned by the omission of some duty incumbent upon him. It is said in the prevailing opinion that "the case of *Hay* v. *Cohoes Co.*, 2 Comst. 159, is not an authority, and has never been regarded as an authority upon the questions involved in this case. It was there assumed that the persons who caused the injuries complained of were the agents and servants of the defendants, and the only question considered in the Court of Appeals was, whether the defendants could be made liable without the proof of negligence."

Pack v. *City of New York*, 8 N. Y. 222; *Kelly* v. *City of New York*, 11 N. Y. 432; *Herrington* v. *Vil. of Lansingburgh*, 110 N. Y. 145; *Roemer* v *Striker*, 142 N. Y. 134; *French* v. *Vix*, 143 N. Y. 90, and *Berg* v. *Parsons*, 156 N. Y. 109, were of like character, and turned upon the liability of an independent contractor, as distinguished from that of the owner, and in some of them also the injuries were indirect and consequential, having been caused by concussion or vibration. *Driscoll* v. *Newark, etc., Co.*, 37 N. Y. 637, was tried and decided on the theory of negligence, and as the recovery was simply sustained on that ground, without considering the sub-

ject of trespass, which, for some reason, was kept out of the case, it has no bearing upon the question before us.

Marvin v. *Brewster Iron Mining Co.*, 55 N. Y. 538, is also relied upon by the appellants. In that case the plaintiff's grantor had purchased a house standing over a mine, which, with the right to work it, had been reserved. It was held that the plaintiff could not enjoin his grantor from blasting in the mine at night, so as to disturb those sleeping in the house. The *Hay* case was distinguished, because the plaintiff therein "had the right of undisturbed possession of his property," whereas in the *Marvin* case his right was subject to that of the defendant to work its mine in the usual way, which was the sole use it could make of its property, and to which use the plaintiff, through his grantor, had expressly assented. When there is a conflict of rights public policy requires one to give up the right of a particular use rather than permit him by such use to destroy his neighbor's property altogether. In the case cited, however, the particular use was the only one possible, and the right to that use was imposed as "a serious servitude" upon the surface land, which was all that belonged to the plaintiff.

We think that the *Hay* case has always been recognized by this court as a sound and valuable authority. After standing for fifty 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 utero 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.

We find no reversible error in the record before us. While the complaint suggests negligence as the gravamen of the action, it was tried upon the theory of trespass, and no ruling was made, or exception taken, which raised any question as to the scope of the pleadings, or suggested the propriety of a motion for leave to amend. We can consider no objection unless it was taken upon the trial and saved by an exception. *Hecla Powder Co.* v. *Sigua Iron Co.*, 157 N. Y. 437. Moreover, if every allegation relating to negligence were struck from the complaint, it would still set forth a cause of action in trespass.

The question whether the defendants, Dinkel and Jewell, were independent contractors was settled by the jury, and after unanimous affirmance by the Appellate Division, is beyond our power of review. *Szuchy* v. *Hillside Coal & Iron Co.*, 150 N. Y. 219. There is no exception relating to the admission of evidence, or to the charge of the court, which requires a reversal.

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

All concur, except GRAY, J., not voting.

Judgment affirmed.

CONVERSION.

WHAT CONSTITUTES CONVERSION. [1]

SPOONER v. MANCHESTER.

(133 Massachusetts, 270.—1882.)

The declaration stated that "The defendant hired the plaintiff's horse and carriage to drive from Worcester to Clinton and

[1] An act of dominion is exercised,—

(*a*) When property is wrongfully taken;

(*b*) When it is wrongfully parted with;

(*c*) When it is wrongfully detained;

(*d*) When it is wrongfully destroyed.

An action for conversion may be maintained by one who has,—

(*a*) General ownership and actual possession;

(*b*) General ownership and right to possession;

(*c*) Special ownership and general right to possession;

(*d*) Limited special ownership.

"The wrong involved in conversion may give the plaintiff:

"(*a*) An option to waive the tort and sue in assumpsit, or to resort to equity.

"(*b*) A right to sue in detinue.

"(*c*) A right to sue in replevin.

"(*d*) A right to sue in trover for damages." Jaggard on Torts, 737.

MEASURE OF DAMAGES.—"The rule is, when the property converted has a fixed value, the measure of damages is that value, with legal interest from the time of the conversion; when the value is fluctuating, the plaintiff may recover the highest value at the time of the conversion, or at any time afterwards." *Douglas* v. *Kraft*, 9 Cal. 562, 563.

In an action for timber cut and carried away, the U. S. Supreme Court (*Woodenware Co.* v. *United States*, 106 U. S. 432) laid down the following rule for assessing damages:

1. In case of a wilful trespasser the full value of the property at the time and place of demand, or of suit brought, with no deduction for labor and expense.

2. In case of an unintentional or mistaken trespasser, or an innocent vendee from such, the value at the time of the conversion, less any amount added to its value.

3. In case of an innocent purchaser from a wilful trespasser, the value at the time of such purchase.

back in a prudent, careful and proper manner, and that the defendant drove the same beyond Clinton to Northborough wrongfully, and managed and drove said horse so improperly, unskillfully and wrongfully while at said Northborough, that said horse's ankle was broken and otherwise injured, to the great damage of the plaintiff." Answer, a general denial.

To the finding in favor of the plaintiff, the defendant alleged exceptions.

Field, J. This case apparently falls within the decision in *Hall* v. *Corcoran*, 107 Mass. 251, except that this defendant unintentionally took the wrong road on his return from Clinton to Worcester, and when, after travelling on it five or six miles, he discovered his mistake, he intentionally took what he considered the best way back to Worcester, which was by a circuit through Northborough.

The case has been argued as if it were an action of tort in the nature of trover, and, although the declaration is not strictly in the proper form for such an action, both parties desire that it should be treated as if it were, and we shall so consider it.

As the horse was hired and used on Sunday, and it does not appear that this was done from necessity or charity, and also as it does not appear that the horse was injured in consequence of any want of due care on the part of the defendant, or that the defendant was not in the exercise of ordinary care when he lost his way, the question whether the acts of the defendant amounted to a conversion of the horse to his own use is vital. The distinction between acts of trespass, acts of misfeasance

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"The value of the chattel, at the time of the conversion, is not, in all cases, the rule of damages in trover; if the thing be of a determinate and fixed value, it may be the rule, but where there is an uncertainty, or fluctuation attending the value, and the chattel afterwards rises in value, the plaintiff can only be indemnified by giving him the price of it, at the time he calls upon the defendant to restore it, and one of the cases even carries the value down to the time of the trial." Kent, J., in *Cortelyou* v. *Lansing*, 2 Caines' Cases in Error, 200.

In a case where fluctuation attended the value, the N. Y. Court of Appeals (*Wright* v. *Bank of the Metropolis*, 110 N. Y. 237, 249) said: "It is the natural and proximate loss which the plaintiff is to be indemnified for, and that cannot be said to extend to the highest price before trial, but only to the highest price reached within a reasonable time after the plaintiff has learned of the conversion of his stock within which he could go in the market and repurchase it."

and acts of conversion is often a substantial one. In actions in the nature of trespass or case for misfeasance, the plaintiff recovers only the damages which he has suffered by reason of the wrongful acts of the defendant; but, in actions in the nature of trover, the general rule of damages is the value of the property at the time of the conversion, diminished when, as in this case, the property has been returned to and received by the owner, by the value of the property at the time it was returned, so that after the conversion and until the delivery to the owner the property is absolutely at the risk of the person who has converted it, and he is liable to pay for any depreciation in value, whether that depreciation has been occasioned by his negligence or fault, or by the negligence or fault of any other person, or by inevitable accident or the act of God. *Perham* v. *Coney*, 117 Mass. 102.

The satisfaction by the defendant of a judgment obtained for the full value of the property vests the title to the property in him, by relation, as of the time of the conversion. Conversion is based upon the idea of an assumption by the defendant of a right of property or a right of dominion over the thing converted, which casts upon him all the risks of an owner, and it is therefore not every wrongful intermeddling with, or wrongful asportation or wrongful detention of, personal property, that amounts to a conversion. Acts which themselves imply an assertion of title or of a right of dominion over personal property, such as a sale, letting or destruction of it, amount to a conversion, even although the defendant may have honestly mistaken his rights; but acts which do not in themselves imply an assertion of title, or of a right of dominion over such property, will not sustain an action of trover, unless done with the intention to deprive the owner of it permanently or temporarily, or unless there has been a demand for the property and a neglect or refusal to deliver it, which are evidence of a conversion, because they are evidence that the defendant in withholding it claims the right to withhold it, which is a claim of a right of dominion over it.

In *Spooner* v. *Holmes*, 102 Mass. 503, Mr. Justice Gray says that the action of trover "cannot be maintained without proof that the defendant either did some positive wrongful act with the intention to appropriate the property to himself or to deprive the rightful owner of it, or destroyed the property," and

the authorities are there cited. *Fouldes* v. *Willoughby*, 8 M. & W. 540, is a leading case, establishing the necessity, in order to constitute a conversion, of proving an intention to exercise some right or control over the property inconsistent with the right of the lawful owner, when the act done is equivocal in its nature. See also *Simmons* v. *Lillystone*, 8 Exch. 431; *Wilson* v. *McLaughlin*, 107 Mass. 587.

It is argued that the act of the defendant in this case was a user of the horse for his own benefit, inconsistent with the terms of the bailment, and that the defendant's mistake in taking the wrong road was immaterial, and these cases are cited: *Wheelock* v. *Wheelwright*, 5 Mass. 104; *Homer* v. *Thwing*, 3 Pick. 492; *Lucas* v. *Trumbull*, 15 Gray, 306; *Hall* v. *Corcoran*, *ubi supra*. In each of these cases, there was an intentional act of dominion exercised over the horse hired, inconsistent with the right of the owner.

In *Wellington* v. *Wentworth*, 8 Met. 548; a cow, going at large in the highway without a keeper, joined a drove of cattle, in May or June, 1842, without the knowledge of the owner of the drove, and was driven into New Hampshire and pastured there, during the season, with the defendant's cattle, and in the autumn returned with the drove and was delivered to the plaintiff; and it was held that there was no conversion. Chief Justice Shaw says, however, that "it was the plaintiff's own fault that his cow was at large in the highway, and entered the defendant's drove." Yet if the defendant had driven the cow to New Hampshire and pastured her there with his cattle, knowing that she belonged to the plaintiff and intending to deprive him of her, there can be no doubt that it would have been a conversion.

Parker v. *Lombard*, 100 Mass. 405, and *Loring* v. *Mulcahy*, 3 Allen, 575, were both decided upon the ground that the defendant neither assumed to dispose of the property as his own, nor intended to withhold the property from the plaintiff.

Nelson v. *Whetmore*, 1 Rich. 318, was an action of trover for the conversion of a slave, who was travelling as free in a public conveyance, and was taken as a servant by the defendant; and the decision was, that to constitute a conversion the defendant must have known that he was a slave.

In *Gilmore* v. *Newton*, 9 Allen, 171, the defendant not only exercised dominion over the horse, by holding him as a horse

to which he had the title by purchase, but also by letting him to a third person. The defendant actually intended to treat the horse as his own.

If a person wrongfully exercises acts of ownership or of dominion over property under a mistaken view of his rights, the tort, notwithstanding his mistake, may still be a conversion, because he has both claimed and exercised over it the rights of an owner; but whether an act involving the temporary use, control or detention of property implies an assertion of a right of dominion over it, may well depend upon the circumstances of the case and the intention of the person dealing with the property. *Fouldes* v. *Willoughby*, *ubi supra*; *Wilson* v. *McLaughlin*, *ubi supra*; *Nelson* v. *Merriam*, 4 Pick. 249; *Houghton* v. *Butler*, 4 T. R. 364; *Heald* v. *Carey*, 11 C. B. 977.

In the case at bar, the use made of the horse by the defendant was not of a different kind from that contemplated by the contract between the parties, but the horse was driven by the defendant on his return to Worcester, a longer distance than was contemplated, and on a different road. If it be said that the defendant intended to drive the horse where in fact he did drive him, yet he did not intend to violate his contract or to exercise any control over the horse inconsistent with it. There is no evidence that the defendant was not at all times intending to return the horse to the plaintiff, according to his contract, or that whatever he did was not done for that purpose, or that he ever intended to assume any control or dominion over the horse against the rights of the owner. After he discovered that he had taken the wrong road, he did what seemed best to him in order to return to Worcester. Such acts cannot be considered a conversion.

Whether a person who hires a horse to drive from one place to another is not bound to know or ascertain the roads usually travelled between the places, and is not liable for all damages proximately caused by any deviation from the usual ways, need not be considered.

An action on the case for driving a horse beyond the place to which he was hired to go, was apparently known to the common law a long time before the declaration in trover was invented. 21 Edw. IV. 75, pl. 9.

Exceptions sustained.

DEMAND AND REFUSAL.

Esmay v. Fanning.

(9 Barbour, 176.—1850.)

Action of trover for a carriage.

The cause was referred to a referee, who reported that he found as facts that about June 1, 1846, the plaintiff loaned to the defendant the carriage in question, to be safely kept by the defendant for the plaintiff, and to be re-delivered to the plaintiff on request; that the defendant had been requested to re-deliver the same to the plaintiff; that the defendant and plaintiff might each use the carriage and the defendant's horses when he chose; that the carriage was obtained by the defendant from the livery stable of George L. Crocker, then of Albany city, and that he kept it safely till about November 1, 1846, during which time it was used occasionally by both parties, plaintiff and defendant. That about November 1, 1846, it was returned by the defendant to the stable of said Crocker; *which return of the carriage to the stable of Crocker, the referee decided was not a re-delivery of the carriage to the plaintiff or his agent.* He, therefore, reported in favor of the plaintiff for the value of the carriage at that time, on which judgment was thereupon given, as for a conversion of the carriage, and the defendant therefrom appealed.

By the Court, Willard, J. The gist of this action is the conversion and deprivation of the plaintiff's property, and not the acquisition of property by the defendant. 3 Barn. & Ald. 685. The general requisites to maintain the action are, property in the plaintiff; actual possession or a right to the immediate possession thereof; and a wrongful conversion by the defendant. 4 Barb. S. C. R. 565. The plaintiff's title was not disputed in this case. The issue is on the conversion: or, in other words, it is whether the defendant re-delivered the carriage to the plaintiff or his agent, before the commencement of this suit. The plaintiff alleges a refusal to re-deliver it, and the defendant avers that he did re-deliver it. The referee found the fact that the defendant did not re-deliver the carriage to the plain-

tiff or his agent; and the proof is that Crocker, to whom the defendant did deliver the carriage, in November, 1846, was not, at that time, the agent of the plaintiff, or authorized to receive it. And there is no evidence that the plaintiff ever assented to that delivery. The question, therefore, becomes narrowed down to this: whether a bailee of a chattel is answerable in trover, on showing a delivery to a person not authorized to receive it. In *Devereux* v. *Barclay*, 2 Barn. & Ald. 702, it was held that trover will lie for the mis-delivery of goods by a warehouseman, although such mis-delivery was occasioned by mistake only; and this court, in *Packard* v. *Getman*, 4 Wend. 613, held that the same action would lie against a common carrier, who had delivered the goods, by mistake, to the wrong person. The same point was ruled by Lord KENYON in *Youl* v. *Harbottle*, Peake's N. P. Cases, 49, and by the English Common Pleas in *Stephenson* v. *Kent*, 4 Bing. 476. If trover will lie against a common carrier or a warehouseman for a mis-delivery, it can, under the like circumstances, be sustained against a bailee for hire or a gratuitous bailee. It results from the very obligation of his contract, that if he fails to restore the article to the rightful owner, but delivers it to another person, not entitled to receive it, he is guilty of a conversion. Story on Bail. § 414.

The referee found as a fact that the carriage was not redelivered to the plaintiff, but was delivered to another person having no right to receive it. The evidence detailed in the case warranted that finding, and it cannot be disturbed by this court. We think the referee drew the right conclusion from that fact, and justly held the defendant liable for the value of the carriage.

As the parties all lived in the same city, the carriage should have been returned to the plaintiff, unless there was some agreement to the contrary. The fact that the carriage was stored by the plaintiff in Crocker's stable, at the time the defendant first received it, did not authorize him, under a contract to return it to the plaintiff, to deliver it to Crocker, who had ceased to be the plaintiff's agent. The place of delivery of the carriage was the plaintiff's residence. *Barns* v. *Graham*, 4 Cowen, 452; Story on Bail. §§ 257, 261, 265. A delivery elsewhere, without authority, was a conversion. We have not adopted the civil law, which allowed the bailee, in case no place was agreed on, to restore the property to the place from which he took it. Story on Bail. § 117.

It was not necessary in this case to prove a demand and refusal. Had the carriage remained in the defendant's possession, no action could have been maintained by the plaintiff against the defendant, until it had been demanded, and the defendant had neglected or refused to return it. A demand and refusal are not a conversion, but evidence from which it can be inferred. A demand is necessary whenever the goods have come lawfully into the defendant's possession; unless the plaintiff can prove some wrongful act of the defendant in respect of the goods which amounts to an actual conversion. 2 Leigh's N. P. 1483; *Bates* v. *Conklin*, 10 Wend. 389; *Tompkins* v. *Haile*, 3 id. 406. As the delivery of the carriage by the defendant to Crocker instead of the plaintiff amounted to a conversion, proof of a demand and refusal was unnecessary. The testimony of Nichols, therefore, to prove a demand was immaterial, and the decision of the referee refusing to permit the defendant to prove what he said at the time the demand was made, could have no influence on the result of the cause. Had a demand been necessary, the declaration of the defendant in answer to the demand would have been admissible, as well on the part of the defendant as of the plaintiff. The decision of the referee that a demand and refusal were admitted by the pleadings, whether right or wrong, worked no injury to the defendant.

A wide range was taken on the argument on the *implied* obligations resulting from the various kinds of bailments, and particularly with reference to the restoring the thing bailed to the bailor. But it seems unnecessary to discuss this subject, in this case, because here there was an *express* agreement to return the property *to the plaintiff*, on request.

The judgment must be affirmed.

MERE ASPORTATION.

FOULDES v. WILLOUGHBY.

(8 Meeson & Welsby, 540.—1841.)

TROVER for two horses. Plea, not guilty.

The defendant was the manager of a ferry over the Mersey river, from Birkenhead to Liverpool, and on October 15, 1840,

the plaintiff embarked on one of defendant's boats at Birkenhead, with two horses, for the carriage of which he paid the usual fare. It was alleged that the plaintiff misconducted himself after he came on board the boat, and when the defendant came on board he told the plaintiff that he would not carry the horses over, and that he must take them on shore. The plaintiff refused to do so, and the defendant took the horses from the plaintiff, who was holding one of them by the bridle, and put them on shore on the landing slip. They were driven to the top of the slip, which was separated by gates from the high road, and turned loose on the road. They were shortly afterwards seen in the stables of an hotel at Birkenhead, kept by the defendant's brother. The plaintiff remained on board the boat and was conveyed over the river to Liverpool. On the following day, the plaintiff sent to the hotel for the horses, but the parties in whose possession they were refused to deliver them up. A message, however, was afterwards sent to him by the hotel-keeper, to the effect that he might have the horses on sending for them and paying for their keep; and that if he did not do so, they would be sold to pay the expense of it. The plaintiff then brought the present action. The horses were subsequently sold at auction. The defense set up at the trial was, that the plaintiff had behaved improperly on the boat, and that the horses were sent on shore in order to get rid of the plaintiff, by inducing him to follow them. The learned judge told the jury, that the defendant, by taking the horses from the plaintiff and turning them out of the vessel, had been guilty of a conversion, unless they thought the plaintiff's conduct had justified his removal from the boat, and he had refused to go without his horses; and that if they thought the conversion was proved, they might give the plaintiff damages for the full value of the horses. Verdict for plaintiff with £40 damages, the value of the horses.

A rule was obtained calling upon the plaintiff to show cause why the verdict should not be set aside on the ground of misdirection, both as to the proof of a conversion, and also as to the amount of the damages.

Lord Abinger, C. B. This is a motion to set aside the verdict on the ground of an alleged misdirection; and I cannot help thinking that if the learned judge who tried the cause had re-

ferred to the long and frequent distinctions which have been taken between such a simple asportation as will support an action of trespass, and those circumstances which are requisite to establish a conversion, he would not have so directed the jury. It is a proposition familiar to all lawyers, that a simple asportation of a chattel, without any intention of making any further use of it, although it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion. I had thought that the matter had been fully discussed, and this distinction established, by the numerous cases which have occurred on this subject; but, according to the argument put forward by the plaintiff's counsel to-day, a bare *asportavit* is a sufficient foundation to support an action of trover. I entirely dissent from this argument; and therefore I think that the learned Judge was wrong, in telling the jury that the simple fact of putting these horses on shore by the defendant, amounted to a conversion of them to his own use. In my opinion, he should have added to his direction, that it was for them to consider what was the intention of the defendant in so doing. If the object, and whether rightly or wrongfully entertained is immaterial, simply was to induce the plaintiff to go on shore himself, and the defendant, in furtherance of that object, did the act in question, it was not exercising over the horses any right inconsistent with, or adverse to, the rights which the plaintiff had in them. Suppose, instead of the horses, the defendant had put the plaintiff himself on shore, and, on being put on shore, the plaintiff had refused to take his horses with him, and the defendant had said he would take them to the other side of the water, and had done so, would that be a conversion? That would be a much more colorable case of a conversion than the present, because, by separating the man from his property, it might, with some appearance of fairness, be said the party was carrying away the horses without any justifiable reason for so doing. Then, having conveyed them across the water, and finding neither the owner nor any one else to receive them, what is he to do with them? Suppose, under those circumstances, the defendant lands them, and leaves them on shore, would that amount to a conversion? The argument of the plaintiff's counsel in this case must go the length of saying that it would. Then, suppose the reply to be, that those circumstances would amount to a conversion, I ask, at what period of

time did the conversion take place? Suppose the plaintiff had immediately followed his horses when they were put on shore, and resumed possession of them, would there be a conversion of them in that case? I apprehend, clearly not. It has been argued, that the mere touching and taking them by the bridle would constitute a conversion, but surely that cannot be: if the plaintiff had immediately gone on shore and taken possession of them, there could be no conversion. Then the question, whether this were a conversion or not, cannot depend on the subsequent conduct of the plaintiff in following the horses on shore. Would any man say, that if the facts of this case were, that the plaintiff and defendant had had a controversy as to whether the horses should remain in the boat, and the defendant had said, "If you will not put them on shore, I will do it for you," and in pursuance of that threat, he had taken hold of one of the horses to go ashore with it, an action of trover could be sustained against him? There might, perhaps, in such a case, be ground for maintaining an action of trespass, because the defendant may have had no right to meddle with the horses at all: but it is clear that he did not do so for the purpose of taking them away from the plaintiff, or of exercising any right over them, either for himself or for any other person. The case which has been cited from Strange's Reports, of *Bushell* v. *Miller*, 1 Stra. 128, seems fully in point. There the plaintiff and defendant, who were porters, had each a stand on the Custom-House Quay. The plaintiff placed goods belonging to a third party in such a manner that the defendant could not get to his chest without removing them, which he accordingly did, and forgot to replace them, and the goods were subsequently lost. Now suppose trespass to have been brought for that asportation, the defendant, in order to justify the trespass, would plead, that he removed the parcels, as he lawfully might, for the purpose of coming at his own goods; and the Court there said, that whatever ground there might be for an action of trespass, in not putting the package back in its original place, there was none for trover, inasmuch as the object of the party in removing it was one wholly collateral to any use of the property, and not at all to disturb the plaintiff's rights in or dominion over it. Again, suppose a man puts goods on board of a boat, which the master thinks are too heavy for it, and refuses to carry them, on the ground that it might be dangerous to his

vessel to do so, and the owner of the goods says, "If you put my goods on shore, I will go with them," and he does so; would that amount to a conversion in the master of the vessel, even assuming his judgment as to the weight of the goods to be quite erroneous, and that there really would be no danger whatever in taking them? In order to constitute a conversion, it is necessary either that the party taking the goods should intend some use to be made of them, by himself or by those for whom he acts, or that, owing to his act, the goods are destroyed or consumed, to the prejudice of the lawful owner. As an instance of the latter branch of this definition, suppose, in the present case, the defendant had thrown the horses into the water, whereby they were drowned, that would have amounted to an actual conversion; or as in the case cited in the course of the argument, of a person throwing a piece of paper into the water; for, in these cases, the chattel is changed in quality, or destroyed altogether. But it has never yet been held, that the single act of removal of a chattel, independent of any claim over it, either in favor of the party himself or any one else, amounts to a conversion of the chattel. In the present case, therefore, the simple removal of these horses by the defendant, for a purpose wholly unconnected with any the least denial of the right of the plaintiff to the possession and enjoyment of them, is no conversion of the horses, and consequently the rule for a new trial ought to be made absolute.

With respect to the amount of damages, it was altogether a question for the jury. I am not at all prepared to say, that if the jury were satisfied that there had been a conversion in this case, they would be doing wrong in giving damages to the full value of the horses. I do not at all rest my judgment on that point, but put it aside entirely. If the Judge had told the jury that there was evidence in the case from whence they might infer that a conversion of these horses had taken place at some time, it would have been different; but his telling them that the simple act of putting them on shore amounted to a conversion, I think, was a misdirection, on which the defendant is entitled to a new trial.

Alderson, B. I am of the same opinion. As to the last point, it would be a strange thing to disturb the verdict on the ground that the jury had given as damages the full value of

these horses; for it appears that they were ultimately sold, and the plaintiff never regained possession of them. If, therefore, the original act of taking the horses really amounted to a conversion of them, it would be a strong proposition for us to say, that the plaintiff was not entitled to recover their full value, as damages for the wrongful act done. But the mere circumstance which the learned Judge in this case put to the jury, as constituting the conversion, does not necessarily amount to one. Any asportation of a chattel for the use of the defendant, or a third person, amounts to a conversion; for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or of another, it is a conversion. So, if a man has possession of my chattel, and refuses to deliver it up, this is an assertion of a right inconsistent with my general dominion over it, and the use which at all times, and in all places, I am entitled to make of it; and consequently amounts to an act of conversion. So the destruction of the chattel is an act of conversion, for its effect is to deprive me of it altogether. But the question here is, where a man does an act, the effect of which is not for a moment to interfere with my dominion over the chattel, but, on the contrary, recognizing throughout my title to it, can such an act as that be said to amount to a conversion? I think it cannot. Why did this defendant turn the horses out of his boat? Because he recognized them as the property of the plaintiff. He may have been a wrong-doer in putting them ashore; but how is that inconsistent with the general right which the plaintiff has to the use of the horses? It clearly is not; it is a wrongful act done, but only like any common act of trespass, to goods with which the party has no right to meddle. Scratching the panel of a carriage would be a trespass; but it would be a monstrous thing to say that it would be a ground for an action of trover; and yet to that extent must the plaintiff's counsel go, if their argument in this case be sound. But such is not the law; and the true principle is that stated by Chambre and Holroyd, Js., when at the bar, in their argument in the case of *Shipwick* v. *Blanchard*, 6 T. R. 299, that "In order to maintain trover, the goods must be taken or detained, with intent to convert them to the taker's own use, or to the use of those for whom he is

acting." This definition, indeed, requires an addition to be made to it, namely, that the destruction of the goods will also amount to a conversion. For these reasons, I think, in the case before us, the question ought to have been left to the jury, to say, whether the act done by the defendant, of seizing these horses and putting them on shore, was done with the intention of converting them to his own use, i. e. with the intention of impugning, even for a moment, the plaintiff's general right of dominion over them. If so, it would be a conversion; otherwise not.

Gurney, B. If it had been left to the jury, on the whole of the evidence in this case, to say whether a conversion had taken place or not, I think there was abundant evidence from which they might have drawn an affirmative conclusion. But the Judge only left that question to them on one part of the evidence, namely, that of the defendant's taking these horses out of the boat, and putting them ashore; and I cannot agree to the position, that that act, standing alone, amounts to a conversion.

Rolfe, B. I quite concur with the rest of the Court. During the argument I had some little doubt, owing to the difficulty which I felt in defining what is a sufficient exercise of an act of ownership over chattels to amount to a conversion, so as to support an action of trover, as distinguished from such an interference with it as will only afford ground for an action of trespass. But that such a distinction does exist in law between these actions, in this respect, appears from the long list of cases to be found in the books on the subject; so that, whatever difficulties may be experienced in applying that distinction, its existence must be recognized. In all the cases on this subject, there has been proof of a trespass having been committed; but there was a further question, namely, whether there was not a conversion also. In every case of trover, there must be a taking with the intent of exercising over the chattel an ownership inconsistent with the real owner's right of possession. Now suppose, instead of actually removing the horses from the boat, the defendant had waved his hand, or cracked a whip, and so made the animals jump out of the boat, would that amount to a conversion? I do not see how, on the hypothesis of Mr. Watson,

any other answer could be given than in the affirmative: for if the principle be that anything which controls the position of the chattel while in my possession will amount to a change of ownership, I do not see how the effecting of that change by frightening the animal which constitutes my property, is distinguishable from any other means adopted for the same purpose. Again, suppose I, seeing a horse in a ploughed field, thought it had strayed, and, under that impression, led it back to pasture, it is clear that an action of trespass would lie against me; but would any man say that this amounted to a conversion of the horse to my own use? Or suppose a man drives his carriage up into an inn yard, and the innkeeper refuses to take it and his horses in, but turns them out into the road, could it be said that he thereby converted them to his own use? Surely not. The same principle applies to the case which has been cited, of *Bushell* v. *Miller*, where a party was held to have a right to move certain goods of another person, provided he put them back again: his not putting them back may give the other a right to bring trespass against him, on the ground that his subsequent neglect made him a trespasser *ab initio;* but it is clear that there was no conversion of the chattel. So that we find the distinction to which I have alluded, between trespass and trover, continually recognized in law. I quite agree with my Brother Gurney, that if the learned Judge in the present case had not put the conversion to the jury as founded on the single fact of taking the horses on shore, but had left it for their consideration on the whole case as it stood, not only was there evidence of a conversion, but there was such as would have fully warranted the jury in coming to the conclusion at which they arrived. The question, however, was not so left to the jury, and this rule to set aside the verdict for misdirection must therefore be made absolute.

Rule absolute.[1]

[1] To the same effect see *Houghton* v. *Butler*, 4 T. R. 364; *Eldridge* v. *Adams*, 54 Barb. 417; *Farnsworth* v. *Lowery*, 134 Mass. 512; *Shea* v. *Milford*, 145 id. 525.

REPLEVIN. (1)

Mennie v. Blake.

(6 Ellis & Blackburn, 842.—1856.)

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

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[1] Trespass, trover, detinue and replevin distinguished.—"Trover and conversion was originally an action of trespass on the case, for the recovery of damages against such person as had found another's goods and refused to deliver them on demand, but converted them to his own use, from which finding and converting, it is called an action of trover and conversion; but the fact of the finding is now wholly immaterial, and the action lies against any one who has had in his possession the goods of another and refuses to deliver them upon demand. Trespass lies only when the goods have been unlawfully taken. Detinue lies wherever the property has been illegally detained, without regard to the manner of taking. Replevin also lies whenever the defendant unlawfully detains property from the plaintiff, without regard to the manner of taking, though, at common law, the taking must have been unlawful. In trover the plaintiff never obtains the possession of the property, but only its alternative value in damages, and the same is true of trespass. In detinue judgment is rendered, on completion of the action, in favor of the plaintiff for the property itself, or in case it cannot be delivered, its alternative value in damages; while in replevin, the plaintiff, by giving bond, obtains possession of the property at the beginning of the action. Replevin, therefore, differs from trover and trespass, in that it is for the recovery of the specific property, and not for damages. It differs from trespass in that it lies for property wrongfully detained, irrespective of the manner of taking; and it differs from detinue in that it restores the property to the plaintiff at the beginning of the action." XX. Am. & Eng. Enc. of Law, 1044.

Replevin in the cepit and in the detinet.—"The action to recover a chattel, as regulated by the Code of Civil Procedure, is substantially a substitute for the action of replevin as it had previously existed. At common law and under the Revised Statutes there were two actions of replevin, one in the *cepit* and one in the *detinet*. In replevin in the *cepit* the general issue was tendered by the plea of *non cepit*, and that put in issue only the taking at the place stated in the declaration. That rule of the common law was copied into the Revised Statutes. (2 R. S. 528, § 39.) Under that plea the defendant could not show title in himself or in a stranger. As it was necessary in such an action for the plaintiff only to show that he was in possession of the property and that the defendant wrongfully took it from his possession, the plea put in issue all plaintiff was, in the first instance, bound to prove. Without more, property in a third person could

which then appeared in evidence is taken from the judgment of this Court.

"One Facey was indebted to the plaintiff. He brought him 15 l. 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.

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be no defense to such an action. Therefore, in order to defend such an action, the defendant was bound to prove either property in himself, or property in a third person with which he was in some way connected and under which he could justify, and the facts he was bound specially to allege.

"But in an action of replevin in the *detinet*, the general issue was tendered by the plea *non detinet*, and that plea at common law put in issue, as well the plaintiff's property in the goods as the detention thereof by the defendant. And it was provided in the Revised Statutes (2 R. S. 529, § 40), that 'when the action is founded on the wrongful detention of the goods, and the original taking is not complained of, the plea of the general issue shall be, that the defendant does not detain the goods and chattels specified in the declaration, or any part thereof, in manner and form as therein alleged; and such plea shall put in issue, not only the detention of such goods and chattels, but also the property of the plaintiff therein.' It was also provided by the Revised Statutes (2 R. S. 528, § 36), that the action of replevin might be founded upon both the wrongful taking and the detention of the property, in which case it was necessary that the declaration should allege the wrongful taking and also allege that the defendant continued to detain such property." *Griffin* v. *Long Island Railroad Co.*, 101 N. Y. 348, 352–3.

"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 added 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 so 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.

Coleridge, J. Upon these facts 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 a 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 show 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:" and the learned reporters, in a note to the passage, refer to Spelman's Glossary, 485 (tit. *Replegio*); *Doctrina Placitandi*, Replevin, 313; Com. Dig. Replevin (A); and Gilbert, Distress and Replevin, 58 (4th ed. p. 80).

There is no doubt that passages, such as those referred to, may be found, stating the definition very broadly; yet we believe that, when the authorities on which some of them rest are examined, and when due attention has been paid to the context in others, it will appear in the result questionable, at the least, whether the commentator's more qualified definition was not correct; at least that replevin was instituted as a peculiar remedy, and under the Statute of Marlbridge, by plaint as a *festinum remedium* for the injury of an unlawful distress.

Thus in 2 Roll. Abr. 430, Replevin (B) 2, it is said, if trespasser takes beasts, replevin lies of this taking at election; the authority for this is Yearb. Mich. 7 H. 4, fol. 28 B: where, the counsel, or another Judge, alleging the contrary, Gascoigne says, "He may elect to have replevin or writ of trespass;" but he adds, or the reporter adds, "and some understand that he cannot;" for which last a reason is given.

Again, Com. Dig. Replevin (A): "Replevin lies of all goods and chattels unlawfully taken:" for this no authority is cited; but the context shows that the Chief Baron was thinking, not so much of the circumstances under which taken, as of the things themselves; for he adds, "whether they be live cattle, or dead chattels," or "a swarm of bees," or "iron of his mill," citing Fitzherbert's *Natura Brevium*, in whose chapter on Replevin we do not find the law so broadly laid down.

As to the passage to which reference is made in Lord Chief Baron Gilbert; it should be remembered that the treatise is on the Law of Distresses and Replevins, and the passage occurs in a chapter in which replevin is treated of with reference to distress, as if the two formed parts of one subject-matter. Little therefore can be inferred from the generality of the language in a single sentence. A dictum of Lord Ellenborough has also been referred to in *Dore* v. *Wilkinson*, 2 Stark. N. P. C. 287 (E. C. L. R. vol. 3), from which the inference is that he thought replevin might conveniently be had recourse to more often than it was, instead of bringing trover; but it was an observation thrown out in the course of a cause, a recollection of what Mr. Wallace used to say, not ruling any point, nor deciding anything, in the cause: much importance ought not to be attached to such casual observations, even of so great a Judge, at Nisi Prius. On the other hand, Lord Coke seems to be authority the other way. In Co. Litt. 145 b, is the following passage: "A *replegiare* lyeth, as Littleton here teacheth us, *where goods are distrained and impounded*, the owner of the goods may have a writ *de replegiari facias*, whereby the sheriff is commanded, taking sureties in that behalf, to re-deliver the goods distrained to the owner, or upon complaint made to the sheriff he ought to make a replevy in the county. *Replegiare* is compounded of *re* and *plegiare*, as much as to say, as to redeliver upon pledges or sureties."

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 the dictum of Lord Redesdale. Three cases are to be found; *Ex parte Chamberlain*, 1 Sch. & Lef. 320; *In re Wilsons*, 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 Wilsons*, 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 favor of possession; how it casts upon him who was in possession the burden 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 shown 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 shows 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 par-

amount 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.

It appeared in this case that the sheriff's deputy for the issuing of replevins was the attorney for the plaintiff: and, although we have no reason to believe that anything wrong was *here* intended, we think it right to notice this circumstance, because it is one which obviously might lead to much abuse and oppression. It is proper to be known that there are several cases to be found in the books in which attachments have issued, where replevins have been thought to have been granted improperly and from improper motives.

The rule should be absolute, not to enter a verdict, but a nonsuit.

Rule absolute for a nonsuit.

NUISANCE.

WHAT CONSTITUTES A NUISANCE.

CAMPBELL v. SEAMAN.

(63 New York, 568.—1876.)

APPEAL from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the plaintiff, entered upon the report of a referee, in an action to recover damages for an alleged nuisance and to restrain its continuance.

EARL, J. The plaintiffs owned about forty acres of land, situate in the village of Castleton, on the east bank of the Hudson river, and had owned it since about 1849. During the years 1857, 1858 and 1859 they built upon it an expensive dwelling-house, and during those years, and before and since, they improved the land by grading and terracing, building roads and walks through the same, and planting trees and shrubs, both ornamental and useful.

The defendant had for some years owned adjoining lands, which he had used as a brick-yard. The brick-yard is southerly of plaintiffs' dwelling-house about 1,320 feet, and southerly of their woods about 567 feet. In burning bricks defendant had made use of anthracite coal. During the burning of a kiln sulphuric acid gas is generated, which is destructive to some kinds of trees and vines. The evidence shows, and the referee found, that gas coming from defendant's kilns had, during the years 1869 and 1870, killed the foliage on plaintiffs' white and yellow pines and Norway spruce, and had, after repeated attacks, killed and destroyed from 100 to 150 valuable pine and spruce trees, and had injured their grape vines and plum trees, and he estimated plaintiffs' damages from the gas during those years at $500.

This gas did not continually escape during the burning of a kiln, but only during the last two days, and was carried into

and over plaintiffs' land only when the wind was from the south.

It is a general rule that every person may exercise exclusive dominion over his own property, and subject it to such uses as will best subserve his private interests. Generally, no other person can say how he shall use or what he shall do with his property. But this general right of property has its exceptions and qualifications. *Sic utere tuo ut alienum non lædas* is an old maxim which has a broad application. It does not mean that one must never use his own so as to do any injury to his neighbor or his property. Such a rule could not be enforced in civilized society. Persons living in organized communities must suffer some damage, annoyance and inconvenience from each other. For these they are compensated by all the advantages of civilized society. If one lives in the city he must expect to suffer the dirt, smoke, noisome odors, noise and confusion incident to city life. As Lord Justice James beautifully said, in *Salvin* v. *Northbrancepeth Coal Co.*, 9 Law R., Ch. Appeals, 705: "If some picturesque haven opens its arms to invite the commerce of the world, it is not for this court to forbid the embrace, although the fruit of it should be the sights and sounds and smells of a common seaport and ship-building town which would drive the Dryads and their masters from their ancient solitudes."

But every person is bound to make a reasonable use of his property so as to occasion no unnecessary damage or annoyance to his neighbor. If he make an unreasonable, unwarrantable or unlawful use of it, so as to produce material annoyance, inconvenience, discomfort or hurt to his neighbor, he will be guilty of a nuisance to his neighbor. And the law will hold him responsible for the consequent damage. As to what is a reasonable use of one's own property cannot be defined by any certain general rules, but must depend upon the circumstances of each case. A use of property in one locality and under some circumstances may be lawful and reasonable, which, under other circumstances, would be unlawful, unreasonable and a nuisance. To constitute a nuisance, the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable or inconvenient.

Within the rules thus referred to, that defendant's brick burn-

ing was a nuisance to plaintiffs cannot be doubted. Numerous cases might be cited, but it will be sufficient to cite, mainly, those where the precise question was involved in reference to brick burning.

The earliest case is that of the *Duke of Grafton* v. *Hilliard et al.*, decided in 1736, not reported, but referred to in *Attorney-General* v. *Cleaver*, 18 Vesey, 211. Chancellor ELDON there says that the court held in that case that "the manufacture of bricks, though near the habitations of men, if carried on for the purpose of making habitations for them, is not a public nuisance." By looking at that case, as found in a note to *Walter* v. *Selfe*, 4 Eng. Law and Eq. 18, it will be seen that no such decision was made in that case, and that no such language was used therein. A temporary injunction had been granted in the first instance, restraining brick burning, but it was dissolved upon the defendant's showing that it would really produce no annoyance or injury to the plaintiff. In *Donald* v. *Humphrey*, 14 F. (Sc.) 1206, the plaintiff brought an action to restrain brick burning, and insisted that the business was *per se* a nuisance and should be restrained without proof of actual injury, but the court held that the business of burning brick was a lawful business and not *per se* a nuisance, but that the question as to whether it was a nuisance or not was one of fact to be determined by the circumstances of each case, and refused an injunction without proof that the business was so conducted as to be a nuisance to the plaintiff.

In the case of *Walter* v. *Selfe*, *supra*, the defendants were enjoined from burning bricks in the vicinity of the plaintiffs' premises so as to occasion damage or annoyance to the plaintiffs or injury or damage to the buildings thereon standing or shrubberies or plantation named in the bill. In *Pollock* v. *Lester*, 11 Hare, 266, the defendant was making preparations to burn bricks near a lunatic asylum of which plaintiff was proprietor, and plaintiff brought his bill praying an injunction to restrain the defendant, alleging in his bill that the smoke and vapor arising from the brick burning would be injurious to his patients and cause them to leave his asylum, and would also injure the trees, shrubs and plants thereon growing, and the injunction was granted. This was done, it will be seen, merely upon the apprehension of damage and before any was actually suffered. After the decision of this case, *Hole* v. *Barlow*, 4 C.

B. (N. S.) 336, was decided. That was an action for a nuisance arising from the burning of bricks on defendant's own land near to the plaintiff's dwelling-house, and the judge at the trial told the jury that no action lies for the reasonable use of a lawful trade in a convenient and proper place, even though some one may suffer inconvenience from its being carried on, and he left two questions to the jury, *first*, "was the place in which the bricks were burned a proper and convenient place for the purpose;" *secondly*, if they thought the place was not a proper place for the purpose then "was the nuisance such as to make the enjoyment of life and property uncomfortable." It was held that there was no misdirection. That case, which was in conflict with prior authorities, has since been overruled in *Beadmore* v. *Treadwell*, 31 Law Jour. (N. S.) 873; *Bamford* v. *Turnley*, 31 Law Jour. (N. S., Q. B.) 286; *Cavey* v. *Ledbitter*, 13 C. B. (N. S.) 470; *Banham* v. *Hall*, 22 Law Times, (N. S.) 116; *Roberts* v. *Clark*, 18 id. 49; *Luscombe* v. *Steer*, 17 id. 229. In *Beadmore* v. *Treadwell* the court granted an injunction restraining the burning of bricks within 650 yards of the plaintiff's dwelling, holding that the burning of bricks within 350 yards of the plaintiff's residence was a nuisance, although the bricks were to be used in the erection of government fortifications. Vice-Chancellor STUART says: "Upon the facts of the present case, notwithstanding the contradictory evidence, my mind is satisfied that there has been an actual and positive injury to the plaintiff; that the comfort and enjoyment of his mansion house are injured; that the trees planted and standing and growing for ornament have been, in some cases, entirely destroyed, and in many cases injured."

In *Bamford* v. *Turnley*, COCKBURN, C. J., before whom the case was tried, followed *Hole* v. *Barlow*, and charged the jury that if they thought the spot was convenient and proper, and that the use by the defendant of his premises was, under the circumstances, a reasonable use of his own land, he would be entitled to a verdict. The jury found for the defendant but upon the hearing in the Exchequer Chamber it was held that the instructions were erroneous, and that it was no answer in an action for a nuisance creating actual annoyance and discomfort in the enjoyment of neighboring property that the injury resulted from a reasonable use of the property, and that the act was done in a convenient place, nor that the same business had

been carried on in the same locality for seventeen years. The doctrine of *Hole* v. *Barlow* was distinctly repudiated, and that case was in terms overruled.

In *Cavey* v. *Ledbitter*, an action for a nuisance caused by brick burning, the judge at the trial left it to the jury, in substance, to say whether the acts of the defendant rendered the plaintiff's residence substantially uncomfortable, and whether his shrubs and fruit trees had been thereby injured; and he refused to ask them whether the bricks had been burned in a convenient place, and it was held that there was no misdirection.

In *Banham* v. *Hall*, a bill was filed for an injunction to restrain the defendant from using a brick-kiln in such a way as to be a nuisance to the property of plaintiff, or to plaintiff and his family. There, as here, the damage and annoyance were suffered only when the wind blew from the direction of the kiln, and V. C. Stewart said "that, *prima facie*, a brick-kiln built within 100 yards in front of a mansion-house would be a nuisance, unless the process used for burning the bricks was one of an unusual kind."

Robert v. *Clark* was a bill for an injunction restraining the defendant from burning brick on his premises to the injury of plaintiff's premises, and the vice-chancellor held that brick burning carried on in the ordinary way was a nuisance to persons living within the limits affected by it, and that 240 yards was no extreme limit for the smoke and vapor to extend, and that it was such a nuisance as the court would restrain.

In *Luscomb* v. *Steers*, the defendant rented premises and began to burn brick within 1,442 feet of the plaintiff's house on premises adjoining. At the time when the bill was brought no actual injury had been sustained by the plaintiff, but the bill was predicated upon a prospective nuisance. The court denied an injunction upon the grounds that no actual injury having been sustained no nuisance existed; and that no evidence having been given to establish the fact of prospective nuisance, it was not a case for equitable relief. But the court said: "If the business should hereafter become a nuisance to the plaintiff, he can then apply to the court for relief and his rights will be protected."

In this country, so far as I can ascertain, the question of nuisance from brick burning has rarely been before the courts. The only case to which our attention has been called is *Huck-*

einstine's Appeal, 70 Penn. 102. In that case Agnew, J., says: "Brick making is a useful and necessary employment and must be pursued near to towns and cities where bricks are chiefly used. Brick burning, an essential part of the business, is not a nuisance *per se*. *Atty.-Gen.* v. *Cleaver*, 18 Ves. 219. It, as many useful employments do, may produce some discomfort and even some injury to those near by, but it does not follow that a chancellor would enjoin therefor." He then goes on to say that the aid of an injunction is not matter of right, but of grace, and concludes that there were so many similar nuisances in the locality that it was not clear that this nuisance increased the discomfort from them, and that it was doubtful whether the plaintiff had suffered any material damage from the acts, and therefore held that an injunction ought not to issue and that the plaintiff should be left to his remedy at law. In the following analogous cases useful industries which produced smoke or noxious gases or vapors or odors, were declared nuisances: *Catlin* v. *Valentine*, 9 Paige, 575; *Peck* v. *Elder*, 3 Sandf. Sup. Ct. 129; *Taylor* v. *The People*, 6 Parker Cr. 352; *Davis* v. *Lamberson*, 56 Barb. 480; *Hutchins* v. *Smith*, 63 id. 251; *Whitney* v. *Bartholomew*, 21 Conn. 213; *Cooper* v. *Randall*, 53 Ill. 524; *Rex* v. *White*, 1 Burr. 337; *Cook* v. *Forbes*, L. R. 5 Eq. Cas. 166; *Sampson* v. *Smith*, 8 Sim. 272; *Tipping* v. *St. Helen Smelting Co.*, 4 B. & L. 505; *Crump* v. *Lambert*, L. R. 3 Eq. Cas. 409; *Pointer* v. *Gill*, 2 Rolls' Ab. 140. Without further citation of authority I think it may safely be said that no definition of nuisance can be found in any text book or reported decision which will not embrace this case.

But the claim is made that although the brick burning in this case is a nuisance, a court of equity will not and ought not to restrain it, and the plaintiffs should be left to their remedy at law to recover damages, and this claim must now be examined.

Prior to Lord Eldon's time, injunctions were rarely issued by courts of equity. During the many years he sat upon the woolsack this remedy was resorted to with increasing frequency, and with the development of equity jurisprudence, which has taken place since his time, it is well said that the writ of injunction has become the right arm of the court. It was formerly rarely issued in the case of a nuisance until plaintiff's right had been established at law, and the doctrine which seems now

to prevail in Pennsylvania, that this writ is not matter of right, but of grace, to a large extent prevailed. But now a suit at law is no longer a necessary preliminary, and the right to an injunction, in a proper case, in England and most of the States, is just as fixed and certain as the right to any other provisional remedy. The writ can rightfully be demanded to prevent irreparable injury, interminable litigation and a multiplicity of suits, and its refusal in a proper case would be error to be corrected by an appellate tribunal. It is matter of grace in no sense except that it rests in the sound discretion of the court, and that discretion is not an arbitrary one. If improperly exercised in any case either in granting or refusing it, the error is one to be corrected upon appeal. *Corning* v. *Troy Iron and Nail Factory*, 40 N. Y. 191; *Reid* v. *Gifford*, Hopkins' Ch. 416; *Pollitt* v. *Long*, 58 Barb. 20; *Mohawk and Hudson R. R. Co.*, v. *Artcher*, 6 Paige, 83; *Parker* v. *Winnipiseogee Lake Cotton and Woolen Co.*, 2 Black (U. S.) 545, 551; *Webber* v. *Gage*, 37 N. H. 182; *Dent* v. *Auction Mart Association*, 35 L. J. [Ch.] 555; *Attorney-General* v. *United Kingdom Tel. Co.*, 30 Beav. 287; *Wood* v. *Sutcliffe*, 2 Sim. [N. S.] 165; *Clowes* v. *Staffordshire Potteries Co.*, L. R. 8 Ch. App. 125. Here the remedy at law was not adequate. The mischief was substantial and, within the principle laid down in the cases above cited and others to which our attention has been called, irreparable.

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 provides himself only with articles of necessity. The law will protect a flower or a vine as well as an oak. *Cook* v. *Forbes*, L. R., 5 Eq. Ca., 166; *Broadbent* v. *Imperial Gas Co.*, 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.

Here the injunction also prevents a multiplicity of suits. The injury is a recurring one, and every time the poisonous breath from defendant's brick-kiln sweeps over plaintiffs' land they have a cause of action. Unless the nuisance be restrained the litigation would be interminable. The policy of the law favors, and the peace and good order of society are best promoted by the termination of such litigations by a single suit.

The fact that this nuisance is not continual, and that the injury is only occasional, furnishes no answer to the claim for an injunction. The nuisance has occurred often enough within two years to do the plaintiffs large damage. Every time a kiln is burned some injury may be expected, unless the wind should blow the poisonous gas away from plaintiffs' lands. Nuisances causing damage less frequently have been restrained. *Ross* v. *Butler*, 19 N. J. 294; *Meigs* v. *Lister*, 23 N. J. Eq. R. 200; *Clowes* v. *North Staffordshire Potteries Co.*, *supra*; *Mulligan* v. *Eliot*, 12 Abb. Pr. (N. S.) 259.

It matters not that the brick-yard was used before plaintiffs bought their lands or built their houses. *Taylor* v. *The People*, *supra*; *Wier's Appeal*, 74 Penn. 230; *Brady* v. *Weeks*, 3 Barb. 156; *Barnwell* v. *Brooks*, 1 Law Times [N. S.] 454. One cannot erect a nuisance upon his land adjoining vacant lands owned by another and thus measurably control the uses to which his neighbor's land may in the future be subjected. He may make a reasonable and lawful use of his land and thus cause his neighbor some inconvenience, and probably some damage which the law would regard as *damnum absque injuria*. But he cannot place upon his land anything which the law would pronounce a nuisance, and thus compel his neighbor to leave his land vacant, or to use it in such way only as the neighboring nuisance will allow.

It is claimed that the plaintiffs so far acquiesced in this nuisance as to bar them from any equitable relief. I do not perceive how any acquiescence short of twenty years can bar one from complaining of a nuisance, unless his conduct has been such as to estop him. There is no proof that plaintiffs, when they bought their lands, knew that any one intended to burn any bricks upon the land now owned by defendant. From about 1840 to 1853 no bricks were burned there. Then from 1853 to 1857 bricks were burned there, and then not again until 1867. From 1857 to 1867 the brick-yard was plowed and used

for agricultural purposes. Before suit brought, plaintiffs objected to the brick burning. No act or omission of theirs induced the defendant to incur large expenses or to take any action which could be the basis of an estoppel against them, and therefore there was no acquiescence or laches which should bar the plaintiffs, within any rule laid down in any reported case.

It is true that if a party sleeps on his rights and allows a nuisance to go on without remonstrance or without taking measures either by suit at law or in equity to protect his rights, and allows one to go on making large expenditures about the business which constitutes the nuisance, he will sometimes be regarded as guilty of such laches as to deprive him of equitable relief. But this is not such a case. *Radenhurst* v. *Coate*, 6 Grant's Ch. [Ont.] 140; *Heenan* v. *Dewar*, 18 id. 438; *Bankart* v. *Houghton*, 27 Beav. 425.

The defendant claims a prescriptive right to burn bricks upon his land and to cause the poisonous vapors to flow over plaintiffs' lands. Assuming that defendant could acquire by lapse of time and continuous user the prescriptive right which he claims, there has not here been a continuous use and exercise of the right for twenty consecutive years. Anthracite coal was first used for burning bricks in this yard in 1834, and after six years brick burning was discontinued. It was not resumed again until about 1853, and after four years it was again discontinued, and it was not resumed again until 1867. So that anthracite coal, which caused plaintiffs' damage, had not been used in all for twenty years, and certainly not continuously in burning bricks upon the yard now owned by defendant. If he could acquire the right claimed by prescription, he, and those under whom he holds, must for twenty years have caused the poisonous gases to flow over plaintiffs' land whenever they burned bricks and the wind blew from the direction of the kiln. Such a prescription neither the allegations in the answer nor the proofs upon the trial, nor the findings of the referee, warrant. The referee finds that the premises of defendant have been known and used as a brick-yard for over twenty-five years. This is not a finding that they have been used as a brick-yard for twenty-five years continuously, or that they have caused the poisonous gases to flow over plaintiffs' land for that length of time continuously. *Ball* v. *Ray*, L. R. 8 Ch. App. 467; *Parker* v. *Mitchell*, 11 Ad. & El. 788; *Battishill* v. *Reed*, 18 C. B. 696; *Bradley Fish Co.* v. *Dudley*, 37 Conn. 136.

Where the damage to one complaining of a nuisance is small or trifling, and the damage to the one causing the nuisance will be large in case he be restrained, the courts will sometimes deny an injunction. But such is not this case; here the damage to the plaintiffs, as found by the referee, is large and substantial. It does not appear how much damage the defendant will suffer from the restraint of the injunction. He does not own the only piece of ground where bricks can be made. We know that material for brick making exist in all parts of our State, and particularly at various points along the Hudson river. An injunction need not therefore destroy defendant's business or interfere materially with the useful and necessary trade of brick making. It does not appear how valuable defendant's land is for a brickyard, nor how expensive are his erections for brick making. I think we may infer that they are not expensive. For aught that appears, his land may be put to other use just as profitable to him. It does not appear that defendant's damage from an abatement of the nuisance will be as great as plaintiff's damages from its continuance. Hence this is not a case within any authority to which our attention has been called, where an injunction should be denied on account of the serious consequences to the defendant.

We cannot apprehend that our decision in this case can improperly embarrass those engaged in the useful trade of brick making. Similar decisions in England, where population and human habitations are more dense, do not appear to have produced any embarrassment. In this country there can be no trouble to find places where brick can be made without damage to persons living in the vicinity. It certainly cannot be necessary to make them in the heart of a village or in the midst of a thickly settled community.

Defendant complains that the damage allowed by the referee was too great. He had the evidence and all the circumstances before him, and we cannot review his decision upon the amount of damage.

It is also complained that the injunction contained in the judgment as entered is broader and more unlimited than that ordered by the referee. This is a matter not to be corrected upon appeal. Defendant should have compelled an entry of judgment in accordance with the decision of the referee. If plaintiffs entered a judgment not authorized by the referee's

report, defendant should have moved to set it aside or to correct it.

One of the three judges who heard the appeal in the General Term of the Supreme Court died before the decision was made, and the appeal was decided by the remaining two judges, and this appeal is from the judgment entered upon that decision. It is now objected that the two judges could not make a decision. Even if the defendant, after he has appealed from the judgment, can raise the objection, we are of opinion that the objection is not well founded, and that two judges can hold a General Term and decide cases argued there. *Van Rensselaer* v. *Witbeck*, 2 Lans. 499.

It follows from these views that the judgment should be affirmed.

All concur.

Judgment affirmed. (1)

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[1] STANDARD FOR RIGHT TO USE PROPERTY.— "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 cases the inquiry always is, when rights are called in question, what is reasonable under the circumstances. . . . 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 generally, 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." *Rogers* v. *Elliott*, 146 Mass. 349, 351.

KINDS OF NUISANCE.

Bohan v. Port Jervis Gas Light Co.

(122 New York, 18.—1890.)

Appeal from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the plaintiff, in an action to recover damages for the depreciation in the value of plaintiff's property, alleged to have been caused by the manufacture of gas in close proximity thereto by the defendant, and to restrain a continuation of the nuisance.

The complaint, among other things, alleged: "That about the year 1880, the defendant erected a new tank for the purpose of its gas-works on its said premises, the southern side of which stands within a few feet of plaintiff's premises. That about the year 1880, the defendant began, and ever since has and still does manufacture its gas at said works from naphtha, and that said tank was and still is used to store said naphtha for the purposes aforesaid. That naphtha is an offensive, noxious, unhealthy and sickening mineral substance, destructive to the health and comfort of those required to be and remain in close proximity to it. That said tank was erected and is maintained in a negligent and unskillful manner and by reason of the negligence and want of care upon the part of the defendant in the construction, use of and maintenance of said tank . . . and also by reason of the erection and use of said tank and said works and the negligent and unskillful manufacture of gas from naphtha, the defendant has since 1880, and still does maintain a nuisance injurious to the comfort and enjoyment of the plaintiff, and injurious to the rental value of the said premises." The answer admitted the erection of the tank and the use of naphtha in the manufacture of gas, but denied negligence in the erection of its works or in the conduct of its business.

Brown, J. The plaintiff made no complaint of the existence of a nuisance upon defendant's property prior to 1880, when defendant first introduced the use of naphtha in the manufacture of its gas, and it was a disputed question on the trial, upon which there was a strong conflict of testimony, whether the

smells from the defendant's works, after it began to use naphtha, were more offensive than when it used coal.

This question, it must be assumed, the jury determined in favor of the plaintiff's contention.

The court charged the jury that, to constitute a nuisance, it was essential that the smells and odors from the defendant's works should be sufficient "to contaminate and pollute the air and substantially interfere with the plaintiff's enjoyment of her property," and that the question for them to determine was: "Did the odor pollute the air so as to substantially render plaintiff's property unfit for comfortable enjoyment." An exception was taken by the defendant to this part of the charge.

The rule stated by the learned judge was in accordance with all the authorities. If one carry on a lawful trade or business in such a manner as to prove a nuisance to his neighbor, he must answer in damages, and it is not necessary to a right of action that the owner should be driven from his dwelling; it is enough that the enjoyment of life and property be rendered uncomfortable. *Rex* v. *White*, 1 Burr. 337; *S. H. S. Co.* v. *Tipping*, 11 H. L. Cas. 642; *Fish* v. *Dodge*, 4 Denio, 311; *Catlin* v. *Valentine*, 9 Paige, 575; *Campbell* v. *Seaman*, 63 N. Y. 568; *Cogswell* v. *N. Y., N. H. & H. R. Co.*, 103 id. 10; Wood on Nuis. § 497.

It was claimed by the defendant, and the court refused a request 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." An exception to this ruling raises the principal question discussed in the case.

While every person has exclusive dominion over his own property and may subject it to such uses as will subserve his wishes and private interests, he is bound to have respect and regard for his neighbor's rights.

The maxim, "*Sic utere tuo ut alienum non lædas*" limits his

powers. He must make a reasonable use of his property, and a reasonable use can never be construed to include those uses which produce destructive vapors and noxious smells, and that result in material injury to the property and to the comfort of the existence of those who dwell in the neighborhood.

The reports are filled with cases where this doctrine has been applied, and it may be confidently asserted that no authority can be produced, holding that negligence is essential to establish a cause of action for injuries of such a character. A reference to a few authorities will sustain this assertion.

In *Campbell* v. *Seaman*, *supra*, there was no allegation of negligence in the complaint, and there was an allegation of due care in the answer. There was no finding of negligence, and this court affirmed a recovery.

In *Heeg* v. *Licht*, 80 N. Y. 579, an action for injuries arising from the explosion of fire-works, the trial court charged the jury that they must find for the defendant, "unless they found that the defendant carelessly and negligently kept the gunpowder on his premises." And he refused to charge upon the plaintiff's request "that the powder-magazine was dangerous in itself to plaintiff, and was a private nuisance, and defendant was liable to the plaintiff, whether it was carelessly kept or not." There was a verdict for the defendant, and this court reversed the judgment, holding that the charge was erroneous. In *Cogswell* v. *N. Y., N. H. & H. R. Co.*, *supra*, the Special Term found, as facts, that in the construction of the engine-house and coal-bins, and in the use of its premises the defendant exercised due care, so far as the same was practicable, and it refused to find, upon plaintiff's request "that in the construction of the engine-house, chimney, smoke-pipe, and coal-bins, it had not exercised, and does not now exercise, such reasonable and proper care as was necessary not to injure the plaintiff's property." A judgment for the defendant was reversed, this court holding that the engine-house as used was a nuisance, and that it was not an answer to the action that the defendant exercised all practicable care in its management. In *Pottstown Gas Co.* v. *Murphy*, 39 Pa. St. 257, the charge of the court, and the refusals to charge, were very similar to the charge in this case. The Supreme Court of Pennsylvania overruled the exceptions, holding that negligence was not essential to a right of recovery. To the same effect see *Cleveland* v. *C. G. L. Co.*, 20 N. J. Eq. 201; *O.*

G. L. &c. Co. v. *Thompson*, 39 Ill. 598; Wood on Nuis. (2d ed.) § 553.

The principle, that one cannot recover for injuries sustained from lawful acts done on one's own property without negligence and without malice, is well founded in the law. Every one has the right to the reasonable enjoyment of his own property, and so long as the use to which he devotes it violates no rights of others, there is no legal cause of action against him.

The wants of mankind demand that property be put to many and various uses and employments, and one may have, upon his property, any kind of lawful business, and so long as it is not a nuisance, and is not managed so as to become such, he is not responsible for any damage that his neighbor accidentally and unavoidably sustains. Such losses the law regards as *damnum absque injuria.*

And under this principle, if the steam-boiler on the defendant's property, or the gas-retort, or the naphtha tanks has exploded and injured the plaintiff's property, it would have been necessary for her to prove negligence, on the defendant's part, to entitle her to recover. *Losee* v. *Buchanan*, 51 N. Y. 476.

But where the damage is the necessary consequence of just what the defendant is doing, or is incident to the business itself, or the manner in which it is conducted, the law of negligence has no application and the law of nuisance applies. *Hay* v. *Cohoes Co.*, 2 N. Y. 159; *McKeon* v. *See*, 51 N. Y. 300.

The exception to the refusal to charge the first proposition above quoted was not, therefore, well taken.

It is contended, however, by the defendant, that the acts of the legislature relating to gas companies are a protection from liability for consequential injuries flowing from the manufacture of gas, or the prosecution of the business, when want of care forms no element of the cause of injury, and it is sought to apply to this case the broad principle that that which the law authorizes cannot be a nuisance, although it may occasion damages to individual rights and property.

The cases cited to sustain this proposition are ones where municipal corporations were engaged in grading and improving public streets and highways. *Radcliff* v. *Mayor, etc.*, 4 N. Y. 195; *Transportation Co.* v. *Chicago*, 99 U. S. 635. Or where the act causing the injury was done by corporations in the construction of works upon property acquired under the power of eminent domain. *Bellinger* v. *N. Y. C. R. R. Co.*, 23 N. Y. 42.

In these cases, in doing the acts complained of, the defendants acted in the performance of a public duty imposed upon them by the legislature, or in the exercise of a right conferred by law; and it is well settled that persons appointed or authorized by law to perform a public duty, or to do acts of a public character are not answerable for consequential damages if they act within their jurisdiction and with care and skill. *Trans. Co.* v. *Chicago*, *supra*, 641; *Uline* v. *N. Y. C. & H. R. R. Co.*, 101 N. Y. 98; *Conklin* v. *N. Y., O. & W. R. Co.*, 102 id. 107; Cooley on Const. Lim. (5th Ed.) 671.

This principle cannot, however, be applied to cases like the one under consideration.

The defendant is incorporated under chapter 37, Laws of 1848, which authorizes in general terms the creation of corporations for manufacturing and supplying illuminating gas. It acquired by that act its corporate life and character, and the power to purchase and hold such real and personal property as might be necessary to enable it to carry on its business.

By section 18 of the act named, it is given the power to lay its conductors through the streets of the city, village or town in which it is located, with the consent of the municipal authorities of such city, etc., and by chapter 311 of the Laws of 1859, it is required to furnish gas to any applicant within 100 feet of its mains.

It may be conceded that the business of manufacturing and distributing gas through the public streets for public and private use is a business of a public character, and the individual possessing such right has a franchise granted by the state for a public object, and that it meets a public necessity for which the state may make provision.

But the state has not seen fit to confer upon the corporations formed under the act cited, the power of eminent domain, and they cannot, therefore, locate their works where they will.

In their ability to acquire real estate upon which to establish their manufactory, they have no greater power than any citizen of the state, and having acquired property they rest under the same obligation as other citizens, to make a reasonable use of it and to respect and regard the rights of their neighbors.

The proposition contended for by the learned counsel for the defendant has, in recent years, received full consideration in the courts of England and of this country, and the rule is now es-

tablished that the statutory authority which will justify an injury to private property and afford immunity for acts which would otherwise be a nuisance must be express, or must be a clear and unquestionable implication from powers expressly conferred, and it must appear that the legislature contemplated the doing of the very act which occasioned the jury. *Cogswell* v. *N. Y., N. H. & H. R. R. Co.*, 103 N. Y. 10; *B. & P. R. Co.* v. *Fifth Bap. Ch.*, 108 U. S. 317; *Hill* v. *Managers of Met. Asylum Dist.*, L. R. (4 Q. B.) 433; L. R. 6 App. Cas. 193; *Pottsdown Gas Co.* v. *Murphy*, 39 Pa. St. 257; *Eames* v. *N. E. W. Co.*, 11 Metc. 570; *Commonwealth* v. *Kidder*, 107 Mass. 188.

In *Pottstown Gas Co.* v. *Murphy*, the Supreme Court of Pennsylvania said: "The principle invoked applies only when an incorporation clothed with a portion of the state's right of eminent domain takes private property for public use on making proper compensation, and when such damages are not a part of the compensation required."

In *Eames* v. *N. E. Worsted Co.*, Chief Justice Shaw said: "The Mill Act affords no warrant or justification for erecting or maintaining a nuisance."

In *Commonwealth* v. *Kidder*, in considering the effect of a statute authorizing the storing and manufacturing of naphtha and petroleum, the Supreme Court of Massachusetts said: "The reasonable, if not necessary, inference is that it was not the intention of the legislature to establish a new rule in this regard, but to leave the question whether the manufacturing is carried on at such places and in such a manner as to be unwholesome and offensive to the public, and on that account indictable as a nuisance, to be determined by the rules of the common law."

In *B. & P. R. Co.* v. *Fifth Bap. Ch.*, it was said: "The authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them where it may think proper without reference to the property and rights of others. Grants of privileges or power to corporate bodies like those in question confer no license to use them in disregard of the private rights of others, and with immunity for their invasion."

And in *Hill* v. *Managers of Met. Asylum Dist.*, Lord Watson said: "Where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons

empowered to determine whether the general powers committed to them shall be put in execution or not, I think the fair inference is that the legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer license to commit nuisance in any place which might be selected."

There is nothing in *Truman* v. *L. B. & S. C. R. Co.*, L. R. (25 Ch. Div.) 45, conflicting with this rule.

The House of Lords in that case recognized fully the rule applied in *Hill* v. *Managers of Met. Asylum Dist.*, and held that the purpose for which the land was acquired by the defendants being expressly authorized by the act of parliament, and being incidental and necessary to the authorized use of the railway for cattle traffic, the company were authorized to do what they did.

The legislature may authorize acts which would otherwise be a nuisance when they affect or relate to matters in which the public have an interest, or over which the public have control, such as highways or public streams.

In such cases the legislative authorization exempts from liability to suits civil or criminal at the instance of the state, but it does not affect the claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large. *Crittenden* v. *Wilson*, 5 Cow. 165; *Brown* v. *C. & S. R. R. Co.*, 12 N. Y. 486; *Sinnickson* v. *Johnson*, 17 N. J. L. 151; *B. & P. R. Co.* v. *Bap. Church*, *supra*.

These views lead to the conclusion that the defendant obtained no immunity from liability for consequential injuries sustained by property surrounding its works by reason of its incorporation, or the privilege conferred upon the business by the acts of the legislature, and that the facts of the case do not take it out of the operation of the rules of law applicable to ordinary common-law nuisances.

The legislature has given to the corporations created to manufacture gas the right to lay down their conductors in the public streets subject to the control and regulation of the municipal authorities, and for acts done in the execution of that privilege they are exempt from prosecution at the suit of the people.

The choice, however, of the place to locate their works, and the selection of materials from which to manufacture gas, has

been left to the corporations, and those things must be performed with reference to the rights of others.

The fact appears in this case that for twenty years the defendant conducted its business without annoyance to any one. For the sake of economy (so it alleges) it adopted, in 1880, a new process and new materials from which to make its gas. The result, under the finding of the jury, has been to impair the value of the plaintiff's property and substantially interfere with its comfortable enjoyment. If the defendant's contention should prevail, there would be no restraint upon the location of the business, and no limit to the offensive character of the materials it might use. It would thus have an immunity which the law denies to every other citizen.

We think the proof permitted the conclusion that the defendant had created a nuisance, and that there was no error in the charge of the court, or the refusal to charge.

The judgment must be affirmed.

HAIGHT, J. (*dissenting*). This action was brought to recover damages alleged to have been sustained by the plaintiff in consequence of offensive odors proceeding from the gas-works of the defendant, and to obtain an injunction restraining the defendant from permitting further emissions of such odors.

The complaint alleges negligent and unskillful construction of the works, and also negligence in the use and maintenance thereof.

The trial resulted in a verdict for damages, upon which the court awarded a judgment for an injunction.

Upon the trial it appeared that the defendant was incorporated under chapter 37 of the Laws of 1848 for the purpose of manufacturing and supplying the streets, public places and inhabitants of the village of Port Jervis with illuminating gas; that its works were constructed in the year 1860 upon lands purchased for that purpose, since which time it has continued the manufacture of gas; that prior to 1880 coal was used in such manufacture, but since that time naphtha has been used instead; that in making the change from coal to naphtha two storage tanks were constructed, one of which was constructed near to the plaintiff's premises. It further appeared that the plaintiff lived upon the premises adjoining those of the defendant and that she had been the owner thereof since the year

1878. It further appeared that in all works with the most approved apparatus and managed with the utmost skill and care there was some odor which was inseparable from the manufacture of gas.

It was claimed upon her part that prior to 1880 there was a smell of gas coming from the works of the defendant, but not near as strong as since the change to naphtha; that since that time the air has been impure and that there has been a disagreeable smell at all times; that at certain times it is greater than at others, causing a nauseous, disagreeable feeling, obliging her to close the windows of her house to keep out the smells. Whilst on the part of the defendant it was claimed that the odor proceeding from the works was not near as strong since the change from coal to naphtha; that the works were constructed in the best possible manner, according to plans of the most approved character and were managed in the highest degree of care and skill.

In submitting the case to the jury the defendant's counsel asked the court to charge "that unless the jury 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 the works were unskillful and incapable, their verdict should be for the defendant;" also, "that if the odors which affected the plaintiff were those that were inseparable from the manufacture of gas with the most approved apparatus and with the utmost skill and care and do not result from any defect in the works, or from want of care in their management, the defendant is not liable in this action;" and also, "that if the jury find that the plaintiff became the owner of the premises described in the complaint after the erection of the defendant's works, and after it was engaged in the manufacture of gas therein, she took them subject to such odors as were inseparable from the manufacture of gas conducted in the most careful and skillful manner and with the most approved machinery for that purpose." These requests were severally refused, and an exception taken, and the court charged the jury that "if this defendant's works gave out foul odors or noxious vapors to an extent sufficient to contaminate or pollute the air and substantially to interfere with the plaintiff's enjoyment of her property, then that would be a nuisance as against her and this plaintiff would be entitled to recover," to which charge the defendant excepted.

The question is thus presented as to whether the works of the defendant are, in the absence of negligence either in their construction or operation, a nuisance *per se*, for if the odors emanating therefrom 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 their management, it follows that all works for the manufacture of gas are nuisances as to those living near enough to the plant to be affected by the odor, even though they located there subsequent to the works. The question is one of importance. It is not free from difficulty, and the authorities treating upon the subject are not in entire harmony.

A nuisance, as it is ordinarily understood, is that which is offensive and annoys and disturbs. A common or public nuisance is that which affects the people and is a violation of a public right either by direct encroachment upon public property or by doing some act which tends to a common injury, or by the omitting of that which the common good requires, and which it is the duty of a person to do. Public nuisances are founded upon wrongs that arise from the unreasonable, unwarrantable or unlawful use of property, or from improper, indecent or unlawful conduct working an obstruction or injury to the public and producing material annoyance, inconvenience and discomfort. Founded upon a wrong it is indictable and punishable as for a misdemeanor. It is the duty of individuals to observe the rights of the public and to refrain from the doing of that which materially injures and annoys or inconveniences the people, and this extends even to business which would otherwise be lawful, for the public health, safety, convenience, comfort or morals, is of paramount importance, and that which affects or impairs it must give way for the general good. In such cases the question of negligence is not involved, for its injurious effect upon the public makes it a wrong which it is the duty of the courts to punish rather than to protect. But a private nuisance rests upon a different principle. It is not necessarily founded upon a wrong, and consequently cannot be indicted and punished as for an offense. It is founded upon injuries that result from the violation of private rights and produce damages to but one or few persons. Injury and damage are essential elements, and yet they may both exist and still the act or thing producing them not be a nuisance. Every person

has a right to the reasonable enjoyment of his own property, and so long as the use to which he devotes it violates no rights of another however much damage others may sustain therefrom, his use is lawful and it is *damnum absque injuria*. *Thurston* v. *Hancock*, 12 Mass. 222.

So that a person may suffer inconvenience and be annoyed and if the act or thing is lawful and no rights are violated it is not such a nuisance as the law will afford a redress; but if his rights are violated, as for instance if a trespass has been committed upon his land by the construction of the eaves of a house so that the water will drip thereon, or by the construction of a ditch or sewer so that the water will flow over and upon his premises, or if a brick-kiln be burned so near his premises as that the noxious gases generated therefrom are borne upon his premises killing and destroying his trees and vegetation, it will be a nuisance for which he may be awarded damages. *Campbell* v. *Seaman*, 63 N. Y. 568.

Hence it follows that in some instances a party who devotes his premises to a use that is strictly lawful in itself may, even though his intentions are laudable and motives good, violate the rights of those adjoining him, causing them injury and damage and thus become liable as for a nuisance. It, therefore, becomes important that the courts should proceed with caution and carefully consider the rights of the parties and not declare a lawful business a nuisance except in cases where rights have been invaded resulting in material injury and damage. People living in cities and large towns must submit to some inconvenience, annoyance and discomforts. They must yield some of their rights to the necessity of business, which, from the nature of things, must be carried on in populous cities. Many things have to be tolerated that under other circumstances would be abated, the necessity for their existence outweighing the ill results that proceed therefrom. Therefore, as to business which is lawful and reasonable and is not of itself a nuisance when properly conducted, which is carried on upon one's own premises, invading no right of a neighbor, it is not such a nuisance as the law will afford redress, even though it produces an inconvenience and annoyance, unless such inconvenience and annoyance is the result of negligence and carelessness; but where the business is of that character as to become a common nuisance the damages may be recovered even

though no negligence is shown. *Rockwood* v. *Wilson*, 11 Cush. 221–226.

The distinction between the two cases is that in the former the business is not of that nature as to injuriously affect others, but may become so by the negligent manner in which it is carried on; whilst in the latter case the nature of the business is such as must necessarily be injurious, even though managed with the greatest care and skill. Wood's Law of Nuisances (2d Ed.) § 127.

Again, there is another class of cases in which the question of negligence is material, as, for instance, where the legislature has authorized the doing of that which would otherwise be a nuisance. In such cases the person is shielded from liability for damages that ensue, unless he is chargeable with negligence for the manner in which the act was done. *Radcliff* v. *Mayor, etc.*, 4 N. Y. 195; *Bellinger* v. *N. Y. C. R. R. Co.*, 23 id. 42; *Kellinger* v. *F. S. S. & G. S. F. R. R. Co.*, 50 id. 206–212; *Uline* v. *N. Y. C. & H. R. R. R. Co.*, 101 id. 98, 107; *Conklin* v. *N. Y. O. & W. R. Co.*, 102 id. 107; *Ottenot* v. *N. Y., L. & W. R. Co.*, 28 N. Y. S. R. 483.

As, for instance, a person may be annoyed and inconvenienced by the noise and tread of passing railroad trains, and yet where the railroad is lawfully built and is managed with proper care and skill, it is not a nuisance, even though it passes near to a dwelling-house and materially disturbs the quiet and slumber of the occupants. *Beseman* v. *P. R. R. Co.*, 50 N. J. L. 235.

But the authority of the legislature should doubtless be express (*Cogswell* v. *N. Y., N. H. & H. R. R. Co.*, 103 N. Y. 10) and relate to matters of public utility in which the people have an interest and the right of control. (*B. & P. R. Co.* v. *Fifth Baptist Church*, 108 U. S. 317–332.)

We are thus brought back to the question as to whether the business of manufacturing gas by the defendant is in and of itself a nuisance. As we have seen, the defendant was incorporated under the general laws of the state for the purpose of manufacturing illuminating gas, and under the provisions of chapter 311 of the Laws of 1859, § 6, it is required to furnish gas for lighting purposes to any applicant within 100 feet of any main laid by it for the distributing of gas. It is subject to legislative control and its meters to the inspection and test of the public inspector, appointed by the governor for that

purpose. The legislature may give it the power to exercise the right of eminent domain, and the discharge of its duty to individuals, and the public may be compelled by *mandamus*. *People* v. *M. G. L. Co.*, 45 Barb. 136; *Williams* v. *M. G. Co.*, 52 Mich. 499; *In re B. & R. N. G. Co.* v. *Richardson*, 63 Barb. 437.

It is, therefore, a business of a public nature and utility, for which the state can control and make provision. Justice HARLAN, in delivering the opinion in the case of *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650–669, says: "The manufacture of gas and its distribution for public and private use by means of pipes laid under legislative authority, in the streets and ways of a city, is not an ordinary business in which every one may engage, but is a franchise belonging to the government, to be granted for the accomplishment of public objects to whomsoever and upon what terms it pleases. It is a business of a public nature and meets a public necessity for which the state may make provision. It is one which so far from affecting the public injuriously has become one of the most important agencies of civilization for the promotion of the public convenience and the public safety."

It is undoubtedly true that in the manufacture of gas the escape of some is unavoidable, and it may inconvenience those who live in the immediate vicinity of the works; but the necessities of the people living in large cities and villages impose some inconvenience on others, and have compelled recognition of the principle that each member of society must submit to annoyances consequent upon the use of property, provided such use is reasonable as respects the owner and those immediately affected in view of time, place and other circumstances. *St. Helens Smelting Co.* v. *Tipping*, 11 H. L. Cas. 642–646; Cooley on Torts, 598–601.

We are aware that a different view has been expressed in reference to gas-works. *Carhart* v. *A. G. L. Co.*, 22 Barb. 297–312.

But, notwithstanding this, our conclusions are that, in view of the circumstances, the public character and utility, the business is lawful, authorized by the legislature and that it is not a nuisance if properly conducted. It may, however, be carried on in such a manner as to unnecessarily affect and injure others, in which case it would become a nuisance. If we are correct

in this view the question of negligence was involved in the case and should have been submitted to the jury. As we have seen, time, place and circumstances have an important bearing upon the question. A person may negligently select an improper place for the establishment of his business. That which would be proper and tolerated in one locality would not be in another. Negligence may also exist in the construction as well as in the management and operation. Each person should conduct his business with the best approved apparatus, with such skill and care as experienced and prudent persons may possess, in order that he may do his neighbor as little harm as possible. *People* v. *Sands*, 1 Johns. 78–88.

We do not understand it to be claimed that the defendant was guilty of maintaining a public nuisance, or that it is chargeable with any fault or negligence in the selection of the locality in which it erected its works. It is claimed that they were constructed of the best material, according to the best known plan and operated with the highest degree of skill and care. For twenty years they were operated without complaint. The plaintiff subsequent to the location of the defendant purchased the adjoining property and took up her residence thereon. It is true that she claimed to be affected from the odors that came from the naphtha tank constructed near her premises and that that was constructed after she became a resident there. It is possible that the defendant negligently located its tank in an improper place, but that question was not submitted to the jury. Neither was the question as to whether the odors proceeding from this tank produced the nuisance. The question submitted was as to whether the odors proceeding from the entire gas-works constituted a nuisance. It was also true that there was some evidence tending to show that the plaintiff's health had been affected. She testified that on some occasions she had been affected with nausea, but the question as to whether the works affected the health of the public or of the plaintiff was not submitted. On the contrary, it was expressly taken from the jury by the instruction to which the exception was taken, in which the court stated that it would be a nuisance "whether it affected the health of the plaintiff and her family or not."

Thus far we have proceeded upon the theory that the business was lawful, proper and reasonable, and was not a nuisance if properly managed and conducted, and that consequently the

question of negligence was involved. But we are also inclined to the view that the business is authorized by the legislature, and is for that reason protected, unless negligence may be shown. As we have seen, the business is of public nature and utility, subject to the control of the legislature, and all individuals living upon the lines of its pipes may demand and enforce service therefrom. It was authorized to acquire land by purchase on which to erect its works. It is true the legislature has not expressly designated any particular lot or parcel of land upon which its works should be erected. The selection of the place was left to the company, and in making its selection, it was doubtless bound to take into consideration the nature of the business and the surrounding locality and so locate as to produce as little harm to others as possible. As we have seen, no complaint has been made in reference to the selection of the locality that was made by the defendant in 1860. The authority to manufacture and supply gas for lighting the streets, public and private buildings of the village of Port Jervis, is express, and if it is conducted in a proper place, with the most approved apparatus, with the utmost skill and care, and without the escape of odors that are not inseparable from such manufacture there can be no liability for consequential injury to others.

The learned general term was of the opinion that the case of *Cogswell* v. *N. Y., N. H. & H. R. R. Co.*, *supra*, held adversely to this view, but we do not so understand that case. The New York and New Haven Railroad Company had purchased a lot adjacent to the plaintiff's dwelling and had erected thereon an engine-house and coal-bins for the use of its road. The engine-house was designed to accommodate eleven locomotives and had eleven smokestacks extending above the roof to about the height of the third-story window of plaintiff's house. The coal-bins were unprovided with covers to prevent the dust from the coal stored therein from passing into and upon the plaintiff's dwelling. The smoke, gases, soot and cinders from the smokestacks and the dust from the coal-bins when loading and unloading the coal produced the damage complained of. The facts found clearly established negligence. The court it is true, held that in that case the defendant was not protected by any authority that it had from the legislature, there being no express authority for the selection of the lot on which this engine-house was

constructed and that the selection made was an improper one. Our views are fully in accord with the principles decided in that case.

In the case of *Heeg* v. *Licht*, 80 N. Y. 579, the defendant had constructed upon his premises a powder-magazine in which he kept stored a quantity of powder which, without apparent cause, exploded, damaging the plaintiff's building. It was held that the plaintiff could recover without showing carelessness or negligence. MILLER, J., in delivering the opinion of the court, says: "The fact that the magazine was liable to such a contingency, which could not be guarded against or averted by the greatest degree of care and vigilance evinces its dangerous character, and might in some localities render it a private nuisance. In such a case the rule which exonerates a party engaged in a lawful business when free from negligence has no application." The rule we have contended for is thus recognized and conceded. There is a distinction between an action for a nuisance in respect to an act producing a material injury to property and one in respect to an act producing personal discomfort. This difference is clearly pointed out in the case of *St. Helens Smelting Co.* v. *Tipping*, *supra*.

We have already shown that any business which endangers the safety or health of others is a common nuisance and must give way for the public good, and that in such cases negligence was not involved. The keeping of gunpowder may not constitute a nuisance *per se*; that depends upon the locality and quantity. A thimbleful might not be dangerous, whilst fifty barrels full might be. It thus becomes a question of fact as to whether it is dangerous, and if it is found to be then it is a nuisance *per se*. The court very properly distinguished this case from those in which the business engaged in is lawful and not dangerous, which, in and of itself, is not a nuisance when properly conducted, but may become such by the negligent manner in which it is carried on.

The claim that the defendant, in order to be brought within the protection of the statute, must have the right of eminent domain and acquire the land upon which its works are constructed by proceedings to condemn is not sustained by any well-considered case. What difference can it make whether the land is acquired by voluntary purchase or by proceedings to condemn? It is the business which is expressly authorized by

the statute, and in order to carry it on the right to acquire land on which to conduct it is given. As we have already shown, no claim has been made that the defendant's works were improperly located, and it is, consequently, not apparent how the question of location can deprive it of the protection of the statute. It is true that a railroad corporation is given the right of eminent domain, and may acquire lands for the purposes of its incorporation by proceedings to condemn, but in order to institute such proceedings it must be shown that they are unable to agree upon the purchase thereof. If they can agree then the proceedings cannot be instituted. Can it be that such a company would be liable for the maintaining of a nuisance by reason of the noise, jar and smoke of its passing trains, because it has acquired the right of way by voluntary purchase instead of by proceedings to condemn? We think not. The answer would be that it makes no difference how the company acquired the title to the land upon which it was operating its road.

The defendant's business is of a public nature and utility. If it is a nuisance *per se*, and without the protection of the statute, an individual may procure it to be enjoined and thus drive it from place to place while another individual, living upon the line of its mains, may compel the company, by mandamus, to proceed with its business and supply his residence with illuminating gas, thus producing a condition in which the company would be liable if it did, and would also be liable if it did not.

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

All concur with BROWN, J., except FOLLETT, CH. J., and HAIGHT, J., dissenting.

Judgment affirmed.

PUBLIC NUISANCE WITH SPECIAL DAMAGE.

Cranford v. Tyrrell.

(128 New York, 341.—1891.)

Appeal from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the plaintiffs.

Gray, J. In this action, which was brought to restrain the defendant from keeping a house of ill-fame and from using his premises as an assignation house, and to recover damages for injuries sustained, the trial court found as facts that the house, as maintained by defendant, was a resort for prostitutes and licentious men, and that the persons occupying rooms acted in a boisterous and noisy manner, and indecently exposed their persons at the windows, "whereby the use and occupation of the plaintiffs' premises have been interfered with and rendered uncomfortable, and whereby the occupants of the plaintiffs' premises have been annoyed and seriously disturbed."

Such a finding was amply justified by the evidence and, indeed, it is not discussed by the appellant; but he argues that the plaintiffs could not maintain a civil action of this nature; inasmuch as the damage they suffered was a damage common to the whole community, and not special to them. If that position had been sustained by the facts, I do not doubt but that it would have been the duty of the trial court to have denied the relief prayed for.

The rule of law requires of him who complains of his neighbor's use of his property, and seeks for redress and to restrain him from such use, that he should show that a substantive injury to property is committed. The mere fact of a business being carried on, which may be shown to be immoral and, therefore, prejudicial to the character of the neighborhood, furnishes, of itself, no ground for equitable interference at the suit of a private person; and though the use of property may be unlawful or unreasonable, unless special damage can be shown, a neighboring property owner cannot base thereupon any private right of action. It is for the public authorities, acting in

the common interest, to interfere for the suppression of the common nuisance. See *Francis* v. *Schoellkopf*, 53 N. Y. 152.

If the business complained of is a lawful one, the legal question presented in a civil action for private damage is whether the business is reasonably conducted, and whether, as conducted, it is one which is obnoxious and hurtful to adjoining property. If the business is unlawful, the complainant in a private action must show special damage, by which the legitimate use of his adjoining property has been interfered with, or its occupation rendered unfit, or uncomfortable. That the perpetrator of the nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person to recover for injury sustained, and for an injunction against the continued use of his premises in such a manner. The principle has been long settled that the objection that the nuisance was a common one is not available, if it be shown that special damage was suffered. *Rose* v. *Miles*, 4 M. & S. 101; *Rose* v. *Groves*, 5 Man. & G. 613; *Francis* v. *Schoellkopf*, *supra*; *Lansing* v. *Smith*, 4 Wend. 9. One who uses his property lawfully and reasonably, in a general legal sense, can do injury to nobody. In the full enjoyment of his legal rights in and to his property, the law will not suffer a man to be restrained; but his use of the property must be always such as in no manner to invade the legal rights of his neighbor. The rights of each to the enjoyment and use of their several properties should, in legal contemplation, always be equal. If the balance is destroyed by the act of one, the law gives a remedy in damages, or equity will restrain. If the use of a property is one which renders a neighbor's occupation and enjoyment physically uncomfortable, or which may be hurtful to the health, as where trades are conducted which are offensive by reason of odors, noises, or other injurious or annoying features, a private nuisance is deemed to be established, against which the protection of a court of equity power may be invoked.

In the present case the indecent conduct of the occupants of the defendant's house and the noise therefrom, inasmuch as they rendered the plaintiff's house unfit for comfortable or respectable occupation, and unfit for the purposes it was intended for, were facts which constituted a nuisance, and were sufficient grounds for the maintenance of the action. If it was a nuisance which affected the general neighborhood and was the subject

of an indictment for its unlawful and immoral features, the plaintiffs were none the less entitled to their action for any injury sustained and to their equitable right to have its continuance restrained.

The judgment appealed from should be affirmed, with costs.

All concur.

Judgment affirmed.

CONTINUING NUISANCE.

SCHLITZ BREWING CO. v. COMPTON.

(142 Illinois, 511.—1892.)

APPEAL from the Appellate Court, Third District.

This is an action on the case, by the appellee against the appellant company. In the trial court, the verdict and judgment were in favor of the plaintiff, which judgment has been affirmed by the Appellate Court. The declaration consists of two counts. The first count alleges, that plaintiff was possessed of certain premises in Springfield, in which she and her family resided, and that the defendant to wit: on April 20, 1885, wrongfully erected a certain building near said premises in so careless, negligent and improper a manner, that, on said day and afterwards, "and before the commencement of this suit," large quantities of rain-water flowed upon, against and into said premises and the walls, roofs, ceilings, beams, papering, floors, stairs, doors, cellar, basement and other parts thereof, and weakened, injured and damaged the same, by reason whereof said messuage and premises became and are damp and less fit for habitation. The second count alleges that plaintiff was the possessor, occupier and owner of said messuage and premises, in which she and her family dwelt, and the defendant, to wit: on said day, caused quantities of water to run into, against and upon the same, and the walls, roofs, floors, cellars, etc., thereof, and thereby greatly weakened, impaired, wetted and damaged the same, by reason whereof said premises became and were and are damp, incommodious and less fit for habitation. The plea was not guilty.

The proof tends to show, that plaintiff's building is a two-

story brick building with a cellar underneath, the front room on the first floor being used as a butcher's shop and the rest of the building being used as a dwelling; that the building was erected several years before that of the defendant; that defendant's building is on the lot west of plaintiff's lot, and is about 60 feet long, having an office in front and a beer-bottling establishment in the rear, and has one roof which slants towards plaintiff's property; that there are three windows on the west side of plaintiff's house, besides the three cellar windows; that her wall is a little over two feet from the west line of her lot; that when it rains the water flows against her west wall and some of it into her windows and cellar from the roof of defendant's building; that the eave-trough is so far below the eave that the water runs over it into the windows, etc.

Magruder, J. Proof was introduced of damage done to plaintiff's property after the commencement of the suit by reason of rain storms then occurring. The defendant asked, and the court refused to give, the following instruction: "The court instructs the jury that the suit now being tried was commenced in the month of April, 1890, and that they are not to take into consideration the question as to whether or not any damage has accrued to plaintiff's property since the commencement of this suit."

The question presented is, whether plaintiff was entitled to recover only such damages as accrued before and up to the beginning of her suit, leaving subsequent damages to be sued for in subsequent suits, or whether she was entitled to estimate and recover in one action all damages resulting both before and after the commencement of the suit.

The rule originally obtaining at common law was, that in personal actions damages could be recovered only up to the time of the commencement of the action. 3 Com. Dig. tit. Damages, D. The rule, subsequently prevailing in such actions, is that damages accruing after the commencement of the suit may be recovered, if they are the natural and necessary result of the act complained of, and where they do not themselves constitute a new cause of action. Wood's Mayne on Das. § 103; *Birchard* v. *Booth*, 4 Wis. 67; *Slater* v. *Rink*, 18 Ill. 527; *Fetter* v. *Beale*, 1 Salk. 11; *Howell* v. *Goodrich*, 69 Ill. 556. In actions of trespass to the realty, it is said that damages may

be recovered up to the time of the verdict (Com. Dig. 363, tit. Damages, D.); and the reason why, in such cases, all the damages may be recovered in a single action, is, that the trespass is the cause of action, and the injury resulting is merely the measure of damages. 5 Am. & Eng. Enc. Law, p. 16, and cases cited in note 2. But in the case of nuisances or repeated trespasses, recovery can ordinarily be had only up to the commencement of the suit, because every continuance or repetition of the nuisance gives rise to a new cause of action, and the plaintiff may bring successive actions as long as the nuisance lasts. *McConnel* v. *McKibbe*, 29 Ill. 483, and 33 id. 175; *The C., R. I. & P. R. R. Co.* v. *Moffitt*, 75 id. 524; *C., B. & Q. R. R. Co.* v. *Schaffer*, 124 id. 112. The cause of action, in case of an ordinary nuisance, is not so much the act of the defendant, as the injurious consequences resulting from his act; and hence the cause of action does not arise until such consequences occur, nor can the damages be estimated beyond the date of bringing the first suit. 5 Am. & Eng. Enc. Law, p. 17, and cases in notes. It has been held, however, that, where permanent structures are erected, resulting in injury to adjacent realty, all damages may be recovered in a single suit. *Idem* p. 20, and cases in note. But there is much confusion among the authorities, which attempt to distinguish between cases where successive actions lie, and those in which only one action may be maintained.

This confusion seems to arise from the different views entertained in regard to the circumstances, under which the injury suffered by the plaintiff from the act of the defendant shall be regarded as a permanent injury. "The chief difficulty in this subject concerns acts which result in what effects a permanent change in the plaintiff's land, and is at the same time a nuisance or trespass." 1 Sedgwick on Das. (8th ed.) sec. 94. Some cases hold it to be unreasonable to assume, that a nuisance or illegal act will continue forever, and therefore refuse to give entire damages as for a permanent injury, but allow such damages for the continuation of the wrong as accrued up to the date of the bringing of the suit. Other cases take the ground, that the entire controversy should be settled in a single suit, and that damages should be allowed for the whole injury past and prospective, if such injury be proven with reasonable certainty to be permanent in its character. Id. § 94. We think

upon the whole that the more correct view is presented in the former class of cases. 1 Sutherland on Das. 199–202; 3 id. 369–399; 1 Sedgwick on Das. (8th ed.) §§ 91–94; *Uline* v. *N. Y. C. & H. R. R. Co.*, 101 N. Y. 98; *Duryea* v. *Mayor*, 26 Hun, 120; *Blunt* v. *McCormick*, 3 Denio, 283; *Cooke* v. *England*, 92 Amer. Dec. 630, notes; *Reed* v. *State*, 108 N. Y. 407; *Hargreaves* v. *Kimberly*, 26 W. Va. 787; *Ottenot* v. *N. Y. L. & W. R'y Co.*, 119 N. Y. 603; *Cobb* v. *Smith*, 38 Wis. 21; *Delaware & R. Canal Co.* v. *Wright*, 21 N. J. L. 469; *Wells* v. *Northampton Co.*, 151 Mass. 46; *Barrick* v. *Schifferdecker*, 123 N. Y. 52; *Silsby Manuf'g Co.* v. *State*, 104 N. Y. 562; *Aldworth* v. *Lynn*, 153 Mass. 53; *Town of Troy* v. *Cheshire R. R. Co.*, 23 N. H. 83; *Cooper* v. *Randall*, 59 Ill. 317; *C. & N. W. Ry. Co.* v. *Hoag*, 90 Ill. 339. We do not wish to be understood, however, as holding that the rule laid down in the second class of cases is not applicable under some circumstances, as in the case of permanent injury caused by lawful public structures, properly constructed and permanent in their character. In *Uline* v. *N. Y. C. & H. R. R. R. Co.*, *supra*, a railroad company raised the grade of the street in front of plaintiff's lots, so as to pour the water therefrom down over the sidewalk into the basement of her houses, flooding the same with water and rendering them damp, unhealthy, etc., and injuring the rental value, etc.; in discussing the question of the damages, to which the plaintiff was entitled, the court say: "The question however still remains what damages? All her damages upon the assumption, that the nuisance was to be permanent, or only such damages as she sustained up to the commencement of the action? . . . There has never been in this State before this case the least doubt expressed in any judicial decision . . . that the plaintiff in such a case is entitled to recover only up to the commencement of the action. That such is the rule is as well settled here as any rule of law can be by repeated and uniform decisions of all the courts; and it is the prevailing doctrine elsewhere." Then follows an exhaustive review of the authorities, which sustain the conclusion of the court as above announced.

In *Duryea* v. *Mayor*, *supra*, the action was brought to recover damages occasioned by the wrongful acts of one, who had discharged water and sewage upon the land of another; and it was held, that no recovery could be had for damages

occasioned by the discharge of the water and sewage upon the land after the commencement of the action.

In *Blunt* v. *McCormick*, *supra*, the action was brought by a tenant to recover damages against his landlord because of the latter's erection of buildings adjoining the demised premises, which shut out the light from the tenant's windows and doors; and it was held that damages could only be recovered for the time which had elapsed when the suit was commenced, and not for the whole term.

In *Hargreaves* v. *Kimberly*, *supra*, the action was case to recover damages for causing surface water to flow on plaintiff's lot, and for injury to his trees by the use of coke ovens near said lot, and for injury thereby to his health and comfort; and it was held to be error to permit a witness to answer the following question: "What will be the future damage to the property from the acts of the defendant?" the court saying: "In all those cases where the cause of the injury is in its nature permanent, and a recovery for such injury would confer a license on the defendant to continue the cause, the entire damage may be recovered in a single action; but, where the cause of the injury is in the nature of a nuisance and not permanent in its character, but of such a character that it may be supposed that the defendant would remove it rather than suffer at once the entire damage, which it may inflict if permanent, then the entire damage cannot be recovered in a single action; but actions may be maintained from time to time as long as the cause of the injury continues."

In *Wells* v. *N. H. & N. Co.*, *supra*, where a railroad company maintained a culvert under its embankment, which injured land by discharging water on it, it was held that the case fell within the ordinary rule applicable to continuing nuisances and continuing trespasses; reference was made to *Uline* v. *Railroad Co.*, *supra*, and the following language was used by the Court: "If the defendant's act was wrongful at the outset, as the jury have found, we see no way in which the continuance of its structure in its wrongful form could become rightful as against the plaintiff, unless by release, or grant, by prescription, or by the payment of damages. If originally wrongful, it has not become rightful merely by being built in an enduring manner."

In *Aldworth* v. *Lynn*, *supra*, where the action was for dam-

ages sustained by a landowner through the improper erection and maintenance of a dam and reservoir by the city of Lynn on adjoining land, the Supreme Court of Massachusetts say: "The plaintiff excepted to the ruling, that she was entitled to recover damages only to the date of her writ, and contended that the dam and pond were permanent, and that she was entitled to damages for a permanent injury to her property. An erection unlawfully maintained on one's own land, to the detriment of the land of a neighbor, is a continuing nuisance, for the maintenance of which an action may be brought at any time, and damages recovered up to the time of bringing the suit. . . . That it is of a permanent character, or that it has been continued for any length of time less than what is necessary to acquire a prescriptive right, does not make it lawful, nor deprive the adjacent landowner of his right to recover damages. Nor can the adjacent landowner in such a case, who sues for damage to his property, compel the defendant to pay damages for the future. The defendant may prefer to change his use of his property so far as to make his conduct lawful. In the present case, we cannot say that the defendant may not repair or reconstruct its dam and reservoir in such a way, as to prevent percolation, with much less expenditure than would be required to pay damages for a permanent injury to the plaintiff's land."

In the case at bar, the defendant did not erect the house upon plaintiff's land, but upon his own land. It does not appear, that such change might not be made in the roof, or in the manner of discharging the water from the roof, as to avoid the injury complained of. The first count of the declaration, by its express terms, limits the recovery for damages, arising from the negligent and improper construction of defendant's building, to such injuries as were inflicted "before the commencement of the suit." The second count was framed in such a way, as to authorize a recovery of damages for the flow of water upon plaintiff's premises from some other cause than the wrongful construction of defendant's building; and accordingly plaintiff's evidence tends to show, that the eave-trough, designed to carry off the water from the roof, was so placed as to fail of the purpose for which it was intended. It cannot be said, that the eave-trough was a structure of such a permanent character that it might not be changed, nor can it be said that the de-

fendant would not remove the cause of the injury rather than submit to a recovery of entire damages for a permanent injury, or suffer repeated recoveries during the continuance of the injury. The facts in the record tend to show a continuing nuisance, as the same is defined in *Aldworth* v. *Lynn*, *supra*. There is a legal obligation to remove a nuisance; and "the law will not presume the continuance of the wrong, nor allow a license to continue a wrong, or a transfer of title, to result from the recovery of damages for prospective misconduct." 1 Suth. on Das. 199, and notes.

The question now under consideration has been before this Court. In *Cooper* v. *Randall*, *supra*, the action was for damages to plaintiff's premises, caused by constructing and operating a flouring mill on a lot near said premises, whereby chaff, dust, dirt, etc., were thrown from the mill into plaintiff's house; it was there held, that the trial court committed no error in refusing to permit the plaintiff to prove, that the dust, thrown upon his premises by the mill after the suit was commenced had seriously impaired the value of the property, and prevented the renting of the house; and we there said: "When subsequent damages are produced by subsequent acts, then the damages should be strictly confined to those sustained before suit brought." It is true, that the operation of the mill, causing the dust to fly, was the act of the defendant; but it cannot be said, that it was not the continuing act of the present appellant to allow the roof, or the eave-trough, to remain in such a condition, as to send the water against appellee's house upon the occurrence of a rain-storm. Nor is appellant's house or eave-trough any more permanent than was the mill in the *Cooper* case.

In *C. & N. W. R'y Co.* v. *Hoag*, *supra*, a railway company had turned its waste water from a tank upon the premises of the plaintiff where it spread and froze, and a recovery was allowed for damages suffered after the commencement of the suit; but it there appeared, that the ice, which caused the damage, was upon plaintiff's premises before the beginning of the suit, and the damage caused resulted from the melting of the ice after the suit was brought. It was there said: "The injury sustained by appellee between the commencement of the suit and the trial was not from any wrongful act done by appellant during that time, but followed from acts done before the suit was com-

menced." Here, the water, which caused the injury, was not upon plaintiff's premises, either in a congealed or liquid state, before the beginning of the suit, but flowed thereon as the result of rain-storms, which occurred after the suit was commenced.

We think the correct rule upon this subject is stated as follows: "If a private structure or other work on land is the cause of a nuisance or other tort to the plaintiff, the law cannot regard it as permanent, no matter with what intention it was built; and damages can therefore be recovered only to the date of the action." 1 Sedgwick on Das. (8th ed.) § 93.

It follows from the foregoing observations, that it was error to allow the plaintiff to introduce proof of damage to her property caused by rain-storms occurring after the commencement of her suit, and that the instruction asked by the defendant upon that subject, as the same is above set forth, should have been given.

The judgments of the Appellate and Circuit Courts are reversed, and the cause is remanded to the Circuit Court.

Judgment reversed.

PARTIES LIABLE.

AHERN v. STEELE.

(115 New York, 203.—1889.)

APPEAL from a judgment of the General Term of the Supreme Court, affirming a judgment at Trial Term in favor of the plaintiff, entered upon a verdict, in an action to recover for the death of plaintiff's son, who, October 8, 1882, without fault on his part, fell through a defective pier in the city of New York, and was drowned.

See the dissenting opinion by Danforth, J., for a statement of the facts.

EARL, J. The will of John Gardner came under consideration in *Greason* v. *Keteltas*, 17 N. Y. 491, and it was there held that the trustee under that will took an estate in fee, determin-

able when the purpose of the trust should cease and that such a trustee had power at law to lease for a term which might extend beyond the period of his trust estate. The lease executed by the trustee to Phelan for a term of five years from May 1, 1880, was, therefore, valid for the whole term, and had nearly four years to run at the time of Mrs. De Dion's death, and more than two years at the time of the accident. Hence any reasoning based upon the postulate that the defendants could have terminated the lease before the end of the term will lead to inevitable error.

There was no proof, even if that were in any way important, that the pier was out of repair in 1817, when Gardner died. It became out of repair and defective at some time during the existence of the trust estate, and in that condition it was demised by the trustee. By demising the pier while it was in such a condition as to be a nuisance, the trustee was guilty of a misfeasance, and during the existence of his estate, notwithstanding the lease, he would have been responsible for any damage caused by the nuisance. Even if he had been the trustee of Mrs. De Dion's children, and they had been the beneficiaries under the trust, they would not have been responsible for any nuisance created or permitted by him; and so it was held in *People* v. *Townsend*, 3 Hill. 479. But he was not trustee for them; they derived no title or benefit from him, and had no connection whatever with him. They took their title under the will of John Gardner, and were in no way responsible for what the trustee did, or omitted to do, upon the trust estate.

We have, then, this question for our determination: Are the children of Mrs. De Dion, who became full owners of this pier at the death of their mother, subject to a valid outstanding lease, responsible for a nuisance created thereon during the existence of the precedent estate, without any notice thereof? I have carefully examined the English and American authorities, and confidently assert that there is not an authority to be found in the books imposing such responsibility.

It is not the general rule that an owner of land is, as such, responsible for any nuisance thereon. It is the occupier, and he alone, to whom such responsibility generally and *prima facie* attaches. *Pretty* v. *Bickmore*, L. R. 8 C. P. 401; *Kirby* v. *Boylston Market Assn.*, 14 Gray, 249; *City of Lowell* v. *Spaulding*, 4 Cush. 277; *Inhabitants of Oakham* v. *Holbrook*, 11 id. 299.

The owner is responsible if he creates a nuisance and maintains it; if he creates a nuisance and then demises the land with the nuisance thereon, although he is out of occupation; if the nuisance was erected on the land by a prior owner, or by a stranger, and he knowingly maintains it; if he has demised premises and covenanted to keep them in repair, and omits to repair, and thus they become a nuisance; if he demises premises to be used as a nuisance, or for a business, or in a way so that they will necessarily become a nuisance. In all such cases I believe there is now no dispute that the owner would be liable. But an owner who has demised premises for a term during which they become ruinous, and thus a nuisance, is not responsible for the nuisance unless he has covenanted to repair. It has even been held in some cases that an owner may demise premises so defective and out of repair as to be a nuisance, and if he binds his tenant to make the repairs he is not responsible for the nuisance during the term. *Pretty* v. *Bickmore*, *supra*; *Gwinnell* v. *Eamer*, L. R. 10 C. P. 658; *Leonard* v. *Storer*, 115 Mass. 86. But these cases are not in entire harmony with the decisions in our own state, and probably would not now be generally received as authority in this country or in England.

A grantee or devisee of premises, upon which there is a nuisance at the time the title passes, is not responsible for the nuisance until he has had notice thereof, and in some cases until he has been requested to abate the same. The authorities to this effect are so numerous and uniform that the rule which they establish ought no longer to be open to question. One of the earliest, if not the earliest case in which this rule was announced, is *Penruddock's Case*, 5 Coke, 100 *b*, where it was resolved that an action lies against one who erects a nuisance without any request made to abate it, but not against the feoffee, unless he does not remove the nuisance after request; and in *Pierson* v. *Glean*, 14 N. J. Law, 37, Chief Justice Hornblower said: "The law, as settled in *Penruddock's Case*, has never, I believe, been seriously questioned since." In *Plumer* v. *Harper*, 3 N. H. 88, Richardson, Ch. J., said: "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." In *Woodman* v. *Tufts*, 9 N. H. 88, it was held that where a dam was erected, and land flowed by the grantor

of an individual, the grantee will not be liable for damages in continuing the dam and flowing the land as before, except on notice of damage and request to remove the nuisance or withdraw the water. In *Eastman* v. *Company*, 44 N. H. 144, it was held that no notice or request to abate the nuisance is necessary before bringing suit against the original wrong-doer in such cases for the damages done; but that the grantee of the nuisance is not liable to the party injured until, upon request made, he refuses to remove the nuisance. SARGENT, J., writing the opinion, said: "The doctrine of the cases in this state and elsewhere is that he who erects a nuisance does not by conveying the land to another transfer the liability for the erection to the grantee; and the grantee is not liable until upon request he refuses to remove the nuisance, for the reason that he cannot know until such request but the dam was rightfully erected; and there can be no injury in holding to this doctrine, as the original wrong-doer continues liable notwithstanding his alienation." To the same effect is *Carleton* v. *Redington*, 21 N. H. 291. In *Johnson* v. *Lewis*, 13 Conn. 303, where it appeared, in an action for the obstruction of a water-course by raising a dam, that the dam creating the obstruction was erected by the defendant's grantor, it was held that the plaintiff could not recover without proving a special request to the defendant to remove the obstruction. SHERMAN, J., writing the opinion, said: "The law is well settled that a purchaser of the property on which a nuisance is erected is not liable for its continuance, unless he has been requested to remove it. This rule is very reasonable. The purchaser of property might be subjected to great injustice if he were made responsible for consequences of which he was ignorant and for damages which he never intended to occasion. They are often such as cannot be easily known, except to the party injured;" and so also it was held in *Noves* v. *Stillman*, 24 Conn. 15. In *Pillsbury* v. *Moore*, 44 Me. 154, it was held that a purchaser of property, on which a nuisance is erected, is not liable for its continuance unless he has been requested to remove it. In *Pierson* v. *Glean*, *supra*, it was held that an action for continuing a nuisance cannot be maintained against him who did not erect it without a previous request to him to remove or abate it. In *Beavers* v. *Trimmer*, 25 N. J. Law, 97, it was held that when the action is not brought against the original erector of a nuisance, but

against a subsequent owner or tenant, a special request to remove it must be alleged. In *McDonough* v. *Gilman*, 3 Allen, 264, it was held that a tenant for years is not liable for keeping a nuisance as it used to be before the commencement of his tenancy if he had not been requested to remove it or done any new act which of itself was a nuisance. And the same rule has repeatedly been laid down in this state. In *Hubbard* v. *Russell*, 24 Barb. 404, an action against the continuator of a private nuisance originally erected by another to recover damages for the injury sustained thereby, it was held that the plaintiff must prove a notice to the defendant of its existence and a request to remove it. In *Miller* v. *Church*, 2 T. & C. 259, in an action to recover damages for the overflow of a mill pond, it was shown that the defendant, the owner of the pond, was not in possession, having leased the same to a third party, and it was held that the owner of the premises overflowed could not recover for such overflow without showing that the defendant had notice or knowledge of the existence of the same before the action was brought. And the same rules, without any variation, are laid down by all the text-writers. In Chitty on Pleadings, 71, it is said that every occupier is liable for the continuance of a nuisance on his own land, though erected by another, if he refuses to remove the same after notice. And in 2 Chitty on Pleadings, 333, note C, the author adds that if the action is not brought against the original erector of the nuisance, but against his feoffee, lessee, etc., it is necessary to allege a special request to the defendant to remove it. In Cooley on Torts, 611, the learned author says: "A party who comes into possession of land as grantee or lessee, with a nuisance already upon it, is not in general liable for the continuance of the nuisance until his attention has been called to it and he has been requested to abate it." In 1 Hilliard on Torts (3d Ed.), 574, it is said: "That a person who continues a nuisance erected by another is liable therefor at the suit of any party damaged thereby if he had knowledge of its hurtful tendency, or more especially if notified or requested to remove it." In Moak's Underhill on Torts, 253–255, the learned editor, with many citations of authorities to sustain him, says: "Where premises are out of repair at the time they are leased in particulars which the landlord is bound as against third persons not to allow, the landlord is liable for any injuries sustained by a third person for such want of repair.

But not even in such case if the tenant's *use* is what produces the injury." "A landlord who negligently or improperly constructs his premises—as a dam—or where they become defective, after notice suffers them to remain so, is liable to his tenant or a stranger, who being himself free from fault, is injured thereby." "Where a lessee or grantee continues a nuisance of a nature not essentially unlawful, he is liable to an action for it only after notice to reform or abate it." In Addison on Torts (Wood's Am. Ed.), § 240, it is said: And so an action will lie against the landlord for a permanent nuisance, although the nuisance was created before the reversion came to him, *i. e.*, if he knew of it and might have determined the tenancy before the injury happened, as in the case of a tenancy from year to year. "If an action is brought against the originator of a nuisance, it is not necessary to demand the abatement or discontinuance of the nuisance before commencing the action, but if the action is brought against the mere continuance of a preceding nuisance, a request to remove the nuisance must be made before the action is commenced." § 280. "The occupier of lands is in general responsible for the continuance of a nuisance upon them; and so is the landlord if the nuisance existed at the time he demised them or created the tenancy after he had the power of determining it." § 283.

According to these authorities the simple fact that the three children of Mrs. De Dion became owners of the pier upon the death of their mother, did not make them responsible for this nuisance then existing. Suppose this accident had happened an hour, or a day, or one week after the death of their mother, would they have been responsible, even if the pier had come to them not subject to any lease? To cast such a responsibility upon a grantee or devisee might imperil his whole fortune. Before it can be cast in such a case, he must have notice of the nuisance and a reasonable time to abate it. There must be some fault, some *delictum* on his part, and his liability can have no other basis. The notice required to put him in fault may be proved like any other fact. The mere fact that the owner personally occupies the premises upon which the nuisance is alleged to exist is not always sufficient to charge him with notice of its existence. It may, like a dam, or a building obstructing ancient lights, be of such a nature that he may rightfully suppose that he has the right to maintain it; or it may be of such a character

that he may not know of its harmful tendency; in such cases he must have actual notice that the structure is a nuisance; and there may be cases in which, besides notice, there must be a request to abate. But where the structure or the condition of premises is such as to be absolutely a nuisance, plainly visible, so that an occupier may see and know the nuisance and its dangerous character or hurtful tendency, then an owner in the occupation of the premises may, from his mere occupancy, be charged with notice thereof. In this case if these defendants had gone into possession of this pier personally, or by their agents, its character was such that they must have known that it was dangerous and a nuisance, and no direct proof of notice would have been required to charge them; it could have been inferred. But when there is no proof that the owners of premises which came to them with a nuisance existing thereon without their fault, were ever in possession of the premises, or ever even saw them, there is no possible ground for charging them with notice or imputing to them legal fault.

But the position of these defendants is stronger than the one we have just been dealing with. This pier came to them, not only with this nuisance existing thereon, but subject to an outstanding lease for some years which they had no power to terminate. The lessee who occupied and used the pier was under obligation to the public to see that it did not become a nuisance, and it was his duty to respond for any damage sustained by any person from the nuisance. The owners of the reversion had the right, in the absence of notice, to suppose that he would discharge such duty and protect the public, and they were under no obligations to see by watchful vigilance that he performed such duty. And so it has been held in all the analogous cases, that the landlord, in the absence of notice, is liable only in case he demised the premises with the nuisance thereon. In *Rosewell* v. *Prior*, 2 Salkeld, 460, a tenant for years erected a nuisance and afterwards made an under-lease, and 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. And it was held that it would, "for he transferred it with the original wrong, and his demise affirms the continuance of it." In *Todd* v. *Flight*, 9 C. B. (N. S.) 377, it was held that an action lies against the owner of premises who lets them to a tenant in a

ruinous and dangerous condition, and who causes or permits them to remain so until by reason of the want of reparation they fall upon and injure the house of an adjoining owner. In *Nelson* v. *Liverpool Brewing Company*, L. R. 2 C. P. Div. 311, it was held that a landlord is liable for an injury to a stranger by the defective repair of demised premises only when he has contracted with the tenant to repair, or where he has been guilty of misfeasance, as, for instance, in letting the premises in a ruinous condition, and that in all other cases he is exempt from responsibility for accidents happening to strangers during the tenancy. Lopes, J., writing the opinion, said: "We think there are only two ways in which landlords or owners can be made liable in the case of injury to a stranger by the defective repair of premises let to a tenant, the occupier, and the occupier alone, being *prima facie* liable—first in the case of a contract by the landlord to do repairs where the tenant can sue him for not repairing; secondly, in the case of a misfeasance by the landlord, as, for instance, where he lets premises in a ruinous condition. In either of these cases we think an action would lie against the owner." In Woodfall's Landlord and Tenant (13th ed.) 735, it is said: "As regards the liability of landlords to third persons, it may be taken as a general rule that the tenant, and not the landlord, is liable to third persons for any accident or injury occasioned to them by the premises being in a dangerous condition; and the only exceptions to the rule appear to arise when the landlord has either (1) contracted with the tenant to repair; or (2) where he has let the premises in a ruinous condition; or (3) where he has expressly licensed the tenant to do acts amounting to a nuisance." In *Knauss* v. *Brua*, 107 Penn. 85, repeated in *Fow* v. *Roberts*, 108 id. 489, it is said: "We do not doubt but that in the absence of an agreement to repair, the landlord is not liable to a third party for a nuisance resulting from dilapidation in the leasehold premises whilst in the possession of a tenant." In *City of Lowell* v. *Spaulding*, 4 Cush. 277, Shaw, Ch. J., said: "By the common law, the occupier, and not the landlord, is bound, as between himself and the public, so far to keep buildings in repair that they may be safe for the public; and such occupier is *prima facie* liable to third persons for damages arising from any defect. If, indeed, there be an express agreement between landlord and tenant that the former shall keep the premises in repair so that in case

of a recovery against the tenant he would have his remedy over, then, to avoid circuity of action, the party injured by the defect and want of repair may have his action in the first instance against the landlord. But such express agreement must be distinctly proved." And to the same effect is *Lorne* v. *Farren Hotel Company*, 116 Mass. 67. In *Cunningham* v. *Cambridge Savings Bank*, 138 Mass. 480, Morton, Ch. J., said: "It is often said in the cases that the occupier, and not the owner, of a building is liable to third persons for damages arising from any defect. But by occupier is meant, not merely the person who physically occupies the building, but the person who occupies it as a tenant having the control of it, and being, as to the public, under the duty of keeping it in repair." In *Dalay* v. *Savage*, 145 Mass. 38, land abutting on a public street in a city was sold under a power contained in a mortgage, and the owner of the equity of redemption released any title he might have to the purchaser, and was allowed by the purchaser to remain in possession under an agreement that he should pay rent at a certain rate monthly. At the time of the sale there was an open and visible defect in the cover of a coal hole in the sidewalk in front of a house on the land, which hole led to the cellar of the house. In consequence of this defect, during the tenancy, a person walking on the sidewalk fell into the hole, and it was held that he could maintain an action against the purchaser of the land for the injury thereby sustained. Field, J., writing the opinion, said: "It seems to be settled that if the landlord lets premises abutting upon a way which were from their condition or construction dangerous to persons lawfully using the way, he is liable to such persons for injuries suffered therefrom, although the premises are occupied by a tenant." "The reason of the rule that if a landlord lets premises in a condition which is dangerous to the public, or with a nuisance upon them, he is liable to strangers for injury suffered therefrom, is that by letting he has authorized the continuance of the nuisance," and the learned judge further said: "If the defendant had bought the premises subject to a lease to Breslin, [the tenant,] who had continued in occupation under it, a different case would have been presented;" and he held the defendant responsible for the nuisance solely on the ground that he had demised the premises with the nuisance thereon. In *Nugent* v. *B. C. & M. Railroad Company*, 80 Me. 62, 77, Virgin, J., writing the opinion, said:

"It is settled law that where the owner lets premises which are in a condition which is unsafe for the avowed purpose for which they are let, or with a nuisance upon them when let, and receives rent therefor, he is liable whether in or out of possession, for the injuries which result from their state of insecurity to persons lawfully upon them; for by the letting for profit he authorizes a continuance of the condition they were in when he let them, and is, therefore, guilty of misfeasance." In *Joyce* v. *Martin*, 15 R. I. 558, A., owning a defective wharf used in connection with a public resort, and knowing the defect, leased the place and wharf to B., who learned of the wharf defect after accepting the lease, but continued to use the wharf and place for public resort; and in an action for damages to C., who was injured by the wharf defect, it was held that the action was maintainable against both A. and B. jointly—against A. solely on the ground that he knew the wharf was defective when he let it.

In *Owings* v. *Jones*, 9 Md. 108, the plaintiff sued for damages for injuries by falling into a vault appurtenant to the property of the defendant, and built under the sidewalk of a public street. It was shown in defense that the property had been leased by the defendant for the term of seven years, for an annual rent, and the court held that the defendant was not relieved from liability if the vault was so constructed as to be unsafe for passers-by when the premises were let, or as to be liable to become unsafe in the necessary opening for the purpose of cleaning it; and it laid down the following rules: (1) When property is demised and at the time of the demise is not a nuisance, and becomes so only by the act of the tenant while in his possession, and injury happens during such possession, the owner is not liable. (2) But where the owner leases premises which are a nuisance, or must, in the nature of things, become so by their use, and receives rent, then, whether in or out of possession, he is liable for injuries received from such nuisance. In *Albert* v. *State*, 66 Md. 325, the action was brought by a minor for damages sustained by him by the death of his parents, who were drowned by reason of the defectiveness of a wharf in the occupation of the defendant's tenant. The instruction given on the trial was that, "if the jury found that the defendant was the owner of the wharf and that he rented it out to a tenant, and that at the time of the renting the wharf was unsafe, and the defendant knew, or by

the exercise of reasonable diligence could have known of its unsafe condition, and the accident happened in consequence of such condition, then the plaintiff was entitled to recover;" and this was, upon appeal, held to be a correct exposition of the law. In *Clancy* v. *Byrne*, 56 N. Y. 129, the true rule was fully apprehended by FOLGER, J., who wrote the opinion. That was a case where plaintiff's horse fell through a defective pier, and the action was against a lessee who had covenanted with his landlord to make all ordinary repairs. The lessee had sublet the pier, and was not in the occupancy thereof, and it was held that if premises are in good repair when demised, but afterwards become ruinous and dangerous, the landlord is not responsible therefor either to the occupant or to the public during the continuance of the lease, unless he has expressly agreed to repair or has renewed the lease after need of repair has shown itself; and that this rule applies to a lessee out of possession who has sublet to another who is in possession. The learned judge said: "Generally speaking, the person responsible for a nuisance is he who is in occupation of the premises on which it exists." "As between him who is landlord and owner and him who is the lessee and occupant of the premises, there is, in general, no obligation upon the former to keep them in repair where he has made no express contract to that effect." "Numerous authorities are cited. We have examined all of them. It will be found that in them the liability of the defendant is placed upon one of these grounds, viz.: That he owned or had rights in the premises, and leased them with the nuisance upon them; that he was in the possession of the premises and used them in their defective condition; that he was under a contract enforceable by plaintiff to keep the premises in repair and failed so to do; that he, in the first instance, created the nuisance and put it in the power of others to continue it; or that, being a municipal corporation, there was a duty upon it to repair. If there are authorities which, in the remarks of the court, reach farther than this, they will be found to go beyond the needs of the case in hand." In *Jaffe* v. *Harteau*, 56 N. Y. 398, it was held that a lessor of buildings, in the absence of fraud or any agreement to that effect, is not liable to the lessee or others lawfully upon the premises for their condition, or that they are tenantable and may be safely and conveniently used for the purposes for which they are apparently intended. In *Swords* v. *Edgar*, 59

N. Y. 28, the plaintiff's intestate was so injured by the falling of a defective pier that he died, and the action was brought to recover damages caused by his death. The defendant, the landlord, had rented the pier to a tenant who was in possession thereof at the time of the accident; and the defendant was held liable solely on the ground that he had demised the pier while the same was in a defective condition. In *Wenzlick* v. *McCotter*, 87 N. Y. 122, it was held that where a person acquires title to land upon which is a nuisance, the mere omission to abate or remove it does not render him liable; and that there must be something amounting to actual use, or a request to abate the nuisance must be shown. In *Edwards* v. *New York and Harlem Railroad Company*, 98 N. Y. 247, it is said: "If a landlord lets premises and agrees to keep them in repair, and he fails to do so, in consequence of which any one lawfully upon the premises suffers injury, he is responsible for his own negligence to the party injured. If he demises premises knowing that they are dangerous and unfit for the use for which they are used, and fails to disclose their condition, he is guilty of negligence which will in many cases impose responsibility upon him. If he creates a nuisance upon his premises, and then demises them, he remains liable for the consequences of the nuisance as the creator thereof, and his tenant is also liable for the continuance of the same nuisance. But when the landlord has created no nuisance and is guilty of no willful wrong or fraud or culpable negligence, no case can be found imposing any liability upon him for any injury suffered by any person occupying or going upon the premises during the term of the demise; and there is no distinction stated in any authority between cases of a demise of dwelling-houses and of buildings to be used for public purposes. The responsibility of the landlord is the same in all cases. If guilty of negligence or other *delictum* which leads directly to the accident and wrong complained of, he is liable; if not so guilty, no liability attaches to him." *Wolf* v. *Kilpatrick*, 101 N. Y. 146, is an instructive case. There the defendants were owners of certain premises in the city of New York, which they leased to M., who, under and in accordance with a permit from the city, built vaults under the sidewalk in front thereof, with a coal-hole, which was properly constructed, and in the usual and permitted manner. Through the wrongful act of a stranger, who broke the stone supporting the iron cover of

the coal-hole, the cover turned when the plaintiff stepped upon it, and he fell and was injured. In an action to recover damages, it did not appear that the defendants had any knowledge or notice of the defect, and it was held that they were not liable; that they would not have been liable had they themselves constructed the vaults lawfully and with due prudence and care, and thereafter transferred possession of the premises to a third person without covenant on their part to repair; that if the coal hole became a nuisance after the stone was broken, only the person who created the nuisance, or he who suffered it to continue, was responsible; that a party out of possession and control and who had no knowledge, actual or constructive, of the defect, could not be said to have suffered it to continue; that a landlord out of possession is not responsible for an after-occurring nuisance unless, in some manner, he is in fault for its construction or continuance, and that the bare ownership will not produce this result. FINCH, J., said: "How can it be said that they (the defendants) suffered it (the nuisance) to continue and so failed in their duty if they had no knowledge, actual or constructive, of the defect, and were out of possession and control?" "It is quite certain that the plaintiff in this case was bound to establish some fault of omission or commission on the part of the landlord tending to the injury, and barely showing him to be the owner is not enough. There was no fault of commission. There could be no fault of omission unless the landlord was bound to repair the defect, had actual or constructive notice of its existence, or was bound at his peril to discover and to remove it." In *Walsh* v. *Mead*, 8 Hun, 387, DANIELS, J., said: "The erection and maintenance of a nuisance is a wrong, and by leasing the building affected by it to another person, the owner continues it, and stipulates for the enjoyment of the profit from it." In 1 Thompson on Negligence, 317, the learned author has concisely stated the law of nuisance in harmony with all these cases.

Now, within these authorities, what ground is there for imposing liability upon these defendants for this nuisance? They did not create it, and had no connection whatever with those who did create it. They were not bound by the lease to repair the pier. They did not demise the pier with the nuisance thereon, and they had no notice, actual or presumptive, of the existence of the nuisance. None of the grounds of liability exist which

are mentioned by Judge FOLGER in *Clancy* v. *Byrne*. They were simply entitled to the rent; it is not even proved that they actually received any. But it has never been held in any case that the receipt of rent imposes responsibility upon a landlord for a nuisance for which he is not otherwise responsible. Landlords always are entitled to rent; and if the mere receipt of rent would make them responsible for a nuisance upon the demised premises, then they would always be responsible, irrespective of other circumstances which have always been deemed necessary to create the responsibility.

The fact that the defendants, under the lease, had the right to go upon the pier and make repairs, if they should see fit to do so, is wholly immaterial in this case. Even when an owner demises premises and covenants to repair, the covenant cannot inure directly to the benefit of a third person not a party thereto. But in such case the third person injured because, for want of repairs, the demised premises have become a nuisance, has a cause of action primarily against the tenant. But because the tenant in case of a recovery against him could sue his landlord for indemnity upon the covenant, to prevent circuity of action, the person injured may bring his action against the landlord, not because the landlord owed him any duty to repair, but because he owed that duty to his tenant. It would have been wholly immaterial if these defendants, owners of the pier, had let it without reserving any right to go upon it for repairs, and even if they could not have gone upon it for repairs without being trespassers. *Fish* v. *Dodge*, 4 Denio, 311; *Swords* v. *Edgar*, *supra*. There is no case which holds that whether the landlord can or cannot go upon the demised premises to make repairs is a material circumstance affecting his liability for a nuisance existing thereon. It was held in *Clancy* v. *Byrne*, *supra*, that a lessee who has covenanted with his landlord to repair is not responsible to a stranger for a nuisance upon the demised premises while in the possession of a subtenant to whom he had let them. As he had made no covenant to repair with his tenant, and was not bound to indemnify him, the person injured could not maintain an action against him, although he had covenanted with his landlord to repair. Here, according to the law of that case, if these owners had even been under a covenant with the predecessors in the title or with any other person but Phelan, to keep this pier in repair, their breach of the covenant

and failure to discharge their duty to their covenantee would not have made them liable for the death of the child; and with much less reason can such a liability spring from a mere stipulation in a lease made by one for whose acts they are in no way responsible which merely put it in their power to make the repairs. In cases where it is said that a landlord bound to make repairs upon demised premises is responsible for a nuisance thereon, the obligation to make the repairs was one existing between him and the tenant. *Russell* v. *Shenton*, 2 Gale & D. 573. The whole argument on this point is summed up in the statement that, as there was here no breach by the defendants of any duty due from them to the tenant, the stipulations in the lease do not concern a stranger thereto.

There is no authority from the reported decisions or from the text-books which imposes upon the landlord, not otherwise liable for a nuisance upon demised premises, the duty of active vigilance to ascertain their condition. A landlord has never been held responsible for a nuisance because he did not himself obtain notice of its existence. But it has always been held to be the duty of any person seeking to enforce the landlord's responsibility for a nuisance to show that he had such notice.

There are two cases to which I have not yet referred, which are so like this in all material particulars that they ought to be received as conclusive authority for the defense of this action. In *Woram* v. *Noble*, 41 Hun, 398, a case entirely similar to this, the action was brought to recover damages for an injury sustained in consequence of a defective coal-hole; and it appeared that the defendant became the owner of the premises in September, 1883, subject to a lease to a tenant expiring May 1, 1884, which required the tenant to make all repairs; that the coal-hole was then in the sidewalk, but it had not been constructed by the defendant, nor did he have any notice or knowledge of its defective condition, although the tenant had noticed the depression in the stone about a year previous to the accident; and it was held that the defendant could not, in the absence of any evidence to show that he was responsible for the condition of the coal-hole or had knowledge of its defective condition, be held liable for the injury sustained by the plaintiff. The judge writing the opinion said: "We find no judicial decision and no principle enunciated in any elementary work that will furnish a basis for a recovery against the defendant in this

action. He did not construct the work that became a nuisance, and he did not continue it in any legal sense." There, as here, the defendant became the owner subject to a lease, and the nuisance existed at the time he became such owner, and it was held that he could not be made liable for the accident without proof of notice to him of the existence of the nuisance. In *Conhocton Stone Road* v. *New York and Erie Railroad Co.*, 51 N. Y. 573, the action was brought to recover damages for injuries to the plaintiff's road-bed, caused by the same being washed and flooded in the years 1864 and 1865, by reason of an embankment and bridge built over a creek by a prior owner of defendant's road in 1851 or 1852. The defendant became the owner of the embankment, bridge and of its road by purchase at a foreclosure sale in 1857, and in February, 1863, it leased its road, including the embankment and bridge, to the Erie Railroad Company, which took possession of the road and had possession under its lease at the time of the damage complained of by the plaintiff; and the general rule was affirmed that in order to maintain an action for damages resulting from a nuisance upon defendant's land where such nuisance was erected by a prior owner before conveyance to defendant, it is necessary to show that before the commencement of the action he had notice or knowledge of the existence of the nuisance, but that it is not necessary to prove a request to abate it. Judge Lott, writing the opinion, said: "Where persons succeeding to the ownership of land on which a nuisance had previously been erected have been held liable for damages resulting from its subsequent continuance, it appeared either that it was after notice of its existence or that the question of such notice had not been raised at the trial." That case is a most emphatic authority for the defendants here. There the defendant became the owner of the premises with the nuisance existing thereon, and actually leased them in the same condition to another company which was in possession at the time of the damage complained of, and yet, in the absence of proof that the defendant had notice of the nuisance, it was held not to be liable for damages caused thereby.

It is frequently said that a landlord who has demised premises with a nuisance thereon, continues liable for the nuisance, although he did not create it, because it was a misfeasance to demise them in that condition. But it will be found that all,

or nearly all, the cases in which this has been said are cases in which, at the time of the demise, the landlord had notice of the nuisance. In the case last cited the defendant demised the premises with the nuisance thereon, and yet it was held not to be liable because there was no proof of notice.

I will now notice the principal cases which are supposed to be in conflict with some of the views I have expressed and with the conclusion I have reached. In *Brown* v. *Cayuga and Susquehanna Railroad Co.*, 12 N. Y. 486, the predecessor of the defendant had constructed its road across a stream of water in such a manner as to cause the stream to overflow and damage the lands of the plaintiff. Upon the trial the defendant insisted that, inasmuch as it had no agency in building the obstruction in the stream or in making the excavation through the bank, but that had been done by the old company, it was not liable, and upon this ground it moved for a nonsuit, which was denied. Upon the appeal it was held that the defendant could not have the benefit of the point that there had been no request to abate the nuisance because it was in no way taken at the trial, and hence the case was treated as if the request had actually been made and proven. The point decided, as stated in the head-note, is that "the successor to the title and possession of property who omits to abate a nuisance erected thereon by another, after notice to do so, is liable for the damage caused by its continuance." Judge Denio, writing one of the opinions, held that an action on the case will lie against one who continues a nuisance by which damage is occasioned to the plaintiff without notice first given to remove it. He cited no authority sustaining his views, but cited authorities in conflict with them, holding that they were not binding upon the court. But it is expressly stated that the court did not pass upon the question whether the defendant was liable, without notice, to remove the obstruction and restore the bank of the stream; and the views of Judge Denio, besides having the support of no authority in this country or England, were distinctly repudiated in *Conhocton Stone Road* v. *Buffalo, New York & Erie Railroad Co.*, *supra*. In *McCarthy* v. *Syracuse*, 46 N. Y. 194, damage was caused by a defective city sewer which it was the duty of the city to keep in repair, and it was held liable for the damage without notice of the defect in the sewer, because it had omitted to discharge that duty. That case bears no analogy to

this. In *Irvine* v. *Wood*, 51 N. Y. 224, the action was against lessor and lessee to recover for injuries sustained by the plaintiff from a defective coal-hole in the street. The plaintiff recovered against both defendants and both appealed, but the lessor abandoned his appeal, and the case was argued only on behalf of the lessee who had maintained and used the coal-hole in its defective condition, and it was held that he was liable. The main litigation at the trial was as to the liability of the lessee which rested upon plain principles of law, and the case is authority only as to such liability. No point or claim was made at the trial that the landlord had no notice of the defective condition of the coal-hole, or that he could be made liable for the accident only upon proof of such notice, and no such point was before the court upon the appeal. In *Swords* v. *Edgar*, *supra*, as stated above, the action was against the landlord, who demised the pier when it was in a defective and dangerous condition, and the case is a valuable authority for the views I have expressed. In *Beck* v. *Carter*, 68 N. Y. 283, and *Clifford* v. *Dam*, 81 id. 52, the actions were in each case against the defendant, who had himself created the nuisance. While in *Bellows* v. *Sackett*, 15 Barb. 96, some things were said by the judge writing the opinion which are not now the law, the case was properly decided, because there the defendant, the landlord, erected the nuisance and demised the premises with the nuisance thereon. *Rex* v. *Pedly*, 1 Adol. & E. 822, is much relied upon by the plaintiff as an authority in his favor. There the defendant purchased premises which were in the occupancy of tenants under a demise for short periods of time from the prior owner, and a nuisance arose thereon after the purchase and after the defendant began to receive the rents. The defendant, the periods being short, was treated as having relet the premises to the tenants with the nuisance thereon, and it was held that he thereby became liable for the nuisance; and upon that ground the decision can stand in harmony with all the cases I have cited. But the court seems to have gone further and affirmed a proposition, not necessary for the decision, that such a reversioner is liable to be indicted for the continuing of the nuisance, if the original reversioner would have been liable, though the purchaser has had no opportunity of putting an end to the tenant's interest or abating the nuisance. That proposition is unsound; and as to that the case has been overruled and dis-

tinctly repudiated in England. In *Rich* v. *Basterfield*, C. B. Rep. 784, the case of *Rex* v. *Pedly*, was largely criticised, and Cresswell, J., writing the opinion, said of it that "if *Rex* v. *Pedly* is to be considered as a case in which the defendant was held, because he had demised the buildings where the nuisance existed, or because he had relet them after the user of the buildings had created the nuisance, or because he had undertaken the cleansing, and had not performed it, we think the judgment right and that it does not militate against our present decision. But if it is to be taken as a decision that a landlord is responsible for the act of his tenant in creating a nuisance by the manner in which he uses the premises demised, we think it goes beyond the principle to be found in any previously decided cases, and we cannot assent to it." In *Todd* v. *Flight*, *supra*, *Rex* v. *Pedly* was cited as holding that if the defendant demised the privy either when it had become a nuisance, or if he had the duty of cleansing it after it became a nuisance, he might be indicted for the nuisance. In *Russell* v. *Shenton*, *supra*, it was said by Lord Ch. J. Denman, in reference to *Rex* v. *Pedly*, that "it was an indictment against the owners of houses and privies which had been built for the very purpose of being so used as to create a nuisance unless the owner took effectual means to prevent it. These means not having been adopted, the owner who received rents for both was held liable for the public nuisance." In the case of *Gandy* v. *Jubber*, 5 B. & S. 78, the owner of premises, attached to which was an area, let the same to a tenant from year to year and died, having devised the property, with an iron grating over the area improperly constructed and out of repair so as to amount to a nuisance, to the defendant, who having no notice of the nuisance suffered the tenant to remain in occupation of the premises upon the same terms as before, receiving rent; and it was held that he was liable for damage caused by the nuisance on the ground that he had relet the premises with the nuisance thereon. That case is in no way an authority for the plaintiff, but by implication the point decided strongly favors the contention of the defendants. It is clear that the court was of the opinion that the defendant would not have been liable but for the fact that he had let the premises with the nuisance thereon. That case went by appeal to the Exchequer Chamber, and is again reported in the same volume, at page 485; and it was there stren-

nously contended on behalf of the defendant that he was not liable because he could not be treated as having demised the premises with the nuisance thereon, and because he had no notice of the nuisance. The court took the case under consideration and finally recommended the plaintiff to accept a *stet processus*, (substantially a final stay of proceedings,) and the plaintiff accepted it, evidently induced so to do because of information that the judgment would go against him. In the course of the argument in the Exchequer Chamber, Chief Justice Erle said of the landlord's liability: "If he lets the premises with a nuisance, all parties agree that he is responsible." The reasons why the Exchequer Chamber recommended that the plaintiff should accept a *stet processus* do not appear in the report. But in 9 Best & Smith, 15, there is what purports to be the undelivered opinion of the court in that case, showing that the court had unanimously come to the conclusion to reverse the judgment of the Queen's Bench; and in the opinion the case of *Rex* v. *Pedly* was again criticised, explained and limited as in prior cases. One question in the case was, whether a landlord, who has the power to determine a tenancy from year to year by giving notice, and who does not exercise it, is to be held as thereby reletting the premises. In the opinion published in 9 Best & Smith, the ground on which the Exchequer Chamber differed from that of the Queen's Bench distinctly appears as follows: "We agree that, to bring liability home to the owner, the premises being let, the nuisance must be one which was, in its very essence and nature, a nuisance at the time of the letting, and not something which was capable of being thereafter rendered a nuisance by the tenant, and that it is a sound principle of law that the owner of property receiving rent should be liable for a nuisance existing on his premises at the date of the demise; but that wherein we differ is, that a landlord, from year to year, having the power to give the ordinary notice to quit, and not giving it, is thereby to be held as reletting the premises, and that such failing to give notice is equivalent to a reletting." That case, then, is an authority that, upon such facts as we have here, devisees of premises under a lease for a term with no power in the devisees to terminate the lease during the term, such devisees are not liable, although they received rent, for a nuisance which they did not cause, create or authorize. In *Salmon* v. *Bensley*, Ry. & M.

189, a *nisi prius* case of very doubtful authority, it was held that a notice to remove the nuisance left at the premises is evidence against a subsequent occupier. That case has no bearing upon this because the defendants were not subsequent occupiers; they never occupied, and did not continue the nuisance. The pier remained in the occupancy of Phelan. Besides, there is no question of notice in this case, as the court held, as matter of law, that the defendants were responsible if the nuisance existed at the time of the demise to Phelan. In Wood's Landlord and Tenant, 618, the author says: "Where a nuisance results from such want of repair, and there is no covenant to repair on the part of either landlord or tenant, an action may be maintained against either of them therefor." But he was speaking of repairs which the landlord was bound by some law to make. But there is no general law and no rule of law which imposes upon the landlord the duty to make repairs upon premises in the occupancy of his tenant. At page 917 the learned author states the proper rule in harmony with all I have said. There he says: "The landlord's right of possession being suspended during the term, it follows that his liabilities in respect to the possession are also suspended in respect to such matters or defects in the premises as existed when the premises were let arising from the manner of use or defective construction. If a nuisance existed upon the premises at the time of the demise, the landlord as well as the tenant is liable for the damages resulting therefrom, although it only becomes a nuisance by the act of the tenant in using it for ordinary purposes. And if the tenant creates a nuisance upon the premises during the term by an unusual or extraordinary use thereof, although the landlord cannot be made chargeable for the consequences in the first instance, yet if he subsequently renews the lease with the nuisance thereon, he becomes chargeable therefor the same as though the nuisance had existed at the time of the original demise; and when a person is in possession as a tenant from year to year, each year is treated as a reletting, so that the landlord becomes chargeable for a nuisance created by the tenant during a previous year which is in existence at the commencement of the new year;" and there is more to the same effect, as there is also in Wood's Law of Nuisance, 78, 141.

If Phelan had been the mere servant or agent of the defendants, and had caused or permitted this or any other nuisance

upon the pier, then the defendants would have been responsible for it, and the cases of *Clark* v. *Fry*, 8 Ohio St. 358, and *Ellis* v. *Sheffield Gas Co.*, 2 Ellis & Black, 767, would have been in point.

It is said that many of the cases I have cited were nuisances created by damming, obstructing, polluting and diverting streams, and that they are not, therefore, applicable. Why are they not applicable? They were all decided by the application of the general law of nuisance, and it has never been suggested in any case that there is any law of nuisance peculiar to such cases, and that they are not to be governed by the same rules that apply to other nuisances. They announce general rules in terms applicable to all cases of nuisance.

If it is at all material, it is a mistake to assume that the children of Mrs. De Dion first became owners of this pier upon the death of their mother. Under the will of their grandfather, John Gardner, they had vested remainders therein long before the death of their mother, and long before the pier was out of repair. They took no new title upon the death of their mother. The estate which was before in them was simply enlarged by the disappearance of the precedent estate. Were they bound in some way to divest themselves of the estate which they had long had in order to escape responsibility for a nuisance which they had not created or authorized? Or, if they did not or could not do that, were they bound to go upon the pier and possibly expend in repairs more than the entire income therefrom to escape responsiblity for the nuisance? And were they bound to do this at the peril of great damages, without notice of the nuisance, while the pier was in the possession of a tenant who had hired it from a stranger to them at a small rent, because it was out of repair, and who was under a duty to the public to keep it safe and in repair? If the children of Mrs. De Dion had, upon the death of their mother, demised this pier without any covenant to repair, and it had become out of repair and a nuisance during the term of the demise, they would not have been responsible for the nuisance; and why should a greater responsibility be cast upon them because the pier came to them subject to the demise? What have they done to incur the responsibility? If they had demised the pier knowing it was out of repair, they would have been guilty of continuing the nuisance, and upon that ground would have been responsible for it.

But they have done nothing. They neither created, authorized or continued the nuisance, and they were not bound by contract or the law to discharge a duty which rested upon the tenant.

I am confident that a holding that the defendants are liable to the plaintiffs for the consequences of this nuisance would be a departure from the law of nuisance as universally approved in the books.

I have not thus far alluded to the claim of the defendants, that they may find protection in the fact that a receiver had been appointed of the rents. It is not necessary to determine whether that fact furnishes them an independent defense. The pier and other property came to them as tenants in common. One was a lunatic, and a partition on that account became important, if not necessary. An action was commenced by one tenant in common against the other two, and a receiver was appointed to take the rents which accrued after the death of their mother. The receiver thus appointed was not their agent. If he had created any nuisance or done any other wrong, they would not have been responsible for it. He was the agent and officer of the court, bound to obey its directions, and subject to its control. It ordered him to take and retain sufficient of the rents, otherwise payable to the defendants, to make necessary repairs. Under such circumstances, with a tenant bound to make the repairs, and a receiver also bound to make them, could the owners, one a lunatic and the other two residing in Europe, without any notice of the nuisance, be charged with any responsibility therefor on the theory of fault or *delictum* on their part?

The principles here involved are very important, and I have deemed a pretty thorough examination of this case quite proper. My conclusion is that this action, upon the facts now appearing, cannot be maintained, and that the judgment should be reversed and a new trial granted.

Danforth, J., (*dissenting.*) I cannot concur in the judgment about to be pronounced in this case. It appears that on the 8th of October, 1882, the plaintiff's intestate, while lawfully upon the easterly half of the pier or wharf known as "No. 54," in the city of New York, fell through its flooring into the East river and was drowned. The plaintiff, as administrator, brought this action for damages to the next of kin on account of his

death. Issue was joined by the defendants and brought to trial before a jury. At the close of the plaintiff's case it was made clear, from admissions in the answer, that the defendants were owners of that part of the pier where the accident happened, and by evidence that it was in a defective condition in 1879, and thenceforward until it gave way; and the jury also found, upon sufficient evidence, that the intestate did not, by any negligence on his part, contribute to the injury. Upon that state of the case the defendants were clearly liable upon the principle of the maxim: "*Sic utere tuo ut alienum non lædas.*" There was no error, therefore, in denying their motion for a dismissal of the complaint, and the exception thereto was without merit.

It is claimed, however, by the appellants that their relation to the property was so controlled by circumstances afterwards disclosed by way of defense, as to relieve them from liability. At the close of the plaintiff's case the defendants went into evidence, and not controverting the ownership of the pier, its condition, or the plaintiff's injury, they showed that James Gardner, being the former owner of the pier, devised it with other property in fee to certain persons in trust that they should, during the lives of the testator's children, "in the first place, out of the rents, issues and profits thereof," uphold, support, amend and repair "the same, with all needful and necessary amendments, repairs and alterations, and, next, distribute the residue among his children, and, after their death, among their issue, to whom was also devised in fee the remainder; that the estate was subsequently divided, and the pier in question, among other pieces of real estate," fell to Jane, the testator's daughter, and her issue, viz.: Mrs. Hutton and Mrs. Steele, the defendants herein. The original trustees having died, McCarty was appointed by the court trustee in their place, of that portion of the property which fell to Jane and her heirs, and he, as such trustee, on the 1st of May, 1880, executed to one Phelan a lease for that part of the pier already referred to, for the term of five years, at an annual rent of $750 for three years and $850 for the other two years, but reserving to "the party of the first part (the lessor), or his agent, the right to enter the premises for the purpose of making repairs, if he should see fit to make them." "But," it continued, "the party of the first part shall not be obliged to repair the premises," and by its

terms the lessor was to be exempt from all liability to the tenant by reason of their non-repair, either then or in the future, and no obligation was imposed upon the tenant to keep them in order or in repair. McCarty continued to act as trustee until the death of Jane, the surviving daughter of the testator, which took place May 22, 1881, whereupon suit was at once commenced by Mrs. Steele for partition of the premises which had been set apart to her mother and her issue, and in that action an order was made July 29, 1881, by which one Brown was appointed receiver "of the rents, issues and profits that have accrued since May 1, 1881, of the lands and premises described in the complaint in that action and which were set apart to Jane De Dion, deceased, in severalty and her issue." Upon these facts, the learned counsel asked the court to direct a verdict for the defendants on the grounds:

"*First.* Because this property was leased by Thomas McCarty, trustee, on the 1st day of May, 1880, for five years, and that the trustee then held the legal title to the property; that Jane De Dion, the life-tenant, was living until May, 1881, a year and one month after the lease was made, and the defendant owners took the pier at that time, subject to the lease, and at no time have had any notice of the defective condition of the pier.

"*Second.* That the defendant owners cannot be charged with the condition of the pier at the time of the accident, because at that time it was leased to the defendant Phelan, and it was his duty to repair it; and in the absence of notice of the defective condition of the pier to the defendant owners, the duty to repair, on their part, never arose.

"*Third.* Because the defendant owners did not become owners of the pier until after the death of the life-tenant in May, 1881, and took it at that time, subject to a lease to run for five years from May 1, 1880, to May 1, 1885, and there is no proof in the case that they had any knowledge or notice of the defective condition of the pier." The motion was denied. The defendants then called Brown, the receiver, and proved that he had acted as such as to the rents until June, 1887; that at the time of his appointment, and for some time after, McCarty was insane; that Mrs. Hutton resided in France and Mrs. Steele in England; that Phelan occupied the full term of his lease. They also proved an order of the court made on the 5th of Novem-

ber, 1881, upon the petition of Mrs. Steele and Mrs. Hutton, by which the receiver was directed to reserve out of the receipts by him as such receiver, and set apart quarterly and each and every quarter, a specified sum "to be applied by him to the payment of the taxes, insurance, necessary repairs, Croton-water tax and other incidental necessary expenses, commissions, etc. And that he pay the remainder of such receipts each and every quarter, as the same shall accrue, to Rosalie M. Steele, or her attorney in fact, and to Henrietta Hutton, or her attorney in fact, and Fanny McCarty, as committee for Thomas McCarty, in equal proportions."

It was then proven by defendants that on the 4th of October, 1884, the plaintiff in this case applied to the court for leave to sue Brown, the receiver, upon the cause set out in the complaint in this action, and that the motion was denied. The defendants' counsel thereupon renewed his motion that the court direct a verdict for the defendant on the further ground that "at the time the accident happened there was a receiver in control of the property, appointed by the court, collecting the rents, issues and profits, and that under the order of the court he had been directed to make necessary repairs to the premises." The learned trial judge declined to do so, and his rulings have been sustained by the General Term. I agree with that court in the conclusion that no error was committed by the trial judge.

It is obvious that the supposed exemption from liability, so far as the condition of the premises and the relations created by the devise and lease are concerned, was at the trial put by the defendants' counsel upon the absence of notice to the defendants of the defective condition of the pier. The lack of that notice or knowledge form the ground of the first three propositions submitted to the trial judge, and that point is now presented with great earnestness in support of this appeal. The validity of the lease is assumed by both parties. It derives its efficacy from the devisor (*Greason* v. *Keteltas*, 17 N. Y. 491), and as he created the power to execute, the lease must be construed as emanating from him; it would otherwise be without force or authority. In contemplation of law, therefore, so far as the lease follows the power, the devisor is to be regarded as the lessor and the estate of the lessee as having precedence over other estates or interests created by the testator (*Isherwood*

v. *Oldknow*, 3 Maule & S. 382), and the rent payable to the trustee so long as his estate continued, and after that to such other person as by the terms of the will should be entitled to it, viz., issue of the children of the testator, and they are the defendants in this action.

The will of Gardner, as we have seen, makes it the duty of the trustees mentioned in it to keep the premises in repair and, as the first object of the trust required them, to apply all the rents and profits if needful to that purpose. This duty devolved upon McCarty as their successor. If we assume that he could shift that duty to another, he has not done so. If from the mere act of leasing such effect could be implied, it could only be where the right to the possession of the premises had been wholly transferred to the tenant, so that an entry by the lessor or landlord would be a trespass. The lease in this case has not that effect; the right of entry, and so the right to the possession of the pier for the purpose of repairs, never passed from the lessor, and the reservation is as broad as the duty imposed by the will. It is true it is to enter if the lessor shall see fit to make repairs but it must be deemed that he intended such repairs, as the will directed, and to have in view those indicated by the testator, viz., "all necessary repairs." The reservation shows that the lessor deemed himself bound to provide for them, and that he intended to do so. Such is the effect of the provision in the lease, and it, moreover, must be read as if it incorporated the directions of the will in regard to the duty of the trustee in respect to repairs. The lessor, therefore, could not avail himself of the principle which requires the tenant, and not the landlord, to make the demised structure safe for the traveler. The right to enter included the right of supervision and inspection, and, indeed, the entire control of the premises, so far as was necessary to enable him to make all necessary repairs. *Kirby* v. *Boylston Market Association*, 14 Gray, 250. If the accident had occurred while the trustee's estate continued, he would have been liable, not only because the leased premises were defective when the lease was executed and the responsibility incurred as matter of law, but because he was himself bound to the duty of reparation. During that period of time these defendants would not have been liable, for they had neither the title to the property, nor its possession, nor in any capacity control over it. Their condition was like

that of the defendant in *People* v. *Townsend*, 3 Hill, 480. They were not responsible for the condition of the pier nor connected with its possession, for they had no estate nor interest in the land and could only enforce the execution of the trust. The trustee, on the other hand, so long as he held that office, had the title and the whole estate, subject only to the execution of the trust; and if, from the condition of the property a third person was injured, it was his fault and his the responsibility. The legal estate of the trustee, however, was in him so long only as the execution of the trust required, and it then vested in the persons beneficially entitled. 1 R. S. 728, §§ 61, 62. This occurred upon the death of the defendants' mother, and it is expressly averred by the defendants that they "then became, as owners in fee, entitled to the rents, issues and profits of the" premises in question under the lease made by the trustee. By thus accepting the estate under the devise the defendants took the place of the lessor, assumed the duty of caring for the property, and, unless the case is exceptional, in suffering it to remain in a dangerous condition they came short of their obligation, and actual notice was not material or necessary to enable the plaintiff to maintain his action. As soon as the defendants acquired the right to the possession of the pier, or to the rents, they were bound to know its condition and at once guard against the danger to which the public had been before exposed, and became liable for the consequences of having neglected to do so in the same manner as if they themselves had originated the lease and the nuisance. They were able at any time to gain possession of the premises for the purpose of repair, and this enabled them to abate the nuisance. In such a case the landlord is not exempt from liability. *Coupland* v. *Hardingham*, 3 Camp. 398; *Irwin* v. *Sprigg*, 6 Gill, 200.

A variety of cases have been referred to by the appellants, or brought to our attention during the consideration of this appeal, which, it is claimed, hold a different doctrine. They have no application to the facts on which the defendants are chargeable. The cases thus cited relate principally to the obstruction of private ways, or the diversion of water-courses, viz.: *Beavers* v. *Trimmer*, 25 N. J. Law, 97; *Pierson* v. *Glean*, 14 id. 36; *Johnson* v. *Lewis*, 13 Conn. 303; *Noyes* v. *Stillman*, 24 id. 15; *Woodman* v. *Tufts*, 9 N. H. 88; *Carleton* v. *Reding-*

ton, 21 id. 291; *Snow* v. *Cowles*, 26 id. 275; *McDonough* v. *Gilman*, 3 Allen, 264; *Inhabitants of Oakham* v. *Holbrook*, 11 Cush. 299; *People* v. *Townsend*, 3 Hill, 479; *Hubbard* v. *Russell*, 24 Barb. 404; *Conhocton Stone Road* v. *Railroad Co.*, 51 N Y. 573. In all of them, except *McDonough* v. *Gilman*, the structure complained of caused water to overflow and injure the plaintiff's land, and it was held that an action for continuing a nuisance could not be maintained against one who did not erect it, without showing that he had notice or knowledge of the existence of the nuisance. In most of these cases the court cite and put the decision upon *Penruddock's Case*, 5 Coke, 1a, 101. And in more than one the rule there laid down is held to be reasonable, "because otherwise the purchaser of property on which the structure is erected might be subjected to great injustice if he were made responsible for consequences of which he was ignorant, and for damages which he never intended to occasion." *Johnson* v. *Lewis*, *supra*; Angell, Water-Courses, § 403.

The law is no doubt so and the reason is obvious. These consequences are often such as cannot easily be known except to the party injured, and he, it is said, should be presumed to acquiesce so long as he rests in silence and does not apprise the purchaser of any cause of complaint, and the latter has, therefore, a right to suppose that the structure which he has bought was rightfully erected (*Eastman* v. *Amoskeag Manufacturing Co.*, 44 N. H. 143-156), and is not bound to know or suspect that before his purchase one party committed a wrong and the other submitted to it.

The cases cited also fall within the well-settled rule that one bound to do something in a certain specified event, the happening of which lies within the peculiar knowledge of the opposite party, is not in default until notice is given to him. Until then the silence of the aggrieved party is held to be evidence of a license to maintain the thing causing injury. Nearly all of them are noted in *Conhocton Stone Road* v. *Buffalo, New York & Erie Railroad Co.*, *supra*, and that case stands on the same reason. It there appeared that the B. & C. R. R. Co., in 1851 or 1852, constructed an embankment and bridge as part of its roadway. The defendant became the owner of these structures upon foreclosure sale, and, in 1863, it leased the property to the Erie Railway. The structure during high water caused an overflow to plaintiff's injury in 1864 and 1865, and

for this the plaintiff recovered against the defendant's motion for a nonsuit. The judgment was reversed on the ground that proof failed to show notice or knowledge on the part of the defendant of the existence of the nuisance.

To the same effect and on similar grounds is *Wenzlick* v. *McCotter*, 87 N. Y. 122, also cited by the appellant; but both cases, as well as those above referred to, involve a principle which extends only to a wrongful act done or committed in the first instance by a third party, and of which the defendant had no knowledge, and not to a neglect of duty on his part in caring for his own property. If it was the defendant's duty to maintain and put in repair the pier, no notice can be necessary to sustain an action for an injury resulting from the neglect of such duty, for whether the act causing it be one of omission or commission is immaterial. In such a case the owner is the originator of the injury, and to him the principle requiring notice does not apply. On the contrary, good sense and sound doctrine require that he who ought to abate a nuisance should answer for its continuance. Every moment that the party whose duty it is to repair fails to do so, is a new tort producing a cause of injury, and he cannot but know it to be so. Whenever, therefore, there is damage, there is a cause of action against him who by omission produces the result complained of. Such is the result of the discussion in *Brown* v. *Cayuga and Susquehanna Railroad Co.*, 12 N. Y. 486, where the action was for overflowing the plaintiff's land. It appeared that the predecessor in interest had created the obstruction, and the defendant on that ground asked for a nonsuit. It was denied and the decision affirmed, the court holding, as matter of law, that the defendant was liable. Upon appeal the point was taken that no request to abate the nuisance was proven. JOHNSON, J., says: "If this matter be important to the rights of the parties, that ground should have been taken at the trial." DENIO, J., was of opinion that an action lay without notice, that it was not required by any authority, and that there was nothing in the nature of the case which required a notice to be given to the upholder of a nuisance as a condition to his being made responsible for its consequences. The words of that eminent jurist are quite applicable to the case in hand. "Every one," he says, "is bound so to use his own property that it shall not be the means of injury to his neighbors, and I think the pro-

prietor should himself look to it, and that he cannot safely wait to be admonished before reforming what may be dangerous to others."

In *Irvine* v. *Wood*, 51 N. Y. 224, the landlord was held liable and also the tenant for damages resulting to a wayfarer in a public street who stepped on the edge of the iron cover of a coal-hole, and it turning under his foot, his leg went in and he was injured. Wood claimed that he had no notice of the defect. The court held that it was his duty "to know its condition and he must be held to the same responsibility as if he had actually known it." So in *McCarthy* v. *Syracuse*, 46 N. Y. 194, a sewer case. The defense was that the city officials had no notice that the sewer was out of repair. The court said: "The mere absence of this notice does not necessarily absolve the city from the charge of negligence. Its duty to keep its sewers in repair is not performed by waiting to be notified by citizens that they are out of repair, and repairing them only when the attention of the officials is called to the damage they have occasioned by having become dilapidated or obstructed; but it involves the exercise of a reasonable degree of watchfulness in ascertaining their condition, from time to time, and preventing them from becoming dilapidated or obstructed. Where the obstruction or dilapidation is an ordinary result of the use of the sewer, which ought to be anticipated and could be guarded against by occasional examination and cleansing, the omission to make such examinations and to keep the sewers clear is a neglect of duty which renders the city liable." *White* v. *Board of Health*, L. R. 10 Q. B. 219.

The same principle applies here. It is in evidence, as we have seen, that the pier was in a weak and dilapidated condition when the lease was made and when the defendants became owners. From the nature of the material of which it was constructed it would, unless cared for, become weaker and more dilapidated, and consequently more dangerous to human life. Of the operation of natural causes and their effects upon such structures the defendants are presumed to have knowledge, and they could not so neglect property subject to those causes that it should for want of repair bring injury upon another without being responsible for that injury. But it is said they were non-residents or absentees. I think that is immaterial. What they were bound to know they must be deemed to have notice of,

wherever they were. It was their duty to know the condition of the pier. And it is fair to presume from the single fact of proprietorship that it was known to them.

But there was not only proprietorship, there was, as we have seen, by the very terms of the lease, a right of entry and such possession as might be needful for repairs retained by the lessor. To that extent the owner was at all times in possession. And these defendants, when they became the absolute and beneficial owners of the pier, must be presumed to have known not only the situation and extent of their own interest, but the qualification made by the lease. They knew the pier was of a material liable to decay. They knew it was actually decaying; that the tenant was under no obligation to repair, and that the right to enter for the purpose of repairing was in the lessor and formed one of the conditions of their own estate. As there was in them a right of entry, there was also a right of occupation which the tenant could not abridge.

It is true that, until the death of Mrs. De Dion, the defendants were reversioners, but they were not passive reversioners. They became owners of the property May 22, 1881, and in July, 1881, through proceedings instituted by themselves as owners of the property, they procured the appointment of Brown as receiver of the rent, and in November, 1881, obtained the order, *supra*, for its distribution, and actually received the rent. Thus they voluntarily went into the place of the ancestor and devisor, accepted the property with its emoluments, and the information which induced them to do so necessarily included its condition and so charged them with the burden which its care required. The neglect of this duty, the suffering the pier to fall into such a state of decay as to become dangerous to those lawfully coming upon it, was the creation of a nuisance. Doubtless the original landlord would have been liable (*Swords* v. *Edgar*, 59 N. Y. 28), but the defendants, his assignees, are equally so. *Rex* v. *Pedly*, 1 Adol. & El. 827; *Salmon* v. *Bensley*, Ryan & M. 414. They maintained and continued it. In *Rex* v. *Pedly* the court says: "If a nuisance be created and a man purchase the premises with the nuisance upon them, though there be a demise for a term at the time of the purchase, so that the purchaser has no opportunity of removing the nuisance, yet by purchasing the reversion he makes himself liable for the nuisance."

Notwithstanding the validity of the lease, and its continuance for the full term is not questioned by the plaintiff, the general rule enunciated in this citation holds good, although we need not, and do not, go so far as to say that such would be the case if the defendants had no opportunity of removing the nuisance. That feature is not in the case. When a landlord is exempt from liability on account of the bad condition of his premises, it is because the tenant is in possession, and the owner has no right to enter upon them; but where he has the power to prevent or abate the nuisance, he is liable for an injury resulting therefrom to third persons. *Clark* v. *Fry*, 8 Ohio St. 359; *Ellis* v. *Sheffield*, 2 El. & Bl. 767; *Swords* v. *Edgar*, *supra; Kirby* v. *Boylston Association*, *supra.* And in this case the defendants had not by implication only, but, as we have seen, by the express terms of the lease, a right to enter upon the premises and abate the nuisance. This doctrine is enforced with much elaboration in *Edwards* v. *New York & Harlem Railroad Co.*, 98 N. Y. 245, and is fully recognized in the still later case of *Wolfe* v. *Kilpatrick*, 101 N. Y. 146, to both of which my attention has been called. The whole argument of the prevailing opinion in the *Edwards* case is based upon the assumption that the landlord had no right to enter the building for the purpose of making any changes or alterations, or to strengthen or support the galleries (the place of accident) "in any way," and the contention that he should go free from the consequences of the imperfect structure was put precisely upon the ground that a contrary rule, one which would place such responsibility "upon a grantor or upon a landlord, while out of possession and deprived of the control of his premises," would lead to injustice, and the argument is sustained by reference to cases where the like fact appeared, viz.: *Mellen* v. *Morrill*, 126 Mass. 545, where it is said, "There is nothing to show that he (the owner) retained any control over the walk," the place of the accident.

In the *Wolf Case*, *supra*, the distinction is again drawn between the liability of a landlord who has parted with all his right to enter upon the demised premises and one who retains control, and the judgment was reversed because it established liability on the part of the landlords "who were out of possession and control." It cannot be said that either the lessor or these defendants had no control over the premises and "no op-

portunity of removing the nuisance," and as they could abate it, and did not, they are liable for its continuance. Moreover, the law casts upon the owner the duty of obeying the obligation which he retained. It did not devolve upon the tenant under the lease to make repairs, and it is said in Wood's Landlord and Tenant, 618, that "where a nuisance results from such want of repair, and there is no covenant to repair upon the part of either the landlord or tenant, an action may be maintained against either of them therefor." It is not material whether this duty is imposed by the principles of the common law or by statute.

In *Bellows* v. *Sackett*, 15 Barb. 96, the objection was made that the action should have been against the tenant in possession, and not the landlord; but it was held that to make the objection available, it should be shown that the tenant was bound to make repairs; it was not to be presumed, and JOHNSON, J., says, "however that may be, I am inclined to the opinion that, in any event, the plaintiff may resort directly to the owner as the one who keeps up and maintains the erection which causes the injury, whoever may be the temporary occupant under him."

It is very difficult to so read the lease as not to perceive a recognition by both lessee and lessor of the defective condition of the premises, their tendency to become worse, a mutual reluctance on either side to assume the burden, but resulting finally in the reservation by the lessor of a right to enter and make repairs, should "he see fit to do so." It would be most unreasonable, therefore, not to hold him responsible for injuries resulting from apparent defects, or defects known to him, or that would have been known if he had exercised ordinary care. If repairs were necessary he was bound "to see fit" to make them.

The same liability devolves upon the defendants as assignors from the devisor. They take the benefit of the lease and under it are bound by its obligations, whether expressed in terms or incorporated by implication from the will.

As to the plaintiff's intestate, it was not optional whether the owners should make those necessary repairs or not. They were required to do so because of the maxim already adverted to, and which furnishes the reason for a remedy in case of nuisance. The intestate was as lawfully on the pier as if on a highway

which he had the right to travel and use, and the owner of the pier comes directly within the rule which requires a party to protect a structure upon his own premises which is dangerous to others rightfully there. It was, therefore, a duty on the part of the owner to put the pier in a safe condition. *Beck* v. *Carter*, 68 N. Y. 283. This rule applies to the appellants, as owners at the time of the accident. They were not nominal owners only. They availed themselves of their title by receiving rent and acting in control of the premises. In *Inhabitants of Oakham*, *supra*, it was claimed that a dam broke away because of its original insufficiency and subsequent want of repair, and carried away the plaintiff's bridges. The defendant was held not to be responsible, the court saying: "Such liability attaches only to a party who transfers an estate with the original wrong, or who receives rent or other consideration for its continuance." *Roswell* v. *Prior*, Salk. 460; *Rex* v. *Pedly*, 1 Adol. & E. 822; "but," say the court, "the defendant did nothing of the kind. He was himself never in possession of the estate. He did not demise it; he received no rent and never claimed that the Messrs. Dexter (the persons actually in possession) were his tenants. He did nothing to vindicate or affirm his own title against theirs. . . . If the title was in him, he was not obliged to assert it; if he considered the burden attached to the estate greater than its benefits, he was not obliged to assume it." The defense succeeded, therefore, because the defendant neither built nor occupied the premises, nor by any bargain or act of his own authorized any other person to occupy them. Here the defendants' case is quite otherwise. They maintained the terms of the lease. They recognized the tenant as their tenant, not only technically, but in a substantial manner, and by affirmative proceedings.

They took the entire estate, and if they took subject to the lease, it was because they chose to do so. The rent was incident to the reversion and followed it. The defendants, therefore, were put at once to their election to reject the devise or assume the title and treat the person then in possession under the lease as a tenant. By undertaking the control and receiving rent they made their election. They became his landlord and he their tenant. They come, therefore, within the general rule that the receipt of rent is an upholding and continuing of the nuisance. *Gandy* v. *Jubber*, 5 B. & S. 78; *Todd* v. *Flight*, 9 C. B. (N. S.) 377; *Swords* v. *Edgar*, *supra*.

Nor is it any answer that a receiver had been appointed of the rents and issues of this property, or that the court refused to direct an action to be brought against him. His duties were specific, and it does not appear that the injuries complained of resulted from his negligence, default or misconduct, or that the plaintiff had any claim against the fund or property in his hands, but, in any aspect, it was in the discretion of the court which appointed him to take cognizance of the receiver's liability, if any, and determine it, or permit the aggrieved party to sue at law. Its decision cannot affect the present litigation. The receiver merely represented the owners of the pier, or those entitled to the rents and profits, and because, on their application, he was directed to pay a portion of the receipts upon necessary repairs, it in no respect exonerates the owners or those who would otherwise be liable for their own neglect. He had no exclusive power, nor was that the character of the jurisdiction of the court. As to the question involved, his official position was no better screen for the defendants than would have been that of a common agent selected by the parties without the interposition of the court. The property was leased. The receiver was directed to receive the rents, with a portion repair the property, and do certain other things respecting it, and divide the residue. He had neither possession of nor control over it. This action interferes with no act or duty on his part.

The case of *Metz* v. *Buffalo, C., etc., Railroad Co.*, 58 N. Y. 61, cited by the appellant, was that of a corporation over whom, against its will, a receiver in bankruptcy had been appointed, and a distinction in its favor is taken by the court upon that ground. GROVER, J., says: "It must be borne in mind that the defendant was not a voluntary bankrupt. The appointment of a receiver was against its will. It had nothing to do with his appointment." By the act of the law its possession was taken from it and given to others. And they, by negligent running of the road, caused the injury complained of. Here it is otherwise. The appointment was at the request of the defendants, and it was their business to see that the property did not become a nuisance. They could not shift the responsibility. In the case of the *Mayor* v. *Bailey*, 2 Denio, 433, it was held that the owner of real estate was responsible for the negligence of water commissioners, although appointed by public authority to make erections upon it, but upon the ground that they acted

at the instance and for the benefit of the corporation, the city was held liable. It would be unreasonable to deprive an injured party of his remedy because, at the request of the owner of property, a receiver of its rents had been appointed with power to apply a part of those rents to repairs. It is to be noticed that the whole annual rent of the pier was $750; of this (assuming distribution to be made) one-fourth only, or less than $200, could be applied by the receiver to repairs. By what rule of law or justice is it that an owner of property, by pledging part of his income, can reserve to himself the rest free from the claims of his creditors or those who, through his neglect of duty, involuntarily became entitled to compensation at his hands. Could the owners of this pier, by depositing a portion of its rents and directing their application to repairs, rid themselves of liability to expend other moneys, and more if necessary, to that purpose? Yet they have done nothing else. Owning much property, including the pier in question, they say to the court: "We are seeking, through you, to divide these estates, but, in the mean time, we need the income wholly or in part for our maintenance; let the receiver set apart so much as at the end of the year shall be sufficient for taxes, insurance, necessary repairs, etc., and pay us the balance every quarter." The court yields to their request. The receiver does not make the repairs, whether for want of money or otherwise does not appear, and so a life is lost. Is it an answer to a claim for indemnity that some money was set apart in the hands of an agent to make repairs? Suppose the money was not enough, or the agent or receiver was unmindful of its just expenditure, is the claimant to bear the burden of its insufficiency, or of his neglect? Where has it ever been held that anything less than the whole estate of a man was liable in such a case, or that proceedings for indemnity should be *in rem*, or against the rents issuing from the nuisance? Suppose the whole income had been retained by the court on the application of the owners of the property, and still the accident happened, would not the representatives of the party injured be entitled to redress from other property belonging to the same person? Surely he would. If the damages were payable only from the rents and the receiver had all the rents, the case might be different. The owner is responsible for the consequences of his omissions, and whether they are his own or his agent's, and although the agent is called a receiver,

so far as the interests of third parties are concerned, they must always be considered as the omissions of the owner. No court can bind a person not before it. The plaintiff suffers from a tort committed by the defendants; and from the obligation so incurred, they should be relieved only by making compensation to the extent of the damage. They could neither before its commission nor after avoid it by setting apart, even by permission of the court, a certain proportion of their estate. No court has that power, nor can it endow its receiver with such a function. It did not attempt to do so. It permitted the application of certain money. It did not even profess to relieve the owner from responsibility for the condition of the pier. Nor was the receiver appointed for the purpose of keeping parties injured from the prosecution of their rights. It has already been seen that the intestate was lawfully on the pier as a public place. A duty rested somewhere to keep it reasonably safe and secure for him. Primarily that duty rests upon the owners. In this instance it is true they became such as devisees, but they were not bound to accept the gift. Before doing so they must be deemed to have ascertained its quality and determined whether, under all the circumstances, it was worth the taking. Among these circumstances was the decayed and dangerous condition of the pier, and the lease with its reservations, limitations and restrictions.

They succeeded to the burden as well as to the advantages of ownership. Under the lease the lessor and his successors in interest remained charged as to third persons with the duty of repair. They had the right to enter for repairs, and so were bound to make them. They cannot be relieved from its performance by the undertaking of another party, although that undertaking is sanctioned by the court, that he will apply a portion or all the money received under the lease for that purpose. Neither the plaintiff nor the injured person was a party to such agreement or order, and the obligation of the receiver in that respect is a matter solely between him and the appellants, and cannot relieve the latter from their liability to third parties.

The case states that the defendants' counsel excepts "to that part of the charge in which the court says that the owners (the defendants in this case) are liable if the pier was defective at the time the lease was made."

The part of the charge to which attention is directed is, I suppose, the following: "If you believe this pier was out of condition at the time the lease was made, and that it continued so up to the time of the accident, the defendants are liable. Having succeeded, upon the death of Mrs. De Dion, to the ownership of the premises, they are absolutely freed from any trust which may have vested in Mr. McCarty, her trustee."

The charge as given was correct and justified upon the principle which led to the decision in *Swords* v. *Edgar*, *supra*, and the rule there declared that if, "at the time of the demise and delivery of possession to the lessee, it is in a defective and unsafe condition, and in consequence thereof, while in the possession of the lessee, an injury happens to one lawfully thereon, the lessor, who is receiving a benefit by way of rent or otherwise, is liable."

It involved not only a defective condition of the pier at the time of the demise, but a condition causing an injury, or, as the trial judge said, "a condition which continued up to the time of the accident." For this condition the defendants, as owners, were responsible, and neither their absence from the state nor the intervention of a lease or a receiver could protect them against the claim of one suffering from it.

The judgment of the court below should, therefore, be affirmed, with costs.

Andrews, Finch and Peckham, JJ., concur with Earl, J.; Ruger, Ch. J., and Gray, J., concur with Danforth, J., dissenting.

Judgment reversed.

Brown v. Woodworth.[1]

(5 Barbour, 550.—1849.)

This suit was commenced by writ of nuisance, and the defendants were summoned to answer *wherefore they kept up and*

[1] "If one who has erected a nuisance on his land conveys the land to a purchaser who continues the nuisance, the vendor remains liable [*Rosewell* v. *Prior*, 12 Mod. 635], and the purchaser is also liable if on request he does not remove it [*Penruddock's Case*, 5 Co. Rep. 101*a*]." Pollock on Torts, 351.

continued a certain dam, to the nuisance of the freehold of the plaintiff. The declaration alleged that the plaintiff was possessed of a certain piece of land, describing it by metes and bounds, through which a stream of water naturally flowed, and that the defendants wrongfully, injuriously and unjustly kept up and continued a certain dam on, upon and across said stream below the said lands of the said plaintiff, by means of which his lands were flowed; stating the injuries resulting therefrom.

It appeared on the trial of the cause, that Stephen Hill, father of the defendant Hill, was the principal in erecting the dam some 8 or 10 years before. That at that time the witness Ralph I. Gates was the owner of the premises flowed, and assisted in the erection of the dam; that in 1817, he deeded the premises to Palmer, and that he conveyed them to the plaintiff on the 8th day of October, following. It appeared that the de-

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"The general proposition is undoubted, that one who creates a nuisance is liable for its continuance as for a new nuisance, so long as it continues, but the proposition is not unqualifiedly true. To remain liable, he must, in fact, own or possess the premises on which the nuisance is erected, or must derive some benefit from its continuance.

"Judge Bronson, I think, states the rule correctly in the case of the *Mayor of Albany* v. *Cunliff*, 2 Comstock, 174, as follows: 'A party who has erected a nuisance, will sometimes be answerable for its continuance after he has parted with the possession of the land; but it is only when he continues to derive a benefit from the nuisance, as by demising the premises, and receiving rent (*Roswell* v. *Prior*, 2 Salk. 460; 1 Ld. Ray. 713, S. C.; *Blunt* v. *Aiken*, 15 Wend. 522); or where he conveys the property with covenants for the continuance of the nuisance. *Waggoner* v. *Jermaine*, 3 Denio, 306.'

"This was in the Court of Appeals, and Judge Bronson had participated in the decision in the Supreme Court of the cases of *Blunt* v. *Aiken*, 15 Wend. 522; *Fish* v. *Dodge*, 4 Denio, 311, and *Waggoner* v *Jermaine*, 3 id. 312, and as he cites *Blunt* v. *Aiken*, he clearly did not consider it overruled by *Waggoner* v. *Jermaine;* and in this same case of the *Mayor of Albany* v *Cunliff*, Judge Strong says: 'The case of *Blunt* v. *Aiken*, was not overruled, nor its authority shaken by the subsequent decision of the same court in *Waggoner* v. *Jermaine*.' He said 'that the latter case held that the creator of a nuisance who had sold the property on which it was situated, with a warranty for the continued enjoyment of it as used at the time, was responsible for damages sustained subsequent to his conveyance.' With that modification, the doctrine of *Blunt* v. *Aiken*, must be deemed still the law, and virtually affirmed by the Court of Appeals in this case of the *Mayor of Albany* v. *Cunliff*, *supra*." *Hanse* v. *Cowing*, 1 Lansing, 288, 293.

Section 1661 of the N. Y. Code of Civ. Pro. provides that, "A person by whom the nuisance has been erected, and a person to whom the real property has been transferred, may be joined as defendants in such an action."

fendant Hungerford carried on the mill, and that his co-defendants Woodworth and Hill were interested with him. The precise nature of their interest, whether as tenants for years or in fee, did not appear by the bill of exceptions. The dam, instead of being across the stream, below the plaintiff's land, abutted to and was continued upon it some rods by a slight embankment.

The defendants moved for a nonsuit upon the following grounds: 1. That there was a variance between the declaration and proof in regard to the location of the dam. 2. That the proceedings were not in a case provided for by the statute, and that Stephen Hill, senior, should have been joined in the proceedings. 3. That the defendants were not liable in this action, the dam having been erected by the consent, license and assistance of Gates, who was then the owner of the premises flowed by the dam; at least without a request to remove the dam before suit brought. Motion granted.

By the Court, Morehouse, J. At common law an assize of nuisance lay only against him who levied the nuisance, or in other words the wrongdoer himself. Upon an alienation of the land wherein the nuisance was set up, the party injured was driven to his *quod permittat prosternere*. This writ was in its nature a writ of right. It lay not at common law for tenant at life, by reason whereof and that there was great delay, the statute of Wm. 2, ch. 25, gave an assize of novel disseisin for the redress of a variety of wrongs. While in use it lay by the heir of the disseisee against the disseisor, or his heir, or his alienee who levied the nuisance, by statute Wm. 2, ch. 24. Long before we were a free people these actions had been turned into actions upon the case, and were out of use in England. They were preserved by legislation, as old remedies, until the revision of the statutes in 1830; and in that revision the writ of nuisance as a common law remedy was retained as theretofore accustomed, subject to the provisions of the revised statutes on that subject. 2 R. S. 332, § 1. To return to the assize of nuisance. We have seen that it lay only against the wrongdoer. In 13 Edw. 1, "there was not found any writ of assize of nuisance in the register but what supposed that the tenants in the assize *levaverunt*, and this cannot be said when the tenement is transferred to another, for he did not levy the nuisance, but the other

only." The 24th chapter of the acts of parliament of that year provides, that the party grieved shall have a writ as well against the alienee as against him that erected it. It was held that that statute extends only to assize of nuisance against him who did the nuisance and his alienee. 2 Lutw. 1588. It does not extend to the alienee of the alienee. It seems by the statute that the action shall be brought against him that did the tort and the tertenants after the alienation. Fitz. Natura Brevium, 124, H. 290, in the note Viner's Ab. Nuisance, 34. On the 12th of March, 1787, the legislature of this state, in an act for giving further remedy and regulating the process and proceedings in assizes and other actions, enacted the provisions in the act of Ed. 1, above referred to. Laws of N. Y. vol. 2, 103, J. & V. ed. 1789. Section 5 of the chapter is as follows: "That in cases of nuisance, the plaintiff shall not go without remedy because the land is transferred to another; and further, that when the writ is granted against him or her who hath levied or shall levy the nuisance, the writ shall be made as hath been heretofore used, in the following form: A. B. hath complained to us, that C. D. unjustly and without judgment, hath erected (or made or levied) a house (or a wall, sink, pond, or whatever other thing it may be,) to the nuisance of his freehold. And if such things so levied, erected, or made, be aliened from one to another, the writ shall be thus: A. B. hath complained to us that C. D. and E. F. have *erected*." This enactment, in precisely the same words, will be found in the revisions of our laws down to and including the revision of 1813. See also 2 R. S. 332, § 3. Writs of nuisance were, by statute, returnable and to be determined in the nature of assizes, either at the supreme court, or at the circuit court, in the county where the nuisance happened. The common law remedies which I have referred to, and which were thus secured by statute, had never been resorted to in this state. An action on the case, or a bill in equity, commended by their simplicity and familiarity to the bar and bench, were the only remedies used in cases of private nuisance. The last revision of our statutes yielded to the wishes of the legislature in abolishing all the real actions known to the common law, not enumerated and retained in ch. 5 of the 3d part of that revision. That by writ of nuisance was among the favored, from an impression "that it might be made very useful because it was, and is, a part of the judgment, *that the nuisance be abated.*

The proceedings in the old writ were simplified, in the service of the writ, in proceedings on default, and in the mode of trial, dispensing with the view of the nuisance by the jury. The judgment of the ancient law was retained. The spectacle of the sheriff, with his *posse comitatus*, conquering the perverseness of a defendant, who had rather pay his ill-natured neighbor six cents a year consequential damages, with costs, than voluntarily sacrifice thousands in abating a dam, has not yet been exhibited. The revised statute made no change as to parties, and enacts in language not susceptible of misconstruction, that in case of a transfer of the land to another, the party by whom the nuisance was erected, and he to whom it was transferred, *shall both* be named as defendants in the writ. 2 R. S. 332, § 2. Assize lies for acts of misfeasance, but for acts of nonfeasance an action on the case lies. It does not lie for a laches of my doing what I ought to do. It can only be brought by the tenant of the freehold, and shall be brought against *tenant of the frank tenement.* Viner's Ab. Nuisance. The writ and the counts in this case concur in complaining of a continuance of the nuisance. It is true, that every continuance of a nuisance, so far as an action for damages is concerned, is held to be a fresh one, and it is upon this assumption, that he who raised a dam, and his alienee continuing it, are allowed to be charged jointly, as having unjustly raised it, and in an action on the case, the plaintiff may declare both ways, for erecting and continuing, or for continuing only, and the latter is sufficient election. The party by whom the nuisance was erected is defendant, and if he has transferred the land to another, then he by whom the nuisance was erected, and he to whom it was transferred, *shall both* be named as defendants in the writ. There is no room for judicial doubt or criticism, as to the sense in which the legislature used the word *shall* in this statute. There is neither precedent nor opinion to be found in the books, from the time of Edward I. to the present day, countenancing the assumption, that the legislature meant to give a mere discretionary power, and not to impose a positive duty, by the use of the term *shall*, in the statute in question. The remedy is retained as *heretofore accustomed.* I have shown that it did not lie against any but the very wrongdoer himself, who levied or did the nuisance, at common law, and that the statute gave a new writ when the lands were aliened, against the wrongdoer and alienee, upon a

complaint, that both had levied or raised the nuisance. Without the statute there is no writ for such a case. Regarding the statute as remedial, I know of no rule of liberality in its construction, which would authorize the court to entirely dispense with the prescribed proceedings for the attainment of the remedy, or warrant its extension to a case not expressly provided for. On the contrary, when I reflect upon the irreparable injuries which might be inflicted upon individuals and companies, using the waters of our country as a motive power, if this obsolete remedy should be revived and favored, and consider the ample remedies of the offended party, to abate the nuisance by his own mere act on authority, in some cases, and in all to sue for damages as continuously as its existence occasions any, I think the court should be rigid in exacting a strict compliance with all the requisites of the statute. 1 Denio, 436; 1 Barb. 65; Smith's Com. 692, § 547. The plaintiff was properly nonsuited, upon the ground that such a case as his was unknown to the common law, and was not authorized by statute. The variance was between matter of description in the count and the proof. The allegation was, that the dam continued was below the plaintiff's land; the proof was, that it was adjoining and on the plaintiff's land. The tests of the materiality of variances introduced by the code in chap. 6 of tit. 6, and the provisions for amendments, by the party and the court, or the total disregard of them by the latter, have no application to this case. The counsel citing it on the argument had overlooked § 390. By express provision the act was not to affect proceedings provided for by title 4 of chapter 5 of part 3 of the revised statutes. The variance was therefore fatal. 1 Denio, 181; 3 id. 356; 2 Barn. & Ald. 363; 2 Barn. & Cress. 910.

The general rule as to license is laid down in Shepherd's Touchstone, 231. It is, "that license, or liberty, cannot be created and annexed to an estate of inheritance or freehold, without deed." In *Monk* v. *Buller*, Cro. Jac. 574, it was held that a license by a commoner must be by deed. 2 Saund. 323, 328. Many cases will be found considered in *Hawkins* v. *Shippam*, 5 B. & C. 221; *Perry* v. *Fitzhowe*, 8 Adol. & Ellis, 575. The license in this case is claimed, not against the person granting it, if any was granted, but a subsequent owner in fee as running with the land, and binding the inheritance; not by the person to whom it was granted, but by his grantees. It is a claim of

an interest in the land, and a freehold interest by way of easement in the lands flowed, which could only pass by deed. 2 Barb. Ch. Rep. 230; 2 R. S. 135, § 6. In an assize of nuisance the party goes for acts of commission, and the person who committed them would not be entitled to notice to reform the nuisance, before suit brought; for the injured party might abate the nuisance, without notice and without an appeal to a court of justice.

New trial denied.

ABATEMENT. [1]

BROWN v. PERKINS.

(12 Gray, 89.—1858.)

ACTION of tort for breaking and entering plaintiff's shop, and carrying away and destroying a barrel of vinegar and other goods. The answer denied this, and alleged that the building was kept for the sale of intoxicating liquors and so was a common nuisance (St. 1855, chaps. 405 and 215, § 37), and that a large number of persons assembled to abate the same and destroyed only spirituous liquor unlawfully kept for sale.

The court, among other things, instructed the jury as follows:

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[1] "In every case the party taking on himself to abate a nuisance must avoid doing any unnecessary damage, as is shown by the old form of pleading in justification. Thus it is lawful to remove a gate or barrier which obstructs a right of way, but not to break or deface it beyond what is necessary for the purpose of removing it. And where a structure, say a dam or weir across a stream, is in part lawful and in part unlawful, a party abating that which is unlawful cannot justify interference with the rest. He must distinguish them at his peril. But this does not mean that the wrong-doer is always entitled to have a nuisance abated in the manner most convenient to himself. The convenience of innocent third persons or of the public may also be in question. And the abator cannot justify doing harm to innocent persons which he might have avoided. In such a case, therefore, it may be necessary and proper, 'to abate the nuisance in a manner more onerous to the wrong-doer.' Practically the remedy of abatement is now in use only as to rights of common, rights of way, and sometimes rights of water; and even in those cases it ought never to be used without good advisement." Pollock on Torts, 342.

"1st. That intoxicating liquors kept for sale, with the vessels containing them, and articles used in the sale, being declared by law to be a common nuisance, it is lawful for any person to destroy them, by way of abatement of a common nuisance, and that it is the exercise of a common and lawful right. 2d. That if kept in such a shop, not a dwelling-house, locked or otherwise closed, it is justifiable to use force, but no more force than is necessary to reach the liquor and vessels, if it cannot be come at otherwise. 3d. That if the combination or conspiracy of a large number of persons extends no further than to take and destroy intoxicating liquor and the vessels, and to use no unnecessary force, the fact that such combination is entered into by a large number of persons to act together, in doing that and no more, would not take away the justification they would have, if done by one or a few of them."

Shaw, Ch. J. This is an action for breaking and entering the plaintiff's shop, and destroying various articles of property.

The defendants, denying the facts, and putting the plaintiff to proof, insist that if it is proved that they were chargeable with the breaking and entering, it was justifiable by law, on the ground that the shop was a place used for the sale of spirituous liquors, and so was declared to be a nuisance; that they had a right to abate the nuisance, and for that purpose to break and enter the shop, as the proof shows that it was done; that the shop contained spirituous liquors kept for sale; that the so keeping them was a nuisance by statute; that they had a right to enter by force and destroy them; that they entered for such purpose and destroyed such articles, and did no more damage than was necessary for that purpose.

A great many points were raised in the report, and argued, upon which the court have not passed; they are all passed over now for the purpose of coming to the main points which are decisive of the case.

The judge who sat at the trial stated that he ruled the law and directed the jury as stated in the report, subject to the opinion of the whole court, and when many other points were raised, he stated that it might be more convenient to report the whole case, so far as controverted points were presented, for the consideration of the whole court; and this, it was understood, was assented to by counsel.

Passing over all questions as to the plaintiff's case, and coming to the justification set forth in the answer, the court are of opinion, after argument, that the ruling and instructions to the jury were not correct in matter of law.

1. The court are of opinion that spirituous liquors are not, of themselves, a common nuisance, but the act of keeping them for sale by statute creates a nuisance; and the only mode in which they can be lawfully destroyed is the one directed by statute, for the seizure by warrant, bringing them before a magistrate, and giving the owner of the property an opportunity to defend his right to it. Therefore it is not lawful for any person to destroy them by way of abatement of a common nuisance, and *a fortiori* not lawful to use force for that purpose.

2. It is not lawful by the common law for any and all persons to abate a common nuisance, merely because it is a common nuisance, though the doctrine may have been sometimes stated in terms so general as to give countenance to this supposition. This right and power is never entrusted to individuals in general, without process of law, by way of vindicating the public right, but solely for the relief of a party whose right is obstructed by such nuisance.

3. If such were intended to be made the law by force of the statute, it would be contrary to the provisions of the Constitution, which directs that no man's property can be taken from him without compensation, except by the judgment of his peers or the law of the land; and no person can be twice punished for the same offence. And it is clear that under the statutes spirituous liquors are property, and entitled to protection as such. The power of abatement of a public or common nuisance does not place the penal law of the Commonwealth in private hands.

4. The true theory of abatement of nuisance is that an individual citizen may abate a private nuisance injurious to him, when he could also bring an action; and also, when a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right, and he cannot be called in question for so doing. As in the case of the obstruction across a highway, and an unauthorized bridge over a navigable water-course, if he has occasion to use it, he may remove it by way of abatement. But this would not justify strangers, being inhabitants of other parts of the Commonwealth, having no such occasion

to use it, to do the same. Some of the earlier cases, perhaps, in laying down the general proposition that private subjects may abate a private nuisance, did not expressly mark this distinction; but we think, upon the authority of modern cases, where the distinctions are more accurately made, and upon principle, this is the true rule of law. *Lonsdale* v. *Nelson*, 2 B. & C. 311, 312, and 3 D. & R. 566, 567; *Mayor &c. of Colchester* v. *Brooke*, 7 Ad. & El. N. R. 376, 377; *Gray* v. *Ayres*, 7 Dana, 375; *State* v. *Paul*, 5 R. I. 185.

5. As it is the use of a building, or the keeping of spirituous liquors in it, which in general constitutes the nuisance, the abatement consists in putting a stop to such a use.

6. The keeping of a building for the sale of intoxicating liquors, if a nuisance at all, is exclusively a common nuisance; and the fact that the husbands, wives, children or servants of any person do frequent such a place and get intoxicating liquor there, does not make it a special nuisance or injury to their private rights, so as to authorize and justify such persons in breaking into the shop or building where it is thus sold, and destroying the liquor there found, and the vessels in which it may be kept; but it can only be prosecuted as a public or common nuisance in the mode prescribed by law.

Upon these grounds, without reference to others, which may be reported in detail hereafter, the court are of opinion that the verdict for the defendants must be set aside and a

New trial had.

EFFECT OF ABATEMENT UPON ACTION.

GLEASON v. GARY.

(4 Connecticut, 418.—1822.)

ACTION on the case for obstructing a water-course, the uninterrupted use of which the plaintiff had enjoyed for forty-seven years, and into which it appeared that the defendant had thrown great quantities of stone, subsequently removed by the plaintiff. The judge instructed the jury, that if the defendant obstructed the water as claimed by the plaintiff, and the plain-

tiff thereafter removed the obstructions, and abated the nuisance, as by law he had right to do; and since such abatement, no damage had accrued to the plaintiff from such obstruction down to the date of the writ; the jury must find a verdict for the defendant. They so found, and the plaintiff moved for a new trial, on the ground of a misdirection.

Hosmer, Ch. J. The only question in the case, is, whether the abatement of the nuisance by the plaintiff, for the damages resulting from which anterior to the removal, he has brought his suit, has extinguished his right of action. The judge expressed an opinion in the affirmative; but it was manifestly incorrect.

In *Baten's case*, 9 Co. Rep. 54, it is said, "that there are two ways to redress a nuisance; one by action, and in that he shall recover damages, and have judgment that the nuisance shall be removed; or the party grieved may enter, and abate the nuisance himself; but then he shall not have an action, nor recover damages; for in an assize of nuisance, or *quod permittat prosternere*, it is a good plea, that the plaintiff himself has abated the nuisance; for in an assize or *quod permittat*, he shall have judgment of two things, *sc.* to have the nuisance abated, and to recover damages, and he has disabled himself, by his own act, to have judgment for one of them; and therefore the action doth not lie." 3 Bla. Comm. 220. This reasoning conclusively shows, that an assize of nuisance, of *quod permittat prosternere*, cannot be sustained, after the plaintiff has abated the nuisance, and disabled himself from the pursuit of those particular remedies; but it has no bearing on the pursuit of redress, by action on the case, for damages only. The objection in *Baten's case*, after the abatement of a nuisance, was not founded on the cause of action being taken away, by complete remedy; for the damages sustained were recoverable, and ought to be satisfied. But, the party, by his own act, had incurred a disability of maintaining certain modes of redress, the judgment in which must be for damages, and likewise for the prostration of the nuisance. In *Kendrick* v. *Bartland*, 2 Mod. Rep. 253, the precise point before the court was decided, and an action on the case, sustained. "The end," say the court, "of a *quod permittat*, or an assize, was to abate the nuisance; but the end of the action on the case, is to recover

damages." Nothing has happened to extinguish the plaintiff's cause of action, or to raise an impediment in the way of his recovery.

The other judges were of the same opinion.

New trial to be granted.[1]

[1] See also *Tate* v. *Parrish*, 7 Monr. 325 ; *Crump* v. *Lambert*, 13 L. T. (N. S.) 133, affirming *S. C.*, L. R. 3 Eq. 409 ; *Pierce* v. *Dart*, 7 Cowen, 609. *Contra*, *Griffith* v. *McCullom*, 46 Barb. 561.

NEGLIGENCE.

WHAT IS NEGLIGENCE. (1)

Baltimore & Potomac Railroad Co. v. Jones.

(95 United States, 439.—1877.)

Error to the Supreme Court of the District of Columbia, in an action by Jones to recover damages for injuries received on

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1 Negligence defined.—"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." Alderson, B., in *Blyth* v. *Birmingham Waterworks Co.*, 11 Ex. 781, 784.

"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." Brett, M. R., in *Heaven* v. *Pender*, 11 Q. B. Div. 503, 507.

"Negligence is the absence of care according to the circumstances." Willes, J., in *Vaughan* v. *Taff Vale Railway Co.*, 5 H. & N. 679, 688.

"Legal negligence does not consist simply of an omission to do that which would have prevented the infliction of damage on another, but, in addition to this, it involves a breach of duty." Beasley, C. J., in *Salmon* v. *Delaware, Lackawanna & Western R. R. Co.*, 38 N. J. Law, 5, 11.

"Negligence is a violation of the obligation which enjoins care and caution in what we do. But this duty is relative, and where it has no existence between particular parties, there can be no such thing as negligence in the legal sense of the term. A man is under no obligation to be cautious and circumspect towards a wrongdoer. A horse straying in a field falls into a pit left open and unguarded; the owner of the animal cannot complain, for as to all trespassers the owner of the field had a right to leave the pit as he pleased, and they cannot impute negligence to him. But injuries inflicted by design are not thus to be excused. A wrongdoer is not necessarily an outlaw, but may justly complain of wanton and malicious mischief. Negligence, however, even when gross, is but an omission of duty. It is not designed and intentional mischief, although it may be cogent evidence of such an act. (Story on Bl. §§ 19, 22; *Gardner* v. *Heartt*, 3 Denio, 336.) Of the latter, a trespasser may complain, although he cannot be allowed to do so in regard to the former." Beardsley, C. J., in *Tonawanda Railroad Co.* v. *Munger*, 5 Denio, 255, 266.

the road of the company. Judgment was rendered in favor of the plaintiff.

Mr. Justice Swayne delivered the opinion of the court.

The defendant in error was the plaintiff in the court below. Upon the trial there, he gave evidence to the following effect:

For several months prior to the 12th of November, 1872, he was in the service of the company as a day-laborer. He was one of a party of men employed in constructing and keeping in repair the roadway of the defendant. It was usual for the defendant to convey them to and from their place of work. Sometimes a car was used for this purpose; at others, only a locomotive and tender were provided. It was common, whether a car was provided or not, for some of the men to ride on the pilot or bumper in front of the locomotive. This was done with the approval of Van Ness, who was in charge of the laborers when at work, and the conductor of the train which carried them both ways. The plaintiff had no connection with the train. On the 12th of November before mentioned, the party of laborers, including the plaintiff, under the direction of Van Ness, were employed on the west side of the eastern branch of the Potomac, near where the defendant's road crosses that stream, in filling flat cars with dirt and unloading them at an adjacent point. The train that evening consisted of a locomotive, tender, and box-car. When the party was about to leave on their return that evening, the plaintiff was told by Van Ness to jump on anywhere; that they were behind time, and must hurry.

The plaintiff was riding on the pilot of the locomotive, and

See, also, Beven on Neg. in Law, (2d ed.), Bk. I., chap. I.; XI. Amer. St. Rep. 548, note; XII. id. 700, note; and XVI. Am. & Eng. Enc. of Law, 389 *et seq.*

Analysis of the cause of action.—"Negligence consists in:

"1. A legal duty to use care;

"2. A breach of that duty;

"3. The absence of intention to produce the precise damage, if any, which actually follows.

"With this negligence, in order to sustain a civil action, there must concur:

"1. Damage to the plaintiff;

"2. A natural and continuous sequence, uninterruptedly connecting the breach of duty with the damage, as cause and effect." Shearman & Redfield on Neg. (5th ed.), § 5.

while there the train ran into certain cars belonging to the defendant and loaded with ties. These cars had become detached from another train of cars, and were standing on the track in the Virginia avenue tunnel. The accident was the result of negligence on the part of the defendant. Thereby one of the plaintiff's legs was severed from his body, and the other one severely injured. Nobody else was hurt, except two other persons, one riding on the pilot with the plaintiff, and the other one on the cars standing in the tunnel.

The defendant then gave evidence tending to prove as follows: About six weeks or two months before the accident, a box-car had been assigned to the construction train with which the plaintiff was employed. The car was used thereafter every day. About the time it was first used, and on several occasions before the accident, Van Ness notified the laborers that they must ride in the car and not on the engine; and the plaintiff in particular, on several occasions not long before the disaster, was forbidden to ride on the pilot, both by Van Ness and the engineer in charge of the locomotive. The plaintiff was on the pilot at the time of the accident, without the knowledge of any agent of the defendant. There was plenty of room for the plaintiff in the box-car, which was open. If he had been anywhere but on the pilot, he would not have been injured. The collision was not brought about by any negligence of the defendant's agents, but was unavoidable. The defendant's agents in charge of the two trains, and the watchman in the tunnel, were competent men.

The plaintiff, in rebuttal, gave evidence tending to show that sometimes the box-car was locked when there was no other car attached to the train, and that the men were allowed by the conductor and engineer to ride on the engine, and that on the evening of the accident the engineer in charge of the locomotive knew that the plaintiff was on the pilot.

The evidence being closed, the defendant's counsel asked the court to instruct the jury as follows: "If the jury find from the evidence that the plaintiff knew the box-car, was the proper place for him, and if he knew his position on the pilot of the engine was a dangerous one, then they will render a verdict for the defendant, whether they find that its agents allowed the plaintiff to ride on the pilot or not."

This instruction was refused, and the defendant's counsel excepted.

Three questions arise upon the record: —

1. The exception touching the admission of evidence.

2. As to the application of the rule relative to injuries received by one servant by reason of the negligence of another servant, both being at the time engaged in the same service of a common superior.

3. As to contributory negligence on the part of the plaintiff.

We pass by the first two without remark. We have not found it necessary to consider them. In our view, the point presented by the third is sufficient to dispose of the case.

Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion. See Wharton on Negligence, sec. 1, and notes.

One who by his negligence has brought an injury upon himself cannot recover damages for it. Such is the rule of the civil and of the common law. A plaintiff in such cases is entitled to no relief. But where the defendant has been guilty of negligence also, in the same connection, the result depends upon the facts. The question in such cases is: 1. Whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or, 2. Whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened.

In the former case, the plaintiff is entitled to recover. In the latter, he is not. *Tuff* v. *Warman*, 5 C. B. (N. S.) 573; *Butterfield* v. *Forrester*, 11 East. 58; *Bridge* v. *Grand Junction Railroad Co.*, 3 M. & W. 244; *Davis* v. *Mann*, 10 id. 546; *Clayards* v. *Dethick*, 12 Q. B. 439; *Van Lien* v. *Scoville Manufacturing Co.*, 14 Abb. Pr. (N. S.) 74; *Ince* v. *East Boston Ferry Co.*, 106 Mass. 149.

It remains to apply these tests to the case before us. The facts with respect to the cars left in the tunnel are not fully disclosed in the record. It is not shown when they were left there, how long they had been there, when it was intended to remove them, nor why they had not been removed before. It

does appear that there was a watchman at the tunnel, and that he and the conductor of the train from which they were left, and the conductor of the train which carried the plaintiff, were all well selected, and competent for their places. For the purposes of this case, we assume that the defendant was guilty of negligence.

The plaintiff had been warned against riding on the pilot, and forbidden to do so. It was next to the cow-catcher, and obviously a place of peril, especially in case of collision. There was room for him in the box-car. He should have taken his place there. He could have gone into the box-car in as little, if not less, time than it took to climb to the pilot. The knowledge, assent, or direction of the company's agents as to what he did is immaterial. If told to get on anywhere, that the train was late, and that he must hurry, this was no justification for taking such a risk. As well might he have obeyed a suggestion to ride on the cow-catcher, or put himself on the track before the advancing wheels of the locomotive. The company, though bound to a high degree of care, did not insure his safety. He was not an infant nor *non compos*. The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. Without the latter, the former could not arise. He and another who rode beside him were the only persons hurt upon the train. All those in the box-car, where he should have been, were uninjured. He would have escaped also, if he had been there. His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit. The case is thus clearly brought within the second of the predicates of mutual negligence we have laid down. *Hickey* v. *Boston & Lowell Railroad Co.*, 14 Allen, 429; *Todd* v. *Old Colony Railroad Co.*, 3 id. 18; 7 id. 207; *Gavett* v. *M. & L. Railroad Co.*, 16 Gray, 501; *Lucas* v. *N. B. & T. Railroad Co.*, 6 id. 64; *Ward* v. *Railroad Co.*, 2 Abb. Pr. (N. S.) 411; *Galena & Chicago Union Railroad Co.* v. *Yarwood*, 15 Ill. 468; *Doggett* v. *Illinois Central Railroad Co.*, 34 Iowa, 284.

The plaintiff was not entitled to recover. It follows that the court erred in refusing the instruction asked upon this subject. If the company had prayed the court to direct the jury to return a verdict for the defendant, it would have been the duty of the

court to give such direction, and error to refuse. *Gavett* v. *M. & L. Railroad Co.*, *supra*; *Merchants' Bank* v. *State Bank*, 10 Wall. 604; *Pleasants* v. *Fant*, 22 id. 121.

Judgment reversed, and the cause remanded with directions to issue a venire de novo, and to proceed in conformity with this opinion.

DUTY TO EXERCISE CARE MUST EXIST.

SWEENY v. OLD COLONY & NEWPORT RAILROAD CO.

(10 Allen, 368. — 1865.)

ACTION to recover damages for personal injuries.

At the trial it appeared that the plaintiff was injured while crossing defendants' tracks on a private way leading from South to Federal street, in Boston; and that the defendants not only did not object to such crossing, so far as it did not interfere with their cars, but kept a flagman there, partly to protect their own property, and partly to protect the public. On the day of the accident, as an engine and car were coming from defendants' depot, the plaintiff, with a horse and wagon, came down South street from the same direction. There was evidence tending to show that the flagman signalled him to stop, and he obeyed; that he afterwards signalled to go ahead, and the plaintiff attempted to cross, looking straight ahead; that he saw the car approaching, and jumped from his wagon, was knocked down and run over by the car. The evidence being contradictory as to the care exercised by the plaintiff and the flagman, the court ruled that, though the defendants were not bound to keep a flagman at that crossing, yet, since they did keep one there, they would be responsible to the plaintiff, provided he used due care, if he was induced to cross by the signal of the flagman, and if that signal was negligently made at a time when it was unsafe to cross. Verdict for plaintiff. The case was reserved for the consideration of the whole court.

BIGELOW, C. J. This case has been presented with great care on the part of the learned counsel for the defendants, who have

produced before us all the leading authorities bearing on the question of law which was reserved at the trial. We have not found it easy to decide on which side of the line, which marks the limit of the defendants' liability for damages caused by the acts of their agents, the case at bar falls. But on careful consideration we have been brought to the conclusion that the rulings at the trial were right, and that we cannot set aside the verdict for the plaintiff on the ground that it was based on erroneous instructions in matter of law.

In order to maintain an action for an injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff, which the defendant has left undischarged or unfulfilled. This is the basis on which the cause of action rests. There can be no fault, or negligence, or breach of duty, where there is no act, or service, or contract, which a party is bound to perform or fulfil. All the cases in the books, in which a party is sought to be charged on the ground that he has caused a way or other place to be incumbered or suffered it to be in a dangerous condition, whereby accident and injury have been occasioned to another, turn on the principle that negligence consists in doing or omitting to do an act by which a legal duty or obligation has been violated. Thus a trespasser who comes on the land of another without right cannot maintain an action, if he runs against a barrier or falls into an excavation there situated. The owner of the land is not bound to protect or provide safeguards for wrongdoers. So a licensee, who enters on premises by permission only, without any enticement, allurement or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not either expressly invited to enter or induced to come upon them by the purpose for which the premises are appropriated and occupied, or by some preparation or adaptation of the place for use by customers or passengers, which might naturally and reasonably lead them to suppose that they might properly and safely enter thereon.

On the other hand, there are cases where houses or lands are so situated, or their mode of occupation and use is such, that the owner or occupant is not absolved from all care for the safety of those who come on the premises, but where the law imposes on him an obligation or duty to provide for their security against accident and injury. Thus the keeper of a shop or store is bound to provide means of safe ingress and egress to and from his premises for those having occasion to enter thereon, and is liable in damages for any injury which may happen by reason of any negligence in the mode of constructing or managing the place of entrance and exit. So the keeper of an inn or other place of public resort would be liable to an action in favor of a person who suffered an injury in consequence of an obstruction or defect in the way or passage which was held out and used as the common and proper place of access to the premises. The general rule or principle applicable to this class of cases is, that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any invitation, allurement or inducement, either express or implied, by which they have been led to enter thereon. A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner or person in possession to provide against the danger of accident. The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used. The true distinction is this: A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby.

This distinction is fully recognized in the most recent and best considered cases in the English courts, and may be deemed to be the pivot on which all cases like the one at bar are made to turn. In *Corby* v. *Hill*, 4 C. B. (N. S.) 556, the owner of land, having a private road for the use of persons coming to his house, gave permission to a builder engaged in erecting a house on the land to place materials on the road; the plaintiff, having occasion to use the road for the purpose of going to the owner's residence, ran against the materials and sustained damage, for which the owner was held liable. Cockburn, C. J., says: "The proprietors of the soil held out an allurement whereby the plaintiff was induced to come on the place in question; they held this road out to all persons having occasion to proceed to the house as the means of access thereto." In *Chapman* v. *Rothwell*, El., Bl. & El. 168, the proprietor of a brewery was held liable in damages for injury and loss of life caused by permitting a trapdoor to be open without sufficient light or proper safeguards, in a passage way through which access was had from the street to his office. This decision was put on the ground that the defendant, by holding out the passage way as the proper mode of approach to his office and brewery, invited the party injured to go there, and was bound to use due care in providing for his safety. This is the point on which the decision turned, as stated by Keating, J., in *Hounsell* v. *Smyth*, 7 C. B. (N. S.) 738. In the last named case the decision is clearly drawn between the liability of a person who holds out an inducement or invitation to others to enter on his premises by preparing a way or path by means of which they can gain access to his house or store, or pass into or over the land, and in a case where nothing is shown but a bare license or permission tacitly given to go upon or through an estate, and the responsibility of finding a safe and secure passage is thrown on the passenger and not on the owner. The same distinction is stated in *Barnes* v. *Ward*, 9 C. B. 392; *Hardcastle* v. *South Yorkshire Railway, &c.*, 4 Hurlst. & Norm. 67; and *Binks* v. *South Yorkshire Railway, &c.*, 32 Law Jour. (N. S.) Q. B. 26. In the last cited case the language of Blackburn, J., is peculiarly applicable to the case at bar. He says, "There might be a case where permission to use land as a path may amount to such an inducement as to lead the persons using it to suppose it a highway, and thus induce them to use it as such." See

also, for a clear statement of the difference between cases where an invitation or allurement is held out by the defendant, and those where nothing appears but a mere license or permission to enter on premises, *Balch* v. *Smith*, 7 Hurlst. & Norm. 741, and *Scott* v. *London Docks Co.*, 11 Law Times, (N. S.) 383.

The facts disclosed at the trial of the case now before us, carefully weighed and considered, bring it within that class in which parties have been held liable in damages by reason of having held out an invitation or inducement to persons to enter upon and pass over their premises. It cannot in any just view of the evidence be said that the defendants were passive only, and gave merely a tacit license or assent to the use of the place in question as a public crossing. On the contrary, the place or crossing was situated between two streets in the city, (which are much frequented thoroughfares), and was used by great numbers of people who had occasion to pass from one street to the other, and it was fitted and prepared by the defendants with a convenient plank crossing, such as is usually constructed in highways, where they are crossed by the tracks of a railroad, in order to facilitate the passage of animals and vehicles over the rails. It had been so maintained by the defendants for a number of years. These facts would seem to bring the case within the principle already stated, that the license to use the crossing had been used and enjoyed under such circumstances as to amount to an inducement, held out by the defendants to persons having occasion to pass, to believe that it was a highway, and to use it as such. But the case does not rest on these facts only. The defendants had not only constructed and fitted the crossing in the same manner as if it had been a highway, but they had employed a person to stand there with a flag, and to warn persons who were about to pass over the railroad when it was safe for them to attempt to cross with their vehicles and animals, without interference or collision with the engines and cars of the defendants. And it was also shown that when the plaintiff started to go over the tracks with his wagon, it was in obedience to a signal from this agent of the defendants that there was no obstruction or hindrance to his safe passage over the railroad. These facts well warranted the jury in finding, as they must have done in rendering a verdict for the plaintiff under the instructions of the court, that the defendants induced the plaintiffs to cross at the time when he attempted to do so, and met with the injury for which he now seeks compensation.

It was suggested that the person employed by the defendants to stand near the crossing with a flag exceeded his authority in giving a signal to the plaintiff that it was safe for him to pass over the crossing just previously to the accident, and that no such act was within the scope of his employment, which was limited to the duty of preventing persons from passing at times when it was dangerous to do so. But it seems to us that this is a refinement and distinction which the facts do not justify. It is stated in the report that the flagman was stationed at the place in question, charged among other things with the duty of protecting the public. This general statement of the object for which the agent was employed, taken in connection with the fact that he was stationed at a place constructed and used as a public way by great numbers of people, clearly included the duty of indicating to persons when it was safe for them to pass, as well as when it was prudent or necessary for them to refrain from passing.

Nor do we think it can be justly said that the flagman in fact held out no inducement to the plaintiff to pass. No express invitation need have been shown. It would have been only necessary for the plaintiff to prove that the agent did some act to indicate that there was no risk of accident in attempting to pass over the crossing. The evidence at the trial was clearly sufficient to show that the agent of the defendants induced the plaintiff to pass, and that he acted in so doing within the scope of the authority conferred on him. The question whether the plaintiff was so induced was distinctly submitted to the jury by the court; nor do we see any reason for supposing that the instructions on this point were misunderstood or misapplied by the jury. If they lacked fullness, the defendants should have asked for more explicit instructions. Certainly the evidence as reported well warranted the finding of the jury on this point.

It was also urged that, if the defendants were held liable in this action, they would be made to suffer by reason of the fact that they had taken precautions to guard against accident at the place in question, which they were not bound to use, and that the case would present the singular aspect of holding a party liable for neglect in the performance of a duty voluntarily assumed, and which was not imposed by the rules of law. But this is by no means an anomaly. If a person undertakes to do an act or discharge a duty by which the conduct of others

may properly be regulated and governed, he is bound to perform it in such manner that those who rightfully are led to a course of conduct or action on the faith that the act or duty will be duly and properly performed shall not suffer loss or injury by reason of his negligence. The liability in such cases does not depend on the motives or considerations which induced a party to take on himself a particular task or duty, but on the question whether the legal rights of others have been violated by the mode in which the charge assumed has been performed.

The court were not requested at the trial to withdraw the case from the jury on the ground that the plaintiff had failed to show he was in the exercise of due care at the time the accident happened. Upon the evidence, as stated in the report, we cannot say, as matter of law, that the plaintiff did not establish this part of his case.

Judgment on the verdict.

After the above decision was rendered, the verdict was set aside, by Chapman, J., as against the evidence.

STANDARD OF DUTY. [1]

Hassenyer v. Michigan Cent. R. R. Co.

(48 Michigan, 205.—1882.)

Defendant brings error.

Cooley, J. The plaintiff in error was sued by the administrators of Louisa Hassenyer to recover damages for the neg-

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[1] "The standard of duty is not the foresight and caution which this or that particular man is capable of, but the foresight and caution of a prudent man—the average prudent man, or, as our books rather affect to say, a reasonable man—standing in this or that man's shoes." Pollock on Torts, 357.

"So far as civil liability is concerned, . . . , if a man's conduct is such as would be reckless in a man of ordinary prudence, it is reckless in him. Unless he can bring himself within some broadly defined exception to general rules, the law deliberately leaves his idiosyncrasies out of

ligence of its agents and servants whereby her death was caused. The case comes up on alleged errors in the admission and rejection of evidence, and in instructions given or refused.

The decedent was killed at the crossing of the railroad with Burdick street, one of the principal streets in the village of Kalamazoo, on the 20th day of December, 1878. She was a girl 13 years of age, and was proceeding along the street with a small pail of milk in her hands. The morning was somewhat cold and stormy. As she approached the railroad track a train was passing in one direction, and its bell was being rung. From the other direction an engine was backing up several cars, and its bell was also being rung. It was by this train that the girl was struck and killed. There was a flagman at the crossing, and no negligence seems attributable to him. The brakeman on the backing train was upon the ground, walking along by its side to guard against accidents, but did not notice the girl until she had been thrown to the ground and killed. No one saw the girl when she was struck, and the place where she was lying when first seen was outside the limits of the street.

It was contended for the defense that there was no evidence of negligence on the part of the railroad agents and servants, and therefore nothing to go to the jury. It was also insisted that a clear case of negligence on the part of the decedent appeared, and that upon this ground, if not upon the other, the court should have instructed the jury to return a verdict for the defendant. We do not agree that the case was so plain on either

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account, and peremptorily assumes that he has as much capacity to judge and to foresee consequences as a man of ordinary prudence would have in the same situation." *Commonwealth* v. *Pierce*, 138 Mass. 165, 176.

"'Negligence' implies generally the want of that care and diligence which an ordinarily prudent man would use to prevent injury under the circumstances of the particular case." *Cotton Press, etc. Co.* v. *Bradley*, 52 Tex. 599.

"The inquiry whether, in the particular case, the party conducted with ordinary care or prudence, always involves the consideration of the difficulties and obstacles to be overcome, the party's knowledge of their existence, and his means and power to overcome them." *Fox* v. *Town of Glastenbury*, 29 Conn. 204.

The feeble, aged, infirm or a child is entitled to more consideration from others than those under no disability, and the law only requires of each the exercise of such care as may reasonably be expected in view of his age and condition. *Sheridan* v. *Brooklyn & Newtown R. R.*, 36 N. Y. 39; *Reynolds* v. *N. Y. C. & H. R. R.*, 58 id. 248.

ground as to justify the court in taking it from the jury. It may be that if we were at liberty to pass upon the facts we should reach the conclusion which the defense insists upon as the only conclusion that is admissible; but we cannot say that the case is too plain upon the facts for fair minds to differ upon, and following our former decisions we agree with the trial court that the facts were properly left to the jury. *Detroit, etc. R. R. Co.* v. *Van Steinburg*, 17 Mich. 99; *Lake Shore, etc. R. R. Co.* v. *Miller*, 25 Mich. 274, 295; *LeBaron* v. *Joslin*, 41 Mich. 313.

Upon a supposition that the jury might find that the decedent at the time she was struck and killed was outside the limits of the highway and upon lands belonging to the railroad company, the defense requested rulings in effect that if such was the fact the decedent was in law chargeable with negligence. We do not agree that this was necessarily the case. The fact might have an important bearing, or it might not; depending on how far she was outside the street lines, and why she was there, and whether she was aware of the fact. As the street was without fences or cattle-guards at this point, it would be unreasonable to hold that at her peril she must keep herself strictly within its lines, and if no intent to leave the highway was apparent, and she was not further outside than one might inadvertently go in passing along the street and looking both ways for coming and passing trains, the fact should neither absolve the employés of the railroad company from the observation of care to prevent injury, nor charge her with fault if otherwise sufficiently vigilant.

Counsel for the plaintiff in error has been industrious in the discovery of faults in the rulings of the circuit judge, but for the most part his criticisms are too particular and technical to be accepted, or to require discussion at our hands. With a single exception we think no error was committed to the prejudice of the party now complaining. The exception is found in the instructions to the jury respecting the degree of care required of the decedent to avoid the danger to which she fell a victim. It was contended for the plaintiff below that the law did not require the same degree of care of a child as of an adult person, and the court so instructed the jury. This was unquestionably correct. *Railway Co.* v. *Bohn*, 27 Mich. 503. But it was also insisted that the law did not expect or require the

same degree of care and prudence in a woman as in a man; and the court gave this instruction also. It is presumable, therefore, that the jury in considering whether the decedent was chargeable with contributory negligence, made not only all proper allowances on account of her immature years, but further allowance also on account of sex.

No doubt the difference in sex has much to do with the application of legal principles in many cases. Police regulations with the utmost propriety sometimes make distinctions between men and women, in the conduct required of them under the same circumstances, and the unwritten law is in some particulars more indulgent to the one sex than the other. Words and conduct which in the presence of men might be condemned for bad taste only, in the presence of women may be punishable as criminal indecency, and a crime of violence committed upon the one would be condemned less severely by public opinion and punished less severely by the law than the same crime committed upon the other. And no doubt also the law ought, under all circumstances where they become important, to make allowances for any differences existing by nature between men and women, and also for any that grow out of their different occupations, modes of life, education and experience. A woman, for example, driving a horse on a highway, may be presumed somewhat wanting in the "amount of knowledge, skill, dexterity, steadiness of nerve, or coolness of judgment—in short, the same degree of competency" which we may presume in a man; and the person meeting her under circumstances threatening collision should govern his own conduct with some regard to her probable deficiencies. *Daniels* v. *Clegg*, 28 Mich. 33, 42. In *Snow* v. *Provincetown*, 120 Mass. 580, a question of contributory negligence was made against a young woman who, in attempting to pass a cart in a public way, which had commenced backing towards her, accidentally fell over an embankment and was injured. The following instruction by the trial judge to indicate the degree of care required of the plaintiff, was held unexceptionable: "Care implies attention and caution, and ordinary care is such a degree of attention and caution as a person of ordinary prudence of the plaintiff's sex and age would commonly and might reasonably be expected to exercise under like circumstances." This no doubt is true.

But while the authorities permit all the circumstances to be

taken into the account, age and sex among the rest, in determining the degree of care to be reasonably required or looked for, no case, so far as we know, has ever laid it down as a rule of law that less care is required of a woman than of a man. Sex is certainly no excuse for negligence (*Fox* v. *Glastenbury*, 29 Conn. 204); and if we judge of ordinary care by the standard of what is commonly looked for and expected, we should probably agree that a woman would be likely to be more prudent, careful and particular in many positions and in the performance of many duties than a man would. She would, for example, be more vigilant and indefatigable in her care of a helpless child; she would be more cautious to avoid unknown dangers; she would be more particular to keep within the limits of absolute safety when the dangers which threatened were such as only great strength and courage could venture to encounter. Of a given number of persons travelling by cars, several men will expose themselves to danger by jumping from the cars when they are in motion, or by standing upon the platform, where one woman would do the same; and a man driving a team would be more likely to cross in front of an advancing train than a woman would. In many such cases a woman's natural timidity and inexperience with dangers inclines her to be more cautious; and if we naturally and reasonably look for greater caution in the woman than in the man, any rule of law that demands less must be unphilosophical and unreasonable.

Suppose, for instance, that a man and woman standing together upon the platform of a moving car are accidentally thrown off and injured, could any rule of law be justified which would permit a jury to award damages to her but not to him, upon the ground that the law expected and required of him the higher degree of care? Or may the woman venture upon an unsafe bridge from which the man recoils, under the protection of such a discrimination? Or trust herself to a fractious horse expecting, if she shall chance to be injured, the tenderness of the law will excuse her with a verdict of such care as was reasonably to be expected, when it would pronounce a man foolhardy? We think not.

No person of any age or sex is chargeable with legal fault who, when placed in a position of peril, does the best that can be done under the circumstances. *Voak* v. *Northern Central*

Ry. Co., 75 N. Y. 320. Even this statement indicates a more rigid rule than the law will justify, for the legal requirement is only the observance of ordinary care; and while in laying down rules that are of general application, it is no doubt better to employ general terms, lest they be supposed applicable to particular classes only (*Tucker* v. *Henniker*, 41 N. H. 317); yet when the actor is a woman, an instruction that she is bound to observe the conduct of a woman of common and ordinary prudence, cannot be held legally erroneous because of being thus special. *Bloomington* v. *Perdue*, 99 Ill. 329.

Women may enter upon and follow any of the occupations of life; they may be surgeons if they will, but they cannot as such claim any privilege of exemption from the care and caution required of men. A woman may be engineer of a locomotive if she can obtain the employment, but the law will expect and require of her the same diligence to avoid mischief to others which men must observe. The rule of prudent regard for the rights of others knows nothing of sex. Neither can sex excuse anyone for the want of ordinary care when exposing one's self to known and obvious perils.

If it was apparent that the error of the judge did not mislead in this case, we might affirm the judgment. But that fact is not apparent. No one witnessed this accident; the question of due care is involved in doubts, and the erroneous ruling may have been controlling. It follows that there must be a new trial.

The other justices concurred.

NO DEGREES OF CARE.

STEAMBOAT NEW WORLD v. KING.

(16 Howard [U. S.], 469.—1853.)

MR. JUSTICE CURTIS delivered the opinion of the court.

This is an appeal from a decree of the District Court of the United States for the Northern District of California, sitting in admiralty. The libel alleges that the appellee was a passenger on board the steamer on a voyage from Sacramento to San Francisco, in June, 1851, and that, while navigating with-

in the ebb and flow of the tide, a boiler flue was exploded through negligence, and the appellee grievously scalded by the steam and hot water.

The answer admits that an explosion occurred at the time and place alleged in the libel, and that the appellee was on board and was injured thereby, but denies that he was a passenger for hire, or that the explosion was the consequence of negligence.

The evidence shows that it is customary for the masters of steamboats to permit persons whose usual employment is on board of such boats, to go from place to place free of charge; that the appellee had formerly been employed as a waiter on board this boat; and just before she sailed from Sacramento he applied to the master for a free passage to San Francisco, which was granted to him, and he came on board.

It has been urged that the master had no power to impose any obligation on the steamboat by receiving a passenger without compensation.

But it cannot be necessary that the compensation should be in money, or that it should accrue directly to the owners of the boat. If the master acted under an authority usually exercised by masters of steamboats, if such exercise of authority must be presumed to be known to and acquiesced in by the owners, and the practice is, even indirectly, beneficial to them, it must be considered to have been a lawful exercise of an authority incident to his command.

It is proved that the custom thus to receive steamboat men is general. The owners must therefore be taken to have known it, and to have acquiesced in it, inasmuch as they did not forbid the master to conform to it. And the fair presumption is, that the custom is one beneficial to themselves. Any privilege generally accorded to persons in a particular employment, tends to render that employment more desirable, and of course to enable the employer more easily and cheaply to obtain men to supply his wants.

It is true the master of a steamboat, like other agents, has not an unlimited authority. He is the agent of the owner to do only what is usually done in the particular employment in which he is engaged. Such is the general result of the authorities. Smith on Mer. Law, 559; *Grant* v. *Norway*, 10 Com. B. 688; *S. C.* 2 Eng. L. and Eq. 337; *Pope* v. *Nickerson*, 3 Story,

R. 475; *Citizens Bank* v. *Nantucket Steamboat Co.*, 2 Story, R. 32. But different employments may and do have different usages, and consequently confer on the master different powers. And when, as in this case, a usage appears to be general, not unreasonable in itself, and indirectly beneficial to the owner, we are of opinion the master has power to act under it and bind the owner.

The appellee must be deemed to have been lawfully on board under this general custom.

Whether precisely the same obligations in all respects on the part of the master and owners and their boat, existed in his case, as in that of an ordinary passenger paying fare, we do not find it necessary to determine. In the *Philadelphia and Reading Railroad Company* v. *Derby*, 14 How. R. 486, which was a case of gratuitous carriage of a passenger on a railroad, this court said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of gross."

We desire to be understood to reaffirm that doctrine, as resting, not only on public policy, but on sound principles of law.

The theory that there are three degrees of negligence, described by the terms slight, ordinary and gross, has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree, thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions, that the rules themselves can scarcely be said to have a general operation. In *Storer* v. *Gowen*, 18 Maine R. 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. *Bratt*, 11 Meeson & Wels. 113; *Wylde* v. *Pickford*, 8 id. 443, 461, 462; *Hinton* v. *Dibbin*, 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*, 3 Mason, 132, and *Foster* v. *The Essex Bank*, 17 Mass. 479, 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, etc.; 11th vol. p. 203, etc.; Makeldey, Man. Du Droit Romain, 191, etc.

But whether this term, gross negligence, be used or not, this particular case is one of gross negligence, according to the tests which have been applied to such a case.

In the first place, it is settled, that "the bailee must proportion his care to the injury or loss which is likely to be sustained by any improvidence on his part." Story on Bailments, § 15.

It is also settled that if the occupation or employment be one requiring skill, the failure to exert that needful skill, either because it is not possessed, or from inattention, is gross negligence. Thus Heath, J., in *Shields* v. *Blackburne*, 1 H. Bl. 161, says, "If a man applies to a surgeon to attend him in a disorder for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action; the surgeon would also be liable for such negligence if he undertook gratis to attend a sick person, because his situation implies

skill in surgery." And Lord Loughborough declares that an omission to use skill is gross negligence. Mr. Justice Story, although he controverts the doctrine of Pothier, that any negligence renders a gratuitous bailee responsible for the loss occasioned by his fault, and also the distinction made by Sir William Jones, between an undertaking to carry and an undertaking to do work, yet admits that the responsibility exists when there is a want of due skill, or an omission to exercise it. And the same may be said of Mr. Justice Porter, in *Percy* v. *Millandon*, 20 Martin, 75. This qualification of the rule is also recognized in *Stanton et al.* v. *Bell et al.*, 2 Hawks, 145.

That the proper management of the boilers and machinery of a steamboat requires skill, must be admitted. Indeed, by the act of Congress of August 30, 1852, great and unusual precautions are taken to exclude from this employment all persons who do not possess it. That an omission to exercise this skill vigilantly and faithfully, endangers, to a frightful extent, the lives and limbs of great numbers of human beings, the awful destruction of life in our country by explosions of steam boilers but too painfully proves. We do not hesitate therefore to declare that negligence in the care or management of such boilers, for which skill is necessary, the probable consequence of which negligence is injury and loss of the most disastrous kind, is to be deemed culpable negligence, rendering the owners and the boat liable for damages, even in the case of the gratuitous carriage of a passenger. Indeed, as to explosion of boilers and flues, or other dangerous escape of steam on board steamboats, Congress has, in clear terms, excluded all such cases from the operation of a rule requiring gross negligence to be proved to lay the foundation of an action for damages to person or property.

The thirteenth section of the act of July 7, 1838 (5 Stat. at Large, 306), provides: "That in all suits and actions against proprietors of steamboats for injury arising to persons or property from the bursting of the boiler of any steamboat, or the collapse of a flue, or other dangerous escape of steam, the fact of such bursting, collapse, or injurious escape of steam shall be taken as full *prima facie* evidence sufficient to charge the defendant, or those in his employment, with negligence, until he shall show that no negligence has been committed by him or those in his employment."

This case falls within this section; and it is therefore incumbent on the claimants to prove that no negligence has been committed by those in their employment.

Have they proved this? It appears that the disaster happened a short distance above Benicia; that another steamer called the Wilson G. Hunt, was then about a quarter of a mile astern of the New World, and that the boat first arriving at Benicia got from twenty-five to fifty passengers. The pilot of the Hunt says he hardly knows whether the boats were racing, but both were doing their best, and this is confirmed by the assistant pilot, who says the boats were always supposed to come down as fast as possible; the first boat at Benicia gets from twenty-five to fifty passengers. And he adds that at a particular place called "the slough" the Hunt attempted to pass the New World. Fay, a passenger on board the New World, swears that on two occasions, before reaching "the slough" the Hunt attempted to pass the New World, and failed; that to his knowledge these boats had been in the habit of contending for the mastery, and on this occasion both were doing their best. The fact that the Hunt attempted to pass the New World in "the slough" is denied by two of the respondents' witnesses, but they do not meet the testimony of Fay, as to the two previous attempts. Haskell, another passenger, says, "about ten minutes before the explosion I was standing looking at the engine, we saw the engineer was evidently excited, by his running to a little window to look out at the boat behind. He repeated this ten or fifteen times in a very short time." The master, clerk, engineer, assistant engineer, pilot, one fireman, and the steward of the New World, were examined on behalf of the claimants. No one of them, save the pilot, denies the fact that the boats were racing. With the exception of the pilot and the engineer, they are wholly silent on the subject. The pilot says they were not racing. The engineer says: "We have had some little strife between us and the Hunt as to who should get to Benicia first. There was an agreement made that we should go first. I think it was a trip or two before." Considering that the master says nothing of any such agreement, that it does not appear to have been known to any other person on board either boat, that this witness and the pilot were both directly connected with and responsible for the negligence charged,

and that the fact of racing is substantially sworn to by two passengers on board the New World, and by the pilot and assistant pilot of the Hunt, and is not denied by the master of the New World, we cannot avoid the conclusion that the fact is proved. And certainly it greatly increases the burden which the act of Congress has thrown on the claimants. It is possible that those managing a steamboat engaged in a race may use all that care and adopt all those precautions which the dangerous power they employ renders necessary to safety. But it is highly improbable. The excitement engendered by strife for victory is not a fit temper of mind for men on whose judgment, vigilance, coolness and skill the lives of passengers depend. And when a disastrous explosion has occurred in such a strife, this court cannot treat the evidence of those engaged in it, and *prima facie* responsible for its consequences, as sufficient to disprove their own negligence, which the law presumes.

We consider the testimony of the assistant engineer and fireman, who are the only witnesses who speak to the quantity of steam carried, as wholly unsatisfactory. They say the boiler was allowed by the inspector to carry forty pounds to the inch, and that when the explosion occurred, they were carrying but twenty-three pounds. The principal engineer says he does not remember how much steam they had on. The master is silent on the subject and says nothing as to the speed of the boat. The clear weight of the evidence is that the boat was, to use the language of some of the witnesses, "doing its best." We are not convinced that she was carrying only twenty-three pounds, little more than half her allowance.

This is the only evidence by which the claimants have endeavored to encounter the presumption of negligence. In our opinion it does not disprove it; and consequently the claimants are liable to damages, and the decree of the District Court must be affirmed.[1]

(Dissenting opinion by Mr. Justice Daniel omitted.)

[1] See also *Perkins* v. *N. Y. C. R. R. Co.*, 24 N. Y. 196.

DILIGENCE INCLUDES COMPETENCE.[1]

DuBois v. Decker.

(130 New York, 325.—1891.)

Appeal from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the plaintiff.

Haight, J. This action was brought to recover damages of the defendant, a physician and surgeon, for alleged malpractice suffered by the plaintiff whilst undergoing treatment as a patient.

On the 1st day of December, 1889, the plaintiff undertook to jump on to an engine of the Ulster and Delaware Railroad, in the city of Kingston, and in doing so slipped, and his left foot was caught by the tender, and a portion thereof crushed. Being destitute, he was taken to the city almshouse, where he was treated by the defendant, who was one of the city physicians having the care of the patients therein, and who was employed for that purpose. Thereafter, and on the 10th day of December, he amputated the plaintiff's leg above the ankle joint, and six or seven days thereafter, gangrene having set in, he again amputated the leg at the knee joint. After the second ampu-

[1] "If a party has taken in hand the conduct of anything requiring special skill and knowledge, we require of him a competent measure of the skill and knowledge usually found in persons who undertake such matters. And this is hardly an addition to the general rule; for a man of common sense knows wherein he is competent and wherein not, and does not take on himself things in which he is incompetent. If a man will drive a carriage, he is bound to have the ordinary competence of a coachman; if he will handle a ship, of a seaman; if he will treat a wound, of a surgeon; if he will lay bricks, of a bricklayer; and so in every case that can be put. Whoever takes on himself to exercise a craft holds himself out as possessing at least the common skill of that craft, and is answerable accordingly. If he fails, it is no excuse that he did the best he, being unskilled, actually could. He must be reasonably skilled at his peril. As the Romans put it, *imperitia culpae adnumeratur*. . . . An exception to this principle appears to be admissible in one uncommon but possible kind of circumstances, namely, where in emergency, and to avoid imminent risk, the conduct of something generally entrusted to skilled persons is taken by an unskilled person." Pollock on Torts, 24.

tation the leg did not properly heal, but became a running sore, and at the time of the trial the bone protruded some three or four inches.

Evidence was given upon the trial from which the jury might find that the bones of the foot were so crushed that immediate amputation of the injured portions was necessary, and that the appearance of gangrene was in consequence of the delay of ten days in the operation; and that in the second operation the defendant neglected to save flap enough to cover the end of the limb and bone, and that the subsequent protrusion of the bone was owing to this neglect.

The question of the defendant's liability consequently became one for the jury. We are aware that he claimed to have waited ten days before operating, for the purpose of seeing whether the foot could not be saved, and that a physician and surgeon will not be held liable for mere errors in judgment. But his judgment must be founded upon his intelligence. He engages to bring to the treatment of his patient care, skill and knowledge, and he should have known the probable consequences that would follow from the crushing of the bones and tissues of the foot.

In submitting the case to the jury, the defendant asked the court to charge that "if the plaintiff did not obey the defendant's instructions and this contributed to an aggravation of the injury, the plaintiff cannot recover." The court declined to charge in the form in which the request was put, and an exception was taken by the defendant.

It appears from the testimony of the defendant that after the second amputation he dressed the stump and put the plaintiff in position by elevating the limb so as to prevent hemorrhage and too much pressure upon the arteries; that the plaintiff did not keep in the position in which he was placed and got his leg to bleeding, and that he presumed that this bleeding interfered with the healing of the limb. It also appears that some time after the second amputation the plaintiff refused and neglected to take the medicine that was left for him by the defendant, and that subsequently, after the defendant had ordered him to be removed to another room so as to avoid liability of contracting erysipelas from a patient that had been brought to the almshouse afflicted with that disease, he left and went away.

Whilst the removing of the limb from the position in which it was placed may have produced the bleeding and thus to some extent impeded the healing, and his going away at the time that he did may also have further aggravated the difficulty, these facts would only tend to mitigate the damages and would not relieve the defendant from the consequence of previous neglect or unskillful treatment. As to the prescription we are not told what it was or what it was for, and the jury was, therefore, unable to determine whether or not the condition of the patient would have been materially changed by its use.

The request to charge, as we have seen, was to the effect that if the plaintiff did not obey the instructions, and this contributed in aggravation of the injury, the plaintiff cannot recover. This was too broad if the jury found that the defendant was guilty of malpractice prior to the disobedience complained of.

In the case of *Carpenter* v. *Blake*, 75 N. Y. 12, the court was requested to charge that if the plaintiff was guilty of any negligence in the management of the arm through or without the fault of the attending surgeon after the defendant ceased to have charge of the case, and such negligence contributed in any material degree to produce the present bad condition of the arm, the defendant was not responsible. This request was refused, and it was held properly for the reason that the request was too broad; that if there had been subsequent negligence, the cause of action for defendant's negligence would simply go in mitigation of damages.

In the case of *McCandless* v. *Mc Wha*, 22 Pa. St. 261–272, Lewis, J., in delivering the opinion of the court, says: "A patient is bound to submit to such treatment as his surgeon prescribes, provided the treatment be such as a surgeon of ordinary skill would adopt or sanction; but if it be painful, injurious and unskillful, he is not bound to peril his health and perhaps his life by submission to it. It follows that before the surgeon can shift the responsibility from himself to the patient on the ground that the latter did not submit to the course recommended, it must be shown that the prescriptions were proper and adapted to the end in view. It is incumbent on the surgeon to satisfy the jury on this point, and in doing so he has the right to call to his aid the science and experience of his

professional brethren. It will not do to cover his own want of skill by raising a mist out of the refractory disposition of the patient."

The defendant moved to dismiss the complaint upon the ground that it failed to show a contract relation between the parties whereby the defendant was employed to attend the plaintiff, and that no facts were alleged showing it to be the duty of the defendant to treat him in a skillful manner. This motion being denied, the defendant asked the court to charge that as the defendant treated the plaintiff gratuitously, he is liable, if at all, only for gross negligence; which was refused.

It has been held that the fact that a physician or surgeon renders services gratuitously does not affect his duty to exercise reasonable and ordinary care, skill and diligence. *McCandless* v. *McWha*, 22 Pa. St. 261–269; *McNevins* v. *Lowe*, 40 Ill. 209; *Gladwell* v. *Steggall*, 5 Bing. N. C. 733.

But we do not deem it necessary to consider or determine this question for it appears that the plaintiff's services were not gratuitously rendered. He was employed by the city as one of the physicians to attend and treat the patients that should be sent to the almshouse. The fact that he was paid by the city instead of the plaintiff did not relieve him from the duty to exercise ordinary care and skill.

Exceptions were taken to the admission and rejection of evidence. We have examined them and find none that require a new trial.

The judgment should be affirmed, with costs. All concur, except Parker, J., not sitting.

Judgment affirmed.

NEGLIGENCE: A QUESTION OF LAW OR FACT.

FARRELL v. WATERBURY HORSE RAILROAD CO.

(60 Connecticut, 239.—1891.)

Action to recover damages for injuries sustained by the negligence of the defendant, and heard in damages, on a default, before Cowell, J., who made the following finding of facts:

On November 10, 1887, and for some time prior thereto the plaintiff was duly licensed to make connections with the sewers in the city of Waterbury. On that day the defendant operated a horse railroad on West Main street in that city, and its cars passed a given point every twelve minutes. In front of the premises of one Kilmartin, which was on the south side of the street, there was a double line of tracks to allow the cars to pass each other. The point of separation between these two lines commenced about one hundred and fifty feet west of Kilmartin's premises, and there was a slight rise of grade towards the east, the street running east and west. The sewer at this point is about fifteen feet below the surface, and is located between the two lines of track. On November 9, the plaintiff commenced excavating for the purpose of connecting Kilmartin's premises with the sewer, and on November 10, by ten o'clock in the forenoon, had reached to the depth of about twelve feet below the southerly line of the defendant's track.

The manner in which the cars passed the trench was by running them up to a point ten or twelve feet distant therefrom, then detaching the horses before the car came to a stop, the horses passing around the north end of the trench. The car without coming to a stop was pushed over the trench by one of the defendant's workmen stationed there for that purpose. The plaintiff also assisted a number of times that morning in pushing the car over the trench, so that he well understood the situation.

On the 10th, a workman, whose duties were generally in the horse-car stables, was driving the horses attached to the car which caused the accident. He was a relief driver, or one whose duty it was to relieve the regular drivers whenever it became necessary. He had had considerable experience as a driver on horse-cars, and was considered a competent driver.

About ten o'clock in the forenoon, one of the plaintiff's workmen was at work in the trench under the north rail of the south line of the defendant's tracks, and the plaintiff was standing in the west side of the trench, facing east, one foot on each side of the south rail of the south line of the track, bending over, giving directions to the workmen in the trench, and for this reason his mind was not alive to the fact that a car was approaching him from the west. The driver of the defendant's car, as he came to the point where the turn-out separates, west

of Kilmartin's, saw the plaintiff, and immediately called out to him to get out of the way, in a voice loud enough to have been heard by the plaintiff if his attention was not then occupied with the workmen in the trench, and was heard by the defendant's workman who was stationed at the trench for the purpose of pushing the car across it, and who was standing but a few feet from the plaintiff, which workman also called out to the plaintiff, to assist in pushing the car. The plaintiff, however, did not hear the call.

Just at this moment the driver began preparations to detach the horses from the car, and for that purpose leaned over the forward rail to remove the pin which holds the coupling pin in place, but for some reason it could not be removed immediately, and the horses' heads reached within a few feet of the trench before the driver succeeded in withdrawing the pin. The car at this time was moving at the rate of three or four miles an hour from the momentum it had received, and from being pushed along by the workman whose duty it was to do so.

The driver, immediately after removing the pin and reining his horses away from the track, saw the plaintiff in close proximity to the forward end of the car. He immediately applied the brake, but the car struck the plaintiff, knocking him down, dragging him some distance, breaking his collar-bone, and otherwise severely injuring him.

No other notice of the approach of the car was given than is above set forth.

I find that the defendant was not negligent in running the car in the manner above described, unless the foregoing facts constitute negligence.

The plaintiff claimed that it was not in law negligence to have his attention concentrated on the workmen in the trench for a few moments to such an extent as to divert his mind from the approach of a horse-car; also that he had the right to rely to some extent on the fact that the driver would see him, and would exercise care to avoid injuring him; also that, being lawfully on the track, the defendant owed him the duty of active vigilance to avoid injuring him; also that the driver was bound to use every reasonable effort to avoid injuring him after discovering that he was on the track exposed to injury.

On the foregoing facts I find that the plaintiff was guilty of contributory negligence, and therefore assess to him $75 only

as nominal damages. If the plaintiff was not on the above recited facts guilty of contributory negligence, his injuries were of such a character that he should recover six fold the assessed damages.

The plaintiff appealed.

TORRANCE, J. This is an action brought to recover damages for an injury caused to the plaintiff by the negligence of the defendant, in the management of one of its horse-cars, on a public highway.

The case was defaulted and heard in damages. The court below made a finding of the subordinate and evidential facts, bearing upon the question of the negligence of the defendant, and the contributory negligence of the plaintiff, and then added the following: "I find that the defendant was not negligent in running the car in the manner above described, unless the foregoing facts constitute negligence. On the foregoing facts, however, I find that the plaintiff was guilty of contributory negligence, and therefore assess to him seventy-five dollars only, as nominal damages. If the plaintiff was not on the above recited facts guilty of contributory negligence, his injuries were of such a character that he should recover six fold the assessed damages."

Upon the trial below the plaintiff made certain claims upon matters of law, which are set forth in the record.

Four of the six reasons of appeal filed in the case are based upon the assumed fact that the court below decided these claims adversely to the plaintiff. But the record neither expressly nor by necessary implication discloses any such fact. For aught that appears, the court below took the view of the law, as expressed in these claims, which the plaintiff asked it to take. This court upon an appeal cannot consider any error assigned in the reason of appeal, unless "it also appears upon the record that the question was distinctly raised at the trial and was decided by the court adversely to the appellant's claims." Genl. Statutes, § 1135. We cannot therefore consider the matters set forth in the last four reasons of appeal.

This leaves to be considered only the first two reasons of appeal, which are stated as follows: "(1) The court erred in deciding that the defendant on the facts found, was not negligent. (2) In deciding that the plaintiff was guilty of contributory negligence."

The plaintiff claims that the conclusions of the trial court upon the facts found, as to the negligence of the defendant, and the contributory negligence of the plaintiff, are inferences or conclusions of law, which may be reviewed by this court upon an appeal, and the defendant claims that they are inferences or conclusions of fact, which cannot be so reviewed.

If the plaintiff is right in his claim, this court can and ought to review the conclusions aforesaid. If the defendant is right, there is properly no question presented upon the record for the consideration of this court. Whether, in a given case involving the question of negligence of either the plaintiff or the defendant, the conclusion or inference of negligence drawn by the trier or triers is one which this court has or has not the power to review, is always an important and often a difficult question to determine. Its importance arises from the fact that in the former case such conclusion may upon review be either sustained or set aside by this court, while in the latter case such conclusion, whether drawn correctly or not, is, generally speaking, final and conclusive.

The difficulty of determining whether the conclusion belongs to one or the other of these classes, arises, in part at least, from the complex nature of negligence as a legal conception, and the fact that the word "negligence" is frequently used for only a part of this complex conception. "Negligence, like ownership, is a complex conception. Just as the latter imports the existence of certain facts, and also the consequence (protection against all the world), which the law attaches to those facts, the former imports the existence of certain facts (conduct), and also the consequence (liability), which the law attaches to those facts." Holmes's Common Law, p. 115. This conception involves, as its main elements, the subordinate conceptions of a duty resting upon one person respecting his conduct toward others; a violation of such duty, through heedlessness or inattention on the part of him on whom it rests; a resulting legal injury or harm to others as an effect, and the legal liability consequent thereon. Accordingly, as a legal conception, negligence has been defined as follows: "A breach of duty, unintentional, and proximately producing injury to another possessing equal rights." Smith's Law of Negligence, 1.

But neither in text-books, nor in judicial decisions, is the

word "negligence" used at all times as standing for all the elements of this entire complex conception. When in courts of law, the principal question is, what was the conduct, it is customary and perhaps allowable to say that the question of negligence is one of fact to be determined by the trier; and when the question principally respects the duty or the liability to say that it is a question of law. When, therefore, in text-books, or in adjudged cases, the assertion is made that the "question of negligence" is a "question of fact" or is a "question of law," or is a "mixed question of law and of fact," no confusion of thought will result if the sense in which the word "negligence" is used in the particular instance be ascertained, and this in most cases may be readily determined from the context.

But another, and perhaps the chief cause of the difficulty of determining in a given case whether the conclusion as to negligence is one of law or of fact, arises from another source, which we will now consider.

The conception of negligence, as we have seen, involves the idea of a duty to act in a certain way towards others, and a violation of that duty by acts or conduct of a contrary nature. The duty is imposed by law, either directly by establishing specific or general rules of conduct binding upon all persons, or indirectly through legal agreements made by the parties concerned. It is with duties not arising out of contract that we are here concerned.

There is further involved in the legal conception of negligence, the existence of a test or standard of conduct with which the given conduct is to be compared and by which it is to be judged. The question whether the given conduct comes up to the standard is frequently called "the question of negligence." The result of comparing the conduct with the standard is generally spoken of as "negligence" or "the finding of negligence." Negligence, in this last sense, is always a conclusion or inference, and never a fact in the ordinary sense of that word. When the question of negligence, in the above sense, can be answered by the court, it is called a "question of law," and the answer is called an inference or conclusion of law; when it is and must be answered by a jury or other trier, it is generally called a question of fact, and the answer is called an inference or conclusion of fact. Where the law itself prescribes

and defines beforehand the precise specific conduct required under given circumstances, the standard by which such conduct is to be judged is found in the law. When in such a case, the conduct has been ascertained, the law, through the court, determines whether the conduct comes up to the standard. The rules of the road, some of the rules of navigation, and the law requiring the sounding of the whistle or the ringing of the bell of a locomotive approaching a grade crossing at a specified distance therefrom, may serve as instances of this kind. Of course if, in cases of this kind, one of the parties injures another, he is not necessarily absolved from blame by showing a compliance with the specific rule or law, for it may be that while so doing he neglected other duties which the law imposed upon him. But, when the only question is whether the ascertained conduct comes up to the standard fixed by the specific rule or law, the conclusion, inference or judgment that it does or does not, is, as we have said, one of law.

"A question of law, in the true sense, is one that can be decided by the application to the specific facts found to exist (here the conduct of some person and the circumstances under which he acted or omitted to act), of a preëxisting rule. Such a rule must contain a description of the kind of circumstances to which it is to apply, and the kind of conduct required." Terry's Leading Principles of Anglo-Am. Law, § 72. In such cases, as this court said in substance in *Hayden* v. *Allyn*, 55 Conn. 289, the evidence exhausts itself in producing the facts found. Nothing remains but for the court, in the exercise of its legal discretion, to draw the inference of liability or nonliability, and this inference or conclusion can in such cases always be reviewed by this court. Clear cases of this kind usually present no difficulty.

As applicable to most cases, however, the law has not provided specific and precise rules of conduct; it contents itself with laying down some few wide general rules. The rule that all persons must act and conduct themselves, under all circumstances, as a man of ordinary prudence would act under like circumstances, is an illustration of this class of rules or laws. This general rule of conduct is not a standard of conduct in the same sense in which a fixed rule of law is such a standard. In most cases where it must be applied, the principal controversy is over the question what would have been the conduct of a man

of ordinary prudence under the circumstances? Manifestly the rule itself can furnish no answer to that question in such cases. "The rule usually propounded, to act as a reasonable and prudent man would act in the circumstances, still leaves open the question how such a man would act." Terry's Lead. Prin. Anglo-Am. Law, § 72.

It is also a varying standard. "In dangerous situations ordinary care means great care; the greater the danger the greater the care required; and the want of the degree of care required may amount to culpable negligence." *Knowles* v. *Crampton*, 55 Conn. 344.

This general rule has rightly been called "a featureless generality," but from the necessity of the case it is the only rule of law applicable in the great majority of cases involving the question of negligence. The law cannot say beforehand how the man of ordinary prudence would act, or ought to act, under all or any probable set of circumstances. But in cases involving the question of negligence, where this general rule of conduct is the only rule of law applicable, it may and sometimes does happen, that the conduct under investigation is so manifestly contrary to that of a reasonably prudent man, or is so plainly and palpably like that of such a man, that the general rule itself may be applied as a matter of law, by the court, without the aid of a jury. That is, the conduct may be such that no court could hesitate or be in doubt concerning the question whether the conduct was or was not the conduct of a person of ordinary prudence under the circumstances.

The difference between the classes of cases where the court can thus apply the general rule of conduct, and those wherein it must be applied by the jury, is well illustrated in the following extract from the opinion of the Supreme Court of the United States, in the case of *Railroad Company* v. *Stout*, 17 Wall. 657. "If a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be ruled, as a matter of law, that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So if a coach-driver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the

breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law, that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of sound judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established, from which one sensible, impartial man would infer that proper care had not been used and that negligence existed, while another equally sensible and equally impartial man would infer that proper care had been used and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury."

The line of division between these two classes of cases is by no means a fixed and well-defined one. Close cases will occur where courts may well differ in opinion as to whether they lie on one side or on the other of the boundary line. "Legal, like natural divisions, however clear in their general outline, will be found on exact scrutiny to end in a penumbra or debatable land." Holmes's Common Law, 127.

Now the difficulty of determining whether a conclusion or inference of negligence is one of fact or one of law, as these phrases are commonly used, arises mainly in this intermediate class of cases. In such cases the law itself furnishes no certain, specific, sufficient standard of conduct, and, of necessity, leaves the trier to determine, both what the conduct is, and whether it comes up to the standard, as such standard exists in the mind of the trier. In a case of this kind the inference or conclusion of the trier, upon the question whether the ascertained conduct does or does not come up to such standard, is, as we have said, called a question of fact, and generally speaking, it cannot be reviewed by this court. If such inference is drawn by a jury, it is final and conclusive, because their opinion of what a man of ordinary prudence would or would not do, under the circumstances, is the rule of decision in that special case. If drawn by a single trier, as it may be under our system of law, it is equally final and conclusive for the same reason.

In every such case the trier, for the time being, adopts his own opinion, limited only by the general rule, of what the man

of ordinary prudence would or would not do under the circumstances, and makes such opinion the measure or standard of the conduct in question. This view of the subject is forcibly put by COOLEY, J., in the case of *Detroit & Milwaukee R. R. Co.* v. *Van Steinburg*, 17 Mich. 99, wherein he says: "When the judge decides that a want of due care is not shown, he necessarily fixes in his own mind the standard of ordinary prudence, and measures the plaintiff's conduct by that. He thus makes his own opinion of what the prudent man would do a definite rule of law." And in speaking of this same matter, the Supreme Court of Pennsylvania uses the following language: "When the standard shifts with the circumstances of the case, it is in its very nature incapable of being determined as a matter of law, and must be submitted to the jury. There are, it is true, some cases in which a court can determine that omissions constitute negligence. They are those in which the precise measure of duty is determinate, the same under all circumstances. When the duty is defined, the failure to perform it is of course negligence, and may be so declared by the court. But where the measure of duty is not unvarying, where a higher degree of care is demanded under some circumstances than under others, where both the duty and the extent of performance are to be ascertained as facts, a jury alone can determine what is negligence and whether it has been proved. Such was this case. The question was not alone what the defendants had done or left undone, but, in addition, what a prudent and reasonable man would ordinarily have done under the circumstances. Neither of these questions could the court solve." And later on in the same opinion, in commenting upon a case cited by the plaintiff, the court says: "Even if the court might, in that case, have declared the effect of the evidence, it must have been because the duty of the defendants was unvarying and well defined by the law. Here the standard of duty was to be found as a fact, as well as the measure of its performance." *McCully* v. *Clark*, 40 Pa. St. 399.

In his book on the Common Law, page 123, Judge HOLMES speaks as follows: "When a case arises in which the standard of conduct, pure and simple, is submitted to the jury, the explanation is plain. It is that the court, not entertaining any clear views of public policy applicable to the matter, derives the rule to be applied from daily experience, as it has been

agreed that the great body of the law of tort has been derived. But the court further feels that it is not itself possessed of sufficient practical experience to lay down the rule intelligently. It conceives that twelve men, taken from the practical part of the community, can aid its judgment."

In treating of contributory negligence, Mr. Beach, in his work on that subject, page 459, says: "In the ultimate determination of the question whether the plaintiff was guilty of contributory negligence, two separate inquiries are involved. *First.* What was ordinary care under the circumstances? *Second.* Did the conduct of the plaintiff come up to that standard? With respect to the standard of ordinary care, it is not always a fixed standard. In many cases it must be found by the jury. In such a case each of these inquiries is for the jury. They must assume a standard and then measure the plaintiff's conduct by that standard. Whenever the standard is fixed, and when the measure of duty is precisely defined by law, then a failure to attain that standard is negligence in law, and a matter with which the jury can properly have nothing to do." The distinction between these two classes of cases is a fundamental one and not one of mere form.

It is sometimes said that, where all the facts are found, the mode of stating the inference or conclusion of negligence will make it one of law or fact as the case may be. But this clearly is not so. No mere mode of statement, whether found in a special verdict or in a special plea, or in a finding of facts, can convert the one into the other. In *Beers* v. *The Housatonic R. R. Co.*, 19 Conn. 566, this court said: "If it were competent for the defendants to have availed themselves of a want of ordinary and reasonable care on the part of the plaintiff by a special plea, and that plea should allege merely the facts or circumstances on which the defendant claims that the court should have declared to the jury that such want of care was proved; or if they had been found in a special verdict by the jury; it is quite clear that such plea or verdict would be unavailable to the defendants on the question, for the reason that the one would allege and the other would find only evidence of the fact in issue, and not the fact itself. In *Williams* v. *Town of Clinton*, 28 Conn. 264, this court said: "Under the pleadings the issue presented nothing but a question of fact—was there or not culpable negligence on her part? We cannot per-

mit such a question to be taken from the jury, the legal and constitutional tribunal, by the defendant's specially reciting the evidence adduced on the trial and claiming that the court shall instruct them as to its legal effect. Such a course would speedily put an end to all jury trials." In *Fiske* v. *Forsythe Dyeing Co.*, 57 Conn. 119, this court said: "The only error assigned in this case is that the court below held that 'upon the facts found, the defendants were guilty of negligence in leaving their horses unhitched and unattended, in the manner described.' The finding of the court states all the facts with great particularity. . . . But the question of negligence cannot thus be made a question of law."

In the following cases the findings of facts were substantially similar in form to the finding of facts in the case at bar, yet this court held, and rightly, that it had no power to review the conclusion as to negligence. *Daniels* v. *Town of Saybrook*, 34 Conn. 377; *Congdon* v. *City of Norwich*, 37 id. 414; *Young* v. *City of New Haven*, 39 id. 435; *Brennan* v. *Fair Haven & Westville R. R. Co.*, 45 id. 284; *Davis* v. *Town of Guilford*, 55 id. 356.

On the other hand, where special findings of fact were made, and from those facts the trial court formally drew the conclusion as to negligence, this court, notwithstanding the form of the finding, held the conclusions to be conclusions of law and reviewed them. *Beardsley* v. *City of Hartford*, 50 Conn. 529; *Nolan* v. *N. Y., N. H. & H. R. R. Co.*, 53 id. 461; *Bailey* v. *Hartford & Conn. R. R. Co.*, 56 id. 444; *Dyson* v. *N. Y. & N. E. R. R. Co.*, 57 id. 9; *Gallagher* v. *N. Y. & N. E. R. R. Co.*, id. 442.

It is frequently supposed or assumed that it makes some difference in this matter whether the case is tried to the jury or to the court, but this is not so. Whether the trier is one man or twelve men makes no difference. If the case is such that the trier and not the law must determine whether the conduct in question is, or is not, that of the prudent man, the conclusion of the single trier upon this point is just as binding and final as that of twelve men.

In *Shelton* v. *Hoadley*, 15 Conn. 535, this court held that where an issue of fact is closed to the court instead of to the jury, the conclusion of the court cannot be reviewed upon a bill of exceptions, which sets out all the facts, any more than the

verdict of a jury could be in like circumstances. And in *Brady* v. *Barnes*, 42 Conn. 512, it is said: "When an issue of fact is closed and tried by the Superior Court, this court will not, upon evidence reported, assume the responsibility of finding by inference therefrom a fact which that court could not find. The principles and the reasons which protect the sovereignty of juries over facts, when issues are closed to them, underlie this right of auditors and committees in chancery; for they are but statutory juries finding facts by forms of procedure peculiar to themselves." So also in *Stannard* v. *Sperry*, 56 Conn. 546, it is said: "Under our system, whenever the court, or a committee of its appointment, finds a fact, such finding is beyond revision or correction equally with the verdict of a jury, if there be no illegality in the mode of proceeding and no intentional wrong done. Errors of judgment as to the value of property must stand uncorrected. This is equally true of the finding of a committee appointed to hear and find in place of and for the court. If its finding of facts is to be reviewed in every case by the court, its hearing becomes a useless expenditure of labor and money."

It may be said that this view of the subject leaves the parties at the mercy of the trier. A like objection, taken in the case last above cited, was thus answered in the opinion: "The defendant suggests that if this be so he is at the mercy of the committee as to the value of his part. But this fact does not vitiate the proceeding. That every person shall be at the mercy of some tribunal, both as to law and fact, is the only reason for the existence of a judicial system."

The distinction in question, then, being in general a fundamental and important distinction, the question remains whether any general rule exists, the application of which will determine in every case with certainty whether the inference as to negligence to be drawn from ascertained facts is one of fact or of law in the sense explained. Perhaps no such general rule has been or can be formulated. At any rate we know of none, and we do not intend in the present case to lay down any such general rule. But cases involving the distinction in question have been frequently before the courts; they have been decided upon principles which have been, to some extent formulated into working rules; and these rules can be applied with reasonable certainty in most cases that arise in actual practice. In

his work on Torts, p. 670, Judge Cooley states such a rule as follows: "The proper conclusion seems to be this: If the case is such that reasonable men, unaffected by bias or prejudice, would be agreed concerning the presence or absence of due care, the judge would be quite justified in saying that the law deduced the conclusion accordingly. If the facts are not ambiguous, and there is no room for two honest and apparently reasonable conclusions, then the judge should not be compelled to submit the question to the jury as one in dispute." In the case of *Detroit & Milwaukee R. R. Co.* v. *Van Steinburg*, *supra*, Judge Cooley stated the rule as follows: "It is a mistake to say, as is sometimes said, that when the facts are undisputed the question of negligence is necessarily one of law. This is generally true only of that class of cases where a party has failed in the performance of a clear legal duty. When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of these conclusions has been drawn by the jury. The inferences must either be certain or uncontrovertible, or they cannot be decided by the court." Wharton says: "The true position is this: Negligence is always a logical inference to be drawn by the jury from all the circumstances of the case, under the instructions of the court. In all cases in which the evidence is such as not to justify the inference of negligence, so that a verdict of a jury would be set aside by the court, then it is the duty of the court to negative the inference. In all other cases the question is for the jury, subject to such advice as may be given by the court as to the force of the inference." Wharton on Negligence, § 420.

The rule as laid down by Judge Cooley is substantially like the one adopted by the Supreme Court of the United States in the case of *Railroad Co.* v. *Stout*, *supra*. The rule is thus stated in Terry, Anglo-Amer. Law, § 72: "The question, was the specific conduct of the specific person in the specific circumstances reasonable or not, must usually remain as a question which is really one of fact. When the reasonableness or unreasonableness of the conduct is very plain, the court will decide it. When it seems to the court fairly to admit of doubt, it will be handed over to the jury."

Mr. Beach, in his work on Contributory Negligence, p. 454, states the rule as follows: "When the facts are unchallenged,

and are such that reasonable minds could draw no other inference or conclusion from them than that the plaintiff was or was not at fault, then it is the province of the court to determine the question of contributory negligence as one of law." In *Ochsenbein* v. *Sharpley*, 85 N. Y. 214, the court stated the rule thus: "When the facts are undisputed and do not admit of different or contrary inferences, the question is one of law for the court." This also substantially appears to be the rule in Ohio and California. *Railroad Co.* v. *Crawford*, 24 Ohio St. 631; *McKeever* v. *Railroad Co.*, 59 Cal. 294.

It is perhaps unnecessary to say that, in making the foregoing citations from text-writers and decisions, we do not necessarily adopt or approve of all their conclusions, or the rule precisely as stated by them; but we think some of the principles stated, upon which the rules are or profess to be based, will furnish a practical guide for the solution of the question we are considering, in cases like the one at bar. Manifestly this frequently recurring question ought to be decided upon principle, so far as it is possible to do so.

We think an examination of the cases from our own reports heretofore cited, and of others therefrom that might be cited, involving the question of negligence, will show that this court in such decisions has applied principles which, in most cases occurring in practice, will solve the question under consideration without much difficulty. From such an examination we think it will appear that, in cases involving the question of negligence, where the general rule of conduct is alone applicable, where the facts found are of such a nature that the trier must, as it were, put himself in the place of the parties, and must exercise a sound discretion based upon his experience, not only upon the question what did the parties do or omit under the circumstances, but upon the further question, what would a prudent, reasonable man have done under those circumstances, and especially where the facts and circumstances are of such a nature that honest, fair-minded, capable men might come to different conclusions upon the latter question, the inference or conclusion of negligence is one to be drawn by the trier and not by the court as matter of law. Such an inference or conclusion will, speaking generally, be treated by this court as one of fact, which will not be reviewed where the facts have been properly found, unless the court can see from the record that

in drawing such inference the trier imposed some duty upon the parties which the law did not impose, or absolved them from some duty which the law required of them under the circumstances, or in some other respect violated some rule or principle of law.

Of course we do not here mean to say that this court cannot review such a conclusion upon an appeal from a verdict against evidence, or that it may or may not do so upon a reservation or other proceeding of a like nature. We only mean to say that, in cases where it is the province of the trier to draw the inference of negligence, and no error of law in the sense explained is apparent on the record, error cannot be predicated of the mere act of the trier in drawing what is supposed to be an incorrect or wrong inference from facts properly found. We think these principles can be applied to the case at bar, and that they are decisive of it.

The principal facts are correctly found. They are somewhat numerous, and the question of the negligence of either party is complicated with questions as to the conduct of others, and with the special facts and circumstances of the case of which the conduct forms a part. Under the facts found the only rule applicable was the general rule of conduct. The facts and circumstances are, we think, clearly of such a nature that a trier must of necessity measure the prudence of the parties' conduct by a standard of behavior which he himself adopts for that case, based upon his opinion of the manner in which a man of ordinary prudence would act under the same circumstances. The problem involved in such an inquiry can only be solved by the trier placing himself in the position of the parties, and, in the light of his experience of human affairs, examining all the facts and circumstances as they appeared to them at the time. Furthermore, we think the facts found are of such a nature that men equally honest and impartial might, and probably would, draw from them different and opposite inferences as to whether due care was or was not exercised by each party under the circumstances.

It is not apparent upon the record that the court, in arriving at the conclusions as to negligence in the case at bar, imposed upon either party the performance of any duty which the law did not impose, nor that it did not require of them the performance of any duty which the law required; nor that in any other respect it violated any rule or principle of law.

For these reasons we think the case at bar comes within the class of cases where the conclusions of the trier, both as to negligence and contributory negligence, are regarded as conclusions of fact which this court cannot review.

There is no error apparent upon the record.

In this opinion ANDREWS, C. J., LOOMIS and SEYMOUR, JJ., concurred. (Concurring opinion of CARPENTER, J., omitted.) [1]

NEGLIGENCE: BURDEN OF PROOF.

CLAFLIN v. MEYER.

(75 New York, 268.—1878.)

APPEAL from a judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of the plaintiff, in an action against the defendant, a warehouseman, for alleged neglect and refusal to return goods entrusted to him. The answer alleged that the goods were stolen without fault on the part of the defendant.

HAND, J. The counsel for the respondents is correct in his position that the question of burden of proof is the material one upon this appeal. For the evidence is such that if it were incumbent upon the defendant to prove himself free from all negligence causing or attending upon the burglary and not merely to leave the case as consistent with due care as with the want of it, it is clear that the judgment, so far as it adjudges his liability for the goods, must be affirmed, as we cannot say that such proof of a conclusive character was given. But the law, as to the burden of proof is pretty well settled to the contrary. Upon its appearing that the goods were lost by a burglary committed upon the defendants' warehouse, it was for the plaintiffs to establish affirmatively that such burglary was occasioned or was not prevented by reason of some negli-

[1] See also *Grand Trunk Ry. Co.* v. *Ives*, 144 U. S. 408; *Hathaway* v. *East Tenn., V. & G. R. R.*, 29 Fed. Rep. 489; *Moore* v. *Westervelt*, 21 N. Y. 103; *Thurber* v. *Harlem B., M. & F. R. R.*, 60 id. 326.

gence or omission of due care on the part of the warehouseman.

The cases agree that where a bailee of goods, although liable to their owner for their loss only in case of negligence, fails, nevertheless, upon their being demanded, to deliver them or account for such non-delivery, or, to use the language of Sutherland, J., in *Schmidt* v. *Blood*, where "there is a total default in delivering or accounting for the goods" (9 Wend. 268), this is to be treated as *prima facie* evidence of negligence. *Fairfax* v. *N. Y. C. and H. R. R. Co.*, 67 N. Y. 11; *Steers* v. *Liverpool Steamship Co.*, 57 id. 1; *Burnell* v. *N. Y. C. R. R. Co.*, 45 id. 184. This rule proceeds either from the assumed necessity of the case, it being presumed that the bailee has exclusive knowledge of the facts and that he is able to give the reason for his non-delivery, if any exist, other than his own act or fault, or from a presumption that he actually retains the goods and by his refusal converts them.

But where the refusal to deliver is explained by the fact appearing that the goods have been lost, either destroyed by fire or stolen by thieves, and the bailee is therefore unable to deliver them, there is no *prima facie* evidence of his want of care, and the court will not assume in the absence of proof on the point that such fire or theft was the result of his negligence. *Lamb* v. *Camden and Amboy R. R. Co.*, 46 N. Y. 271, and cases there cited; *Schmidt* v. *Blood*, 9 *Wend.* 268; *Platt* v. *Hibbard*, 7 Cow. 500, note. Grover, J., in 46 N. Y. (*supra*), says, in delivering the opinion of the court, the question is "whether the defendant was bound to go further (*i. e.* than showing the loss by fire) and show that it and its employees were free from negligence in the origin and progress of the fire, or whether it was incumbent upon the plaintiffs to maintain the action to prove that the fire causing the loss resulted from such negligence." And he proceeds to show that the charge of the judge who tried the cause gave to the jury the former instruction and that this was contrary to the law and erroneous. So Sutherland, J., in 9 Wend. (*supra*), in the case of a warehouseman, says the *onus* of showing the negligence "seems to be upon the plaintiff unless there is a total default in delivery or accounting for the goods." And he cites a note of Judge Cowen to his report of *Platt* v. *Hibbard*, 7 Cow. 500, in which that very learned author says, criticising and questioning a

charge of the circuit judge, "the distinction would seem to be that when there is a total default to deliver the goods bailed on demand, the *onus* of accounting for the default lies with the bailee; otherwise he shall be deemed to have converted the goods to his own use and trover will lie (*Anonymous*, 2 Salk. 655), but when he has shown a loss or where the goods are injured, the law will not intend negligence. The *onus* is then shifted upon the plaintiff."

It will be seen, as the result of these authorities, that the burden is ordinarily upon the plaintiff alleging negligence to prove it against a warehouseman who accounts for his failure to deliver by showing a destruction or loss from fire or theft. It is not of course intended to hold that a warehouseman, refusing to deliver goods, can impose any necessity of proof upon the owner by merely alleging as an excuse that they have been stolen or burned. These facts must appear or be proved with reasonable certainty. Nor do we concur in the view that there is in these cases any real "*shifting*" of the burden of proof. The warehouseman, in the absence of bad faith is only liable for negligence. The plaintiff must in *all cases*, suing him for the loss of goods, allege negligence and prove negligence. This burden is never shifted from him. If he proves the demand upon the warehouseman and his refusal to deliver, these facts unexplained are treated by the courts as *prima facie* evidence of negligence; but if, either in the course of his proof or that of the defendant, it appears that the goods have been lost by theft, the evidence must show that the loss arose from the negligence of the warehouseman.

Applying these principles to the present case, we must hold that when it appeared, as it did, that the goods were taken from the defendants' warehouse by a burglarous entry thereof, the plaintiffs should have shown that some negligence or want of care, such as a prudent man would take under similar circumstances of his own property, caused or permitted or contributed to cause or permit that burglary.

Examining the case under this rule of law we find that there was no proof tending to show when the warehouse was entered, whether in the night or day time. It was, it seems, during a large portion of every twenty-four hours in the custody of the government janitors. It does not appear nor is it found whether access to the warehouse was gained through the scuttle or roof

or by the ordinary entrances, whether the thieves got in by stealth and broke *out* through the roof or broke *in* through the roof. The evidence was clear that access to the roof was gained from an adjoining tenement-house by means of a burglar's ladder, and a blank brick wall rising some twenty or twenty-five feet above the roof of the tenement-house was scaled by means of this ladder; that the goods were removed from the third story of the warehouse where they were stored, the packages being carefully replaced so as to delay observation and discovery, and the marks removed from the goods in an upper room of the tenement-house, hired probably by the thieves for the purpose.

The plaintiffs rested their case upon the pleadings without proving any demand or refusal, admitting a "robbery," but not attempting to show any negligence, in the defendant.

The motion for dismissal of the complaint then made by the defendant on the ground that no negligence had been shown, that there was no evidence of refusal to deliver, and the burden was still upon the plaintiffs, should I think have been granted; and its denial may perhaps explain the subsequent finding by the referees. But if, from the evidence afterwards given on the part of the defendant himself, his negligence appeared, that finding could not now perhaps be disturbed, although it may have proceeded upon a false theory as to the burden of proof.

The respondent's counsel insists that this evidence discloses defects in the construction of the scuttle and the roof and that upon this fact want of due care can be predicated; but all the testimony concurred that the scuttle was as secure and as securely fastened as in any warehouses of that class, was as well built as any wooden scuttle in the city, that no grating upon the coping to obstruct a passage on to the roof from a neighboring building was ever known to be put upon any warehouse, and one witness, a government officer who stated that he had seen nearly all the bonded warehouses in New York, testified that the scuttle was as strong as on any warehouse he ever saw. Another witness, also a government officer, said that it compared favorably with scuttles of other warehouses as to strength and safety. These statements are without any contradiction. It is true the police officer Field, called as a witness by the defendant, stated upon cross-examination that some warehouses had an inner grating, that many had not, that the principal

warehouses had them, that this grating was more protection than the scuttle, but he did not explain what this grating was, how long used, how constructed, or whether ever applied to a United States bonded warehouse of this class. A question to this witness as to how this scuttle compared in strength and safety with other warehouse scuttles was excluded on the objection of the plaintiffs, but he stated that it was a good strong wooden scuttle and the fastenings good. He was positive that the thieves broke out from the inside and he was equally positive that the strength of scuttle fastenings was of no importance when burglars were once upon a roof as they could go through the roof itself easier than through a scuttle.

The evidence of this witness was not in my opinion sufficient upon which to base a finding "of want of care which an ordinarily prudent man would under the circumstances have exercised in relation to the protection and safe keeping of his own property." And on the whole we do not think, taking all the testimony together, that there was sufficient evidence of the fact of negligence. In the language of Maule, J., (13 C. B. 916), "when we say that there is no evidence to go to a jury, we do not mean literally none, but that there is none that ought reasonably to satisfy a jury, that the fact sought to be proved is established."

The theory upon which the case was tried by the plaintiffs absolved them from affirmative proof upon this point and it may well be that upon another trial much fuller and more satisfactory testimony may be produced as to the care ordinarily used and proper to be used in the construction of the roofs and fastenings of warehouses of this sort, but that given by the defendant upon this trial did not in our opinion convict him of negligence.

I have so far left out of view a feature of this case which has caused us a good deal of embarrassment. I refer to the inspection of the warehouse and its roof and scuttle by the referees in the presence of counsel, and the statement in their report that their findings are based upon the proofs *and* "such view."

If the intention of the parties was to submit themselves to the decision of the referees absolutely, irrespective of the evidence, these would become arbitrators, and their decision an arbitration, and the arrangement would be a discontinuance of the action. *Larkin* v. *Robbins*, 2 Wend. 505; *Merritt* v. *Thomp-*

son, 27 N. Y. 225; *Jordan* v. *Hyatt*, 3 Barb. 278. We cannot suppose that such was the intention of the parties or hold it to be fairly the consequence of their conduct. If the inspection of the premises meant anything more than that by it the referees might better understand the evidence (the adjournment of the reference to the warehouse and the examination of a witness upon the spot would favor this view of it), and was a submission to them of additional ocular evidence of facts to be considered in the decision, this evidence to influence the fate of the case upon appeal should appear in some way before this court. The defendant having moved for a non-suit and having excepted to the finding of negligence as wholly unauthorized by the evidence and there being none produced by the plaintiffs, it would seem that they, to sustain the finding by any evidence produced by the defendant, must be able to show it to us *in the case*. If this consists in what was seen at the warehouse by the referees it should have been detailed and spread out in the case. As the record now stands we must treat it as if it had no existence and pass upon the questions as if the only evidence was that appearing in the appeal book.

The result at which we have arrived renders it unnecessary to consider any of the exceptions to the exclusion of evidence; and as to the measure of damages, new facts developed upon another trial with regard to the payment by the plaintiffs of the duties upon the goods or their ascertained liability or non-liability for them may very probably end all controversy upon this point. The plaintiffs, in case they are entitled to recover, should of course be limited to an indemnity for their loss and should use reasonable exertions to diminish such loss. *Dillon* v. *Anderson*, 43 N. Y. 231. Whether their loss necessarily includes the duties payable upon the goods if or when they should withdraw them from the warehouse, we are not called upon at present to decide.

The judgment must be reversed and new trial ordered, with costs to abide the event.

All concur, except MILLER and EARL, JJ., absent at argument.

Judgment reversed.

PRESUMPTION OF NEGLIGENCE. (1)

Volkmar v. The Manhattan Railway Co.

(134 New York, 418.—1892.)

Appeal from a judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of the defendant entered upon a verdict directed by the court.

Haight, J. This action was brought to recover damages for a personal injury.

On the 24th of June, 1885, the plaintiff was driving along Sixth avenue, in the city of New York, in a wagon, going uptown under the defendant's elevated railroad structure. When near Thirty-ninth street an iron plate or clip with a part of a broken bolt fell from the structure, striking him upon the shoulder, causing the injury for which this action was brought.

It appears that the bolt was about fourteen inches long; that it passed through the guard rail of the defendant's road, the stringer upon which it rested and an iron plate or clip underneath, which was held in place by a nut upon the end of the bolt; that the bolt was broken about two inches from the nut.

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[1] A consideration of what is and of what is not enough to raise the presumption of negligence will be found in the leading cases of *Hammack* v. *White*, 11 C. B. N. S. 588, and *Byrne* v. *Boadle*, 2 H. & C. 722, in the former the cause of the injury being animate, and in the latter, inanimate. Mr. Beven (Negligence in Law, I., 132 [2d ed.]) thus summarizes the law as laid down by those cases: "There must be *reasonable evidence* of negligence; and the mere occurrence of an injury is sufficient to raise a *prima facie* case: (*a*) when the injurious agency is under the management of the defendant; (*b*) when the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care. Over inanimate things this duty of care is absolute. Over animate it only goes to guard against injury from their customary habits."

"There are two classes of cases to which it [the maxim *res ipsa loquitur*] has been frequently applied, those relating to the liability of carriers of passengers and those where there has been interference with the safety of a public highway. Beyond these classes of cases, the courts have not been swift to apply the rule." *May* v. *Berlin Iron Bridge Co.*, 43 App. Div. 569, 572.

See also *Cosulich* v. *Standard Oil Co.*, 122 N. Y. 118.

These facts having been shown the plaintiff rested. Thereupon the defendant introduced evidence showing a proper construction of its elevated railway, and then called Samuel S. Roach as a witness, who testified that he was the defendant's track walker and inspector at the place where the injury was received by the plaintiff; that it was his duty to move carefully over the track during the daytime to examine carefully all the rails, switches, signals, bolts and fastenings of all kinds and to keep them tight; that in June, 1885, he was engaged in following out his instructions, and that he performed them to the best of his ability.

The defendant's counsel then moved the court to direct a verdict for the defendant, which motion was granted.

The plaintiff asked permission to go to the jury upon the question of the defendant's negligence upon the ground that the evidence showed that the presumption arose that the defendant was negligent in view of the fact that the iron plate fell from its structure upon the plaintiff. This request was denied and an exception was taken by the plaintiff to such denial and to the direction of a verdict in favor of the defendant.

No question is made but that the defendant's elevated railroad was properly constructed. It is claimed, however, that it was negligently suffered to get out of repair, and that because of such negligence the plaintiff suffered the injury complained of.

It was the duty of the defendant to exercise ordinary care for the purpose of keeping its structure in proper repair so as to prevent injury to persons passing over or underneath it.

The evidence showed that the bolt was broken, and that in consequence the iron plate or clip fell upon the plaintiff. The structure was consequently out of repair, and under the circumstances I think the presumption of negligence follows.

It has been held that where a building adjoining a street falls into the street in the absence of explanatory circumstances negligence will be presumed, and the burden is placed upon the owner of showing the use of ordinary care; that where a plaintiff was passing on a highway under a railroad bridge when a brick fell from one of the pilasters upon which an iron girder of the bridge rested, striking him upon the shoulder, causing injury, negligence would be presumed; that where a barrel rolled out of the window of a warehouse on to a street, injuring a person passing, negligence would be presumed; that where a person, while walking along

the street in front of a building, was struck by a falling chisel, the presumption of negligence is sufficient to call for an explanation; that where plaintiff was injured while walking on the sidewalk of a street immediately under the defendant's railroad by being struck with a heavy piece of metal which fell from one of defendant's cars passing above, from the nature of the accident negligence might be inferred, etc. *Mullen* v. *St. John*, 57 N. Y. 567; *Kearney* v. *London R. R. Co.*, L. R. 5 Q. B. 411; *S. C.* 6 id. 759; *Byrne* v. *Boadle*, 2 Hurl. & Colt. 722; *Cahalin* v. *Cochran*, 1 N. Y. St. Rep. 583; *Goll* v. *Manhattan Ry. Co.*, 24 id. 24; affirmed 125 N. Y. 714; *Payne* v. *Troy & Boston R. R. Co.*, 83 id. 572.

The learned General Term, in its opinion, admits this proposition, and concedes that the fall of the plate or clip in the absence of an explanation raises a presumption of negligence. That court, however, reached the conclusion that the presumption was overthrown by the evidence produced on behalf of the defendant. As we have seen, that evidence was given by the witness Roach. It was his duty, as he testified, to examine carefully all rails, switches, signals, bolts and fastenings of all kinds, and to keep them tight. He further states that in June, 1885, he was engaged in following out his instructions and performed them to the best of his ability. In no place does he testify that he ever examined the bolt and clip which fell upon the plaintiff. He does not tell us how often he passed over the track, or to what extent he examined the bolts and fastenings. He only gives us his own conclusion that he performed his duty to the best of his ability. It does not appear to us that this was sufficient to remove the presumption which necessarily follows from the established fact that the bolt was broken, and in that particular the structure was out of repair and dangerous.

But even if this evidence was sufficient to remove the presumption as held by the General Term, the credibility of the witness would still be involved and be a question for the jury. This witness was the defendant's trackwalker. It was his duty to examine the bolt which was broken. If there was any negligence for which the defendant was chargeable, it was that of this witness. He was, therefore, a person interested, and possibly actuated by a motive to shield himself from blame. *Dean* v. *Van Nostrand*, 23 Weekly Digest, 97; *Elwood* v. *W. U. Tel. Co.*, 45 N. Y. 549–554.

It is claimed that the plaintiff neglected to produce upon the trial the broken bolt. His counsel said it was lost. He had established a *prima facie* case when he rested. The burden was then on the defendant. The upper portion of the broken bolt was left in the structure in the possession of the defendant who could have produced it had it so desired.

The plaintiff should have been permitted to submit to the jury the question of the defendant's negligence.

The judgment should consequently be reversed and a new trial granted, with costs to abide the event. All concur, except Follett, C. J., and Brown and Parker, JJ., dissenting.

Judgment reversed.

CONTRIBUTORY NEGLIGENCE.[1]

Baltimore & Potomac Railroad Co. v. Jones.

(95 United States, 439.—1877.)

Ante, page 604.

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[1] "The plaintiff cannot recover for the negligence of the defendant, if his own want of care or negligence has in any degree contributed to the result complained of, there can be no dispute. *Gay* v. *Winter*, 34 Cal. 153. The reason of this rule is, that both parties being at fault, there can be no apportionment of the damages, and not that the negligence of the plaintiff justifies or excuses the negligence of the defendant, . . . The law does not justify or excuse the negligence of the defendant. It would, notwithstanding the negligence of the plaintiff, hold the defendant responsible, if it could. It merely allows him to escape judgment because, from the nature of the case, it is unable to ascertain what share of the damages is due to his negligence. He is both legally and morally to blame, but there is no standard by which the law can measure the consequences of his fault, and therefore, and therefore only, he is allowed to go free of judgment. The impossibility of ascertaining in what degree his negligence contributed to the injury being then the sole ground of his exemption from liability, it follows that such exemption cannot be allowed where such impossibility does not exist; or, in other words, the general rule that a plaintiff who is himself at fault cannot recover, is limited by the reason upon which it is founded." *Needham* v. *San Francisco & San José Railroad Co.*, 37 Cal. 409, 419.

"The fact that courts of admiralty have always ordered compensation in cases of contributory negligence, apportioning the damages as they deemed to be just under the circumstances, and that this course has been univer-

Smithwick v. Hall & Upson Co.

(59 Connecticut, 261.—1890.)

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 of the defendant 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

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sally acquiesced in and has given general satisfaction, affords strong proof that the stern rule of common law is not founded upon any immutable principle, but is simply the result of judicial unwillingness to trust juries to apportion damages between parties in fault: a task for which very few juries are competent." Shearman & Redfield on Negligence, (5th ed.) § 63.

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 casual 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 of 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.

Under these circumstances the failure or neglect to heed the warning does not constitute contributory negligence. *Gray* v. *Scott*, 66 Penn. St. 345.

In the case cited certain boys had been warned not to play at a certain point because of some particular and obvious dangers existing there. They failed to heed the warning, and one of them, playing at that place, was killed. His death was caused by the negligence of another and came from a source of danger not obvious and entirely different from any the boys had been warned against.

In answering the argument that the boy's failure to heed the warnings was a cause of his death and contributory negligence, the court say: "But because he was under the tramway in the passage below it is thought he was guilty of contributory negli-

gence. He could not be guilty of negligence as to the defendant without there was some reason to expect danger and a duty of care on his part in relation to it. There was ordinarily none. He had a right therefore to suppose everything secure and safely managed on the tramway, and because it was not he was killed. Precisely the same argument could have been used if the boy had been killed in that place by the negligent use of fire-arms discharged a hundred yards off."

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 his injury by placing himself where in case of such accident there was nothing to prevent his fall.

Whether the claim that he would probably 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 stand-point, 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 Penn. St. 297; *Stebbins* v. *Central R. R. Co.*, 54 Vt. 464. 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.

Eckert v. The Long Island Railroad Co.

(43 New York, 502.—1871.)

Appeal from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the plaintiff, in an action to recover damages for the death of plaintiff's intestate, who, seeing a child three or four years old sitting or standing upon the track of defendant's road as a train of cars was approaching, and liable to be run over, if not removed, ran to it, and seizing it, threw it clear of the track, and, continuing across the track himself, was struck by some part of the locomotive or tender, thrown down, and received the injuries from which he died.

At the close of the plaintiff's case, counsel for the defendant moved for a nonsuit upon the ground that the deceased's negligence contributed to the injury. This was denied and an exception taken. At the close of the whole case, counsel for the defendant requested the court to charge, that if the deceased voluntarily placed himself in peril from which he received the injury, to save the child, whether the child was or was not in danger, the plaintiff could not recover. This was refused and an exception taken, the question of the intestate's contributory negligence being submitted to the jury.

Grover, J. The important question in this case arises upon the exception taken by the defendant's counsel to the denial of his motion for a nonsuit, made upon the ground that the negligence of the plaintiff's intestate contributed to the injury that caused his death. The evidence showed that the train was approaching in plain view of the deceased, and had he for his own purposes attempted to cross the track, or with a view to save property placed himself voluntarily in a position where he might have received an injury from a collision with the train, his conduct would have been grossly negligent, and no recovery could have been had for such injury. But the evidence further showed that there was a small child upon the track, who, if not rescued, must have been inevitably crushed by the rapidly approaching train. This the deceased saw, and he owed a duty

of important obligation to this child to rescue it from its extreme peril, if he could do so without incurring great danger to himself. Negligence implies some act of commission or omission wrongful in itself. Under the circumstances in which the deceased was placed, it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If, from the appearances, he believed that he could, it was not negligence to make an attempt so to do, although believing that possibly he might fail and receive an injury himself. He had no time for deliberation. He must act instantly, if at all, as a moment's delay would have been fatal to the child. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence, which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life, it is not wrongful, and therefore not negligent unless such as to be regarded either rash or reckless. The jury were warranted in finding the deceased free from negligence under the rule as above stated. The motion for a nonsuit was, therefore, properly denied. That the jury were warranted in finding the defendant guilty of negligence in running the train in the manner it was running, requires no discussion. None of the exceptions taken to the charge as given, or to the refusals to charge as requested, affect the right of recovery. Upon the principle above stated, the judgment appealed from must be affirmed, with costs.

Church, C. J., and Peckham and Rapallo, JJ., concur.

Allen, J. (dissenting). The plaintiff's intestate was not placed in the peril from which he received the injury resulting in his death, by any act or omission of duty of the defendants, its servants, or agents. He went upon the track of the defendant's road in front of an approaching train, voluntarily, in the

exercise of his free will, and while in the full possession of all his faculties, and with capacity to judge of the danger. His action was the result of his own choice, and such choice not compulsory. He was not compelled, or apparently compelled, to take any action to avoid a peril, and harm to himself, from the negligent or wrongful act of the defendant, or the agents in charge of the train. The plaintiff's rights are the same as those of the intestate would have been, had he survived the injury and brought the action, and must be tested by the same rules; and to him and consequently to the plaintiff, the maxim *volenti non fit injuria* applies. It is a well established rule, that no one can maintain an action for a wrong, when he consents or contributes to the act which occasions his loss. One who with liberty of choice, and knowledge of the hazard of injury, places himself in a position of danger, does so at his own peril, and must take the consequences of his act. This rule has been applied to actions for torts as well as to actions upon contract, under almost every variety of circumstance.

Whenever there has been notice of the danger, and freedom of action, the injured party has been compelled to bear the consequences of the action irrespective of the character and degree of negligence of other parties. *Gould* v. *Oliver*, 2 Scotts. N. R. 257; *Ilott* v. *Wilkes*, 3 B. & Ald. 311; *Slagan* v. *Slingerland*, 2 Caines, 219; *per* Marvin, J., in *Corwin* v. *N. Y. and E. R. R. Co.*, 3 Ker. 42; *per* Cowen, J., in *Hatfield* v. *Roper*, 21 W. R. 620. The doctrine applicable to voluntary payments of money not recoverable by law grows out of this rule of law, and the rules governing in cases of contributing negligence of the injured party is nearly allied to, if not an outgrowth of the maxim *volenti non fit injuria.*

Whether the defendant was or was not guilty of negligence, or whatever the character and degree of the culpability of the defendant and its servants, is not material. The intestate had full view of the train and saw, or could have seen, the manner in which it was made up, and the locomotive attached, and the speed at which it was approaching, and, if in the exercise of his free will, he chose for any purpose to attempt the crossing of the track, he must take the consequence of his act. The defendant may have been running the train improperly, and perchance illegally, and so as to create a legal liability in respect to any one sustaining loss solely from such cause, but

the company is not the insurer of, or liable to those who, of their own choice and with full notice, place themselves in the path of the train and are injured.

It is not the law that the coöperating act of the injured party must be culpable or wrong in intention. It may be merely negligence or the result of the free exercise of the will. *Per* Beardsley, J., in *Tonawanda R. R. Co.* v. *Munger*, 5 Denio, 255. The rescue of the child from apparent imminent danger was a praiseworthy act and entitled the plaintiff to the favorable consideration of the court and to a lenient and liberal interpretation and application of the rules of law in her behalf. But the principles of law cannot yield to particular cases.

The act of the intestate in attempting to save the child was lawful as well as meritorious, and he was not a trespasser upon the property of the defendant, but it was not in the performance of any duty imposed by law, or growing out of his relation to the child, or the result of any necessity. There is nothing to relieve it from the character of a voluntary act, the performance of a self-imposed duty, with full knowledge and apprehension of the risk incurred. *Evansville R. R. Co.* v. *Hyatt*, 17 Ind. 102, is in circumstance somewhat like the case before us, and the decision is in accord with the views herein expressed.

I am of the opinion that the judgment of the Supreme Court and of the City Court of Brooklyn should be reversed and new trial granted, costs to abide event.

Folger, J., concurred in the foregoing opinion.

Judgment affirmed.

CONTRIBUTORY NEGLIGENCE: BURDEN OF PROOF. [1]

Hoyt v. The City of Hudson.

(41 Wisconsin, 105. — 1876.)

Appeal from the Circuit Court, in an action to recover damages for personal injuries alleged to have been caused by negligence on the part of the defendant, in suffering ice and snow to accumulate on the sidewalk in one of its streets, whereby the plaintiff slipped and broke his leg.

At defendant's request, the court, among other things, charged the jury as follows:

"In an action of this nature, for personal injuries caused by a defect in the highway, the person injured cannot recover if all the evidence in the case is equally consistent with either care or negligence on his part.

"It is well settled that, in order to recover for an injury on the ground of negligence, it must appear that the plaintiff was in the exercise of due care in respect to the occurrence from which the injury arose; or that the injury was in no part due to his own fault or want of care. The burden rests upon the plaintiff to make this appear.

"This burden is held to be on the plaintiff for the reason that it is a subordinate proposition necessarily involved in the more general one upon which the action is founded, to wit: that the injury to the plaintiff was caused by the negligence or wrongful act of the defendant. If this be shown by evidence which excludes fault on the part of the plaintiff, the proposition of due care is established.

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[1] The plaintiff must prove his freedom from fault in Connecticut, Illinois, Indiana, Iowa, Louisiana, Maine, Massachusetts, Michigan, Mississippi and New York.

The defendant has the burden of proving the contributory negligence of the plaintiff in the U. S. Supreme Court, and in Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Kansas, Kentucky, Maryland, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Vermont, Virginia, Washington, West Virginia and Wisconsin.

For cases in the above jurisdictions see Shearman & Redfield on Negligence (5th ed.), §§ 107 and 108, notes.

"All the circumstances under which the injury was received being proved, if they show nothing in the conduct of the plaintiff, either of acts or neglect, to which the injury may be attributed in whole or in part, the inference of due care may be drawn from the absence of all appearance of fault."

The following request from the plaintiff was refused: "Unless there is something in the evidence from which the jury find that the plaintiff was guilty of negligence, they cannot so find. The law does not raise a presumption of negligence; and if the plaintiff was guilty of any negligence, the burden of proving such negligence is upon the defendant."

Verdict for defendant; plaintiff appeals.

Lyon, J. In the record before us we find no affirmative evidence from which the jury could properly find that the plaintiff was guilty of any negligence which contributed proximately to cause the injury of which he complains. The jury were instructed, however, that the burden was upon the plaintiff to prove that he was in the exercise of due care, when injured. Inasmuch as the plaintiff failed to make any such proof, if the instruction is correct, the jury should have been directed to return a verdict for the defendant. But the learned circuit judge further instructed the jury that if the circumstances under which the injury was received, as proved, show nothing in the acts or omissions of the plaintiff to which the injury might be attributed, in whole or in part, "the inference of due care may be drawn from the absence of all appearance of fault." That is to say, the jury were first told that the burden was upon the plaintiff to prove that he was in the exercise of due care when injured; and then, that they were at liberty to infer from his entire failure to introduce any evidence on the subject, that he did exercise due care. This involves the absurdity of proving a fact by failing to prove it. Such an *onus probandi* is incomprehensible to us. See *Mil. & Ch. R. R. Co.* v. *Hunter*, 11 Wis. 160.

It should be stated, however, that the instructions are fully sustained by the late case of *Ryerson* v. *Abington*, 102 Mass. 526, and by other decisions of that court. But we cannot adopt a decision which involves so manifest an absurdity, though made (as that was) by one of the ablest courts in the country. The common sense view of the subject is, that if the burden of

proving his own due care to avoid the injury is upon the plaintiff, he must prove such care, either by direct evidence, or by showing *res gestæ* which exclude fault on his part, or he must fail in the action. But if the burden is upon the defendant to prove that the plaintiff was guilty of contributory negligence, and there is nothing in the evidence tending to show such negligence, the court should hold, as a proposition of law, that the plaintiff was free from fault, and it is error to submit the question to the jury.

Sufficient has been said to show that the important question in this case is, Was the *onus* upon the plaintiff to prove that, when injured, he was in the exercise of proper care to avoid the injury, or was it upon the defendant to prove that the plaintiff was guilty of some negligence which contributed proximately to the injury of which he complains? If the *onus* was upon the plaintiff, he failed to meet its requirements, and the verdict and judgment were properly for the defendant; but if upon the defendant, the defense of contributory negligence was not established, and the action could not properly be defeated on that ground. But the action may have been defeated on that ground alone. It cannot be determined from the record that it was not. Hence, if the court erred in the instructions — if the *onus probandi* was upon the defendant, the error is material, and the judgment must be reversed.

In *Chamberlain* v. *R. R. Co.*, 7 Wis. 425, and *Dressler* v. *Davis*, id. 527, this court held that in an action for injuries caused by negligence the burden is upon the plaintiff to show himself free from contributory fault. This rule was vigorously assailed, as unsound in principle, by the late Mr. Justice Paine, in *R. R. Co.* v. *Hunter*, 11 Wis. 160; but it does not seem to have been overturned. Yet in *Achtenhagen* v. *Watertown*, 18 id. 331, Dixon, C. J., seems to concede that the rule no longer prevails in this state. Since *R. R. Co.* v. *Hunter*, we are not aware that the subject has been discussed or considered here. The question is not one to which the rule *stare decisis* is applicable; and in view of the difference of opinion which members of this court have entertained in regard to it at different times, we feel at liberty to consider and determine the question on the merits, untrammeled by the earlier decisions, or by the later opinions of the court or any justice thereof, in opposition thereto.

It has been held in Massachusetts and several other states,

that in actions of this kind the plaintiff must prove that he was free from contributory fault, or fail in his action. These decisions go upon the ground that there can be no recovery unless two conditions concur, to wit, negligence of the defendant and freedom of the plaintiff from contributory fault; and that it is incumbent on the plaintiff to show the existence of both conditions.

The same proposition may be stated in another form. The defendant is only liable to respond in damages for an injury caused by his negligence. But if the negligence of the plaintiff concurred with that of the defendant to produce the injury, it cannot correctly be said that the same was caused by the negligence of the defendant. The meaning of the rule is, that to render the defendant liable, the injury must be the result of his negligence alone. Hence, to establish a cause of action, the plaintiff must show that the negligence of the defendant was the sole proximate cause of the injury; and to do this he must necessarily prove himself free from contributory fault.

Many of the cases which hold the above doctrine will be found cited in the notes to §§ 33 and 34 of Shearman & Redfield on Negligence, and in the brief of counsel for the defendant.

On the other hand, the contrary doctrine is maintained in many cases, some of which are cited in the brief of counsel for the plaintiff and in the above notes in Shearman & Redfield. These cases hold that if the negligence of the plaintiff concurred in producing the injury complained of, that is purely matter of defense, and hence the burden of proving it is upon the defendant. This is the view taken by Judge Duer in *Johnson* v. *The Hudson River R. R. Co.*, 5 Duer, 21; and that able judge rested his opinion mainly on two grounds: 1. He held that in the absence of proof there is no presumption that the person injured was guilty of negligence which contributed to the injury, any more than there is a like presumption that he whose act or omission caused the injury was guilty of negligence. And inasmuch as the plaintiff must prove affirmatively that the act or omission of the defendant which resulted in the injury, was negligent, before he can recover, so in like manner the defendant must prove affirmatively that the act or omission of the plaintiff contributed proximately to the injury, in order to defeat the action on that ground. 2. He further held that no averment is required in the complaint in such an action that the plaintiff,

when injured, was in the exercise of proper care and caution to avoid the injury; and, from the elementary rule that every fact is necessary to be averred in the complaint which the plaintiff is bound to prove in order to maintain his action, he draws the conclusion that the plaintiff in such an action is not bound to prove in the first instance his own freedom from contributory fault; in other words, that the *onus probandi* is not upon him to disprove his own negligence, but is upon the defendant to prove such negligence.

In the elementary treatise above referred to (Shearman & Redfield on Negligence), the authors agree with Judge Duer, and, discussing the rule of the cases which hold the *onus* to be upon the plaintiff to prove his freedom from contributory fault, they say: "If this broad rule is adopted, even if we distinguish such defenses as payment, release, satisfaction, etc., as relating to facts subsequent to the act complained of, we cannot see upon what ground the plaintiff is to be excused from proving that he is not an alien enemy, if war exists, or that he was not in a state prison, or that the defendant was not acting under the authority of any statute in what he did, or, in cases where the defendant would not be responsible if he was a mere agent, that he was not acting as an agent. And at any rate, what possible ground of distinction can there be between the rule forbidding a plaintiff to recover when his negligence has contributed to the injury, and that which prevents a recovery for a fraud or trespass when the parties are *in pari delicto?* Yet we are not aware of any case in which it has been held that the plaintiff in such actions must assume the burden of showing himself free from fault."

It seems to us that the reasons in favor of the rule which casts the burden of proof in such cases upon the defendant, are the stronger and better reasons; and that such rule rests upon sound legal principles, and ought to prevail in this state. We therefore hold that, in the absence of any evidence tending to show that the plaintiff was chargeable with negligence contributing to the injury of which he complains, the presumption of law is that he was free from such negligence, and the burden was upon the defendant to prove such contributory fault, if the same was relied upon as a defense.

The rule here adopted does not apply to a case in which the proofs on behalf of the plaintiff show, or tend to show, his con-

tributory negligence. If such negligence conclusively appears, the court will nonsuit the plaintiff, or direct the jury to find for the defendant; if the evidence only tends to show such contributory negligence, the question must go to the jury, to be determined, like any other question of fact, upon a preponderance of the evidence.

Inasmuch as the instructions were predicated upon an erroneous rule of law, the judgment of the Circuit Court must be reversed. We do not deem it necessary to determine the other questions argued at the bar.

Judgment reversed, and cause remanded for a new trial.

Hale v. Smith.

(78 New York, 480.—1879.)

Appeal from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of defendant, in an action to recover damages for injuries to a horse, wagon and harness while in the custody of defendant's intestate. The intestate hired the horse and wagon of the plaintiff, and on his drive stopped at Macedon and there stabled his horse for a short time. On resuming the drive, the horse suddenly started, ran away and the injuries complained of resulted. Plaintiff claimed that the stableman at Macedon improperly harnessed the horse, and the damages resulted from such negligence. Defendant claimed that the injuries were due to defects in the harness and the viciousness of the horse.

Rapallo, J. This case is so fully considered in the opinion of Rumsey, J., on the motion for a new trial, in which we concur, that we deem it necessary only to refer to the exception to the concluding sentence of the charge, on which special stress has been laid by the appellant on the argument in this court. The judge charged in regard to the viciousness of the horse, that it was incumbent upon the plaintiff to show by a preponderance of evidence, that the horse was not vicious. This charge if standing alone would be subject to criticism, and if the judge had instructed the jury that the failure of the

plaintiff to prove that the horse was not vicious, would of itself entitle the defendant to a verdict, it would have been erroneous. But taking the whole charge, in connection with the evidence, the jury could not have so understood the judge. He had distinctly charged them, that if the damage was occasioned by a defect in the horse or in the harness, and would not have occurred if those defects had not existed, then the defendant was not responsible. Also that if the defendant or his servants were to some extent guilty of negligence, yet if the defect or default of the property did in fact exist, and but for such defect or fault in the property the damage would not have resulted, the plaintiff could not recover.

The jury were thus distinctly instructed that to constitute a defense it was not enough to show that the horse was vicious, but that to exempt the defendant from responsibility the damage must have been caused or contributed to by that circumstance. In the portion of the charge excepted to, there is nothing which withdraws or conflicts with this instruction.

The sentence excepted to relates wholly to the burden of proof on the question of the viciousness of the horse, and not to the sufficiency of that fact alone to constitute a defense. In this aspect it must be construed with reference to the state of the evidence. If there had been no evidence in the case to show that the horse was vicious, the charge might be subject to the criticisms made. But that question was one of the issues in the case, upon which evidence had been adduced on both sides. The burden of proof on the whole case was with the plaintiff, and it was incumbent upon him to satisfy the jury by a preponderance of proof that the injury had been occasioned by the negligence of the defendant's intestate alone, and that he himself was free from fault. In cases where contributory negligence may be claimed, it is settled in this court that the absence of contributory negligence is part of the plaintiff's case, and the burden of satisfying the jury on that point rests upon him. *Reynolds* v. *N. Y. Cent. R. R. Co.*, 58 N. Y. 248; *Gaynor* v. *Old Col. R. R.*, 100 Mass. 208; *Murphy* v. *Deane*, 101 id. 466; *Park* v. *O'Brien*, 23 Conn. 339. The character of the horse was the main fact upon which the question of contributory negligence depended, and having been assailed by evidence the burden rested upon the plaintiff to sustain it, or to show that it did not contribute to the damage. *Button* v. *Hudson R. R.*,

18 N. Y. 248. If the evidence left the jury in doubt whether the injury was occasioned by the fault of defendant's intestate alone, or was caused or contributed to by the viciousness of the horse, the defendant was entitled to the benefit of that doubt, and the plaintiff had failed to make out his case. This is only stating in another form the proposition that the plaintiff was bound to prove the controverted facts by a preponderance of testimony.

The judgment should be affirmed.

All concur.

Judgment affirmed.

DOCTRINE OF IDENTIFICATION.[1]

LITTLE v. HACKETT.

(116 United States, 366. — 1885.)

FIELD, J. On the 28th of June, 1879, the plaintiff below, defendant in error here, was injured by the collision of a train

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[1] "The only remnant of this doctrine which remains in sight anywhere is the theory that one who rides in a *private* conveyance thereby makes the driver his agent, and is thus responsible for the driver's negligence, even though he has absolutely no power or right to control the driver. This extraordinary theory, which did not even occur to the hair-splitting judges in *Thorogood* v. *Bryan*, was invented in Wisconsin, and sustained by a process of elaborate reasoning (*Prideaux* v. *Mineral Point*, 43 Wisc. 513); and this Wisconsin decision, in evident ignorance of all decisions to the contrary, was recently followed, with some similar reasoning, in Montana (*Whittaker* v. *Helena*, 14 Mont. 124); and in Nebraska (*Omaha etc.*, *R. Co.* v. *Talbot*, 48 Neb. 627) without any reasoning whatever; which last is certainly the best method of reaching a conclusion, directly opposed to common sense and to the decisions of twenty other courts. The notion that one is the 'agent' of another, who has not the smallest right to control or even advise him, is difficult to support by any sensible argument. This theory is universally rejected, except in the three states mentioned, and it must soon be abandoned even there." Shearman and Redfield on Negligence, (5th ed.) § 66.

The rule that the driver's negligence may not be imputed to a passenger "is only applicable to cases where the relation of master and servant or principal and agent does not exist, or where the passenger is seated away from the driver or is separated from the driver by an enclosure and is without opportunity to discover danger and to inform the driver of it." *Brickell* v. *N. Y. C. & H. R. R. Co.*, 120 N. Y. 290, 293.

of the Central Railroad Company of New Jersey with the carriage in which he was riding; and this action was brought to recover damages for the injury. The railroad was at the time operated by a receiver of the company appointed by order of the court of chancery of New Jersey. In consequence of his death the defendant was appointed by the court his successor, and subjected to his liabilities; and this action was prosecuted by its permission.

It appears from the record that on the day mentioned the plaintiff went on an excursion from Germantown, in Pennsylvania, to Long Branch, in New Jersey, with an association of which he was a member. Whilst there, he dined at the West End Hotel, and after dinner hired a public hackney-coach from a stand near the hotel, and taking a companion with him, was driven along the beach to the pier where a steam-boat was landing its passengers, and thence to the railroad station at the West End. On arriving there he found he had time before the train left to take a further drive, and directed the driver to go through Hoey's Park, which was near by. The driver thereupon turned the horses to go to the park, and in crossing the railroad track near the station for that purpose, the carriage was struck by the engine of a passing train, and the plaintiff received the injury complained of. The carriage belonged to a livery-stable keeper and was driven by a person in his employ. It was an open carriage, with the seat of the driver about two feet above that of the persons riding. The evidence tended to show that the accident was the result of the concurring negligence of the managers of the train and of the driver of the carriage—of the managers of the train in not giving the usual signals of its approach by ringing a bell and blowing a whistle, and in not having a flagman on duty; and of the driver of the carriage in turning the horses upon the track without proper precautions to ascertain whether the train was coming. The defense was contributory negligence in driving on the track, the defendant contending that the driver was thereby negligent, and that his negligence was to be imputed to the plaintiff. The court left the question of the negligence of the parties in charge of the train and of the driver of the carriage to the jury, and no exception was taken to its instructions on this head. But with reference to the alleged imputed negligence of the plaintiff, assuming that the driver was negligent, the court instructed them

that unless the plaintiff interfered with the driver and controlled the manner of his driving, his negligence could not be imputed to the plaintiff.

"I charge you," said the presiding judge to them, "that where a person hires a public hack or carriage, which at the time is in the care of the driver, for the purpose of temporary conveyance, and gives directions to the driver as to the place or places to which he desires to be conveyed, and gives no special directions as to his mode or manner of driving, he is not responsible for the acts or negligence of the driver, and if he sustains an injury by means of a collision between his carriage and another he may recover damages from any party by whose fault or negligence the injury occurred, whether that of the driver of the carriage in which he is riding or of the driver of the other; he may sue either. The negligence of the driver of the carriage in which he is riding will not prevent him from recovering damages against the other driver, if he was negligent at the same time." "The passenger in the carriage may direct the driver where to go—to such a park or to such a place that he wishes to see; so far the driver is under his direction; but my charge to you is that, as to the manner of driving, the driver of the carriage or the owner of the hack—in other words, he who has charge of it and has charge of the team—is the person responsible for the manner of driving, and the passenger is not responsible for that, unless he interferes and controls the matter by his own commands or requirements. If the passenger requires the driver to drive with great speed through a crowded street, and an injury should occur to foot-passengers or to anybody else, why, then, he might be liable, because it was by his own command and direction that it was done, but ordinarily in a public hack the passengers do not control the driver, and therefore I hold that unless you believe Mr. Hackett exercised control over the driver in this case, he is not liable for what the driver did. If you believe he did exercise control, and required the driver to cross at this particular time, then he would be liable because of his interference."

The plaintiff recovered judgment, and this instruction was alleged as error, for which its reversal was sought.

That one cannot recover damages for an injury to the commission of which he has directly contributed is a rule of established law and a principle of common justice. And it matters

not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it. If his fault, whether of omission or commission, has been the proximate cause of the injury, he is without remedy against one also in the wrong. It would seem that the converse of this doctrine should be accepted as sound—that when one has been injured by the wrongful act of another, to which he has in no respect contributed, he should be entitled to compensation in damages from the wrong-doer. And such is the generally received doctrine, unless a contributory cause of the injury has been the negligence or fault of some person towards whom he sustains the relation of superior or master, in which case the negligence is imputed to him, though he may not have personally participated in or had knowledge of it; and he must bear the consequences. The doctrine may also be subject to other exceptions growing out of the relation of parent and child, or guardian and ward, and the like. Such a relation involves considerations which have no bearing upon the question before us.

To determine, therefore, the correctness of the instruction of the court below—to the effect that if the plaintiff did not exercise control over the conduct of the driver at the time of the accident he is not responsible for the driver's negligence, nor precluded thereby from recovering in the action—we have only to consider whether the relation of master and servant existed between them. Plainly, that relation did not exist. The driver was the servant of his employer, the livery-stable keeper, who hired him out with horse and carriage, and was responsible for his acts. Upon this point we have a decision of the Court of Exchequer in *Quarman* v. *Burnett*, 6 M. & W. 499, 507. In that case it appeared that the owners of a chariot were in the habit of hiring for a day, or a drive, horses and a coachman from a job-mistress, for which she charged and received a certain sum. She paid the driver by the week and the owners of the chariot gave him a gratuity for each day's service. On one occasion he left the horses unattended and they ran off and against the chaise of the plaintiff, seriously injuring him and the chaise, and he brought an action against the owners of the chariot and obtained a verdict; but it was set aside on the ground that the coachman was the servant of the job-mistress, who was responsible for his negligence. In

giving the opinion of the court, Baron PARKE said: "It is undoubtedly true that there may be special circumstances which may render the hirer of job horses and servants responsible for the neglect of the servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses or ordering the servant to drive in a particular manner, which occasions the damage complained of, or to absent himself at one particular moment, and the like." As none of these circumstances existed it was held that the defendants were not liable, because the relation of master and servant between them and the driver did not exist.

This doctrine was approved and applied by the Queen's Bench Division, in the recent case of *Jones* v. *Corporation of Liverpool*, 14 Q. B. D. 890. The corporation owned a water-cart and contracted with a Mrs. Dean for a horse and driver, that it might be used in watering the streets. The horse belonged to her, and the driver she employed was not under the control of the corporation otherwise than its inspector directed him what streets or portions of streets to water. Such directions he was required to obey under the contract with Mrs. Dean for his employment. The carriage of the plaintiff was injured by the negligent driving of the cart, and, in an action against the corporation for the injury, he recovered a verdict, which was set aside upon the ground that the driver was the servant of Mrs. Dean, who had hired both him and the horse to the corporation.

In this country there are many decisions of courts of the highest character to the same effect, to some of which we shall presently refer.

The doctrine resting upon the principle that no one is to be denied a remedy for injuries sustained, without fault by him, or by a party under his control and direction, is qualified by cases in the English courts, wherein it is held that a party who trusts himself to a public conveyance is in some way identified with those who have it in charge, and that he can only recover against a wrong-doer when they who are in charge can recover. In other words, that their contributory negligence is imputable to him, so as to preclude his recovery for an injury when they by reason of such negligence could not recover. The leading case to this effect is *Thorogood* v. *Bryan*, decided by the Court

of Common Pleas in 1849, 8 C. B. 114. It there appeared that the husband of the plaintiff, whose administratrix she was, was a passenger in an omnibus. The defendant, Mrs. Bryan, was the proprietress of another omnibus running on the same line of road. Both vehicles had started together and frequently passed each other, as either stopped to take up or set down a passenger. The deceased, wishing to alight, did not wait for the omnibus to draw up to the curb, but got out whilst it was in motion, and far enough from the path to allow another carriage to pass on the near side. The defendant's omnibus coming up at the moment, he was run over, and in a few days afterwards died from the injuries sustained. The court, among other things, instructed the jury, that if they were of the opinion that want of care on the part of the driver of the omnibus in which the deceased was a passenger, in not drawing up to the curb to put him down, had been conducive to the injury, the verdict must be for the defendant, although her driver was also guilty of negligence. The jury found for the defendant, and the court discharged a rule for a new trial for misdirection, thus sustaining the instruction. The grounds of its decision were, as stated by Mr. Justice Coltman, that the deceased, having trusted the party by selecting the particular conveyance in which he was carried, had so far identified himself with the owner, and her servants, that if any injury resulted from their negligence, he must be considered a party to it; "In other words," to quote his language, "the passenger is so far identified with the carriage in which he is traveling, that want of care on the part of the driver will be a defense of the driver of the carriage which directly caused the injury." Mr. Justice Maule, in the same case, said that the passenger "chose his own conveyance and must take the consequences of any default of the driver he thought fit to trust." Mr. Justice Cresswell said: "If the driver of the omnibus the deceased was in had, by his negligence or want of due care and skill, contributed to any injury from a collision, his master clearly could maintain no action, and I must confess I see no reason why a passenger, who employs a driver to carry him, stands in any different position." Mr. Justice Williams added that he was of the same opinion. He said: "I think the passenger must, for this purpose, be considered as identified with the person having the management of the omnibus he was conveyed by."

What is meant by the passenger being "identified with the carriage," or "with the person having its management," is not very clear. In a recent case, in which the Court of Exchequer applied the same test to a passenger in a railway train, which collided with a number of loaded wagons that were being shunted from a siding by the defendant, another railway company, Baron POLLOCK said that he understood it to mean "that the plaintiff, for the purpose of the action, must be taken to be in the same position as the owner of the omnibus or his driver." *Armstrong* v. *Lancashire & Yorkshire Railroad Co.*, L. R. 10 Ex. 47, 52. Assuming this to be the correct explanation, it is difficult to see upon what principle the passenger can be considered to be in the same position with reference to the negligent act as the driver who committed it, or as his master, the owner. Cases cited from the English courts, as we have seen, and numerous others decided in the courts of this country, show that the relation of master and servant does not exist between the passenger and the driver, or between the passenger and the owner. In the absence of this relation, the imputation of their negligence to the passenger, where no fault of omission or commission is chargeable to him, is against all legal rules. If their negligence could be imputed to him, it would render him equally with them responsible to third parties thereby injured, and would also preclude him from maintaining an action against the owner for injuries received by reason of it. But neither of these conclusions can be maintained; neither has the support of any adjudged cases entitled to consideration.

The truth is, the decision in *Thorogood* v. *Bryan* rests upon indefensible ground. The identification of the passenger with the negligent driver or the owner, without his personal cooperation or encouragement, is a gratuitous assumption. There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver or the person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world.

Thorogood v. *Bryan* has not escaped criticism in the English courts. In the court of admiralty it has been openly disregarded. In *The Milan*, Dr. LUSHINGTON, the judge of the High Court of Admiralty, in speaking of that case, said: "With due respect to the judges who decided that case, I do not consider

that it is necessary for me to dissect the judgment, but I decline to be bound by it, because it is a single case; because I know, upon inquiry, that it has been doubted by high authority; because it appears to me not reconcilable with other principles laid down at common law; and, lastly, because it is directly against *Hay* v. *La Neve*, and the ordinary practice of the court of admiralty." Lush. 388, 403.

In this country the doctrine of *Thorogood* v. *Bryan*, has not been generally followed. In *Bennet* v. *New Jersey Railroad Co.*, 36 N. J. L. 225, and *New York, Lake Erie & Western Railroad Co.* v. *Steinbrenner*, 47 N. J. L. 161, it was elaborately examined by the Supreme Court and the Court of Errors of New Jersey, in opinions of marked ability and learning, and was disapproved and rejected. In the first case it was held that the driver of a horse car was not the agent of the passenger so as to render the passenger chargeable for the driver's negligence. The car, in crossing the track of the railroad company, was struck by its train, and the passenger was injured, and he brought an action against the company. On the trial the defendant contended that there was evidence tending to show negligence by the driver of the horse car, which was in part productive of the accident, and the presiding judge was requested to charge the jury, that if this was so, the plaintiff was not entitled to recover; but the court instructed them that the carelessness of the driver would not affect the action or bar the plaintiff's right to recover for the negligence of the defendant. And this instruction was sustained by the court. In speaking of the "identification" of the passenger in the omnibus with the driver, mentioned in *Thorogood* v. *Bryan*, the court, by the Chief Justice, said: "Such identification could result only in one way, that is, by considering such driver the servant of the passenger. I can see no ground upon which such a relationship is to be founded. In a practical point of view, it certainly does not exist. The passenger has no control over the driver or agent in charge of the vehicle. And it is this right to control the conduct of the agent which is the foundation of the doctrine that the master is to be affected by the acts of his servant. To hold that the conductor of a street car or of a railroad train is the agent of the numerous passengers who may chance to be in it, would be a pure fiction. In reality there is no such agency, and if we impute it, and correctly apply legal principles, the passenger on

the occurrence of an accident from the carelessness of the person in charge of the vehicle in which he is being conveyed, would be without any remedy. It is obvious, in a suit against the proprietor of the car in which he was a passenger, there could be no recovery if the driver or conductor of such car is to be regarded as the servant of the passenger. And so, on the same ground, each passenger would be liable to every person injured by the carelessness of such driver or conductor, because, if the negligence of such agent is to be attributed to the passenger for one purpose, it would be entirely arbitrary to say that he is not to be affected by it for other purposes. 7 Vroom, 227, 228.

In the latter case it appeared that the plaintiff had hired a coach and horses, with a driver, to take his family on a particular journey. In the course of the journey, while crossing the track of the railroad, the coach was struck by a passing train and the plaintiff was injured. In an action brought by him against the railroad company, it was held that the relation of master and servant did not exist between him and the driver, and that the negligence of the latter, co-operating with that of persons in charge of the train, which caused the accident, was not imputable to the plaintiff, as contributory negligence, to bar his action.

In New York a similar conclusion has been reached. In *Chapman* v. *New Haven Railroad Co.*, 19 N. Y. 341, it appeared that there was a collision between the trains of two railroad companies, by which the plaintiff, a passenger in one of them, was injured. The Court of Appeals of that State held that a passenger by railroad was not identified with the proprietors of the train conveying him, or with their servants, as to be responsible for their negligence, and that he might recover against the proprietors of another train for injuries sustained from a collision through their negligence, although there was such negligence in the management of the train conveying him as would have defeated an action by its owners. In giving the decision the court referred to *Thorogood* v. *Bryan*, and said that it could see no justice in the doctrine in connection with that case, and that to attribute to the passenger the negligence of the agents of the company, and thus bar his right to recover, was not applying any existing exception to the general rule of law, but was framing a new exception based on fiction and inconsistent with justice. The case differed from *Thorogood* v.

Bryan in that the vehicle carrying the plaintiff was a railway train instead of an omnibus, but the doctrine of the English case, if sound, is as applicable to passengers on railway trains as to passengers in an omnibus; and it was so applied, as already stated, by the Court of Exchequer in the recent case of *Armstrong* v. *Lancashire & Yorkshire Railroad Co.*

In *Dyer* v. *Erie Railway Co.*, 71 N. Y. 228, the plaintiff was injured while crossing the defendant's railroad track on a public thoroughfare. He was riding in a wagon by the permission and invitation of the owner of the horses and wagon. At that time a train standing south of certain buildings, which prevented its being seen, had started to back over the crossing without giving the driver of the wagon any warning of its approach. The horses becoming frightened by the blowing off of steam from engines in the vicinity, became unmanageable, and the plaintiff was thrown or jumped from the wagon, and was injured by the train, which was backing. It was held that no relation of principal and agent arose between the driver of the wagon and the plaintiff, and, although he traveled voluntarily, he was not responsible for the negligence of the driver, where he himself was not chargeable with negligence, and there was no claim that the driver was not competent to control and manage the horses.

A similar doctrine is maintained by the courts of Ohio. In *Transfer Company* v. *Kelly*, 36 Ohio St. 86, 91, the plaintiff, a passenger on a car owned by a street railroad company, was injured by its collision with a car of the Transfer Company. There was evidence tending to show that both companies were negligent, but the court held that the plaintiff, he not being in fault, could recover against the Transfer Company, and that the concurrent negligence of the company on whose cars he was a passenger could not be imputed to him, so as to charge him with contributory negligence. The Chief Justice, in delivering the opinion of the court, said: "It seems to us, therefore, that the negligence of the company, or of its servants, should not be imputed to the passenger, where such negligence contributes to his injury jointly with the negligence of a third party, any more than it should be so imputed, where the negligence of the company, or its servant, was the sole cause of the injury." "Indeed," the Chief Justice added, "it seems as incredible to my mind that the right of a passenger to redress

against a stranger for an injury caused directly and proximately by the latter's negligence, should be denied, on the ground that the negligence of his carrier contributed to his injury, he being without fault himself, as it would be to hold such passenger responsible for the negligence of his carrier, whereby an injury was inflicted upon a stranger. And of the last proposition it is enough to say that it is simply absurd."

In the Supreme Court of Illinois the same doctrine is maintained. In the recent case of the *Wabash, St. Louis & Pacific Railway Co.* v. *Shacklet*, 105 Ill. 364, the doctrine of *Thorogood's Case* was examined and rejected, the court holding that, where a passenger on a railway train is injured by the concurring negligence of servants of the company on whose train he is traveling, and of the servants of another company with whom he has not contracted, there being no fault or negligence on his part, he or his personal representatives may maintain an action against either company in default, and will not be restricted to an action against the company on whose train he was traveling.

Similar decisions have been made in the courts of Kentucky, Michigan and California. *Danville, etc., T. Co.* v. *Stewart*, 2 Met. (Ky.) 119; *Louisville, etc., R. Co.* v. *Case*, 9 Bush, 728; *Cuddy* v. *Horn*, 46 Mich. 596; *Tompkins* v. *Clay Street R. Co.*, 4 West Coast Reporter, 537.

There is no distinction in principle whether the passengers be on a public conveyance like a railroad train or an omnibus, or be on a hack hired from a public stand in the street for a drive. Those on a hack do not become responsible for the negligence of the driver if they exercise no control over him further than to indicate the route they wish to travel or the places to which they wish to go. If he is their agent so that his negligence can be imputed to them to prevent their recovery against a third party, he must be their agent in all other respects, so far as the management of the carriage is concerned, and responsibility to third parties would attach to them for injuries caused by his negligence in the course of his employment. But, as we have already stated, responsibility cannot, within any recognized rules of law, be fastened upon one who has in no way interfered with and controlled in the matter causing the injury. From the simple fact of hiring the carriage or riding in it no such liability can arise. The party hiring or

riding must in some way have co-operated in producing the injury complained of before he incurs any liability for it. "If the law were otherwise," as said by Mr. Justice DEPUE in his elaborate opinion in the latest case in New Jersey, "not only the hirer of the coach but also all the passengers in it would be under a constraint to mount the box and superintend the conduct of the driver in the management and control of his team, or be put for remedy exclusively to an action against the irresponsible driver or equally irresponsible owner of a coach taken, it may be, from a coach stand, for the consequences of an injury which was the product of the co-operating wrongful acts of the driver and of a third person, and that, too, though the passengers were ignorant of the character of the driver, and of the responsibility of the owner of the team, and strangers to the route over which they were to be carried." *New York, Lake Erie & Western Railroad* v. *Steinbrenner*, 47 N. J. L. 161, 171.

In this case it was left to the jury to say whether the plaintiff had exercised any control over the conduct of the driver further than to indicate the places to which he wished him to drive. The instruction of the court below, that unless he did exercise such control and required the driver to cross the track at the time the collision occurred, the negligence of the driver was not imputable to him, so as to bar his right of action against the defendant, was therefore correct, and

The judgment must be affirmed.

IMPUTATION OF NEGLIGENCE: CHILDREN.[1]

HARTFIELD v. ROPER.

(21 Wendell, 615.—1839.)

ACTION on the case by the plaintiff, William Hartfield, by his next friend, Gabriel Hartfield, for injuries sustained by being

[1] The rule of imputed negligence seems to be established in California, Delaware, Indiana, Kansas, Maine, Maryland, Massachusetts, Minnesota, and New York. *Contra:* Alabama, Connecticut, Georgia, Illinois, Iowa, Louisiana, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, Ohio, Pennsylvania, Texas, Utah and Virginia. For cases *pro*

run over, as alleged, by the defendants, with a sleigh and horses. In March, 1836, the plaintiff, a child of about two years of age, was standing or sitting in the beaten track of a public highway, and no person near him; the defendant Roper was driving a sleigh and horses upon the same road, and before the

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and *con* the rule, see Shearman & Redfield on Negligence (5th ed.), §§ 74 and 78, notes.

In *Robinson* v. *Cone*, 22 Vt. 213, the court said: "We are satisfied, that although a child, or idiot, or lunatic, may, to some extent, have escaped into the highway through the fault or negligence of his keeper, and so be improperly there, yet if he is hurt by the negligence of the defendant, he is not precluded from his redress. If one know, that such a person is in the highway, or on a railway, he is bound to a proportionate degree of watchfulness, and what would be but ordinary neglect, in regard to one whom the defendant supposed a person of full age and capacity, would be gross neglect as to a child.

* * * * * * * * * * *

"What is reasonable skill, proper care and diligence, etc., can only be determined, as matter of fact, by the jury. It is impossible to establish any general rule upon so indefinite a subject; and it is impossible to make juries, or merely practical men any where, determine these matters except upon the circumstances of each particular case. It is true, no doubt, that the defendant, in such cases, is to be allowed a favorable construction of his own conduct, with reference to what he had reason to expect of the other party, at the time. One might possibly injure a deaf or blind man, without fault, through ignorance of his infirmity, expecting him to conduct differently from what he did. But in the case of a child four years old, there could be no doubt, the defendant was bound to the utmost circumspection, and to see to it, that he did not allow his team to acquire such impetus, after he saw the child, that he could not check them, or avoid injury to the child."

In those jurisdictions favoring the rule of imputability, its consideration becomes pertinent only when the child is *non sui juris*, and, as the law does not define when it becomes *sui juris*, the jury must, as a rule, determine this fact. "From the nature of the case it is impossible to prescribe a fixed period when a child becomes *sui juris*. Some children reach the point earlier than others. It depends upon many things, such as natural capacity, physical conditions, training, habits of life and surroundings. These and other circumstances may enter into the question. It becomes, therefore, a question of fact for the jury where the inquiry is material unless the child is of so very tender years that the court can safely decide the fact." *Stone* v. *Dry Dock, etc., R. R. Co.*, 115 N. Y. 104.

The care to be exercised by a child of the *sui juris* age is less than is required of an adult (*Reynolds* v. *N. Y. C. & H. R. R. Co.*, 58 N. Y. 248), and "a sick or aged person, a delicate woman, a lame man or a child, is entitled to more attention and care from a railroad company than one in good health and under no disability." *Sheridan* v. *Brooklyn & Newtown R. R. Co.*, 36 N. Y. 39.

child was perceived the horses passed over him. He was discovered by Newell, the other defendant, who was in the same sleigh, and on his exclaiming that a child had been run over, the horses were immediately stopped by Roper and backed, and the sleigh prevented from passing over the child. The sleigh was at the time of the injury descending a hill, at the foot of which was a bridge, and the child was in the road about six or eight rods from the bridge. The course of the road was such that in descending the hill there was a fair view of the road beyond the bridge. The defendant Roper had no sleigh bells. The horses at the time of the injury were trotting, but not at great speed; Roper sat on the front seat driving, and Newell sat on the back seat. A motion for a nonsuit was denied, and the jury, under the charge of the court, returned a verdict for the plaintiff. The defendants then moved for a new trial.

By the Court, COWEN, J. The injury to this child was doubtless a very serious misfortune to him. But I have been utterly unable to collect, from the evidence, anything by which the jury were authorized to impute such carelessness as rendered these defendants responsible. It is true, they might have seen the child from the turn of the road in descending, had they looked so far ahead; but something must be allowed for their attention to the management of the horses and their own safety in descending the hill to a bridge. So unobserving were they in fact, that Mrs. Lewis, who sat in the rear of the sleigh, on the left side, and therefore in the best position of the three to overlook the road in its full extent, as far as the place where the child was, did not discern him. It was somewhat severe, in a case like this, to allow testimony of Newell's ability to pay, though it was not objected to. It seems to imply that he had been so brutal as silently to allow Roper's going on and endangering the child's life, after he, Newell, had discovered it to be in the road. But, perhaps, no objection can now be heard to that evidence having been received, because it was not made at the trial.

No doubt the action was properly brought in the name of the child. Nor is there any objection to its form, since the statute. 2 R. S. 456, § 16, 2d ed. Nor could the father have brought an action for loss of service, in respect to so small a child, according to the English case of *Hall* v. *Hollander*,

4 Barn. & Cress. 660; though I should think it quite questionable whether that case can be considered as law here. If the defendants were, in truth, so reckless of the child's safety, as to run over it, in the way described, after knowing it to be in the road, the verdict is none too large. But such trifling with human life ought not to be presumed; and there was no proof of it, either direct or circumstantial. This is not a case, however, for interfering upon the ground of excessive damages.

The only question which seems to be open for our consideration is, that of negligence. This respects both parties. It is quite necessary to drive at a moderate pace, and look out against accidents to children and others, in a populous village or city. See *McAllister* v. *Hammond*, 6 Cowen, 342, and *per* LAWRENCE, J., in *Leame* v. *Bray*, 3 East, 597. But this accident happened in the country, where was a solitary house; a child belonging to it happening to be in the road, a thing most imprudently allowed by its parents, and what could have been easily prevented by ordinary care. Travelers are not prepared for such things. They, therefore, trot their horses. They are warrantably inattentive to small objects in the road, which they may be incapable of seeing in the course of a drive for miles through the country, among a sparse population. To keep a constant lookout, would be more than a driver could do, even if he were continually standing and driving on a walk. Yet to this the matter must come, if he is to take all the responsibility. The roads would thus become of very little use in the line for which they were principally intended. It seems to me, that the defendants exercised all the care which, in the nature of this case, the law required. If so, it is a case of mere unavoidable accident; for which they are not liable. *Dygert* v. *Bradley*, 8 Wendell, 469, 472, 473; *Clarke* v. *Foote*, 8 Johns. R. 421; *Penton* v. *Holland*, 17 id. 92.

Was the *plaintiff* guilty of negligence? His counsel seemed to think he made a complete exception to the general rule demanding care on his part, by reason of his extreme infancy. Is this indeed so? A snow path in the public highway, is among the last places in this country to which such a small child should be allowed to resort, unattended by any one of suitable age and discretion. The custody of such a child is confided by law to its parents, or to others standing in their place; and it is absurd to imagine that it could be exposed in the road, as this child

was, without gross carelessness. It is the extreme of folly even to turn domestic animals upon the common highway. To allow small children to resort there alone, is a criminal neglect. It is true that this confers no right upon travelers to commit a *voluntary injury* upon either; nor does it warrant *gross neglect;* but it seems to me that, to make them liable for anything short of that, would be contrary to law. The child has a right to the road for the purposes of travel, attended by a proper escort. But at the tender age of two or three years, and even more, the infant cannot personally exercise that degree of discretion, which becomes instinctive at an advanced age, and for which the law must make him responsible, through others, if the doctrine of mutual care between the parties using the road is to be enforced at all in his case. It is perfectly well settled, that, if the party injured by a collision on the highway has drawn the mischief upon himself by his own neglect, he is not entitled to an action, even though he be lawfully in the highway pursuing his travels. *Rathbun* v. *Payne*, 19 Wendell, 399; *Burckle* v. *N. Y. Dry Dock Co.*, 2 Hall, 151, which can scarcely be said of a toppling infant, suffered by his guardians to be there, either as a traveler or for the purpose of pursuing his sports. The application may be harsh when made to small children, as they are known to have no personal discretion. Common humanity is alive to their protection; but they are not, therefore, exempt from the legal rule, when they bring an action for redress; and there is no other way of enforcing it, except by requiring due care at the hands of those to whom the law and the necessity of the case has delegated the exercise of discretion. An infant is not *sui juris*. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose; and in respect to third persons, his act must be deemed that of the infant; his neglect, the infant's neglect. Suppose a hopeless lunatic suffered to stray by his committee, lying in the road like a log, shall the traveler, whose sleigh unfortunately strikes him, be made amenable in damages? The neglect of the committee to whom his custody is confided shall be imputed to him. It is a mistake to suppose that because the party injured is incapable of personal discretion, he is, therefore, above the law. An infant or lunatic is liable personally for wrongs which he commits against the person and property of others. *Bullock* v. *Babcock*,

3 Wendell, 391, 394. And when he complains of wrongs to himself, the defendant has a right to insist that he should not have been the heedless instrument of his own injury. He cannot, more than any other, make a profit of his own wrong. *Volenti non fit injuria.* If his proper agent and guardian has suffered him to incur mischief, it is much more fit that he should look for redress to that guardian, than that the latter should negligently allow his ward to be in the way of travelers and then harass them in courts of justice, recovering heavy verdicts for his own misconduct.

The counsel for the plaintiff probably have the advantage of saying that the neglect of an infant has not, in any reported case, ever been allowed by way of defense in an action for negligently injuring him. But so far, there is an equal advantage on the other side. The defense has not been denied in any book of reports. The defendant has also another advantage. The reports expressly say that negligence may be predicated of an infant or lunatic. All the cases agree that trespass lies against an infant. That was adjudged in *Campbell* v. *Stakes*, 2 Wendell, 137, and *Bullock* v. *Babcock*, before cited. And it is equally well settled that where an injury is free from all negligence, as if it arise from inevitable accident, there trespass does not lie. *Weaver* v. *Ward*, Hob. 134; Marcy, J., in *Bullock* v. *Babcock*, 3 Wendell, 393; *Dygert* v. *Bradley*, before cited. The cases maintaining trespass against an infant, therefore, imply that he may be guilty of negligence. Trover will also lie for a mere non-feasance, *e. g.*, a non-delivery of goods, where they do not come to the infant's hands by contract. Lawrence, J., in *Jennings* v. *Rundall*, 8 T. R. 337; *Campbell* v. *Stakes*, 2 Wendell, 143. The cases most favorable to infants all agree in that. And so, where the contract of bailment to an infant has expired, it was agreed that, on non-delivery, the owner may maintain detinue, replevin, or trover. *Penrose* v. *Curren*, 3 Rawle, 351. And see *per* Rogers, J., id. 354. It was said trespass lies against an infant, though only four years of age; 25 Hen. 6, 11 b. *per* Wangford, though this is put by Brooke with a *quære*. Br. Abr. Corone pl. 6. No doubt, however, he may bring a suit at any age; and if that suit depends upon a condition on his side, he must show that it was performed. It was said in *Stowel* v. *Zouch*, Plowd. Com. 364, if an infant lord, who has title to enter for mortmain, does not

enter within the year, he shall be bound by his laches; "for there he had but title to a thing which never was in him." To warrant an action he must have entered within the year; and not having done so, he could have no remedy. Several like instances are put in the same page, which are also collected and arranged in 9 Viner's Abr. Enfant, (B. 2,) pl. 7, 8, p. 376, of the octavo ed. But it is plain in the nature of things, that, if an infant insist on a right of action, he must show a compliance with the conditions on which his right is to arise; and this is entirely irrespective of his age. Land descends to an infant of a year old; and he is bound to make a share of the partition fence. He neglects to do so, whereby his neighbor's cattle enter and trespass upon the land. No one would think of contending that his neighbor must, therefore, be deprived of his defense. The infant has neglected to fulfill the condition, on which he could sue, or his guardian has done so, which is the same thing. He might as well sue because his neighbor had left a gate on his own premises open, through which the infant had crept, and fallen into a pit and hurt himself. The man has a right to keep his gate open; and the child's parents must keep him away. But one has no plainer right to walk about his own premises, and open and shut his own gates, than he has to travel in the highway with his horses. An infant creeps into the track from your field to your barn, and is injured by your driving a load of hay along the path, are you to be deprived of all excuse in an action for the injury?

The argument for this plaintiff goes quite too far and proves too much. It was said that drivers are bound to suppose that small children may be in the road, and as all the care lies on the side of the former, damages follow of course for every injury to the latter. Suppose an infant suddenly throws himself in the way of a sleigh, a wagon or a railroad car, by which his limb is fractured; it may be said with equal force, he is incapable of neglect. So if he be allowed to travel the road alone in the dark. The answer to all this is, the law has placed infants in the hands of vigilant and generally affectionate keepers, their own parents; and if there be any legal responsibility in damages, it lies upon them. The illustration sought to be derived from the law in respect to the injury of animals turned or suffered to stray into the street, does not strike me as fortunate. If they be there without any one to attend and take care of

them, that is a degree of carelessness in the owner which would preclude his recovery of damages arising from mere inattention on the side of the traveler. Indeed, it could rarely be said that animals entirely unattended are lawfully in the roads or streets at all. They may be driven along the road by the owner or his servants; but if allowed to run at large for the purpose of grazing, or any other purpose, entirely unattended, and yet travelers are to be made accountable in all cases of collision, such a doctrine might supersede the use of the road, so far as comfort or expedition is concerned. The mistake lies in supposing the injury to be wilful, to arise from some positive act, or to be grossly negligent. Such an injury is never tolerated, be the negligence on the side of the party injured what it may. *Clay* v. *Wood*, 5 Esp. R. 44; *Rathbun* v. *Payne*, before cited. But where it arises from mere inadvertence on the side of the traveler, he is always excused by the law on showing that there was equal or greater neglect on the side of his accuser. It is impossible to say, then, that the accuser was not himself the author of the injury which he seeks to father upon another. My difficulty in the case at bar is to find the least color for imputing gross negligence, or indeed any degree of negligence to the defendants. But if there were any, there was, I think, as much and more on the side of the plaintiff.

It therefore seems to me, that here was a good defense established at the trial, on the ground that the defendants being free from gross neglect, and the plaintiff being guilty of great neglect on his part, indeed being unnecessarily, not to say illegally occupying the road, having no right there, (for he does not appear to have been traveling, nor even on the land which belonged to his family,) the injury was a consequence of his own neglect, at least such neglect as the law must impute to him through others.

Again; I collect from the evidence that Newell had demised the team for a term of two years, which was unexpired at the time of the injury, to his son-in-law and co-defendant, Roper. Newell then had no control of the team, and cannot be made liable without proof of positive and active concurrence in the injury, a thing for which there is no pretense in the proof, and which implies a barbarous temper, which the law cannot presume in any one. He, at least, should have been acquitted by the jury. He neither actually participated in the management

of the team, nor could his interference have been legally efficient to prevent mischief. He had no lawful control of the horses. Roper was the exclusive owner *pro hac vice.*

The evidence, at the time when the motion was made to allow the jury to pass upon the case of Newell, had made out nothing actual against him, if Roper, the driver, may be said to have been implicated as a wrong-doer. But Newell might, at this stage, perhaps have been regarded by the jury as owner of the horses, and Roper as his servant. The lease was not in proof. Constructively, his liability would follow from the neglect of his servant; and in this view it cannot be said there was no evidence against him. It is only where the evidence totally fails as to one whose case can be separated from the other, that he is entitled to be acquitted for the purpose of being sworn as a witness for his co-defendant.

The motion for a nonsuit, which followed, seems to have been the more proper one; for I have been utterly unable to see that, so far, the evidence had made out any neglect, or the semblance of neglect on the part of the defendants, while it had established clear neglect on the other side. But this question has been sufficiently dwelt upon in connection with the defendants' proofs, and that which the plaintiff adduced at the close of the cause. It was enough, if the cause of action was then made out, although the judge might have refused to nonsuit. It appears to me it was not.

It follows that a new trial should be granted. The costs should, I think, abide the event; for the judge erred in omitting to nonsuit the plaintiff. The case was certainly not made better for the plaintiff by the subsequent evidence. It is not, therefore, *merely* the case of a verdict against the weight of evidence, which calls for payment of costs.

New trial granted; costs to abide the event.

Newman v. Phillipsburg Horse Car Railroad Co.

(52 New Jersey Law, 446.—1890.)

The plaintiff, a child two years of age, was in the custody of her adult sister, and, being left by herself for a few minutes, got upon the track of the defendant and was injured by one of its cars. At the time of the accident, which took place in one of the streets of Phillipsburg, no one was in charge of the horse car, the driver being in the car, collecting fares.

The Circuit Judge submitted the following to this court for advisement:

1. Whether the negligence of the persons in charge of the plaintiff, a minor, should be imputed to her.

2. Whether the conduct of the persons in charge of the plaintiff at the time of the injury complained of, was not so demonstrably negligent that the said Circuit Court should have nonsuited the plaintiff, or that the court should have directed the jury to find for the defendant.

3. Whether a new trial ought not to be granted, on the ground that the damages awarded are excessive.

Beasley, C. J. There is but a single question presented by this case, and that question plainly stands among the vexed questions of the law.

The problem is, whether an infant of tender years can be vicariously negligent, so as to deprive itself of a remedy that it would otherwise be entitled to. In some of the American states this question has been answered by the courts in the affirmative, and in others in the negative. To the former of these classes belongs the decision in *Hatfield* v. *Rofer & Newell*, reported in 21 Wend. 615. This case appears to have been one of first impression on this subject, and it is to be regarded, not only as the precursor, but as the parent of all the cases of the same strain that have since appeared.

The inquiry with respect to the effect of the negligence of the custodian of the infant, too young to be intelligent of situations and circumstances, was directly presented for decision in the primary case thus referred to, for the facts were these, viz.: The plaintiff, a child of about two years of age, was standing

or sitting in the snow in a public road, and in that situation was run over by a sleigh driven by the defendants. The opinion of the court was, that as the child was permitted by its custodian to wander into a position of such danger it was without remedy for the hurts thus received, unless they were violently inflicted, or were the product of gross carelessness on the part of the defendants. It is obvious that the judicial theory was, that the infant was, through the medium of its custodian, the doer, in part, of its own misfortune, and that, consequently, by force of the well known rule, under such conditions, he had no right to an action. This, of course, was visiting the child for the neglect of the custodian, and such infliction is justified in the case cited in this wise: "The infant," says the court, "is not *sui juris*. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose; in respect to third persons his act must be deemed that of the infant; his neglects the infant's neglects."

It will be observed that the entire content of this quotation is the statement of a single fact, and a deduction from it, the premise being, that the child must be in the care and charge of an adult, and the inference being that, for that reason, the neglects of the adult are the neglects of the infant. But surely this is, conspicuously, a *non sequitur*. How does the custody of the infant justify, or lead to, the imputation of another's fault to him? The law, natural and civil, puts the infant under the care of the adult, but how can this right to care for and protect be construed into a right to waive, or forfeit, any of the legal rights of the infant? The capacity to make such waiver or forfeiture is not a necessary, or even convenient, incident of this office of the adult, but, on the contrary, is quite inconsistent with it, for the power to protect is the opposite of the power to harm, either by act or omission. In this case in Wendell it is evident that the rule of law enunciated by it is founded in the theory that the custodian of the infant is the agent of the infant; but this is a mere assumption without legal basis, for such custodian is the agent, not of the infant, but of the law. If such supposed agency existed, it would embrace many interests of the infant, and could not be confined to the single instance where an injury is inflicted by the co-operative tort of the guardian. And yet it seems certain that such

custodian cannot surrender or impair a single right of any kind that is vested in the child, nor impose any legal burthen upon it. If a mother traveling with a child in her arms should agree with a railroad company, that in case of an accident to such infant by reason of the joint negligence of herself and the company the latter should not be liable to a suit by the child, such an engagement would be plainly invalid on two grounds—*first*, the contract would be *contra bonos mores*, and, *second*, because the mother was not the agent of the child authorized to enter into the agreement. Nevertheless, the position has been deemed defensible that the same evil consequences to the infant will follow from the negligence of the mother in the absence of such supposed contract, as would have resulted if such contract should have been made and should have been held valid.

In fact, this doctrine of the imputability of the misfeasance of the keeper of a child to the child itself, is deemed to be a pure interpolation into the law, for until the case under criticism it was absolutely unknown; nor is it sustained by legal analogies. Infants have always been the particular objects of the favor and protection of the law. In the language of an ancient authority this doctrine is thus expressed: "The common principle is, that an infant in all things which sound in his benefit shall have favor and preferment in law as well as another man, but shall not be prejudiced by anything in his disadvantage." 9 Vin. Abr. 374. And it would appear to be plain that nothing could be more to the prejudice of an infant than to convert, by construction of law, the connection between himself and his custodian into an agency to which the harsh rule of *respondeat superior* should be applicable. The answerableness of the principal for the authorized acts of his agent is not so much the dictate of natural justice as of public policy, and has arisen, with some propriety, from the circumstances, that the creation of the agency is a voluntary act, and that it can be controlled and ended at the will of its creator. But in the relationship between the infant and its keeper, all these decisive characteristics are wholly wanting. The law imposes the keeper upon the child, who, of course, can neither control or remove him, and the injustice, therefore, of making the latter responsible, in any measure whatever, for the torts of the former, would seem to be quite evident. Such subjectively

would be hostile, in every respect, to the natural rights of the infant, and, consequently, cannot, with any show of reason, be introduced into that provision which both necessity and law establish for his protection. Nor can it be said that its existence is necessary to give just enforcement to the rights of others. When it happens that both the infant and its custodian have been injured by the co-operative negligence of such custodian and a third party, it seems reasonable, at least in some degree, that the latter should be enabled to say to the custodian, you and I, by our common carelessness, have done this wrong, and, therefore, neither can look to the other for redress; but when such wrongdoer says to the infant, your guardian and I, by our joint misconduct, have brought this loss upon you, consequently you have no right of action against me, but you must look for indemnification to your guardian alone, a proposition is stated that appears to be without any basis either in good sense or law. The conversion of the infant, who is entirely free from fault, into a wrongdoer, by imputation, is a logical contrivance uncongenial with the spirit of jurisprudence. The sensible and legal doctrine is this, an infant of tender years cannot be charged with negligence; nor can he be so charged with the commission of such fault by substitution, for he is incapable of appointing an agent, the consequence being, that he can, in no case, be considered to be the blamable cause, either in whole or in part, of his own injury. There is no injustice, nor hardship, in requiring all wrongdoers to be answerable to a person who is incapable either of self-protection or of being a participator in their misfeasance.

Nor is it to be overlooked that the theory here repudiated, if it should be adopted, would go the length of making an infant in its nurse's arms answerable for all the negligences of such nurse while thus employed in its service. Every person so damaged by the careless custodian would be entitled to his action against the infant. If the neglects of the guardian are to be regarded as the neglects of the infant, as was asserted in the New York decision, it would, from logical necessity, follow, that the infant must indemnify those who should be harmed by such neglects. That such a doctrine has never prevailed is conclusively shown by the fact that in the reports there is no indication that such a suit has ever been brought.

It has already been observed that judicial opinion, touching

the subject just discussed, is in a state of direct antagonism, and it would, therefore, serve no useful purpose to refer to any of them. It is sufficient to say, that the leading text writers have concluded that the weight of such authority is adverse to the doctrine that an infant can become, in any wise, a tort-feasor by imputation. 1 Shearm. & R. Neg. § 75; Whart. Neg. § 311; 2 Wood Railw. L. p. 1284.

In our opinion, the weight of reason is in the same scale.

It remains to add that we do not think the damages so excessive as to place the verdict under judicial control.

Let the Circuit Court be advised to render judgment on the finding of the jury.

DANGEROUS THINGS.

DUTY OF INSURING SAFETY. [1]

RYLANDS V. FLETCHER.

(L. R. 3 English & Irish Appeals, 330.—1868.)

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 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.

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[1] "We have now to consider the cases where a stricter duty has been imposed. As a matter of history, such cases cannot easily be referred to any definite principle. But the ground on which a rule of strict obligation has been maintained and consolidated by modern authorities is the magnitude of the danger, coupled with the difficulty of proving negligence as the specific cause, in the particular event of the danger having ripened into actual harm. The law might have been content with applying the general standard of reasonable care, in the sense that a reasonable man dealing with a dangerous thing—fire, flood-water, poison, deadly weapons, weights projecting or suspended over a thoroughfare, or whatever else it be—will exercise a keener foresight and use more anxious precaution than if it were an object unlikely to cause harm, such as a faggot, or a loaf of bread. . . . But the course adopted in England has been to preclude questions of detail by making the duty absolute; or, if we prefer to put it in that form, to consolidate the judgment of fact into an unbending rule of law. The law takes notice that certain things are a source of extraordinary risk, and a man who exposes his neighbor to such risk is held, although his act is not of itself wrongful, to insure his neighbor against any consequent harm not due to some cause beyond human foresight and control." Pollock on Torts, 393.

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 defendants' 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 neg-

ligence 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 coal-workings 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. (3 H. & C. 774.) That judgment was afterwards reversed in the Court of Exchequer Chamber. (4 id. 263; L. R. 1 Ex. 265.) The case was then brought on error to this House.

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 neighborhood, and they proposed 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 workings by the plaintiff of his mine, he 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.

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 plain-

tiff 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*, 7 C. B. 515, in the Court of Common Pleas.

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, 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 showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches."

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.

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*, Sir T. Raym. 421. 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 laedat 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* and *Baird* v. *Williamson*. 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 skilfully or unskilfully performed, that the plaintiff had been damaged, and he was therefore held liable for the consequences. The damage in the former case may be treated as having arisen from the act of God; in the latter, from the act of the defendant.

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 arising 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 skilfully 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.

Losee v. Buchanan.

(51 New York, 476.—1873.)

Appeal from an order of the General Term of the Supreme Court, reversing a judgment entered upon a verdict in favor of the defendants, in an action to recover damages occasioned by the explosion of a boiler owned and used by the Saratoga Paper Company. Buchanan and Bullard were joined with the company as defendants, on the ground that they were trustees, stockholders and agents, and engaged in superintending the business of the company. The Clutes, who manufactured the boiler, were also made defendants, on the ground that they had built the boiler in a negligent manner.

Earl, C. Upon the first trial of this action, the presiding judge dismissed the complaint as against the defendants Clute, who manufactured the engine, and held that the other defendants were liable irrespective of negligence, and excluded all evidence to show that they were not guilty of negligence. For this error, upon appeal to the General Term, the judgment was reversed and new trial granted, the court holding that the defendants could be made liable only by proof against them of negligence. Upon the second trial, the presiding judge held in accordance with the law as thus laid down by the General Term, and upon the question of negligence the jury decided against the Saratoga Paper Company and in favor of the other two defendants. The plaintiff claimed, as he did upon the first trial, that the defendants were liable without the proof of any negligence, and requested the justice so to rule, and the refusal of the justice to comply with this request raises the principal question for our consideration upon this appeal.

Upon the last appeal, the majority of the court held the law to be as it had been held upon the first appeal, but a new trial was granted for certain alleged errors in the charge of the justice, which will hereafter be considered.

The claim on the part of the plaintiff is, that the casting of the boiler upon his premises by the explosion was a direct trespass upon his right to the undisturbed possession and occupation of his premises, and that the defendants are liable just as

they would have been for any other wrongful entry and trespass upon his premises.

I do not believe this claim to be well founded, and I will briefly examine the authorities upon which mainly an attempt is made to sustain it.

In *Farrand* v. *Marshall*, 21 Barb. 409, it was held that a man may dig on his own land, but not so near that of his neighbor as to cause the land of the latter to fall into his pit, thus transferring a portion of another man's land to his own. This is upon the principle that every man has the natural right to the use of his land in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots. He has a right to the support of the adjoining soil, and to that extent has an easement in his neighbor's soil, and when the soil is removed his easement is directly interfered with. When one adjoining owner thus removes the soil, he is not doing simply what he may with his own, but he is interfering with the right which his neighbor has in the same soil. This rule, however, as stated by Judge Bronson in *Radcliff's Executors* v. *Mayor, etc., of Brooklyn*, 4 Comst. 203, must undoubtedly be somewhat modified in its application to cities and villages. In *Hay* v. *The Cohoes Company*, 2 Comst. 159, the defendant, a corporation, dug a canal upon its own land for the purposes authorized by its charter. In so doing it was necessary to blast rocks with gunpowder, and the fragments were thrown against and injured the plaintiff's dwelling upon lands adjoining. It was held that the defendant was liable for the injury, although no negligence or want of skill in executing the work was alleged or proved. This decision was well supported by the clearest principles. The acts of the defendant in casting the rocks upon plaintiff's premises were direct and immediate. The damage was the necessary consequence of just what the defendant was doing, and it was just as much liable as if it had caused the rocks to be taken by hand, or any other means, and thrown directly upon plaintiff's land. This is far from an authority for holding that the defendants, who placed a steam boiler upon their lands, and operated the same with care and skill, should be liable for the damages caused by the explosion, without their fault or any direct or immediate act of theirs. It is true that Judge Gardner, in writing the opinion of the court, lays down broadly the principle that "every individual is en-

titled to the undisturbed possession and lawful enjoyment of his own property," citing the maxim *sic utere tuo*, etc. But this principle, as well as the maxim, as will be seen, has many exceptions and limitations, made necessary by the exigencies of business and society.

In *Bellinger* v. *The New York C. R. R. Co.*, 23 N. Y. 47, it was decided that where one interferes with the current of a running stream, and causes damage to those who are entitled to have the water flow in its natural channel, but such interference is in pursuance of legislative authority granted for the purpose of constructing a work of public utility, upon making compensation, he is liable only for such injury as results from the want of due skill and care in so arranging the necessary works as to avoid any danger reasonably to be anticipated from the habits of the stream and its liability to floods. Judge DENIO, in his opinion, referring to the maxim *aqua currit et debet currere*, says, it "absolutely prohibits an individual from interfering with the natural flow of water to the prejudice of another riparian owner upon any pretence, and subjects him to damages at the suit of any party injured without regard to any question of negligence or want of care." The liability in such cases is based upon the principle that the interference is an immediate and direct violation of the right of the other riparian owners to have the water flow in its natural channel. No one has an absolute property in the water of a running stream. He may use it, but he must not, by his use of it, interfere with the equal right which other riparian owners have also to use it, and have it flow in its natural way in its natural channel.

In *Pixley* v. *Clark*, 35 N. Y. 520, it was held, that if one raises the water in a natural stream above its natural banks, and to prevent its outflow constructs embankments which answer the purpose perfectly, but by the pressure of the water upon the natural banks of the stream percolation takes place so as to drain the adjoining lands of another, an action will lie for the damages occasioned thereby; and that it matters not whether the damage is occasioned by the overflow of or the percolation through the natural banks, so long as the result is occasioned by an improper interference with the natural flow of the stream. This decision was an application of the maxim *aqua currit et debet currere* to the facts of that case. It was held that the liability was the same whether the water was

dammed up and caused to overflow or to percolate through the banks of the stream. It was a case of flooding lands by damming up the water of a stream, and the liability of a wrong-doer in such a case has never been disputed.

In the case of *Selden* v. *The Delaware and Hudson Canal Co.*, 24 Barb. 362, it was held that the defendant had the power, under its charter, to enlarge its canal; but that, though it possessed this power, and upon making compensation therefor to take private property for that purpose, it was liable to remunerate individuals in damages for any injuries they might sustain as the consequence of such improvement; and that, if by means of the enlargement, a lawful act in itself, the lands of an individual were inundated, even though the work may have been performed with all reasonable care and skill, it was a legal injury, for which the owner was entitled to redress. It may well be doubted if this decision can stand in view of the principles laid down in the case of *Bellinger* v. *The New York Central Railroad Company*, *supra*. Within the principles of that case, if the Delaware and Hudson Canal Company exercised a power conferred upon it by law in a lawful and proper manner, it could not be held liable for the consequential damages necessarily occasioned to the owners of adjoining lands. But if we assume, as was assumed at the General Term in that case, that the defendant did not have the protection of the law for the damages which it occasioned, then it was clearly liable. Its acts were necessarily and directly injurious to the plaintiff. It kept the water in its canal when it knew that the necessary consequence was to flood the plaintiff's premises. The damage to plaintiff was not accidental, but continuous, direct and necessary. In such a case the wrong-doer must be held to have intended the consequence of his acts, and must be treated like one keeping upon his premises a nuisance doing constant damage to his neighbor's property.

In the case of *McKeon* v. *See*, 4 Rob. Superior Court R. 449, it was held, that the defendant had no right to operate a steam engine and other machinery upon his premises so as to cause the vibration and shaking of plaintiff's adjoining buildings to such an extent as to endanger and injure them. This case was decided upon the law of nuisances. It was held that the engine and machinery, in the mode in which they were operated, were a nuisance, and the decision has been affirmed at this term of

this court. The decision in this case, and in scores of similar cases to be found in the books, is far from an authority that one should be held liable for the accidental explosion of a steam boiler which was in no sense a nuisance. We are also cited to a class of cases holding the owners of animals responsible for injuries done by them. There is supposed to be a difference as to responsibility between animals *mansuetæ naturæ* and *feræ naturæ*. As to the former, in which there can be an absolute right of property, the owner is bound at common law to take care that they do not stray upon the lands of another, and he is liable for any trespass they may commit, and it is altogether immaterial whether their escape is purely accidental or due to negligence. As to the latter, which are of a fierce nature, the owner is bound to take care of them and keep them under control, so that they can do no injury. But the liability in each case is upon the same principle. The former have a known, natural disposition to stray, and hence the owner knowing this disposition is supposed to be in fault if he do not restrain them and keep them under control. As to the former, the owner is not responsible for such injuries as they are not accustomed to do, by the exercise of vicious propensities which they do not usually have, unless it can be shown that he has knowledge of the vicious habit and propensity. As to all animals, the owner can usually restrain and keep them under control, and if he will keep them he must do so. If he does not, he is responsible for any damage which their well-known disposition leads them to commit. I believe the liability to be based upon the fault which the law attributes to him, and no further actual negligence need be proved than the fact that they are at large unrestrained. But if I am mistaken as to the true basis of liability in such cases, the body of laws in reference to live animals, which is supposed to be just and wise, considering the nature of the animals and the mutual rights and interests of the owners and others, does not furnish analogies absolutely controlling in reference to inanimate property.

Blackstone (vol. 3, p. 209) says, "that whenever an act is directly and immediately injurious to the person or property of another, and therefore necessarily accompanied with some force, an action of trespass *vi et armis* will lie;" for "the right of *meum* and *tuum* or property in lands being once established, it follows as a necessary consequence that this right

must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil. Every entry, therefore, thereon without the owner's leave, and especially contrary to his express order, is a trespass or transgression." The learned author was here laying down the distinction between an action of trespass and trespass on the case, and asserting the rule that in the former action the injury must be direct and immediate, and accompanied with some force, whereas in the latter action it could be indirect and consequential. He was also manifestly speaking of a direct entrance by one upon the lands of another. He was laying down a general rule that every unauthorized entrance upon the land of another is a trespass. This was sufficiently accurate for the enunciation of a general rule. Judges and legal writers do not always find it convenient, practicable or important, in laying down general rules, to specify all the limitations and exceptions to such rules. The rule, as thus announced, has many exceptions, even when one makes a personal entry upon the lands of another. I may enter my neighbor's close to succor his beast whose life is in danger; to prevent his beasts from being stolen or to prevent his grain from being consumed or spoiled by cattle; or to carry away my tree which has been blown down upon his land, or to pick up my apples which have fallen from my trees upon his land, or to take my personal property which another has wrongfully taken and placed there, or to escape from one who threatens my life. Bacon's Abridgment, Trespass, F. Other illustrations will be given hereafter.

By becoming a member of civilized society, I am compelled to give up many of my natural rights, but I receive more than a compensation from the surrender by every other man of the same rights, and the security, advantage and protection which the laws give me. So, too, the general rules that I may have the exclusive and undisturbed use and possession of my real estate, and that I must so use my real estate as not to injure my neighbor, are much modified by the exigencies of the social state. We must have factories, machinery, dams, canals and railroads. They are demanded by the manifold wants of mankind, and lay at the basis of all our civilization. If I have any of these upon my lands, and they are not a nuisance and are not so managed as to become such, I am not responsible for any damage they accidentally and unavoidably do my

neighbor. He receives his compensation for such damage by the general good, in which he shares, and the right which he has to place the same things upon his lands. I may not place or keep a nuisance upon my land to the damage of my neighbor, and I have my compensation for the surrender of this right to use my own as I will by the similar restriction imposed upon my neighbor for my benefit. I hold my property subject to the risk that it may be unavoidably or accidentally injured by those who live near me; and as I move about upon the public highways and in all places where other persons may lawfully be, I take the risk of being accidentally injured in my person by them without fault on their part. Most of the rights of property, as well as of person, in the social state, are not absolute but relative, and they must be so arranged and modified, not unnecessarily infringing upon natural rights, as upon the whole to promote the general welfare.

I have so far found no authorities and no principles which fairly sustain the broad claim made by the plaintiff, that the defendants are liable in this action without fault or negligence on their part to which the explosion of the boiler could be attributed.

But our attention is called to a recent English case, decided in the Exchequer Chamber, which seems to uphold the claim made. In the case of *Fletcher* v. *Rylands*, 1 Exchequer, 265, Law Reports, the defendants constructed a reservoir on land separated from the plaintiff's colliery by intervening land. Mines, under the site of the reservoir and under part of the intervening land, had been formerly worked; and the plaintiff had, by workings lawfully made in his own colliery and in the intervening land, opened an underground communication between his colliery and the old workings under the reservoir. It was not known to the defendants, nor to any person employed by them in the construction of the reservoir, that such communication existed, or that there were any old workings under the site of the reservoir, and the defendants were not personally guilty of any negligence; but, in fact, the reservoir was constructed over five old shafts, leading down to the workings. On the reservoir being filled, the water burst down these shafts and flowed, by the underground communication, into the plaintiff's mines. It was held, reversing the judgment of

the Court of Exchequer, that the defendants were liable for the damage so caused, upon the broad doctrine that one who, for his own purposes, brings upon his land, and collects and keeps there, anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. Mr. Justice BLACKBURN, writing the opinion of the Court, says: "The question of law therefore arises, what is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escapes out of his land? It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbors; but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions in order to keep it in, but no more;" and he reaches the conclusion that it is an absolute duty, and that the liability for damage from the escape attaches without any proof of negligence. This conclusion is reached by the learned Judge mainly by applying to the case the same rule of liability to which owners are subjected by the escape of their live animals. As I have shown above, the rules of law applicable to live animals should not be applied to inanimate property. That case was appealed to the House of Lords and affirmed, 3 H. L. [Law Rep.] 330, and was followed in *Smith* v. *Fletcher*, 20 W. R. 987.

It is sufficient, however, to say that the law, as laid down in those cases, is in direct conflict with the law as settled in this country. Here, if one builds a dam upon his own premises and thus holds back and accumulates the water for his benefit, or if he brings water upon his premises into a reservoir, in case the dam or the banks of the reservoir give way and the lands of a neighbor are thus flooded, he is not liable for the damage without proof of some fault or negligence on his part. Angell on Water-courses, § 336; *Tapham* v. *Curtis*, 5 Vt. 371; *Todd* v. *Cochell*, 17 Cal. 97; *Everett* v. *Hydraulic, etc., Co.*, 23 id. 225; *Shrewsbury* v. *Smith*, 12 Cushing, 177; *Livingston* v. *Adams*, 8 Cowen, 175; *Bailey* v. *Mayor, etc. of New York*, 3 Hill, 531,

s. c. 2 Denio, 433; *Pixley* v. *Clark*, 35 N. Y. 520, 524; *Sheldon* v. *Sherman*, 42 id. 484.

The true rule is laid down in the case of *Livingston* v. *Adams* as follows: "Where one builds a mill-dam upon a proper model, and the work is well and substantially done, he is not liable to an action though it break away, in consequence of which his neighbor's dam and mill below are destroyed. Negligence should be shown in order to make him liable."

In conflict with the rule as laid down in the English cases is a class of cases in reference to damage from fire communicated from the adjoining premises. Fire, like water or steam, is likely to produce mischief if it escapes and goes beyond control; and yet it has never been held in this country that one building a fire upon his own premises can be made liable if it escapes upon his neighbor's premises and does him damage without proof of negligence. *Clark* v. *Foot*, 8 J. R. 422; *Stuart* v. *Hawley*, 22 Barb. 619; *Calkins* v. *Barger*, 44 id. 424; *Lansing* v. *Stone*, 37 id. 15; *Barnard* v. *Poor*, 21 Pick. 378; *Tourtellot* v. *Rosebrook*, 11 Metcalf, 460; *Batchelder* v. *Heagan*, 18 Maine, 32. The rule, as laid down in *Clark* v. *Foot*, is as follows: "If A. sets fire to his own fallow ground, as he may lawfully do, which communicates to and fires the woodland of B., his neighbor, no action lies against A. unless there was some negligence or misconduct in him or his servant." And this is the rule throughout this country except where it has been modified by statute. *Tourtellot* v. *Rosebrook* was an action to recover damages caused by a fire communicated to the plaintiff's land from a coal-pit which the defendant lawfully set on fire upon his own land, and it was held that the burden was on the plaintiff to prove negligence on the part of the defendant.

In *Hinds* v. *Barton*, 25 N. Y. 544, and *Teall* v. *Barton*, 40 Barb. 137, sparks were emitted from a steam dredge used upon the Erie canal, and they set fire to neighboring buildings, and although the sparks were thrown directly upon the buildings it was held that the defendants could be made liable only by proof of negligence. In *Cook* v. *The Champlain Transportation Co.*, 1 Denio, 91, the buildings of the plaintiff were fired by sparks thrown thereon from defendant's steamboat upon Lake Champlain, and it was held that the defendant could be made liable only by proof of negligence. All these cases and the class of cases to which they belong are in conflict with the rule as

claimed by the plaintiff. A man may build a fire in his house or his steam-boiler, and he does not become liable without proof of negligence if sparks accidentally pass directly from his chimney or smoke-stack to the buildings of his neighbor. The maxim of *sic utere tuo*, etc., only requires in such a case the exercise of adequate skill and care.

The same rule applies to injuries to the person. No one in such case is made liable without some fault or negligence on his part, however serious the injury may be which he may accidentally cause; and there can be no reason for holding one liable for accidental injuries to property when he is exempt from liability for such injuries to the person. It is settled in numerous cases that if one driving along a highway accidentally injures another he is not liable without proof of negligence. *Center* v. *Finney*, 17 Barb. 94; *Hammock* v. *White*, 103 Eng. Com. Law, 587.

In *Harvey* v. *Dunlop*, Lalor's Supplement, 193, the action was for throwing a stone at the plaintiff's daughter and putting out her eye. It did not appear that the injury was inflicted by design or carelessness, but did appear that it was accidental, and the court held that the plaintiff could not recover, laying down the broad rule that no liability results from the commission of an act arising from inevitable accident, or which ordinary human care and foresight could not guard against. In *Dygert* v. *Bradley*, 8 Wend. 469, the action was for running one boat against another in the Erie canal, and the court held that if the injury was occasioned by unavoidable accident, no action would lie for it; but if any blame was imputable to the defendant, he would be liable. In *Brown* v. *Kendall*, 6 Cushing, 292, the defendant having interfered to part his dog and the plaintiff's, which were fighting, in raising his stick for that purpose, accidentally struck the plaintiff and severely injured him; it was held that he was not liable. In writing the opinion of the court, Chief Justice Shaw says: "It is frequently stated by judges that where one receives injury from the direct act of another, trespass will lie. But we think this is said in reference to the question whether trespass and not case will lie, assuming that the facts are such that some action will lie. These *dicta* are no authority, we think, for holding that damage received by a direct act of force from another will be sufficient to maintain an action of trespass, whether the act was lawful or unlaw-

ful, and neither willful, intentional or careless." We think, as the result of all the authorities, that the rule is that the plaintiff must come prepared with evidence to show that the *intention* was unlawful, or that the defendant was in *fault;* for if the injury was unavoidable and the conduct of the defendant was free from blame, he will not be held liable. If, in the prevention of a lawful act, a casualty, purely accidental, arises, no action can be supported for an injury arising therefrom. So, too, contrary to what was held in an early English case, if one raise a stick in self-defense to defend himself against an assault and accidentally hit a third person, he cannot, in my opinion, be made liable for the injury thus, without fault or negligence, inflicted.

In *Rockwood* v. *Nelson*, 11 Cushing, 221, Mr. Justice THOMAS says: "Nothing can be better settled than that if one do a lawful act upon his own premises, he cannot be held responsible for injurious consequences that may result from it, unless it was so done as to constitute actionable negligence."

In *Bissell* v. *Booker*, 16 Ark. 308, it was held that one who is hunting in the wilderness is not bound to anticipate the presence, within range of his shot, of another man, and that he is not liable for an injury caused unintentionally by him to a person of whose presence he was not aware. (See, also, the case of *Driscoll* v. *The Newark and Rosendale Co.*, 37 N. Y. 637.)

In *Spencer* v. *Campbell*, 9 Watts & S. 32, a man drove a horse to defendant's steam grist-mill to get some grist which he had had ground, and he was thus lawfully upon defendant's premises and was just as much entitled to protection there as if he had been upon his own premises. While there the steam boiler exploded and killed his horse, and the action was brought for the value of the horse; and it was held that, to entitle the plaintiff to recover, he was bound to show the want of ordinary care, skill and diligence. I am unable to see how that case differs in principle from the one at bar. To sustain the broad claim of the plaintiff here, it should have been held in that case that the owner of the steam boiler was absolutely liable, irrespective of any care, skill or diligence on his part, for any damage which the boiler by its explosion occasioned to any property lawfully in the vicinity. Within the rules laid down by these authorities, the defendants in this case could not, without proof of negligence, be made liable for injuries caused to the persons

of those who were near at the time of the explosion; and it would be quite illogical to hold them liable for injuries to property, while they were not liable for injuries to persons by the same accident.

In support of the plaintiff's claim in this action the rule has been invoked that, where one of two innocent parties must suffer, he who puts in motion the cause of the injury must bear the loss. But, as will be seen by the numerous cases above cited, it has no application whatever to a case like this.

This examination has gone far enough to show that the rule is, at least in this country, a universal one, which, so far as I can discern, has no exceptions or limitations, that no one can be made liable for injuries to the person or property of another without some fault or negligence on his part.

In this case the defendants had the right to place the steam boiler upon their premises. It was in no sense a nuisance, and the jury have found that they were not guilty of any negligence. The judgment in their favor should, therefore, have been affirmed at the General Term, unless there were errors in the charge, or refusal to charge, of the judge who presided at the trial, and these alleged errors I will now briefly examine.

It is alleged that the judge erred in charging the jury that "defendants are not liable for negligence or want of skill on the part of the manufacturers of the boiler in question not known to them;" "that defendants are not liable except upon proof of negligence or unskilfulness on the part of the authorized servants or agents of the company;" "that there is no proof of any relation between the plaintiff and defendant, Buchanan, creating any obligation or duty on the part of the latter toward the former;" "that defendant, Buchanan, is not liable for any negligence or unskilfulness on the part of the Saratoga Company, or on the part of the manufacturers of the boiler in question." These are not found in the charge, but were decisions made upon the motion for a nonsuit, and were not excepted to.

The judge charged the jury "that if they were of opinion that the reduction by Goddard (the engineer and agent of the paper company, who had charge of the boiler) of the steam pressure from 120 to 110 was a proper, prudent and sufficient exercise of care and skill under the circumstances, that the defendants were not liable on account of leakage;" "that the

cold shut in the head that previously gave out was no evidence of the cold shut in the head that did give out;" "that if Goddard told Bullard that it would be prudent to run the steam boiler at 110, and if Bullard believed that and acted upon it, then he was not liable;" "that if the jury found from the evidence that Goddard came to the conclusion that to reduce the pressure from 120 to 110 would render the use of the boiler prudent and safe, and communicated that idea to Bullard, he, Bullard, was not personally liable." These charges were excepted to by plaintiff's counsel. These were requests to charge on the part of the defendants acceded to by the judge. Some of them should properly have been somewhat qualified and explained, and are therefore liable to some criticism. But we must look at the whole charge, and judge of it from its whole scope, and if, taking it altogether, it presented the questions of law fairly to the jury so as not to mislead them, exceptions to separate propositions in it, or to detached portions of it, will not be upheld. As said by Chief Judge Church, in *Caldwell* v. *New Jersey Steamboat Co.*, 47 N. Y. 282, "If the charge as a whole conveyed to the jury the correct rule of law, on a given question, the judgment will not be reversed although detached sentences may be erroneous; and if the language employed is capable of different constructions, that construction will be adopted which will lead to an affirmance of the judgment, unless it fairly appears that the jury were, or at least might have been, misled."

The judge in his charge submitted the whole question of negligence to the jury. He charged that the defendants were liable for the omission of such care as men of ordinary prudence engaged in the use of such a steam boiler in such business would exercise, and that they were liable for any imperfections in the boiler, which contributed to the explosion, which were known to them; but that if the explosion was caused by the cold shut in the head of the boiler which was imperceptible to the defendants or undiscoverable on examination or by the application of known tests, they were not liable. He charged the jury fully in reference to the leakage of the boiler, and his charge upon that subject was fully as favorable to the plaintiff as he could claim. He called the attention of the jury to all the facts connected with it and to what Goddard had told Bullard about it, and stated to them that they had a right to say, from all the

facts, whether or not Bullard was chargeable with negligence in the use of the boiler, under the circumstances. I think, from the charge as made, the jury could not have failed to understand that the defendants were to be held liable for any defects in the manufacture of the boiler which they knew or ought to have known, and for any negligence in the use of the boiler which could be attributed to them.

The plaintiff requested the court to charge "that the defendants cannot excuse or justify themselves in the use of the boiler in question, on the ground that the same was purchased of reputable manufacturers." This the judge refused to charge, and the plaintiff excepted. The principle of law involved in this request was fairly covered by the charge as made, and yet it may well be doubted whether the judge would have been justified in charging in the language of the request. The fact that the defendants bought the boiler of reputable manufacturers was one of the facts tending to a justification which the jury were to consider. It was not of itself a conclusive justification, and the judge did not charge that it was. If he had refused to charge that they could not justify on the *sole* ground that they had purchased it of reputable manufacturers, it would have been error. A charge in the very language of the request might have misled the jury by taking from their consideration the fact that the boiler was bought from reputable manufacturers upon whose judgment, skill and integrity the defendants had the right to place some reliance.

I have, therefore, reached the conclusion that no error was committed upon the trial of this action, and it follows that the order of the General Term must be reversed, and the judgment entered upon the verdict must be affirmed, with costs.

All concur.

Order reversed and judgment accordingly.

Mears v. Dole.

(135 Massachusetts, 508.—1883.)

Colburn, J. This is a bill in equity. As appears from the bill, answer and master's report, the plaintiff and the defendant both own lands bounded northwesterly by the sea in Quincy Bay, in Boston Harbor; the lands of the defendant being bounded easterly and northeasterly and in part northwesterly on land of the plaintiff (a part of the plaintiff's land extending between the defendant's land and the sea). The shore on both the plaintiff's and the defendant's lands, being composed of gravel and shingle, had become compacted and indurated, so that so far back as can be ascertained, at least for nearly two hundred years, there had been no substantial change in the shore line. The defendant excavated and carried away for sale the soil and gravel from his land, down to low-water mark, from the sea for a considerable distance inland, and near to the lines of the plaintiff's land, but not so near that, except for the action of the sea, his lands would have been undermined and fallen in.

It is a matter of common knowledge, that the rise of the tide in Boston Harbor is ten or twelve feet. The consequence of this excavation has been, through the action of the sea, that the plaintiff's lands have been undermined and have fallen, and have been washed into the excavation of the defendant, the soil in places has been washed away by being overflowed by the sea at high tides, and the gravel and shingle have been washed from the base of a hill along the shore, at some distance from the excavation of the defendant, so that the soil of said hill is caving, and is being carried away by the action of rains, frosts and melting snows down to the shore, and the plaintiff's well has been rendered at times brackish.

The defendant contends that to take away the soil, gravel, and other material from his land, is a natural and reasonable use of his land; and that to deprive him of that use would render his land comparatively worthless.

Without discussing at length the question of the natural and non-natural uses of land, which has been considered in some cases, we are of opinion that a person has no right to carry

away the gravel or other material of his land, if the consequence would be to turn a watercourse, or to let in the sea, so as to inundate or injure the land of his neighbor. As said by Chief Justice Shaw in *Commonwealth* v. *Alger*, 7 Cush. 53, 86: "All real estate, inland or on the sea-shore, derived immediately or remotely from the government of the State, is taken and held under the tacit understanding that the owner shall so deal with it as not to cause injury to others; that when land is so situated, or such is its conformation, that it forms a natural barrier to rivers or tidal watercourses, the owner cannot justifiably remove it, to such an extent as to permit the waters to desert their natural channels, and overflow, and perhaps inundate fields and villages, render rivers, ports and harbors shallow, and consequently desolate, and thereby destroy the valuable rights of other proprietors, both in the navigation of the stream, and in the contiguous lands." "Ordinarily, and when no such circumstances exist, the owner of land has a perfect right to use and remove the earth, gravel and clay of which the soil is composed, as his own interest or convenience may require. But can he do this when the same materials form the natural embankment of a watercourse? He may say, perhaps, that he merely intends to make use of materials which are his own, and to which he has a right, and for which he has other uses. But we think the law will admit of no such excuse; he knows that, when these materials are removed, the water, by the law of gravitation, will rush out, and all the mischievous consequences of diverting the watercourse will follow." See *Attorney General* v. *Tomline*, 40 L. T. (N. S.) 775.

The defendant by his excavations, for his own purposes, brought the sea upon his land, where it would not have been but for the excavations, and as a consequence it has escaped, and acted upon the plaintiff's land so as to cause damage, and for this he must be held responsible. *Fletcher* v. *Rylands*, L. R. 1 Ex. 265, 279; L. R. 3 H. L. 330, 339; *Smith* v. *Fletcher*, L. R. 7 Ex. 305; *Wilson* v. *New Bedford*, 108 Mass. 261. It is true that the injury was caused by the natural action of the sea; but this action was exerted at a place where it would not have occurred except for the acts of the defendant. The fact that the water was not accumulated and kept on the defendant's land is immaterial; it was by his acts caused to come

there, twice a day, probably causing more damage than if it had been dammed up there.

It is well settled to be an actionable tort to allow filthy water to percolate from a vault through the soil, to the injury of a well or cellar of a neighboring proprietor. *Bull* v. *Nye*, 99 Mass. 582. Though sea-water may not be filthy water, it is as effectually destructive to a well for domestic purposes as is such water. A person is liable for the injuries caused by the percolation through the earth of water, artificially introduced or accumulated upon his land, to the cellar, well or vegetation of a neighboring proprietor. *Fuller* v. *Chicopee Manuf. Co.*, 16 Gray, 46; *Wilson* v. *New Bedford*, *ubi supra*; *Pixley* v. *Clark*, 35 N. Y. 520.

It is urged by the defendant, that the sea is regarded as a common enemy, and that it is a rule that each man may defend himself against its encroachments as best he can, even if thereby it washes against his neighbor's land. This may be so, but the rule has no application to the case at bar. The defendant was not protecting himself against the common enemy; he voluntarily introduced the enemy upon his land, and allowed it to escape from there to the injury of the plaintiff.

The defendant contends that no action can be maintained against him at the suit of an individual, but that the remedy is by indictment. Whatever rights the Commonwealth may have in tide-water or the sea-shore, it has never attempted, so far as we are aware, by any legislative acts, to do more than protect navigation, by preserving the integrity of the harbor; and if the defendant is liable to indictment, the plaintiff is not thereby deprived of his right of action. His damages are special and peculiar, and are not sustained in common with the public, or, so far as appears, with any other individual. *Wesson* v. *Washburn Iron Co.*, 13 Allen, 95; *Brayton* v. *Fall River*, 113 Mass. 218.

We are of opinion that for such injuries to his land as the plaintiff showed were the direct result of the excavations made by the defendant, in changing the action of the sea, he is entitled to recover.

We do not understand from the master's report that he assessed any damages for injury to the driftway. The driftway was upon a natural dike, which protected the plaintiff's land from the sea; and it was for injuries caused by cutting away

this natural dike, as part of the defendant's excavation, that damages were assessed, and not for the loss of the driftway, as a way, as we construe the report.

It appears that, on September 25, 1876, the plaintiff brought an action at law against the defendant, in which he recovered damages for injuries resulting from digging and carrying away gravel. The defendant contends that damages must in that case have been assessed for the injuries then received, and such as would in the future result from the excavation made at the time that action was brought; and that, as the master has assessed damages for all injuries which have resulted since September 25, 1876, he must have included some damages which were embraced in the assessment in the former suit. This objection of the defendant, that he has been subjected to double damages, may be well founded. The master had no facts before him from which he could determine whether or not any part of the damages he assessed were recovered in the former suit. He states in his report that he had "not been shown how great an excavation had been made by the defendant on September 25, 1876, or how much that excavation had been increased since that date." It was the duty of the plaintiff, in claiming incidental damages in this suit, to show what such damages were. They were such damages as he had sustained from the defendant's unlawful acts, for which he could not have recovered in the former suit. And to show for what he could, or could not, have recovered in the former suit, it was necessary for him to show as far as possible the extent of the excavation on September 25, 1876, and the progress or changes, if any, made in the excavation between that date and the time damages were assessed in that suit. If the defendant had ceased to excavate on September 25, 1876, and did not resume until after the assessment of damages in the former suit, the plaintiff was entitled to recover in that suit such damages as he had sustained at the time of the assessment, and such as would probably result in the future from that excavation, or such expense as he might be obliged to incur to prevent future damages, as these damages would all be the result of the cause of action for which the suit was brought. But if, after September 25, 1876, and before the assessment of damages in the first suit, the defendant had enlarged and changed his excavation, so as to cause damages to the plaintiff, in amount or kind, which would not have resulted

from the excavation as it existed when the action was brought, so that a new cause of action accrued to the plaintiff, in which the original cause was merged, he could only recover such damages in the first action as had resulted while that cause of action continued. *Warner* v. *Bacon*, 8 Gray, 397; *Troy* v. *Cheshire Railroad*, 3 Foster, 83, 101.

As the master had no evidence before him upon which he could determine these questions, there must be a reassessment of damages; and, upon being furnished with the proper evidence, the master will be able to determine, with as much accuracy as the nature of the case admits, what damages were recoverable in the former suit, and what are incident to the suit at bar.

It appears that the master allowed, as part of the damages assessed, the expense of erecting structures to prevent further damage, which the master finds must result after October 9, 1880, if the defendant then ceased to excavate, unless such structures were erected. We do not understand that he assessed the expense of any structures to repair past damages, or assessed damages for any injuries which might result in the future from excavations made up to October 9, 1880, except so far as assessing the expense of structures to prevent future damages may be considered as practically an assessment of future damages. It does not appear what these structures were to be, or when or where they were to be erected, or their estimated cost. We can understand that structures might in some cases be erected, which would prevent future injury, at much less cost than would compensate for the injuries if not prevented. If the defendant had been restrained by injunction from making any further excavation, or had permanently desisted from all further excavation, the plaintiff would be entitled to recover for such future injuries as would probably result from the excavation already made; and if the plaintiff could prevent such injuries by erecting structures at a less cost than the injuries would amount to, the defendant could not complain that he was required to pay the cost of such structures, rather than damages for the injuries. This principle of assessing the costs of structures to prevent future damages is recognized in *Bates* v. *Ray*, 102 Mass. 458, and in *Fowle* v. *New Haven and Northampton Co.*, 112 Mass. 334. This case does not depend upon the same principles, as to damages, as the cases cited by the defendant, relating to damages for injuries resulting from the

loss of lateral support of land. In this case, the plaintiff was not directly deprived of the support to his land of the land of the defendant. The defendant introduced a destructive element upon his land, which he suffered to escape to the injury of the plaintiff's land, and to continue its devastations indefinitely.

As the case must be recommitted to the master to revise his assessment of damages, and as the defendant has now been enjoined from future digging, in order to settle the whole controversy between the parties, and give the plaintiff all the damages to which he is entitled as incident to the relief he seeks, the case should be recommitted to the master to assess all the damages sustained by the plaintiff from the excavations of the defendant which he could not have recovered in the former action, and for such future injuries as are probable to result, if any, and, if the cost of structures to prevent future injuries is assessed, to report the nature and estimated cost of such structures, and the estimated future damages they are expected to prevent.

This case has been treated by counsel and the master, and in the decree, as if the question of incidental damages was open under the bill, but the only prayer of the bill is for an injunction. The bill may be amended by adding a prayer for the assessment of incidental damages. The decree entered in this case, dated June 27, 1881, and filed August 2, 1881, is to stand, as entered, except as to the damages and costs ordered to be paid, and the case recommitted to the master for the assessment of damages as above indicated.

DANGEROUS ANIMALS.

Evans v. McDermott.

(49 New Jersey Law, 163.—1886.)

Parker, J. An action was brought in the Hoboken District Court, by John McDermott against Samuel Evans, the prosecutor, to recover damages occasioned by the bite of a dog.

It was proved that McDermott, at the time he was bitten, was in the saloon kept by the prosecutor as a place of public resort; that the prosecutor was the owner and possessor of the dog; that in going from the billiard-room to the bar-room of the saloon, McDermott met the dog in the passage-way; that he put out his hand to motion the dog out of the passage-way he was obstructing, when the dog growled and bit him on the hand.

McDermott swore that about a month after he was bitten, his hand broke out from the effect of the bite; that he became nervous, lost sleep and suffered pain; that he employed a physician, paid for medicines, lost two or three weeks' wages, and was out of pocket in money about $25.

Dr. Pinder, a practicing physician, swore that about the time McDermott's hand broke out, he was consulted professionally; that he made an examination of the hand and prescribed for the injury. He said that he found the skin broken, the hand considerably inflamed and swollen, and that it appeared to him to be a pretty bad hand. The witness added that hydrophobia might possibly result from such a wound, but that he did not apprehend such result in this case.

At the close of the plaintiff's evidence, the counsel for the defendant moved to nonsuit, on the ground that it did not appear that the dog had bitten McDermott maliciously; and also on the ground that there was no proof that the dog had bitten other persons, except in play; or that the defendant had knowledge of the propensity of the dog to bite.

The judge refused to nonsuit. In charging the jury, the judge said: "Some time ago, a girl was bitten by a dog in this state; the case was carried to the Supreme Court, and a judge there held the owner of the dog liable for an injury committed

by the dog, if he had notice of his *mischievous propensity;* and this is the law which applies to this case."

Upon request to charge, the judge held, in substance, as he had ruled on the motion to nonsuit.

The jury found for McDermott in the sum of $300 damages.

When the plaintiff rested, there was evidence of the propensity of the dog to bite, and that the defendant knew of it, before McDermott was bitten.

But it is said, on the part of the prosecutor, that although several persons had been bitten by the dog, of which he had information, yet it appeared that in every instance the biting occurred while the dog was in a playful mood; and it is argued that damages cannot be recovered where it is shown that the dog had a propensity to bite only in play; but that to justify a recovery, it must appear that the dog was in the habit of biting mankind while in an angry mood, actuated by a ferocious spirit.

This is not the law. An action can be maintained against the owner by a party injured, upon evidence that a dog, with the knowledge of the owner, had a *mischievous propensity* to bite mankind, whether in anger or not. In either case, the person bitten would suffer injury. A mischievous propensity is a propensity from which injury is the natural result.

In the case of *Hudson* v. *Roberts*, 6 Exch. 699, it appears that the plaintiff was walking in the street, wearing a red handkerchief. The bull of defendant, ordinarily gentle and quiet, and not known to have gored any person previously, was being driven along the street, when he attacked and gored the plaintiff. The defendant said that the red handkerchief caused it, and that he knew the bull would run at anything red. The plaintiff recovered. The bull had no hostile feeling against the man he injured, and no disposition to gore mankind, yet because of his mischievous propensity to rush at a red object, of which his owner knew, it was held that when he caused the injury to the plaintiff, through that propensity, his owner should pay damages.

A domesticated bear may hug a man until his ribs be broken. This may be the mode adopted by the animal to manifest his affection; yet if he had on other occasions previously, shown his affection in that way, causing injury, and his owner knew of such propensity, the owner would have to pay damages

caused by breaking the man's ribs. It is true that the bear is classed with animals *feræ naturæ*, and the presumption in such case would be that although domesticated, the animal had relapsed into his wild habits; yet, although the presumption on the question of *scienter* would be against the owner, he might be able to prove that the habit of embracing persons did not proceed from the savage nature of the bear, but under the influence of civilization from a cultivated affection.

But this proof would not avail the owner in a suit by a party embraced. Such a propensity would be held to be mischievous, because hurtful to those who were the object of the bear's affection.

In the case of *Oaks* v. *Spaulding*, 40 Vt. 347, it appeared that Mrs. Oaks was driving cows home from pasture, when the ram of Spaulding attacked and injured her. It was shown that the ram had a propensity to butt mankind and that the defendant knew it, but it did not appear whether the previous buttings by the ram proceeded from an ugly disposition, or from the exuberance of a playful spirit; yet it was held that the defendant was liable. It did not cure the hurt nor assuage the pain of the woman to be told that the ram, when he butted her, was only in one of his accustomed sportive moods. It might have been fun for the ram, but it was hurtful to Mrs. Oaks. It was a mischievous propensity, whether proceeding from ugliness of temper or from good nature, which, if known to the owner of the ram, made him liable for damages resulting from such propensity.

There is no doubt that in cases of animals not naturally inclined to do mischief, a previous mischievous propensity must be shown, and the *scienter* clearly established. The gist of the action is, not the keeping of the animal, but the keeping with knowledge of the mischievous propensity, whether proceeding from a savage disposition or not.

The conclusion is that the plaintiff below, having shown by his proof that on several previous occasions the dog in question had bitten various persons on the hand, with the knowledge of the defendant, he was entitled to recover, even if the habit did not proceed from a ferocious nature, but was the result of a mischievous propensity.

In this instance (whatever may have been the circumstances attending the previous bitings of the dog,) the bite was accom-

panied by a growl, while McDermott was in a place where he had a right to be, and when he was doing nothing except to motion the animal out of the passage-way, which he was obstructing.

The damages found by the jury are not excessive. In such a case they cannot be measured by mere expenditure of money to cure from the effects of the bite. Compensation should be made for the pain and the anxiety of mind which must necessarily follow the bite of a dog.

The judgment of the District Court is affirmed. (1)

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[1] To the same effect see *Klenberg* v. *Russell*, 125 Ind. 531 ; *Marble* v. *Ross*, 124 Mass. 44 ; *Muller* v. *McKesson*, 73 N. Y. 195.

EXCEPTION: ACT OF GOD.

Sheldon v. Sherman.

(42 New York, 484.—1870.)

Appeal from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the plaintiff who claimed to recover on an alleged contract between himself and the defendants, and also as assignee on contracts between the defendants and others.

The findings of fact, so far as material, were as follows : 1. In March, 1859, the defendants had a large number of saw logs secured by a boom in the Hudson river at Glens Falls. 2. During the month an unusual freshet occurred, whereby said logs were carried away, floated down said river and lodged upon the meadow lands of the plaintiff ; where they remained until the next fall and winter, when they were taken away by the defendants. 3. That said logs passed the boom, floated down said river and lodged on the lands of the plaintiff without any negligence, omission, fault or wrongful act of the defendants. 4. That the plaintiff sustained damages by reason of the logs remaining on the meadow for the period aforesaid, to $431.93.

It appeared that the logs were removed by one Mayo Pond, who had agreed with the defendants to remove the logs, saw

them into lumber at his mill, deliver the lumber to them at a certain price per piece, and to pay land damages. Pond also agreed with the plaintiff on the amount of the land damages, representing himself as the authorized agent of the defendants. The defendants were not aware that Pond had represented himself as their agent, until after they had accepted the lumber from him at the place agreed upon for delivery.

HUNT, J. There is a large class of cases, in which injury is suffered by a party, where the law gives no redress. If a tree growing upon the land of one is blown down upon the premises of another, and in its fall injures his shrubbery, or his house, or his person, he has no redress against him upon whose land the tree grew. If one builds a dam of such strength that it will give protection against all ordinary floods, the occurrence of an extraordinary flood by which it is carried away, and its remains are lodged upon the premises of the owner below, or by means whereof the dam below is carried away, or the mill building is destroyed, gives no claim against the builder of the dam. If the house of A accidentally take fire, and the flames spread and consume the house of B, the latter has no claim of indemnity upon A. If the horses of A, being properly equipped and driven, become unmanageable, without fault or negligence, run away and injure the property or the person of his neighbor, the latter must suffer the loss. In these cases the injury arises from a fortuitous occurrence beyond the control of man. It is termed "the act of God." The party through whom it occurs is not responsible for it. The party suffering must submit to it, as a providential dispensation. *Ryan* v. *N. Y. Cen. R. R. Co.*, 35 N. Y. 210; *Anthony* v. *Harvey*, 8 Bing. 191; Story on Bail., § 83 a, and the learned note. Auth. *post.*

In all these cases, there is no liability on the part of him through whose innocent instrumentality the injury occurs; and his promise to respond to the damages would be without consideration and void.

In the instance before us, the logs were carried down the river and deposited upon the plaintiff's land, without fault on the part of the defendants or of those building or having charge of the boom. The defendants were not responsible for an injury arising from their being thus deposited, and a promise to make it good would be without consideration, and not oblig-

atory. Neither were the defendants unconditionally liable for the injury arising from allowing the logs to remain where deposited. If they chose to abandon their property thus cast on shore, they had the right so to do, and no one could call them to account. They were not compelled, however, to abandon it, but had the right to reclaim it; like one whose fruit falls or is blown upon his neighbor's ground, the ownership is not thereby lost, but the owner may lawfully enter upon the premises to recapture his property. When he does so reclaim or recapture, his liability to make good the damage done by his property arises. He then becomes responsible. Before he can reclaim or recapture the property thus astray, justice and equity demand that he should make good the injury caused by its deposit and its continuance.

The rule is sensibly expressed by Domat, in the articles following, viz: "1st. He who has found a thing that is lost is bound to preserve it, and to take care of it in order to restore it to its owner. . . . And when he does restore it, he cannot detain any part of it nor demand anything for having found it. But he will recover only what expense he has been put at, as shall be explained in the following article. 2d. The person to whom one restores the thing which he had lost, is obliged on his part to repay the money that has been laid out either in keeping the thing or in delivering it to him, as if it was some strayed beast which it was necessary to feed, or that the carriage of the thing from one place to another had obliged the person in whose custody it was to be at some charges; or if any money has been laid out in advertisements or in having the thing cried, in order to give notice to the owner. . . . 3d. The proprietor of a ground on which is thrown the rubbish of a building that has fallen down, or that which a flood has carried away from another's ground, is obliged to suffer him who has had the loss to take away what remains, and to allow him such free access to his grounds as is necessary for that end. But upon the conditions that are explained in the following article. 4th. In the cases of the foregoing article, he who desires to have back the materials of his building that has fallen down, or that which a flood hath carried away from his land and thrown upon another man's ground, is obliged, on his part, not only to indemnify the proprietor of said ground, as to what damage shall happen to be done by taking away the

things which have been thrown upon it, but he is moreover bound to repair all the damage which has been already done to the ground by the things since they were cast upon it. But if he chooses rather not to take away anything, he will owe nothing; for, if he abandons to the proprietor of that ground all that has been cast upon it, he is not bound to make good a damage that has happened by the bare effect of that accident, and it is enough that he loses what the accident has carried away from him. 5th. If he, whose materials or other things have been thrown by these accidents on the estate of another person, be desirous to take them away, he will be obliged, besides the making reparation for the damage sustained by the owner of the ground, to take away as well the unprofitable stuff that can be of no manner of use as that which is useful and which he is desirous to take away, and to clear entirely the surface of the ground on which the things have been thrown." Domat, vol. 1, pp. 334, 335, part 1, b. 2, tit. 9, § 2, arts. 1, 2, 3, 4, 5. Lond. ed. of 1722.

The logs in question were reclaimed by the authority of the defendants and removed from the premises of the plaintiff. No question is made as to Pond's authority to remove the property, whatever may be said of his authority to promise payment. When the defendants thus removed their property, they became at once responsible for the payment of the damages. If they made no express promise to pay them, the law raises the promise and will sustain an action based upon it. "Where there is a legal right to demand a sum of money and there is no other remedy, the law will imply a promise of payment." *Poor* v. *Guilford*, 6 Seld. 276; *Newton* v. *Coon*, 3 Denio, 134; 5 Greenleaf R. 519.

The doctrines of Domat are sustained by *Amory* v. *Flyn*, 10 John. R. 102, and *Rider* v. *Anderson*, 4 Dana, 193. See also Story on Bail. 121, and note 621 a. *Nicholson* v. *Chapman*, 2 H. Black. R. 254, is not analogous, and furnishes no authority to the contrary. Nor is the case of *Binstead* v. *Bach*, 2 W. Bl. 1117; or of 2 Strange, 278; 1 M. & S. 290; 20 J. R. 28; 10 id. 249; 4 Wend. 652, to the point. This is not the case of a gratuitous or voluntary service, for which no compensation can be demanded. The use of the plaintiff's land was compulsory. He never consented to the use. He had not the power to resist. Whether the logs remained upon the premises an

unreasonable length of time, was a question of fact to be decided by the jury, or by the judge acting in their place, if the question became important. 3 B. & C. 213; 4 B. & Ald. 366, 387; 2 B. & B. 692. The finding in favor of the plaintiff determines this question in his favor, upon the well settled principle that every fact not expressly found, shall be deemed to have been found and held in such manner as to uphold the judgment. 36 N. Y. 340; 32 id. 464; 28 id. 532; 22 id. 425, 433; 21 id. 551.

The recovery was upon general principles of law, without reference to the statute. It is not necessary to invoke it in his behalf, nor are his rights disturbed by its provisions. The judgment should be affirmed with costs.

Judgment affirmed.

MISCELLANEOUS CONDENSED CASES.

1. In an action by A against B to recover for services rendered, C was called as a witness, and, during his examination, testified that A had in the fall of last year put in all the wheat on the farm of B. He was asked, where was B at the time; and answered that "B had run away." He was then asked, why he had run away; and answered, "for poisoning his father." He was further asked, how he knew; and answered, "Everybody says so." Has B a cause of action against C?

2. A was driving along Catharine street, in the city of New York, and had crossed the track of B's road, but before the rear part of his buggy had crossed far enough to permit the passage of a car, his progress was arrested by a blockade of trucks, nor could he turn to the side. A car approached on B's road, the driver of which told A to "get off the track." A said "I will as soon as the trucks move." The driver said, "Damn you, if you don't get off here; I am late; I will get you off some way or other." A said, "Wait a moment; I think the trucks are moving." The trucks started, and as the plaintiff prepared to move on, the car driver started his horses, and the platform of the car struck the hind wheels of the buggy and overturned it, injuring A. Against whom has he a cause of action?

3. A was a patient in The Woman's Hospital, a charitable corporation. While there she was placed under the influence of an anæsthetic during the performance of an operation. Afterwards she was placed in a bed heated with bottles of hot water, but the nurse had neglected to remove one of them, in consequence of which A's foot, coming in contact with the bottle, was severely burned. Against whom has A a cause of action?

4. A was killed by falling into a vault which B was employed in excavating on a lot belonging to C. The work was done under contract, and for the purposes of the contract B had exclusive possession of the lot. Another person had fallen into the vault, and in approaching to aid him in response to his cries for help, it is probable that A met with the accident that caused his death. In falling his head struck the shaft of a cart that was in use in doing the work, and which had been left over night in the excavation. Who is responsible?

5. B, a policeman, arrested A for disorderly conduct towards a number of laborers engaged in laying a track in front of his premises. A used profane and abusive language to them, swore he would kill some of them, approached them with an axe and threatened to cut their heads off. A resisted arrest, and in the struggle was thrown down and handcuffed. Has A a cause of action against B?

6. A owned and occupied house No. 1133 Marlborough street, in the city of Philadelphia. Immediately adjoining on the north are certain premises owned by B, and leased to certain tenants. On B's premises are three houses, the first on the corner of Girard avenue and Marlborough street; the second on Girard avenue, immediately adjoining; the third adjoined this property on Girard avenue. There was an alleyway running between the first stories of these last two properties, from Girard avenue up to the yard of these houses. In said yard was a cesspool for the accommodation of those who occupied said three houses, located very near A's house. The filth and water from said cesspool ate their way through A's wall and settled in his cellar, rendering his house unfit for habitation, injuring the paper and paint, and making his family sick. Is any one responsible?

7. In an action by A against B for malicious prosecution, defendant's counsel called C, a member of the bar, who testified as follows:

"Mr. B 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." Was this error?

8. A, who lived with his father in a thickly settled portion of Provincetown, had received a sun-stroke, and one of the incidents of his illness was that loud noises might throw him into convulsions. Opposite his father's house, across a street but twenty feet in width, was a church of which B was the clergyman in charge. B was informed by A's physician and by his father of the probable consequences to A of ringing the bell upon his church, and was requested not to ring it. B refused to refrain, but caused it to be rung, as usual, eight times upon the next Sunday, twice before each of the four services held upon that day. A, the windows of whose room were shut, was thrown into violent and painful convulsions each time the bell on the church was rung, his illness increased and his recovery was retarded. Has he a remedy?

9. B received a promissory note from A, made by a third person and indorsed by A, and gave a receipt therefor, stating that it was received for negotiation, and the note to be returned the next day or the avails thereof. At the time A told B not to let the note go out of his reach without receiving the money. B, after negotiating with C about buying the note, delivered the note to him under the promise that he would get it discounted, and return the money to B, and he took away the note for that purpose. C did procure the note to be discounted, but appropriated the avails to his own use. Has A a cause of action against B?

10. The wrong of which the plaintiff complained, was a collision of cars upon the railway of the defendant company, in consequence of which the cars "were broken, overturned, and thrown from the track, and fell upon the lot of ground and premises of the plaintiff, and against and upon the dwelling-house of the plaintiff, and thereby and by reason thereof, greatly endangered the life of the said plaintiff, then being in said dwelling-house, and subjected her to great fright, fear, alarm, and nervous excitement and distress, whereby she then and

there became sick and disabled, and continued to be sick and disabled from attending to her usual work and duties, and suffered and continues to suffer great mental and physical pain and anguish, and is thereby permanently weakened and disabled." To this statement the defendant demurred, and the court entered judgment for the defendant upon said demurrer. Was this error?

11. Action to recover damages for an alleged libel claimed to have been published by the defendant, a corporation. The act complained of was committed by the defendant's general manager. 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 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. The letter was written in reference to the business of the corporation, and had relation to a small sum of money 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. Is the corporation liable?

12. A was the owner of one hundred shares of stock of a mining corporation, issued to one Brown, and properly indorsed by him. This stock was stolen from A by C, an employee in his office, and delivered for sale to D, who was engaged in the business of buying and selling stocks on commission. At the time of placing the stock in D's possession, C represented himself as its owner, and D, relying upon this representation, in good faith, and without any notice that the stock was stolen, sold the same in the usual course of business, and subsequently, still without any notice that the person for whom he had acted in making the sale was not the true owner, paid over to him the net proceeds of such sale. What are the rights and liabilities of the parties?

13. In an action to recover damages for injury to person and property, the plaintiff declared that the defendants, being druggists and chemists, sold and delivered to certain persons an

article which the defendants supposed to be black oxide of manganese, but which was in fact sulphide of antimony; that this mistake arose from the negligence and want of skill of the defendants; that the person to whom the article was sold by the defendants, acting on the belief that it was the oxide of manganese, resold it to the plaintiff; that he, influenced by the same belief, mixed it with chlorate of potassia; and that thereby a dangerous and explosive substance was created, which exploded and caused great injury and damage to the person of the plaintiff and to his property. Advise the defendants.

14. Mrs. A 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. B, a physician and druggist. A small quantity of the medicine thus purchased was administered to Mrs. A, on whom it produced alarming effects, such as coldness of the extremities, feebleness of circulation, spasms of the muscles, and derangement of mind. She recovered, although for a 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, "½ lb. dandelion, prepared by C, No. 108 John street, N. Y.; jar, 8 oz." It was sold for and believed by Dr. B. to be the extract of dandelion as labelled. Dr. B purchased the article as the extract of dandelion from D, a druggist at New York. D bought it of E as extract of dandelion, believing it to be such. E 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 as well as those which he purchased, were put up in jars and labelled alike as "prepared by C," who was employed by E as an assistant in his business. The jars were labelled in C's name, because he had been previously in the same business on his own account at 108 John street, and his labels rendered the articles more salable. The extract in the jar sold to D, and by him to Dr. B, was not manufactured by E, but was purchased by him of another manufacturer or dealer. Dandelion and belladonna resemble each other in color, consistence, smell and taste; but may, on careful examination by those acquainted with the articles, be distinguished. C's labels were paid for by E, and

used in his business, with his knowledge and assent. Against whom has Mrs. A a cause of action?

15. While B, a boy about twelve years of age, was shooting an arrow from a bow, the arrow struck A and put out one of his eyes. A and B were schoolmates, and had been engaged in shooting at a mark, when B said, "I will shoot you." A ran into the school-house, and hid behind a fire-board standing before the fire-place in the school-room. B followed to the door of the school-room, and saying, "See me hit that basket," discharged the arrow. At that moment A raised his head above the fire-board, and the arrow struck him. There was a basket on a desk in the direction in which the arrow was aimed, and there were also several boys in the room at the time. Has A a cause of action?

16. A bought a ticket for passage upon B's railroad, and entered one of the cars. Before reaching his destination, he lost his ticket, and when he attempted to pass from the station into the street, was prevented by the gate-keeper, who told him he could not pass until he produced his ticket or paid his fare. A explained that he had paid his fare, but had lost his ticket. The gate-keeper refused to let him pass, had him arrested and locked up over night. In the morning he was examined before a magistrate and discharged. What are the rights and liabilities of the parties?

17. B was a passenger on a Broadway car, which was so crowded that he was compelled to stand on the rear platform, which was also crowded. At a certain point the car was stopped to discharge passengers, and, while A was crowding by in an endeavor to alight, B felt a tug at his watch-chain, and, putting his hand to his pocket, discovered that his watch was missing. A alighted and started off on a run. B gave chase, overtook, seized and held him until an officer came up, who took A into custody upon B's complaint, who described what had occurred and exhibited the broken watch-chain. Meanwhile the car proceeded on its way. On the following day, A was arraigned, but was discharged, it appearing to the satisfaction of the magistrate that B's watch-chain had caught on a button of A's coat, that the watch was thus pulled out of B's pocket, that the chain

broke, that the watch dropped upon the platform of the car, and that it was afterwards picked up by a passenger and handed to the conductor who delivered it to the company for safe-keeping. Has A a cause of action against the city, against the officer or against B?

18. The plaintiff claims to recover damages of the defendant, because, he says, the defendant falsely charged him with the commission of a crime. The defendant says the plaintiff ought not to recover, because the accusation was not false, but true. At the close of the trial the plaintiff requested the court to instruct the jury that the defendant, in order to maintain his defense, must prove the commission of the crime beyond a reasonable doubt, the same as if he, the plaintiff, were on trial for the commission of the crime. The court refused, but instructed the jury that if the defendant had made out the truth of the charges against the plaintiff by a preponderance of evidence, the defendant was entitled to a verdict. Plaintiff excepted. Verdict for defendant. Is plaintiff entitled to a new trial?

19. In August, 1879, the plaintiff left his plow on the farm of one A, with the latter's consent, until he should come and take it away. In April, 1880, the farm passed into the possession of one B, the plow being still there. In June, 1880, the defendant, a neighboring farmer, borrowed the plow of B to plow a field, supposing the plow to belong to B, and, having used it, in three or four days returned it to B. In the summer of 1881, the plaintiff informed the defendant that it was his plow which he had used, and demanded of him pay for the use, and the return of the plow. The defendant not complying, the plaintiff brought action of trover for the plow. Is defendant liable?

20. In an action for deceit, the plaintiffs alleged that, wishing to purchase a tannery for the purpose of carrying on a business in the making and vending of leather, they inquired of the defendant if he could inform them where they could purchase such an establishment; that the defendant intending to deceive and defraud them, and to induce them to purchase a tannery belonging to himself, and to give a much greater sum for it than it was worth, falsely asserted and af-

firmed to them that he had such a tannery, and that it was worth $4,000, being the same sum which he paid one A for it, and that it could be bought for that price; that it was not worth that sum at the time of their purchase, nor before, the defendant having paid only $3,000 for it; and that the plaintiffs, confiding in the defendant's false assertions and affirmations, and believing them to be true, and being ignorant of the value of the property, made the purchase, etc., to their damage. The evidence fully sustained the allegations. Is the defendant liable?

21. The plaintiff claimed, as the act of negligence for which the defendant was liable to him in damages, that the car, in which he was a passenger at the time, was "suddenly, negligently and carelessly driven around a curve in the track upon which it was being moved over a switch;" whereby he was thrown from the car and sustained certain personal injuries. In his charge to the jury the trial judge instructed them that the duty owing to the plaintiff was, "that of reasonable care; that is, the degree of care which it is presumed that an ordinarily careful and prudent man would exercise in the circumstances by which he is surrounded . . . the degree of ordinary and reasonable care to look out for the safety of others." At the close of his charge the plaintiff made the request, that he should charge the jury that, "in respect to carrying passengers a railroad company is bound to exercise all the care and skill which human prudence and foresight can suggest to secure the safety of their passengers." The court so charged and the defendant excepted. Verdict for plaintiff. Is the defendant entitled to a new trial?

22. Demurrer to declaration in slander. In the first count the words were, "Chase is a black-leg and swindler; here is Stephen Potter's letter to confirm it." Innuendo, that the said plaintiff had been guilty of the crime of swindling. Second count, "Chase is a black-legged swindler; his agent refused to do his business on that account; here is Potter's letter which I will show you confirming the fact." Innuendo, that the plaintiff had been guilty of the crime of swindling, and the defendant was so understood by those who heard the words. Judgment for whom?

23. 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 wilfully 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. What are the rights and liabilities of the parties?

24. B bought clothes, amounting to $21.55, of one A, who called at B's house, by appointment for his pay. Some discussion arose about the bill, and B went upstairs, brought down the clothes, placed them on a chair, and put $20 on a table, and told A that he could have the money or the clothes. A took the money and put it in his pocket, and told B that he owed him one dollar and fifty-five cents, whereupon B demanded his money back, and, on A refusing, attacked him, threw him on the floor, and choked him until he surrendered the money. What are the rights and liabilities of the parties?

25. A was a merchant, doing business in the city of Syracuse. B was the proprietor of a mercantile agency, and published a semi-annual volume, containing the names of persons and firms doing business in various parts of the United States and Canada, and information as to their financial standing. He also published a weekly sheet of corrections, which was sent to subscribers in the city of New York by private messenger, and in the country by mail. About 10,000 copies of the semi-annual volume, and between 3,000 and 4,000 copies of the weekly sheet were distributed. In one of the weekly sheets, it was stated that A had failed. This was false, and the next week a retraction of that statement was made. Has A a cause of action?

26. B was a servant of a railroad company, and had charge of the freight at one of its freight depots. A, a boy about fourteen years of age, was playing there and refused to leave when requested so to do. B then forcibly removed him, and in doing so kicked him and severely injured him. The president of the company gave B directions to keep boys out of the depot and to remove them therefrom. What are the rights and liabilities of the parties?

27. A, while passing along one of the streets of the city, stopped at a point where B's railroad track crossed the street, and engaged in conversation with a woman who had in charge two children, one an infant in arms, the other a girl about four years old. B had constructed a safety gate at this point, and during the greater part of the day kept a watchman there to close the same when trains were approaching, as a warning to travelers. The accident that caused the injury occurred about seven o'clock in the evening, while it was yet light. The watchman had gone home, and the gate was open, though the street was used at that hour quite as extensively as at any other part of the day. A local freight train was past due, and approaching at a higher rate of speed than that prescribed by the ordinances of the city. The little girl wandered across the railroad track, and seeing the approaching train, became excited by the sight or noise, and by clapping her hands and other manifestations of surprise and delight, attracted the attention of her nurse and of A. The nurse excitedly called the child to her, and while crossing the track, in obedience to the call, the child tripped and fell in front of the rapidly approaching train, whereupon A sprang to its rescue, caught it in his arms, and leaped onward, but was struck by the locomotive, before he could pass beyond its reach, and received severe injuries. Has A a cause of action?

28. On the first day of November, the defendant signed and sealed a memorandum stating that he had hired a water lot of the plaintiff for one year from the first day of December, at $1,000 rent, payable quarterly. In an action to recover for rent, the defendant alleged that he was induced to sign the memorandum through fraudulent representations of the plaintiff that the lot comprehended a certain other parcel of land, which turned out to belong to a third person. Evidence was given tending to show the alleged fraud; and also that the defendant discovered it before his term commenced. The defendant claimed the right to have what he contracted to pay the third person for the parcel mentioned, deducted from the rent, on the ground of the alleged fraud. The court charged the jury, among other things, that though they found the alleged fraud, yet, if they also found that the defendant discovered it before the first day of December, and without offering to

rescind his contract with the plaintiff or its being modified in any way, obtained his contract from the third person, and afterwards took possession under the contract with the plaintiff, he thereby waived all objection on the ground of fraud, and was entitled to no deduction. Defendant excepted. Verdict for plaintiff. Is defendant entitled to a new trial?

29. B met A in the street, and paid him $25 for an ox, which A directed him to go and take from his inclosure. B took an ox which he supposed he had bought, but which, as matter of fact, A did not sell. B slaughtered the animal, but the mistake was not discovered until the next day, when A found that B had taken away the wrong ox. What are the rights and liabilities of the parties?

30. Tort, to recover damages for alleged wrongful acts of the defendant, in that, in an action of contract brought by him against the plaintiff to recover the sum of $4,500, he maliciously placed the *ad damnum* in the writ at $40,000, and maliciously caused to be issued various attachments, each in the sum last named, upon the real and personal property of the plaintiff. An order was afterwards obtained reducing the *ad damnum* in the writ to $10,000, but the original action in which the attachments were issued not having been terminated when the present action was brought, but was still pending, the judge ruled that the present action was prematurely brought, and nonsuited the plaintiff. Plaintiff excepted. Should the exception be sustained?

31. Action for slander. The defamatory words were uttered at the dwelling-house of the defendant, and in that part called the bakery, where bread and other articles were sold to customers, and were spoken by the defendant to the plaintiff. The defendant requested the court to charge that if the words were spoken to the plaintiff, and no other person was present, there was no such publication as would sustain the action. The court refused, and instructed the jury that if the words were publicly uttered in the defendant's bakery, there was a sufficient publication. Verdict for plaintiff. Defendant excepts. Should the exception be sustained?

32. Action to recover damages alleged to have been occasioned

by a fire negligently set by defendant railroad company or their employees. The negligence complained of consisted in allowing to accumulate upon the corporation's right of way, inflammable material which was liable to become ignited from the sparks emitted from passing locomotives. The evidence tended to show that the fall before the defendants had caused sweet fern brush, huckleberry brush, weeds and stuff to be mowed, which they then permitted to lie upon the ground, and that it was in this material the fire started and spread upon adjoining lands and thence across the lands of several intervening owners for a distance of two miles upon the plaintiff's lands, causing the damage complained of. At the close of the plaintiff's and at the close of the whole case, the defendants moved for dismissal upon the ground, among others, that the testimony showed that the fire had burned two days, and had crossed over more than two miles of territory, before it reached the plaintiff's lands, and that it was not the proximate cause of the injury. Motion denied. Defendants except. Verdict for plaintiff. Are defendants entitled to a new trial?

33. A and B being engaged in an angry altercation, B raised a club, in an attitude for striking, and within striking distance, and said to A, "If you say a word or open your mouth, I will strike you," and this without any just cause or provocation. Has A a cause of action?

34. *Brown* v. *Jones*, for false imprisonment. The plaintiff, an infant, had been placed by his mother at a school kept by the defendant, who, upon application by the mother to take her son away, refused to give him up, unless she paid an amount which he claimed to be due. The plaintiff was not present at the conversation between his mother and the defendant, nor did he learn of it until after he left school, a week later, when his mother adjusted her difference with the defendant. Is the plaintiff entitled to recover?

35. A, an expressman, went to St. Luke's Hospital, a well-known charitable institution, to deliver a package addressed to that institution, and was told by the person in charge of the office to take the package down stairs to the basement and deliver it there. He started to do so, but on the way down, with-

out fault on his part, caught his foot in a hole in the stair carpet, fell and broke his leg. The superintendent in charge knew of the defect in the stair covering, but had neglected to repair it. The rules of the express company required delivery only at the street door of the place to which packages were addressed. Has A a cause of action against the hospital?

36. A, a young woman eighteen years of age, left her home and went to work as a domestic in the employ of B. Her father said she might keep her earnings, and thereafter she supported herself. While in the service of B, and within a year after leaving her father's house, she accepted the attentions of C, a young man twenty-three years of age, who, under promise of marriage, accomplished her ruin. She returned to her father's house where she was delivered of a child. What possible actions may be maintained against C, and what will be the measure of damages?

37. Two dogs, belonging to A and B, respectively, were fighting in the presence of their masters. B took a stick about four feet long, and began beating the dogs in order to separate them. A was looking on, at the distance of about a rod, and then advanced a step or two towards the dogs. In their struggle, the dogs approached the place where A was standing, and B retreated, striking them as he retreated. As B approached A, with his back towards him, in raising his stick over his shoulder, in order to strike the dogs, he accidentally hit A in the eye, inflicting a severe injury. Has A a cause of action?

38. A, a young man eighteen years of age, and earning $20 per week, was run over and instantly killed by a wagon driven by and belonging to B. At the time of his death he was indebted to C in the sum of $200 for necessaries furnished. He left surviving him his father, but no estate. What would you advise the father to do? If an action is begun, what must be alleged and proved? May Creachany moneys recovered as damages?

39. Fire fell from a locomotive, on B's elevated railway, upon a horse attached to a wagon in the street below and upon the hand of the driver. The horse became frightened and ran away, and the driver attempted to guide his movements and drive him against a post of the elevated railroad so as to stop

him. Failing to accomplish this, he intentionally turned the horse and attempted to run him against the curbstone to make it heavy for him and so arrest his progress, but the wagon passed over the curbstone instead of being arrested by it, and threw the driver out and ran over and injured A who was standing on the sidewalk. Against whom has he a cause of action, if any?

40. In an action by A against B to recover damages for criminal conversation with his wife, the defendant contended that A condoned the adultery of his wife by living with her after he had discovered the same. The court charged the jury that such condonation did not bar the plaintiff of his right to recover, although it was a matter to be taken into consideration by the jury in mitigation of damages. Exception by defendant. Verdict for plaintiff. Is defendant entitled to a new trial?

41. The plaintiff and his wife went to a certain town for the purpose of taking a train upon defendant's railway. In order to secure tickets, the plaintiff preceded his wife to the depot. To reach the depot it was necessary to cross several tracks which lay between the station building and the town, and the railway company had built a board walk several feet in width across the intervening tracks for the use of passengers passing to and from the depot. For the purpose of reaching the depot by passing around the end of an intervening train, the wife left the board walk, and after taking a few steps was struck by an engine of another train. For the injuries thus caused to her person the wife brought suit against the company, and for the damages in the nature of surgical expenses, and, for the loss of the society of his wife and of her aid in taking care of the household, the husband brought a separate action against the company. For trial purposes, the court ordered the two cases consolidated and tried before the same jury. Upon the trial, the court, among other things, charged the jury that if the wife, by negligence on her part, had contributed to the accident, she could not recover, but that negligence on her part would not defeat the action on behalf of her husband. Defendant excepted. The jury found for the defendant in the suit by the wife, and for the plaintiff in the suit by the husband. Is the defendant entitled to a new trial?

42. The plaintiff was the mother of one Clara O. Nelson, now deceased. The deceased was an infant, unmarried, in the service of her mother, her father being dead. The defendant is a physician and attended said Clara in her last illness. The action is brought on substantially two causes of action. The first charges the defendant with malpractice in his attendance on the patient, by reason of which said Clara died. The second charges that, after the death of said Clara, the defendant maligned her memory by repeating to the plaintiff, and to divers other persons, a false, untrue and malicious charge that the said Clara had been pregnant and had had a miscarriage. When the cause was submitted to the jury, the court charged that the plaintiff could recover for the loss of the services of her daughter from her daughter's death to the time she would have arrived at the age of twenty-one years. The defendant asked the court to charge that the plaintiff could not recover damages for the death of the deceased. The court so charged, "except so far as she loses her personal services." The plaintiff recovered a verdict for $5,000. The defendant appeals from the judgment and also from the order denying a motion for a new trial. Is he entitled to a new trial?

43. Action for conversion by the defendants of a quantity of law blanks belonging to the plaintiffs. The plaintiffs were book-sellers and stationers in the city of Albany. The defendants dealt largely in materials used in the manufacture of paper. Their course of business was to purchase from junk shops and small dealers rags, old paper, etc., in bales, and to sell to the manufacturers. They bought, among others, from one Perry, a junk dealer in Albany. The evidence upon the trial tended to show that among the materials purchased from Perry were law blanks belonging to the plaintiffs, which had been stolen from them by one Mason, who was a porter in their employ. He lived in the building occupied by plaintiffs as a store, had the key to it, and it was his business to open it in the morning. He delivered packages and parcels of books, and went upon errands, etc., but was never authorized to sell their goods. Certain bales of paper materials containing these blanks were shipped after purchase by the defendants from Perry's store to Allen Brothers, paper manufacturers at Sandy Hill. The defendants paid five cents per pound for the materials bought

from Perry. Mason was detected in carrying away law blanks by one of the plaintiffs. The plaintiffs opened several bales of paper materials at Perry's and took out of each some law blanks, amounting to 237 pounds. They also obtained from Allen Brothers 700 or 800 pounds of blanks, paying five cents a pound for them. Evidence was offered tending to show that blanks with the names of the plaintiffs upon them had been used in manufacturing by Allen Brothers. The good faith of the defendants was not questioned. Are they liable?

44. A warehouseman had on storage two lots of flour, one belonging to A, and the other and more valuable to B. A baker ordered twenty-eight barrels of flour from C, who to fill the order bought from A the same number of barrels of his flour and took an order for them on the warehouseman. The latter person, by mistake, delivered to C twenty-eight barrels of B's flour; the baker received it from C and consumed it, not knowing or believing that it was different from that which he ordered, and gaining no benefit from the mistake. Has the warehouseman a cause of action against the baker?

45. Action for libel. The plaintiff, a sanitary inspector of the board of health of a certain city, in the discharge of his duties, made a report to the superintendent of the health department, wherein, as stated in the complaint, he "highly commended the pavement made and furnished by the Smith Pavement Company as a pavement of great excellence," giving statistics, etc. This report was published in the official paper of the city. The defendant thereupon wrote a letter, which was published in one of the daily papers of the city, containing the following in relation to the report:

"A young assistant inspector of the board of health has thought it worth while to look outside of the district assigned him, and to write to his superior officer in the health board a letter recommending the Smithite Pavement. This letter, it would appear, was written under the dictation of the Smith Pavement Company, or without a full inquiry into the merits of the subject. What object there was in the production of this letter it might be difficult to learn. It is understood that the stock of the Smith Pavement Company has been placed 'where it will do the most good,' and the name of at least one

officer of the city government can be given who, on taking official position, where it was supposed he might have to advocate or oppose this pavement, returned to the company stock which had been presented to him. When such an example is known, those who step aside from the strict line of duty, to advocate something outside of their proper official sphere, cannot feel aggrieved if their action is looked upon with suspicion."

The answer alleged that said letter was a privileged communication. Is the defense good?

46. A was in the employ of the Boston Warehouse Co., of which B was agent and manager. A sum of fifty dollars belonging to the company had been lost, for which A, the bookkeeper, was held responsible, and the amount was deducted from his pay. A month or two thereafter, B handed A some money to pay the help. A, 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 B, saying he had received his pay and was going to leave. B then seized him and attempted to take the money from him. A struggle ensued, in which A was injured. What are the rights and liabilities of the parties?

47. Upon the advice of counsel, B petitioned the court, praying that A might be declared a bankrupt, and that a warrant might issue to take possession of his estate, averring himself to be a creditor for goods sold and delivered. It having been subsequently determined that B was not a creditor of A, the proceedings in bankruptcy were dismissed, and A brought suit against B, alleging that those proceedings had been prosecuted maliciously and without probable cause. At the close of the trial, the court, among other things, instructed the jury that "if B had no legal claim or demand against A, then, whether he had probable cause or not, he had no right to institute the proceedings in bankruptcy. He cannot go back and allege that, though he had no legal claim against A, he thought he had; in other words, that he had probable cause to believe that he had such a demand. Unless he had a debt, he cannot allege probable cause for proceeding in bankruptcy at all. His defense cannot stand on two probable causes, one on top of the other. . . . As it has been adjudicated that B never had a legal

claim against A, and therefore had no right to institute proceedings in bankruptcy against him, A is entitled to recover in this action the damages he has sustained by those unlawful proceedings. The court therefore rules that the defense in this case cannot be sustained by proving that the defendant had probable cause to believe that the plaintiff had committed an act of bankruptcy; but it being shown by judicial determination that he had no legal claim or debt against the plaintiff, and had, therefore, no right to institute bankruptcy proceedings, he is liable for the damages sustained by the plaintiff thereby, and the only question for the jury will be the amount of the damages, under the circumstances of the case. . . . We charge you, therefore, that the plaintiff is entitled to recover his actual damage, or the loss he has actually sustained at all events. . . . The actual damages sustained by the plaintiff, that you will give him a verdict for at all events." Exception by defendant. Verdict for plaintiff. Is the defendant entitled to a new trial?

48. A, a competent driver and the owner of a team of horses, invited Mr. and Mrs. Smith and their two children to take a ride with him. A drove, and on the front seat with him sat one child, four years of age, while Mr. and Mrs. Smith occupied the back seat, the mother holding in her arms the other child, two years of age. Partly through lack of care on A's part and through clear negligence on the part of B, who was driving his own team along the same road, A collided with B, and the force of the shock threw Mrs. Smith and both children to the ground, severely injuring the children. What, if any, cause of action have the children, and against whom?

49. Plaintiff's intestate, a laborer in defendant's employment, having finished his day's work, with some fellow-workmen got upon one of defendant's cars in order to ride home. The foreman in charge handed passes to the conductor for all the laborers. All the seats in the car were occupied, and plaintiff's intestate stood on the back platform with several of his fellow-workmen. A gate on that platform was insecurely fastened, and the conductor whose duty it was to fasten the gate before starting the car knew that the gate was out of order and could not be properly fastened. On the way, plaintiff's intestate

was crowded against the gate by those standing on the back platform, the gate swung open, and plaintiff's intestate fell from the car and was killed. Is plaintiff entitled to recover?

50. D, the stock transfer agent of a certain company, having in his possession a number of blank certificates of its stock, signed by its former president, filled out one of the blank certificates to correspond with a *bona fide* certificate previously issued to one C, signed it as transfer agent, wrote upon it B's name as treasurer, placed the company's seal upon it, and then wrote C's name as a signature to the blank assignment on the back of the certificate. D then applied to A for a loan, offering said certificate as security for his note, but A refused to accept it unless C's signature was attested. D then procured B to sign the assignment as a witness to C's signature, saying that he wanted to use the stock for the purpose of a loan. A then accepted the certificate, B's signature being known to him. The note fell due, but was not paid. Against whom has A a cause of action?