THE LAW

OF

NEGLIGENCE.

THE LAW

OF

NEGLIGENCE.

Second Edition.

BY

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THE LAW OF NEGLIGENCE.

GENERAL PRINCIPLES.

Subject of this treatise. The Law of Negligence.

§ 1. The subject of this treatise has for its range a class of cases not capable of very accurate definition, but determined by the circumstance that the question of "negligence" forms a prominent feature in the materials for their solution. The subject may be named "the law of Reparation or civil redress for damage by Negligence;" or, for the sake of brevity, "the law of Negligence." "Negligence" is a term which has been of late, in the current language of the forum, applied to cases of a very wide and heterogeneous class. It has been described as "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 Company*, cited in *Smith* v. *L. & S. W. Ry. Co.*, L. R. 5 C. P. 102.] This *dictum* seems open to

A definition given by Baron Alderson applying to *ordinary negligence.*

the criticism that the term "negligence" does not properly denote the omission or act itself, but the state of mind of the person who is guilty of the act or omission. But the description, though having no pretension to accuracy as a definition, may serve to indicate the class of cases which are usually grouped under the term "negligence" in our common legal parlance. And the negligence indicated in this description is commonly designated "ordinary negligence" by way of distinction to that negligence which is properly indicated, as I shall show further on, by the terms *culpa lata* and *culpa levissima*. The description includes not only acts which result from *negligence*, in the usual and popular acceptation of the term, but also those acts or omissions which result from states of mind distinguishable from *negligence*, and more properly described by the terms *heedlessness* and *rashness*.

"Negligence" as used by English lawyers includes heedlessness and rashness.

The shades of difference between the states of mind implied by these words in their ordinary and popular sense are well analysed by Austin in his twentieth lecture (p. 444, 3rd Ed., and Students' Ed., p. 208). They may be shortly noted as follows:—

In cases of *negligence* (in the popular sense of the word), the person adverts not to the act which it is his duty to do.

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

In cases of *rashness*, he adverts to those conse-

quences of the act; but, by reason of some assumption, which he examines insufficiently, he concludes that those consequences will not follow the act in the instance before him.

All these states of mind may be included in the term inadvertence. Each is clearly distinguishable from *intention;* and they are analysed by Austin, in connection with intention, as being, equally with intention, grounds for imputing guilt to the author of the act or omission.

Each distinguished from *intention*, but, equally with intention, grounds of imputability.

It must be further observed that negligence, heedlessness, and rashness, as well as intention, properly describe a state of mind, and that no one of them can of itself constitute *injury* or breach of duty. But one or other of these four states of mind is a condition precedent to an injury or breach of duty being committed.

The opposites to negligence—heedlessness—rashness—respectively may be named "diligence"—"heed"—"circumspection." But, with a view to conforming to the language familiar to English lawyers, I shall in this essay include the three species of inadvertence under the common name of "Negligence;" and by way of contrast, I shall include the last three under the term "Diligence." Negligence, then, is the want of diligence. And the greater the diligence required by law in the particular case, the smaller is the degree of negligence which will be sufficient to make the act or omission an injury.

Negligence opposed to Diligence. The greater the diligence required, the less the Negligence which will suffice for liability.

Terms used by Roman lawyers —*Culpa*— *Dolus*—*Casus*.

§ 2. Negligence, in the wide sense which I have just given to the word, is by the Roman lawyers termed "*Culpa*," and is distinguished from "*Dolus*," which, used in collocation with *culpa*, signifies *intention*, and nothing more. In the same collocation the word *casus* (or accident) is by the Roman lawyers used to indicate some fact which negatives the presumption that the occurrence happened either through *culpa* or *dolus*.

Culpa lata. *Culpa levis.*

Culpa lata is *great*, or gross negligence. *Culpa levis*, a slighter degree of negligence, opposed, by way of comparison, to *culpa lata*.

Diligentia.

Diligentia, or *exacta diligentia*, is the kind of diligence required where something even less than *culpa levis* would infer guilt.

Culpa levissima.

And, in order to express the degree of *culpa* correlating to *exacta diligentia*, the modern civilians have employed the term *culpa levissima* (*a*).

Casus.

What is termed *casus* by the Roman lawyers, is in English law embraced in the term "act of God," indicating some force the effect of which it is beyond human skill or foresight to avert. The "act of God" is usually coupled with "the Queen's enemies," for whose acts the lieges are not responsible. *Casus* also embraces occurrences

(*a*) The only use of *culpa levissima* that I am aware of, by the classical jurists, is in connection with the lex Aquilia in D. ix. 2, l. 44 pr. "In lege Aquilia et levissima culpa venit." The analogy to this in English law we shall see in the class of cases arising out of dangerous tenements, &c., §§ 4, 14, *post*, pp. 8, 26, &c.

which may happen through immediate human agency, but over which the person in question has no actual or presumed control.

§ 3. Bearing in mind the meaning of these expressions, and collating the passages of the Corpus Juris where they occur, it is not difficult to recognise the principles upon which the great practical lawyers of the classic period were wont to estimate the degrees of diligence or negligence forming the criterion of liability in the various transactions of life. The general principles are these :— Degrees of diligence or negligence, and criteria to distinguish the cases to which they respectively apply.

1. Where the contract or transaction out of which the duty arises is for the benefit solely of the person to whom the duty is owed, the person owing the duty is liable for *dolus* (or intention), and on no other account. Rules (Roman law). 1. Benefit of obligor—*Dolus.*

2. Where the contract or transaction out of which the duty arises is for the mutual benefit of both, then he is liable for *culpa.* 2. Benefit of both—*Dolus et Culpa.*

3. Where the contract or transaction out of which the duty arises is for the benefit solely of the person owing the duty, he is bound to the utmost (that is to say to a very great degree of diligence), and he is liable for negligence although very slight. 3. Benefit of obligee—*Dol. et Culp. et Diligentia.*

§ 4. Of the first kind is the duty arising out of *depositum*, a word which, as used by the Roman Instances—1. *Depositum.*

lawyers, properly denoted the delivery of a thing to a person who gratuitously undertakes to keep it for the depositor. [Inst. III. 14, § 3; D. XIII. 6, 5, § 2; D. L. 17, 23.]

2. The contracts usual in business.

2. Of the second kind are the duties arising out of the more usual contracts:—*e.g.*, deposit when payment (*merces*) is received for the care of the thing. This was properly designated by the Roman lawyers not *depositum* but a species of *locatio*. [D. XVI. 3. 1, § 9, *eod. tit.* 5, § 2.] Other examples are pledge, sale, locatio-conductio (generally), partnership, and indeed every contract or transaction where benefits accrue on both sides, or, as we should say in English law, where *valuable* consideration passes to the person promising, amongst other things, the diligence in question. [D. XIII. 6. 5, § 2; D. XIII. 7. 13, § 1; D. XVIII. 6. 11; D. L. 17. 23.] Within this large class of cases many shades of difference must necessarily occur in the kind and degree of diligence exacted, or of the negligence punishable by law. Such degrees of diligence or negligence must be estimated according to the circumstances of the case. [D. XIII. 6. 18 pr.] For instance, where the matter is one of mere common sense, the diligence required is such as "homines frugi et diligentes præstare debent." [D. XVIII. 6. 11.] But if a matter upon which skilled labour is hired, want of the necessary skill is reckoned negligence. [D. XIX. 2. 9, § 5.] And where the contract is partnership, the

diligence required from the partner is that which he is accustomed to bestow upon his own affairs. For says the law, if a man take to himself a negligent partner, he has himself to blame. [Inst. III. 25. 9.] (*a*).

3. Of the third kind is the duty of care on the part of the borrower, arising out of *commodatum* or gratuitous loan. In this case it is said, "Talis diligentia præstanda est qualem quisque diligentissimus paterfamilias suis rebus adhibet, ita ut tantum eos casus non præstet quibus resisti non possit, veluti mortes servorum, quæ sine dolo et culpa ejus accidunt," &c. [D. XIII. 6. 18 pr.] And again: "At is, qui utendum accepit exactam diligentiam custodiendæ rei præstare jubetur, nec sufficit ei tantam diligentiam adhibuisse, quantam in suis rebus adhibere solitus est si modo alius diligentior poterit eam rem custodire. Sed propter majorem vim, majoresve casus non tenetur, si modo non hujus ipsius culpâ is casus intervenerit. Alioqui, si id, quod tibi commodatum est, peregre tecum ferre malueris, et vel incursu hostium prædo- 3. *Commodatum.*

(*a*) The same principle has been applied by an English Court of Equity to a claim by A., arising between partners (A. & B.) on the ground of A.'s negligence and incompetence, it being proved that before entering into partnership A. had ample opportunity of estimating B.'s fitness for the business. [*Atwood* v. *Maude*, L. R. 3 Ch. 369.] The principle of "diligentia quam in suis rebus," &c., applied also in the Roman law to res dotales and to the quasi-partnership of co-heirs. D. xxiii. 3. 17 pr.; D. xx. 2. 25, § 26.

numve, vel naufragio amiseris, dubium non est quin de restituenda ea re tenearis." [Inst. III. 14. 2, *cf.* D. XIII. 6. 5–13.] If, however, the transaction, although called *commodatum* (and therefore nominally gratuitous), is one from which the lender is to receive benefit, the duty of diligence will be reduced to one of the second class, that is to say, the borrower will be liable simply for *culpa*, or negligence of an ordinary kind and degree. [D. XIII. 6. 18 pr.] Under this head also, though on a somewhat different principle, may be classed the obligations laid upon persons in the use or enjoyment of their own property by the *lex Aquilia*, the principle of which was to presume injury from the fact of damage to others while exercising their lawful rights. Here, as we have seen, *culpa levissima* inferred liability. [D. IX. 2. 44 pr.] Or, what amounted to the same thing, *culpa* was presumed, and nothing could rebut the presumption but proof of *casus*, that is to say, accounting for the occurrence by a cause against which no human care or foresight would have availed.

Extension of 1st class to *culpa lata*, which is by law *æquiparata dolo*.

§ 5. Recurring to the first class of cases, namely, where the contract or transaction is for the benefit solely of the person to whom the duty of diligence is owed—I have stated broadly that the other party is liable for *dolus* (or intention), and on no other account. But this must be taken with an important qualification. The Roman lawyers con-

sidered *culpa lata* (*i.e.*, great or gross negligence) equivalent to *dolus*: not that (as Austin seems to suppose, p. 441, &c.) they confounded the state of mind denoted by the word *dolus* (intention) with that indicated by *culpa* (negligence); but, by a convenient fiction, they held a person committing or omitting an act through gross negligence liable *as if* committing or omitting with intention. [Puchta Institutionem, cclxxviii.; D. VI. 16. 213, § 2. *eod. tit.* 226; D. XI. 6. 1. § 1; D. XVI. 3. 32.]

§ 6. Substituting *culpa lata* (or gross negligence) for *dolus* (or intention) we arrive at the three degrees of diligence or negligence formulated by some of the modern civilians, and adopted by Professor Erskine in his great treatise on the law of Scotland. Erskine states the principle as follows:—

Rules as stated by modern civilians, and in particular by Professor Erskine.

"What degree of negligence throws the blame upon any party contracting, so as to make him liable for the damage sustained by the other party? This the Romans have settled by the following general rules:—Where the contract is entered into for the benefit of both parties, each contractor is bound to employ a middle sort of diligence, such as a man of ordinary discretion uses in his affairs; the opposite of which is called *culpa levis*, or simply *culpa*. Where only one of the two parties is benefited by it, such party is bound in the degree of diligence by which one of the most consummate

prudence conducts himself; the neglect of which is called *culpa levissima*; and the other party who is no gainer by the contract is not accountable for any proper diligence, he is liable only *de dolo vel lata culpa*; *i.e.* for dole [D. XIII. 6. 5. § 2, *eod. tit.* 18 p.] or for gross omissions which the law construes to be dole. [D. L. 16. 226.] Where one bestows less care on the subject of any contract which requires an exuberant trust than he is known to employ in his own concerns, it is accounted dole, though the diligence he hath actually employed be as exact as a man of ordinary prudence would have used. [D. XVI. 3. 32.] These equitable rules have been adopted by us, and by most other civilised states; and agreeably thereto the borrower in commodate must be exactly careful of the subject lent, while in his own possession, since he alone has the whole profit arising from the contract. Cases are figured in the Roman law where that contract may be formed for the sole advantage of the lender; in all of which the borrower is liable barely *de dolo*. [D. XIII. 6. 5, § 10.] But most of the cases there stated do not constitute the proper subject of commodate, which is always gratuitous on the part of the lender. [Inst. III. 14, § 2.]"

Reasons of preference for the language of the classic jurists.

§ 7. It will be easily seen by comparison, that the rules stated by Erskine are virtually identical with those which I stated at the outset as the rules

of the Roman law. I myself prefer to adhere exactly to the language of the classic jurists themselves, which savours of their great practical experience, and which will be found singularly to harmonise with the modern decisions of our own Courts. Indeed our modern decisions even more than the learned discourses of Holt and Sir W. Jones (to be touched on presently) reflect the language and modes of thought of the classic jurists.

Notable exception to general rules in case of *mandatum*.

§ 8. To the general rules above laid down there is one notable exception, and it is one curiously illustrative of the exact business habits of the ancient Roman. In the transaction of *mandatum* (mandate) the benefit may be on the side of either party solely, or it may be common to both. But in *mandate* the degree of care required from the person undertaking the commission does not depend upon the benefit. The law says: If you undertake to do a thing, you must do it. Neither the circumstance of the service being gratuitous, nor any careless habits in which you are accustomed to indulge in your own affairs, will excuse you for carelessness in business which is another's. [C. IV. 35. 11, 13.] It was your own choice to undertake it, and if you had not done so the mandant might have done it himself, or found some one else to do it. [Inst. III. 26. 11.] The argument which holds in partnership will not apply here. It is always a matter of choice whether one will take a partner

or no; and if he decide on taking a partner, it is in his choice whom to take. But the case is different in regard to mandate. A person may have business which must be done, and the choice of commissioners may be limited. The case is still stronger with regard to *negotiorum gestio*. Here A. finding that B.'s concerns in his absence require looking after, without any mandate from A. undertakes to manage the affair. In this case A. will have a claim against B. for all disbursements. But on the other hand A. is bound, even more stringently than in the ordinary case of mandate, to give exact diligence. [D. III. 5. 6, § 12, *eod. tit.* 11; D. L. 17. 23.] It has indeed been said that in certain cases of urgency, where a friend interposes as *negotiorum gestor* to prevent imminent loss, he will only be liable for *dolus*. [D. III. 5. 3, *eod. tit.* 9.] But on the other hand it has been said that he is even liable for *casus*, if he should, on behalf of the absent, have commenced some novel and unwonted business. [D. III. 5. 11. 22.] The amount of care demanded varies, in fact, with the circumstances, and especially with the kind of necessity there was for interposition. [C. II. 19. 20.]

Negotiorum gestio.

Conception of contract in Roman and in English laws.

§ 9. Before applying these principles to the English law I must advert to a difference between the Roman law and our own in their conceptions of contract.

The Roman law classified *obligations* according to whether they arise *ex contractu* or *ex delicto*; a division which, from its manifest imperfection, they were obliged to supplement by arranging the remaining obligations by some fancied analogy to either. Hence the division adopted by the Institutes of Justinian: *ex contractu—quasi ex contractu*; *ex maleficio — quasi ex maleficio.* The obligations which arise *ex contractu* they again subdivide according to the different modes of completing or evidencing the contract, namely, whether *Re*, *Verbis*, *Literis*, or *Consensu*; and these subdivisions are again further analysed into the different species of contracts which compose them, as follows:—

Roman classification of obligations. *Ex contractu* —*ex delicto.*

Those *ex contractu* subdivided.

- *Re* . . .
  - Mutuum
  - Commodatum
  - Depositum
- *Consensu*
  - Emptio venditio
  - Locatio conductio
  - Societas
  - Mandatum

Verbis, depending for their effect on a legal solemnity, like *deeds under seal* with us.

Literis, contracts which (like those under Statute of Frauds with us) must be made or evidenced by writing.

The English law makes no attempt to classify obligations arising out of contract, but contemplates all contracts as moulded on a single type;

English law. Contracts viewed under a single type. Promise for consideration.

namely, a *promise* grounded on a *consideration.* Where obligation is contracted by deed, consideration is presumed. But in other cases, the question whether or not a contract is enforceable by law, generally resolves itself into the question whether or not the promise to be enforced is grounded upon a *good legal consideration.* The language used amongst English equity lawyers is somewhat different, but comes, in effect, to the same thing. "An agreement binds the conscience," but "equity will not interfere in favour of a volunteer."

English Equity same effect.

Coggs v. *Bernard.*

§ 10. In the celebrated case of *Coggs* v. *Bernard* (Sm. L. Ca. vol. i. p. 177) the decision amounted to this: that the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it. And accordingly it was held a good ground of action, that B. (as the declaration stated) undertook safely and securely to carry and lay down certain casks of brandy, and that by B.'s negligence one of the casks was staved; although it was not alleged that B. was a common carrier, nor averred that he was to have anything for his pains.

Coggs v. *Bernard* simply a case of *mandate.*

Now according to the Roman law, this would have been simply a case of *mandate*; and by that law the person undertaking the mandate was liable for *culpa.* And the only difference between the Roman law and the English upon the point

consists in this: that in ours the conclusion is reached by the fiction of a consideration, which in the Roman law was unnecessary. The case of *Coggs* v. *Bernard* was long celebrated in Westminster Hall for the judgment of C. J. Holt, who, under colour of citing *Bracton*, introduced a learned discourse on the doctrine of the civil law; and enumerated six kinds of bailment, and the rules, founded on the civil law, applicable to each. I may observe that *bailment* is a technical term of English law signifying the delivery of a thing by the owner upon a contract involving some duty in the keeping of it at the hands of the other.

Bailment.

The case of *Coggs* v. *Bernard* is also notable as being the peg upon which Sir W. Jones hung his able and scholarly treatise on the *law of bailment*. This judgment of Holt, and the treatise of Sir W. Jones, have since been considered the leading authorities in the law of England upon this subject.

Sir W. Jones' Essay on law of bailment.

§ 11. While adverting to these authorities I must make this observation (*a*), that although both C. J. Holt and Sir W. Jones follow the Roman law in excepting mandate from the ordinary rule, by which responsibility correlates with benefit, the necessity for this exception has not always been perceived by the English lawyers

Confusion made by English lawyers in their application of the term *gross negligence*.

(*a*) These remarks are referred to with approval by the late Mr. Justice Willes in *Oppenheim* v. *White Lion Company*, L. R. 6 C. P. 521. (C. P. June, 1871.)

who followed them. The result has been a curious ambiguity in their use of the term *gross negligence.* Imagining that, to make the gratuitous commissioner liable, a case of gross negligence must be established, they have applied the terms "gross negligence," "*crassa negligentia*," "*culpa lata*," to mere want of the skill or care promised. For instance, it has been held that a person employed on account of the skill of a particular kind which he professes, is liable, although acting gratuitously, if he fail to bring such skill as may reasonably be expected from his profession. In order to harmonize the case with the general rules of bailment, these lawyers thought it necessary to term such failure in skill *gross negligence;* and this misuse of the term gross negligence has even been imported into cases of contract for mutual benefit, where there is not the shadow of an excuse for such language. This absurd and misleading use of words has given fair occasion for the remark that *gross negligence* is only ordinary negligence with a vituperative epithet (1 Sm. L. Ca. 196, *Grill* v. *Genl. Iron Screw Collier Co.*, L. R. 1 C. P. 612). The truth is, that however confused their language, the instinct of English lawyers has led them practically to adopt the conclusion arrived at by the Roman law, so that except in the case of common carriers (who have peculiar liabilities of their own as will presently be seen) there is no distinction in law between the duty implied by mandate and

that implied by work done for hire. Or if there be any difference it is merely this, that a jury may if they please, in acquitting from negligence, take into account the gratuitous nature of the service. [See cases commented on in Smith, L. Ca. vol. I. pp. 193–196.] I must while upon this subject further observe, that having through the association of ideas above referred to imported the expression "gross negligence" into cases of ordinary contract, they then rationalised upon the words *gross*, &c., explaining them to mean considerable or palpable as opposed to slight or merely constructive negligence. I shall afterwards revert to this subject (§§ 76, 85, 115, *infra*). In the meantime note that, when we come upon the terms *gross negligence*, &c., in English law, it must be marked whether they are used in the sense of *culpa lata* as employed by the Roman lawyers, or merely in the sense of considerable or palpable negligence.

§ 12. I have another observation to make in preparation for the ensuing analysis of cases upon the subject of negligence. In laying down the above rules the Roman lawyers contemplate only obligations arising out of contract. And in this they are followed both by C. J. Holt and Sir W. Jones. But the principle embodied in these rules extends to cases which do not arise out of contract. This the Roman lawyers recognised as we have seen in

Extension of the principles to obligations not arising *ex contractu*.

the case of damage under the *lex Aquilia*. But this extension of the principle is obscured by the sharp line of demarcation which they drew between obligations arising *ex contractu*, and those which arise *ex delicto*—a distinction which is still more marked in the language of English lawyers, who are accustomed to consider actions arising out of *torts* (wrongs) as a class apart altogether from those which arise out of contract. But this distinction is illogical. To speak correctly, all *actions* have their legal ground in *wrong*. For all must arise upon the breach, actual or apprehended, of some duty. And although it may be useful to distinguish injuries or breaches of duty, according to whether the *primary* duty (that is the duty broken) is imposed by contract or not imposed by contract, it is not logical in this sense to oppose *delict* to contract. For there are many duties which are not imposed by contract, and yet do not arise from delict. Such for instance are all the duties arising from the domestic and personal relations. Such is the duty of *restitution* where money has been paid in the mistaken belief of its being owed. Such duties are by Lord Stair happily distinguished from those which arise out of contract, and are by him classed under the name of *obediential obligations* —duties which are laid upon us by the will of God, and not through our own engagement or consent. Another set of duties which have always puzzled those who try to class all obligations as arising

either *ex contractu* or *ex delicto*, are those arising from possession: the duty of the occupier to keep his premises in safe repair, &c.

Actions founded on tort, and on contract.

§ 13. The distinction in English law between actions founded on contract and those founded on tort rests upon no intelligible principle; and it is now much less important than formerly (*a*).

Lord Campbell's Act.

The only effect of this distinction which still exists, is the question whether or not, apart from the provisions of Lord Campbell's Act, the action survives. To explain this it is necessary here briefly to refer to the Act just mentioned.

(*a*) Besides the questions which used to arise in the time of strict technical pleading, and which became unimportant after the C. L. P. Acts, there were questions of costs which up to a very recent date were considered to turn upon the technical question whether an action was founded on contract or on tort. These arose under the County Courts Acts; the latest being 30 & 31 Vict. c. 142, s. 5, which disentitled the plaintiff to the costs of an action in the superior Courts if he recovered a sum not exceeding £20 if the action is *founded on contract*, or £10 if *founded on tort*. According to the principle of the decision of the House of Lords in *Garnett* v. *Bradley* [3 App. Cas. 944] the provisions of this section are now understood to be superseded by the 55th Order under the Judicature Acts. The previous decisions under this section of the County Courts Act were to the effect of holding every injury, not being the direct breach of an express contract, to be a tort. [*Pontifex* v. *Midland Ry. Co.*, 3 C. P. D. 23; *Fleming* v. *Manchester Ry. Co.*, 26 W. R. 741; *Bryant* v. *Herbert*, 3 C. P. D. 189, reversed by C. A. 2 July, 1878. It seems doubtful whether *Baylis* v. *Lintott*, L. R. 8 C. P. 345, can be reconciled with the other decisions.]

By the common law of England an action in tort, and the cause of action so far as founded on tort, dies with the injured person: and it has been laid down by authority that by the common law the death of a human being could not be complained of as an injury by any one in a civil Court. [*Baker* v. *Bolton*, 1 Camp. 493; and see *Osborn* v. *Gillett*, L. R. 8 Ex. 88.] To remedy this, the Act 9 & 10 Vict. c. 93 (commonly called Lord Campbell's Act) was passed, so as to enable the executor or administrator of a deceased person to recover for the benefit of the wife, husband, parent, or child of the deceased, damages from the person who by his wrongful act, neglect, or default, had caused the death. The Act was suggested by the practice of the Scotch Courts, which in such cases gave a remedy formerly known as an action of *assythement*, in the Justiciary Court, an action which was gradually superseded by an ordinary action in the Court of Session. [See *Eisten* v. *N. B. Ry. Co.*, 8 Macph. 980; *Greenhorn* v. *Addie*, 17 D. 860.] By 27 & 28 Vict. c. 115, the remedy given by Lord Campbell's Act is extended so as to admit of the interested persons themselves suing after the lapse of six months, if the executor or administrator shall not then have commenced an action.

It has been held that, apart from Lord Campbell's Act, the executrix of an injured passenger on a railway may recover, in an action for *breach of contract* against the railway company, the

damage to the personal estate of the passenger arising in his lifetime from medical expenses, and loss occasioned by his inability to attend to business. [*Bradshaw* v. *Lanc. & York Ry. Co.*, L. R. 10 C. P. 189.] And it has been held that the cause of action thus laid upon contract is so distinct from that in the action under Lord Campbell's Act, that an admission in an action under the Act does not operate as an estoppel in the action upon the contract. [*Leggott* v. *G. N. Ry. Co.*, 26 W. R. 784.] Where there is no relation by way of contract between the parties at all, the cause of action is destroyed, and the action, if commenced, abates and cannot be revived. [*Hemming* v. *Batchelor*, L. R. 10 Ex. 54.] The principles on which the amount of damage may be assessed, having regard to the probable duration of life and the use of tables, such as the "Carlisle tables," for the purpose, are discussed in the case of *Rowley* v. *L. & N. W. Ry. Co.*, L. R. 8 Ex. 221. The principle seems to be that every element may be taken into consideration, and the whole left to the jury.

Liabilities for unliquidated damages arising "otherwise than by reason of contract," not provable in bankruptcy.

I am not aware of any other consequence, which is now important, of the technical distinction between actions on contract and on tort. There is, however, a consequence of the cognate but more logical distinction whether a liability arises or does not arise "otherwise than by reason of a contract." By s. 31 of the Bankruptcy Act, 1869, it is enacted that "demands in the nature of unliqui-

dated damages arising otherwise than by reason of a contract or promise shall not be provable in bankruptcy," and the section then proceeds to enact in the most comprehensive language that all other liabilities shall be debts provable in bankruptcy. The language of this section seems expressly designed to comprise in the category of debts provable all the cases arising out of an implied contract, which have given rise to the difficulties under the section of the County Court Act mentioned in the note, p. 19, *supra*; and I have no doubt that in all such cases, such for instance as the break down of a private toll bridge, where the question might become very important, the liability (except for damages under Lord Campbell's Act) would be a debt provable in bankruptcy.

Obligations ranged according to degree of care demanded.

§ 14. If I were to range the obligations which are the subject of this essay according to the degree of care to which a person is bound, or which, to use the favourite fiction applied by English law to a large class of cases, he *promises*, I should adopt the following order. The obligation to answer for the safety of a subject is either :—

1. Absolute—in the nature of insurance. This can only be by *express* contract [*Ford* v. *Cotesworth*, L. R. 5 Q. B. 544; *Robinson* v. *Davidson*, L. R. 6 Ex. 269; *River Wear Commissioners* v. *Adamson & Others*, House of Lords, July 27, 1877, 26 W. R. 217, overruling the decision of the

Queen's Bench reported in a parallel case, *Dennis* v. *Tovell*, L. R. 8 Q. B. 10]; or where one of the parties is *in mora*, for instance where in case of a sale a change of ownership is only not effected by reason of the default of one of the parties, who is then liable for *casus*, even though the property is in the other. [*Martineau* v. *Kitching* (*per* Blackburn), L. R. 7 Q. B. 456.] The obligations of insurance, properly so called, or of indemnity against *casus*, are not within the scope of this essay. It is enough to say here that proof of *casus* exonerates from liability for negligence which would *primâ facie* be inferred from the circumstances. [See *The Virgo*, 25 W. R. 397; *River Wear Commissioners*, *supra*, *cit.*; *Readhead* v. *Midland Ry. Co.*, p. 36, *post*; *Doward* v. *Lindsay*, L. R. 5 P. C. Ap. 338 (case of drifting from moorings in a storm, and anchor fouling by accident).]

2. In the nature of warranty—

(*a*) Against everything except the act of God and the Queen's enemies; *e.g.*, common carriers. This is in fact a kind of limited insurance.

(*b*) That reasonable care is taken, &c.; *e.g.*, carriers of passengers by rapid conveyance.

Culpa levissima. or *Exacta diligentia.*

3. Indemnity against the consequences of ordinary negligence.	*Culpa.*
4. Indemnity against the consequences of wilful wrong, or such gross negligence as the law presumes equivalent thereto.	*Dolus vel culpa lata.*

Explanation of order followed in this essay

§ 15. It will be convenient to some extent to follow the order above indicated, but I shall in the sequel consider the liabilities which I have proposed to treat, without further reference to any question as to an implied contract, and without sharply dividing the cases where the primary duty does, and where it does not arise from contract. Thus the breaches of duty which the Roman law dealt with under the *lex Aquilia* above referred to, will be treated of in the same comprehensive section with the obligations imposed by English law, under the custom of the realm, upon common carriers, and the somewhat lighter, though still onerous, duties which modern decisions have imposed upon carriers of passengers by rapid conveyance.

I do not pretend that the degrees of care required in the different relations of life are capable being ranged in classes by any sharp distinctions, nor do I think that the modern civilians who have spoken of the different degrees of diligence above

mentioned, have (speaking generally) supposed that an exhaustive and sharply defined classification of liabilities for negligence could be founded on such degrees of diligence. But the classical phrases I have adverted to suggest a convenient order of treating my subject, and I shall in the sequel consider, 1st, cases where slight negligence is sufficient to infer liability; 2ndly, where ordinary negligence is sufficient; 3rdly, where the *culpa lata* which the Roman lawyers held equivalent to *dolus* is necessary to infer liability.

I. *Exacta diligentia—Culpa levissima.*

§ 16. First, then, I shall consider the circumstances under which slight negligence is sufficient to infer liability. 1. Slight negligence sufficient to infer liability.

(*a*) The typical species of this genus is *commodatum*, or gratuitous loan. This transaction being for the sole benefit of the borrower, he is liable for very slight negligence—everything (as the Roman lawyers expressed it) short of *casus*. (*a*) *Commodatum* or loan.

But the reason of this rule applies to a much wider and more important class of cases. It embraces that responsibility to *strangers* under which every one lies while lawfully using his own property or pursuing his own private advantage or pleasure. This is the meaning of the maxim "*Sic utere tuo ut alienum non laedas.*" The principle of this responsibility was applied by the Roman

lawyers very widely in their expositions of the *lex Aquila de damno*; and the same principle is within somewhat narrower limits asserted in the English law. I do not say that in all these cases the care or diligence required must necessarily be described by superlatives. But I think it may generally be affirmed that in such cases the amount of care required is greater and the degree of negligence deemed inexcusable is less than in ordinary cases of contract.

(β) Occupier of buildings, &c., bound to keep them in safe repair.

§ 17. (β) It is, for instance, the duty of every one in the possession or occupation of lands or buildings to take care that his premises are in such condition and to conduct operations thereon in such manner as is consistent with safety to all persons being where they have right to be. [*Tarry* v. *Ashton*, L. R. 1 Q. B. D. 414.] The person in actual possession is always liable, and *primâ facie* is alone liable. The landlord, having the *possessio civilis*, is also liable if the damage arises from his nonfeasance, or misfeasance, and in such a case the injured person has the option of suing either the landlord or the tenant. There appear to be only two ways in which the liability can be brought home to the landlord, namely, *first*, if he has entered into an express contract with his tenant to repair; and *secondly*, if he has let the premises in a dangerous state. But in the latter case he is exonerated if the tenant has entered

into an express covenant to repair. [*Hadley* v. *Taylor*, L. R. 1 C. P. 53; *Todd* v. *Flight*, 9 C. B. (N.S.) 377; *Nelson* v. *Liverpool Brewery Company*, 2 C. P. D. 311; *Pretty* v. *Bickmore*, L. R. 8 C. P. 401; *Gwinnell* v. *Eamer*, L. R. 10 C. P. 658.] In Scotland where houses are often let to families in "flats" with a "common stair," and where the landlord undertakes the duty of keeping the common stair in tenantable condition, he has been held responsible for the death of a child invited on the premises by one of the tenants in order to go a message, and who fell through a place where there was a missing rail of which the landlord had for months past had notice. [*McMartin* v. *Hannay*, Court of Session, 3rd series, vol. x. p. 411.]

The duty here spoken of is an absolute duty, that is to say, a duty to the public at large; and if a case of palpable danger were made out, the occupier of the premises or author of the operations would doubtless be liable to an Indictment or Information [*Reg.* v. *Stevens*, L. R. 1 Q. B. 702], just as in any other case of nuisance to the public. And it would be no answer to such an Indictment or Information to say that the dangerous state of the premises was caused by acts of his servants or workmen contrary to his general orders, or even by acts of persons over whom he had no control of any kind. [*Reg.* v. *Stevens*, *supra*; *Att.-Gen.* v. *Bradford Navigation*, 35 L. J. (Ch.) 619.] Danger to the public is, however,

then commonly first perceived when some one is damaged, and therefore the question of negligence generally comes into a court of law in an action for the injury. As an instance, I will take the following case from the Law Reports:—

§ 18. In an action for negligence brought against a railway company for not keeping in proper repair the bridge over a highway crossed by their line, in consequence of which a brick fell and damaged the plaintiff: The state of facts was this:—

The bridge was an iron-girder bridge resting on one side on iron piers, and on the other on a perpendicular brick wall with pilasters. The brick fell from the top of one of the pilasters, where one of the girders rested on the pilaster. A train had passed just previously. On this evidence the jury found a verdict for the plaintiff. It was held that the verdict was justified by the evidence. It was the duty of the defendants to use all reasonable diligence and care in keeping the bridge in proper repair. The unusual occurrence of a brick falling was *primâ facie* evidence of the want of due diligence; and it lay on the defendants to rebut this, by showing that the bridge had been examined by proper persons from time to time. [*Kearney* v. *L. B. & S. C. Ry.*, June 15, 1870; L. R. 5 Q. B. 411; affirmed by the Exchequer Chamber, June 15, 1871, L. R. 6 Q. B. 759.] "Reasonable" is, of

course, a word of shifting import, but it is impossible to resist the inference that what the judges here demand is what the Roman lawyers would have called *exacta diligentia.*

§ 19. The case of *Scott* v. *London Dock Company* [3 H. & C. 596, & 34 L. J. Ex. 17, 22] was a case in which a custom-house officer upon his lawful business was injured by the fall of sugar-bags from a lift over a door on the defendant's premises. No explanation was given of the cause of the occurrence. The fact was, however, held evidence of negligence. It will be observed that the statutes for the protection of the revenue give to custom-house officers the right of entry to premises where occupations of certain kinds are carried on. The occupiers of the premises therefore hold them subject to the right of entry of the revenue officers, just as any one having a house under which is a public passage, holds the premises subject to the right of the public to pass. Consequently this was a case very like that of the last, namely, that of a person passing along a public road under the railway bridge: and it seems that in both cases liability would be inferred from something less than *ordinary negligence.* For had the question been whether there was negligence of the order commonly called *ordinary* negligence I think that some positive evidence as to the cause of the occurrence would have been

required (*a*). The inference seems to be that, in a question with strangers being where they have right, every person is bound in exact diligence for the safe repair of his premises and conduct of his operations. Failing such safe repair of premises or conduct of operations, *primâ facie* evidence of negligence may be furnished, in case of resulting damage, by the maxim *res ipsa loquitur*. [See also *Bryne* v. *Boodle*, Nov. 25, 1863, 2 H. & C. 722; *Briggs* v. *Oliver*, May 1, 1866, 35 L. J. 163. But compare *Higgs* v. *Maynard*, 14 W. R. 610, Harrison and Rutherford, p. 581 (glass falling on plaintiff's eye from window broken by ladder inside); *Welfare* v. *L. & B. Ry. Co.*, June 3, 1869, L. R. 4 Q. B. 693 (plank and roll of zinc falling on plaintiff while looking at time-tables at a railway station); *Barnes* v. *Ward*, 9 C. B. 392 (unfenced excavation near a public way).]

§ 20. I have above observed that where an action will lie against the occupier of a dangerous tenement or author of a dangerous operation,

(*a*) It appears that on a second trial of this case, the defendants led evidence explaining how the bags came to fall, and got a verdict which was not disturbed. [*Solicitors' Journal*, Mar. 4, 1871, p. 328.] This is quite consistent with the principle laid down in the text. The company were not bound absolutely to restrain their sugar bags from falling, which would have been an obligation in the nature of insurance, but to warrant care or diligence for the safe conduct of their operations.

an indictment, speaking generally, will also lie. It is not, however, true conversely that an action is competent in all cases in which an indictment would lie. There is no action for the breach of an absolute duty where the damage suffered by the individual is merely an inconvenience of the same kind as that suffered by the public generally. [*Winterbottom* v. *Lord Derby*, L. R. 2 Ex. 316.] It has been decided by the Court of Queen's Bench that an action does not lie against a local board under the Public Health Acts for damage to an individual occasioned by dis-repair of a parish road vested in them, and placed by the Act under their management. [*Gibson* v. *Mayor of Preston*, L. R. 5 Q. B. 218.] This appears to be a consequence of the old form of remedy, which only lay by indictment against the inhabitants of the parish. It was held that the Act, by transferring the duty of management, did not give individuals a new form of remedy. But it has been decided by the same Court that a local board who were by statute constituted surveyors of highways, were liable to an action for misfeasance by the negligence of their servants in leaving a heap of stones in the road without guard or light. [*Foreman* v. *Mayor, &c., of Canterbury*, L. R. 6 Q. B. 214, *Solicitors' Journal*, 1871, p. 595.] And it has been also decided that a local board, by having a sewer under the road vested in them (under ss. 43 and 45 of the Public Health Act,

1848), were liable for damage caused by a grid over the sewer being in a defective state. [*White* v. *Hindley Local Board*, L. R. 10 Q. B. 219.] An ordinary surveyor of a highway does not usually employ his own servants, and, though responsible for personal negligence [*Pendlebury* v. *Greenhalgh*, C. A. from Q. B., 1 Q. B. D. 36], is not responsible for the servants of the parish or for the negligence of a contractor employed by him. [*Taylor* v. *Greenhalgh*, L. R. 9 Q. B. 487.] This last was a case arising out of the same circumstance as that of *Pendlebury* v. *Greenhalgh*, but the facts as brought before the Court of first instance were incorrect, and the judgment was reversed on the true state of the facts being brought before the Court of Appeal.

§ 21. To the class of cases now under consideration may be referred the liabilities which arise under an obligation, as between adjoining occupiers, for one of them to maintain at all times a sufficient fence. In the case of *Lawrence* v. *Jenkins* [L. R. 8 Q. B. 274], the existence of a prescriptive obligation of this kind on the defendant was proved by evidence extending over more than forty years; and it was held that the obligation was absolute to keep up a sufficient fence at all times, the act of God or *vis major* only excepted; and that a gap having been made, and plaintiff's cows getting through and killing themselves with eating leaves

of a yew felled by a person who had contracted with defendant to buy his timber, the defendant was liable for the loss of the cows. *Firth* v. *Bowling Iron Company* [3 C. P. D. 254] was a case arising out of an obligation of one of two tenants under the same landlord, by the terms of his lease, to fence the land in his occupation for the benefit of the lessor and his tenants. And as the obligee fenced his premises with old iron wire, which he allowed to decay and fall to pieces on the adjoining ground, he was held liable for the death of his neighbour's cows who swallowed the pieces with the grass.

Right to support.

§ 22. A class of cases not necessarily arising from negligence, but allied with the cases of the class now under consideration, are those involving the right of support which one proprietor has from the ground of his neighbour. The principle, according to English law, is that the proprietor has the right to the support of his land in its ordinary state, but not to the support of buildings on it, unless by grant or reservation, express or implied, actual or presumed. If the operations would have caused a subsidence of the ground without a building erected on it, but the damage would then have been inappreciable, there will, speaking generally, be no right of action for damage by subsidence to a new building, although

the damage may be considerable. [*Smith* v. *Thackerah*, L. R. 1 C. P. 564.] It has been decided that the presumption arising from enjoyment of the grant of an easement to the support of buildings is not assisted by the (so-called) Prescription Act, 2 & 3 Will. IV., c. 71, and that the 2nd section of this Act in no way affects an easement of this nature. [*Angus* v. *Dalton*, 3 Q. B. D. 85.] Such presumption therefore depends on the common law; and on the authorities referred to by Lush, J., in the last cited case, it is clear that the presumption arises on proof of enjoyment for twenty years. But not only is the presumption liable to be rebutted, but, according to the decision of the majority in the case last cited (Cockburn, C.J., and Mellor, J., against Lush, J., dissenting in a judgment giving very forcible reasons), the surrounding circumstances shewing that no permission was in fact given or asked for at the time when the altered building was erected, were held sufficient to rebut the presumption. Where negligence in fact is proved in the manner of conducting the excavating operations, the case depends on other considerations. On this point the cases cited on p. 115 of the last-mentioned judgment may be referred to. Where the plaintiff's right of support is invaded and damage ensues, it has been decided by a majority in the Queen's Bench, that the plaintiff may at once sue for and recover damages

on an estimate of the whole future damage likely to ensue from the operations. [*Lamb* v. *Walker*, 3 Q. B. D. 389.]

(γ) Persons entrusted with the maintenance of works used by the public paying tolls.

§ 23. (γ) Where a person or corporation is by statute entrusted with the making and maintenance of works, and entitled to demand tolls for the use of those works, there is then a duty upon that person or corporation to all persons lawfully using the works [*Shoebottom* v. *Egerton*, 18 L. T. (N.S.) 889], as well as to the public using bridges or other collateral works which the enabling statute enjoins to be made for their accommodation [*Manley* v. *St. Helen's Canal, &c., Co.*, 2 Hurlst. & N. 840], to take care that the works are constructed and maintained with reasonable efficiency for the purpose for which they are authorized to be made. And if a person lawfully using the works is damaged through want of care in their construction or maintenance I think that something less than *ordinary* negligence suffices to make the damage an injury; or, which is saying the same thing, I think that more than ordinary care in the performance of the statutory duty is demanded from those owing it. This may be illustrated by the case of the *Mersey Docks and Harbour Trustees* v. *Gibbs and others*, decided in 1865 in the House of Lords on appeal from the Court of Exchequer Chamber. [Reported L. R. 1 H. of L. 93.] The action was for damage to a

ship and cargo caused by the ship grounding upon a bank of mud at the mouth of the dock. At the trial the Chief Baron Pollock directed the jury that, "if the cause of injury was a bank of mud in the dock, and if the defendants by their servants had the means of knowing the state of the dock, and were negligently ignorant of it, they were liable." A bill of exceptions was tendered to this ruling, and the jury having found for the plaintiffs, the question whether the Chief Baron's ruling was right in point of law came before the Exchequer Chamber, and afterwards on appeal to the House of Lords. [7 H. & N. 329; L. R. 1 H. of L. 93.]

§ 24. It was argued for the defendants that, to establish a case of liability against them, it was not enough that they were proved to have the means of knowledge of the obstruction unless they were also proved to have actual knowledge of the existence and of the dangerous nature of the bank. But this contention did not avail. And it was held to be clear on the authority of the cases cited in the argument (especially that of *Parnaby* v. *Lancaster Canal Company*, 11 Ad. & E. 223) that a body incorporated by statute, with the right to levy tolls for the profit of its members, in consideration of making and maintaining a dock or a canal, is liable in its corporate capacity to make good to the persons using it any damage occa-

sioned by neglect in not keeping the works in proper repair.

But the defendants further claimed exemption from liability on the ground that they were not authorized to receive tolls for their own profit, since by the constitution of the corporation the profits of their undertaking were dedicated to the benefit of the public and of the shipping interest using the docks. It was, however, decided by the unanimous opinion of the learned lords present, following the joint opinion of the consulted judges (delivered by Blackburn, J.), that the circumstances of the profits being thus ultimately applied to public purposes made no difference. The result seems to be that every person or corporation priviledged to make and maintain public works, and to levy tolls for the use of them, is bound to use exact diligence in making and maintaining those works so as to be in a reasonable state of efficiency; that the breach of this duty gives a right of action to any person, being within the scope of the benefit intended by the statute, who is damaged by such breach of duty; and that the negligence of servants, contractors, and employés of every description causing failure in the performance of these duties may be imputed to the person or corporation itself. [*Mersey Docks Trustees, &c.* v. *Gibbs*, L. R. 1 H. of L. 93; *Coe* v. *Wise*, L. R. 1 Q. B. 711; *Jolliffe* v. *Wallasey Local Board*, L. R. 9 C. P. 62; *Virtue* v. *Commissioners of Police of*

Allon, Court of Session, Dec. 12, 1873; *Stephen* v. *Thurso Police Commissioners*, Court of Session, 4th series, vol. iii. p. 535.] As to the kind of proof which will exonerate, see *Grote* v. *Chester & Holyhead Ry. Co.* [2 Ex. 251]; *Hammond* v. *Vestry of St. Pancras* [L. R. 9 C. P. 316]; *Thomson* v. *Greenock Harbour Trustees* [Court of Session, 4th series, vol. iii. p. 1194].

§ 25. It seems, then, that the position of a person or corporation privileged to make and maintain public works and to levy tolls for them, and who has omitted the performance of his duty to make or maintain the works in a reasonable state of efficiency, is very similar to the position of an occupier having his tenement in a dangerous state. He is unquestionably liable to an Indictment for non-performance of the duty, and he is also liable, as for injury, to the individual affected, in case the threatened danger or mischief result in actual damage.

§ 26. I have observed that liability under the head now treated is incurred to any person damaged, who is within the scope of the benefit intended by the statute. It is necessary, therefore, to distinguish whether the enactment is conceived in the interest of the public at large or of some class of persons on public grounds, or is merely in the nature of a covenant, *e.g.* with the adjoining

owner or occupier. A statutory enactment of the latter class will not ground a remedy in favour of a stranger. [*Manchester, &c., Ry. Co.* v. *Wallis*, 14 C. B. 213 (case of cattle straying on a highway adjoining the railroad).]

Water companies. Their obligation to keep hydrants charged.

Where the enactment is conceived for the benefit of the public, the question remains whether, on a true construction of the Act, it was intended to give a right of action to all persons damaged by the breach of duty. This question was much canvassed in the case of a water company, who are bound by statute to keep all their pipes to which fire-plugs are fixed at all times charged with water under a specified pressure unless unavoidably prevented, the statute imposing penalties for the breach of that duty. The question, which was raised on demurrer [*Atkinson* v. *Newcastle, &c., Waterworks Company*, C. A. from Ex. Div., 2 Ex. D. 441, 25 W. R. 794], was, whether a person whose house was burnt down in consequence, as he alleged, of the failure of the company to perform the duty, could maintain an action against the company for the damage. The Court of Appeal, reversing the decision of the Court of Exchequer, decided that such an action could not be maintained. The ground of decision is not very clearly expressed, but it appears to amount to this; that the legislature cannot be supposed, in an Act conferring privileges on a water company, to have meant to impose on the company the condition of

becoming insurers against fire of all the buildings in their districts—a condition which, if stated explicitly, would probably not have been accepted by the companies—; and that this construction of the Act is aided by the clause imposing a penalty, which under the circumstances may be presumed to have been intended to be the only sanction of the duty imposed.

Second branch of *Couch* v. *Steel*. Statutory duty sanctioned by penalties.

The judges of appeal, however, went further, and expressed doubts as to the decision of the Queen's Bench on the second branch of the demurrer in *Couch* v. *Steel* [3 E. & B. 402]. They did not, however, expressly overrule *Couch* v. *Steel*; and as the principle of the decision in that case, rightly understood, still governs a class of cases of great importance, it is necessary to state clearly the distinction between the cases. In *Couch* v. *Steel* the plaintiff was a seaman who brought an action against the shipowner, alleging, amongst other things, that he had suffered damage through illness in consequence of the neglect of the shipowner to provide a supply of medicines as prescribed by the Merchant Shipping Act. The Court of Queen's Bench, notwithstanding that this duty prescribed by the Act was enforced by penalties, overruled a demurrer to the action.

It must be admitted, after the decision of the Court of Appeal in *Atkinson* v. *Newcastle, &c., Waterworks Company*, that the judges of the Queen's Bench, in *Couch* v. *Steel*, too broadly stated the

doctrine that every statutory enactment for the benefit of a class of persons, and whether sanctioned by a penalty or not, gave ground for an action by a member of the class who suffers damage from neglect of the duty. But the decision in *Couch* v. *Steel* may be safely quoted as an authority for a narrower proposition, which is yet one of considerable importance, and which may be stated as follows:—Where a statute, of a strictly public character, prescribes in regard to a class of persons such as ship-owners, mill-owners, colliery proprietors, &c., &c., the performance of certain acts, *as reasonable precautions* for the health or safety of a class of persons having to do with them, the neglect of such a statutory precaution gives a right of action to any person, within the scope of the intended benefit, suffering damage of the kind intended to be provided against. [See *Britton* v. *Great Western Cotton Company*, Jan, 29, 1872, W. N. p. 29; *Blamires* v. *Lancashire and Yorkshire Ry. Co.*, L. R. 8 Ex. 283.] Where a statutory duty of this kind is imposed, the civil right of action is not excluded by the circumstance that the statute imposes a penalty for breach of the duty, although doubtless the remedy by Indictment would be excluded. The statutory duty does not, however, give any right of action in a case where the resulting damage is of a nature different from the kind of damage contemplated by the statute. Thus where a statutory precaution was imposed on ship-

owners to prevent the spread of contagious disease among cattle, it did not give a right of action to a person who alleged that by reason of the neglect of such precaution his sheep were washed overboard. [*Gorris* v. *Scott*, L. R. 9 Ex. 125.]

Statutory enactment in the nature of a covenant.

§ 27. Where there is a statutory duty imposed on a railway or other public company by way of contract with the adjoining owner or occupier, as, for instance, in the case of accommodation works under the 68th section of the Act 8 & 9 Vict. c. 20, the presumption is that the intention was to give a right of action, and the effect of the cases is to construe the duty very strictly against the statutory corporation; the liability being very similar to that already mentioned in the case of a prescriptive obligation to maintain a fence (p. 32, *supra*). The company, when bound to fence, warrant to the occupier of the adjoining land the sufficiency of the fence for all purposes of good husbandry [*Bessant* v. *G. W. Ry. Co.*, 8 C. B. (N.S.) 368; *Corbett* v. *G. W. Ry. Co.*, Nov. 29, 1872, W. N. p. 225], including sufficiency to keep out pigs. [*Child* v. *Hearn*, L. R. 9 Ex. 176.] And the liability is incurred not only to the owner or occupier himself, but also to persons having cattle on the land with the licence of the occupier. [*Dawson* v. *Midland Ry. Co.*, L. R. 8 Ex. 8.]

(δ) Liabilities

§ 28. (δ) On a similar principle is based the lia-

bility of certain public officers entrusted by the State with duties for which fees are payable, and on the exact performance of which the security of private right depends. of certain public officers.

The most familiar instance in this country is the liability of the sheriff for failure in the due execution of and return to the writ intrusted to him [*Dennis* v. *Whetham*, L. R. 9 Q. B. 345] and for an escape. In the latter case it has been said that nothing but the act of God or the Queen's enemies will excuse; that is to say, he warrants the exact performance of the duty. [Atkinson on the Office of a Sheriff, sec. x.; *Allen* v. *Carter*, L. R. 5 C. P. 414; *cf. Lloyd* v. *Harrison*, L. R. 1 Q. B. 502.] This high degree of responsibility only applies between the sheriff and the person who employs him. For instance, his liability to the owners of goods seized under an execution is only that of an ordinary bailee entrusted with goods for sale. But he is liable for wilful misfeasance, *e.g.*, by making a false return, to any person immediately affected by it so as to suffer damage. [*Beasyer* v. *Maclean*, L. R. 6 P. C. Ap. 398.] Sheriff for escape, &c.

In Scotland the duty of executing all the Queen's writs (inclusive of the summons, which in England may be served by anybody) belongs to messengers-at-arms. The liability of these officers in Scotland is substantially on a par with the liability of the sheriff in England. In the inferior courts in Scotland the execution of writs belongs to sheriff-

officers, who are not mere servants of the sheriff but are themselves responsible public officers (*a*). The *rationale* of the liability of these officers is well considered in the case of *Brock* v. *Kemp* [Feb. 20, 1844, Court of Session, 6 D. 709], where it is in effect held that the officer warrants the due execution of the writ.

Notary public.

§ 29. In most European countries, except England, the office of a notary is considered a public function. I am not aware of any function of a notary exercised in England, and which is recognised by English Courts as a public function, except the protest of bills of exchange. A notary has, doubtless, even in England, other useful functions in connection with mercantile law [*Rex* v. *Scriveners' Company*, Chitty on Bills, 334]: but their object relates to the rules of evidence in foreign, not in English Courts. He is therefore in England to be viewed rather as a private person employed on account of professional skill than as a public officer. In Scotland he is considered a public officer, and has there most important functions connected with the evidencing of heritable rights.

(*a*) The Office of the sheriff, although originally identical in England and Scotland, is now very different. In Scotland his judicial functions have been developed, so as almost to overshadow the important ministerial functions which he still exercises. In England the importance of the office has altogether declined, and his most important function is now the execution of writs and precepts of the Courts of law.

§ 30. In Scotland the security of title to land in questions between purchasers for value depends on the accuracy of the Records, which are under the charge of certain public officers, whose duties are defined by statute, and who are by the statute declared to be liable to the parties prejudiced by the not due observing of the Act. The responsibility of these officers is illustrated by the case of *Davidson* v. *McKenzie* [Court of Session, Dec. 20, 1856, 19 D. 226]. The principle seems to be that the keepers of the Registers guarantee that the entries in their respective departments are made with exact accuracy. Keepers of Scotch Registers of title.

§ 31. In the case of *Pickering* v. *James*, L. R. 8 C. P. 489, a question arose upon the effect of the Ballot Act (35 & 36 Vict. c. 33), in regard to the liability of the presiding officer at an election for alleged breaches of the duties imposed on him by the Act, whereby the plaintiff alleged that he had lost his election. It was held on demurrer that the duties in question, as to the delivery and proper marking of the ballot papers, were *primâ facie* imposed on the presiding officer, and that the plaintiff's action would lie accordingly. The section (11) of this Act which imposes penalties, expressly imposes them in addition to any other liability. Presiding officer under Ballot Act.

§ 32. The liability of public officers of the class Ministers of Government

not legally responsible for inferior servants in their departments.

above considered, does not extend to those who are mere ministers or servants of the Government, so as to make them liable for the negligence of inferior servants. Thus it has been held that an action will not lie against the Postmaster-General for negligence of the inferior officials and servants in the Post-office [*Lane* v. *Cotton*, 1 Ld. Raym. 646]; and, doubtless, the same principle applies to every Government Department in this country. [*Reg.* v. *Treasury*, L. R. 7 Q. B. 387.]

Judges, &c.

§ 33. The irresponsibility of judges rests upon considerations of public utility. That of a barrister is commonly attributed to the circumstance that the fee is an *honorarium*, and cannot be recovered by legal process. [*Swinfen* v. *Lord Chelmsford*, 1 Fost. & Fin. 619; affd. 5 H. & N. 390.] This is of course no reason. For, as I have shewn in regard to *mandate* (of which the retainer of counsel is a species), it matters not that the skilled service is undertaken gratuitously. The fact is, that the privilege of a barrister is altogether anomalous, and is due to the peculiar history and traditions of the profession.

(ϵ) Bringing on land anything of a dangerous nature.

§ 34. (ϵ) Another class of cases where a duty is owed higher than the diligence correlating to ordinary negligence is the following :—"The person who for his own purposes brings on his land, and collects and keeps there anything likely to do

mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape, and can only excuse himself by shewing that the escape was owing to the default of the person damaged, or perhaps that the escape was the consequence of *vis major*, or the act of God." This principle was laid down in the judgment of the Exchequer Chamber, and approved by the House of Lords in the case of *Fletcher* v. *Rylands* (L. R. 1 Exch. 279, and L. R. 3 H. of L. 339). The facts were as follows:—The plaintiff was the lessee of mines under certain ground, adjoining land on which the defendant had with the owner's permission constructed a reservoir. The reservoir had been made by a contractor, and under the supervision of an engineer, both of whom were competent persons. Soon after the completion of the reservoir, and upon its being filled with water, the water burst into the shaft of an old mine, and by means of underground communications between this old mine and the plaintiff's workings, these workings became flooded and damaged. There was no personal negligence on the part of the defendants; but reasonable care had not been exercised on the part of the persons employed in making the reservoir so as to provide for its sufficiency to bear the pressure of the water. The shaft—ultimately the cause of the mischief—had been observed in making the reservoir, but at that

Fletcher v. *Rylands.*

time it was not known that it had any communication with the plaintiff's mine. It was held in the Exchequer Chamber, reversing the decision of the Court of Exchequer, that the plaintiff was responsible, and the judgment of the Exchequer Chamber was upheld in the House of Lords.

§ 35. The principle of *Fletcher* v. *Rylands* was applied by the ultimate Court of Appeal in the case of *Musgrave* v. *Smith*, a mining case in which a judgment giving damages to the plaintiff was affirmed by the House of Lords on the 27th of July, 1877; and in *Huroman* v. *N. E. Ry. Co.* [26 W. R. 489], a case decided on demurrer, where the company were alleged to have deposited close to the plaintiff's house an artificial accumulation of soil and clay, which acted like a sponge and made the plaintiff's house damp; and in a Scotch case, *Chalmers* v. *Dixon*, reported in the 4th Series of Court of Session Cases, vol. iii., p. 461, where the defenders had accumulated on their premises an enormous mass of ironstone refuse, which from some unexplained cause took fire, and damaged a neighbouring property.

The same principle was considered by the Court of Exchequer to apply in the case of *Smith* v. *Fletcher* [L. R. 7 Ex. 305], where the accumulation of water was the result of the defendants' operations by quarrying, and the occurrence of exceptional heavy rain. But a new trial was ordered

by the Exchequer Chamber, who thought that the defendant ought to have been allowed to lead evidence as to the precautions taken. [L. R. 9 Ex. 64.]

It is on a similar principle that the occupier of a house is liable for damage done to an adjoining house or premises from the escape of sewage owing to the defective state of the drains under the first house. This principle is given effect to in the case of *Humphreys* v. *Cousins* [2 C. P. D. 239], and is summed up in a passage there cited [p. 245] from a judgment of Blackburn, J., in the case of *Hodgkinson* v. *Ennor* [4 B. & S. p. 241], "I take the law to be as stated in *Tenant* v. *Goldwin*, that you must not injure the property of your neighbour, and consequently, if filth is created on any man's land, then, in the quaint language of the report in Salk. 361, 'he whose dirt it is must keep it that it may not trespass.'"

In *Nichols* v. *Marsland* [L. R. 10 Ex. 255] there was an artificial lake, and the damage occurred from the mere overflow after an exceptionally heavy fall of rain. The jury found that there was no negligence, and that the rainfall amounted to *vis major*. The case was distinguished from *Rylands* v. *Fletcher*, and the defendant excused, and the decision was affirmed by the Court of Appeal [2 Ex.D. 1]. This was merely an application of the general principle of excuse by *vis major* or the act of God already adverted to, and which is fully

considered in the case of the *River Wear Commissioners* before the ultimate Court of Appeal [26 W. R. 217].

Where an accumulation of water is for the benefit of both parties, or incidental to an artificial erection of which both parties are tenants, *e. g.* tenants of an upper and lower storey in the same house, the principle of *Fletcher* v. *Rylands* does not apply, and one of the tenants would be answerable to the other only for negligence in the ordinary sense of the term. [*Carstairs* v. *Taylor*, L. R. 6 Ex. 217; *Ross* v. *Fedden*, L. R. 7 Q. B. 661.]

In *Wilson* v. *Newberry*, a case on demurrer [L. R. 7 Q. B. 31], it was held that the mere allegation that the defendant was possessed of yew trees, the clippings of which he knew to be poisonous, and did not prevent the clippings of his yew trees being placed on land where the plaintiff's horses were poisoned by them, was not sufficient to sustain an action. The clippings were not things having themselves any tendency to escape, and might have been placed on the neighbour's land by a stranger; so that there is no analogy between the case and the class of cases of which *Fletcher* v. *Rylands* is the type.

§ 36. On the same principle with *Fletcher* v. *Rylands*, the *Festiniog Railway Company* were held liable to one *Jones*, whose haystack was burnt down —ignited by sparks from a locomotive engine used

by the company, who had no express statutory power to use such an engine. It was proved by the defendants that all reasonable precautions had been taken to prevent the emission of sparks. They were, nevertheless, held liable on the ground that the locomotive was a dangerous machine to be brought and used by the defendants upon their premises at their peril of the consequences in case of damage to others. [*Jones* v. *Festiniog Ry. Co.*, L. R. 3 Q. B. 733.] The case would have been different if the company had been authorized by statute to use the locomotive; and in that case they would have been merely bound to take all reasonable precautions, and, having done so, the statutory authority would have been their warrant, and any loss caused by the use of the locomotive would have been *damnum absque injuria*. [*Vaughan* v. *Taff Vale Ry. Co.*, 5 H. & N. 685; *Hammersmith Ry. Co.* v. *Brand*, L. R. 4 H. of L. 171; *Cracknell* v. *Mayor and Corporation of Thetford*, L. R. 4 C. P. 629; *Thompson* v. *Hill*, L. R. 5 C. P. 564; *City of Glasgow Union Ry. Co.* v. *Hunter*, L. R. 2 H. L. Ap. Sc. 78; *Dunn* v. *Birmingham Canal Co.*, L. R. 8 Q. B. 42.] The company is however bound not only to use all reasonable means which they possess at common law, but also to make reasonable use of all the powers which they possess by their enabling statute to do their work in such a manner as shall be effective, without damaging the

property of others. [*Geddis* v. *Proprietors of Bann Reservoir*, 3 App. Cas. 430.]

§ 37. The class of cases of which *Fletcher* v. *Rylands* is the type, are instances of the extreme degree of responsibility. But in all the cases I have hitherto commented on it is clear that something less than mere negligence, in the ordinary sense, will render the party liable; and, on the other hand, there is a duty towards the stranger of something more than ordinary care. This, the Roman lawyers would have expressed by saying "*præstat exactam diligentiam*;" or, in the language of the modern civilians, he is liable for *culpa levissima*—everything but *casus*. We express this by saying that the circumstance implies a duty to restrain the thing; the fact of its breaking out raises a presumption of neglect of duty; and nothing will override that presumption except proof of contributory negligence on the part of the defendant, or proof of some of those occurrences which are termed by English lawyers the "act of God." Whether even such inevitable catastrophe will exonerate in a case where aggravation of its injurious consequences was the natural result of the operations carried on by the defendant, may well be questioned. I am inclined to think that in such a case he would not be exonerated.

Dangerous and tame animal.

§ 38. The liability incurred by a person keeping

or harbouring a dangerous animal (*a*) is similar in principle to that in the cases of which *Fletcher* v. *Rylands* is the type. No question can well arise in the case of those animals which we are not accustomed to consider tame. But the domestic dog has occasioned many legal disputes; and the presumption by the common law of England is that he is tame, and therefore the owner is not held responsible, unless the dog in question is by disposition ferocious, and reasonable ground be shewn for presuming that this ferocious character is known to the owner. This is technically called proof of the "*scienter*," from the terms anciently used in pleading. But this presumption was carried to an absurd extent, when the wolfish nature of the creature was deemed so completely extinguished that it was against his nature to worry sheep and cattle. And it astonished the Scotch sheep-farmers when this doctrine was brought to their notice by the decision of a Scotch Appeal by Lords Brougham and Cranworth [*Fleming* v. *Orr*, 2 Macq. 14], who applied the Dogs.

(*a*) The liability for trespass of tame animals is similar in principle. Liability is unqualified for such damage caused by the trespass, as may reasonably be expected from the nature of the animal (*e.g.* the eatage of oxen or sheep), but not further extended without negligence (ordinary) or *scienter*. [*Cooke* v. *Waring*, 2 Hurlst. & C. 332 (scabby sheep); *Read* v. *Edwardes*, 17 C. B. (N.S.) 260 (dogs—damage to game).] The American rule as to damage from trespassing animals seems much more severe—Shearman, § 186.

rule to Scotland, so that, as Lord Cockburn observed, "every dog became entitled to at least one worry." The consequence was that an Act (26 & 27 Vict. c. 100) was soon afterwards passed (for Scotland), declaring it unnecessary in an action against the owner of the dog to prove a previous propensity to injure sheep or cattle (*a*). An Act to a similar purport was afterwards passed for England (28 & 29 Vict. c. 60).

It has been decided by the Queen's Bench that horses are, under the word "cattle," within the protection of this Act. [*Wright* v. *Pearson*, June 25, 1869.] A person is not guilty of "harbouring" a strange ferocious dog if he uses reasonable efforts to drive it off his premises. [*Smith* v. *Great Eastern Ry. Co.*, L. R. 2 C. P. 1.] Attempts to bite, if brought to the knowledge of the owner, are evidence of the dog's dangerous character. [*Worth* v. *Gilling*, L. R. 2 C. P. 1.] A dog having four years ago bitten a boy, and defendant's wife having notice, has been held evidence to go to a jury of the dog's dangerous character and defendant's *scienter*. [*Gladman* v. *Johnson*, 15 W. R. 313 C.P.] Knowledge of a servant appointed by the the master to keep a dog is imputable to the master. [*Baldwin* v. *Casella*, L. R. 7 Ex. 325.] It has been held in a Scotch case, that the defendant's

(*a*) As a late case of the application of this Act, see *M'Intyre* v. *Carmichael*, Court of Session, Feb. 18, 1870, 3rd series, vol. viii., p. 570.

servant having tied up a Spanish bloodhound in a place accessible to the public, and the defendant having said to some one, "You need not be afraid of the dog, if you call him by his name, he will not harm anybody," was evidence of knowledge of a ferocious disposition in the dog. [*Renwick* v. *Von Rothberg*, Court of Session, 4th series, vol. ii., p. 855.] The necessity of proof of *scienter* in the case of an animal not ordinarily dangerous, does not extend to a case of contract where there may be an implied warranty. In the case of *Smith* v. *Cook* [1 Q. B. D. 79], under a contract for agistment, the defendant (who was the agister) had put the plaintiff's horse to feed amongst his heifers. There was a bull feeding on the adjoining marshes which (as the defendant knew) had sometimes got in among the heifers, but there was no evidence that the defendant knew the bull to be of a ferocious disposition. One morning the horse was found dead, gored by a bull. The judge left it to the jury to say whether there was a want of reasonable care and the jury found there was. The Court refused to disturb the verdict.

Exception, where danger caused by acts done under express power given by statute for public purposes.

§ 39. In referring to the Festiniog Railway case (the case of damage by sparks from a locomotive), I observed that the question would have assumed a different aspect if the company had employed the locomotive engine under express statutory authority. [*Rex* v. *Pearse*, 4 B. & Ad. 30; *Vaughan*

v. *Taff Ry. Co.* 5 H. & N. 679.] The express statutory power alters the legal character of the act. Instead of being a use of property made by the owner at his peril, although not prohibited by law, it becomes a legitimate use for public purposes, and with public sanction and allowance; and in such a case affirmative evidence of negligence, beyond the mere fact of sparks being emitted from the engine, would be necessary to infer liability. [*Aldridge* v. *G. W. Ry. Co.*, 3 Man. & G. 523.] So a case which would otherwise have been similar to *Rylands* v. *Fletcher*, was distinguished on the ground of the authority given by Act of Parliament, for public purposes, to create the accumulation of water. [*Dunn* v. *Birmingham Canal Co.*, L. R. 7 Q. B. 244.]

Where a person under a statutory enactment is empowered to break up a road for a temporary purpose, it lies upon him to reinstate it [*Glover* v. *East London Waterworks Co.*, C. P., 16 W. R. 310]; but not to answer for the consequence of the subsequent natural subsidence of the soil. [*Hyams* v. *Webster*, L. R. 4 Q. B. 138 (Ex. Ch.).]

Level crossings on railways.

§ 40. The statutory authority by which a railway crosses a road at a level confers an immunity which is conditional upon the statutory precautions being complied with. If the road be a turnpike, statute labour, or other public carriage road, the Public General Acts relating to railways provide

that gates shall be used at such level crossings, under the charge of proper persons to open and shut them [5 & 6 Wm. IV., c. 50; 2 & 3 Vict. c. 45, s. 1; 5 & 6 Vict. c. 55, s. 9; 8 & 9 Vict. c. 20, s. 47], and the last statute enacts that, unless the Board of Trade by special order direct otherwise, the gates are to be kept constantly closed on both sides of the railway, except when horses, carriages, &c., have to cross. In such a crossing it has been held by the Court of Exchequer that the leaving open one of the gates was an intimation on the part of the company that the line was safe, and a jury was held justified in finding a verdict for the plaintiff (a foot passenger who had been knocked down by the Brighton express), on the ground of negligence on the part of the company [*Stapley* v. *L. B. & S. C. Ry.*, L. R. 1 Ex. 21]; and the principle has since been affirmed by the Exchequer Chamber and House of Lords, affirming a decision of the Queen's Bench [*Wanless* v. *N. E. Ry. Co.*, L. R. 6 Q. B. 481, and L. R. 7 H. L. Ap. 12]; and a railway company has been held liable in a case where a private road came out on one side, through a gate which also served for a level crossing by a public carriage-way, and where the gatekeeper, being asked whether the line was safe, said "Yes, come on." That was held an intimation by the company that the line was safe [*Lunt* v. *London & N. W. Ry. Co.*, L. R. 1 Q. B. 277.]

Where the railway company construct their line

across a highway under sanction of an Act of Parliament there is also an implied duty to keep the line in a proper state for the passage of carriages across the rails. [*Oliver* v. *N. E. Ry. Co.*, L. R. 9 Q. B. 409.]

By section 61 of the last-mentioned statute (8 & 9 Vict. c. 20) it is enacted that when a railway crosses a public highway other than a public carriage-way on the level, the company are, if the way is a bridle way, to erect and maintain gates, and if a footway, gates or stiles. When this duty was neglected, and a child of four and a half years old who had been sent on an errand was found, shortly afterwards, lying on the footpath with its foot cut off, this was held to be evidence sufficient to fix the liability on the company, although it was suggested that the child might have strayed down the line from another point. [*Williams* v. *G. W. Ry. Co.*, L. R. 9 Ex. 157.]

There is however no duty imposed on the company by any general Act to place a watchman at a level crossing over a public footway, nor at a level crossing over a private carriage-way. Nor does the Act 5 & 6 W. IV., c. 50, apply to a private railway which crosses a road by permission of the road trustees, and is not forced on them by statutory authority. [*Matson* v. *Baird*, H. L. 5 July, 1878.] And where no duty is expressly imposed by the legislature there is none by the common law, and the question will be simply this: whether, having

regard to the circumstances, the company has been, through their directors or servants, guilty of negligence. The omission to place a watchman is not evidence of negligence if the view of the line at the spot is clear. [*Stubley* v. *L. & N. W. Ry. Co*, L. R. 1 Ex. 13; *Walker* v. *Midland Ry. Co.*, 14 L. T. (N.S.) 796; *Cliff* v. *Midland Ry. Co.*, L. R. 5 Q. B. 258.]

§ 41. It has been said by a great authority that the mere failure to perform a self-imposed precaution will not constitute actionable negligence (per Willes J., in *Skelton* v. *L. & N. W. Ry.*, L. R. 2 C. P. 636). And it is no evidence of actionable negligence to shew that the company having formerly been used to employ a gatekeeper, had for years before the accident in question discontinued such practice; nor that, having obtained powers to divert the road so as to cross the railway by means of a bridge, they had not carried those powers into execution. [*Cliff* v. *Midland Ry. Co.*, L. R. 5 Q. B. 258.] The neglect however to use a precaution imposed by statute is evidence of negligence, especially if it appears that the precaution is one generally adopted. So it has been held in case of failure to provide the passenger communication required by 31 & 32 Vict. c. 119, s. 32. [*Blamires* v. *Lancashire & Yorkshire Ry. Co.*, L. R. 8 Ex. 283; and see observations on *Couch* v. *Steel*, p. 40, *supra*.]

§ 42. Here I must allude to a case whose authority has been much canvassed, the case of *Bilbee* v. *L. & Brighton Ry. Co.* [18 C. B. (N.S.) 484.] The railway crossed on a level a public carriage and footway at a spot which was particularly dangerous owing to a curve in the line and bridge obstructing the view, so that trains coming in one direction were not seen until very close. There were gates across the carriage-way which were kept locked; but the footway was protected merely by a swing-gate on either side, no person being there to caution people passing. The plaintiff while using the footway was knocked down by a passing train and damaged. The judge at the trial left it to the jury to say whether or not the company had been guilty of negligence. The jury gave their verdict in favour of the plaintiff, and it was held by the Court that this verdict was warranted by the evidence. It is difficult to harmonise Bilbee's case with the other authorities, but it is possible to do so if we suppose the ground of the decision to have been that the company, having chosen to obstruct the view from the crossing by making a bridge close by, are bound to use some extra precaution for the safety of the public (see observations in *Cliff's Case*, L. R. 5 Q. B. pp. 263, 264). In agreement with this view it has been held that, on approaching a level crossing at a smoky place on a dark night it would have been a reasonable precaution to whistle, and that the engine-driver's

omission to do so was evidence of negligence against the company. [*James* v. *G. W. Ry. Co.*, L. R. 2 C. P. 634, note; *Grant* v. *Caled. Ry. Co.*, Court of Session, 3rd series, vol. ix. p. 258.] But after the decision of the Exchequer Chamber in *Ellis* v. *G. W. Ry. Co.* [L. R. 9 C. P. 551], the omission to whistle cannot be relied on as sufficient, where there is nothing to obstruct the view. It has been held evidence of negligence in an engine driver on an engine standing at a level crossing over a road where there was much traffic, unnecessarily to blow off steam from the mudcocks, so as to frighten horses waiting outside the gates. [*Manchester, &c., Ry. Co.* v. *Fullerton*, 14 C. B. (N.S.) 54.]

(ζ) Responsibility of occupier to persons coming on the land by invitation.

§ 43. (ζ) The same responsibility in regard to the safety of his premises which a person owes to the public being in places where they have lawful right, he owes to those who, by his invitation, come upon his own premises in pursuit of a matter of common interest to both. I here exclude the case where the relation between the parties is one of contract, and the damage arises from a risk which the sufferer may be presumed to have contemplated as a risk incident to the contract (*a*).

(*a*) *E. g. Seymour* v. *Maddox*, 16 Q. B. 326. (Supernumerary employed at theatre, where there was an unfenced hole in the floor between the dressing-room and stage, alleged to have been insufficiently lighted.) A similar

Being on the premises by invitation of the occupier is distinguished from being there by his mere licence, in which case the occupier is presumed to undertake no warranty in regard to the safety of the premises. But even where there is a bare licence the owner or occupier giving the licence is liable for anything in the nature of a *trap* upon the premises known to him, and of which he fails to warn the person who obtained his permission to go there. [*Southcote* v. *Stanley*, 1 H. & N. 247; *White* v. *France*, 2 C. P. D. 308.] It is not, perhaps, easy in all cases to distinguish the circumstances which imply an *invitation* from those which imply a mere licence; and the only guide on this point will be a close study of the decided cases. Of those in which *invitation* has been inferred, I shall instance *Nicholson* v. *Lancashire & Yorkshire Ry. Co.* [34 L. J. Ex. 84]; *Indermaur* v. *Dames* [L. R. 1 C. P. 274, and 2 C. P. 311]; *Smith* v. *London & St. Katharine Docks Co.* [L. R. 3 C. P. 326]; *Holmes* v. *N. E. Ry. Co.* [L. R. 4 Ex. 254; 6 Ex. 123]; *Chapman* v. *Rothwell* [El. Bl. & El. 168 (*a*)]; *Smith* v. *Steele* (pilot injured by negli-

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case is that of *Brookes* v. *Courtenay*, Q. B., 20 L. T. (N.S.) 440.

(*a*) This was a case on demurrer. Declaration stated that deceased fell through a trap-door negligently left open, &c., in a passage. In the case of *Paddock* v. *N. E. Ry. Co.* [18 L. T. (N.S.) 60], a person coming on business to a railway goods depôt, and following in the dark as nearly as possible the directions of a

gence of defendant's crew) [L. R. 10 Q. B. 125]; *Wright* v. *L. & N. W. Ry. Co.* [L. R. 10 Q. B. 298]; *Watkins* v. *G. W. Ry. Co.* [C. P. Div., 25 W. R. 905]; *Caledonian Ry. Co.* v. *Greenock Sailing Co.* [Court of Session, 4th series, vol. ii. p.671]; and of those where a mere licence has been inferred—*Bolch* v. *Smith* [7 H. & N. 736, 31 L. J. Ex. 201]; *Sullivan* v. *Waters* [14 Irish C. L. R. 460]; *Gautret* v. *Egerton* [L. R. 2 C. P. 371.]

§ 44. The principle appears to be that *invitation* is inferred where there is a common interest or mutual advantage, while a licence is inferred where

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servant of the company, fell into a coal receiver, a deep place occupying the width between the rails, where coal-waggons were standing. The Exchequer Chamber held that there was a case for a jury. But in a very similar case to the last, where the plaintiff in the dark fell down an ordinary staircase, he was nonsuited. [*Wilkinson* v. *Fairrie*, 1 Hurlst. & C. 633.] In the case of *Axford* v. *Prior* [C. P., 14 W. R. 611], a person coming to see a friend at a public-house fell through a hole in the parlour which was being repaired. There seems to have been contradictory evidence whether he was warned or not. He was held, after verdict, entitled to damages. In *White* v. *France* [2 C. P. D. 308], plaintiff, a licensed waterman, going to defendant's wharf to make a complaint as to the navigation of his barge, and also to ask for employment, was damaged by the fall of a bale of goods negligently left by defendant's servants in a dangerous position. He was held entitled to maintain an action. In all these cases, except Fairrie's, there seem to have been present both the elements of invitation and of something like a trap.

the object is the mere pleasure or benefit of the person using it. A case where the common interest is not at first obvious, but yet was held sufficient to infer invitation, was that of *Smith* v. *London & St. Katharine Dock Co.* [L. R. 3 C. P. 326] where the damage occurred by reason of a gangway, provided by the company for access to a ship lying in the dock, being left in an insecure condition. The sufferer had come on board at the invitation of one of the ship's officers. The ground of decision was that the providing of access to the ships for the crews and all who had business on board was within the undertaking of the company, for which they received consideration in the dues authorized to be taken from the shipowners. *Invitation*, therefore, in the technical sense of the word as employed in this class of cases, differs from invitation in the ordinary sense—implying the relation between host and guest. In the case of host and guest, it would be thought hard that the hospitality of the former should expose him to the responsibilities implied by business relations. The guest must take the premises as he finds them, with any risk owing to their disrepair; although the host is bound to warn his guest of any concealed danger upon the premises known to himself. [*Southcote* v. *Stanley*, 1 H. & N. 247] Where a railway company, having a station unprovided with a foot bridge, invite persons using the station to cross the rails, it would seem that very slight

additional circumstances shewing want of precaution on the part of the company, will warrant a jury in a verdict against the company for damage to an intending passenger crossing the railway. [*Girdwood* v. *N. B. Ry. Co.*, Court of Session, 4th series, vol. iv. p. 115.]

§ 45. (η) I shall now consider the case of common carriers, from whom, by the law of England, a peculiar kind of responsibility is exacted. And the responsibility of common carriers falls to be considered here, because their responsibility is greater than that of those from whom merely ordinary care is demanded. But their case is exceptional. For the contract being to carry for hire, the benefit of both parties is contemplated. A common carrier is one who undertakes to carry for hire, from one certain place to another, such goods as shall be delivered to him for carriage by any person. The carrier is answerable by the custom, as it is said, of the realm, for every loss or injury to the goods so delivered, unless occasioned by the act of God, or the Queen's enemies; and he is, moreover, bound to receive and convey any goods of every applicant who is ready to pay the price of carriage provided there be room for them. [Smith, L. Ca. vol. i. p. 206; Stephen's Comm. vol. ii. p. 86.] When a person has received goods in the capacity of a common carrier, he is not discharged from liability in that capacity until he

(η) Responsibility of common carriers exceptionally strict.

has either delivered the goods to the consignee or his assignees, or until a reasonable time has elapsed after the consignee has notice of the arrival of the goods, for him to come and receive them. [*Bourne* v. *Gatliff*, Ex. Ch., Dec. 9, 1841 ; 3 Scott, N. R. 1 ; 3 M. & G. 643; H. of L., June 7, 10, 1844; 8 Scott, N. R. 604; 11 Cl. & Fin. 45.] In the case of carriage of goods by sea, the time and mode in which the shipowner may land the goods so as to discharge himself from liability is now, in the absence of express stipulation, defined by statute. [25 & 26 Vict. c. 63, § 67 ; see *Wilson* v. *London, Italian, &c., Co.*, L. R. 1 C. P. 61.]

§ 46. A common carrier may, however, defend himself by shewing that the goods have perished by some internal defect without fault on his part. And if, from the nature of the goods consigned, they are liable to peculiar risks, and the carrier takes all reasonable care and uses all proper precautions to prevent injuries, he is excused if they are destroyed in consequence of such risks. [Jones on Bailments, 4th ed., App. xxi., cited in *Blower* v. *G. W. Ry. Co.*, L. R. 7 C. P. 660.] And, accordingly, although it has been held that a railway company undertaking to convey animals, is a common carrier. [*McManus* v. *Lanc. & York. Ry. Co.*, 4 H. & N. 327; 28 L. J. (Ex.) 358 (*a*) ; *Paxton*

(*a*) In the case of *Richardson* v. *N. E. Ry. Co.* [L. R. 7 C. P. 75], it was expressly found in the case stated by

v. *N. B. Ry. Co.*, Court of Session, 3rd series, vol. ix. p. 50], yet if damage occurs through the animals' "proper vice" the carrier is not liable. [*Blower* v. *G. W. Ry. Co.*, L. R. 7 C. P. 655; *Kendall* v. *L. & S. W. Ry. Co.*, L. R. 7 Ex. 373 (*a*)]. And if all reasonable precautions are taken, a common carrier by sea will not be liable for damage to an animal caused partly by severe weather, and partly by the animal having become restive in consequence. [*Nugent* v. *Smith*, C. A., May 29, 1876; 1 C. P. D. 423; 25 W. R. 117.] The duty of a carrier in regard to perishable goods is illustrated by the Scotch case of *McDonald* v. *Highland Ry. Co.* [Court of Session, 3rd series, vol. xi. p. 614, where the company were held liable for not forwarding in preference to other goods as it was their custom to do in goods of this class.]

§ 47. It must be observed that where a common carrier between two places, *e.g.* Liverpool and London, undertakes at the last place to deliver them at some particular address, there are two parts of the contract which must be distinguished. The first part is undertaken in the capacity of a

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the County Court that the company were not common carriers of dogs, but it does not appear how this proposition could be supported in point of law.

(*a*) Compare *Gill* v. *Manchester, &c., Ry Co.* [L. R. 8 Q. B. 186], where actual negligence on the part of the company's servant was inferred.

common carrier. But I think the last part cannot be undertaken, strictly speaking, in that capacity, although by reason of the public nature of the employment, a liability similar to that of a common carrier is incurred. According to the strict definition, however, a person cannot be a *common carrier* between King's Cross (for instance) and the various addresses in London to which parcels may be consigned. But this makes little, if any, practical difference. For since the bailee cannot discharge his liability as common carrier except by averring and proving loss by the act of God or the Queen's enemies, or default on the part of the owner to take delivery within a reasonable time after notice that the goods have arrived at the terminus, he cannot by way of defence avail himself of any distinction between the special undertaking and the undertaking of a common carrier. If the bailment in its commencement is that of a common carrier, as that of a railway company generally is [*Pickford* v. *Grand Junction Ry. Co.*, 10 M. & W. 399; *Parker* v. *G. W. Ry. Co.*, 7 Scott, N. R. 835], the practical consequence of the goods being specially addressed appears to be merely this: that if tendered for delivery at a reasonable hour at the address given, his liability as a common carrier will cease, and he is thenceforth only bound to use reasonable care. In case of refusal by the consignee to receive the goods at the stated address, the usual course of business is to give notice to the

consignor that the goods have been rejected, and to wait his instructions. The goods will now be held to the order of the consignor [*Metzenburg* v. *Highland Ry. Co.*, 7 McPh. 919] and will be at his risk, the carrier being, as an involuntary bailee, responsible for ordinary negligence only. [*Hudson* v. *Baxendale*, 2 H. & N. 575; *G. W. Railway* v. *Crouch*, 2 H. & N. 491, 3 H. & N. 183; *Heugh* v. *London and North-Western Ry. Co.*, L. R. 5 Exch. 51.] When the goods are not forthcoming, the measure of damage recoverable by law is the value of the goods at the place and at the time at which they ought to have been delivered. [*O'Hanlan* v. *G. W. Ry. Co.*, 13 W. R. 741.] In *Scaife* v. *Farrant* [L. R. 10 Ex. 358], the defendant was a person who gave himself out generally as undertaking the business of removing furniture, and who agreed to remove the plaintiff's furniture on terms which expressed the defendants as "undertaking risk of breakages (if any) not exceeding £5 on any one article." The Court of Exchequer Chamber, affirming the judgment of the Court of Exchequer, decided that, whether the general nature of the defendant's business was that of a common carrier, or implied the liabilities of a common carrier, or not, he was by the special contract exempted from the liability of a common carrier, and was only liable for loss by breakage or by negligence, and that he was not liable by fire which happened on a railway journey without his fault.

Railway Companies making joint traffic arrangements.

§ 48. When two railway companies are connected in business together, so that one of them (A) receives goods to be conveyed over the line of the other (B), there is only one contract. The liability of company A is just the same as if they had been owners of the whole railway, and does not end until there has been delivery in the ordinary and usual way. [*Muschamp* v. *Lancaster and Preston Ry. Co.*, 8 M. & W. 421; cited in *Shepherd* v. *Bristol and Exeter Ry. Co.*, L. R. 3 Ex. 195; and this and other cases cited in Smith's L. Ca. vol. i. p. 221.] Company A., if sued, have of course their action against company B. upon the contract (express or implied) between the two companies. But they cannot as part of the damages for breach of such contract, recover costs incurred by them in an action by the owner of the goods, such costs not being considered a proximate consequence of the breach of contract between the two companies. [*Baxendale* v. *L. C. & D. Ry. Co.* (Ex. Ch.) L. R. 10 Ex. 35, overruling (in the opinion of the majority) the case of *Mors le Blanche* v. *Wilson*, L. R. 8 C. P. 227.] Where company A. not only received the goods but sent on their own guard with their train carrying the goods over the line of company B., the only interest of company B. being a remuneration by mileage proportion of the rate allowed in account between the two companies, it was held by the House of Lords that the contract was with company A. alone, and the

owner of the goods had no privity of contract with company B. by which he could sue them. [*Bristol & Exeter Ry. Co.* v. *Collins*, 7 H. of L. Ca. p. 194.] But it has been held by the Queen's Bench, that the owner of the goods may, by proving a contract between two companies for an interchange of traffic and division of whole proceeds, shew that the receiving company were agents for the forwarding company, and so establish a contract on which he may sue the latter. [*Gill* v. *Manchester Ry. Co.*, L. R. 8 Q. B. 186.] The question whether the consignor or consignee is the right person to sue the carrier in cases of loss, will be solved by considering upon whom the loss would fall in case of its not being recovered from the carrier. Thus in the case of goods shipped or sent on account and at the risk of the consignee, the consignee is the person to sue; in which case the consignor would be considered the consignee's agent to retain the carrier. Otherwise, where the goods are sent merely for approval, or where the consignee is really the agent of the consignor. [Smith's L. Ca. vol. i. p. 219—20, and cases there cited.]

§ 49. It has been held in some American Courts that telegraph companies are common carriers of messages, a doctrine not without some practical convenience. In England it has been decided that the receiver of the message has no privity of contract with the company transmitting it. [*Play-*

ford v. *U. K. Tel. Co.*, L. R. 4 Q. B. 706; *Dickson* v. *Reuter's Tel. Co.*, L. R. 2 C. P. D. 62.] He cannot of course sue the sender of the message, who has no control over the machinery of the telegraph office (*a*), so that he is practically without redress. The business of inland telegraphy being now in the hands of a Government department, there is, for another reason explained, § 32, p. 46, *supra*, no legal redress against mistakes.

Carriers Act.

§ 50. By the Act 11 Geo. IV. & 1 W. IV. c. 68, common carriers by land for hire are not liable for loss of articles of certain specified descriptions where the value of such articles in any package exceeds £10, unless their value is declared and an increased charge paid or undertaken to be paid. There is an exception of loss by the felonious act of the carrier or his servants, and to prove the felonious act it is not necessary to bring such evidence as would convict any particular servant. [*Vaughton* v. *L. & N. W. Ry. Co.*, L. R. 9 C. P. 93; *Gogarty* v. *Great Southern & Western Ry. Co.*, 8 Ir. Rep. C. L. 344.] To require evidence of this nature in the case of a railway company would involve the injustice of

(*a*) In *Henkel* v. *Pape* [L. R. 6 Ex. 8], the reason given is that "the Post-office authorities are only agents to transmit messages in the terms in which the senders deliver them." This is only a pedantic way of saying that the sender of a message cannot be responsible for a mistake of the telegraph clerk.

obliging the plaintiff to call the company's servants as his witnesses, whereas it seems reasonable to require the company by means of their servants to explain the circumstances, if circumstances are proved which unexplained lead to the inference that the theft was committed by the company's servants. But the mere circumstance that the goods were taken from a truck on a siding to which the public had easy access, although the servants of the company had greater facilities than others for committing the theft, is not such *primâ facie* evidence against the company as to throw upon them any burden of disproof by calling the servants as witnesses, or otherwise. [*McQueen* v. *G. W. Ry. Co.*, Court of Session, 4th series, vol. ii., p. 433.] Whether an article is a "picture" or other article within the specified description in the Act, which is a description of a popular character, is properly left as a question of fact to a jury. [*Woodward* v. *L. & N. W. Ry. Co.*, 3 Ex. D. 121; 26 W. R. 354.]

Railway and Canal Traffic Act.

§ 51. The practical monopoly enjoyed by railway companies in the carrying trade enabled them easily to evade the law relating to common carriers, by making special contracts with their customers through public notices stuck up in their offices, notices on the invoices, &c., and otherwise. [*Austin* v. *Manchester, &c., Ry. Co.*, 10 C. B. 454; Smith, L. Ca. vol. i. p. 211.] But this practice is

now controlled by the Railway and Canal Traffic Act (17 & 18 Vict. c. 31, s. 7, extended by 26 & 27 Vict. c. 92, s. 31), enacting, in effect, that no special contract as to carrying goods by companies of the specified class shall be binding on the other party unless signed by him or by the person delivering the goods into their hands, nor unless the stipulations of such contract limiting the liability be reasonable. The word "reasonable," as usually happens when this word is employed in a statute, has been a fertile mine of litigation. On this point I refer to Smith's Leading Cases, vol. i. p. 206–219, and I here confine myself to citing a few of the more recent cases. In a contract for carriage of meat, this condition has been held reasonable: "The company will not be responsible for any damage to any meat on the ground of loss of market, provided the same be delivered within a reasonable time after the arrival thereof at the station from whence delivery is to be made." [*Lord* v. *Midland Ry. Co.*, L. R. 2 C. P. 339; *Finlay* v. *N. B. Ry. Co.*, Court of Session, 3rd series, vol. viii., p. 959.] In a contract for the conveyance of cattle, a condition stipulating that "the owner undertakes all risks of loading, unloading, and carriage, whether arising from the negligence or default of the company or their servants, or from default or imperfection in the station platform or other place of loading or unloading, or of the carriage in which the cattle may be loaded or

conveyed, or from any other cause whatever," has been held unreasonable, notwithstanding an offer on the part of the company to grant free passes to persons having the care of live stock, as an inducement to owners to send proper persons to take care of them. And consequently the company were held liable for damage, having unloaded the cattle trucks at a place where, for want of the line being properly fenced, they strayed on the line and some of them were killed. [*Rooth* v. *N. E. Ry. Co.*, L. R. 2 Ex. 173; see also *Doolan* v. *Midland Ry. Co.*, H. of L., July, 1877, 2 Ap. Ca. 792, 26 W. R. 882.] The condition, however, that a person travelling with a free pass in charge of cattle "shall travel at his own risk," is good, and such a stipulation has been held to comprise all the incidents of the journey, including his getting off the premises after leaving the train. [*McCawley* v. *The Furness Ry. Co.*, L. R. 8 Q. B. 57; *Gallin* v. *L. & N. W. Ry. Co.*, L. R. 10 Q. B. 212.] In *Peck* v. *N. Staffordshire Ry. Co.* (in the House of Lords, July 1863, 10 H. L. C. 473), a condition that the company should not be responsible for injury to the goods (marbles), unless they were declared and insured at the rate of 10 per cent. on the declared value, was decided to be unreasonable. But in the case of *Lewis* v. *G. W. Ry. Co.*, decided by the Court of Appeal for the Queen's Bench (3 Q. B. D. 195, 26 W. R. 255), where the contract signed by the sender was,

"Please receive and forward, &c. . . . . Owner's risk;" and where it was proved that the words "owner's risk" referred to a course of dealing well known to both parties, by which goods could be sent at alternative rates, the lower rate being in consideration of relieving the company from all liability except wilful misconduct of their servants, it was held that under the circumstances the words "owner's risk" were to be construed as embodying the terms so understood, and that the terms were not *unreasonable*. But the words "at owner's risk," where not proved to refer to a particular course of dealing, have been construed as only exempting the company from the ordinary risks incurred by goods going along the railway, and as not covering damage from delay or otherwise by the negligence of the company. [*D'Arc* v. *London & N. W. Ry. Co.*, L. R. 9 C. P. 325; *Mitchell* v. *L. & Y. Ry. Co.*, L. R. 10 Q. B. 256.] A contract to carry cattle at a lower rate than that authorized by statute, on condition that the company are only liable for damage caused by negligence on the part of the company or their servants, has been held reasonable, and to have the effect of throwing on the plaintiff the burden of proving negligence. [*Harris* v. *Midland Ry. Co.*, 25 W. R. 63.] It has been held that the Railway and Canal Traffic Act does not apply to a special contract by which a company exempts itself from liability or loss on a railway not belonging to or worked by them, and

therefore that such a condition indorsed on the ticket of a passenger, although not signed by him, was a protection to the company against liability for loss of the passenger's luggage occurring on lines beyond the company's control. [*Turner* v. *S. E. Ry. Co.*, 17 W. R. 1096; *Zunz* v. *S. E. Ry. Co.*, L. R. 4 Q. B. 539.]

Master of general ship.

§ 52. The master or owner of a general ship is *primâ facie* liable as a common carrier, but his responsibility may be either enlarged or qualified by the terms of the bill of lading, if there be one. [*Lancroni* v. *Drury*, 8 Exch. 173.] But the special contract will not, unless the terms are express, exempt from liability for negligence (in the ordinary sense), although it will shift the onus of proof of negligence. [*Brass* v. *Maitland*, 6 E. & B. 470; *Ohrloff* v. *Briscall*, *The Hélène*, L. R. 1 P. C. Ap. 231; *Leuw* v. *Dudgeon*, 16 W. R. 80; *Grill* v. *Iron Screw Collier Co.*, L. R. 1 C. P. 600; *Martin* v. *G. I. Peninsular Ry. Co.*, L. R. 3 Ex. 9; *Czech* v. *Gen. St. Nav. Co.*, L. R. 3 C. P. 14.] Warranty of seaworthiness of the vessel is, in the absence of express exception in the bill of lading or policy [*The Miranda*, L. R. 3 Adm. 561], an implied term in a contract for carriage of goods by sea, as well as in every voyage policy for insurance of the vessel. [*Quebec Marine Co.* v. *Comml. Bank of Canada*, L. R. 3 P. C. Ap. 234; *Kopitoff* v. *Wilson*, 1 Q. B. D. 377; 24 W. R. 706; *Steel* v.

State Line Steamship Co., 3 Ap. Ca. 72.] The owners and master of a ship acting as common carriers are from the nature of their liability, as above explained, sometimes liable for the negligence of those over whose operations they have no control whatever. This I have pointed out as occurring in other cases where the law demands more than ordinary care. Consequently, although the operation of stowage is usually carried on by a stevedore, who is an independent contractor [*Murray* v. *Currie*, 19 W. R. 104], yet the owners are as common carriers liable for his negligence. Where there is a charterparty the question who are the responsible owners depends on whether the terms of the charterparty contain a demise of the ship itself. [*Sandeman* v. *Scurr*, L. R. 2 Q. B. 86.] The register is *primâ facie* evidence of ownership. [*Hibbs* v. *Ross*, L. R. 1 Q. B. 534.]

Shipowners, whether custom similar to that in regard to common carriers applies to them.

§ 53. The liability of shipowners by analogy to common carriers has been held to be not confined to the case where the ship is put up as a general ship, but to extend to other cases where there is a public employment of the ship to carry goods. In the *Liver Alkali Company* v. *Johnson* [L. R. 7 Ex. 267, & 9 Ex. 338], a barge owner made it his business to send out barges or "flats" under the care of his own servants, to carry cargoes to and from different places in the Mersey as required by the customer. He carried for any one who chose

to employ him, but always for one person at a time. Here there were neither the fixed termini which belong to the usual definition of the trade of a common carrier, nor the offer to carry for all persons in common, which is characteristic both of the employment of a common carrier and of the owner of a ship put up as a general ship. The liability of a common carrier was however held to attach. The Court of Exchequer and the majority of the judges of the Exchequer Chamber held the employment to be that of a common carrier. Brett, J., in his judgment delivered in the Exchequer Chamber, distinguished the employment of shipowners from that of common carriers, but he gave a very wide description of the custom under which shipowners are liable. "I think," he says [L. R. 9 Ex. 344], "that by a recognised custom of England—a custom adopted and recognised by the Courts in precisely the same manner as the custom of England with regard to common carriers has been adopted and recognised by them—every shipowner who carries goods for hire in his ship, whether by inland navigation, or coastways, or abroad, undertakes to carry them at his own absolute risk, the act of God or of the Queen's enemies alone excepted, unless by agreement between himself and a particular freighter, on a particular voyage, or on particular voyages, he limits his liability by further exceptions." This description of the custom comes with great

authority from a judge of so much experience in maritime cases as Mr. Justice Brett. It is consistent with the true source of the liability of common carriers as described in the ensuing paragraph, and it is fortified by the practice of shipowners always inserting in charterparties a careful enumeration of exceptions. It must be observed, however, that the description of the principle as here given was strongly dissented from by Cockburn, C.J., in his judgment given in the Court of Appeal in *Nugent* v. *Smith* [1 C. P. D. 423, 433, 434; 25 W. R. 117, 119].

Source of the so-called custom of the realm relating to carriers.

§ 54. The peculiar responsibility of the common carrier is usually said to arise out of the custom of the realm. This is a prevalent mode of expression to account for a legal principle of which lawyers do not know or care to acknowledge the real source. And the real source is (like that of more of our common law than its exponents formerly cared or ventured to confess) to be found in the Roman law. The principles of the Roman law upon the subject were based upon the well-known passage in the edict of the Prætor; "Nautæ, Caupones, Stabularii, quod cujusque salvum fore receperint, nisi restituent, in eos judicium dabo." [D. IV. 9.] And the public utility of the principle led to its extension to carriage by land as well as by sea, and its adoption into the law-merchant of the civilised world.

§ 55. The liability of an innkeeper for the goods of his guest by common law is similar both in its history and effect to the liability of a common carrier. The innkeeper is *primâ facie* answerable for the goods of the guest in his inn, but the guest may by his own conduct discharge him from responsibility. [*Burgess* v. *Clements*, 4 M. & S. 306, and other authorities cited under *Calye's Case*, Smith's Leading Cases, vol. i.] A recent case on the subject, which illustrates the principle of the liability, and where most of the cases bearing on the question are cited, is *Oppenheim* v. *White Lion Hotel Company* [L. R. 6 C. P. 515], where the plaintiff sued the owners of the inn for the loss of a bag containing £22 6*s*. in money. A London manufacturer who had occasional business at Bristol, and when there resorted to the White Lion Inn, arrived on the occasion in question about eleven in the evening. When in the commercial room he did not exhibit his money, but about five minutes before he went to his bedroom he took out the bag from his pocket and took sixpence from it to pay for some postage stamps. The door of his bedroom had a bolt as well as a lock and key on the inside. When the plaintiff went to bed the bag was left in his trousers pocket on a chair by the bed on the further side from the door. In the morning the bag was missing from the pocket. The plaintiff, in giving his evidence, admitted that he was generally in

Innkeepers.

the habit of locking his bedroom doors when sleeping at an inn, but he had not done so on the occasion in question. The judge in summing up the case to the jury, after explaining the law as to the liability of innkeepers for the safe custody of the property of their guests, told them that the question for their consideration was, whether the loss would or would not have happened if the plaintiff had used the ordinary care that a prudent man might reasonably be expected to have taken under the circumstances; adding that, in the former case they would find for the plaintiff, in the latter for the defendants. The jury found for the defendants. The Court held that the judge's direction was right, and that there was evidence to justify the verdict.

The liability of innkeepers is restricted by statute (26 & 27 Vict. c. 41) which enacts that "no innkeeper shall, after the passing of this Act, be liable to make good to any guest of such innkeeper any loss of or injury to goods or property brought to his inn, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than the sum of £30, except in the following cases; (that is to say,)

"(1.) Where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper or any servant in his employ:

"(2.) Where such goods or property shall have been deposited expressly for safe custody with such innkeeper:

"Provided always, that in the case of such deposit it shall be lawful for such innkeeper, if he think fit, to require, as a condition of his liability, that such goods or property shall be deposited in a box or other receptacle, fastened and sealed by the person depositing the same." The statute further enacts that if the innkeeper shall refuse or make default to receive his guests' goods for safe custody, or if through his default the guest is unable to deposit the goods, he shall lose the benefit of the Act.

(θ) Contract to carry passengers by fast conveyance for hire.

§ 56. (θ) The contract to carry passengers does not come within the function of a common carrier; and in the case of such a contract it has been held by great authority that no more than ordinary care as to the sufficiency of the carriage is implied; and that it is enough if the carriage be sufficient so far as the eye can discover. [Sir J. Mansfield in *Christie* v. *Griggs*, 2 Camp. 79, Ill. 145, Ad. 564.] But through appreciation of the peculiar danger introduced by travelling in stage-coaches, judges and juries have combined gradually to tighten the responsibility and to exact a higher degree of care than that corresponding to ordinary negligence. [Bell's Commentaries on the Law of Scotland, 6th ed. p. 153.] And this tendency has

received a new impetus through the introduction of railways with their more occult causes of risk and the practical monopoly of conveyance which they enjoy. The responsibility for a latent defect in the construction of a railway carriage resulting in a smash was much considered in the recent case of *Redhead* v. *The Midland Ry. Co.* [L. R. 2 Q. B. 412. In the Exch. Ch., L. R. 4 Q. B. 379]. The casualty occurred through the breaking of the tyre of a wheel owing to a flaw in the welding caused by an air bubble. There was evidence to the effect that such a defect would sometimes occur in spite of the greatest care on the part of the manufacturer; that it could not be discovered in the process of manufacture nor afterwards, either by the eye or by the ringing of the metal. Lush, J., who tried the case at *nisi prius*, left the case to the jury, telling them that if the accident was occasioned by any neglect on the part of the defendants, they should find for the plaintiff, but that if it was occasioned by a latent defect in the wheel, such that no care or skill on the part of the defendants could detect it—the verdict should be for the defendants. The jury gave their verdict for the defendants. The direction given by the judge was held to be right, both by the Court of Queen's Bench and by the Court of Exchequer Chamber. It was agreed by all the judges that the carrier of passengers was not (like a common carrier of goods) an *insurer*; but Blackburn, J., was of opinion that,

Redhead v. *Midland Ry. Co.*

although not insurers, the railway company were bound, at their peril, to supply a carriage reasonably fit for the journey; and that it was not enough that they made every reasonable effort to secure that result, if the carriage was in fact not sufficient. In other words, he deemed the obligation of the company to the passengers equivalent to a warranty of the reasonably sufficiency of the vehicle he supplies. He consequently thought the defendants liable for the failure to supply a vehicle in fact reasonably sufficient, although such failure was occasioned by a latent defect. This view he supported by the analogy of the law which obliges a shipowner to furnish a ship good and capable for the voyage.

§ 57. When this case of *Redhead* v. *Midland Ry. Co.* came into the Court of Exchequer Chamber, it was so adjusted as to put the question categorically whether the defendants were liable for an accident "owing to a latent defect in the tyre which was not attributable to any fault on the part of the manufacturer, and could not be detected previously to the breaking." This question was answered in the negative. And the judges were unanimously of opinion that there is no contract either of general warranty or insurance (such as that in the contract of a common carrier of goods), or of limited warranty (as to the vehicle being sufficient) entered into by the carrier

of passengers, and that the contract of such a carrier and the obligation undertaken by him are to take *due care* (including in that term the use of skill and foresight) to carry a passenger safely. To the argument of Blackburn, J., it was in effect answered that a shipowner answers to the owners of the cargo for the seaworthiness of his ship as part of his general liability for safe carriage of the goods. And it might be added that there is generally an express warranty, and never an exception, of the seaworthiness of the ship, in the bills of lading. And it is by no means clear that the doctrine of *warranty* of seaworthiness does extend to shipowners as carriers of passengers.

§ 58. Here may be cited, as a case in some respects similar to the case of *Redhead* v. *Midland Ry. Co.*, the case of *Richardson* v. *G. E. Ry. Co.* [L. R. 10 C. P. 486, and on appeal 1 C. P. D. 342; 24 W. R. 907]. A disaster occurred through the breaking of the axle of a truck, which, after being left at Peterborough for such repairs as on the usual cursory examination of through traffic waggons were found to be necessary, was allowed to come on the Great Eastern line. The Court of Common Pleas, after a finding of a jury to the effect that it was the duty of the railway company to require from the waggon company some satisfactory assurance that the truck had been thoroughly repaired, held the plaintiff entitled to a

verdict. But the Court of Appeal being of opinion that there was no evidence in support of such finding, and that by such finding the jury virtually found that there was no duty on the company to make a strict examination themselves before sending on the waggon, reversed the judgment.

Responsibilities of railway companies.

§ 59. Where an accident happens to a passenger in a carriage on a railway by the carriage breaking down or running off the rails [*Dawson* v. *Manchester, &c. Ry. Co.*, 5 L. T. (N.S.) 682], or by the train being severely jolted against the permanent buffers at a terminus [*Burke* v. *Manchester, &c. Ry. Co.*, 18 W. R. 694 (C. P.)], there is *primâ facie* evidence from which a jury may infer negligence. A railway company carrying passengers seem to be equally responsible for the state of the permanent way as for the sufficiency of their carriages. [*Pym* v. *Great Northern Ry. Co.*, 2 Fost. & Fin. 619; *Great Western Ry. of Canada*, 1 Moo. P. C. (N.S.) 106; *Grote* v. *Chester and Holyhead Ry. Co.*, 2 Exch. 251.] This responsibility would in great measure follow from the ground stated § 18 *supra*, but it may be noted that here also the peculiar risk attendant upon rapid travelling is an element in the *ratio* of the great care required. Consequently the same peculiar degree of care does not extend to those accommodations for passengers which have nothing to do with the rapid nature of the locomotion. In these it seems that no more is

required than that the accommodations be reasonably sufficient for the purposes of ingress, egress, &c., and for persons using them in a reasonable way. [*Crafter* v. *Metropolitan Ry.* (slippery stair), L. R. 1 C. P. 300; *Blackman & another* v. *London, Brighton, & South Coast Ry.* (stumbling over weighing machine on platform), 17 W. R. 769, C. P.; *Rigg* v. *Manchester, &c. Ry. Co.*, C. P. 14 W. R. 834. But *cf. Leishman* v. *London, Brighton, & South Coast Ry. Co.*, Ex., 19 W. R. p. 106, where staircase was out of repair by being worn away. This was held evidence of negligence.]

§ 60. A railway company, in their contract with a passenger, have even been held answerable for the negligence of another company over whose line they have contracted to carry him. [*Great Western Ry. Co.* v. *Blake*, 7 H. & N. 987; 31 L. J. Ex. 346; *Buxton* v. *North Eastern Ry. Co.*, L. R. 3 Q. B. 549; and *Thomas* v. *Rhymney Ry. Co.*, L. R. 5 Q. B. 226, affd. (Ex. Ch.) L. R. 6 Q. B. 266. Compare *Wright* v. *Midland Ry. Co.*, L. R. 8 Ex. 137.] In the first of these cases there was an agreement between the companies under which arrangements were made for through passenger traffic. Under such circumstances the second company may well have been considered the agents for the first for carrying out their contract with the passenger; but in the case of *Thomas* v. *Rhymney Ry. Co.* there was no contract between the

companies, only the defendant company had running powers over the line of the other, and the traffic arrangements were by the special Act placed under the control of the latter. There seems at first some difficulty in reconciling this decision with that of the Exchequer Chamber and House of Lords in the case of *Daniel* v. *Metr. Ry. Co.* [L. R. 3 C. P. 591, and 5 H. of L. 45.] But there is room for a distinction on the hypothesis that the carrying company warrant care on the part of everybody as to the sufficiency of the carriages used and the railroad travelled by them, and the keeping of the line (so far as relates to traffic management) clear and free from obstruction during the running of a train, but that with regard to collateral operations which may cause danger if not carried on with due care, the company are entitled to rely upon the care and skill of the competent and responsible persons (not being the servants of the company) to whom the operation has been properly committed. The view that the safe condition of the way itself is guaranteed in the contract to carry passengers is borne out by the case of *John* v. *Bacon* [L. R. 5 C. P. 437], where damage occurred to a passenger in the transit over a hulk not belonging to the shipowner contracting for the passage; the casualty being due to a hatchway which had been negligently left unprotected. When a collision happens on the defendants' line, and there is no evidence to

They warrant care in regard to safety of permanent way and sufficiency of carriages, but not in regard to collateral operations.

shew which company has the control of the train causing the collision, the plaintiff has been held entitled to retain a verdict, on the ground that the jury might reasonably infer that the train causing the damage was the train of the defendants. In this case the train causing the collision was moving, and that in which the passenger travelled was stationary. [*Ayles* v. *S. E. Ry. Co.*, L. R. 3 Ex. 146.]

§ 61. To establish a contract to carry a passenger it is not always necessary that the passenger should have paid the fare or be provided with a ticket. It is sufficient that he is travelling without intent to defraud the company or to evade payment of the fare. [*Great Northern Ry. Co.* v. *Harrison*, 10 Ex. 376; *Austin* v. *G. W. Ry. Co.*, L. R. 2 Q. B. 442; *Hamilton* v. *Caledonian Ry. Co.*, Court of Session, 2nd series, vol. xix., p. 457.]

Passengers' luggage.

§ 62. It has been a matter of some controversy whether, in respect of the luggage carried by a railway company or other carrier as "passengers' luggage," the company are subject to the liability of common carriers of goods, or only to that of carriers of passengers; but it appears to be now settled law that the liability is, generally speaking, that of common carriers of goods. [*Macrow* v. *G. W. Ry. Co.*, L. R. 6 Q. B. 612, 618, and see cases referred to in the argument upon *Talley* v. *G. W. Ry. Co.*, L. R. 6 C. P. 44, 47, 48.] And

the provisions of the Railway and Canal Traffic Act apply to such luggage. [*Cohen* v. *S. E. Ry. Co.*, 24 W. R. 552.] The company's responsibility as carriers is not ended by the luggage being put out on the platform at the terminus, until a reasonable time has been given to the owner to claim it and take it away. [*Patscheider* v. *G. W. Ry. Co.*, 3 Ex. D. 153.] But it is only in respect of what properly falls under the denomination of personal luggage, or has been accepted by the carriers as such, that the liability to carry safely, irrespective of negligence, attaches. So that, in regard to bulky articles of household use which were lost on a railway without proof of negligence on the part of the company, the company were held to be not responsible. [*Macrow* v. *G. W. Ry. Co.*, L. R. 6 Q. B. 613.] And when the passenger takes personal charge of his luggage, as is presumed in case of articles placed at his request in the carriage in which he travels, and not in the van or usual place for luggage, the company is not responsible for negligence. [*Talley* v. *G. W. Ry. Co.*, L. R. 6 C. P. 44; *Bergheim* v. *G. E. Ry. Co.*, L. R. 3 C. P. D. 221.] And where a person sent his luggage with a servant by one train and himself travelled by a later train, it was held that the company's contract being with the servant, the owner was not entitled to sue the company for the loss. [*Becher* v. *G. E. Ry. Co.*, L. R. 5 Q. B., 241.] The common device by companies to impose special

conditions by a notice indorsed on tickets, which are mere vouchers for payment, has not met with much favour in the Courts, who have held the passenger not bound or presumed to look at such notice. [*Henderson* v. *Stevenson*, L. R. 2 H. of L., Sc. 470; and as to cloak room deposit, see *Parker* v. *S. E. Ry. Co.*, 25 W. R. 97.]

Lord Campbell's Act in relation to railway passengers.

§ 63. I have already (p. 19, *supra*) adverted to Lord Campbell's Act, 9 & 10 Vict. c. 93, intituled, "An Act for compensating the families of persons killed by accidents"; and as this Act has probably been most frequently called into operation by accidents to railway passengers, I shall here, in default of a better place, mention some further points in regard to the application of this Act.

In England the measure of damages is based merely upon a calculation of pecuniary loss, and so far the effect of the action differs from that of the Scotch action for *assythement* or *solatium* which suggested the English enactment. [*Blake* v. *Midland Ry. Co.*, 18 Q. B. 93; *Pym* v. *G. N. Ry. Co.*, 2 Fost. & Fin. 619, 4 B. & S. 396.] The death of a poor man's wife is presumably the cause of pecuniary loss, and a verdict for £200 in such a case has been held not to be excessive. [*Chant* v. *S. E. Ry. Co.*, April 18, 1866, Ex., W. N., p. 134.] Where an action is brought under Lord Campbell's Act, it has been decided that the jury may take into consideration a benefit to which the family

has become entitled under a contract of life assurance, or insurance against accidents. [*Hicks* v. *Newport, &c., Ry. Co.*, 4 B. & S. 403.] But it is otherwise in an action for injury at common law, in which case no account can be taken of a benefit to which the injured person becomes entitled, through the circumstance of the damage, by contract with a third party. [*Bradburn* v. *G. W. Ry. Co.*, L. R. 10 Ex. 1.]

(ι) Stand for viewing a public exhibition for payment.

§ 64. (ι) The same responsibility as that of a carrier of passengers by fast conveyance is exacted from a person taking payment for admission to a stand for viewing a public exhibition. A crowd is invited to use the stand, which must be dangerous if not well constructed, and there is a warranty of due care to make it safe. In other words, there is a *positive duty* on the proprietor to use due care and skill in the erection of the stand, and he is not exonerated by having employed an independent contractor (being a competent person)—if in fact due care and skill have not been exercised—although the defect was such as could not have been discovered by a survey made subsequently to the erection being completed. [*Francis* v. *Cockerell*, L. R. 5 Q. B. 184, 501 (Ex. Ch.).] This positive duty has been distinguished from the ordinary obligation of a bailee receiving goods for safe keeping for hire into his premises, and who was held not answerable for the careless or improper

conduct of the builder (a contractor) of which the defendant had no notice. [*Searle* v. *Laverick*, L. R. 9 Q. B. 122.]

II. *Culpa* (*simply*).

Culpa (simple) applies to most contracts, and to a variety of circumstances not arising out of contract.

§ 65. Having considered the cases in which less than an ordinary degree of negligence will infer liability, and where consequently a more than ordinary degree of diligence or care is exacted, I proceed to consider those where an ordinary degree of care only is owed; and before entering into details I must state the principle, to which I adverted in commenting on *Scott* v. *London Dock Company* (p. 29, *supra*), that where an ordinary degree of care only is owed, some positive evidence of negligence must be given to raise a *primâ facie* case of liability. [*Cotton* v. *Wood*, 8 C. B. 568; *The Marpesia*, L. R. 4 P. C. Ap. p. 212.] This principle is well illustrated by the two cases, which have been already referred to (p. 32, *supra*), of *Taylor* v. *Greenhalgh*, in the Queen's Bench [L. R. 9 Q. B. 487], and *Pendlebury* v. *Greenhalgh*, in the Appeal Court [1 Q. B. D. 36.] The two actions were by two different parties who were each damaged by the same occurrence. They were brought against a road surveyor on the ground of negligence in conducting the operation of altering the level of a road, the place having been left unfenced and unlighted during the operation. As the facts

were stated in the first case, it appeared that the defendant had contracted with G. to do the work, and the jury found that the defendant did not personally interfere, and on these facts the defendant was acquitted; but as the facts were brought out in the second case it appeared that the defendant only employed G. to do the labour, and that he superintended the execution of the work himself; and it was held by the Court of Appeal that the defendant ought to have seen that the dangerous part of the road was fenced or lighted, and was liable for the consequences of neglecting to do so.

The cases where *culpa*, simply, is in question are numerous and various. In regard to questions arising out of contract I merely refer, as beyond the limits of my subject, to the class of cases where there is an express contract of indemnity in the nature of insurance, or a contract that something shall be done, made in terms which clearly express the intention to exclude all question whether the thing to be done is possible or not. [*Jones* v. *St. John's College*, L. R. 6 Q. B. 115.] There are also large classes of cases arising out of contract which are most properly classed under the head of *culpa levissima*. And, as I have already pointed out (p. 24, *supra*), the cases cannot be classed under these heads in an exhaustive manner. I have had no hesitation in comprising the liability of common carriers (p. 65, &c., *supra*) in the first class. And,

by near analogy, I have treated in the same class the liability of carriers of passengers by rapid conveyance. But there is, besides, the large array of contracts which may be broadly included under the head of *locatio conductio*, where the *locator operis* promises skill (*spondet peritiam artis*), and in which the skill promised is often so great that the fault to make him liable is undistinguishable from *culpa levissima* in the strict sense of the term. As an illustration of a case of promised skill I mention one which came before the Court of Session in Scotland (*Hinshaw* v. *Arden*, 3rd series of Reports, vol. viii. p. 933), where a quantity of goods of the class called *lustre goods* were sent to defendants for the operation of *finishing* and returned damaged. It appeared that the operation is a very delicate one, its success depending on the application of a high degree of heat and pressure; and the attempt seems to have been made in argument to suggest that there was a necessary risk attendant on the operation for which the finishers could not be held responsible. But it was not satisfactorily proved that no amount of care in the operation could have avoided the damage, and therefore the finishers who undertook the job were held responsible. In effect, the damaged state of the goods was held evidence of negligence, which it lay upon the finishers to rebut by evidence that the due amount of skill had been furnished. Doubtless the requirements in such a case are as high as in most cases

which I have considered under the head of exact diligence, and so it may happen in many cases where skill is promised. But as the skill demanded varies with the nature of the particular art, no rigid standard can be fixed to measure the corresponding neglect. Accordingly, with the few exceptions already treated under the head of exact diligence, I shall comprise under the present head the various shades of care demanded in cases arising out of contracts contemplating mutual advantage. In the same class I include also a great variety of circumstances not arising out of contract but where persons are thrown into collision in the ordinary transactions of life.

§ 66. It would be out of place in this short essay to attempt to enumerate the various species of facts which have been deemed sufficient or insufficient to warrant a jury in inferring negligence where ordinary negligence is in question. The duties of legal practitioners are however in a peculiar degree within the cognizance of the Courts of Justice, and therefore the acts or omissions from which injurious negligence can be inferred are here more precisely than in other professional and private duties defined as matter of law (*a*). The following principles have been established by decision :—

(*a*) For the collection of cases cited in the analysis immediately following I am mainly indebted to my friend Mr. Elphinstone.

Solicitor and client.

§ 67. The relation of solicitor and client implies an obligation on the part of the former to bring a reasonable amount of care, diligence, skill, and knowledge to the performance of the business entrusted to his charge. [*Hart* v. *Frame*, 6 Cl. & Fin. 210; *Allen* v. *Clark*, 1 N. R. 358 (Q.B.); *Parker* v. *Rolls*, 14 C. B. 691.]

The following facts have been held to amount to breaches of this obligation. Misdescription in the particulars of sale prepared for a sale under the authority of the Court of Chancery. [*Taylor* v. *Gorman*, 4 Ir. Eq. Rep. 550.] Vendor's solicitor causing abortive expenses to be incurred by his client executing a conveyance, while the title deeds were (as he knew) in the hands of an adverse party. [*Potts* v. *Dutton*, 8 Beav. 493.] Allowing client to enter into unusual covenant without explaining to him the liability incurred. [*Stannard* v. *Ullithorne*, 10 Bing. 491.] Solicitor of purchaser or intending lessee omitting to investigate the title as far as the conditions of sale will allow him. [*Knights* v. *Quarles*, 2 Bro. & B. 102; *Allen* v. *Clark*, 1 N. R. 358.] Omitting (in a case where counsel is employed) to lay before counsel the whole abstract received from the purchaser. [*Treson* v. *Pearman*, 3 Barn. & Cress. 799.] Solicitor of intending mortgagee sanctioning investment of client's money upon a fresh mortgage, while resting satisfied with investigation of title made on occasion of former mortgage and not

inquiring as to subsequent incumbrances [*Hopgood* v. *Parkin*, L. R. 11 Eq. 74]: or omitting to make the searches which are reasonable and proper having regard to the circumstances known [see Dart, V. & P. 622; *Cooper* v. *Stephenson*, 31 L. J. N. S. (Q.B.) 292; *Graham* (Court of Session), Mar. 4, 1831, 9 Sh. 543]: or to procure registration where necessary to secure priority or keep alive a right of action [*Hunter* v. *Caldwell*, 16 L. J. (N. S.) Q. B. 274]: or to give the proper notices to secure priority of title. [*Watts* v. *Porter*, 3 Ell. & Bl. 743; *Lillie* (Court of Session), 13 Dec. 1816, F. C.].

It is not, however, the proper duty of the solicitor to ascertain the value of the subject of the mortgage [*Hayne* v. *Rhodes*, 8 Ad. & Ell. (N.S.) 342]; nor is it incumbent on him to warn the client against every possible folly; so in a case where the mortgagee, unknown to his solicitor, advanced the money without first obtaining the security, the solicitor was not deemed guilty of negligence for not having cautioned him not to do so. [*Brumbridge* v. *Massey*, 28 L. J. (N.S.) Ex. 59.]

When a solicitor undertakes to prepare a security for money under circumstances which import neither a good legal consideration nor a transaction *contra bonos mores*, it seems that a solicitor preparing the security by way of mere agreement and not by deed under seal would be guilty of negligence. [*Parker* v. *Rolls*, 14 C. B. 691.] Again, a

solicitor having taken upon himself the office of receiver of rents, though without any appointment as receiver, has been held liable for the rents which he omitted to collect. [*Wood* v. *Wood*, 4 Russ. 558.] He has been held liable for the expense caused by the omission to get immediate correction of a mistake in drawing up in a decree of the Court [*In re Bolton*, 9 Beav. 272], and for all expenses and loss caused by an order got from the Court of Chancery upon a misrepresentation of facts when the truth might have been ascertained by reasonable care. [*Re Spencer*, 18 W. R. (Ch.) 240.] He is bound to take care of a deed intrusted to him by his client, and the loss of the deed raises a presumption against him of the want of due care, which he must rebut if he can by evidence shewing that it was lost without his fault. [*Reeve* v. *Palmer*, 5 C. B. (N.S.) 84.]

§ 68. The liability of a solicitor in the conduct of causes is well summarised by C. J. Tindal as follows :—

"He is liable, generally, for the consequences of ignorance or non-observance of the rules of practice of the Court (in which he proceeds); for the want of care in the preparation of the causes for trial or of attendance thereon with his witnesses; and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. Whilst on the

other hand he is not answerable for error in judgment upon points of new occurrence or of nice or doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law." [*Godefroy* v. *Dalton*, 6 Bing. 468.]

§ 69. This short statement of principle by C. J. Tindal is borne out by the following cases. On the first branch, *i.e.*, where liability attaches—Neglect or ignorance of rules of the Court, *Cox* v. *Leach*, 1 C. B. (N.S.) 617; *Hunter* v. *Caldwell*, 10 Ad. & Ell. (N.S.) 69; *Frankland* v. *Cole*, 2 Cromp. & Jervis, 590; *Huntley* v. *Bulwer*, 6 Bing. N. C. 511; *Stokes* v. *Trumper*, 2 K. & J. 232. Seeing to attendance of witnesses, *Reece* v. *Rigby*, 4 Barn & Ald. 202. Neglecting to retain counsel, *Rex* v. *Tew*, Sayer, 50; to deliver the brief, *De Roupigny* v. *Peale*, 3 Taunt. 484; and to attend the trial himself or by one of his clerks so as properly to instruct counsel, *Hawkins* v. *Harwood*, 4 Ex. 503. To attend at an arbitration where counsel were not retained, *Swannell* v. *Ellis*, 1 Bing. 347. Neglecting to inform client that if he proceeded in an action without the consent of the creditors he would be liable for the costs, *Allison* v. *Rayner*, 7 B. & C. 441. Abandoning case without reasonable notice to the client although not supplied with funds, *Hoby* v. *Built*, 3 Barn & Ald. 349. Neglecting while suing upon French bills

of exchange to ascertain whether they had been indorsed as required by French law, *Long* v. *Orsi*, 18 C. B. 610. Neglecting to register *lis pendens*, where that was necessary to attain the object of the suit, *Plant* v. *Pearman*, Jan. 19, 1872, Q. B.

On the second branch, *i.e.*, where the attorney is excused, the following cases may be cited: *Pitt* v. *Yalden*, 4 Burr. 2066; *Montriou* v. *Jefferys*, 2 Carr. & P. 113; *Baikie* v. *Chandless*, 3 Camp. 17; *Laidler* v. *Elliott*, 3 B. & Cr. 738; *Elkington* v. *Holland*, 9 M. & W. 661; *Chapman* v. *Van Toll*, 8 Ell. & Bl. 407; *Bulmer* v. *Gilman*, 4 Man. & Gr. 108. It is in cases of this last description that the expressions "gross negligence," "*crassa negligentia*," "*lata culpa*," have been applied to the kind of negligence or ignorance which will make an attorney liable. It is to be regretted that these expressions have had the sanction of a judge enjoying so highly the reputation of a civilian as Lord Mansfield, because the expressions tend to obscure the line of demarcation between the degrees of liability for negligence as understood by the classical jurists. It is easy, however, to understand the intention of the expressions as applied by Lord Mansfield and others to the negligence of attorneys. "God forbid," says Abbott, C.J. (in *Montriou* v. *Jefferys*), "that it should be imagined that an attorney or counsel, or even a judge, is bound to know all the law; or that an attorney is to lose his fair recompense on account of an error, being such

as a cautious man might fall into." This is really all that is meant in this class of cases, where with an affectation of learning borrowed from the Pandects the expressions *culpa lata*, *crassa negligentia*, have been used. The expression *considerable* negligence, which is used in some of these cases, is much preferable, and may well be employed to indicate culpable default as contrasted with that occasional failure in diligence or knowledge which the inherent difficulty of the subject renders almost inevitable.

§ 70. A solicitor cannot get rid of responsibility by consulting counsel when the law would presume him to have the knowledge himself [*Godefroy* v. *Dalton*, 6 Bing. 469]: nor is it enough that he acted on the advice of counsel unless the advice have been obtained *bonâ fide* on a case fairly stated [*Re Clark*, 1 De G. M. & G. 43; *Fray* v. *Voules*, 1 El. & El. 839]: nor unless the advice have been properly pursued. [*Andrews* v. *Hawley*, 26 L. J. Ex. (N.S.) 323.] And if, in laying a case before counsel to advise on a title, he draws a conclusion from deeds, instead of laying before counsel an abstract of the deeds themselves, he draws the conclusion at his peril. [*Treson* v. *Pearman*, 3 Barn. & Cres. 313.] But there can on the other hand be no doubt, in English practice, that a solicitor acting on the advice of eminent counsel fairly obtained in matters such as are usually submitted to counsel's

opinion, is exonerated. And in the time of strictest pleading it was said by Chief Baron Pollock that he should be much astonished to hear a jury say that an attorney had been guilty of want of reasonable care where he had taken and acted on the opinion of an eminent pleader. [*Manning* v. *Wilkin*, 12 L. T. 249; *Kemp* v. *Burt*, 1 Nev. & Man. 262.]

§ 71. A solicitor is not guilty of actionable negligence if he enters into a compromise without the consent of the client provided he acts *bonâ fide* and with reasonable care and skill, and the compromise is for the benefit of the client and not made in defiance of his express prohibition. [*Chown* v. *Parrott*, 14 C. B. (N.S.) 74; *Prestwick* v. *Poley*, 18 C. B. (N.S.) 806.] But he is liable if he does so against the client's express prohibition, even under the advice of counsel. [*Fray* v. *Voules*, 1 El. & El. 839.]

§ 72. The solicitor is equally responsible whether the breach of duty has arisen through his own default or through the default of his agent (*a*) [*Collins* v. *Griffin*, Barnes, 37; *Simmons* v. *Rose*, 31 Beav. 11; *cf. Corporation of Ruthin* v. *Adams*,

(*a*) As to the relations between law agents in Edinburgh and other parts of Scotland, it is to be observed that a great change took place by the Law Agents Act, 1873: and I think the English rule would now prevail, the *ratio decidendi* of the case of *Barles* v. *Strathern & Douglas* [2 Dunlop, 851, 861] being no longer applicable.

7 Sim. 345], of his partner [*Norton* v. *Cooper*, 3 Sm. & Giff. 375, 384], or of his clerk [*Floyd* v. *Nangle*, 3 Atk. 568].

§ 73. When an action is brought by a client against his attorney or solicitor for negligence he must state and prove negligence in fact, or at least state and prove circumstances from which negligence is implied by necessary legal inference. [*Purves* v. *Landell*, 12 Cl. & Fin. 91.] When negligence has been proved, in consequence of which judgment has gone against the client, the client is not bound to shew that but for the negligence he could have succeeded in the action, it is for the solicitor to defend himself if he can by shewing that the client has not been hurt by his negligence. [*Godefroy* v. *Jay*, 7 Bing. 413.]

§ 74. On the other hand, when the client resists payment of his solicitor's bill of costs on the ground of negligence, it is for the latter to shew affirmatively that he has done all that he ought to have done, and it does not lie upon the client to shew negatively that the solicitor has neglected his duty. [*Allison* v. *Rayner*, 7 B. & C. 441; *Bracey* v. *Carter*, 12 Ad. & El. 373; *Hill* v. *Allen*, 2 M. & W. 283.] If through negligence (in the sense which the law deems injurious) the solicitor has caused the suit to be lost [*Stokes* v. *Trumper*, 2 K. & J. 232], or if through such negligence all the

previous steps in the suit or action becomes useless [*Bracey* v. *Carter*, 12 Ad. & El. 373], he is unable to recover any portion of his bill, even money paid out of pocket. [*Lewis* v. *Samuel*, 8 Ad. & El. (N.S.) 685.] He cannot charge for work that is useless, whether done through wilful error, or through inadvertence or inexperience. [*Potts* v. *Dutton*, 8 Beav. 493; *Stokes* v. *Trumper*, 2 K. & J. 232; *Hill* v. *Featherstonhaugh*, 7 Bing. 569.] When an item of the bill of costs is for work which through the solicitor's default is useless the client may get that item struck out, but in respect of charges for work partially useless or in regard to which there has been some injurious negligence, the remedy is by counterclaim. [*Shaw* v. *Arden*, 9 Bing. 287.] A solicitor to a company under the Companies Act, 1862, having a charge over the company's property, but who has failed to comply with the 43rd section of the Act, which directs that the company shall register all charges specifically affecting property of the company, cannot enforce his charge in equity: and it seems that the same applies to all officers of the company, upon all of whom the duty lies under the statute of seeing to the registration of such charges. [*Re Patent Bread Machinery Co.*, L. R. 7 Ch. 289.]

§ 75. In certain cases a Court of Equity has visited a solicitor with the modified penalty of declining to allow him his costs in a suit to which

he had by his own default become a necessary party, although such default might not have itself been deemed actionable negligence. This has occurred in a suit to set aside a voluntary settlement of family affairs by a person lying *in extremis* which contained no power of revocation. [*Forshaw* v. *Welsby*, 30 Beav. 243.] If the solicitor had adverted to and performed his exact duty, he would have seen that such a power was inserted in the deed. The same result happened where a deed was set aside for undue influence. The solicitor who there had acted for both parties would, if he had acted with circumspection, have suspected the existence of undue influence and insisted on the grantor of the deed being separately advised. [*Harvey* v. *Mount*, 8 Beav. 452.] Another indirect consequence of negligence arising from the relation of solicitor and client as maintained by the Courts administering equity is, that the solicitor cannot derive any benefit to himself through his own ignorance or negligence. Thus, where on the contract for sale of land the purchaser required a fine to be levied, and the solicitor advised a fine to be levied without informing his client that such a proceeding would revoke a devise contained in the client's will, the solicitor was not allowed as heir-at-law to reap any benefit from the transaction. [*Bulkeley* v. *Wilford*, 2 Cl. & Fin. 102.] It does not follow that this would have been actionable negligence in the solicitor if he had not been personally interested.

How far the Court of Chancery had jurisdiction in questions arising out of negligence.

§ 76. According to the practice previously to the Judicature Acts, 1873–1875, a bill in Chancery did not lie against a solicitor for negligence unaccompanied by fraud. [*Brooks* v. *Day*, Dick, 572; *Luke* v. *Bridges*, Precedents in Chancery, 146; *British Mutual Investment Company* v. *Cobbold*, L. R. 19 Eq. 627.] Probably a bill would lie in such a case of *crassa negligentia* as Equity will construe to be fraud. [*Craig* v. *Watson*, 8 Beav. 427.] Indeed this would probably be the case not only where the conduct of a solicitor is in question, but in every case where a position of confidence is abused. [*Overend, Gurney, & Co.* v. *Gurney, &c.*, 17 W. R. 719 & 1115; *Turquand* v. *Marshall*, L. R. 6 Eq. 112, 4 Ch. 376]. V.-C. Stuart seems to think that a bill may lie in a case of *crassa negligentia* in the sense of merely considerable negligence. [*Chapman* v. *Chapman*, L. R. 9 Eq. 276.] But there seems to be no instance of a successful suit of this last nature; and in the case of Overend and Gurney above cited the bill was dismissed without pronouncing an opinion that the negligence of the directors was inconsiderable. Where costs in a suit are incurred through the negligence or improper conduct of a solicitor in the suit with respect to proceedings in the suit itself, the Court of Chancery has been accustomed to exercise jurisdiction on motion or petition in the suit, whether by the client or by another party to the suit, to order the solicitor to pay such costs [*Cook* v. *Broomhead*,

16 Ves. 133; *Ridley* v. *Tiplady*, 20 Beav. 44; *Re Spencer*, 18 W. R. (Ch.) 240], or to disallow any such costs. [*Cook* v. *E. of Rosslyn*, *Re Hook*, 3 Giff. 175.] It has been maintained, on the authority of a *dictum* by Lord Hardwicke, that this jurisdiction of the Court extends to ordering amends generally for damage suffered by the client through the attorney's negligence. [*Floyd* v. *Nangle*, 3 Atk. 568.] But I suspect that Lord Hardwicke only intended his observations to apply to a really gross case of negligence (*culpa lata* in the sense of the Roman lawyers), from which wilful default is presumable (*aequiparata dolo*). And in a suit which was commenced in the Court of Chancery and carried on in the Chancery Division under the present practice, it has been decided by the Court of Appeal, that the Court of first instance had no jurisdiction to order a solicitor to pay the costs of the suit because it had been rendered necessary by his having made a blunder. The remedy would be an action for professional negligence. [*Clarke* v. *Girdwood*, 7 Ch. D. 9, 23; see also *Dixon* v. *Wilkinson*, 4 De G. & J. 508; *Frankland* v. *Lucas*, 4 Simon, 586.] It seems that the taxing master has, in taxing the bill of costs, no jurisdiction to entertain the question whether the attorney or solicitor was guilty of negligence in respect of the matters to which the items refer. [*Matchett* v. *Parker*, 9 M. & W. 767; *sed vide Matthews* v. *Livesley*, 11 Exch. 221.]

The claim for redress against the solicitor for negligence depends, of course, on the relation of solicitor and client having been constituted. So that an attorney was held not liable to an action for negligence when, in answer to a casual inquiry, he had given erroneous information as to the contents of a deed to a person who was not his client. [*Fisk* v. *Kelly*, 17 C. B. (N.S.) 194.] The question whether or not the solicitor has been retained, if depending on contradictory evidence, may generally be left to the jury. [*Frankland* v. *Cole*, 2 Cr. & J. 590, 599.]

§ 77. A right of action against a solicitor for negligence, whereby the fund for distribution amongst the plaintiff's creditors is diminished, passes to his assignee in bankruptcy as part of his personal estate. [*Re Davies*, 16 L. T. (N.S.) 127; *Crawford* v. *Cinnamond*, Ex. Ir. 15 W. R. 996.] This principle is, doubtless, not confined to the case of a solicitor, but would hold in the general case of an action by a principal against his agent for negligence. On the same principle the liquidator of a banking company which has suffered loss through the negligence of its directors by making reckless advances, &c., seems to be entitled to sue the directors for negligence so as to make the damages that may be recovered against them available as an asset of the company. This was done in the case of the Western Bank of Scotland,

and the competency of the proceeding was held to be undoubted. [*Liquidators of Western Bank* v. *Douglas, &c.*, Court of Session, 22 D. 447, 24 D. 859.] Most of these actions were eventually compromised, but it is believed that considerable assets were recovered to the company from this source. The failure of an attempt in the case of Overend, Gurney, & Co., to enforce a similar liability by a Chancery suit does not, I think, interfere with the principle here laid down. I do not say that the negligence in that case would have been sufficient to support an action at law. [See *Turquand* v. *Marshall*, L. R. 4 Ch. 376; *Overend, &c.*, v. *Gibb*, L. R. 5 H. L. 480.]

§ 78. The relation between solicitor and client belongs properly and historically to the head of mandate; but the right of the solicitor to charge for his services tends to bring the relation more nearly within the category of *locatio conductio*. The question to which head the relation belongs is of no practical importance. For as I have already shewn, the undertaking of a business under a mandate involves a duty no less than that implied by a contract of mutual benefit.

Duties and liabilities of trustees.

§ 79. To the head of mandate are also referable the duties and liabilities of trustees, and, as a sub-species of trustees, the duties and liabilities of directors of companies. The broad principle is

that trustees and directors are both liable for negligence in the ordinary sense of the word. It has been said that directors are not liable for being defrauded. [*Land Credit of Ireland* v. *Lord Fermoy*, L. R. 5 Ch. p. 772]. Whether this last remark is true for trustees has been questioned. [*Hopgood* v. *Parkin*, L. R. 11 Eq. 77.] I doubt whether the proposition can be broadly affirmed in either case. In the particular case of the Land Credit, &c., Co., there had been, in accordance with an express power in the deed of settlement, a delegation of certain functions to an executive committee, and the question was whether one of the directors under whom the executive committee acted, but who had in fact no notice of an intended misapplication of money drawn upon the requisition of the executive committee, could be held liable. The real question in the case either of directors or of trustees must be whether the fraud was of such a nature as to deceive a man giving that diligence to the affair which his fiduciary position demanded. It has been held that if a person obtained trust property from trustees by a forgery, the loss fell on them and not on the *cestuis que trustent*. [*Eaves* v. *Hickson*, 30 Beav. 136.] But the true *ratio decidendi* of that case is the policy of the law to discourage forgery and protect genuine writings by aid of a presumption that forgery can and ought to be detected by every one who acts on the faith of a written document;

the only exception at common law (*a*) being where the person in whose name the forgery is committed is disentitled to complain of it if he has by his own negligent or rash act, as by entrusting cheques or orders, with blank space, to a clerk, facilitated the forgery. [*Guardians of Halifax, &c.*, L. R. 10 Ex. 183; compare *Baxendale* v. *Bennett*, 3 Q. B. D. 525.] Generally speaking, the true criterion of liability for negligence in the case of trustees is, whether they have conducted the business with the prudence and care which persons of reasonable or ordinary prudence use in the management of their own affairs. [*Edmonds* v. *Peake*, 7 Beav. 239; *Westmoreland* v. *Holland*, Nov. 22, 1870. V.-C. S.] Trustees are viewed with great favour in regard to costs of all proceedings taken for the administration of the estate under their charge, but yet if by "wilful neglect" they render a suit necessary, they will be ordered to pay the costs of it. [*Jeffreys* v. *Marshall*, Chancery, Nov. 14, 1870, 19 W. R. 194.] It has been held by the Court of Chancery that trustees are liable to an intending purchaser of the equitable interest if they give such intending purchaser false information upon which he acts, and that whether the information is given fraudu-

(*a*) The statute 16 & 17 Vict. c. 59, s. 19, which protects the bankers upon whom a draft or order is drawn payable to order on demand, does not protect any other person paying such draft if the indorsement is forged. [*Ogden* v. *Benas*, L. R. 9 C. P. 513.]

lently or through forgetfulness. [*Burrows* v. *Lock*, 10 Ves. 470; Dart, V. & P. 4th ed. 99.] A trustee of an outstanding legal estate is bound, upon the request of persons to whom the equitable fee has been conveyed as trustees for sale, to convey such legal estate to them; but if he does more than so convey the legal estate, and deals with the property so as to facilitate a breach of trust by the trustees, he will be responsible for such breach of trust. [*Angier* v. *Stannard*, 3 Myl. & K. 566.] If trustees incur a liability to strangers merely on the ground of ownership or partnership in trust property, without personal negligence of their own, they are entitled to the fullest extent to resort to the trust estate to supply them with the funds to meet such liability. The position of a trustee on a creditors' deed under the Bankruptcy Act, 1861, having *quasi*-judicial duties to perform, is protected if he deals *bonâ fide*; and he has been held not liable for over-payments made under a misapprehension of the law upon what was considered a doubtful point. [*Ex parte Ogle, &c., In re Pilling*, L. R. 8 Ch. 711.]

Directors of public companies.

§ 80. With regard to directors, it is possible that there may be room for the application of the principle already mentioned with regard to partners (p. 7, *supra*), and that the choice by the shareholders exonerates them from taking more care than they are accustomed to bestow on their

own concerns, or rather exonerates them from taking more trouble than the shareholders under the circumstances of the election may be presumed to have expected from them. So that if the shareholders choose, for the sake of their names, directors who they know are not likely to give their time to the business, there may be some colour of excuse for them in pleading non-attendance at meetings and ignorance of what was going on. But on the other hand, it must be observed that persons who offer themselves for election as directors presumably esteem the position as a desirable one; and it seems fair that their responsibilities should be at least as strictly construed as those of gratuitous trustees. I am inclined to think the arguments in favour of the stricter interpretation of the duties of a director are the more forcible, and that the general observations made by Lord Romilly upon the case of *Turquand* v. *Marshall* [L. R. 6 Eq. 112, 130], to the effect that directors are bound to use their opportunities of becoming acquainted with the true position of the company as appearing by the books to which they have access, are well founded. This view is borne out by the judgment of the Court of Session in Scotland in the action by the Western Bank against William Baird, a former director, raised after the compromise of the other actions, and reported in the 11th volume of the 3rd series of Court of Session Reports. The Court held it a relevant ground of

action that the director had neglected to exercise control over the manager in the advances made on open account, and also that for four years he had entirely failed to attend the meetings; but the case illustrates the difficulty of making a former director liable upon a ground of this kind where the account in question has, for some years after his retirement, been continued with the customer still reputed solvent. The decision of Lord Romilly in *Turquand* v. *Marshall*, above cited, was reversed principally on the ground that the acts complained of, the result of which was to represent the concern as more prosperous than it was, were adopted by the shareholders with full notice; and further, that acts of this kind, however they might injure an individual who bought shares at an overvalue on the strength of reports, were not calculated to injure the shareholders as a body. That such acts may form a ground of action by individual shareholders who have been deceived, was decided by the Court of Appeal in France, in the case of the *Crédit Mobilier*, August 1st, 1868 [*Times* of August 4th.] In that case certain shareholders had brought actions individually against certain directors on the ground of false reports; and the directors were found liable; the guilty knowledge having been brought home to them by the fact that they were also directors of another company which was insolvent, and in which a large part of the capital of the first company was

locked up. But actions of this kind are quite separate and independent from an action *by the company*, as representing the general body of shareholders [*Western Bank* v. *Douglas*, Court of Session, 2nd series, vol. xxii. p. 447]; and whereas the *company*, with whom the directors are in a fiduciary relation, may have a remedy for breach of trust arising from neglect of the duty owed to the shareholders as a body, the individual shareholder, with whom the directors as such have no privity, can only have his remedy on the ground of fraud, taking fraud in its proper and popular sense as involving a conscious act of deception [*Ship* v. *Crosskill*, L. R. 10 Eq. 73] acting on the mind of the plaintiff as one of the class of persons intended to be deceived. [*Peek* v. *Gurney*, L. R. 6 H. L. 377; *Cargill* v. *Bower*, 26 W. R. 716.]

Wilful neglect on the part of directors may place them in a situation such that the summary remedy in favour of the general body of shareholders given by the 165th section of the Companies Act, 1862, may be enforced against them; and in a case which went to the Court of Appeal, where directors, before the company was formed, had entered into an agreement for a sum of £3500 to be paid to a certain person for preliminary expenses, and then authorized payment of this sum (which was in fact misapplied) without inquiring how it was to be applied, the Court held that although not guilty of fraud, they had "misap-

plied" the money within the meaning of the 165th section, and were rightly ordered to refund it. [*In re Eaglefield Colliery Co.* 8 Ch. D. 388.]

§ 81. I have already (p. 94, *supra*) stated the principle that where the question is one of ordinary negligence it is necessary to adduce some positive proof of negligence. [*Cotton* v. *Wood*, 8 C. B. 568.] That being done, the latitude allowed to a jury is comparatively wide.

Where the ground of action was negligence in drilling a hole in a gas pipe, whereby the plaintiff's eye was damaged, it was proved that there were two known ways of doing this work, and that one was more dangerous than the other. The jury drew the inference of negligence from the fact that the more dangerous mode had been adopted; and the Court declined to disturb the verdict. [*Cleveland* v. *Spier*, 16 C. B. (N.S.) 399.] Again, in the case of the *Submarine Telegraph Co.* v. *Dickson* [15 C. B. (N.S.) 759], it was decided that a jury might infer negligence from the circumstance that the defendants hauled up their anchor without heed to the chance of fouling a submarine cable, although it was not averred that they knew the cable to be there.

Culpa (simple) applies to persons coming into collision under similar circumstances.

§ 82. Liability for ordinary negligence applies, I think, to all cases where persons pursuing each their own business or pleasure, under similar cir-

cumstances, come into collision so as to cause damage to one of them. Thus the occurrences commonly called accidents, in the course of the ordinary use of a public road, by riding, driving, &c., or by ships sailing on the high seas, come within this class.

What I here mean by *similar circumstances* may be illustrated thus: I have shewn that the occupier of land or buildings owes a peculiar degree of care to all persons being where they have lawful right to be, and also to those who come on his land by invitation (in the technical sense above explained). But to a mere licensee he stands in a different position. Being there by the mere permisssion of the owner or occupier, and therefore presumably for the pursuit of his own concerns, he is not entitled to charge the occupier as such with any higher degree of care than he is entitled to from any stranger or other licensee who is using or is upon the lands. That is to say, the owner or occupier stands to the licensee in the same position as any one else who is using or is upon the lands not unlawfully, and is answerable to the licensee for ordinary negligence only. With regard then to mutual duties of care, they stand in similar circumstances. The owner certainly, like any other person, would be answerable for a trap set by him on the premises. And the owner or occupier may be held answerable for anything in the nature of a trap which he knows to be on the premises, and of

which he negligently omits to warn the person going there with his permission.

Omission and commission.

§ 83. In a question of damage to the licensee through negligence of the owner, a distinction has been drawn between omission and commission, and it has been supposed that liability is inferred by the latter only [see *dictum per* Bramwell, B., in *Southgate* v. *Stanley*, 1 H. & N. 248; *Corby* v. *Hill*, 4 C. B. (N.S.) 556; *Gallagher* v. *Humphery*, 10 W. R. (Q. B.) 664]. But even in the case of licence, liability is not confined to the case of commission. It is true that what is called ordinary negligence is commonly inferred from commission, that is to say, from *acts* as distinguished from *omissions*. But this is not necessarily the case. For suppose that there is, to my knowledge, a peculiar danger in the nature of a trap—*e.g.*, a concealed pit—on the premises, of which I neglect to warn the person who I know is going there by my permission; it is obviously unimportant whether the pit was dug by my orders, or whether it was there when I myself came to the premises, and I have only neglected to have it fenced. The reason for the remark having been made is probably this: that the *commission* supplies that positive evidence of negligence which is requisite in all cases where negligence of the ordinary degree has to be established. [*Cotton* v. *Wood*, June 9, 1860, 8 C. B. (N.S.) 568.]

Offer of seat in a carriage, &c.

§ 84. I have observed that the liability of host to guest (like that of occupier to licensee) is merely for ordinary negligence. [*Southcote* v. *Stanley*, 1 H. & N. 248]. A very similar relation exists between persons, one of whom having a carriage offers a seat in it to the other, who accepts it. These persons again may be fairly described as persons each pursuing their own business or pleasure under similar circumstances. And accordingly, the owner of the carriage is in such a case not bound in the sort of diligence exacted from a person carrying passengers for hire, but only for negligence in the ordinary sense of the term. [*Moffat* v. *Bateman*, L. R. 3 P. C. Ap. 115.] It is true that, in the report of the judgment in this case, the expression *gross* negligence is employed to denote the kind or degree of negligence necessary to constitute injury. But this term, if it mean anything, is here merely used by way of comparison with the slighter fault which would render liable a person carrying passengers for hire. For although the judges looked for positive proof of negligence it was clearly not in their minds to require proof of that kind of negligence (*culpa lata*) which the Roman lawyers held equivalent to fraud.

This case was as follows :—It arose in Australia. The plaintiff was a decorator and ornamental gardener in the service of the defendant, at a salary. On the day of the accident the defendant had asked the plaintiff to accompany him to a place about

eight miles distant, for the purpose of assisting in papering some rooms, and offered to drive him there in his trap. The plaintiff had with some hesitation consented to be driven over by the defendant; his hesitation apparently having arisen from his knowledge of the defendant's reckless habit of driving. The carriage was overturned on the way, and the plaintiff damaged. Except that the kingbolt had broken, there was no evidence to shew how the accident occurred. And to rebut any presumption that might have been raised upon this fact, as to want of care, evidence was given that the carriage was regularly examined by a blacksmith every three months. The jury gave a verdict for the plaintiff, and the question for the Court was, whether that verdict was warranted by the evidence. The Judicial Committee of the Privy Council in their judgment, delivered by Lord Chelmsford, held that there was no evidence of such negligence as to warrant the verdict.

§ 85. I have observed that the expression *gross* negligence is loosely and improperly used in the judgment as expressing the kind or degree of negligence from which liability in such a case might be inferred. It is true the expression *gratuitous service* is used to indicate the relation between the parties—the master offering a seat in the trap having, it is said, performed a gratuitous service for the other. And this might seem at

first sight to indicate that the expression *gross* negligence is used advisedly, and in the technical sense equivalent to *culpa lata*. But *gratuitous service* does not really describe the nature of the case. The owner of the carriage was driving on an errand for his own purposes, although it may be taken that he gratuitously offered to give the plaintiff a seat. But that it was not a gratuitous service in the sense of inferring a more than ordinary degree of responsibility is evident if we compare the case with that which would have occurred if the defendant had not desired to go himself, and the plaintiff (although there were other means of going) had asked for the loan of the trap and the defendant had lent it him. In this case doubtless the defendant would only have been liable for *culpa lata* in the proper sense of the word; *e.g.*, if he had lent the carriage, knowing of a defect in the king-bolt such as would by natural consequence have caused a disaster. Such seems to be the purport of the decision in the case of *McCarthy* v. *Young* [Jan. 31, 1861, 6 H. & N. 329], arising out of a defective scaffolding gratuitously lent by the defendant to the plaintiff for the purposes of a contract in which the defendant had an interest, but where there was no obligation on him to furnish the scaffolding.

Questions relating to railway companies.

§ 86. I have under the head of exact diligence considered the liability of railway companies as

carriers of passengers. There are various cases arising, not directly from the contract to carry, but from circumstances collateral to it, and in which the question is merely one of negligence in the ordinary sense of the word, and where positive evidence of negligence is therefore required to make out the plaintiff's case. I shall proceed to note some of these cases.

Neglect to shut doors.

In *Gee* v. *Metr. Ry. Co.* [L. R. 8 Q. B. 161], the plaintiff, who was a passenger, had got up and put his hand on the bar passing across the window of a railway carriage for the purpose of looking out; and the pressure causing the door to fly open he was damaged. There was no other evidence of negligence, and the plaintiff had a verdict. He was held by the Queen's Bench, and on appeal by the Exchequer Chamber, entitled to retain his verdict and recover damages. To a similar effect is the Scotch case of *Cassidy* v. *N. B. Ry. Co.* [Court of Session, 3rd series, vol. xi. p. 341].

Shutting doors negligently.

Conversely cases have arisen from shutting the doors on a railway journey. In *Fordham* v. *L. B. & S. C. Ry. Co.* [17 W. R. 896], the shutting of the door by the guard on plaintiff's hand as he was getting in was sufficient evidence to go to a jury of injurious negligence. But the shutting of the door when the plaintiff had been in the carriage for about half a minute, has been held to be insufficient. [*Richardson* v. *Metr. Ry. Co.*, 16 W. R. 909.] Lastly, on this point is the case of the

thumb, whose unfortunate owner, after succeeding in the Court of Common Pleas and Court of Appeal, was found by the unanimous judgment of the Lords (Cairns, C., O'Hagan, and Gordon), to be without redress. [*Metr. Ry. Co.* v. *Jackson*, L. R. 3 App. Ca. 193.] It appears that at station A. an uncontrolled crowd got into the carriage. At station B. a further crowd tried to get in, but were so far controlled that the porter kept them out of the carriage, and shut the door upon the thumb of the plaintiff, who had risen to protest. It was by the ultimate judgment, in effect, held, that what happened at station B. was no evidence of negligence on the part of the railway authorities, and, so far as the occurrence was in any way due to what happened at station A., the cause was too remote to be the ground of an action for injury. In *Simpson* v. *General Omnibus Company* [25th April, 1873, C. P.], the plaintiff's wife travelling in an omnibus was kicked through the panel, and the common expedient of a kicking strap had not been applied; and this was held to be evidence of negligence to go to a jury.

Invitation to alight.

As collateral to the contract of a railway company to carry passengers, I shall also here advert to the much vexed question, when is a passenger entitled to alight on the train stopping, or what is an invitation to alight? The decisions are conflicting, but the tendency is to allow very slight circumstances to go to a jury as evidence. The

following are the most recent cases:—*Siner* v. *G. W. Ry. Co.* [L. R. 4 Ex. 117 (Ex. Ch.], where it was held by a majority that there was no evidence; *Cockle* v. *London & S. E. Ry. Co.* [L. R. 5 C. P. 45, and in Ex. Ch., L. R. 7 C. P. 321], the decision in the Exchequer Chamber being that there was evidence to go to the jury—the night was dark, the place where the carriage stopped was not lighted, and the train had, to appearance, come to a final stand-still; *Bridges* v. *North London Ry. Co.* [L. R. 5 C. P. 459, note, in Ex. Ch. L. R. 6 Q. B. 377, and in H. of Lords, L. R. 7 H. L. 213], the ultimate result (as more fully stated below) being to hold that there was a case for a jury; *Whittaker* v. *Manchester, &c. Ry. Co.* [22 L. T. (N. S.) 545]; *Reynolds* v. *S. W. Ry. Co.* [C. P., Nov. 16, 1870]; *Praeger* v. *B. & E. Ry. Co.* [23 L. T. (N. S.) 366 (Ex.), reversed (Ex. Ch.) Feb. 4, 1871], the result being to leave the case to the jury; *Weller* v. *L. B. & S. C. Ry. Co.* [L. R. 9 C. P. 126]—dark night, station insufficiently lighted, porter had called out, "Selhurst, Selhurst," and the train had apparently come to a final stand-still, and it was held that the question of negligence ought to have been left to the jury; *Lewis* v. *London, Chatham, & Dover Ry. Co.* [L. R. 9 Q. B. 66],—where the facts were somewhat similar, but it was light, the plaintiff knew the station well, and the train which had shot past the station, started back after a very short interval, and the

Court held there was no evidence to go to a jury; *Robson* v. *N. E. Ry. Co.* [L. R. 10 Q. B. 271]—where the train had shot past the platform, and the station-master was seen taking luggage out, and there was held to be evidence to go to the jury; and *Rose* v. *North-Eastern Ry. Co.* [C. A. from Ex. D., 19 Dec. 1876; L. R. 2 Ex. D. 248; 25 W. R. 205], where the Court of Appeal, reversing the judgment of the Exchequer Division, held there was evidence to go to the jury. The facts simply went to shew that the train having overshot the platform no attempt was made to bring it back. In the case of *Bridges* v. *North London Ry. Co.*, which went to the Court of ultimate appeal, the evidence consisted of that of a passenger who had alighted from the carriage next to the last in the train, after hearing the name of the station, "Highbury," called out in the usual way as the train stopped. This passenger had alighted on a narrow platform, which extended beyond the platform proper, and into a tunnel. After getting out, this witness heard the warning "Keep your seats!" and afterwards the train moved on (that is to say, moved further up to the platform). The witness hearing a groan, proceeded further back into the tunnel and beyond the extremity of the platform, and found the deceased lying with his legs across the rails, between the wheels of the carriage, and his body on the rubbish. (The statement is confused, but probably this was before the train moved on.)

By the unanimous judgment of the Lords who heard the appeal (Cairns, Hatherley, and Colonsay, the last named having heard the appeal and agreed in the proposed judgment, but having died before the judgment was pronounced), and which was in accordance with the unanimous opinion of the consulted judges (Pollock, Denman, Keating, Brett, and C. B. Kelly), it was decided that there was evidence of negligence which ought to have been left to the jury. The Scotch case of *Potter* v. *N. B. Ry. Co.* [Court of Session, 3rd series, vol. xii. p. 664], in which the case was left to the jury, is in harmony with the general tenor of the English decisions.

Negligence in dealing with possession of goods.

§ 87. The pledgee of goods who either through negligence or misplaced confidence parts with the possession of goods or surrenders the control of them to a person not entitled to demand the possession or control, so as to enable that person to defeat the rights of one having a prior right, is liable in an action (for conversion of the goods or document of title to them, according to the old style of pleading) to the person whose rights are so defeated. [*Matthews* v. *Discount Corporation*, L. R. 4 C. P. 228.] And a similar liability may ensue even where the person having the immediate possession or control is an involuntary bailee, and who by a needless and imprudent act enabled another person to represent himself as

owner and so to commit a fraud. This happened in the case of *Hiort* v. *Botts* [L. R. 9 Ex. 86], where the plaintiffs, merchants who had been in the habit of employing one G. as their broker, received a telegram from G., in consequence of which they consigned a quantity of barley to the defendant. G. called on the defendant, and by representing the matter as a mistake, contrived to induce defendant (to save trouble, as G. alleged) to indorse the delivery order to G., the result of which was to enable G. to make away with the barley. It happened that the delivery order had made the goods "deliverable to the order of consignor or consignee"; so there was clearly no occasion for the defendant to interfere at all, and the reasonable and prudent course would have been to leave G. to get the mistake rectified by obtaining the consignor's indorsement. It was held by the Court of Exchequer that the defendant having indorsed the order without any occasion to do so, and without authority, was liable.

§ 88. On the same principles, in a case where A., a mortgagee of real estate, parted with his deeds to B. (the mortgagor) in order to enable the latter to raise money by deposit of them with his bankers, A.'s security was postponed to the security of the deposit so created, the bankers having no notice of the prior charge; and this although A. had expressly requested B. to inform the banker of

And in the title of real estate.

that prior charge. [*Briggs* v. *Jones*, L. R. 10 Eq. 92.] Where the holder of the legal title relies on his right as a purchaser for valuable consideration without notice of an adverse title, his plea is subject to this, that notice may be imputed to him of a title of which he is only without notice through neglect of the inquiries which the law holds it to be the duty of a purchaser to make. Notice is accordingly imputed of what might be ascertained on a requisition for the production of the title-deeds [*Peto* v. *Hammond*, 30 Beav. 303], and of the rights claimed by the tenant (if any) in actual possession. [*Mumford* v. *Stohwasser*, L. R. 18 Eq. 556.] And he is not excused from the investigation because he has agreed to a special condition precluding it. [*Peto* v. *Hammond*, *supra*.] Still more is a purchaser fixed with notice who deliberately avoids inquiry. [*Whitehead* v. *Jordan*, 1 Y. & C. 303, referred to in *Jones* v. *Smith*, 1 Phill. 244, 255.] But where a mortgagee on acquiring for value a conveyance of the legal estate is informed of the existence of a settlement, and at the same time informed that it did not affect the mortgaged estate, although in fact it did, he is entitled to rely on the information so given, and not bound to inquire further. [*Jones* v. *Smith*, 1 Phill. 244.] And the Court of Chancery has repudiated the doctrine which at one time received some authority, which fixed a person who relied on the legal estate with constructive notice of documents forming

links in the legal title, and the existence of which he had no means of discovering. [*Pilcher* v. *Rawlins*, L. R. 7 Ch. 259.] And a mortgagor having the legal estate is not to be postponed, merely because he has not possessed himself of the title deeds, unless such want of possession is attributable to fraud or negligence. And negligence is not imputed by reason of the mortgagee's solicitor omitting to examine a parcel of deeds handed over previously to execution, and purporting to contain all the title deeds. [*Ratcliffe* v. *Barnard*, L. R. 6 Ch. 652.]

Where the question arises between two claimants, each holding an equitable title, as to which is to suffer from the fraud of a third person, the question generally is which of them has reposed the confidence or been guilty of the negligence which armed that person with the means of committing the fraud. [*Rice* v. *Rice*, 2 Dr. 73; *Hunter* v. *Walters*, L. R. 11 Ch. 292, 7 Ch. 75; *Maxfield* v. *Burton*, M. R., 17 Nov. 1873, W. N. p. 206.] In fact the principles on which a person would be deprived of the benefit in equity due to priority of time are very much the same as those on which he would be deprived of the benefit of the legal estate. And negligence is not imputed nor is confidence in the above sense attributed to an equitable mortgagee merely because he has accepted the representation of the mortgagor that certain early deeds offered and given as security

were all the title deeds of the party, while he fraudulently kept back the later deeds, and subsequently raised money on them. [*Dixon* v. *Muckleston*, L. R. 8 Ch. 155.]

I have already adverted to the exceptional liability in the case of trustees acting on a forged document. The principle appears to be that any person acting upon the genuineness of a document does so at his peril; but if A., believing that he holds a genuine document, *e.g.*, a bill of lading, states to B. that he has such a document, and B. acts on the faith of it, without asking to see it, A. is not held to warrant the genuineness of the document. [*Leather* v. *Simpson*, L. R. 11 Eq. 398.] And although a person who by his negligence, *e.g.*, by leaving a blank in a document, enables another to commit a forgery, will suffer by such negligence [*Guardians of Halifax*, L. R. 10 Eq. 183], this does not apply to the neglect of some collateral precaution, such as omitting to send a letter of advice in relation to the letter containing a draft which is stolen. [*Arnold* v. *Cheque Bank*, L. R. 1 C. P. D. 578.]

Duty of master of a ship in regard to goods under special contract, &c.

§ 89. The duty lying on the master of a ship as representing the owner, in regard to goods damaged by perils excepted in the bills of lading, are to take such measures as are reasonably practicable under the circumstances to check and arrest the consequent loss and deterioration; and for

neglect of this duty the shipowner is responsible to the shippers. [*Notara* v. *Henderson*, L. R. 7 Q. B. 225.]

Where a vessel cast off from moorings in a navigable river places herself at night partly across the fairway, so that her regulation lights cannot be seen by vessels astern of her coming up the river, she is bound to make use of some conspicuous signal to warn them of her position. [*The John Fenwick*, L. R. 3 Ad. & E. 500.] It has been held that a steam ferry-boat is not entitled to cross a navigable river in a fog so dense that ordinary care will not enable her to avoid a collision with a vessel anchored in the river, and the owners of a ferry boat starting in such a fog were held liable for such a collision, although their speed did not exceed three miles an hour. [*The Lancashire*, L. R. 4 Adm. 198.] And when a dense fog comes on, it is the duty of a steam vessel, having reached a proper anchorage ground, to anchor at once, and a steam vessel under such circumstances attempting to go on, although at moderate speed, was held liable for coming into collision with another vessel which had anchored. [*The Otter*, L. R. 4 Adm. 203.]

It may be here noted that the liability of shipowners for occurrences by improper navigation, without their actual fault or privity, is limited by the Merchant Shipping Acts (that now in force being the 25 & 26 Vict. c. 63, s. 54), in proportion

to the tonnage of the ship; and this applies whether the vessel improperly navigated is a stranger to the vessel damaged, or was towing her, or otherwise connected with her. [*Wahlberg* v. *Young*, 24 W. R. 847.]

Builders and other contractors.

§ 90. The following are cases illustrating the liability which contractors engaged upon building and other operations may incur to strangers. A contractor under the Metropolitan Board of Works having opened a trench in a highway for the purpose of constructing a sewer, and afterwards reinstated it by properly and completely filling in the trench, was held not liable for damage to a horse, five months afterwards, stumbling over a hole in the road caused by the natural subsidence of the material. [*Hyams* v. *Webster*, L. R. 4 Q. B. 138 (Ex. Ch.).] A sub-contractor engaged on an unfinished building was held not liable to a custom-house officer who was in the habit of passing that way (not being the regular entrance) to perform his duty in visiting a bonded vault, and in doing so fell into an opening and was damaged. [*Castle* v. *Parker*, 18 L. T. (N. S.) 367.] A builder's workman employed in repairing a railway station left a plank resting on the gates at the entrance. A servant of the railway company shutting the gates at night was damaged by the falling of the plank. The builder's workman did not know of the gates being shut at night.

It was held that there was no evidence of negligence for which the railway servant could sue the builder. [*Pearson* v. *Plucknett*, 20 L. T. (N. S.) 662.]

Letting cab for hire.

§ 91. The nature of the duty of the person letting for hire a horse and cab upon the terms usual in London, was decided by the Court of Common Pleas in the case of *Fowler* v. *Lock* [L. R. 10 C. P. 901]. The horse with which the plaintiff (a cab driver) was supplied being fresh from the country and never before harnessed to a cab, overturned the cab and damaged the plaintiff. In answer to questions put to them by the judge, the jury found that the horse was not reasonably fit to be driven in a cab, that the plaintiff did not take upon himself the risk of its being reasonably fit to be so driven, that the defendant did not take reasonable precautions to supply plaintiff with a reasonably fit horse, and that the horse and cab were intrusted to the plaintiff as bailee, and not as servant. A verdict having been on these findings entered for the plaintiff, the Court refused to disturb it.

Liability for servants or agents.

§ 92. It may be noted that in certain of the cases where more than an ordinary kind of responsibility is implied, the party has been held liable for the negligence of those over whom he has practically no control whatever. In the class

of cases where ordinary negligence and ordinary care are the criteria, liability for the acts of others is limited to the cases where the person charged with liability has or is presumed to have some control over the acts. So in cases demanding ordinary care, the master or principal is held responsible for the acts of servants or agents within their respective spheres of duty or authority. In such cases the principle *respondeat superior* is said to apply; and the principle is sometimes expressed by the maxim, *Qui facit per alium facit per se.*

Master liable for servants acting within their sphere of duty or course of employment. Principal for agent within the scope of his authority.

§ 93. The principle, to state it accurately, is this:—The master is answerable for the acts or omissions of servants or workmen while pursuing the course of their employment. The principal is answerable for acts or omission of his agent while acting within the scope of his authority. And the person suffering the damage may either sue the servant or agent whose act immediately caused the damage, or at his option may sue the master or principal, though he cannot, generally speaking, sue an intermediate agent for the act of a sub-agent. [Dicey on Parties, 466, 467.] So that if a servant driving his master's carriage along the highway carelessly runs over a bystander, or if a gamekeeper employed to kill game carelessly fires at a hare so as to shoot a person passing on the ground, or if a workman employed by a builder in building a house negligently throws a stone or a

brick from a scaffold, and so hurts a passer-by—in all these cases the person damaged has a right to treat the wrongful or careless act as the act of the master. [*Per* Lord Cranworth in the *Bartonshill Colliery case*, 3 Macq. 283.] And it is no answer for the master to say that he has taken the utmost care in the selection of his servants, or that the particular act was unauthorized, or even that it was contrary to the masters' general orders. [*Page* v. *Defries*, 7 B. & S. 137; *Reg.* v. *Stevens*, L. R. 12 Q. B. 702.] Where *scienter* is of the essence of liability, knowledge by servants whose duty is to inform the master, or who appear to represent the master for the purpose of receiving a communication, may be imputed to the master. [*Baldwin* v. *Casella*, L. R. 7 Ex. 325; *Applebee* v. *Percy*, L. R. 9 Eq. 647.] And this is the case although the master is a corporation. [*Stiles* v. *Cardiff Steam Nav. Co.*, 33 L. J. (Q.B.) 310.] If I lend my servant to an independent contractor to be under his control, the contractor is liable for the way in which he does his work, and not I. [*Per* Brett, J., in *Murray* v. *Currie*, C. P., Nov. 16, 1870, 19 W. R. 104.]

The master of a ship acting within the scope of his authority will make his owners liable for a collision caused by his negligence; and, although himself an agent, is subject to an exceptional liability, so as to be answerable for the negligence of all on board to the same extent as if he were

himself the ultimate principal. [Dicey on Parties, p. 467.] The owner remains liable although by an agreement between him and the master, the latter is interested in the venture and has the widest possible discretion in conducting it, so long as the agreement does not amount to a demise of the vessel; and the circumstance of an owner after such an agreement registering himself, as "managing owner," under the Merchant Shipping Act, 1875 (s. 4, subs. 4), though not conclusive, is a cogent circumstance to shew that there was no intention on the part of the owner to give up the control of the vessel. [*Steel* v. *Lester*, 3 C. P. D. 121. See also *Omoa, &c., Co.* v. *Huntley*, 2 C. P. D. 464.]

Trustees having a duty to invest the trust-money safely are held liable for the negligence of a solicitor employed by them acting within the scope of his authority: *e. g.* omitting, while investing money on a fresh mortgage, to inquire whether any incumbrances had been created since the date of a former investigation of title. [*Hopgood* v. *Parkin*, L. R. 11 Eq. 74.] And from the above doctrine coupled with the principle that such partner is the agent of the firm for the purpose of carrying on its business in the usual way, it follows that the members of an ordinary partnership are jointly liable in damages for the negligence of any one of its members in conducting the business of the partnership. [Lindley on Partnership, p. 315,

3rd ed.; *Mellors* v. *Shaw*, 1 B. & Sm. 437; *Ashworth* v. *Stanwix*, 7 Jur. (N.S.) 467; *Duke of Brunswick* v. *Sloman*, 8 C. B. 317.] And the partnership is liable for the negligence of their servants acting in the course of their employment by the firm. [Lindley, *ibid*; *Stables* v. *Eley*, 1 Car. & P. 614.] And similarly joint stock companies and corporations are liable for the negligence of their directors, officers, and servants acting within their respective spheres of duty and course of employment [*Mersey Docks, &c.*, v. *Gibbs*, L. R. 1 H. of L. 93; *Coe* v. *Wise*, L. R. 1 Q. B. 717; Lindley, p. 316], and within the scope of the powers of the company or corporation itself. [*Poulton* v. *S. W. Ry. Co.*, L. R. 2 Q. B. 534; compare *Walker* v. *S. E. Ry. Co.*, 18 W. R. 1032 (C. P.); *Allen* v. *L. & S. W. Ry. Co.*, 19 W. R. 127 (Q. B.)]

What is "course of employment," "sphere of duty," "scope of authority."

§ 94. The expressions "course of employment," "scope of authority," are phrases which have become current in the arguments and decisions upon this class of cases. Their meaning can only be accurately defined by the illustration derived from cases authoritatively decided. Of these I shall cite two, one in the Court of Common Pleas and the other in the Queen's Bench. In one the defendant was held liable, in the other, not. The distinction, if any, between the circumstances of these two cases is very fine. I cite them as amongst the more recent cases, and as giving the key, through the

cases cited in the arguments, to the whole train of earlier authorities upon the subject.

Whatman v. Pearson.

§ 95. The case in the Common Pleas [*Whatman* v. *Pearson*, L. R. 3 C. P. 422] was as follows:— The defendant, a contractor, was employed under the district board of Greenwich in carting away the soil excavated from a highway there, during the construction of a sewer, and for this purpose employed a number of men with horses and carts. The duty of the men so engaged was to travel with their carts for a certain number of hours each day between the place where the excavation was going on and the place of deposit for the earth and rubbish, with an hour's interval for dinner, but never to quit their horses or carts, or leave their work. One of the men, contrary to his instructions, went home to dinner at a place about a quarter of a mile out of the line of his work, and left his horse and cart in the street before his house: the horse had his bridle off and a nosebag on, and there was no one to look after him. While the driver was thus absent, the horse ran away and damaged the plaintiff's railings, for which action was brought. The judge at the trial left it to the jury to say whether the driver had been guilty of negligence, and whether he was at the time acting within the course of his employment. The jury gave their verdict for the plaintiff on both points. The Court held that the question

had been properly left to the jury, and that the verdict was justified by the evidence.

§ 96. The case in the Queen's Bench [*Storey* v. *Ashton*, L. R. 4 Q. B. 476] was this:—The defendant was a wine-merchant having offices in Vine Street, Minories. On the day in question (Saturday) the defendant sent a clerk and carman with a horse and cart, to deliver wine at Blackheath. They delivered the wine and received some empty bottles, and it was then the duty of the carman to have driven back direct to the defendant's offices, left the empties there, and taken the horse and cart round to the stables, which were near. Instead of doing this, the carman, within a quarter of a mile from home, it being then after business hours (3 P.M. Saturday), at the persuasion of the clerk, turned off in another direction on an errand for the clerk's private behoof, and while driving along the City Road in pursuit of this errand heedlessly drove over the plaintiff. The question for the Queen's Bench was, whether the defendant was liable for the negligence of the carman: and this question was decided in the negative. *Storey* v. *Ashton.*

Cockburn, C.J., said, "The true rule is, that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant. I am very far from saying, if the servant, when going on his master's

business, took a somewhat longer road, that, owing to this deviation, he would cease to be in the employment of the master so as to divest the latter of all liability: in such cases it is a question of degree how far the deviation could be considered a separate journey. Such a consideration is not applicable to the present case, because here the carman started on an entirely new and independent journey, which had nothing at all to do with his employment."

§ 97. In the judgment last cited the opinions of Maule and Cresswell, JJ., in *Mitchell* v. *Crassweller* [13 C. B. 237; 22 L. J. (C. P.) 100], are quoted with approbation. The case of *Mitchell* v. *Crassweller* was a case where a carman in the employ of the defendant had returned from an errand and got from his employer the keys of the stable for the purpose of putting up his horse, and then, to oblige a fellow-servant and without leave or knowledge of the master, drove away to a place at some distance, and on returning committed the damage complained of. The master was held not responsible. Maule, J., observed, "The master is liable even though the servant, in the performance of his duty, is guilty of a deviation or a failure to perform it in the strictest and most convenient manner. But, where the servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, the master

cannot be said to do it by his servant, and therefore is not responsible for the negligence of the servant in doing it." Cresswell, J., said, "I agree that in the circumstances the carman cannot be said to have been acting in the employ of the defendants at the time the injury complained of was done, so as to make them responsible in damages for his negligence. No doubt, if a servant, in executing the orders, express or implied, of his master, does it in a negligent, improper, and roundabout manner, the master may be liable. But here the man was doing something which he knew to be contrary to his duty, and in violation of the trust reposed in him. I think it would be a great hardship upon the employers to hold them responsible under the circumstances."

§ 98. The case in the Common Pleas (*Whatman* v. *Pearson*) is perhaps an extreme case for the inference of the master's liability. But it is not absolutely inconsistent with the other cases above cited, and it seems authorized by the *dicta* of Parke, B., in his charge to the jury in *Joel* v. *Morison* (6 C. & P. 503), which have been subsequently quoted with approbation. In that case the occurrence seems to have happened at a considerable distance from the direct line where the cart should have been in the due course of business. Yet Parke, B., left the case to the jury with these observations: "If the servants, being on their

master's business, took a *détour* to call upon a friend, the master will be responsible. If you think the servants lent the cart to a person who was driving without the defendant's knowledge, he will not be responsible. The master is only liable where the servant is acting in the course of his employment. If he was going out of the way, against his master's implied commands, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable."

§ 99. The following cases have been decided subsequently to the decisions of the Queen's Bench and Common Pleas above commented on at length. In *Bayley* v. *Manchester, &c., Ry. Co.* (L. R. 7 C. P. 415, affid. Ex. Ch. 8 C. P. 148), a railway company were held liable for the act of a porter who injured a passenger by violently pulling him out of a carriage after the train had started under the impression that he was in the wrong train. There was a rule against allowing a passenger to get in or out of a train in motion. It was proved to be the duty of the porters to prevent, as far as they could do so, passengers from going by the wrong trains, but it was not their duty to remove persons from the wrong train or carriage. It was held that there was evidence on which a jury might find that the act of the porter in pulling the plaintiff out of the carriage was an act done within

the course of his employment as the defendants' servant, and for which the defendants were therefore responsible. In *Burns* v. *Poulsom* (L. R. 8 C. P. 563) the foreman of a stevedore whose duty it was to ship iron rails *after* the same had been unloaded on the quay by a carman, not satisfied with the way in which the carman unloaded them, got into the cart and threw out some of them so negligently that a passer-by was damaged. The Court by a majority, Grove and Denman, JJ., Brett, J., dissenting, held that there was evidence on which the jury might find that the foreman was acting within the scope of his employment, so as to render the stevedore responsible for his acts. In *Whiteley* v. *Pepper* [2 Q. B. D. 276], the defendant, a coal merchant, was held liable for the act of his carman in removing the iron plate over the coal-hole of a cellar, and leaving the coal-hole open without any warning, so that a passer-by fell into the coal-shoot and was damaged. It was held that every one who interferes with a public highway so as to render it dangerous to passengers is bound to guard against such danger. The carman having in the due course of his employment removed the plate, there was a positive duty upon him, for which his employer was responsible, to warn passers-by, and this having been neglected the employer was held liable. On the other hand, in *Rayner* v. *Mitchell* [2 C. P. D. 357], the defendant, a brewer,

was held not liable for the negligence of his carman. The course of employment was that the carman should take out beer to customers with the defendants' horse and cart, and on his return journey call for empty casks wherever they would be likely to be collected. The carman on the occasion in question had without his master's permission and for a purpose of his own wholly unconnected with the defendant's business taken out the horse and cart, but in returning he had picked up some empty casks which at the time of the accident were in the cart. It was held that the carman had not re-entered upon his ordinary duties at the time of the accident, and that the master was therefore not liable.

Partners responsible for each other.

§ 100. The responsibility of persons for their agents applies between partners, who are each responsible for acts of the other (whether negligent or fraudulent) within the scope of the partnership business; and there are frequent instances in the case of partnership between solicitors where the Courts have held one partner liable for money or securities received by or entrusted to another partner acting on behalf of the firm, and then misappropriated by the latter partner. [*Blair* v. *Bromley*, 5 Hare, 542, 2 Ph. 354; *Atkinson* v. *Macreth*, L. R. 2 Eq. 570; *St. Aubyn* v. *Smart*, L. R. 3 Ch. 646; *E. of Dundonald* v. *Masterman*, L. R. 7 Eq. 504; *Plumer* v. *Gregory*, L. R. 18 Eq.

621.] In an action for careless steering, the circumstance of the barge being the property of the defendant has been held *primâ facie* evidence that it was steered by his servant. [*Joyce* v. *Capel*, 8 Car. & P. 370.] But such evidence may be rebutted by evidence to the contrary. [*Shields* v. *Edinburgh, &c., Ry. Co.*, Court of Session, 2nd series, vol. xviii., p. 1199.]

Owners for master of ship.

§ 101. I cite here, as an instance of the responsibility of the owners for the master of a ship, the case of *The Thetis* (L. R. 2 Adm. 365). In making a deviation in order to perform salvage services, the master was held as acting within the general scope of his authority, and therefore the owners were held liable for damages caused by a collision occurring through the master's negligence while so deviating from his course.

Exception to the maxim "*respondeat superior*" where the damage arises from a risk incident to a contract of employment for hire.

§ 102. To the principle "*respondeat superior*" there is one important limitation. If there is a relation existing by contract between the person damaged and the person by whose servant the damage is caused, and if the damage, although immediately caused by the servant, is of such a nature that the risk of such damage is a risk incident to the contract, the maxim *respondeat superior* does not apply. The sufferer is presumed to have contemplated the risk as part of the consideration for the benefit promised to him by the contract, and

he has no remedy against the master unless the master be personally guilty of negligence. [*Priestly* v. *Fowler*, 3 M. & W. 1.]

Bartonshill Colliery cases.

§ 103. This doctrine was much considered in the Bartonshill Colliery cases (3 Macq. 266, 300). These cases arose out of a fatal casualty in the shaft of a coal-mine caused by the negligence of the engineman, who omitted to stop the engine when the cage containing workmen arrived at the pit-head. The engineman had an excellent character for carefulness and steadiness. The Lord President, in the trial, directed the jury, that "if they were satisfied on the evidence that the injury was caused by culpable negligence and fault on the part of the engineman in the management of the machinery, the defenders were, at law, answerable." This ruling was found erroneous, on the ground that damage by the negligence of the engineman, a fellow-servant in a common employment with the pursuer (plaintiff) was one of the risks of the service in which he had voluntarily engaged for hire.

§ 104. In this case Lord Brougham observed that the liability depended on the question "Whether the negligence was that of a fellow-workman engaged with the plaintiff upon the same work," or, to use a word which has been much employed in these arguments, the negligence of a

collaborateur. The result of subsequent judicial opinion is, however, to shew, that the question is not whether the two servants were *collaborateurs* or fellow-workmen in any technical sense of the term; but whether the damage was within the risk incident to the service undertaken for reward. The negligence of a fellow-workman engaged upon a common work is commonly accounted amongst the risks so undertaken, but is only a subordinate instance, and must be considered in its relation to the more general principle. And upon this point the authorities in the law of England, Scotland, and America now agree. [*Farwell* v. *Boston Railroad Corporation*, 4 Metcalf, 49, 3 Macq. 316; *Morgan* v. *Vale of Neath Ry. Co.*, L. R. 1 Q. B. 149; *Tunney* v. *Midland Ry. Co.*, L. R. 1 C. P. 291; *Wilson* v. *Merry and Cunningham*, L. R. 1 H. of L., Sc. 321; *Feltham* v. *England*, L. R. 2 Q. B. 33; *Leddy* v. *Gibson*, Court of Session, 3rd series, vol. xi., p. 304; *Sneddon* v. *Mossend Colliery Co.*, Court of Session, 4th series, vol. iii., p. 868.] The tendency of the English Courts is to give considerable latitude to the risks assumed to have been undertaken under a contract of service. Thus risks arising from the negligence of a certificated manager appointed by the owner of a colliery pursuant to the Coal Mines Regulation Act, 1872, have been held to be undertaken by the workmen within their contract of service, and therefore not to form a ground of liability against the owner.

Howells v. *Landore, &c.*, L. R. 10 Q. B. 62.] And a waterman employed by the owner of a warehouse at weekly wages for the purpose of mooring barges, and who was in the habit of going when sent for to the office on the land side of the warehouse for orders, was on one of those occasions knocked down by a sack of grain negligently let fall by the men engaged in hoisting it to the warehouse. It was held that the waterman could not make the owner responsible to him. [*Lovell* v. *Howell*, 1 C. P. D. 161.]

The exception to the maxim "*respondeat superior*" depends on contract.

§ 105. That the principle of the cases above cited depends entirely on the contract between the parties is strongly exemplified by the case of *Warburton* v. *Great Western Ry. Co.* [L. R. 2 Ex. 30], where a railway porter engaged in his usual occupation at a station in the service of the N. Company was damaged by the negligence of an engine driver in the service of the W. Company, who had a joint use of the station under an agreement with the N. Company. Here the sufferer recovered compensation from the W. Company (with whom he had no contract) for the damage caused by the negligence of the servant of the latter. This was a case where the person in fault was engaged in the ordinary course of his employment under the company whom he served. The Scotch case of *Calder* v. *Cal. Ry. Co.* (reported 3rd series of Court of Session Reports, vol. ix., p.

833), and *Adams* v. *Cal. Ry. Co.* (Court of Session Reports, 4th series, vol. iii., p. 215), involve the same principle. But where a seaman, one of the crew of a vessel, acting under the immediate orders and control of a master stevedore in the loading of a vessel, by his negligence damaged a workman employed in the same operation, also under the orders of the stevedore, the owners of the vessel were not held liable for the damage. [*Murray* v. *Currie*, Nov. 14th, 1870 (C.P.)] The view taken was, I presume, that the seaman was, for the time being, not the servant of the owners at all, but of the persons who undertook the loading. The mode of payment seemed to imply this, since the stevedore paid wages to such of the crew as he chose to employ, which was afterwards deducted from the wages paid them by the owners.

It has been held that a pilot employed under the compulsory clauses of the Merchant Shipping Act does not undertake the risk of damage by negligence of the crew as incident to his employment. [*Smith* v. *Steele*, L. R. 10 Q. B. 125.] The master of the ship being compelled to employ the pilot, and the remuneration being according to a fixed tariff, no possibility in fact remains to support the presumption (in most cases a fiction) that the employee demands and receives larger pay in consideration of the risks of the service, including those arising from negligence of servants. The pilot is therefore in the position of a stranger

coming by invitation, as in *Indermaur* v. *Dames* [L. R. 2 C. P. 311], or of the custom-house officer in *Scott* v. *London Dock Co.* (p. 29, *supra*).

Can the exception be extended to a case where there is no contract by way of service?

In a case where the person damaged was himself an independent contractor, the Court of Session in Scotland have held that there was no implied undertaking of the risks arising from the negligence of the defendant's servants. The defendant, who was building a house, employed journeymen masons without the intervention of a contractor. He contracted with the plaintiff for the execution of the joiner work, and the plaintiff, at the defendant's request, commenced operations before the masons' work was finished. The damage took place through the falling of a stone in the course of a hazardous system of work adopted by the masons in consequence of the employer pressing on the work. The Court, who were by no means impressed with the reasonableness of the presumption adopted in England regarding the risks undertaken in the contract of service (although in the case of a contract of service they would have felt bound by the authority of the cases decided in the House of Lords), thought the doctrine ought not to be extended, and held the position of the joiner to be that of a person on the premises by invitation, and entitled to hold the master responsible, as in the English cases of which *Indermaur* v. *Dames* is the type. [*Gregory* v. *Hill*, Dec. 14, 1869, Court of Session, 3rd series, vol. viii., p. 282.]

This decision was, however, virtually reviewed in the later case of *Woodhead* v. *Gartness Mineral Co.*, Court of Session, 4th series, vol. iv., p. 469, where it was held by a majority of seven judges, the Lord Justice Clerk dissenting, that where there is a privity between the owner and the person damaged, whether by way of contract of service with the owner, or of service under a contractor with the owner, and generally where there is a privity by contract or sub-contract, the question, in the absence of personal fault, is, whether the risk was one within the scope of the risks undertaken by the person damaged, and that this is presumed if the damage occurred from the negligence of a subordinate engaged in the same common work. The *ratio decidendi* in *Gregory* v. *Hill* is thus overruled, though the actual decision in that case might be supported on the ground that there was some evidence of personal negligence. The ruling of Chief Justice Cockburn in *Fletcher* v. *Peto* (3 Fost. & Fin. 368] is to the effect that a contractor under a special contract would in England not be presumed to undertake risks from the negligence of the employer's servants or workmen in a different department of work. But the Scotch case last quoted is more in accordance with the *dicta* in *Wilson* v. *Merry* [L. R. 1 H. of L., Sc., pp. 331, 332], and the question is one which, if it should be directly raised in an English case, would require a good deal of consideration.

Master's duties to servant.

§ 106. What the master does owe to the servant, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work [*per* Lord Cairns (Chancellor) in *Wilson* v. *Merry*, L. R. 1 H. of L., Sc. 332; *Cook* v. *Bell*, Court of Session, 2nd series, vol. xx. pp. 137, 143]; and when a master employs a servant in a work of a dangerous character he is bound to take all reasonable precautions for the safety of that workman. [*Per* Lord Cranworth in *Paterson* v. *Wallace*, July, 1854, 1 Macq. 751; *Brydon* v. *Stewart*, H. of L., 13 March, 1855, 2 Macq. 30; *Weems* v. *Mathieson*, 4 Macq. 215; *Pollock* v. *Cassidy*, Court of Session, 3rd series, vol. viii. p. 615; *Edgar* v. *Law*, Court of Session, 3rd series, vol. x. p. 236; *Robertson* v. *Brown*, do., 4th series, vol. iii. p. 652.] He also owes to his servants the duty, whether the employment is itself dangerous or not, to take reasonable care that machinery which, if unfenced or out of order, must be dangerous, is sufficiently fenced, or otherwise safe and in a condition that his servants can use it properly without danger. [*Watling* v. *Oastler*, L. R. 6 Ex. 73; *Holmes* v. *Clarke*, 7 H. & N. 937; *Murphy* v. *Phillips*, April 28, 1876, Ex. D., 24 W. R. 647.] But it would appear that the master sufficiently discharges his duty as to the selection of servants, if he employs a competent foreman whose duty it

is to engage the servants; and as to the condition of the machinery, if he employs competent persons to keep it in proper order. [*Balleny* v. *Cree*, Court of Session, 3rd series, vol. xi. p. 626.] And it will not bring home liability to the master if it is shewn that the foreman had notice of the habitual negligence of a boy employed in the works. [*Smith* v. *Howard*, 22 L. T. 130 (Ex.)]. If the master by personal heedlessness exposes the servant to danger, he is liable as in any other case of ordinary negligence. [*Warren* v. *Wildee*, C. P., 15 April, 1872; and see judgment of Byles, J., in *Fowler* v. *Lock*, L. R. 7 C. P. 280.] In certain works there is also a statutory duty to fence machinery, 7 & 8 Vict. c. 15, s. 21; and the neglect of the statutory duty, being itself only a reasonable precaution, forms ground for a remedy by action in favour of the workman damaged, or his representatives, under Lord Campbell's Act. [*Holmes* v. *Clarke*, *supra cit.*; *Britton* v. *Great Western Cotton Co.*, L. R. 7 Ex. 130; *Gibb* v. *Crombie*, Court of Session, 4th series, vol. ii. p. 866.] By the Coal Mines Regulation Act, 35 & 36 Vict. c. 76, s. 51, after a number of general rules chiefly by way of precaution for the safety of workmen, it is enacted that "every person who contravenes or does not comply with any of the general rules in this section shall be guilty of an offence against this Act; and in the event of any contravention or non-compliance with any of the said general rules

in the case of any mine to which this Act applies, by any person whomsoever, being proved, the owner, agent, and manager shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the said rules as regulations for the working of the mine, to prevent such contravention or non-compliance." In *Baker* v. *Carter* [3 Ex. D. 132], a case of an information against a colliery owner for non-compliance with one of the general rules, it was proved that the general rules were put up in various parts of the mine, and that the defendant occasionally visited the mine but resided at a distance and took no part in the management, which was under the exclusive control of the certificated manager, who was also part-owner. The defendant was not examined as a witness as he might have been under s. 63, subs. 4, of the Act, but it was admitted that he had not personally taken any means to enforce the rules. The justices found as a fact that the defendant had taken all reasonable means of publishing, and to the best of his power enforcing, the rules, &c. (following the language of the concluding clause of s. 51), and dismissed the information. The Court held that the finding was justified, on the ground that the reasonable thing to do for a person residing at a distance was to appoint a certificated manager to reside at the mine and take all the management.

Further instances of legislation of the kind here referred to are the Acts of the present year relating to threshing machines, 41 Vict. c. 12, s. 1, and in relation to factories and workshops, c. 16, ss. 5–9.

What is a risk incident to the service?

§ 107. The question, what is a risk incident to the service, is not capable of any certain criterion. Perhaps the doctrine has been stretched to its furthest point when it has been held that a risk arising from the circumstance that the company is in the habit of employing an insufficient number of hands, to the knowledge of the person undertaking the service, is a risk incident to his contract of service. Yet this seems to be, in England, established by authority. [*Skipp* v. *E. C. Ry.*, 9 Exch. 223.] It was a still greater extension of a risk incident to the service to hold that the owner of a ship does not warrant to the crew the seaworthiness of the vessel. Yet this also was held to be law in the case of *Couch* v. *Steel* [3 Ell. & Bl. 402].

First branch of *Couch* v. *Steel*.

Law now altered by statute, and shipowner in effect warrants to seamen care that the ship is seaworthy.

By the provisions of the Merchant Shipping Act, 1876, however, the shipowner incurs to the crew a warranty similar to that above described in the case of carriers of passengers by rapid conveyance. This Act (39 & 40 Vict. c. 80) after (sect. 4) making it a misdemeanour for any person knowingly to send a ship to sea in an unseaworthy condition, enacts that (sect. 5) "in every contract

of service, express or implied, between the owner of a ship and the master or any seaman thereof, and in every instrument of apprenticeship whereby any person is bound to serve as an apprentice on board any ship, there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship, that the owner of the ship, and the master, and every agent charged with the loading of the ship, or the preparing thereof for sea, or the sending thereof to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same: Provided that nothing in this section shall subject the owner of the ship to any liability by reason of the ship being sent to sea in an unseaworthy state where, owing to special circumstances, the so sending thereof to sea is reasonable and justifiable."

"*Respondeat superior*" does not extend to case of an independent contractor.

§ 108. It has been observed that the maxim *respondeat superior* depends on the presumed control implied by the relation between the parties. It therefore does not extend to the case of an independent contractor to whom the execution of a work is committed without any control or power of direction being reserved on the part of the employer as to the manner of executing the work. [*Taylor* v. *Greenhalgh*, L. R. 9 Q. B. 487; and

compare *Pendlebury* v. *Greenhalgh*, 1 Q. B. D. 36, and observations on those cases, p. 94, *supra*.] In such cases the law makes the contractor alone responsible for damage done by him in the execution of the works [*Welfare* v. *Brighton Ry. Co.*, L. R. 4 Q. B. 696], the maxim *respondeat superior* applying only to the contractor for acts of his servants. But the rule which thus exempts the employer does not apply to cases where the injurious act is the very act which the contractor was employed to do; or a necessary consequence of the work committed to him. Nor, by parity of reasoning, is the employer exempted if he commits to the contractor the performance of a duty incumbent on himself, and the contractor neglects its fulfilment. If the performance of the duty be omitted, the fact of the person owing it having entrusted it to a person who also neglected it, furnishes no excuse in law. [*Per* Williams, J., delivering the judgment of the Court in *Pickard* v. *Smith*, 10 C. B. (N.S.) 480, cited in *Mersey Docks Trustees* v. *Gibbs*, L. R. 1 H. of L. 114; see also *Gray* v. *Pullen*, 5 B. & S. 970; 34 L. J. (Q.B.) 265; *Tarry* v. *Ashton*, L. R. 1 Q. B. 314; *Stephen* v. *Thames Police Commissioners*, Court of Session, 4th series, vol. iii. p. 535.]

§ 109. The principle last mentioned consists with what has been already stated with regard to situations where more than ordinary care is

This is the same as to say care is not warranted.

demanded; namely, that in such cases a person cannot exonerate himself by shewing that he delegated the business to independent and competent contractors. For the duty is in these cases conceived of as a positive duty—to take care, as opposed to the negative duty of not being guilty of heedlessness or rashness. And although, as I have shewn, the distinction between the different degrees of responsibility does not accurately correspond with any line between positive and negative duties, it may be useful to conceive of the duty where the higher degree of care is demanded as a positive duty, for the special purpose of drawing the inference that the delegation of the duty to another will not exonerate from liability for non-performance.

French law. *Commettant et Préposé.*

§ 110. It seems that the French law, in its application of the maxim *respondeat superior*, is in harmony with our own. A question depending on this law came recently before the Judicial Committee of our Privy Council in an appeal from the Mauritius. By Art. 1384 of the Code Napoléon, "Les maîtres et les commettants [sont responsables] du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés." In their interpretation of the article, the French lawyers appear to have qualified the doctrine so far as regards the *commettant* and *préposé* by saying that to make the *commettant*

responsible for the negligence of the *préposé*, the latter must be acting "sous les ordres, sous la direction et la surveillance du commettant." And in applying this law the Judicial Committee held the *commettant* responsible where, having employed certain Indians with gangs of labourers under them to clear a piece of ground, the plaintiff's house was burnt by their negligence. Having regard to the nature of the work and the condition of the men employed, the Court thought it unreasonable to infer that the defendant had parted with the power of correcting, as the work went on, the mode in which it was to be performed, and of directing what kind of brushwood and other growth was to be removed, and what was to be left standing. It was also observed that these men (the Indians) do not at all answer the description given by Sirey (Codes Annotés, vol. i. p. 665) of "ouvriers d'une profession reconnue et déterminée;" they were ordinary labourers, characterised by the Court below as "a set of idle, careless, semi-barbarians." [*Sérandat* v. *Saissé*, L. R. 1 P. C. Ap. 152, 167.]

Cab-owners' responsibility to public.

In regard to the proprietor and driver of a London cab, although, as already seen [*Fowler* v. *Lock*, p. 135, *supra*], the relation as between themselves, is that of bailor and bailee, a liability towards the general public has been held to exist on the footing that the driver is the servant of the proprietor, and the latter is responsible for his negligent

driving by which a stranger is damaged. [*Powles* v. *Hider*, 6 E. & B. 207; *Venables* v. *Smith*, 2 Q. B. D. 279.]

Person lending a hand to work.

§ 111. A person voluntarily lending a hand to a work, although not hired, is in no better position than the workmen or servants engaged in the work. [*Degg* v. *Midland Ry. Co.*, 1 H. & N. 773; *Potter* v. *Faulkner*, 1 B. & S. 800.] But the case is different where the person lending a hand to the work has himself an interest in having it done, as has been held in cases where the owner of cattle or goods, or his servants, being on the premises for that purpose with the consent of the railway company, has lent a hand to the operations for getting delivery, and while doing so been damaged by the fault of the company's servants. [*Wright* v. *L. & N. W. Ry. Co.*, L. R. 10 Q. B. 298; *Holmes* v. *N. E. Ry. Co.*, L. R. 4 Ex. 254; *Wyllie* v. *Caledonian Ry. Co.*, Court of Session, 3rd series, vol. ix. p. 463.]

III. *Culpa lata aequiparata dolo.*

Culpa lata in two cases. Gratuitous deposit and loan.

§ 112. I now proceed shortly to illustrate the lowest degree of responsibility, namely, that where more than ordinary negligence is requisite to constitute injury; and where, therefore, less than the ordinary care of a prudent and reasonable person is demanded. Of this class the two best marked

species are the responsibility of the gratuitous depositee, and the responsibility of the bailor in the case of commodate or loan.

§ 113. By the Roman lawyers the case of deposit is emphatically given as an instance in which the bailee is only liable for intentional wrong (*dolus*), or for that gross negligence (*culpa lata*) which the law refuses to distinguish from intention. In the celebrated judgment of Holt, C.J., in *Coggs* v. *Bernard*, *deposit* is instanced as that kind of bailment in which, of all others, the least responsibility is demanded of the bailee. And in the most recent case where the liability of the depositee has been considered in our Courts, the practical result is to exonerate the bailee from a great part of that responsibility which in any case of contract from which he received benefit would certainly have been demanded of him. Deposit.

§ 114. I here refer to the case of *Giblin* v. *McMullen* [L. R. 2 P. C. Ap. 317], decided by the Judicial Committee of the Privy Council on appeal from the Supreme Court of Victoria. It arose out of the loss of debentures *to bearer* from a box deposited with the plaintiffs (who were bankers), as gratuitous bailees, and placed by them in their strong room, where a considerable amount of securities and specie of their own as well as valuable property of other customers was kept. The *Giblin* v. *McMullen*.

customer retained possession of the key of the box. The debentures were abstracted by a servant of the bank, who left the service before the loss was discovered, and who, being a tried servant and bearing an excellent character, had been entrusted with the keys of both the doors (one within another), by which access to the strong-room was obtained, and who thus enjoyed opportunities of having access to the strong-room alone. After the discovery of the loss, the directors, by way of additional precaution, made regulations by which it became necessary that two officers of the bank should go together whenever the strong-room was visited. The Supreme Court of the colony held, in effect, that there was no evidence to go to the jury of such negligence as would render the bank liable for the loss; and this judgment was affirmed by the Privy Council. Now it is clear that if the transaction had been one from which the bank received valuable consideration, for instance, if the securities had been placed with the bank by way of pledge for advances, there would have been evidence of negligence which could not have been withdrawn from the consideration of a jury. For the fact that they afterwards thought proper to take an additional precaution would have been a piece of evidence from which a jury might have inferred that the precautions taken in the first instance were not such as reasonable and prudent men would have thought sufficient.

The distinction here pointed out was the ground of the judgment pronounced by the Master of the Rolls (Lord Romilly) in *Re United Service Co., Johnston's Claim* (Nov. 21, 1870), a case where the owner of shares of certain companies deposited the certificates for safe custody with his bankers, who charged a small commission upon the collection of the dividends. The certificates were placed by the bank in the hands of their servant, who obtained money for his own purposes by forging transfers of the shares and delivering up the certificates to the transferees. The owner of the certificates was in consequence obliged to bring a chancery suit against the companies to have his name restored to the register as a shareholder in their books. He was successful in the suit, but failed in recovering costs. For the expense to which he had been so put he claimed in the liquidation of the bank. The Master of the Rolls, holding the bank to be bailees for reward, thought he was entitled to recover. The Lords Justices, on appeal [L. R. 6 Ch. 212], agreed that the bank were bailees for reward, not merely on the ground that they received commission, which they might have done without having the certificates deposited with them, but also being of opinion that the bank would have been entitled to a lien upon the certificates for their general banking account, and that the case was therefore distinguishable from *Giblin* v. *McMullen*, where the customer kept the key of the

box and alone had lawful access to the contents. The Lords Justices, however, thought that the neglect of the bank was not the only reason of the costs in the suit being refused, and held that the special damage claimed was not the natural, necessary, or ordinary consequence of that neglect, and could not be recovered against the bank.

The expression "gross negligence" not unmeaning as applied to cases of gratuitous deposit.

§ 115. In the judgment delivered by Lord Chelmsford as the judgment of the Court in this case, the expression "gross negligence," as used by Chief Justice Holt and since misapplied by others, is criticised, and in a qualified manner defended. But the criticism, as well as the defence of the expression, is misdirected. For it fails to point out that while Holt used the word technically as translating the technical expression *culpa lata* (aequiparata dolo), his successors applied it not only loosely, but in a manner grounded on misconception, as I have already pointed out. In this case (of *Giblin* v. *McMullen*), therefore, the expression "gross negligence" might well have been employed in a exact and technical sense to indicate that kind of negligence which the Roman lawyers were wont to equate to intention. Note also that in this case of *Giblin* v. *McMullen* much weight is given to the circumstance that the bank kept the securities as they kept their own of the like nature. And this circumstance seems to have been thought sufficient to rebut any inference of gross negligence

which might have been drawn from the mere fact of loss, and to have necessitated some positive evidence of negligence. The weight given to the circumstance of the bank keeping the goods with the same care as their own is in exact accordance with the principles of the Roman law above referred to.

§ 116. Of the responsibility of the *bailor* in commodate or loan, I will cite a text of the Roman law, the principle of which doubtless applies to ours: Item qui sciens vasa vitiosa commodavit, si ibi infusum vinum vel oleum corruptum effusumve est, condemnandus eo nomine est [D. XIII. 6. 18, § 3]. This text was cited by Mr. Justice Coleridge, delivering the judgment of the Court in the case of *Blakemore* v. *Bristol and Exeter Ry. Co.* (8 E. & B. 1035), with the following comment:—"This is so consonant to reason and justice that it cannot but be part of our law. Would it not be monstrous to hold that, if the owner of a horse, knowing it to be vicious and unmanageable, should lend it to one who is ignorant of its bad qualities and conceal them from him, and the rider, using ordinary care and skill, is thrown from it and injured, he should not be responsible? The principle laid down in *Coggs* v. *Bernard*, and followed out by Lord Kenyon and Buller, J., and by Lord Tenterden in the *nisi prius* cases cited in the note in Smith's Leading Cases [vol. i. p. 162, 4th ed.], that a gratuitous Loan.

agent or bailee may be responsible for gross negligence or great want of skill, gets rid of the objection that might be urged from want of consideration to the lender. By the necessarily implied purpose of the loan, a duty is contracted towards the borrower not to conceal from him those defects known to the lender which may make the loan perilous or unprofitable to him." [See also *McCarthy* v. *Young*, 6 H. & N. 329; 30 L. J. Exch. 227, Sm. L. Ca. 6th ed. pp. 225, 226.] It is *à fortiori* clear that when a person knowingly gives another dangerous goods to carry for a reward, he is bound to give notice of their dangerous character to the person employed to carry them. [*Farrant* v. *Barnes*, Jan. 23, 1862, 11 C. B. (N.S.) 553.] In such a case negligence (in the ordinary sense) on the part of the person giving the goods to be carried is certainly sufficient to infer liability; and there is good authority for saying that the person sending goods for carriage without notice that they are of a dangerous character warrants that they are not so. [*Brass* v. *Maitland*, 6 Ell. & Bl. 470 (goods shipped on board a general ship). See also *Penton* v. *Murdoch*, C. P., 18 W. R. 382 (glandered horse).]

Dedication of way to public.

§ 117. In the same category with the above may be mentioned the case of a person gratuitously dedicating a way to the public. The public adopting a way dedicated to its use must take it as it is.

[*Robbins* v. *Jones*, 15 C. B. (N.S.) 221, 243; *Fisher* v. *Prowse*, 2 Best & Sm. 770.] At the same time it is scarcely to be supposed that the dedicator would be justified in omitting to warn the public of a concealed danger in the way, known to himself.

Proximate and remote cause.

§ 118. I shall conclude this essay with some observations of general application. In order to impute injury to the person whose negligence causes the damage, it is necessary that the negligent act or default should be the immediate or proximate cause of the damage, or, to speak more accurately, that such damage is within the ordinary or probable consequences of the act or default. [*Sharp* v. *Powell*, L. R. 7 C. P. 259, *per* Grove, J.] The typical case illustrative of this principle is the well-known case of *Scott* v. *Sheppard*, 1 Sm. L. C. 417; where a squib thrown by defendant, and picked up and thrown by others, ultimately damaged plaintiff's eye. This was a case of trespass, so that the question was of intention. I cite the following cases where negligence is in question.

Cases of proximate cause.

I cite first the case of *Smith* v. *London and S. W. Ry. Co.* [L. R. 5 C. P. 98]: a case of the following nature. In an exceptionally dry season workmen employed by a railway company in cutting grass and trimming the hedges bordering the railway, placed the trimmings in heaps near the line and

allowed them to remain there fourteen days. Fire from a passing engine ignited one of these heaps, and burned the hedge, and was thence carried by a high wind across a stubble field and a public road, and burned the goods of the plaintiff in a cottage about two hundred yards from the railway. It was held by two judges out of three in the Common Pleas (Bovill and Keating, JJ., against Brett, J.) that there was evidence to go to a jury of actionable negligence on the part of the company [*Smith* v. *London and S. W. Ry. Co.*, L. R. 5 C. P. 98], and this judgment was affirmed by the Exchequer Chamber, Nov. 30, 1870. This was perhaps an extreme case, as the difference of opinion among the judges seems to imply. I here refer also to a case arising out of negligence to protect the public using a road from the effect of a jet of water likely to frighten horses coming along it; the jet of water being caused by the defendants the New River Company in the exercise of their statutory powers. [*Hill* v. *New River Co.*, Q. B. 18 L. T. (N.S.) 555.] I refer also to a case where commissioners under a Drainage Act were made responsible for the flooding of land owing to the negligent construction of the works made under the powers of their Act [*Collins* v. *Middle Level Commissioners*, L. R. 4 C. P. 279]; to the case of a gas company who had laid down a defective gas-pipe, causing an escape, and a consequent explosion: and where the company were held liable

for the damage done to the shop although the explosion was partly due to the negligence of the gasfitter who was called in and went to the place with a lighted candle [*Burrows* v. *March Gas Co.*, L. R. 5 Ex. 67]; and to the case where a ship becoming unmanageable through the negligence of the captain and crew at a point about three-quarters of a mile from a lee-shore, drifted ashore and damaged the plaintiff's sea-wall. In this last case the negligence was held the proximate cause of damage, and therefore the owners of the ship were held liable. [*Bailiffs of Romney Marsh* v. *Trinity House*, L. R. 5 Ex. 208.]

§ 119. I have already (p. 39, *supra*) referred to the case of *Atkinson* v. *Newcastle, &c., Water-works Co.*, where it was held, on appeal, that no action lay, by a person whose house was burnt down, for the breach of the duty imposed by statute on the company to keep their pipes charged at a certain pressure. The decision of the Court of Exchequer [L. R. 6 Ex. 404], which was over-ruled, may yet be cited on the question of proximate cause, to shew that had there been a duty on the company which could be enforced by a suit at the instance of a private individual, the damage might, in the opinion of the Court, be considered the natural result of that neglect. In the case of *Lawrence* v. *Jenkins* [L. R. 8 Q. B. 274] already cited (p. 32, *supra*) the escape of the cows, and

their death from eating of the yew-berries which they so got at, was held to be the natural consequence of the act which caused the gap in the fence. The only question was whether the defendants were liable for that act, which was the act of another, and that being decided in the affirmative as before mentioned, the defendant was held liable for the consequences. The case, also before mentioned (p. 33, *supra*), of *Firth* v. *Bowling Iron Co.*, where the defendants allowed their iron fence to decay, and the plaintiff's cow browsed upon the fragments [3 C. P. D. 254], is somewhat analogous. In the case of *Sneesby* v. *Lancashire and Yorkshire Ry. Co.* [L. R. 9 Q. B. 263], which was affirmed on appeal [1 Q. B. D. 42], the defendant company were held liable for the consequence of their servants' act in negligently sending some empty trucks down an incline into a siding, so as to frighten and render unmanageable a herd of cattle which was being driven along an occupation road. The cattle were afterwards killed on another part of the railway, and this was held to be the natural consequence of the act in question. Where a vessel (No. 1) by improper navigation compelled another (No. 2) to alter her course, and in consequence No. 2 came into collision with and damaged No. 3, No. 1 was held liable to No. 3 for the damage. [*The Sisters*, 1 P. D. 117.] The case of *Smith* v. *Green* [1 C. P. D. 92], though arising out of express warranty, and where, there-

fore, the question of negligence did not directly come into question, may appropriately be cited here. The defendant sold to the plaintiff, whom he knew to be a farmer, a cow "warranted free from infectious disease," &c. The cow was in fact suffering from foot and mouth disease; other cows placed in the same field by the farmer caught the disease and died; and the deaths of those cows as well as of the first cow were held to be the natural consequence of the defendant's breach of warranty.

Clark v. *Chambers.*

§ 120. The question of proximate and remote cause was very fully considered, and many of the previous cases commented on, in the case of *Clark* v. *Chambers* [3 Q. B. D. 327], where the defendant, who had put up a *chevaux de frise* as a barrier across a private road over which he and others had rights of way, was held liable to the plaintiff, who, lawfully passing along the road on a dark night, ran against the *chevaux de frise*, in an unexpected place to which it had been removed by the intervention of a third person without the knowledge of the defendant. *Harris* v. *Mobbs* [June 18, 1878, C. P. Div.], was an action under Lord Campbell's Act. The defendant had left a van, with ploughing gear, on the grassy side of a road, to stand there for the night. Deceased drove by along the road, and his mare, who it appeared in evidence was a confirmed kicker, shied at the thing, and then kicked and ran away, upset the deceased, and

kicked him so that he died. It was held by Denman, J., that the act of the defendant, in leaving the van, was an unreasonable user of the highway, and that the death was the proximate and natural result.

Cases where consequence held too remote.

§ 121. I now cite some cases in which it has been held that the damage complained of could *not* be attributed to the negligent act or default as its proximate cause.

In a case where a person receiving a popular ovation, imprudently, though unintentionally, incited others to commit damage, he was held not liable to make compensation. [*Peacock* v. *Young*, 18 W. R. 134 (Q. B.]

In the case of *Sharp* v. *Powell* [L. R. 7 C. P. 253] above referred to (p. 169, *supra*), the defendant's servant had, contrary to the provisions of the Police Act, washed a van in the street, and suffered the water used for the purpose to flow down a gutter towards a sewer about twenty-five yards off. The weather being frosty, a grating through which the water flowing down the gutter passed into the sewer had become frozen over, in consequence of which the water sent down by the defendant, instead of passing into the sewer, spread over the street, which was ill-paved and uneven, and there froze. The plaintiff's horse coming to the place slipped and fell, and was damaged. It was held that, as there was nothing to shew that the defend-

ant was aware of the obstruction of the grating, and as the stoppage of the water was not the necessary or probable consequence of the act, the defendant was not responsible for what had happened. In a case in the Queen's Bench [*Hobbs* v. *L. & S. W. Ry. Co.*, L. R. 10 Q. B. 111], plaintiff with wife and children was taken to Esher instead of to Hampton at 12 o'clock on a wet night, and had to walk home a distance of between four and five miles. He was held entitled to retain a verdict for £8, for the inconvenience, but not for £20 compensation found by the jury for the wife's having caught cold and being laid up in consequence. In a case where a leakage in the pipe laid by a water company across a road, caused the ground to be saturated with water, and the plaintiff, a contractor, who had undertaken to make a tunnel under the road at an agreed on sum, suffered loss by reason of the work being consequently more expensive than he anticipated, it was held that the plaintiff could not recover compensation for such loss in an action against the water company. [*Cattle* v. *Stockton Waterworks Co.*, L. R. 10 Q. B. 453.] I here again refer to the case of *Baxendale* v. *L. C. & D. Ry. Co.* [L. R. 10 Ex. 35], where the costs of an unsuccessful defence by a carrier in an action against him by the consignee, were held too remote to be recovered as damages in an action by the carrier against the railway company with which he had made a sub-contract

for carriage of the goods; and to the case of *Jackson* v. *Metr. Ry. Co.* [3 App. Ca. 193], where the negligence of the company in permitting an uncontrolled crowd to get into a carriage at one station, was, if a cause at all, too remote to be made an actionable ground for damage which occurred to plaintiff's thumb through the scrimmage at the next station.

Special damage, whether too remote or not.

§ 122. I have already referred to the case of *Re United Service Co., Johnston's Claim* [L. R. 6 Ch. 212], where it was held by the Lords Justices on appeal that the special damage claimed for the expenses of a chancery suit resulting from the loss of share certificates, was not the natural, necessary, or ordinary consequence of the neglect, or, in other words, was *too remote.* I now cite some cases of contract where special damage was claimed and disallowed as too remote. The principle is, that if the contract is made by one party for a special purpose he must in order to fix the other with the responsibility for the failure of that purpose (not being a loss which might reasonably be considered as naturally resulting from the breach of contract), give express notice of the purpose in such a manner that the other party by making the contract impliedly warrants that the purpose should be answered. In *Woodger* v. *G. W. Ry. Co.* [L. R. 2 C. P. 318], a commercial traveller was held not entitled to recover personal expenses incurred by

him while waiting for a box which was delayed in carriage, but of the contents or purpose of which he had given no notice to the company. The following case is a good illustration of the principle. Machinery of a saw-mill was shipped at Glasgow for Vancouver's Island, the shippers having a general knowledge of the nature and purpose of the goods. On arriving at the destination an essential piece of the machinery was found wanting. The shippers were held liable for the cost of replacing the lost articles at Vancouver's Island, with 5 per cent. for the delay, but not for special damage for the loss of profits. Such damage was held too remote a consequence of the negligence, there having been no express contract for a special purpose so as to import a warranty. [*British Columbia Sawmill* v. *Nettleship*, L. R. 3 C. P. 499; see also *Cory* v. *Thames Ironworks Co.*, L. R. 3 Q. B. 181; *Horne* v. *Midland Ry. Co.*, L. R. 7 C. P. 583, affirmed Ex. Ch. 8 C. P. 131; "*The Parana*," 2 P. D. 118, C. A. from Probate Div. Mar. 27, 1877.] As an illustration, on the other hand, of the circumstances where special damage on a contract has been held well claimed, I may cite *Simpson* v. *L. & N. W. Ry. Co.* [1 Q. B. D. 274], where in a contract for carriage of goods the consignment note contained the words "must be at Newcastle on Monday certain," and the circumstances shewed that the agents for the carrying company knew that they were sent for the purpose

of exhibition at a cattle-show there, a verdict of £20 as special damage for loss of profit was sustained.

Liability to third party arising out of a contract is the result of presumed intention.

§ 123. The question of proximate cause or otherwise is nearly akin to a class of questions where a contract having been made between A. and B., a duty becomes owing from A. to a third person, C. Instances of this are the cases of *Langridge* v. *Levy* [2 M. & W. 519, and 4 M. & W. 337] (gun sold for use of plaintiff *and his sons*); *George* v. *Skivington* [L. R. 1 Ex. 1] (hair-wash for use of plaintiff's wife). It is hard to say on what principle these cases rest, unless it be that the vendor of a weapon dangerous to the user, or of a deleterious compound, must be presumed to intend the consequences to the person for whose use it is sold. Where there is merely ordinary negligence in the execution of a contract it does not appear that the negligent act can involve liability to a person not a party to the contract, and for an occurrence removed in respect of time and place from the act itself. Thus where a plaintiff declared that the defendant negligently and improperly hung a chandelier in a public-house, knowing that the plaintiff and others were likely to be there, and that the chandelier unless properly hung was likely to fall upon and injure them, and that the plaintiff being lawfully in the public-house the chandelier fell upon and injured him, the declaration was on

demurrer held bad. [*Collis* v. *Selden*, L. R. 3 C. P. 495.] If the declaration had alleged that the defendant had knowingly hung the chandelier so as to be dangerous, it might have disclosed a cause of action; and it might possibly have been sufficient to prove that the defendant by his personal act or wilful omission in the matter, either doing the work himself and doing it so that the thing was dangerous, or by employing workmen whom he knew to be unskilled in the matter, was guilty of such gross negligence that the law would presume intention—the intention, namely, of a person "setting a trap." The case of *Winterbottom* v. *Wright* [10 M. & W. 109,] referred to in the judgment of this case, was a case where the defendant contracted with the Postmaster General to provide a mail coach, and the plaintiff who was hired to drive the coach was damaged in consequence of its breaking down through latent defects in its construction. It was held, in effect, that there was no warranty on the part of defendant towards the plaintiff in respect of the fitness of the coach.

Contributory negligence.

§ 124. It remains to consider the cognate topic of "contributory negligence," namely, to consider the questions which arise where the damage complained of is in some manner or to some extent attributable to a breach of duty on the part of the person damaged. In the treatment of these questions there has been a variance between the practice

of the Admiralty and Common Law Courts; and this variance still survives in the distinction adopted by the Judicature Act of 1873 between damages arising out of collision between ships and other cases of damage.

In cases of collision where both parties are to blame, the Admiralty Courts used the simple method of dividing the loss between them. This rule has been adopted in the French Civil Code, and has now by the Judicature Act of 1873 been retained as the rule in all cases of collision between ships.

The English Courts of Common Law have attempted the more difficult task of analyzing the cause of damage, and have acted on the principle that the person damaged is not entitled to compensation if guilty of what they term "contributory negligence."

It has been questioned whether this doctrine of "contributory negligence" is based on the reason that a person so guilty ought to be personally barred from suing, or whether it is merely a corollary to the proposition that the plaintiff must prove damage resulting from the breach of duty on the part of the defendant as its proximate cause. This theoretical question is intimately connected with the practical one whether (in cases tried with a jury), on the plaintiff's case disclosing contributory negligence, the judge should direct a nonsuit, or should leave the whole case to the jury. The

balance of authority seems to be in favour of leaving the whole case to the jury, *if there is room for doubt* of the facts from which the contributory negligence is inferred, or if there is a fair question as to the conclusion which a practical man may draw from the facts—for instance, as to whether the facts amounted to an intimation by the defendant, on which the sufferer relied, of the absence of danger—in which case there would be no negligence in his acting on such intimation. But if there are facts disclosed in the plaintiff's case, the truth of which is not disputed, and which if true clearly shew that the sufferer contributed to the disaster, then the judge may nonsuit. [*Praeger* v. *B. & E. Ry. Co.*, L. R. 6 Q. B. 402, n; *Britton* v. *G. W. Ry. Co.*, L. R. 7 Ex. 130; *Weller* v. *L. B. & S. C. Ry. Co.*, L. R. 1 C. P. 126; *Watkins* v. *G. W. Ry. Co.*, 25 W. R. 905; *Paterson* v. *Wallace*, 1 Macqueen, 748; *Bridges* v. *N. London Ry. Co.*, L. R. 6 Q. B. 377, 394; L. R. 7 H. L. Ap. 213; *Lewis* v. *L. C. & D. Ry. Co.*, L. R. 9 Q. B. 66, and other cases as to *invitation to alight* cited pp. 126–128, *supra.*] Perhaps this is the same as to say that the balance of authority with us inclines to the second alternative of the theoretical question. And I think upon the whole this is the rationale of the decisions in our Courts. (*a*) But they are not logically consistent,

(*a*) I have not yet seen a complete report of the Irish appeal case of *Slattery* v. *The Dublin, Wicklow & Wexford*

for they have on the other hand laid down the rule that the contributory negligence of a third person is no defence. [*Illidge* v. *Goodwin*, 5 C. & P. 190; *Lynd* v. *Nurdin*, 1 Q. B. 29; *Abbot* v. *Macfie*, 2 H. & C. 744; *Harrison* v. *G. N. Ry. Co.*, 3 H. & C. 231.] Indeed it would be impossible to carry the theory of the defendant's negligence being *the one proximate cause* of the damage to all its logical consequences, for there must be some complexity of causes in every case. The line must be drawn somewhere, and it is drawn at contributory negligence of the person damaged.

In some American cases it has been held that where the extent of the damage has been aggravated by the plaintiff's act, but that act cannot be viewed as a contributory cause of the whole damage, the damage is divisible, and the plaintiff is entitled to recover to the extent of the damage which would

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Ry. Co., commented on in an article in the *Law Journal*, 17th August, 1878. It appears that the case was tried upon two distinct issues—one of negligence on the part of the company, the other of contributory negligence on the part of the deceased,—and that the jury found a verdict for the plaintiff on both issues. The Court by a majority decided that although the evidence of contributory negligence was very strong they could not set aside the verdict and enter a verdict for the defendants. But it appears they were precluded from entertaining the question whether the verdict was against evidence, and I do not think this decision can interfere with the rule that where the case is tried upon a general issue, and the contributory negligence is clearly shewn on the plaintiff's own case, he may be non-suited.

have been sustained without his fault. But this doctrine has been distinctly repudiated in England. In *Greenland* v. *Chaplin* [5 Ex. 243, 247], Pollock, C.B., says, "I entirely concur with the rest of the Court that a person who is guilty of negligence, and thereby produces injury to another, has no right to say, 'Part of that mischief would not have arisen if you yourself had not been guilty of some negligence.'"

I shall now mention some of the points which have been decided under the head of contributory negligence.

Cases of contributory negligence.

§ 125. It has been held that, notwithstanding the neglect by a master of a statutory duty to have his tackle daily examined for the purposes of safety to his servants, yet a servant who risked his safety on the tackle with notice of its dangerous condition was barred from making the master liable. [*Senior* v. *Ward*, 1 Ell. & Ell. 385. See also *Cook* v. *Bell* (Court of Session), 2nd series, vol. xx. p. 137; *Caswell* v. *Worth*, 5 E. & B. 849; *cf. Doel* v. *Sheppard*, 5 E. & B. 856.] So a person crossing a railway at a level crossing where there is no express statutory duty imposed on the company is bound at least to look before he crosses. [*Stubley* v. *London and N. W. Ry. Co.*, L. R. 1 Ex. 20; *Skelton* v. *London & N. W. Ry. Co.*, L. R. 2 C. P. 631.] And it has been held that where a

railway company have omitted to perform the statutory duty of having a man to open and shut the gates at a level crossing, a person driving a gig getting out and opening the gates for himself, and being damaged by the gates swinging back against his horse, was not entitled to recover against the company. [*Wyatt* v. *G. W. Ry. Co.*, 6 Best & Smith, 709.] The judgment was dissented from by Mr. Justice Blackburn, and the question was left open whether the plaintiff would have been entitled to recover if he had been damaged by a passing train. Where a sailing vessel in tow proceeded during a fog and got aground, the owners were held to have no remedy against the owners of the tug; it having been the duty of the master of the sailing vessel to order the tug to stop. [*Smith* v. *St. Lawrence Towboat Co.*, L. R. 5 P. C. Ap. 308.]

Contributory negligence of child.

It may seem harsh to apply the doctrine of contributory negligence to a case where damage occurs to a young child. Yet this application is made, and this whether the fault is that of the child itself or the negligence of the person under whose immediate care it is. [*Singleton* v. *Eastern Counties Ry. Co.*, 7 C. B. (N. S.) 287; *Waite* v. *North-Eastern Ry. Co.*, 2 B. & E. 719; *Grant* v. *Caled. Ry. Co.* (Court of Session), Dec. 20, 1870.] *A fortiori*, a child is barred from redress when the proximate cause of the damage is its own meddling

with a thing which would be safe if let alone, or generally when the immediate cause is what may be described as the child *getting into mischief*. [*Mangan* v. *Atterton*, L. R. 1 Ex. 239 ; *Davidson* v. *Monklands Canal Ry. Co.* (Court of Session), 17 D. 1038 ; *Lumsden* v. *Russell*, 18 D. 468.] The child himself would indeed be, in such cases, liable as a wrongdoer for damage done by his mischievous act.

Sufferer "identified" with wrongdoer.

§ 126. In the case of *Waite* v. *N. E. Ry. Co.*, cited in the last paragraph, the decision, following *Thorogood* v. *Bryan* [8 C. B. 115], was based on the principle that the child was identified with the person under whose care it was. And on the same principle it has been held that the inspector of a railway company travelling in one of their trains on the line of another company over which the first company had running powers, and who met with damage caused partly by the negligence of the second company causing an obstruction, and partly by the reckless driving of the engine-driver of the first company, was so far identified with the first company as to be unable to recover in an action against the second company. [*Armstrong* v. *Lanc. & York. Ry. Co.*, L. R. 10 Ex. 47.] This doctrine of "identification" has been adversely criticised, as appears from the authorities cited in argument in the case last quoted. In a Scotch

case, *Adams* v. *Glasgow & South-Western Ry. Co.*, Dec. 7, 1850, the Court of Session avowedly declined to recognise the principle. This case admits of no distinction in principle from the case of *Armstrong*, in the Court of Exchequer. It would be difficult to assign any principle for the English rule unless on the second of the theoretical alternatives mentioned in par. 124, *supra*; but if this theory of contributory negligence is admitted, the identification theory is quite in harmony with it, and merely supplies a subordinate rule in drawing the line where to stop in the analysis of causes.

Contributory negligence no answer to a case of intentional mischief.

§ 127. Contributory negligence of a simple or ordinary degree is no answer to injury caused by such gross neglect as the law equates to intentional mischief. This I take to be the principle of the decision in *Lynch* v. *Nurden* [1 Q. B. 38], where the plaintiff, a young child, was hurt by playing with a cart which the owner had left unattended in a public place. When a person in charge of a horse and cart leaves it alone in a public place it is obvious that *some* mischief is the natural consequence. And therefore negligence of this kind may well be equated to intention. The principle is similar to that on which it was held, even before the Acts prohibiting spring guns, &c., that trespass is no answer to the serious injury caused by these

instruments placed by the owner on his premises without notice. [*Bird* v. *Holbrook*, 4 Bing. 628] (*a*) A curious case occurred in Scotland of damage from nitro-glycerine left in a can in a hut, where trespassers coming from a frequented place adjoining had easy access. The owner of the premises successfully exonerated himself by proving that he had ordered the can to be emptied and that the order had been carried out by two men, who turned the can over into a running stream, not being aware that a portion of the dangerous compound had remained (as it did) in a solid state, and this it was that caused the explosion. [*Galloway* v. *King*, Court of Session, 3rd series, vol. x., p. 788]. I think the true principle is, that where the damage results immediately from a trespass, whether of child or man, the question is whether the defendant is chargeable with such heedlessness or rashness as in its probable and natural results is equivalent to the setting, without notice, of a dangerous trap or spring-gun. This theory seems to reconcile the cases immediately above cited with *Hughes* v. *Macfie*, *Abbott* v. *Macfie*, 12 W. R. 315, 2 H. & C. 744, and *Mangan* v. *Atterton*, L. R. 1 Ex. 239, *supra cit.*, and to be in itself reasonable. The doubts expressed as to *Mangan* v. *Atterton* [L. R. 1 Ex. 239]

(*a*) This was a case which arose out of an occurrence previous to the Act 7 & 8 Geo. IV. c. 18, prohibiting these instruments (now replaced by 24 & 25 Vict. c. 100, and 27 & 28 Vict. c. 47).

in the later case of *Clark* v. *Chambers* [L. R. 3 Q. B. 327, 339], really come to this, whether the exposing for sale in a public street on market-day, an oil-cake crushing machine which anybody could set in motion by turning the handle, and without the handle being in any way secured, was not an act of this nature, having regard to the likelihood of children not understanding the danger being tempted to play with it; and, a jury who had inspected the machine having found that the machine was dangerous and one which should not have been left unguarded in the way of ignorant people without at all events the handle being removed or fastened up and the cogs thrown out of gear, it is well worthy of further consideration whether the facts did not bring it within the principle of *Bird* v. *Holbrooke*. In a Scotch case, *Campbell* v. *Ord* [Court of Session, Nov. 5, 1873], the facts of which are almost identical with *Mangan* v. *Atterton*, the plaintiff was held entitled to recover, and the two cases together suggest the inference that the machine in question has a peculiar fascination for children of the ages of seven and four.

Contributory negligence must be a cause of the damage.

§ 128. Where there has been negligence on the part of the plaintiff which might have caused damage, but which did not in fact contribute to the occurrence in question, there is no case of contributory negligence. As where a vessel coming

into collision was unprovided with side lights according to regulation, but it was proved that there being no look-out on board the other vessel; this neglect could not have contributed to the collision, and the latter was held solely in fault. [*The Englishman*, 3 P. D. 18.]

And proximately so.

§ 129. To make contributory negligence a defence, it must be the proximate cause, or at least such as to constitute (conjointly with the other) a proximate cause. If, therefore, a person by some negligence of his own has placed himself in the way of danger by collision with another, so that he himself becomes unable to avert the danger, but yet the other by the use of ordinary care may avert the danger, the latter will be liable if damage ensues. [*Davies* v. *Mann*, 10 M. & W. 546 (the oft-quoted donkey case); *Tuff* v. *Warman*, 2 C. B. (N. S.) 740; and in the Exch. Ch. 5 C. B. (N. S.) 573; *L. B. & S. C. Ry. Co.* v. *Walton*, C. P., Feb. 10, 1866, W. N., p. 71.]. The case of *Tuff* v. *Warman* was that of a steamer running down a barge which had negligently got in the way and not ported. A similar principle was applied against a railway company whose servants broke down a bridge belonging to the railway of another company, by pushing against it a truck which had been somewhat negligently left by the latter company so loaded that it could not pass under the bridge. [*Radley* v. *L. & N. W. Ry. Co.*, 1 App.

Ca. 754.] For general considerations on the duty of a steamer meeting a sailing vessel, owing to the easier command which the engine affords over the former, see *William Inman* v. *F. Rech and Others* [L. R. 2 P. C. Ap. 25]. The cases of collision between ships commonly depend on the express Admiralty rules which are framed having regard to the principle stated in the text. [*The Owen Wallis*, L. R. 4 A. & E. 175; *Beal* v. *Marchais*, L. R. 5 P. C. Ap. 316; *Union Steamship Co.* v. *Aracan*, L. R. 6 P. C. Ap. 127.]

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