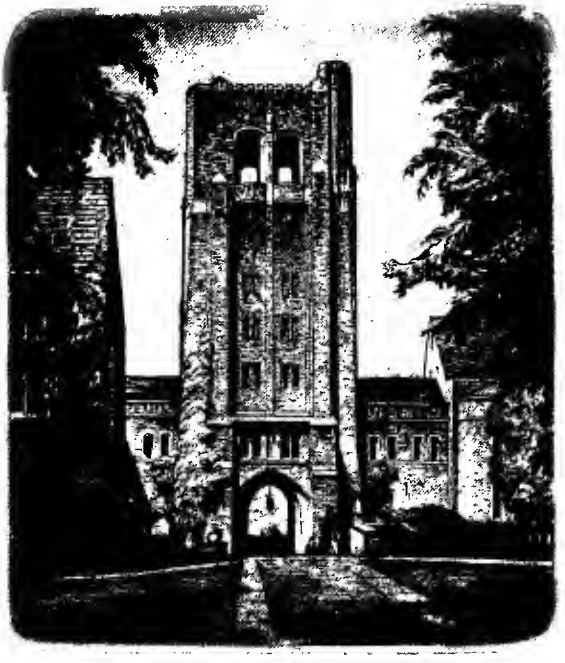

A TREATISE

ON THE

LAW OF NEGLIGENCE.

BY

FRANCIS WHARTON, LL. D.,

AUTHOR OF TREATISES ON "EVIDENCE," "CONFLICT OF LAWS," "CRIMINAL LAW," AND "MEDICAL JURISPRUDENCE."

SECOND EDITION.

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TO MY BROTHER,

HENRY WHARTON,

THIS VOLUME IS AFFECTIONATELY INSCRIBED,

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

CAMBRIDGE, *October*, 1874.

PREFACE TO SECOND EDITION.

THE following are the distinctive features of the present edition: —

1. When I undertook the preparation of the former edition, in 1874, the exposition of the Roman Law of Negligence, proposed by Sir William Jones, was accepted as authoritative by our courts as well as by our text-writers. That exposition I undertook to show was without support in the Classical Roman Law; was based on the fictions of the mediæval jurists, and was unsuited to the exigencies of modern practical jurisprudence. To prove the first of these positions I felt it necessary to cite largely not only from the Roman standards, but from the authoritative German and French jurists of the present day. These citations have answered their purpose, and in the present edition I have so far condensed them as to give the conclusions, without the arguments, of the jurists to whom I appeal. In this way I have contracted by one fifth the bulk of the volume. The practitioner will find the results for which he seeks in the present edition in a a reduced compass; for the arguments and proof the student may be referred to the former edition.[1]

[1] For the accuracy of my exhibition of the Roman Law, both ancient and modern, I may cite an elaborate and thorough review of the first edition, by Prof. L. von Bar, published in Grünhut's Zeitschrift, f. d. Privat-u. öffentl. Recht d. Gegenwart, Wien, IV. Bd. Prof. Bar's authority, as a jurist of first rank in this line of the Roman Law, none can doubt; and I feel much satisfaction in being able to state that he gives a specific approval to the summary of the Roman Law of Negligence which I sustained at large in my former edition, and which in this edition I give in outline.

2. The space which I have thus obtained has been required for the introduction of an analysis of the multitude of new cases by which this branch of the law is peculiarly distinguished. Since the publication of the first edition, we have had a number of decisions, one fourth as many as the aggregate of their predecessors in this line, and overruling many of the principles which those predecessors established. These decisions have necessitated numerous changes in my text. The chapter on the Liability of Master to Servant, for instance, I have felt compelled to rewrite; and the chapters on Contributory Negligence, on Carriers, and on Railway Collisions, to rearrange and qualify. The entire work, I may add, has been subjected to a careful revision and verification.

F. W.

CAMBRIDGE, *December* 15, 1877

PREFACE TO FIRST EDITION.

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

Our Anglo-American Law of Negligence, it will be remembered, as well as that of Bailments, with which it is so closely associated, is drawn confessedly from the Roman Law. It so happened, however, that both Lord Holt and Sir W. Jones, who did so much to form opinion in these departments, relied for authority on the scholastic jurists of the Middle Ages rather than on the classical jurists of business Rome; and it was but natural that Judge Story and Chancellor Kent, the treatise of Gaius not having been as yet discovered, and the chief accessible summaries of the Corpus Juris being those of the scho-

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

[2] I must except, in respect to the theory of *culpa levissima*, the notes by Mr. Green, in the last (1874) edition of Story on Agency; and an article by the same able writer in the July number of the American Law Review; an article which was published after my own observations on this point were printed, but which, reaching the same result, though from a line of authorities distinct from those to which I have appealed, I should be glad to have placed by the side of my own conclusions on this topic.

lastic jurists, should have followed Lord Holt and Sir W. Jones.[1] Between the scholastic and the classical jurists, however, there is a conflict, as will be hereafter demonstrated, which runs through the whole line of the subject before us. This conflict may be at this point thus briefly epitomized: —

SCHOLASTIC JURISTS.	CLASSICAL JURISTS.
Culpa is of three grades: *culpa lata*, *culpa levis*, *culpa levissima;* and in agencies involving special trust, the agent is liable for *culpa levissima.*	*Culpa* has but two grades: *culpa lata* and *culpa levis;* the negligence of a specialist and that of a non-specialist; or, in other words, the negligence of one professing to be, and of one not professing to be, an expert. As to *culpa levis*, it exists where a specialist neglects the diligence usual with good specialists of his department; and if such diligence is applied, there is no negligence the law takes hold of. *Culpa levissima* the law does not punish, for *culpa levissima* is incident to all business; and to punish men for *culpa levissima* in their business would be to prevent them from doing business at all.[2]
In jure non remota causa sed proxima spectatur.	To causation responsible moral agency is essential; and causal connection is juridically broken, in cases of negligence, when between the first negligence and the damage intervenes the negligence of a second responsible person directly producing the damage.[3]

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

[2] Infra, § 26 *et seq.*

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

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

Mandatum (agency) is not gratuitous; for in all cases a special action lies against the mandant in behalf of the mandatary for the recovery of his *salarium* or *honorarium*. And in any view, the mandatary (agent) who undertakes to act as a business man is required to exhibit the skill and diligence good business men in his department are accustomed to exhibit.[1]

If the plaintiff's negligence, no matter how trivial, contributes to the injury, he is barred, on the theory of *culpa levissima*, from recovery.

Injuria non excusat injuriam. No matter how negligent the plaintiff may have been, this does not excuse the defendant in negligently injuring him, if this injury could have been avoided by the exercise of the diligence good business men are accustomed to exercise in such matters. Nor can the plaintiff's *culpa levissima* bar his recovery. If it does, there is no plaintiff who can recover, for there is no human action to which *culpa levissima* is not imputable.[2]

The scholastic theories on the above topics are the products of a recluse and visionary jurisprudence scheming for an ideal humanity; the classical theories, as contained in the Corpus Juris, are the products of a practical and regulative jurisprudence, based, by the tentative processes of centuries, on humanity as it really is, and so framed as to form a suitable code for a nation which controlled, in periods of high civilization, the business of the globe. Hence, when the attempt was made, even under the high auspices of Lord Holt and Sir W. Jones, to enforce the scholastic jurisprudence in the business transactions of England

[1] See infra, § 485.

[2] See infra, §§ 300–345.

and of the United States, it was but natural that judges should stagger at refinements so unsuitable for practical use;[1] and hence we can understand, also, how Judge Story, enthusiastic as was his admiration for the "civil law" (which includes, in his acceptation of the term, the scholastic jurisprudence), should have shrunk from judicially imposing the subtleties which he accepted as theoretically sound. The consequence was that our adjudications have been on one plane of jurisprudence, and our principles on another plane; the necessities of business life drove us to approach the law of business Rome, while the authority of our jurists induced us to still cling to the idealistic fictions of mediævalism. In the following pages I have sought to avoid this incongruity, by substituting as a basis the Roman for the scholastic jurisprudence; striving in this way not only to present the law in logical consistency, but to arrange it in a shape which can be readily and quickly mastered by the practitioner. Some of our older decisions, based exclusively on the scholastic formulas, I have passed over without notice; but I think I can fairly claim to have noticed and discussed, in its proper place, every modern pertinent Anglo-American adjudication. And these adjudications I have classified so as to enable them to take their place in further exposition of that consummate system which the jurists of Rome framed to meet the business necessities of Rome when Rome embraced all civilization. And it is an interesting fact, illustrating the philosophical truth and comprehensiveness of the principles I here seek to vindicate, that we, in the nineteenth century, in the United States, should be instinctively and unconsciously constructing for ourselves, in defiance of the scholastic traditions we have been trained to reverence, a jurisprudence which rejects these traditions, and assimilates itself to the jurisprudence of Rome at her business prime.

[1] See, for illustrations, infra, § 44.

F. W.

CAMBRIDGE, *October*, 1874.

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ERRATA.

Page 103, note 6, for "Morrison *v.* Darn" read "Morrison *v.* Davis."

Page 119, note 2, add, "See Santer *v.* R. R. 66 N. Y. 50."

Page 140, note 1, for "Bagley *v.* R. R. 6 C. B.," read "Bayley *v.* R. R. 7 C. B."

Page 161, note 5, for "Brewer *v.* Peate," read "Bower *v.* Peate."

Page 162, note 1, add, "See King *v.* R. R. 66 N. Y. 181."

Page 183, fourth line of text, strike out "case," and insert, "rule relieving the employer from liability."

Page 204, note 2, last citation, change "1 Colo." to "1 Cold."

Page 211, note 2, line 2, change "cited" to "citing."

Page 224, note 3, change "Hurd *v.* R. R." to "Hard *v.* R. R."

Page 279, to note 4, add, "Govt. R. R. *v.* Hanlon, 53 Ala. 70."

Page 291, to note 2, add, "Balt. &c. R. R. *v.* Jones, S. C. U. S. 1877."

Page 296, at end of note 2, add, "In Massachusetts, by statute of May 15, 1877, the provisions of the Sunday statute 'shall not constitute a defence to an action against a common carrier of passengers for any tort or injury suffered by a person so travelling.'"

Page 302, note 2, for "infra, § 761," read "infra, § 860."

Page 303, add to note 3, "St. Louis R. R. *v.* Bell, 81 Ill. 76."

Page 316, to note 4, add, "Reversed in H. of L. Dec. 1877."

Page 319, at end of first paragraph of note 3, add, "Ill. Cent. R. R. *v.* Green, 81 Ill. 20."

Page 332, note 3, add, "See Sutton *v.* R. R. 66 N. Y. 243."

Page 336, note 4, add, "Robinson *v.* R. R. 66 N. Y. 11."

Page 338, to note 5, add, "Balt. &c. R. R. *v.* Mulligan, 45 Md. 486."

Page 354, note 1, after Jackson *v.* R. R. add, "but see reversal in H. of L. Dec. 1877."

Page 386, note 6, correct to "Griffiths *v.* Zipperwich, 28 Oh. St. 388."

Page 410, end of note 1, add, "In Craig *v.* Gregg, 83 Penn. St. 19, it was held that an action at law against a director of a corporation for negligence cannot be maintained by an individual stockholder; but that the remedy must be 'in a form to protect the interests of the corporation, as the trustee for all its stockholders and the creditors.'"

Page 434, end of first paragraph of note, to "Am. St. Co. *v.* Bryan," add, "83 Penn. St. 446."

Page 467, note 2, after "28 Oh. St." add "418."

Page 501, at end of note 2, add, "See, however, *S. C.* reversed in H. of L. Dec. 1877."

Page 739, to note 8, add, "Lanigan *v.* Gas Co. 16 Alb. L. J. 466."

BOOK I.

GENERAL PRINCIPLES.

CHAPTER I.

DEFINITION OF NEGLIGENCE.

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

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

Definitions.

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

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

§ 2. Mr. Austin's definition is not much more satisfactory.

By Austin.

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

[1] Lect. on Juris. 3d ed. i. p. 439.

[2] Infra, §§ 79–81.

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

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

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

I. Inadvertence.

II. Imperfection in discharge of a duty.[3]

III. A duty which is thus imperfectly discharged.

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

Two subjects, that of Omission as distinguished from Commission, and that of Causal Connection, which underlie each of the above conditions, will be considered hereafter independently.[4]

§ 4. Before, however, proceeding to a specific consideration of the constituents of negligence, as above expressed, it is important for us, in view of the large measure in which our law in this respect is founded on the Roman, to inquire

Meaning of *culpa*.

[1] See infra, § 25.

[2] See infra, § 25; and see Salmon *v.* R. R. 38 N. J. L. 11, where this definition is approved. See, *per contra*, a criticism by a learned reviewer in the Alb. Law J. for Dec. 18, 1874 (p. 397).

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

[4] See §§ 73–79.

into the meaning of the term *culpa*, of which our own term negligence is so frequently used as an equivalent.

§ 5. First have we to observe that *culpa*, like other general terms in our own law (*e. g.* "wrong," "fault"), is used by the Roman jurists sometimes as a *nomen generalissimum* to include all defects in the performance of duty. It is true that when we take the terms *dolus* and *culpa* in antithesis, *dolus* includes an intentional, *culpa* an inadvertent fault. Yet we must remember that unless the terms are used in sharp contrast, they are apt, as is the case with our own terms "malice," "wrong," and "negligence," to overlap each other's domains. Negligence, in a very large sense, may include malice even in our own diction; for constructive malice is a term sometimes used to describe a general or determinate evil intent, which is the result of ignorance or neglect correctly to examine the grounds of a wrong.[1] So, on the other hand, gross negligence is with us constantly treated as convertible with fraud or malice. In the Roman law we have the same confusion: a necessary consequence, indeed, of the inadequacy of language to fix conditions so apt to melt into each other as are advertence and inadvertence. Thus we not only find *dolus*, when used as a *nomen generalissimum*, applied to all breaches of duty, including *culpa*, but *culpa*, even in its distinctive sense, is regarded, when it is gross and flagrant, as stamped with the character of *dolus*. Nowhere is this more strikingly exhibited than in the maxim, *Magna negligentia culpa est, magna culpa est dolus*.[2]

Culpa, in its distinctive juridical sense, does not include either *dolus*, or breaches of non-legal duties.

§ 6. That *culpa*, in its distinctive juridical sense, does not include *dolus* (except so far as gross and flagrant *culpa* raises a presumption of *dolus*), will be presently more fully shown. This, however, is not the only popular expansion of *culpa* against which the practical jurists had to guard. As with us, "wrong" may be used to include felonies on the one extreme, and aberrations of taste on the other; so *culpa*, while popularly extended on the one side so as to include *dolus*, was extended on the other side, in non-technical use, so as to include every breach of rule,

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

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

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

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

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

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

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

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

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

Division of *culpa* as Aquilian and extra Aquilian.

§ 8. It is, however, impossible to understand the character of *culpa*, as it exists in the Roman law, without taking into view the two distinct classes of *culpa* which that law made the subject of civil suit. The first of these is *culpa* as defined in the Aquilian law. The second is such *culpa* as is not included in the Aquilian law, embracing

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

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

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

And see Muldowney *v.* R. R. 36 Iowa, 462, where it was held that the honest and *bonâ fide* belief of a party that he will not sustain an injury in doing acts which, but for such belief, would be negligent, does not exonerate him from the charge of negligence.

mainly *culpa* in the non-performance or imperfect performance of particular contracts. To express this distinction more exactly, it is necessary to give a succinct notice of the Aquilian law, — a law which is one of the most conspicuous results of Roman legislation, to the exposition of which have been devoted the labors of some of the keenest juridical intellects in times both ancient and modern, and which lies at the basis of those of our own adjudications which connect themselves with the maxim, *Sic utere tuo ut non alienum laedas.*[1]

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

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

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

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

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

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

1. The letter of the Lex Aquilia reached only to cases where damage resulted from corporal action on the thing injured (*damnum corpore datum*); this was subsequently extended to cases where the injury was consequential: *e. g.* where an animal is starved to death; where the damage is caused by the malicious provocation of an animal to fury, so that he injures property; where the rope fastening a boat is cut so that the boat is wrecked. *But a mere omission was held not to be the subject of an action unless accompanied with a positive act;* as when one fails to give

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

notice when cutting down trees or casting tiles from a roof;[1] or when a surgeon neglects to apply the remedies necessary after an operation.[2] The principle is, that whoever does an act must do all necessary to keep such act from injuring others.

2. By the letter of the Lex Aquilia, to constitute a delict it was necessary that injury should be done to a particular thing (*damnum corpore datum*). This was subsequently expanded to include cases where one person causes the loss of a thing to another; as where the cattle of another are frightened and thus caused to stray, so that they are lost.

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

4. By the text of the Aquilian law, the claim for damages could only be made by the owner of the thing injured. By subsequent adjudications, as published in the Justinian Digest, not merely the owner, but the possessor, and those holding equitable interests or liens, had a right to sue.[3]

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

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

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

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

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

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

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

[3] See infra, § 780.

5. The expression *damnum injuria*, or *culpa datum*, involves two divisible elements: (1) The act must have an illegal injury as its object. (2) The wrong must be imputable to a responsible person. But here, as Hasse at another point [1] remarks, we have to distinguish *dolus* from *culpa*. *Dolus* implies an imputable intentional injury. *Culpa*, in its narrow sense, implies an unintentional injury springing from imputable negligence. That both fall under the Aquilian law is expressly ruled. The *animus nocendi*, we are told in a famous passage,[2] is not essential; damages may be recovered *etiam ab eo qui nocere noluit*. Frequently is the same statement substantially reiterated. *Culpa*, outside of *dolus*, according to Hasse, necessarily includes imputability. It is only necessary to show this to appeal to the rule, *Semper speciala generalibus insunt*. Wherever there is *culpa*, no matter of what grade, there is imputation. Imputation only ceases when accident (*casus fortuitus* or *casus*) begins.

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

Inadvertence an essential of negligence.

§ 12. It is true that Mr. Austin tells us [3] that "Heedlessness differs from negligence, although they are closely allied. The party who is negligent *omits* an act, and breaks a positive duty. The party who is heedless *does* an act, and breaks a *negative* duty." He goes on to say, however: "The states of mind which are styled 'Negligence' and 'Heedlessness' are precisely alike. In either case the party is inadvertent. In the first case, he does *not* an act which he was bound to do, because he adverts not to it. In the second case, he *does* an act which he was bound to forbear, because he adverts not to certain of its probable consequences. Absence of a thought which one's duty would naturally suggest is the main ingredient in each of the complex notions which are styled 'negligence' and 'heedlessness.' The party who is guilty of temerity or rashness, like the party who is guilty of heedlessness, does an act

Negligence does not exclude heedlessness, or temerity.

[1] P. 64.

[2] L. 5. § 1. D. ad L. Aq.

[3] Lect. on Juris. 3d ed. i. 440; citing Bentham, Principles, &c., pp. 86, 161.

and breaks a positive duty. But the party who is guilty of heedlessness thinks not of the probable mischief. The party who is guilty of rashness *thinks* of the probable mischief; but, in consequence of a missupposition, begotten by insufficient advertence, he assumes that the mischief will not ensue in the given instance or case. . . . . The party runs a risk of which he is conscious; but he thinks (for a reason which he examines insufficiently) that the mischief will probably be averted in the given instance." But as a matter of fact, negligence in the sense Mr. Austin gives (*i. e.* an omission to do a required thing), heedlessness, and rashness are in many cases coincident. We may take, for instance, a case frequently used as illustrative by the Roman jurists: —

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

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

[1] L. 30. § 3. D. ad Leg. Aquil. 9. 2. Infra, §§ 865–6.

[2] A similar case is to be found in Higgins *v.* Dewey, 107 Mass. 494, noticed infra, § 20.

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

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

§ 15. In malicious injuries, the injurer foresees the specific evil result, and wills it either explicitly or implicitly; in negligent injuries he may foresee a probable danger, but, from lack of due consideration, may rashly risk the consequences, without being chargeable with a malicious intent. This distinction is established by the Roman law. To *dolus* it is essential that there should be a *scientia* as to the injurious consequences which the act in question involves. But *culpa* is not changed into *dolus* by

The distinction between knowledge of an impending evil result and knowledge of a probable danger.

the fact that the culpable person foresees that the act may become under certain contingencies dangerous. Thus, to revert to an illustration already introduced, the man who carelessly watches a fire is aware that an unwatched fire may spread. But he neglects either to connect this knowledge with the duty in which he is engaged, or he neglects to use the proper means by which this knowledge is to be made useful. Malice assumes a *scienter* attached to the act; negligence may imply a *scienter* detached.[1]

Not essential to negligence that the damage might "reasonably have been expected."

§ 16. It has been often said that a wrong-doer is at least responsible for the mischievous consequences "that may be reasonably expected to result under ordinary circumstances from his misconduct;"[2] and from this the converse has sometimes been drawn, that unless the consequence of an act or forbearance "might have been reasonably expected" by the defendant himself, no liability accrues.

§ 17. This, however, is not correct.[3] No doubt in actions for an *intentional* injury, the fact that the injury in question is one that could not have reasonably been expected from the act goes far to negative an injurious intention. So, on the other hand, the fact that such consequence could have been reasonably expected goes far to establish a wrongful intention. Men are presumed to intend the natural and probable consequences of their acts. A man shoots into a crowd of persons. It is reasonably to be expected that some one of these will be hit. Just in proportion as this expectation increases in probability (from the density of the crowd, and the deliberateness of his aim), does the presumption gather strength that the shooting was intentional. It is true that this is not, as has frequently been erroneously stated, a presumption of law.[4] It is simply a presumption or inference of fact, varying in intensity with the evidence in each particular case. The argument, reduced to a syllogism, is as follows: Whatever might reasonably have been expected it

[1] See infra, § 76.

[2] Pollock, C. B. — Rigby *v.* Hewitt, 5 Exch. 243; "cited by Byles, J., Hoey *v.* Felton, 11 C. B. N. S. 573, and applied in Senior *v.* Ward, 1 E. & E. 385;" as stated in Broom's Com. 4th ed. 689. And see Pearson *v.* Cox, 36 L. T. Rep. N. S. 495.

[3] See infra, § 76. Muldowney *v.* R. R. 36 Iowa, 462.

[4] See Whart. on Evidence, §§ 1258–71.

is probable was intended: this consequence was reasonably to have been expected; therefore it is probable it was intended. Of course the whole force of the reasoning depends upon the degree of "reasonable expectation." There are some kinds of "reasonable expectation" so strong (*e. g.* that of hurting when a blow is aimed at another's face), that a jury could have no hesitation in inferring a wrongful intention. There are other kinds more faint, in which other circumstances are required to make out the intent. But however strong or weak the inference, the reasonableness with which an event is to be expected is an important element in determining the actor's liability in all cases where intended injury is charged.

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

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

§ 19 *a*. So, to take a case elsewhere noticed,[1] a kicking horse is taken from the stables and put, for a single trip, into an omnibus. The horse has been known to have kicked back at the carriage once or twice before, but it is very improbable that he

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

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

§ 20. So, in a case already cited, which was decided by the supreme court of Massachusetts in 1871, where the defendant was charged with negligently making a fire on his own land, which fire spread to a neighbor's, Judge Gray, in giving the opinion, said that "a man who negligently sets fire to his own land, and keeps it negligently, is liable to an action at common law for any injury done by the spreading or communication of the fire directly from his own land to the property of another, whether through the air or along the ground, and whether he might or not have reasonably anticipated the particular manner in which it is actually communicated."[1]

§ 21. Again, in a case in 1870, in the English exchequer chamber,[2] where the question was directly agitated, the evidence was

[1] Higgins *v.* Dewey, 107 Mass. 494; Filliter *v.* Phippard, 11 Q. B. 347; citing Tubervill *v.* Stamp, 1 Salk. 13; Perley *v.* East. R. R. 98 Mass. 414.

[2] Smith *v.* R. R. L. R. 6 C. P. 14.

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

§ 22. *When the imperfection in the discharge of duty is so great as to make it improbable that it was the result of mere inadvertence, then, in proportion to such improbability, does the*

[1] Law Rep. 5 C. P. 98.
[2] 11 Exch. 781.
[3] Smith *v.* R. R. Law Rep. 6 C. P. 21.

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

§ 23. In this light are we to understand the famous rule of the Roman law: *Magna negligentia culpa est, magna culpa est dolus.*[2] Mr. Austin, while giving to this and similar maxims an erroneous gloss,[3] concurs in the position that the question of *dolus*, in such case, is one to be determined inferentially from all the acts of the particular case. But he is in error in saying that the meaning of the Roman lawyers was, that, "judging from the conduct of the party, it is impossible to determine whether he *intended*, or whether he was negligent, or heedless, or rash. And such being the case, it shall be *presumed* that he *intended*, and his liability shall be determined accordingly, *provided the*

[1] See Whart. on Evidence, § 40.

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

[3] Lect. on Juris. 3d ed. i. 441.

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

Meaning of "Legal Duty."

§ 24. A legal duty is that which the law requires to be done or forborne to a determinate person, or to the public at large, and is correlative to a right vested in such determinate person, or the public at large.[2] "Every right, be it primary or sanctioning, resides in a person or persons determinate or certain; meaning by a person determinate, a person determined specifically." The *duty* may be to the public at large; *e. g.* a duty not to commit a nuisance; but in civil issues the right to enforce this duty must reside in individuals. "Duties answering to rights which avail against the world at large are *negative;* that is to say, duties to forbear. Of duties answering to rights which avail against persons determinate, some are *negative*, but others, and most, are *positive;* that is to say, duties to do or perform. . . . . By most of the modern civilians, though not by the Roman lawyers, rights availing against the world at large are named *jura in rem;* rights availing against persons determinate, *jura in personam*, or *jura in personam certam*. . . . . The proprietor or owner of a given subject has a right *in rem;* since the relative duty answering to his right is a duty incumbent upon persons, *generally and indeterminately*, to forbear from all such acts as would hinder his dealing with the subject agreeably to the lawful purposes for which his right exists. But if I singly, or I and you jointly, be obliged by bond or covenant to pay a sum of money, or not to exercise a calling within conventional limits, the right of the obligee or covenantee is a right *in personam;* the relative duty answering to his right being an

[1] See this point fully discussed in Whart. on Evidence, § 1227 *et seq.*

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

obligation to do or to forbear, which lies exclusively on a person determinate."[1]

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

Meaning of *damnum* and *injuria*.

§ 25. We must remember, when we adapt the Roman law maxims relative to *damnum* and *injuria*, as is so often done by our judges, to our own practice, that *injuria* has a meaning distinct from that popularly assigned to our term "injury." *Injuria* is the feminine of the adjective

[1] Aust. Juris. i. 47.

[2] Austin's Lect. on Juris. 3d ed. i. p. 49.

injurius, and means, therefore, an unlawful act, or, as Pernice[1] defines it, an objective unlawfulness. From this, as this intelligent commentator well shows, is developed the idea of hurt illegally perpetrated, whether this hurt be to property or character. So far as concerns the actor, the language is, *facere imponere inferre jacere immittere injuriam;* so far as concerns the sufferer, *accipere pati ferre.* In the *Corpus Juris* the word when juridically used is applied exclusively to the outward act, never being used to express the relation to such act of the actor. The word, therefore, includes all *quod non jure fit;* that is to say, everything that is repugnant to law. If there is no such repugnancy in the concrete, there is no *injuria*, although in an abstract sense a law may have been violated. Thus, for instance, the actor may be acting in self-defence, or may be irresponsible, in which case, though hurt may be inflicted, there is no *injuria.* Of course, these qualifications are to be taken into consideration where particular cases are to be investigated. It is with such qualifications that we are to consider the general definition of Ulpian.[2] "Injuria ex eo dicta quod non jure fit . . . . hoc generaliter, specialiter autem injuria dicitur contumelia. Interdum injuriae appellatione damnum culpa datum significatur, ut in lege Aquilia dicere solemus."

Other passages to the same effect may be cited; but the terms of the Aquilian law are by themselves conclusive. No doubt the word is used by the jurists in a narrow technical sense, in its relation to attacks upon character; but this does not affect the principle, that in a general sense whatever inflicts an illegal hurt on person and property (supposing the actor in his particular act be responsible) is an *injuria.* There may be therefore *damnum* without *injuria*, for the hurt may not have been perpetrated by a responsible agent, or it may have been inflicted lawfully. There can, however, be no *injuria* (so far as concerns civil proceedings) without *damnum.*[3]

[1] Sachheschädigungen, 27.

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

[3] "In the next place," says Mr. Broom (Com. 5th ed. p. 368), "it may be laid down, as a true proposition, that although bare negligence, unproductive of damage to another, will not give a right of action, negligence causing damage will do so:[1] negligence being defined to be "the

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

omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do;" [1] negligence, moreover, not being "absolute or intrinsic," but "always relative to some circumstances of time, place, or person." [2]

[1] Per Alderson, B. — Blyth *v.* Birmingham Waterworks Co. 11 Exch. 784. Laches has been defined to be "a neglect to do something which by law a man is obliged to do;" per Lord Ellenborough, C. J. — Sebag *v.* Abitbol, 4 M. & S. 462; adopted per Abbott, C. J., Turner *v.* Hayden, 4 B. & C. 2.

[2] Judgm., Degg *v.* Midland R. C. 1 H. & N. 781; approved in Potter *v.* Faulkner, 1 B. & S. 800. As to proof of negligence, Assop *v.* Yates, 2 H. & N. 768; Perren *v.* Monmouthshire R. C. 11 C. B. 855; Vose *v.* Lancashire & Yorkshire R. C. 2 H. & N. 728; Harris *v.* Anderson, 14 C. B. N. S. 499; Reevè *v.* Palmer, 5 C. B. N. S. 84; Manchester, &c. R. C. app., Fullarton, resp. 14 C. B. N. S. 54; Roberts *v.* Great Western R. C. 4 C. B. N. S. 506; North *v.* Smith, 10 C. B. N. S. 572; Manley *v.* St. Helen's Canal & R. C. 2 H. & N. 840; Willoughby *v.* Horridge, 12 C. B. 742; Templeman *v.* Haydon, Ibid. 507; Melville *v.* Doidge, 6 C. B. 450; Grote *v.* Chester & Holyhead R. C. 2 Exch. 251; Dansey *v.* Richardson, 3 E. & B. 144; Roberts *v.* Smith, 2 H. & N. 213; Cashill *v.* Wright, 6 E. & B. 891; Holder *v.* Soulby, 8 C. B. N. S. 254.

CHAPTER II.

DIFFERENT KINDS OF NEGLIGENCE.

Distinction between diligence of specialist and that of non-specialist, § 26.

Roman law adopts this distinction under the terms *culpa lata* and *culpa levis*, § 27.

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Probability of danger to be taken in view as determining not merely the grade but the existence of negligence, § 47.

Degree of negligence imputed corresponds to degree of diligence exacted, with the qualification, that the utmost degree of diligence exacted is that which a good business man is under the particular circumstances accustomed to show, § 48.

Culpa in concreto with its antithesis *diligentia quam suis*, or diligence exercised by an agent in his own affairs, § 54.

Culpa levissima, § 57.

The doctrine of *culpa levissima* is derived not from the *Corpus Juris* but from the scholastic mediæval jurists, § 59.

It is rejected by the present authoritative expositors of the Roman law, § 62.

It is practically discarded by Anglo-American courts, § 64.

It is incompatible with a sound business jurisprudence, § 65.

Classification of contracts in respect to grade of negligence, § 68.

By Mommsen, § 68.

By Hasse, § 69.

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

Distinction between diligence of specialist and diligence of non-specialist.

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

Roman law adopts this distinction under the terms *culpa lata* and *culpa levis*.

§ 27. The distinction thus stated lies at the root of the well known division by the Roman law of *culpa* into *culpa lata* and *culpa levis*. *Culpa lata* is the lack of expert diligence; *culpa levis* the lack of non-expert diligence.

§ 28. With the view just expressed harmonize the following definitions in the Digest: —

"Lata culpa est nimia negligentia, id est, non intelligere quod omnes intelligunt."[2] "Sententiarum. Latae culpae finis est,

[1] See, fully, infra, §§ 754, 780. For an ingenious criticism on the distinction in the text, see Albany Law J. Dec. 18, 1874, p. 397. And see, also, Russell *v.* Koehler, 66 Ill. 459; and infra, § 32. Mr. Bigelow, in his Cases on Torts, p. 591, thinks the distinction between expert and non-expert is only applicable to bailments; and urges that in all non-contractual torts the duty of the aggressor is that of an expert. Of course, when an expert (*e. g.* a railway engineer, colliding with a traveller) does an injury to a stranger, the conduct of the offender is to be measured by the test of what a good expert of the same class would have done under the circumstances. But we can conceive of cases (*e. g.* that of the traveller colliding with the locomotive), when the prudence required is simply that required of a person possessing eyes, ears, and the most rudimentary business capacity. Hence in such cases the distinction of the text obtains, though the tort is not one based on bailment. The engineer, in the collision, is bound to the diligence of the specialist; the traveller, to the diligence of the non-specialist.

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

non intelligere id, quod omnes intelligunt." [1] The policy of the law, it was argued, requires that every man, expert or non-expert, should keep his eyes open, and should be acquainted with the facts of which ordinary observation would advise him. If he does not do this, — if, on the other hand, he acts blindly, or inconsiderately, or recklessly, — if, in exercising dominion over his own things, he does not take time to think what injury to others may incidentally result, — if, in other words, his conduct is that of a *homo deperditus et nimium securus*,[2] then his ignorance, based on his *nimia securitas, crassa summa negligentia*, is no defence. The rule in such case is, *cui facile est scire, ei detrimento esse debet ignorantia sua.* He must recompense others for the injury done to them by his negligent acts,[3] though his negligence consists in not seeing what every body, non-specialist as well as specialist, sees.

Meaning of *culpa lata.*

§ 29. *Culpa*, as has been noticed, presupposes a danger which

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

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

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

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

can be averted by diligence and attention. The knowledge of the existence of such a danger does not necessarily involve malicious intent. Thus, for instance, the danger may be encountered as a sort of practical joke, as in cases elsewhere mentioned, where a drunken man is induced to continue to drink excessively,[1] and where false alarms are mischievously given. By the Roman law,[2] this *lusus perniciosus* is not *dolus*, but *culpa lata*. The same is held where the danger, from its very familiarity, ceases, though observed, to interest; and where the defendant does not notice the danger, though it is at the time obvious to ordinary observers, or where, though noticing the danger, he does not notice such means of averting it as are in like manner obvious to ordinary observers. It will be at once seen that while *culpa lata* in this view excludes malice, it includes not only that mental torpor which is indifferent to surrounding danger, but that absorption in extraordinary topics which leaves no faculties for the observation of the ordinary incidents of life, and that insolence of power which deals with its own interests without condescending to consider how its dealing may affect others. The ordinary and obvious line of distinction, however, is that of specialist and non-specialist. Thus, to illustrate this again by the case of the cottager with whom a box is deposited by a traveller: every one knows that to leave a box at night in an open and unguarded porch is to expose it to theft or damage; hence this is gross negligence for the cottager to so leave the box. It does not require the special skill of a man trained to a particular branch of business to know that a box is not to be so exposed; hence the exposure of the box in this way implies gross or common, as distinguished from slight or special, negligence.[3] Or, reverting to the case of an ordinary unprofessional nurse called in to assist a person taken suddenly sick, such nurse, we must agree, is not liable for special or slight negligence, *i. e.* the lack of diligence and skill belonging to a professed physician; but is liable for gross negligence, *i. e.* the lack of diligence and skill belonging to ordinary unprofessional persons of common sense, such as omitting to watch, or to call in a substitute if obliged to suspend watching, in cases in which watching is required. But the physician is liable for *culpa levis*, if he either undertake the case without the ordinary quali-

[1] Wh. C. L. 7th ed. §§ 1002, 1012.

[2] L. 50, § 4, de furtis.

[3] Infra, § 457.

fications of a physician under such circumstances, or manage it without the ordinary skill of such a physician.[1]

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

Meaning of *culpa levis*.

§ 31. But *paterfamilias* is not to be understood in the homely and sometimes ludicrous sense in which the term is now received. The Roman and the English *paterfamilias* differ widely. The English *paterfamilias* is the drudge of his family. The Roman *paterfamilias* was the monarch of his family, no matter how large and scattered it may have been; a man of high responsibilities, the chief of a tribe, invested with almost unlimited authority over his children, irrespective of age, until they were emancipated; wielding, therefore, possessions and prerogatives the due management of which required peculiar sagacity, business tact, keenness of apprehension, and promptness in executive action. Even in France, where the power attached to the *paterfamilias* is much higher than obtains with us, the term *diligent père de famille* is viewed as indicating business as distinguished from mere family excellence. Thus Lebrun, in his *Essai sur la prestation de fautes*,[2] reminds us, in construing this term, that the Roman *paterfamilias* was eminently the man of affairs; that the good *paterfamilias* was a good man of affairs; and hence that the term *bonus et diligens* paterfamilias is convertible with "conscientious and diligent business man," or "conscientious and diligent specialist." To adopt Hasse's rendering, in reviewing Lebrun,[3] "*Man sich unter einen* diligens paterfamilias *einen durchaus tüchtigen Mann zudenken haben, der ueber seine Angelegenheiten mit voller Aufmerksamkeit und ganzem Fleisse zu wachen gewohnt sei.*" The *diligentia*, therefore, of a *diligens*, *bonus*, *studiosus paterfamilias* is not to be measured by what we might call the diligence of an ordinary English family man. It is rather, to adopt our own phraseology, the diligence shown by a good and trustworthy specialist when dealing with his particu-

"Bonus paterfamilias" to be regarded as equivalent to "good business man."

[1] Infra, § 730.
[2] Paris, p. 2.
[3] Hasse, p. 508.

lar duties. And the diligence that such a man shows in the discharge of his particular duties is the diligence which a business man is required to show when he undertakes as a business to attend to the affairs of others. If he fails to do this, he is guilty of *culpa levis*, and is liable to make good the loss.

Culpa levis is the lack of the diligence belonging to a good business man in his specialty.

§ 32. Hence, to adopt the exposition of Hasse,[1] whoever undertakes the practice of a particular art or business must not only possess but apply the skill necessary to the due practice of such particular art or business. If he does this, he does only what is his duty; for no honest man undertakes, when duly informed, to do something which he knows he does not know how to do, or uses ordinary care in that which he knows requires extraordinary care. It is no defence to him in such a case that his negligence was not gross, that his *culpa* was not *lata*, that the mischief that he failed to notice or remedy was not one which an ordinary observer would have noticed and remedied. The particular duty he has assumed requires from him a higher degree of diligence; the diligence, not of an ordinary observer, but the *diligentia diligentis paterfamilias;* the diligence of a good business man in his particular specialty. A man, for instance, who undertakes to mend a watch ought to be skilled in watch mending; and the mere undertaking to do the work without the skill is *culpa levis*. He is absolved, it is true, if he possesses and applies the diligence of a skilful expert. *Culpa autem abest si omnia facta sunt, quae diligentissimus quisque observaturus fuisset.* He is not liable simply because he does not rise to a height of mechanical genius, or apply an intensity of exertion, unusual among experts in his particular branch. But he is required to possess the usual skill of such experts, and to diligently apply such usual skill. Consequently he is responsible not merely for *culpa lata*, *i. e.* for negligence in not doing what non-specialists would do, but for *culpa levis*, *i. e.* for negligence in not doing what specialists would do. From such persons the *diligentia diligentis* is required; and such persons, if they neglect to apply *diligentia diligentis*, are in this respect guilty of *culpa levis*. Hence *culpa levis* is the lack of the diligence belonging to a good specialist or expert in his particular work.[2]

[1] Hasse, p. 93.

[2] Stanton *v.* Bell, 2 Hawks, 145;

[The *hiatus between* § 33 and § 43, *inclusive, is caused by the omission for the purposes of condensation, of Mommsen's analysis of negligence as given in my first edition.*]

§ 44. So far as concerns the formal expression of the distinction just stated, we must remember that it has by no means been universally accepted by our Anglo-American courts. A striking illustration of this will be found in an opinion delivered in 1875, by a learned judge of the supreme court of the United States.[1] "Some of the highest English courts," so argues Davis, J., "have come to the conclusion that there is no intelligible distinction between ordinary and gross negligence. Redfield on Carriers, section 376. Lord Cranworth, in Wilson *v.* Brett, 11 M. & W. 113, said that gross negligence is ordinary negligence with a vituperative epithet, and the exchequer chamber took the same view of the subject. Beal *v.* South Devon Railway Company, 3 H. & C. 327. Grill *v.* General Iron Screw Collier Company, Law Reports, C. P. 1, 1865–6, was heard in the common pleas on appeal. One of the points raised was the supposed misdirection of the lord chief justice who tried the case, because he had made no distinction between gross and ordinary negligence. Justice Willes, in deciding the point, after stating his agreement with the dictum of Lord Cranworth, said: 'Confusion had arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use. Gross is a word of description and not of definition, and it would have been only introducing a source of confusion to use the expression gross negligence instead of the equivalent — a want of due care and skill in navigating the vessel, which was again and again used by the lord chief justice in his summing up.'" "Gross negligence," so proceeds Judge Davis, "is a relative term. It is, doubtless, to be understood as meaning a greater want of care than is implied by the term ordinary negligence, but after all, it means the absence of the care

Recent tendency to reject all degrees of negligence.

Heinemann *v.* Heard, 50 N. Y. 27. Mr. Bell, in illustrating this principle, refers us to a Scotch case (Kay *v.* Simpson), in which it was held that a common mechanic was not responsible for a short delay in effecting an insurance, when a broker would have been required to make good the loss. Bell's Com. 7th ed. 530.

[1] Davis, J., Milwaukee, &c. R. R. *v.* Arms, 91 U. S. (1 Otto) 494.

that was requisite under the circumstances. In this sense the collision in controversy was the result of gross negligence, because the employees of the company did not use the care that was required to avert the accident. But the absence of this care, whether called gross or ordinary negligence, did not authorize the jury to visit the company with damages beyond the limit of compensation for the injury inflicted. To do this there must have been some wilful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences. Nothing of this kind can be imputed to the persons in charge of the train, and the court, therefore, misdirected the jury."

It should be remembered, however, that the question before the court, in the case in which this opinion was delivered, was whether there is such a distinction between "gross" and "ordinary" negligence as in the case of "gross" negligence to justify punitive damages. Now, no doubt the court below was wrong in apparently sanctioning such a distinction, and Judge Davis was right in rejecting it. But this does not touch the question whether a different degree of diligence is not exacted from a specialist from that which is exacted from a non-specialist. In fact the opinion of the supreme court, in the case just cited, goes to sustain this distinction; for in substance, though not in terms, it exacts from the specialist the diligence customary with good specialists of his class, requiring in non-specialists only the diligence of non-specialists. The same observation may be made on the conclusions of an eminent Massachusetts jurist, at the time holding a seat on the federal supreme bench.[1]

Confusion produced by ambiguity of terms.

§ 45. No doubt the discredit into which the supposed Roman classification has fallen among us is attributable not merely to the absurdity of the hypothesis of a *culpa levissima*, — an hypothesis which we will soon see is rejected by the Roman standards, — but to our own capricious modes of translating *culpa levis* and *culpa lata*. *Culpa levis* is sometimes rendered in our books as *slight*, sometimes as *light*, sometimes as *ordinary*, sometimes, and more accurately, when we remember that it is the negation of the diligence of a specialist, as *special* negligence. But to *culpa lata* the most re-

[1] See infra, § 64.

markable latitude of translation has been vouchsafed. Chancellor Kent comes near to the definition of Ulpian, when he declares that "gross neglect is the want of that care which every man of common sense, under the circumstances, takes of his own property;"[1] though he leaves out the important qualification of "solet," so justly emphasized by Mommsen in a passage to be quoted. But while by some eminent English judges *lata* is used as convertible with "gross," a term which, as is elsewhere seen, Lord Cranworth declares to be "vituperative,"[2] by others it is translated as "ordinary;" while by Willes, J., "gross" negligence, or *culpa lata*, is declared to be the negligence of the expert; leaving us to the conclusion that *culpa levis* is that negligence of the non-expert of which Ulpian declares that it consists, not in not seeing what only specialists see, but in not seeing what everybody sees. "Gross negligence," to quote Judge Willes's own words,[3] "can only be said of a person who omits to use the skill he has, not of a person who is without skill. We are subsequently told by Cresswell, J., in the same case, that this is the civil law exposition of *crassa negligentia*, or *lata culpa*. Erroneous as is the definition here given of gross negligence, still more extraordinary is the mistake which led so painstaking a judge to declare that the definition so given was that of the "civil" law. By the "civil" law (if by "civil" is meant Roman), *culpa levis* has the meaning assigned by Judge Willes to *culpa lata*, and *culpa lata* the meaning assigned by him to *culpa levis*.[4]

§ 46. Because a good business man sometimes blunders, it does not follow that the business man under trial is to be excused when he made the blunder complained of. The standard business man, whom this test appeals

Importance of word "accustomed" in definition.

[1] 2 Comm. 560.

[2] 1 Sm. L. Ca. 196; Grill *v.* Collier Co. L. R. 1 C. P. 612.

[3] Phillips *v.* Clark, 5 C. B. N. S. 884. In Austin *v.* The Manchester, &c. Railway Company, 16 Jur. 766, Cresswell, J., said: "The term 'gross negligence' is found in many of the cases reported on this subject, and it is manifest that no uniform meaning has been ascribed to those words, which are more correctly used in describing the sort of negligence for which a gratuitous bailee is held responsible, and have been somewhat loosely used with reference to carriers for hire." As showing the confusion produced by the use of this epithet, see Kansas P. R. R. *v.* Pointer, 14 Kans. 37; Kansas P. R. R. *v.* Salmon, 14 Kans. 512; Cremer *v.* Portland, 36 Wis. 92.

[4] See Campbell on Negligence, § 11.

to, undoubtedly is occasionally careless. Such exceptional carelessness, however, is not to be considered as a test. The diligence is *qualem diligens paterfamilias suis rebus adhibere solet. Solet* is an essential test. Were it not so, the appeal to the *diligens paterfamilias*, or the good business man, would be illusory. The answer would be, "The *diligens paterfamilias*," or "the good business man," "makes slips, and so do I; consequently I am doing just what is done by your model." The whole life of the *diligens paterfamilias*, however, with its occasional deflections from its average standard, is not to be reproduced. The test is, what is the *usage* of this *diligens paterfamilias?* And in applying this test it is not lawful to take up as an example those exceptional cases in which a good business man lapses into negligence. He who takes charge of another's affairs must exercise without intermission the attention of a *diligens homo.* He is permitted on no occasion to relax such attention. And it is one of the results of the constancy of assiduity thus required from him that while the standard of this assiduity is not raised to a pitch of intensity to which human capacity could not as a constancy attain,[1] he is not permitted to fall below the level of the diligence of good business men of his class and circumstances. Hence it is that it is admissible, for a party charged with negligence, to prove what was the degree of diligence used by other business men of the same class, under similar circumstances.[2]

[1] See Patrick *v.* Pote, 117 Mass. 297; McCracken *v.* Hair, 2 Speers S. C. 256.

[2] Brown *v.* Waterman, 10 Cush. 117; Lichtenhein *v.* R. R. 11 Cush. 70; Cass *v.* R. R. 14 Allen, 448; Lane *v.* R. R. 112 Mass. 455; though see Hoyt *v.* Jeffers, 30 Mich. 182; and see Whart. on Ev. § 40. No doubt we sometimes meet with cases in which the courts refuse to hold it a defence that business men of the same class were accustomed to follow the practice charged on the defendant. Thus in an Iowa action against a railroad company for injuries to plaintiff received in coupling a car loaded with timber projecting over the end thereof, the defendant asked the court to instruct the jury, that "if the car which hurt plaintiff was loaded as loads of timber had been usually and commonly loaded and carried over defendant's and other railroads, then it was not negligence in defendant to carry the timber upon which plaintiff was hurt." It was held by the supreme court, that the instruction was properly refused, on the ground that if the manner of carriage was negligent, the habit of defendant or other roads in that respect would not relieve defendant from liability. Hamilton *v.* R. R. Co. 36 Iowa, 31. See, also, Koester

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

Probability of danger to be taken in view as determining not merely the grade but the existence of negligence.

§ 48. As a rule, the degree of diligence required is proportionate to the duty imposed, and the degree of negligence imputed corresponds to the degree of diligence exacted; with the qualification, that the utmost degree of diligence exacted is that which a good business man is under the particular circumstances accustomed to show. The limitation last expressed (that the utmost degree of diligence exacted is that which a good business man is under the particular circumstances accustomed to show) will be presently fully sustained.[3] At present we have to do simply with the position that between *culpa lata*, which approaches to *dolus*, on the one side, and *culpa levis*, or the *culpa* of a good business man when neglecting to bestow his special accomplishments on his specialty, on the other side, the line of demarcation depends upon the relation of the things to be done to the persons by whom such things are attempted. In other words, *culpa* may be thus divided: —

Diligence to be proportioned to duty.

v. Ottumwa, 34 Iowa, 41. But if the request had been to charge that if *prudent and careful* companies were accustomed to load in the same way as the defendant, the defendant was not liable, then the request should have been granted.

[1] See supra, § 16.

[2] See infra, §§ 635, 872–4. Pendleton St. R. R. *v.* Shires, 18 Oh. St. 255; Dolfinger *v.* Fishback, 12 Bush, 475.

[3] See infra, § 57.

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

Now between *culpa lata* and *culpa levis* the distinction may sometimes be shadowy. We may find it difficult to predicate of a particular case whether it is *culpa lata* or *culpa levis*, just because it may be hard to determine whether the defendant claimed or did not claim to be a specialist; and though there are many instances in which he is entitled to a verdict, should it appear that he did not claim to be a specialist, simply because in such case he would be liable not for *culpa levis* but only for *culpa lata* which is unproved, yet, should it appear that he claimed to be a specialist, liability attaches to him whether *culpa lata* or *culpa levis* be proved. When, however, we come to the distinction between *dolus* and *culpa* on the one side, and between *culpa* and *culpa levissima* on the other side, then the line is one which is in all cases of decisive importance. On the one side, *dolus* and *culpa* are not only morally and psychologically distinct states,[1] but when followed by *damnum*, they are the subject, both by Roman and Anglo-American law, of distinct forms of action. On the other side, *culpa levissima* is a fiction of the Schoolmen, which, as will presently be seen, is repudiated as much by the necessities of business as by the conclusions of philosophy.

§ 49. If the view just stated, therefore, be correct, we are limited, in inquiring whether a particular case be *culpa*, to the Roman division of *culpa lata* and *culpa levis*; for if the case proves *dolus* on the one side, or merely *culpa levissima* on the other, then it is not *culpa*. But we must again remember that *culpa levis* does not prescribe an unelastic standard. Undoubtedly it appeals to "a good business man" as the model; but this is not to "a good business man" in the abstract, but to "a good business man" *in his particular specialty, as he is accustomed to act in circumstances such as the present.* Hence, while the *idea* of diligence in *culpa levis* is constant, the phase and tone of such diligence vary, just as much as one specialty differs from another, or the emergencies of one case differ from the

[1] See supra, §§ 6, 22.

emergencies of another case. It is in this sense that we are to understand the following excellent remarks of Judge Bradley, in a case decided by the supreme court of the United States in December, 1873: "We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party, and which he fails to perform, than of the amount of inattention, carelessness, or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate perhaps to call it simply 'negligence.' And this seems to be the tendency of modern authorities.[1] If they mean more than this, and seek to abolish the distinction of degrees of care, skill, and diligence required in the performance of various duties, and the fulfilment of various contracts, we think they go too far; since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed."[2] Many judicial utterances to the same effect will be found in the following pages. That we should concur in rejecting the fiction of *culpa levissima* is a duty which, as has just been stated, and will presently be fully shown, is exacted as much by business as by logic. That we should concede that *culpa levis*, or the negligence of the specialist, varies with the nature of the specialty and the intensity of the duty, is what both reason and authority demand.[3] But it is a departure as much from the principles of common sense as from those of the

[1] 1 Smith's Lead. Cases, 6th Amer. ed. — note to Coggs *v.* Bernard; Story on Bailments, § 571; Wyld *v.* Pickford, 8 M. & W. 443; Hinton *v.* Dibbin, 2 Q. B. 661; Wilson *v.* Brett, 11 M. & W. 115; Beal *v.* South Devon R. Co. 3 Hurlst. & Colt. 337; L. R. 1 C. P. 600; Steamboat Co. *v.* Curtis, 16 How. 469.

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

[3] See Murphy *v.* R. R. 38 Iowa, 539.

Roman jurisprudence to hold either that a non-specialist is to be liable for not having the skill of a specialist, or that a specialist is only required to exhibit the skill of a non-specialist.[1]

While test (diligence of a specialist as distinguished from non-specialist) is constant, its application varies with agent and subject matter.

§ 50. In fact, if we analyze negligence (excluding, as in the above diagram, *dolus* on the one side and *culpa levissima* on the other), we will find that it involves two factors, each of which may be viewed in almost an infinite number of gradations. First, there is the *person acting*. The distinction between specialist and non-specialist has been already set forth; and it is a distinction which the standards emphatically prescribe, but at the same time present in several varying aspects. Thus, for a person to undertake, without the necessary qualifications, a business requiring skill, is in itself a *culpa*. Hence a surgeon who undertakes an operation for which he has not the proper qualifications is liable for the damage his unskilfulness works;[2] and so when a person undertaking to drive another to a particular spot has no aptitude to drive, or when he who undertakes to make up cloth into a coat spoils the cloth from his incapacity.[3]

[1] See Doward *v.* Lindsay, L. R. 5 P. C. 338; Todd *v.* Old Col. R. R. 7 Allen, 207; Goodale *v.* Worcester Ag. Soc. 102 Mass. 401; Toledo, W. & W. R. R. *v.* Baddeley, 54 Ill. 20; Chicago, &c. R. R. *v.* Stumps, 69 Ill. 409. "The measure of care," said Chapman, C. J., in 1871 (Gray *v.* Harris, 107 Mass. 492), "required in such cases must be that which a discreet person would use if the whole were his own." This, as we have seen, may be a test in cases of *culpa lata*. But in *culpa levis, i. e.* when a business man undertakes as such to do a particular business, the standard is, "the care which *a good business man in his specialty is in such circumstances accustomed to show.*" This care, of course, varies with the emergency. Thus, for instance, the driver of a horse-car is bound to be more careful when he observes children and infirm persons in his way than he would be as to adults in full possession of their faculties. Schierhold *v.* N. B. & M. R. R. 40 Cal. 447. See Robinson *v.* Cone, 22 Vt. 213; Daley *v.* N. & W. R. R. 26 Conn. 591; Rauch *v.* Lloyd, 31 Penn. St. 370. Infra, § 306–7. So the engineer of a locomotive is obliged to exercise diligence, as will hereafter be seen, in proportion to the critical and hazardous character of the agency he wields. So, as will be seen when we discuss the topic of Depositum, the care to be bestowed on an object is to be graduated by its value. And, as will appear in our examination of the doctrine, *Sic utere tuo ut non alienum laedas*, diligence in our relations to others is to be determined by the nature of the injury they are likely to receive from our negligence. Infra, § 785.

[2] Infra, § 730.

[3] To these points Mommsen cites § 7. I. de Leg. Aquil. (4. 3); L. 6. § 7. D. de off. prae. (1. 18); L. 7. § 8; L.

Indeed, the maxim is of universal application in all cases where the defendant claims to be an expert: "Imperitia culpae adnumeratur."[1] The reason of this is that it is negligence for a person to undertake a duty for which he is incompetent: "Cum affectare quis non debeat, in quo vel intelligit, vel intelligere debet, infirmitatem suam alii periculosam futuram."[2] He who thus intrudes when incompetent is not a *diligens paterfamilias*. At the same time we must not lose sight of the qualification already noticed, that there is nothing extraordinary or abnormal required to constitute the *diligentia* of a *diligens paterfamilias*. Hence if the actor brings to the undertaking adequate skill, and bestows on it a degree of care such as is usual in undertakings of a similar character, he is exonerated from the consequences of a disaster which could only have been averted by the exertion of a degree of vigilance and skill unusual among competent specialists in this particular department. Yet at the same time the question whether the requisite degree of skill is possessed depends not merely upon the party's own particular training, but upon the relation borne by that training (as will be more fully illustrated when we come to consider negligence by physicians) to the age and place in which he lives. Here, then, on the question of competency alone, we see how numerous are the constituents, the change of any one of which may change the complexion of the whole case.

§ 51. So, also, independently of the question of *diligentia quam suis* to be presently discussed, we may readily conceive of cases in which the peculiar characteristics of a mandatory or agent may enter into and modify the character of the duties with which he is charged. It is true that there are certain broad and uniform duties which belong to specific obligations, and which all persons undertaking such obligations must perform. Yet there may be distinctive and peculiar duties imposed upon an individual by virtue of his own particular and notorious qualifications. If, for instance, I employ a distinguished artist to paint a picture for me, and offer him a price corresponding to his abilities, I can de-

8. § 1; L. 27. § 29. D. ad Leg. Aquil. (9. 2); L. 9. § 5; L. 13. § 5; D. locat. (19. 2.)

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

[2] L. 8. § 1. D. (9. 2.)

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

§ 52. It may be not out of place, also, to call at this point renewed attention to the circumstance that there are branches of business in which, to avert danger, an extraordinary degree of activity and of watchfulness is required. Here, however, the *termini* already given are maintained. The transportation of glass, for instance, will have bestowed on it by the good business man greater care than he bestows on the carriage of stone. So also there are particular lines of business which require, as

[1] Hasse, p. 145.

Mommsen well argues, at certain given periods, the absorption of the whole attention and energy of the party employed. Here the same test may be continued. A *diligens paterfamilias*, or good business man, will not undertake such a service without the proper qualifications, and without knowing that when the emergency comes which requires his undivided attention to be given to the particular duty, he can for the time disembarrass himself from his other engagements so as to concentrate himself on this.[1] We must at the same time be again reminded that if the defendant brings into play the qualifications and capacity for concentration usual among prudent workmen in his department, he will not be liable if a casualty occurs which could only have been avoided by the display of a degree of energy and watchfulness beyond that which by such prudent workmen is usually applied. To railway carriage this distinction is peculiarly applicable. On the one hand, in regard to the duties imposed on carriers by the use of steam, the degree of care exacted is in proportion to the risk. On the other hand, the law does not impose any abnormal standard, though the business be one of great risk and requiring great caution. The duties imposed must be reasonable and not oppressive, and must be applied with reference to the ordinary conduct of affairs.[2] And the same view applies to the use of valuable improvements possible, but as yet unaccepted in practical life. Thus, it is negligence in a carrier to omit to furnish for his vehicles and machinery for the transportation of persons any improvement known to practical men, and which has actually been put into practical use; but a failure to take every possible precaution which the highest scientific skill might suggest, or to adopt an untried machine or mode of construction, is not of itself negligence.[3]

§ 53. Hence, to sum up what has been said in prior sections, viewing the question in relation to the thing to be done, in order to avert the charge of *culpa levis*, the amount of care bestowed must be equal to the emergency. It may be that only a small degree of exertion and caution is required, according to the usage of prudent workmen

Care proportioned to emergency.

[1] See Clark *v.* Craig, 29 Mich. 398.

[2] Mich. Cent. R. R. Co. *v.* Coleman, 28 Mich. 440. Infra, §§ 635, 872–4.

[3] Steinweg *v.* R. R. 43 N. Y. 123.

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

§ 54. Yet, while we must expect that every man professing to be an expert or business man must show the diligence and skill, in his particular department, of a conscientious and diligent expert or a conscientious and diligent business man, there are

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

Diligentia quam suis.

§ 55. So there may be cases in which it is clear that a principal in selecting an agent, or a partner[2] in selecting a copartner, has manifestly the intention that the person so selected should exhibit in the business so committed to him the same characteristics that he exhibited in his own affairs. So, also, it may be

[1] See, particularly, Hasse, § 49.

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

well argued that the diligence shown by an agent in his own affairs is all that can be required of him in an office in which he is thrust without his own consent. Hence the standard applied in such case is *diligentia quam suis rebus adhibere solitus est;* and this most generally in extenuation, rarely in aggravation, of responsibility.[1] These cases, however, are exceptional. In suits based on the Aquilian law, or, to adopt our English mode of putting the Aquilian principle, on the doctrine *Sic utere tuo ut non alienum laedes*, *diligentia quam suis* is never the test; and it is to be applied to obligations, as will be hereafter shown, only exceptionally, as an evidential qualification, for the purpose of extenuation or aggravation.

§ 56. At the same time, in the definition of *culpa in concreto*, with its antithesis of *diligentia qualem suis rebus adhibere solet*, the word *solet*, as Mommsen[2] remarks, is to be appealed to as a necessary check. It is not enough, therefore, in order to defeat the charge of *culpa in concreto*, that the defendant can be shown to have been *in a single instance* as negligent in his own affairs as he was in the agency which he is charged with negligence in conducting. As in *culpa levis* the continuous, not the exceptional, conduct of a *diligens paterfamilias* is the standard, so here have we to inquire whether the negligence in question is what the agent showed in his own affairs continuously as distinguished from exceptionally. Hence must we conclude that *culpa in concreto* is essentially coincident with *culpa levis*, when the party charged acted in the particular business as a *diligens paterfamilias*. Hence, also, we may further infer that a particular action or omission will not be sufficient to relieve the party charged from the liability of *culpa in concreto*. If the party charged had formerly in his own affairs exhibited a similar neglect and thereby had suffered injury, this very injury may have been the reason why after this he began in his own affairs to show greater care. Hence, to clear the agent on the charge of *culpa in concreto*, it is not enough to show a similar act of negligence by him in his own affairs, but he must show that such acts of negligence were common with him, or that his general

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

[2] Beiträge zum Obligationenrecht, iii. 374.

mode of conducting his business was the same as that with which he conducted his trust.[1]

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

Culpa levissima no longer recognized.

§ 58. (1) That the doctrine of a third grade of *culpa*, called *culpa levissima*, is taken by Lord Holt and Sir W. Jones, not from the classical Roman law, which was the law of business Rome, but from the scholastic jurists, who dealt with the question as belonging rather to speculative than to regulative jurisprudence.

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

(3) That while it lingers still in English and American textbooks, it is practically dropped by our courts.

(4) That it is incompatible with the necessities of business. If so, we may conclude that the recognition of only two degrees, *culpa lata* (negligence of non-specialist) and *culpa levis* (negligence of specialist), is sufficiently exact for all philosophical purposes, and sufficiently flexible for the purposes of practical jurisprudence.

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

The doctrine of a third grade of *culpa*, called *culpa levissima*, taken from the scholastic jurists.

[1] See, infra, §§ 458, 463.

in their turn moulded, the commercial and social activity of Rome.

The relations which they were called upon to determine were of unparalleled extension and complexity. Rome, during this period of four centuries, was mistress of the world, and the business of the world had to be directed by her courts. Her genius was eminently administrative; and the powers of intellect which she applied to the determination of the multitudinous practical issues which it became necessary for her to settle, were at least equal to those which she lavished so exuberantly in the departments of oratory, of history, and of poetry. Nor, as the dates which have just been given show, was the development of this high juridical activity limited in the sense in which our modern jurisprudences are limited. Our Anglo-American jurisprudence, on its commercial side, is not over two hundred years old; and during these two hundred years it has been occupied as much in the adoption of foreign jurisprudences as in the logical development of its own jurisprudence. Distinctive German jurisprudence, now so elaborate and authoritative, is scarcely one hundred years old; distinctive French jurisprudence not much older. But the Roman jurists, whose opinions the Digest collects, did not begin to write until Roman jurisprudence had assumed a settled shape and it had become an induction, definite though still unsystematized, of the business regulations of an empire whose genius was administration, whose mode of expression was at once singularly stately, impressive, and exact, and whose field was all civilization. Hence these great jurists, who, for four hundred years were occupied in defining and applying these settled business rules, wrote not speculatively but regulatively. Their genius was necessarily practical. They did not deal with men as an ideal, as we will presently more fully see; and this fact is worthy of peculiar weight in the discussions in which we are about to engage. They recognized the truth, that no unreal speculative refinements can be imposed as rules of business action. Hence, dealing with business as it actually arose, they dealt with it in the concrete, laying down only such general maxims as the experience of the past and the needs of the present told them would be of value in the determination of business issues in the future. If we seek in the Digest for a series of all

embracing principles, each logically subdivided with the exactness and delicacy with which, on a blank piece of paper, straight lines may be made to radiate from a given centre, then we will seek in vain. As Dr. Johnson once said, you may walk in a straight line on a desert, but you cannot walk in a straight line on Cheapside. Speculative engineering runs its railroads over valleys, under mountains, and through wilds; practical engineering makes such deflections and curves as are called for by the peculiarities of the face of nature and the demands of population. To illustrate this by turning to the point immediately before us, speculative jurisprudence divides negligence (*culpa*) into a series of grades; and it declares that in certain cases it exacts a *diligentia diligentissimi* or *diligentia exactissimi*, — a standard as we will presently see, which is impracticable and absurd. The practical jurisprudence of the classical jurists, however, dealing with men as they really are, and with business as it actually arises, rejected these romantic refinements. Of the *diligentia diligentissimi* or perfect diligence, with its antithesis of *culpa levissima* or infinitesimal negligence, the Digest, viewing the terms as categorical, knows nothing. The words *diligentia diligentissimi* and *culpa levissima* undoubtedly appear a few times in the *Corpus Juris*. They do not, however, express distinct grades of *diligentia* and of *culpa*. They are used, on the contrary, simply to designate such particular intensities of business duty as require that such business duty should, in the special case, be performed with particular care. The jurists do not say, "There is such a thing as perfect diligence to be exacted, and infinitesimal negligence to be punished;" for they knew that no business transaction is conducted with perfect diligence and without infinitesimal negligence, and hence that to exact perfect diligence and punish infinitesimal negligence in any particular enterprise would be to prevent such enterprise from being undertaken. Hence they content themselves with a simple, obvious, easy applicable, and yet at the same time necessary distinction. Is a transaction one of business, or not of business? If of business, then the person undertaking it is bound to display the business diligence of a good business man, when exercising his particular business; *diligentia diligentis; diligentia quam*

diligens paterfamilias in suis rebus praestare solet,[1] a diligence analogous to that which a vigilant head of a household exercises in his domestic affairs. If the transaction be not of business; if, as in the illustration already given of a *depositum*, a thing is simply left with another person, with no obligation exacted or confidence specially imposed as to its safe keeping; then the diligence required is simply that which is exercised by a person without business qualifications, — a person, therefore, who only sees and guards against perils such as persons not experts in the particular business see and guard against, and hence the bailee or *praestator* in such case is only liable for *nimia negligentia*, i. e. *non intelligere quod omnes intelligunt*. To negligence or *culpa* of the first class was assigned the term *culpa levis*, — *slight* or special negligence. To negligence or *culpa* of the second class was assigned the term *culpa lata*, — gross or ordinary negligence.

When, however, cases of *culpa* came to be adjudicated, there were occasions in which, either in aggravation or excuse, the question, as has been seen,[2] might be invoked whether the *praestator*, or party called upon to make good his conduct, showed in the particular transaction investigated the diligence he showed in his own affairs, — *diligentia quam suis rebus adhibere solet*, or *diligentia quam suis*. Hence *culpa*, in the law of business Rome, as exhibited in the *Corpus Juris*, may be thus tabulated: —

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

As evidential phases of both of these kinds of negligence, but

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

[2] Supra, § 54.

not forming a distinct class, comes in the *diligentia quam suis rebus adhibere solet; the diligentia quam suis* which has been already noticed.[1]

§ 60. Such is the classification made by the business jurists of Rome, when at her prime.[2] The last of these jurists, as has been mentioned, died nearly two centuries before the formation of the Justinian compilation, and they ceased to speak, therefore, as Rome began to decline. In the dark ages, jurisprudence as well as business was asleep; and jurisprudence was the first to awake. It assumed, however, at its awakening, a speculative rather than a regulative type; for in fact, like other sciences at that era, not having the subject matter of reality on which to work, it devoted itself to prescribing for imaginary and not actual conditions. The jurists of this revival took, indeed, the *Corpus Juris* as their basis, but for the *Corpus Juris* their treatises soon became substitutes. For the *Corpus Juris* is an immense work; and of this the Digest, consisting of extracts, by no means systematically classified, of opinions of the great business jurists on cases stated, constitutes three fourths. The Digest, as now reproduced in Mommsen's magnificent edition, contains twice as much material as do the Revised Statutes of New York. Of the Revised Statutes of New York, however, there are innumerable copies, and each copy has an adequate index. Of the Digest there were very few copies, even in the fourteenth century; and indeed it was for a long time an accepted fact that until the discovery by Lothar II. in 1136, of the Florentine Manuscript, the work in its completeness was lost.

[1] See supra, § 54.

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

Of the works of the jurists which are condensed in the Justinian Digest only two survive: the first is the *Sententiae* of Julius Paulus, which, however, is only an epitome, and which shared the long oblivion of the Digest; the second is the *Institutiones* of Gaius, which was discovered, in 1816, by Niebuhr, in a monastery at Verona, covered by writings of St. Jerome.[1] It is shown abundantly by Güterbock, in his treatise on Bracton,[2] that by Bracton, whose diligence and intelligence cannot be disputed, the *Corpus Juris* was only known through the scholastic expositions. The jurists of business Rome were no longer read. Their place was assumed by scholastic jurists, who dealt with society not as a reality but as an ideal.

Speculations of particular scholastic jurists.

§ 61. Of these jurists, the earliest, so far as concerns the question immediately before us, was Accursius (1182–1260), whose *Apparatus Authenticorum* was published in Lyons in 1589, and was constantly appealed to, as Holtzendorff tells us, in the courts as then reorganized; and whose speculations therefore were received as undoubted law by magistrates to whom the examination of the *Corpus Juris* would have been impracticable. By Accursius, *culpa latissima* and *dolus* were made convertible; and *culpa*, outside of *dolus*, was divided into the three grades of *culpa lata*, *culpa levis*, and *culpa levissima*. But with this poverty of analysis subsequent theorists were not contented. "Corasius," we are told by Wening-Ingenheim,[3] "added to *culpa lata*, *levis*, and *levissima*, a *levior;* and Sebast. Medices announced six grades, *culpa lata* itself, theretofore intact, being subjected to subdivision." Faber (1280–1340), who is cited as authoritative by both Pothier and Sir W. Jones, and who fell back on the three grades, is declared by Sir W. Jones "to have discovered no error in the common interpretation;" though by eminent German critics it is

[1] See an interesting sketch of this discovery in Hadley's Roman Law, p. 71.

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

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

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

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

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

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

[3] Bailments, p. 31.

lying on Sir W. Jones, this judgment has been adopted as conclusive by a series of subsequent eminent English and American expositors, including Judge Story.

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

§ 63. Germany requires more specific attention, for it is in Germany that the true sense of the *Corpus Juris*, by the aid of those processes of historical exegesis which began with the present century, was restored. The first of the line of commentators who thus revived the true doctrine was Thibaut (1772–1840), an eminent professor, first at Jena and then at Heidelberg, known in our own literature by the passages quoted from him in the Lectures of Mr. Austin. Thibaut, who may be regarded as reviving, though with some just modifications, the theory of Donellus, was followed by Von Löhr, in his Theorie der *culpa*, and by Schömann in his Lehre vom Schadensersatze. According to these authors (I condense here the summary given of their writings by Wening-Ingenheim, not having access to the original works), while the distinction between negligence in commission and negligence in omission was brought sharply out, the notion of a *culpa levissima* was denounced as without authority in the *Corpus Juris* and in right reason. The most conclusive vindication, however, of this position is to be found in the treatise of Hasse on the *Culpa des Römischen Rechts*, of which the first edition was published in 1815, and the second, revised by Bethmann-Hollweg, well known as one of the most prominent jurists and statesmen of his day, in 1838. Of this work, whose exegesis

[1] In harmony with the exposition in the text may be cited Demangeat's Cours de Droit Romain, iii. 450, Paris, 1866, extracts from which will be found reprinted in the first edition of this work.

of the *Corpus Juris* is now accepted in Germany as indisputable,[1] and which Lord Mackenzie, in a passage hereafter to be quoted, declares to have "the merit of having established the true Roman theory, and of having forever extinguished the system of the three degrees of fault," copious extracts will hereafter be given. It is enough now to say that by all subsequent commentators of the Digest the idea of *culpa levissima* is declared to be without basis in the authoritative jurists, and to be an absurd figment of scholasticism. The only question as to which there is any doubt is as to whether the *diligentia quam suis*, or diligence exercised by a man in his own affairs, is to be viewed as a distinct form of diligence, or as simply an evidential phase of the two great forms of diligence (ordinary or non-expert diligence, and extraordinary or expert diligence), which find their root in the necessities of business life.

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

Outside of the relations of the common carrier to goods, which, as has been seen, have no bearing on this particular issue, though the term *culpa levissima* sometimes appears in our reports, yet when so, the term is used inartificially, as indicating only an in-

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

tense phase of the *culpa levis*, or negligence of the specialist, and is to be regarded simply as announcing the truth that in affairs of extreme difficulty and responsibility a specialist is to use extreme care.[1] On the other hand, the notion that, as a matter of law, there are three distinct grades of diligence, with three correlative grades of negligence, has been frequently repudiated. Several illustrations of this have been already noticed. Among the most significant, however, is the following from an eminent jurist, who for a time occupied a seat on the supreme federal bench: "The theory that there are three degrees of negligence, described by the terms slight, ordinary, and gross, has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree, thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation."[2] Other expressions in the same opinion indicate that by this high authority the negligences of the expert and of the non-expert were recognized as distinguishable as separate grades, which, though running into each other at their common boundary, nevertheless have generally distinct *differentia*. But this is not so with *culpa levissima*, on which, as a subtlety of pure scholastic jurisprudence, the con-

[1] See, to same effect, Mr. Green's note to Story on Agency (1874), § 183.

An exception to the statement in the text is to be found in Culbreth *v.* Phil. R. R. 3 Houston (Delaware), 392, where the court, following the old terminology, ruled that diligence was capable of three degrees: First, the diligence required of the common carrier as to goods, which is the highest species of diligence, and which makes the carrier the insurer of the goods, and hence responsible for the slightest negligence, *culpa levissima*. Secondly, the diligence required in ordinary bailments, when the bailee (*e. g.* as is the case of the common carrier after the goods are stored by him for hire in his warehouse) is bound to show the diligence of a prudent business man (bonus et prudens paterfamilias), and is responsible only for ordinary negligence. Thirdly, the diligence required of the mere gratuitous depositary, such as is the railway company who warehouses goods without hire, in which case the company is liable only for gross negligence.

[2] Curtis, J., in Steamboat New World *v.* King, 16 How. U. S. 469. See, for other cases, supra, § 43.

demnation just cited distinctively falls. That it is condemned in practice by our courts will be hereafter abundantly seen when we treat concretely of the diligence of experts whether in law, medicine, engineering, or special lines of industry. It will be then seen that in no case is *diligentia diligentissimi*, or diligence beyond the range of ordinary capacity, required; but that the test is uniform, that the diligence required is that which a good and faithful business man in the particular specialty is accustomed to apply in a transaction such as that under investigation.[1] Even in the employment of steam, *culpa levissima* is not imputable.[2] Thus, it has been held that when the captain of a steamer, upon a vessel being reported lying ahead, immediately gave orders to stop and reverse, but was unable to stop the way of his ship in time to prevent a collision, he was not proved to have been guilty of negligence because he did not take the further precaution of immediately dropping his anchor.[3]

§ 65. (4) *The hypothesis of a culpa levissima is incompatible with a sound business jurisprudence.* — Where is the *diligentissimus* or *exactissimus* to be found, who is to be taken as the standard by which the *diligentia diligentissimi*, with its antithesis of *culpa levissima*, are to be gauged? This question is put by Le Brun, without any reply from his astute antagonists; and it is repeated by Hasse, with the confident assertion that the search is one that will be made in vain. Is Cæsar, asks Hasse, taking up one of the stock illustrations of the Schoolmen, the type of a *diligentissimus?* But waiving the obvious comment made by Hasse, that there are but few Cæsars, and that these few are not likely to undertake ordinary bailments, still even Cæsar, — with all his intense sensibility during a crisis to impending dangers, his incomparable fertility in expedients, and his almost preter-

[1] See, particularly, infra, §§ 631, 635, 872. Thus the fact that a mare ordinarily gentle is in the habit of kicking when in heat, does not make it obligatory on the owner to restrain her at other times; and his failure to do so, though it may be *culpa levissima*, does not make him liable for her kicking when not in heat. Tupper *v.* Clark, 43 Vt. 200.

[2] Supra, § 52; infra, §§ 635, 872. See Mich. Cent. R. R. *v.* Coleman, 28 Mich. 440; Steinweg *v.* R. R. 43 N. Y. 123.

[3] Tyne Steam Shipping Company *v.* Smith, 21 W. R. 702; The C. M. Palmer *v.* Larnax, 21 W. R. 702; 29 L. T. N. S. 120, P. C. See, also, Doward *v.* Lindsay, L. R. 5 C. P. 338.

natural coolness, promptness, and intrepidity in applying the right remedy at the right moment to the right thing, — even Cæsar, when the crisis was over, sometimes yielded to a *negligentia* which was not merely *levis* but *lata*. No one more diligent than Cæsar could, it would be admitted, be found. But it s absurd to apply the diligence of Cæsar to the ordinary bailee. First, the ordinary bailee has not the genius of Cæsar; has not and cannot have the exquisite sensibility and prescience — the eyes behind as well as before, the intense activity — of the great captain. Secondly, even with these unparalleled gifts Cæsar was often unquestionably negligent. *Magnus Apollo dormitat.* And Cæsar, if tried by a scholastic court, according to scholastic refinements, could rarely have escaped the liabilities imposed on *culpa levissima*.[1]

[1] Lord Macaulay struck this point when speaking, in his first article on Lord Chatham, of the execution of Admiral Byng. "We think the punishment of the admiral altogether unjust and absurd. . . . . He died for doing what the most loyal subject, the most intrepid warrior, the most experienced seaman, would have done. He died for an error of judgment, an error such as the greatest commanders — Frederick, Napoleon, Wellington — have often committed, and have often acknowledged. Such errors are not proper objects of punishment, for this reason, that the punishing of such errors tends, not to prevent them, but to produce them. . . . . Queens, it has often been said, run far greater risk in childbed than private women, merely because their medical attendants are more anxious. The surgeon who attended Marie Louise was altogether unnerved by his emotions. 'Compose yourself,' said Bonaparte; 'imagine that you are assisting a poor girl in the Faubourg Saint Antoine.' . . . . Bonaparte knew mankind well. As he acted toward this surgeon, so he acted toward his officers. No sovereign was ever so indulgent to mere errors of judgment; and it is certain that no sovereign ever had in his service so many military men fit for the highest commands."

Compare the following extract from an article in the London Quarterly Review for October, 1874 (Am. ed. p. 206): "The aim of the literary or Girondin party was perfection — a dream that has always attracted and amused the minds of philosophers. Plato had given it form in his 'Republic;' Bacon and Sir Thomas More in the 'Atlantis' and 'Utopia.' But both the last were the mere sportive fancies of practical statesmen, while Plato says of his own republic: 'Perhaps in heaven there is laid up a pattern of it for him who wishes to behold it, and, beholding, to organize himself accordingly. And the question of its present or future existence on earth is quite unimportant.' The problem was not strange to theology, and on speculations of the kind Butler remarks, with his usual strong sagacity: 'Suppose now a person of such a turn of mind to go on with his reveries, till he had at length fixed upon some plan of nature as appearing to him the best; — one shall scarce be

§ 66. For from the essential imperfection of human activity, so it is well argued by Hasse, there is no continuous duty which we can engage in without being justly chargeable, at some time or other during its discharge, with this *culpa levissima*, or infinitesimal negligence. The successful general, it has been said by those who were themselves great generals, is he who commits the fewest blunders. There is no past campaign, even of the most consummate strategists, of which we cannot say, "There was a blunder which was only saved from being injurious by a greater blunder on the other side." And as with great affairs, so with little. We may take the case of an ordinary common carrier of goods. This carrier, if he studied the weather bulletins, might have prognosticated a sudden storm by which the goods carried by him were soaked. If he had properly examined the architecture of a great city (*e. g.* as in Chicago, before the fire of 1871), he would not have stored his goods in the city, so that they were burned up, but would have taken them to the outskirts, or not stored them at all. So, again, we may say of a traveller who is struck, on crossing a track, by a locomotive, that if he had carefully scanned the map of the country, he would have seen that by making a long detour he could have crossed an intervening railroad by a bridge, instead of attempting to cross on a level.[1] But to exact diligence in cases corresponding to the first two of these illustrations would require a skill and extensiveness of apprehension incompatible with the occupation of an ordinary common carrier; to require precautions so excessive as those indicated by the third illustration would be incompatible with the prompt performance of his business duties. In other words, to pass from the concrete to the abstract, the human mind, from its limitedness of vision, is incapable of perfect diligence. In certain periods of great excite-

thought guilty of detraction against human understanding, if one should say, even beforehand, that the plan which this speculative person would fix on, though he were the wisest of the sons of men, would not be the very best, even according to his own notions of the best.'

"Yet this finite capacity of the human mind was precisely what the revolutionary philosophers refused to admit. Each of them assumed that the conception of perfection he had himself formed had a positive external equivalent. Hence their reasoning was constructively valueless, for it was based on a *petitio principii*, or an assumption of what it was really necessary to prove."

[1] See infra, § 997.

ment such diligence may for a time be approached. But in any continuous work such intense diligence is intermittent. And when the intermission comes, there is *negligentia levissima*. The *diligentia diligentissimi*, for the time at least, has waned.

§ 67. So also must we conclude, viewing the question inductively, from an examination not merely of the person acting, but of the thing acted on. Is there any enterprise of any importance to society that can be conducted without some *culpa levissima?* Has there ever been such? And if the managers of such enterprises are to be held responsible for *culpa levissima*, would such enterprises ever be undertaken? Have we not illustrated the impracticability of such a superlative standard of diligence by the fact that our Anglo-American common carrier's liability for insurance of goods is now, with the approval of the courts, almost universally excepted away? In other words, some slight deflection from a perfect standard is incident to all human labor; and that which is incident to all labor cannot be judicially punished without paralyzing the labor to which it is incident. Or, to fall back on the postulates of the older jurists, the law deals with men, not as perfect mechanisms, capable of pursuing an exact line, but as imperfect moral agents, who must use imperfect machines, and depend upon uncertain natural agencies. We must recognize this imperfection of humanity, and shape our jurisprudence accordingly. It is sufficient if we say to the non-specialist (*e. g.* a non-professional nurse, or a farmer in whose barn a box is temporarily left by a traveller for his own convenience), "You are required only to use such diligence as ordinary persons commonly use in ordinary affairs;" and if we say to the specialist (*e. g.* the physician, or the railroad company, or the pilot), "You are required to use the diligence which a skilful and faithful expert in your own branch uses as to work in his particular line." The only qualification to this is that which arises, as has been heretofore shown, when, either as matter of aggravation or excuse, it is proper to show how the agent charged with negligence acted as to his own affairs.[1]

§ 68. Mommsen lends his high authority to the position that the grade of negligence is, as a general rule, to be determined

[1] See, to same effect, Mackenzie's Roman Law, 2d ed. p. 197.

by the question of advantage.[1] Is the contract solely for another's benefit? Then I am liable only for *dolus* and *culpa lata*. Am I, to take the alternative, to reap a benefit from the contract, either for myself alone or in company with others? Then I am liable for *culpa* in its fullest sense. But to this rule Mommsen makes the following exceptions: —

Classification of contracts in respect to grade of negligence.

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

(b) There are some obligatory relations in which the delinquent is liable for *dolus* and *culpa*, the *culpa* however being subject to the modification of *culpa in concreto*. This is the case with the obligation of the guardian, of the partner, of those concerned in the *communio incidens*, and of the husband (by the Roman law) as to the *dos*. In partnership, in the *communio incidens*, and in respect to the *dos*, the delinquent is usually liable for *culpa* generally.[2]

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

Hasse's classification.

A. When agency is established.

a[1] This may occur voluntarily, in which case the agent is responsible for *omnis culpa;* not merely for the neglect of ordinary diligence, but for the neglect of

[1] Beiträge zum Obligationenrecht, iii. 391.

[2] Demangeat (Cours de Droit Romain, iii. 447, Paris, 1866) gives another scheme of classification, in a passage which is reprinted in the first edition of this work, but which is now omitted for the purpose of condensation. Reference may also be made to the exposition of Ortolan, in his Explication Historique des Instituts, iii. 360, 8th ed. Paris, 1870.

the diligence of a good business man. Under this head falls, —

a^2 The Mandator.

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

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

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

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

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

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

b^2 The Universal Fiduciar.

c^2 The Singular Fiduciar and the Legatar.

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

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

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

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

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

[1] As cases defining duties of pledgees, see Markham *v.* Jaudon, 41 N. Y. 235; Strong *v.* Bk. 45 N. Y. 718; Fisher *v.* Brown, 104; Mass. 259;

d^1 The Usufruct.

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

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

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

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

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

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

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

Thayer *v.* Dwight, 104 Mass. 254; Faulkner *v.* Hill, 104 Mass. 188; Worthington *v.* Tormey, 34 Md. 182; and see, fully, infra, § 672.

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

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

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

[4] L. 5. § 10. D. Commod.

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

CHAPTER III.

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I. DEFINITION OF CAUSATION.

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

Causation must be immediate by responsible agent.

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

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

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

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

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

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

"Also you may not confound the act with the execution only

[1] Reg. 1.

of the act, and so the cause of the act with the execution of the act, and by that means make the immediate cause a remote cause."

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

Yet, though Bacon avoids philosophical and even juridical exposition of his text, it is natural to infer that he does so because the text is itself virtually from Aristotle, whose works were then in the hands of jurists as well as of philosophers, and whose authority even the powerful criticisms of Hume and of Mr. J. S. Mill have failed to shake. By Aristotle causes are divided into four heads: the *material*, the *formal*, the *efficient*, and the *final*. The *material* cause is the matter from which a thing is made, and without which it cannot be made; as marble is the matter of a statue. The *formal* cause is the *archetype*, as the idea of the sculptor is the formal cause of the statue. The *efficient* cause is the principle of change or motion which produces the thing; as, in a juridical sense, the will of the sculptor is the prompting power which produced the application of his idea to the marble, and, in a theological sense, the Divine will is the prompting power which evolved the Divine idea in the formation of both sculptor, of marble, and of the everlasting hills from which the marble is dug. This is the Αρχὴ τῆς κινήσεως; the *causa efficiens*, to which the jurists constantly advert. The *final* cause is the object of a thing; the ultimate beneficial purpose for which it is designed; το ου ἕνεκα και το ἀγαθον, *causa finalis*. This classification is expressly accepted by Bacon in his "De

Augmentis."[1] It is true that he declines to enter upon the discussion of *final* cause, "the inquisition" of which he declares "is barren," "like a virgin consecrated to God." But his mode of treating the "causa efficiens" makes it plain that he regards it as convertible with the "proximate cause" of the maxim.[2]

Not necessary that the specific injury should have been foreseen.

§ 74. Unquestionably we are frequently told that liability in negligence attaches when the party charged has reasonable grounds to expect the damage that occurred in consequence of his neglect; and this is sometimes pushed to the extent of maintaining that when there is on his part such reasonable grounds of expectation then he is liable, and that he is not liable when there are no such reasonable grounds of expectation. Thus we are told by Pollock, C. B., that "every person who does a wrong is at least responsible for all the mischievous consequences that may be reasonably expected to result under ordinary circumstances from such misconduct;"[3] and constantly the idea of "reasonableness of expectation" is made convertible with imputability.

It has however been already shown,[4] that there may be cases in which there is such a reasonable expectation in which there is no imputability of negligence.

§ 75. Illustrations to the same effect may be drawn almost

[1] Book iii. ch. v.

[2] *Meaning of* term "*proximate*" *illustrated by insurance cases.* — The term "proximate" is illustrated by a series of cases which, though not in the direct line of the present inquiry, may be invoked for their juridical value. "Perils of the sea" are insured against in our marine policies. Is the loss of a particular ship chargeable to a peril of the sea? It has been generally ruled that the peril must be the *proximate* and not the *remote* cause of the disaster. Taylor *v.* Dunbar, L. R. 4 C. P. 206; Seagrave *v.* Union Mar. Ins. Co. L. R. 1 C. P. 320; Hagedorn *v.* Whitmore, 1 Stark. N. P. C. 157; Grill *v.* General Iron Co. L. R. 3 C. P. 476; *S. C.* L. R. 1 C. P. 600; Livie *v.* Janson, 12 East, 653, citing Green *v.* Elmslie, Peake N. P. C. 278; Hahn *v.* Corbett, 2 Bing. 205; Walker *v.* Maitland, 5 B. & Ald. 171; Waters *v.* Louisville Ins. Co. 11 Peters, 213; Columbia Ins. Co. *v.* Lawrence, 10 Peters, 517; Patapsco Ins. Co. *v.* Coulter, 3 Peters, 222; General Mut. Ins. Co. *v.* Sherwood, 14 Howard (U. S.), 354; Patrick *v.* Commercial Ins. Co. 11 Johns. R. 14; and other cases cited in Broom's Legal Maxims (5th Lond. ed.) 216 *et seq.*

Compare an able article on this topic in the American Law Journal for January, 1870, p. 214.

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

[4] Supra, § 16.

without limit from ordinary observation. The miner, the manufacturer, and the merchant, so argues a vigorous German thinker of our own day,[1] must regard it as probable that the weapon to which each contributes his share may be used to commit a wrong; the roof coverer must regard it as probable that a tile may at some future time be detached and may strike some one walking in the street. So parents, especially such as are not themselves distinguished for their reverence for law, must regard it as not improbable that their children may become law breakers. In neither of these cases, however, does this perception of probability by itself create liability. Even when this probability approaches the highest grade, there are cases in which liability is by common consent excluded. For instance, a man is suffering with a sickness which in a few days will terminate fatally, unless he submits to a perilous operation which, if not successful, will cause his death in a few hours. He is unconscious; and therefore unable to give or withhold assent. A surgeon performs the operation skilfully but unsuccessfully, and the patient dies, not of the disease but of the operation. The surgeon saw that it was highly probable that death would ensue; yet he is nevertheless not liable for the death, for he acted, notwithstanding this probability, according to the rules usually accepted in practical life. If desperate operations are not risked in desperate cases, improvement in surgery is greatly hindered; and besides this, it is in conformity with the ordinary rules of society to risk a few days of unconscious or of exquisitely painful existence for even a slight probability of recovery. So, also, there exist, to follow the argument of this acute reasoner, certain necessary though dangerous trades, of which we can say statistically that in them will be sacrificed prematurely the lives not merely of those who voluntarily engage in them, but of third persons not so assenting. Yet in such cases (*e. g.* gas-factories and railroads), we do not hold that liability for such injuries attaches to those who start the enterprise foreseeing these consequences. If the consequence flows from any particular negligence according to ordinary natural sequence, without the intervention of any independent human agency, then such consequence, whether foreseen as probable or unforeseen, is imputable to the negligence. But if the agency

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

by which the harm is done is conducted with proper precautions, and is itself one of the necessary incidents of our social life, the persons concerned in managing such agencies are not liable for injuries incidentally inflicted on others, even though such injuries were foreseen.

§ 76. It must not be supposed, however, that the foreseeing an event as probable has nothing to do with the imputation of liability. It is true that it is not enough to make a person liable for hurt done through his agency that he foresaw the probability of such hurt in general, for the hurt, as we have just seen, may be one of the regular and lawful incidents of a lawful employment. So, on the other hand, if such hurt is one of the incidents of improper conduct on the part of the person charged, he cannot relieve himself by proof that he did not foresee it, because it was his duty to have marshalled the probabilities, and he is liable for negligence in omitting so to do. At the same time it must not be forgotten that the probability of a particular result has much to do in explaining the motive prompting to such result. Motive is the creature of probabilities. A certain result is probable, and I do what will lead to this result. Two extremes however, in this view, are to be avoided. The *absolute* foreseeing of a result is not essential to the imputation of negligence, for this is incompatible not only with the idea of negligence, but with that of moral agency, which precludes absolute foreknowledge. So the foreseeing of a harm as remotely and slightly probable does not involve the imputation of such a harm, for there is nothing that we can do that may not remotely produce some harm, and therefore if we are to avoid such imputation we must do nothing. But if an event regularly (*i. e.* not uniformly, but in accordance with natural laws) follows a cause, then it is a contingency which a prudent man would expect; and so, on the other hand, that a prudent man would expect it is strong proof that it regularly follows in accordance with natural sequence.[1]

But the foreseeing of an injury may be an incident from which both *dolus* and *culpa* may be inferred.

[1] See observations supra, §§ 16–22. In Vicars *v.* Wilcocks, 8 East, 1, it was ruled that the damage alleged in support of an action for slander must be the usual and natural consequence of the words spoken. In Lynch *v.* Knight, 9 H. of L. Cas. 577, where the case of Vicars *v.* Wilcocks was much discussed, Lord Wensleydale says: "I strongly incline to agree,

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

that to make the words actionable by reason of special damages, the consequence must be such as, taking human nature with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking of the words, not what would reasonably follow, nor what we might think ought to follow." We have, therefore, "reasonable expectation" treated as an incident of "regular and natural sequence."

In Sneesby *v.* The Lancashire & Yorkshire Railway Co. L. R. 9 Q. B. 263; aff. in Court of Ap. L. R. 1 Q. B. D. 42; 33 L. T. N. S. 372, some cattle, the property of the plaintiff, were being driven along an occupation road about 11 P. M. The road crossed some sidings of the defendants' railway on a level, and while the cattle were crossing the sidings, the defendants' servants, negligently and without warning, sent some trucks violently down an incline into the sidings. The cattle were dispersed, and, in spite of the efforts of the drovers, six or seven of them were not found till the next morning, when they were found on the line, having been run over by a passing train. Their tracks were traced, and they appear to have gone along the road for some distance, then into a garden and orchard, the property of the defendants, and then, through the defective fence, on to the railway. The court of queen's bench held that the death of the cattle was the result of the negligence of the defendants' servants, and that the damage was not too remote, and the court of appeal, without calling on counsel for the plaintiff, affirmed that decision.

[1] Supra, §§ 16, 24.

[2] Higgins *v.* Dewey, 107 Mass. 494. See White *v.* Ballou, 8 Allen, 408; Luce *v.* Dorch. Ins. Co. 105 Mass. 297; Lewis *v.* Smith, 107 Mass. 334; Kelley *v.* State, 53 Ind. 311; Dowell *v.* Steam Nav. Co. 5 E. & B. 195; Dymen *v.* Leach, 26 L. J. Exch. 221; Clarke *v.* Holmes, 7 H. & N. 937; Senior *v.* Ward, 1 E. & E. 385; Williams *v.* Clough, 3 H. & N. 258; Burrows *v.* March Gas, &c. Co. L. R. 5 Exch. 67; Gould *v.* Oliver, 2 Scott N. R. 257; Smith *v.* Dobson, 3 Scott N. R. 336; Taylor *v.* Clay, 9 Q. B. 713; Tuff *v.* Warman, 2 C. B. N. S. 740; *S. C.* 5 Ibid. 573; Witherley *v.* Regent's Canal Co. 12 C. B. N. S. 2, 7; Morrison *v.* General Steam Nav. Co. 8 Exch. 733; Pearson *v.* Cox, L. R. 2 C. P. D. 369. See supra, §§ 15, 16.

§ 78. Nor, when we scrutinize the cases in which the test of "reasonable expectation" is applied, do we find that the "expectation" spoken of is anything more than an expectation that some such disaster as that under investigation will occur *on the long run* from a series of such negligences as those with which the defendant is charged. Indeed, even by Pollock, C. B., whose language is so frequently quoted as sustaining this test, the phrase is used, as we find from other expressions of the same judge, simply for the purpose of excluding those contingencies which are so remote that they are not, in the long run, within the range

"To be reasonably expected" equivalent to "in ordinary natural sequence."

As an illustration of the distinction just taken may be cited an English case decided by the queen's bench in 1876. Hobbs *v.* R. R. L. R. 10 Q. B. 111. The plaintiff, with his wife, and two children of five and seven years old, respectively, took tickets on the defendants' railway from Wimbleton to Hampton Court by the midnight train. They got into the train, but it did not go to Hampton Court, but went along the other branch to Esher, where the party were compelled to get out. It being so late at night, the plaintiff was unable to get a conveyance or accommodation at an inn; and the party walked to the plaintiff's house, a distance of between four and five miles, where they arrived at about three in the morning. It was a drizzling night, and the wife caught a severe cold, and was laid up for some time, being unable to assist her husband in his business as before, and expenses were incurred for medical attendance. In an action to recover damages for the breach of contract, the jury gave £28 damages; viz.: £8 for the inconvenience suffered by having to walk home, and £20 for the wife's illness and its consequences. It was ruled by the court that, as to the £8, the plaintiff was entitled to damages for the inconvenience suffered in consequence of being obliged to walk home; but as to the £20, that the illness and its consequences were too remote from the breach of contract for it to be given as damages naturally resulting from it. It was argued by Cockburn, C. J., that if a carrier undertakes to put down a passenger at a certain place, and does not put him down at that place but puts him down somewhere else, it must have been in the contemplation of the parties that the passenger must obtain some other means of getting home. If he can get other means, he may take them and make the carrier liable for the expense so incurred by him; but if no other means can be found, then the carrier must compensate him for the personal inconvenience which the absence of those means has caused. On the other hand, the wife's catching cold was not a regular and natural sequence from the negligence of the railroad company. "If, in walking home," said Mellor, J., "she had put her foot into a pool of water, and when she got home had omitted to take proper means to prevent catching cold in consequence, to say that she could recover damages from the railway company for an illness so caused would be to lay down a very dangerous rule indeed."

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

Losses of profit, when regular and not speculative, may be recovered in a suit against a common carrier for loss of goods.[4]

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

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

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

In Bradshaw *v.* Lancashire & Yorkshire Railway Co. 31 L. T. N. S. 847; 11 Alb. Law J. 167, it was held that, where a passenger on a railroad was negligently injured, so that he died six months afterward, the railroad company was liable for the damages resulting from his inability to attend to his business, which had fallen off and become of less value. *S. P.*, Chicago *v.* Langlass, 66 Ill. 361.

[4] See Ward *v.* R. R. 47 N. Y. 29. So where a common carrier neglected to forward promptly, goods delivered, with notice that they were sold if forwarded at once, it was held that the carrier, by delay, became liable for the amount of the depreciation of the goods in the market value, and also for loss of the chance to sell. Deming *v.* R. R. 48 N. H. 455.

So in an English case, decided in 1876, Simpson *v.* R. R. L. R. 1 Q. B.

II. DISTINCTION BETWEEN ACTS AND OMISSIONS.

§ 79. A distinction has been frequently taken between negligence in commission and negligence in omission; and this view has been advanced not only by Donellus, a learned jurist, to whose acuteness we owe in other re-

Distinction between *culpa in faciendo*

D. 274; 33 L. T. N. S. 805, the evidence was that the plaintiff was a dealer in cattle-spice, and samples were shipped by defendants' railroad to be exhibited at an agricultural show. The samples were addressed to the show-ground, and the consignment note was indorsed, "Must be delivered on Monday." Owing to defendants' negligence, they were not delivered in time, and plaintiff, who had gone to the show, lost the benefits of his journey. Defendants paid £10 into court to cover expenses of plaintiff's journey, but plaintiff demanded compensation for loss of time and profit. The jury awarded £20 additional damages, and the court of queen's bench upheld the verdict, on the ground that defendants had notice of the purpose for which the goods were required, and that plaintiff was entitled to recover damages which naturally flowed from the failure to deliver the goods.

The carrier, however, must have general notice of what the goods are, for he cannot be held liable for profits on goods of peculiar value, of which value he was not informed. Brock *v.* Gale, 14 Fla. 523.

In Lane *v.* Atlantic Works, 111 Mass. 136, Colt, J., hit the true line in the following: "In actions of this description the defendant is liable for the natural and probable consequences of his negligent act or omission. The injury must be the direct result of the misconduct charged; but it will not be considered too remote, if, *according to the usual experience of mankind, the result ought to have been apprehended.*" *S. P.*, Hill *v.* Winsor, 118 Mass. 257; Pearson *v.* Cox, L. R. 2 C. P. D. 369.

In Derry *v.* Flitner, 118 Mass. 131, it was said by Morton, J., that "the true inquiry is, whether the injury sustained was such as according to common experience and the usual course of events, might reasonably be expected." See, to same effect, Lowery *v.* Tel. Co. 60 N. Y. 198.

On the other hand, diverging from the rule above and hereafter stated, we have the following: —

"The cause of an event," says Appleton, C. J., in Moulton *v.* Sanford, 51 Maine, 134, "is the sum total of the contingencies of every description, which, being realized, the event invariably follows. It is rare, if ever, that the invariable sequence of events subsists between one antecedent and one consequent. *Ordinarily that condition is usually termed the cause, whose share in the matter is the most conspicuous and is the most immediately preceding and proximate in the event.*" Cited, with approval, in Sutton *v.* Wauwantosa, 29 Wis. 21. This definition, which, down to the part in italics, is substantially that of J. S. Mill, is open in this respect to objections which will be more fully stated in § 86 *et seq.* The objection to the part in italics is, that it includes material conditions as well as moral causes. Jeffersonville, &c. R. R. *v.* Riley, 39 Ind. 568. See supra, §§ 15, 16; infra, § 85; and see Gates *v.* R. R. 39 Iowa, 45.

spects much, but by a contemporaneous English judge of much sagacity.[1] Under these circumstances it is proper to consider it somewhat in detail. and *culpa in non faciendo.*

§ 80. By the Aquilian law, as we have seen, a party whose property or person is injured by the negligence of another can, independently of contract, have redress, under certain limitations, from the party injured. But it is not necessary that under this law the aggression should consist of an act of positive commission. Undoubtedly the Roman law, resting, as we have seen, upon that theory of individual independence which was the pride of the jurists, held that no man could usually be made liable for a mere omission to act. Yet even under this law an omission created a liability when it was a breach of a positive duty. An interesting case to this effect is given in the Digest, in the discussion of the Aquilian law.[2] One servant lights a fire and leaves the care of it to another. The latter omits to check the fire, so that it spreads, and burns down a villa. Is there any one liable for the damages? The first servant is chargeable with no negligence, and the second chargeable only with an omission. Of course, if we apply to this case the maxim that a mere omission cannot be the basis of a suit, there can be no redress. But Ulpian, who on another occasion insists strongly on this maxim, when it relates to voluntary action, casts it summarily aside when the attempt is to so use it as to confuse the bare omission of an act we are not bound to perform with the imperfect performance of an act to which we are bound. Against the *negligenter custodiens*, he decides the *utilis Leg. Aq.* can be enforced; and there can be no question that he decides rightly, and in full accordance with his own views as to abstract non-liability for pure omissions. For it is clear that in the case before us the non-action of the second servant is equivalent to action. He undertakes the charge of the fire, and in the imperfect performance of this charge he acts aggressively and positively. So, also, is it in the well known case of a physician who undertakes the care of a patient.[3] A physician is not Under the Roman law.

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

[2] L. 27. § 9. D. ad L. Aquil. 2.

[3] See L. 8. pr. D. ad L. Aq. 2; Hasse, p. 22. See, also, Cleland *v.* Thornton, 43 Cal. 437.

liable for not undertaking the case of a sick stranger. If, however, he undertakes the case, he is liable for omission to act. For, as Hasse well argues, it would be as absurd to require that some remedy should have been actually administered by him, in order to constitute liability on his part, as it would be to require, in order to make the person undertaking to watch a fire liable, that he should have stirred the coals with the tongs. Whoever, in other words, undertakes an office or duty, is responsible for imperfection in the discharge of such office or duty. He is not liable, as a general rule, because he declines to accept the office or duty. But accepting it, he is bound to perform it well. *Voluntatis est suscipere mandatum, necessitatis est consummare.*[1] And the same rule applies to suits based on the rule, *Sic utere tuo ut non alienum laedes.* If I undertake to accumulate deleterious matter on my land, I am liable if I omit properly to confine it. If I undertake to build fire in a steam-engine, I am liable if I omit properly to guard its smoke-pipe.

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

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

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

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

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

But, answers Hasse, the qualification *Nisi alia res te ad diligentiam obliget* contains the principle at issue. For if I am not bound to certain duties to another, I cannot be compelled to perform such duties, no matter what may be the moral reasons call-

[1] See supra, §§ 12, 13; infra, § 442.

ing on me to act. If, however, I undertake the performance of this duty, then I am obliged to perform it diligently. Under the Aquilian law, as has just been shown, omission is treated as equivalent to action, in cases where I begin a work and then drop it, wherever this withdrawal works injury to another; nor does it matter whether such withdrawal arises from malice, or ignorance, or timidity. So far as concerns obligations, as distinguished from non-contractual duties, he who undertakes an obligation cannot excuse himself on the ground that he was ignorant of the scope of the obligation, or that he wanted capacity to undertake its complete discharge. If he was incapable, he had no business to undertake the obligation; if he was ignorant of what it required, then his duty was to decline its acceptance.[1]

Omissions as such, when disconnected with a legal duty, not the subject of suit.

§ 82. Yet as a general rule it may be affirmed that omissions, unless when involving the non-performance or mal-performance of a positive duty, are not the subject of a suit. As has been elsewhere shown, this results from the nature of the civil compact; for if the law undertook to compel men to perform toward each other offices of mere charity, then the practical and beneficent duty of supporting self would be lost in the visionary and illusory duty of supporting every one else.[2] It is scarcely necessary to point attention to the fact, that if the maxim be generally true that he who injures another by his omissions is civilly liable, then the converse must also be true that every one is obliged by law to be as useful to another as he can. To the Romans such an assumption was peculiarly offensive, as to the Romans the independence of each family was a fundamental principle of the law. If each man is compelled to feed his neighbor, then his neighbor will be compelled to feed him back; and where will this end? It is true that in degenerate periods the cry of the rabble was for *panem et circenses;* but by the law as held by the great jurists, each family was a principality itself, which in its proud isolation depended on itself for its own support, excluding the aid of others as an intrusion upon personal rights, and rejecting such aid on principle as inconsistent with that spirit of personal independence which they held essential to a brave and

[1] See supra, § 13.

[2] See 2 Wh. Cr. L. §§ 1011, 2529.

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

Otherwise in respect to legal duties.

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

A physician, to take another illustration, who undertakes to attend a patient and omits to give a necessary prescription, is guilty of a positive malfeasance; and so of the carpenter who omits properly to fasten a roof so that the tiles fall on the street; and of the engine-driver who omits to give notice to an approaching train, so that a collision ensues. So the owner of a dwelling-

[1] Hasse, § 3.

[2] Cotton *v.* Wood, 8 C. B. N. S. 568; Saunders on Neg. § 50. Infra, §§ 345–53. See Carleton *v.* Steel Co. 99 Mass. 216; French *v.* Vining, 102 Mass. 132.

house, it may be again mentioned, who omits, when leasing it, to give notice that it has been infected with small-pox, is liable to his lessee for damages caused by his omission.[1] An omission, therefore, may be a juridical cause; but it is so, not because it is a negation, but because it is a positive, though a negligent wrong.[2]

§ 84. So far as concerns omissions to discharge discretionary duties, no liability, as we shall hereafter see, is imposed on municipal corporations.[3]

III. DISTINCTION BETWEEN CONDITIONS AND CAUSES.

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

Conditions to be distinguished from causes.

[1] Minor *v.* Sharon, 112 Mass. 477.

[2] See, also, to same effect, Demangeat (Cours de Droit Romain, iii. 443, Paris, 1866), as cited at large in the first edition of this work.

[3] Infra, § 261.

of the human will, it contents itself with announcing as a fact established by experience that by making a law that a human "antecedent" shall be punishable for a wrongful act, such "antecedent," if not restrained from committing the wrong, may be compelled to redress it. The question, therefore, when an injury is done, is, whether there is any responsible person who could, if he had chosen, have prevented it, but who either seeing the evil consequences, or negligently refusing to see them, has put into motion, either negligently or intentionally, a series of material forces by which the injury was produced. This is the basis of the distinction between conditions and causes.[1] We may concede that all the antecedents of a particular event are conditions without which it could not exist; and that, in view of one or another physical science, conditions not involving the human will may be spoken of as causes. But, except so far as these conditions are capable of being moulded by human agency, the law does not concern itself with them. Its object is to treat as causes only those conditions which it can reach, and it can reach these only by acting on a responsible human will. It knows no cause, therefore, except such a will; and the will, when thus responsible, and when acting on natural forces in such a way as through them to do a wrong, it treats as the cause of the wrong.[2]

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

[2] "The law cannot enter upon an examination of, or inquiry into, *all the concurring circumstances which may have assisted in producing the injury, and without which it would not have occurred.* To do so would only be to involve the whole matter in utter uncertainty, for when once we leave the direct, and go seeking after remote causes, we have entered upon an unending sea of uncertainty, and any

As a legal proposition, therefore, we may consider it established, that the fact that the plaintiff's injury is preceded by several independent conditions, each one of which is an essential antecedent of the injury, does not relieve the person by whose negligence one of these antecedents has been produced from liability for such injury.[1] On the other hand, the fact that a party is shown to have been negligent in a particular proceeding, does not make him liable for an injury produced by conditions to which his negligence did not contribute.[2]

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

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

So in a case where the evidence was that a sign hung over a street in a city, with due care as to its construction and fastenings, but in violation of a city ordinance which subjected its owner to a penalty for placing and keeping it there, was blown down by the wind in an extraordinary gale, and in its fall a bolt which was part of its fastenings struck and broke a window in a neighboring building. It was ruled that the owner of the sign was liable for the damage sustained by the window. The wind was a *condition* of the injury; the unlawful arrangement of the

conclusion which should be reached would depend more upon conjecture than fact." Marston, J., Michigan Cent. R. R. *v.* Burrows, 33 Mich. 15, citing Denny *v.* R. R. 13 Gray, 481; Railroad *v.* Reeves, 10 Wall. 176; Morrison *v.* Davis, 20 Penn. St. 171; Hoadley *v.* Trans. Co. 115 Mass. 304. And see Ins. Co. *v.* Seaver, 19 Wall. 531. See, *per contra*, Appleton, C. J., in Moulton *v.* Sanford, quoted in note to § 79. The student is particularly referred to Mr. R. G. Hazard's able Treatise on Causation, Boston, 1869.

[1] Moore *v.* Abbot, 32 Me. 46; Moulton *v.* Inhab. of Sanford, 51 Me. 127; Hunt *v.* Pownal, 9 Vt. 411; Allen *v.* Hancock, 16 Vt. 230; Winship *v.* Enfield, 42 N. H. 197; Marble *v.* Worcester, 4 Gray, 395; Murdock *v.* Warwick, 4 Gray, 178; Rowell *v.* Lowell, 7 Gray, 100; Atchison *v.* King, 9 Kansas, 558. See, as to contributory negligence, infra, § 303.

[2] Infra, §§ 130, 145; Maynard *v.* Buck, 100 Mass. 40, 48; Roberts *v.* Gurney, 120 Mass. 33.

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

sign its juridical *cause*.[1] "It is contended," said Chapman, C. J., in giving the opinion of the court, ... "that the act of the defendant was a remote, and not a proximate cause of the injury. But it cannot be regarded as less proximate than if the defendant had placed the sign there while the gale was blowing, for he kept it there till it was blown away. In this respect, it is like the case of Dickinson *v.* Boyle, 17 Pick. 78. The defendant had wrongfully placed a dam across a stream on the plaintiff's land, and allowed it to remain there, and a freshet came and swept it away; and the defendant was held liable for the consequential damage. It is also, in this respect, like the placing of a spout, by means of which the rain that subsequently falls is carried upon the plaintiff's land. The act of placing the spout does not alone cause the injury. The action of the water must intervene, and this may be a considerable time afterwards, yet the placing of the spout is regarded as the proximate cause. So the force of gravitation brings down a heavy substance, yet a person who carelessly places a heavy substance where this force will bring it upon another's head does the act which proximately causes the injury produced by it. The fact that a natural cause contributes to produce an injury, which could not have happened without the unlawful act of the defendant, does not make the act so remote as to excuse him. The case of Dickinson *v.* Boyle rests upon this principle."[2]

IV. RESPONSIBLE HUMAN AGENT.

§ 87. But a man, to be a juridical cause either through his acts or omissions, must be responsible. If he is irresponsible, he is no longer a cause, but he becomes a condition, — *i. e.* he is ranked among those necessitated forces, which, like weapons of wood or stone, are incapable of moral choice, but act only as they are employed or impelled. The cause of the event to which any

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

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

of these classes of forces is related as conditions must in every case be a responsible originator. The question, therefore, to be here practically considered is, who are irresponsible. And among such persons we may mention: —

§ 88. 1. As to persons incapable of reason there is no question. Neither an idiot nor a maniac can be a juridical cause.[1] And the same reasoning applies to persons so young and inexperienced as to be unable to exercise intelligent choice as to the subject matter.[2]

Persons incapable of reason cannot be causes.

The Roman law, which is to the same effect, bases this doctrine on the necessity of *will* to *causation*. Whoever is incapable of *diligentia*, it declares, cannot be charged with *negligentia*. Hence neither *furiosus* nor *infans* could be held liable under the Aquilian law.[3] Liability of the infant, however, as is shown by Pernice,[4] comes with capacity; when he is *doli* or *culpae capax* he is liable. But this is not peculiar to the Aquilian law. In respect to the performance of contracts, he only is liable for *culpa* who is *culpae capax;* and the same principle extends to *dolus* and *culpa lata*. Thus: —

"An in pupillum, apud quem sine tutoris auctoritate depositum est, depositi actio detur quaeritur, sed probari oportet, *si apud doli mali capacem* deposueris, agi posse si dolum commisit."[5]

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

§ 89. 2. So, also, a person under compulsion cannot be viewed as a juridical cause. What he does, he does purely as the me-

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

[2] See Coombs *v.* New Bedford Cord. Co. 102 Mass. 572; Grizzle *v.* Frost, 3 F. & F. 622; Bartonshill Coal Co. *v.* McGuire, 3 Macq. 300; and cases cited infra, §§ 216, 308; Railroad Co. *v.* Gladmon, 15 Wallace, 401. See, particularly, infra, § 309.

[3] L. 5. § 2. h. t.

[4] Op. cit. p. 53.

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

chanical extension of the person by whom he is directed; and he can no more be charged with the liabilities of juridical causation than could the stream by which a meadow is flooded, or the spark by which a hay-stack is kindled.[1] Such, also, is the rule where the plaintiff is put into a position by the defendant from which he (the plaintiff) cannot escape, and in which he without blame to himself sustains damage. This is illustrated by a Pennsylvania case, in which the defendant negligently blocked up the lock of a slackwater, keeping the plaintiff's boats in the open stream, where, on the rising of the stream, they were swept over the dam; upon which facts the defendant was held liable for the damages thus sustained.[2] Further illustrations may be found in the cases hereafter fully cited,[3] where a person is frenzied or paralyzed by fright, caused by another's misconduct.

So of persons under compulsion.

§ 90. 3. The same rule applies to unconscious agents.[4] An explosive compound, negligently packed, is put into the hands of a carrier to deliver, the carrier being ignorant of its contents. Who, in case of the package being left at the place of delivery, and there exploding, is liable for the injury produced by the explosion? Had the carrier known, or had he been in a position in which it was his duty to know, that the package was in this dangerous condition, then he would become liable, on the principle that he who negligently meddles with a dangerous agency is liable for the damage. But if he was non-negligently ignorant of the contents of the package, he is no more liable than is the car by which they are carried.[5] No matter how numerous may be the agencies through which such a package is transmitted, the original forwarder, in case of the carriers' being ignorant and innocent, continues liable, while the carriers are free from liability. Thus a person who is guilty of negligence in manufacturing a dangerously inflammable oil is liable for the damage done by it, no matter how numerous may

Unconscious agents.

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

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

[3] Infra, §§ 93, 304.

[4] See, as to persons deprived of their senses, infra, § 307; as to innocent vendees, infra, §§ 145–6, 853.

[5] See infra, §§ 854–5–6.

be the agents by whom it is innocently passed. "Certainly one who knowingly makes and puts on the market for domestic and other use such a death-dealing fluid, cannot claim immunity because he has sent it through many hands."[1] When, however, a vendee or agent knows the explosive or otherwise perilous character of a compound, and then negligently gives it to a third person, who is thereby injured, the causal connection between the first vendor's act and the injury is broken.[2]

Negligent sale of poison.

§ 91. So with regard to the negligent sale of poison. If B. negligently sells poison, under the guise of a beneficial drug, to A., he is liable for the injury done to A.; or to those to whom A. innocently gives the poison. But suppose that A. has grounds to suspect that the drug is poisonous, and then, instead of testing it, sells it or gives it to C.? Now, in such a case there can be no question that A. is liable for the damage caused by his negligence; though, as we have just seen, if A. is unconscious of the mistake, and acts merely as the unconscious agent of B., then there is no causal connection between A.'s agency and the injury, and B. is directly liable to C.[3] Beyond this it is not safe to go. It is true that in a New York case[4] the liability was pushed still further; but wherever an intelligent third party comes in, and negligently passes the poison to another, this breaks, as will hereafter be shown, the causal connection, and makes such intervening negligence the juridical cause.[5]

Giving of loaded gun to another.

§ 92. The same distinction applies to the giving of a loaded gun to another. If the gun be given by B. with due warning to A., a person experienced in the use of fire-arms, who so negligently handles the gun that it explodes and injures C., then A., and not B., is liable. But if the loaded gun be given to an unconscious child, and the child, not knowing what the gun is, handles it so that it explodes, and injures a

[1] Agnew, C. J., Elkins *v.* McKean, 79 Penn. St. 493.

[2] Carter *v.* Towne, 103 Mass. 507. See Wellington *v.* Downer Oil Co. 104 Mass. 64.

[3] Norton *v.* Sewall, 106 Mass. 143; George *v.* Skivington, Law Rep. 5 Exch. 1. See R. *v.* Michael, 9 C. & P. 356; 2 M. C. C. 120.

[4] Thomas *v.* Winchester, 2 Selden, 397. See comments in Bigelow's Cases on Torts, 609.

[5] Infra, § 134.

third person, then the liability is not attached to the child, but is imputable to him who gives the child the gun.[1]

Injury encountered by the plaintiff when losing self-control through the defendant's negligence.

§ 93. Suppose the plaintiff, when on a coach, jumps off to avoid danger, acting unwisely in so doing, yet in confusion of mind produced by the defendant's reckless driving? Or suppose that the plaintiff, when legitimately on a railway track, loses his presence of mind through the unexpected and irregular course of a train which is negligently driven on the track; and suppose that when thus confused, he unwisely but intentionally runs into instead of out of danger? Is the plaintiff, in either of these cases, the juridical cause of an injury thus produced, or is the negligent driver the cause? Certainly the latter; for the plaintiff, on the assumption that he is at the time incapable of responsibly judging, is not a responsible, independent agent, capable of breaking the causal connection between the defendant's negligence and the injury. It was the defendant's negligence that put the plaintiff in a position in which he was forced to make so perilous a choice; and the defendant is liable for the consequences.[2]

Self-injury done in fright.

§ 94. Another case that falls under this head is that of injury a person may inflict on himself in fright. Suppose that by the negligence of A., B. is so frightened that he attempts to fly, and so doing injures himself; is A. liable? He certainly is, if B., in consequence of A.'s act, has lost his self-control so as to be irresponsible.[3] There can be no question that where one person pursues another with such violence that the latter, in seeking to escape, is drowned in a stream into which he is forced to precipitate himself, the former is guilty

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

[2] See infra, § 377; Coulter *v.* Am. Un. Exp. Co. 5 Lansing, 67; *S. C.* 56 N. Y. 585; Buel *v.* N. Y. Cent. R. R. 31 N. Y. 314; Frink *v.* Potter, 17 Ill. 406; Adams *v.* Lancas. R. R. 4 L. R. C. P. 739, 885; Sears *v.* Dennis, 105 Mass. 310; Stevens *v.* Boxford, 10 Allen, 25; Babson *v.* Rockport, 101 Mass. 93; Lund *v.* Tyngsboro, 11 Cush. 563; Indianapolis R. R. *v.* Carr, 35 Ind. 510; Greenleaf *v.* Ill. Cent. R. R. 29 Iowa, 47; Snow *v.* Housatonic Co. 8 Allen, 441; Reed *v.* Northfield, 13 Pick. 98, and cases cited infra, § 304.

[3] See R. *v.* Pitts, C. & M. 284; Frink *v.* Potter, 17 Ill. 406; Greenleaf *v.* Ill. Cent. R. R. 29 Iowa, 47; Snow *v.* Housatonic R. R. 8 Allen, 441; R. *v.* Williamson, 1 Cox C. C. 97; and cases cited infra, §§ 218, 219, 304. As to injuries in rescuing a horse, see infra, § 104.

of homicide;[1] and there is no reason why the same principle should not be applied to actions for negligence. Hence, where the defendant chased with an axe a boy who in his fright ran unconsciously against a cask of wine and broke it, the defendant was held liable for the injury thus incidentally produced.[2] So a person thrown from a bridge into a rapid river may be able to swim, and if in full possession of his faculties to save himself; but if in the confusion and terror of the moment he loses his self-command and is drowned, the person throwing him in the water is liable.[3] And if a person who has his clothes taken from him on a cold night is so numbed and enfeebled that he cannot seek refuge, and hence is frozen to death, the assailant is as liable for his death through freezing as he would be if the deceased had been tied to a stake in the open air in such a way that escape was impossible.[4]

Injury to others caused by persons acting instinctively.

§ 95. More difficult questions arise when an injury is produced by persons acting precipitately and under excitement, which precipitation and excitement were caused by the negligent act of the defendant. In the leading case on this subject,[5] the evidence was that the defendant, on the evening of the fair day at Melbourne Port, October 28, 1770, "threw a lighted squib made of gunpowder from the street into the market-house, which is a covered building supported by arches, and inclosed at one end, but open at the other and both the sides, where a large concourse of people were assembled; which lighted squib, so thrown by the defendant, fell upon the standing of one Yates, who sold gingerbread, &c. That one Willis, *instantly, and to prevent injury to himself and the said wares of the said Yates, took up the said lighted squib from off the said standing, and threw it across the said market-house, where it fell upon another standing there of one Ryal, who sold the same sort of wares, who instantly, and to save his own goods from being injured, took up the said lighted squib from off the said standing, and then threw it to another part of the said*

[1] Wh. C. L. § 941 *a*.

[2] Vandenburg *v.* Truax, 4 Denio, 467.

[3] L. 5. § 7. D. ad Leg. Aquil.

[4] L. 14. § 1. D. 19. 5.

[5] Scott *v.* Shepherd, 2 W. Black. 892; 1 Smith's Leading Cases, 549, 7th Am. ed. 755. See Comments in Bigelow's Cases on Torts, p. 608.

market-house, and in so throwing struck the plaintiff, then in the said market-house, in the face therewith, and the combustible matter then bursting, put out one of the plaintiff's eyes." That there was a causal connection between the defendant's act and the plaintiff's hurt was apparently conceded in the argument. The only question that arose was as to whether the proper remedy was trespass. The majority of the court held that trespass would lie. "It is like," said Nares, J., "the case of a mad ox turned loose in a crowd. The person who turns him loose is liable in trespass for whatever mischief he may do." Blackstone, J., argued that the damage was consequential, and therefore case was the remedy, if there was any. But he went beyond this. "The tortious act," he said, "was complete when the squib lay at rest upon Yates's stall. He, or any by-stander, had, I allow, a right to protect themselves by removing the squib, but *should have taken care to do it in such a manner as not to endanger others.* . . . . This differs from the cases of turning loose a wild beast or a madman. They are only instruments in the hand of the first agent. But it is said that the act is not complete, nor the squib at rest, till after it is spent or exploded. *It certainly has a power of doing fresh mischief, and so has a stone that has been thrown against my windows, and now lies still; yet if any person gives that stone a new motion, and does further mischief with it, trespass will not lie for that against the original thrower.* No doubt but Yates may maintain trespass against Shepherd, and according to the doctrine contended for, so may Ryal and Scott. Three actions for one single act; nay, it may be extended *ad infinitum.* If a man tosses a foot-ball into the street, and after being kicked about by one hundred people, it at last breaks a tradesman's window, shall he have trespass against the man that first produced it? Surely only against the man that gave it that mischievous direction. But if it is said Scott has no action against Shepherd, against whom must he seek his remedy? I give no opinion whether *case* would lie against Shepherd for the *consequential* damage; though, as at present advised, I think upon the circumstances it would. But I think in strictness of law trespass would lie against Ryal, the immediate actor in this unhappy business. Both he and Willis have exceeded the bounds of self-defence, and not used sufficient circumspection in

removing the danger from themselves. The throwing it across the market-house, instead of brushing it down, or throwing it out of the open sides into the street (if it was not meant to continue the sport, as it is called), was at least an unnecessary and incautious act." Gould, J., and De Grey, C. J., agreed with Nares, J. De Grey, C. J., said: "I agree with my brother Blackstone as to the principles he has laid down, but not in his application of those principles to the present case. The real question certainly does not turn upon the lawfulness or unlawfulness of the original act; for actions of trespass will lie for legal acts when they become trespasses by accident, as in the case cited for cutting thorns, lopping off a tree, shooting at a mark, defending one's self by a stick which strikes another behind, &c. They may also not lie for the consequence even of illegal acts, as that of casting a log into the highway, &c. *But the true question is, whether the injury is the direct and immediate act of the defendant, and I am of opinion that in this case it is.* The throwing the squib was an act unlawful, and tending to affright the by-stander. So far mischief was originally intended; not any particular mischief, but mischief indiscriminate and wanton. Whatever mischief therefore follows, he is the author of it. . . . . And though criminal cases are no rule for civil ones, yet in trespass I think there is an analogy. Every one who does an unlawful act is considered the doer of all that follows; if done with a deliberate intent, the consequence may amount to murder; if incautiously, to manslaughter. Fost. 261. So too in 1 Ventr. 295: a person breaking a horse in Lincoln's Inn Fields hurt a man; held that trespass lay; in 2 Lev. 172, that it need not be laid *scienter*. I look upon all that was done subsequently to the original throwing as a continuation of the first force and first act, which will continue till the squib was spent by bursting. And I think that any innocent person removing the danger from himself to another is justifiable. The blame lights upon the first thrower. The new direction and new force flow out of the first force, and are not a new trespass. The writ in the Register, 95 *a*, for trespass in maliciously cutting down a head of water, which thereupon flowed down to and overwhelmed another's pond, shows that the immediate act needs not be instantaneous, but that a chain of effects connected together will be sufficient. It has been

urged that the intervention of a free agent will make a difference; but I do not consider Willis and Ryal as free agents in the present case, but acting under a compulsive necessity for their own safety and self-preservation." It is clear, therefore, that the defendant was held liable on the ground that the intermediate parties by whom the squib was passed on acted "under a compulsive necessity," instinctively, the object being to rid themselves as quickly as possible of a dangerous missile which might the next moment explode.

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

§ 96. Hence, rejecting the conclusion reached in New York in the case just mentioned, we must accept that of the supreme court of Pennsylvania, in a suit[3] where the evidence was that the defendant mounted a pile of flag-stones in a street to make a public speech, and a crowd of hearers gathered about him, some of whom also got on the pile and broke it, and where it was ruled by the court that the speaker was not liable, as a matter of law, for the breaking of the pile by the by-standers.

[1] Guille *v.* Swan, 19 Johns. 381.

[2] See infra, § 308.

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

V. ORDINARY NATURAL SEQUENCE.

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

1. *Those sequences which are in conformity with well known material forces.* — Among those we may mention the following: The gate of a dam is negligently left open, and the water pours out during the night and floods a meadow. Here the flooding of the meadow is the result of the well known material law, that water will descend from a higher to a lower level. A person who meddles with water under these circumstances is presumed to know this law, and is responsible for mischief accruing through his negligence.[1] The switch of a railroad is negligently left open in front of an approaching train. That the train on reaching the switch should be deflected by this check from its course is also in obedience to a well known material law; and hence the negligent switch-tender, who ought to know this law, is liable for the consequence of his neglect.[2] A fire is kindled in a field in a strong wind. The field is covered with thick dry grass which extends to a neighboring cottage. The fire thus kindled, no effort being made to check it, runs along the grass until the cottage is fired. He who negligently makes or negligently tends this fire is liable for the burning of the cottage, because it is a material law, of which he ought to be cognizant, that fire when applied to inflammable matter will spread.[3]

Sequences of material forces.

§ 98. It is unnecessary at this point to treat concretely propositions which will be examined in detail when we come to discuss the principle that no one is to use a material agency in such a way as to inflict an injury on another.[4] One or two specific illustrations, however, may be here not inappropriately introduced. The first is an interesting English case,[5] where the evidence showed that in an exceptionally dry season the employees of a railway company, in cutting grass and trimming the hedges bordering the track, placed the trimmings in heaps near the line and allowed them to remain there fourteen days, forming a sort of

[1] See Collins *v.* Middle Level Commis. L. R. 4 C. P. 279. Infra, §§ 787, 794, 934.

[2] Infra, § 802.

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

[4] See supra, § 12; infra, § 851.

[5] Smith *v.* R. R. L. R. 5 C. P. 98.

tinder. Sparks from a passing engine set fire to one of these heaps, and the fire was thence carried by a high wind across a stubble-field and a public road, and burned the goods of the plaintiff in a cottage about two hundred yards from the railway. It was held by two judges out of three in the common pleas (Bovill and Keating, JJ., against Brett, J.), that there was evidence to go to a jury of actionable negligence on the part of the company, and this judgment was affirmed by the exchequer chamber. Cases of this kind will hereafter be discussed at large.[1] It is enough to say, that where a heap of inflammable material is left without guard in a position in which, in the ordinary course of nature, it will be visited by a high wind, the person guilty of this negligence is liable for the damage thereby immediately produced. This is affirmed in a well known opinion of a great Roman jurist, elsewhere cited.[2] And this conclusion, philosophical and just in itself, is sustained by a long train of decisions in English and American courts.

Cutting off water which would extinguish a fire.

§ 98 *a*. There is a natural tendency in fire to spread, and in water to put out fire; hence, he who intercepts a stream of water which is in the process of putting out a fire is liable for the spread of the fire.[3]

Collision injuring carriages.

§ 99. It is also an ordinary law of mechanics that carriages should gradually, and yet imperceptibly become weakened, and that this weakness should first disclose itself upon striking a defect on a highway. Hence the road-maker must be held to contemplate such latent defects, and hence a town cannot relieve itself from liability for damage to a carriage from striking a defect which was negligently permitted, by showing that the carriage was itself defective, provided the defect was not known to the plaintiff, or caused by his negligence.[4]

[1] Infra, §§ 868–878.

[2] See supra, § 12; infra, § 865.

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

[4] Palmer *v.* Andover, 2 Cush. 601; Rowell *v.* Lowell, 7 Gray, 102; Titus *v.* Northbridge, 97 Mass. 264–5; Fletcher *v.* Barnet, 43 Vt. 192; Hammond *v.* Mukwa, 40 Wis. 35. Infra, § 987.

§ 100. 2. We are bound to presume that animals will act in conformity with their natural and probable habits; and if I negligently do or omit something with regard to an animal under my control, which, supposing him to follow his natural and probable habits, leads him either to hurt himself or others, I am liable for the hurt.[1]

Natural and probable habits of animals.

Hence, in the ordinary case to be hereafter more fully considered, if I own a dog accustomed to worry sheep, and negligently let him loose in a place where he can reach sheep, I am liable for the injury done by him.[2]

Letting loose dogs addicted to worrying.

§ 101. So of cattle whose tendency is to stray. If I negligently let down a fence by which cattle are confined, so that they wander at large, I am liable for the damage sustained by them or the damage they perpetrate. Of this a pointed illustration is found in an English case decided in 1873.[3] The plaintiff owned two cows which were inclosed in his field adjoining the defendant's woodland. The two fields were separated by a fence which it was the defendant's duty to maintain. The defendant sold certain trees to a man named Higgins, who, in felling them, broke down the fence. The cows strayed through the aperture, and ate, on the defendant's ground, the foliage of a laurel tree which Higgins had cut down. It being the duty of the defendant to keep the fence in order, and it being the natural habit of cows to stray, he was held liable for any damage that accrued through their straying. The damage they sustained was a natural consequence of their straying; and the law, as will be seen, would have been the same if in straying they had collided with a railroad train. In other words, whoever causes cattle to stray is responsible for the natural and probable effects of their straying.[4]

Permitting cattle to stray.

[1] Infra, §§ 904–926. Thus A. is liable for frightening B.'s horse, and thereby injuring B. McDonald *v.* Snelling, 14 Allen, 290, and see infra, §§ 835–6, 983. As to *casus* in animals, see infra, § 921.

[2] Infra, § 908.

[3] Lawrence *v.* Jenkins, L. R. 8 Q. B. 274. See Spray *v.* Ammerman, 66 Ill. 309.

[4] In Lee *v.* Riley, 18 C. B. N. S. 722, the defendant's horse having strayed into a field belonging to the plaintiff, through the defect of a fence which the defendant was bound to repair, and having kicked the plaintiff's horse, the damage was considered as not too remote; and so in Powell *v.* Salisbury, 2 Y. & J. 391, where the plaintiff's horses were injured by the fall of the defendant's hay-stack. In Wisconsin it is ruled that in a suit for

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

Frightened horses striking defects on road.

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

damage to plaintiff caused by defendant striking the plaintiff's horses, and causing them to run, the jury was entitled to consider, as an ingredient of damages, the nervous injury done to the horses in causing them to run away, and thus inducing in them a vicious habit, though they were not physically injured. Oleson *v.* Brown, 41 Wis. 413.

[1] Gilman *v.* Europ. & N. A. R. R. 60 Me. 235. See Vicars *v.* Wilcocks, 8 East, 1. Infra, § 898.

In a case determined in England in 1876 (Sneesby *v.* Lancashire & Yorkshire Railway Co. L. R. 1 Q. B. D. 42; 33 Law Times Rep. N. S. 372), it appeared in evidence that in consequence of defendants' servants negligently sending trucks down an incline into a siding at 11 P. M., plaintiff's drove of cattle, which were lawfully being driven across the siding, were separated from the drovers, became frightened, and escaped beyond the control of the drovers. Six of them ran through a defective fence into an orchard, from which they got on to defendants' line, and were run over by a passing train and killed. The orchard was the property of defendants; but it was in the possession of a tenant, who was bound to repair the fences. It was held by the queen's bench division, and ultimately by the court of appeal, that the death of the cattle was the natural and probable result of defendants' negligence. See fully, infra, § 898.

[2] See infra, §§ 835, 983.

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

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

[1] See Davis *v.* Dudley, 4 Allen, 557; Murdock *v.* Warwick, 4 Gray, 178; Sneesby *v.* R. R. L. R. 1 Q. B. D. 42; Powell *v.* Salisbury, 2 Y. & J. 391; Lawrence *v.* Jenkins, L. R. 8 Q. B. 274. Infra, §§ 104, 921, 983.

[2] Woods *v.* Groton, 111 Mass. 357; Houfe *v.* Fulton, 29 Wis. 296; Stone *v.* Hubbardstown, 100 Mass. 50. Infra, § 983.

[3] Kelley *v.* Fond du Lac, 31 Wis. 180. See infra, where this case is further noticed. In Lower Macungie, *v.* Merkhoffer, 71 Penn. St. 276, the court said: "It was not a defence to the township to show that by careful driving accident might have been avoided at the place in question. That would fall far short of what is the purpose of a public highway. It must be kept in such repair that even skittish animals may be employed without risk of danger on it, by reason of the condition of the road. The law provides the means for repairing the roads, and if it be not done, and injury ensue, it would be wrong that individuals should suffer for the default of the public officers."

§ 104. On the other hand, when a horse becomes violently and extraordinarily unmanageable, so as to dash out of such beaten track on the edges of the road, this is one of those extraordinary incidents of travel not in the contemplation of the road-builder, and for the consequences of which the town is not responsible. The town is bound to keep a road fit to be travelled by horses according to the ordinary usage of travel, and wide enough for the ordinary shyings and frights of horses; but to require a road to be so built as to present no defects which would damage a runaway horse would throw on the town an intolerable burden, and revive the exploded[1] and absurd doctrine of *culpa levissima*.[2]

Where, however, the fright is caused by a startling object in the road, liability attaches to the town;[3] even though the collision be with something for which the town is not responsible, when the startling object is one the town could have removed, and is likely to frighten horses. The reason is, that the town is

[1] See supra, § 97.

[2] Infra, §§ 114, 984. See Marble *v.* Worcester, 4 Gray, 397; Davis *v.* Dudley, 4 Allen, 557; Titus *v.* Northbridge, 97 Mass. 258; Baldwin *v.* Turnpike Co. 40 Conn. 238; Kelley *v.* Fond du Lac, 31 Wis. 180; Fogg *v.* Nahant, 98 Mass. 578. See Hey *v.* Philadelphia, 81 Penn. St. 441. In this case the plaintiff was driving in East Fairmount Park, belonging to and under the control of the city of Philadelphia, upon a highway fifty feet wide, which, after crossing the tracks of the Reading Railroad at grade, curved around a high, rocky bank, and then, by a moderate declivity, approached and passed through one of the arches of a lofty railway bridge, over which frequent trains passed. The high bank continued along the left side of the road, and on the right a descending bank extended down to the river Schuylkill. There were no barriers between the highway and the river, except a raised footway at the roadside, six to ten inches high and six feet wide. The horse having become frightened by a locomotive whistle on the bridge, plaintiff jumped out and seized the horse by the head, but fell, whereupon the horse ran over the bank into the river and was drowned. It was held by the supreme court of Pennsylvania (Agnew, C. J., and Paxon, J., dissenting), that there was sufficient evidence that the negligence of the city, in having omitted to erect proper barriers at this spot, was the proximate cause of the accident, to sustain a verdict in the plaintiff's favor. This ruling can be sustained on the ground that in view of the liability of horses to take fright at the locomotives passing in close proximity, so dangerous a precipice as that on the right should have been fenced off. See infra, § 976. And see, to same effect, cases cited infra, § 984. The Massachusetts rule relieves the town from liability where the horse escapes from the master's control before the collision.

[3] Ibid. See fully, infra, §§ 107, 983.

liable if it permit to remain on a public road objects at which roadworthy horses are apt to take fright.[1]

Injury of driver while rescuing horse.

§ 105. Suppose a driver, in his efforts to rescue a horse who is hurt by a defect in the road, is himself injured, can he recover from the town? If the driver, after the horse has received his hurt, interposes, and takes deliberately the risk of injury, then, supposing the master's injury to be an independent transaction from the injury to the horse, the town is not liable.[2] It is otherwise when the master instinctively, while the horse is in peril, rushes in to extricate him, and is consequently hurt.[3]

Horse switching his tail over the reins.

§ 106. It has been held in Massachusetts that the liability of a town for injuries resulting from a defect in a highway is diverted by the fact that the defect could have been avoided had it not been that the plaintiff's horse, by throwing his tail over the reins, freed himself from his driver's control, and thus precipitated the carriage against the defect.[4] But is the switching by a horse of his tail over the reins one of those extremely unlikely and abnormal acts which are called the acts of God, and which ordinary sagacity cannot foresee? The bites of flies, at certain periods of the year, are apt to produce this switching, even with the quietest horses; yet we can hardly view such bites as such unique casualties as to be outside of the ordinary incidents of travel. If within the ordinary range of travel, then they are contingencies for which the road-maker should provide.

Horse becoming lame.

A person, also, is not chargeable with contributory negligence from his horse becoming lame, when this is an ordinary incident of travel.[5]

Unfitness of horses or wagons,[6] and *rashness of driver* induced by fright,[7] are considered in separate sections; and so as to the

[1] Infra, § 983. But such liability is not conceded in Massachusetts. Ibid. For suits for damages arising from negligent driving, see infra, § 820.

[2] Hyde *v.* Jamaica, 27 Vt. 443.

[3] Infra, § 931; Page *v.* Bucksport, 64 Me. 51; Stickney *v.* Maidstone, 30 Vt. 738; Jaquish *v.* Ithaca, 36 Wis. 108. See, also, Ins. Co. *v.* Seaver, 19 Wall. 531; Lund *v.* Tyngsboro, 11 Cush. 563.

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

[5] Morrison *v.* Davis, 20 Penn. St. 171. See infra, §§ 558, 634.

[6] Supra, § 99; infra, §§ 985, 987.

[7] Infra, § 966.

question whether it is contributory negligence to leave a horse hitched so that he gets loose.[1] It will be also seen that roads are to be made fit for the infirm as well as for the strong,[2] and that it is not contributory negligence to prefer a straight to a circuitous road, though the former was more safe.[3]

Frightening horses on public road.

§ 107. Certainly it will not be maintained that it is an unusual and unnatural thing for horses, when travelling on a road, to be frightened by extraordinary noises or sights. He, therefore, who, on a road travelled by horses, makes such noises or exhibits such spectacles, is liable for any damage caused by a horse taking fright.[4] This rule has been applied 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.[5]

On the same reasoning it has been held in Maine that there was a case sufficient to go to a jury where it appeared that the defendants negligently piled their boards in the travelled part of a public highway; that a wagon loaded with barrels was driven over these boards, causing a rattling noise, which frightened the plaintiff's well broken and carefully driven horse; and that the horse being frightened by the noise, suddenly started and threw the plaintiff, while carefully driving, out of his wagon, whereby he was injured.[6]

On the same principle rest the rulings elsewhere noticed that a town is liable for defects which cause horses to take fright;[7] and the decisions hereafter to be considered imputing negligence to the wanton use of steam-whistles,[8] and to the display of flags or banners likely to frighten horses.[9]

Natural and probable habits of men acting in masses.

§ 108. 3. It is not natural or usual that at a particular moment in each day, and by a particular individual, a letter without address should be dropped in a post-office; but it is natural and usual that in a particular month, at a particular office, a number of unaddressed letters should

[1] Infra, § 993.

[2] Infra, § 996.

[3] Infra, § 997.

[4] See, fully, infra, §§ 835, 983; and for illustrations, see infra, § 983.

[5] Hill *v.* New River Co. Q. B. 18 L. T. N. S. 355. See Judd *v.* Fargo, 107 Mass. 264.

[6] Lake *v.* Milliken, 62 Me. 240.

[7] Supra, § 103. See infra, § 983.

[8] Infra, § 836.

[9] Infra, §§ 836–7.

be posted bearing a proportion generally constant to the whole amount of posted letters. It is not natural or usual that at a particular moment a particular person should pass at a particular point in a thoroughfare in which there is danger; but it is natural and usual that in the course of a week one or more persons should pass the particular point and be exposed to the particular danger. Men, moving in masses, act in obedience to general laws which can be predicted as to the mass, though not as to an individual member of the mass; and hence, wherever we may be able to say that men in masses will probably move in conformity with such laws, then, when as masses they so move, they do not interrupt causal connection.[1] If I negligently weaken, for instance, the foundations of a bridge over which a large population daily throngs, I cannot defend myself from an action for damages produced by my negligence on the ground that each particular individual should examine the bridge before stepping on it. If by a false alarm I cause the passengers of a crowded boat to rush over in a flock on one side, I cannot, if the boat is thus upset, excuse myself on the plea that the general alarm was foolish, and that each one should have inquired for himself.[2] Or, to present the question in another aspect, when we inquire, in respect to negligence, what is that "regularity" and "naturalness" which are necessary incidents, as has been shown, of causal connection, we must apply the test, not to the particular individual who may ultimately be injured, nor to the particular point of time in which the injury to him takes place, but to the adjacent population in the aggregate, and to the whole period of time over which the negligence immediately operates. If it is one of the incidents of society that a throng of people should pass a particular point, then I am liable if one person of this throng is injured by my placing an obstruction or dangerous instrument at this point.[3]

Dropping things on thoroughfare.

§ 109. A man, for instance, to repeat a well known illustration from the Roman law, cuts off the bough of a tree that overhangs a public road in a populous neighborhood. Now, it is a law of society that in such a road there will be constant passing and repassing in proportion to the pop-

[1] See infra, § 145.

[2] As to cases where a crowd is collected, and injuries ensue, see supra, §§ 95–6.

[3] See infra, §§ 145, 860; Weick *v.* Lander, 75 Ill. 93.

ulation; and he, therefore, who casts anything down on such road does so at his own risk; for he is either negligent in being ignorant of this law, or, when cognizant of it, he is negligent in letting the thing fall without giving notice. On the other hand, if the tree be in the centre of a large inclosed field, he has a right to assume, in accordance with an equally well known social law, that there will be no passing of travellers under the tree, even though he should be so covered up by the leaves that he cannot see what is going on underneath; and hence he will not be liable for damages sustained by the falling of a bough on a person of whose presence he is not conscious, but who is lounging under the tree.

The general rule is thus stated: —

"Si putator ex arbore ramum cum dejiceret, vel machinarius hominem praetereuntem occidet, ita tenetur, si is in publicum decidat, nec ille proclamaverit, ut casus ejus evitari possit."[1]

Yet even here, if, in the most sequestered spot, there is a likelihood of some person being underneath the tree, who may be injured, he who is in the tree must take heed, and is liable if he acts in face of such probability.[2]

"Sed Mucius etiam dixit, si in privato idem accidisset, posse de culpa agi: *culpam autem esse, cum quod a diligente provideri poterit non esse* provisum, aut tum denunciatum esset, cum periculum evitari non posset. Secundum quam rationem non multum refert, per publicum an per privatum iter fieret, cum plerumque per privata loca vulgo iter fiat. Quod si nullum iter erit, dolum duntaxet praestare debet, ne immittat in eum, quem viderit transeuntem, nam culpa ab eo exigenda non est, cum divinare non potuerit, an per eum locum aliquis transiturus sit."[3]

The same distinctions apply, as we have seen, to the duty of a land-owner as to those whom he may expect, and those whom he may not expect, to visit his premises.[4]

§ 110. A similar test may be applied to exercise in shooting.[5] If this be done by soldiers in a camp, where such shooting is customary, then there is no liability if a person passing in the neighborhood is non-negligently hit.

Liability for careless shooting.

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

[2] See infra, §§ 112, 315, 344, 860.

[3] L. 31. D. Leg. Aq.

[4] See infra, § 347.

[5] See People *v.* Fuller, 2 Parker C.

And in an Arkansas case,[1] it was held that one who is hunting in a wilderness is not bound to anticipate the presence, within range of his shot, of another man, and that he is not liable for an injury caused unintentionally by him to a person of whose presence he is thus not to be expected to be aware.[2] But a person who shoots at a thoroughfare, without notice to travellers, he not being required by official duty to shoot, is liable for the consequences arising if a person passing on the thoroughfare is hit. "Si quis, dum jaculis ludit vel exercitatur, transeuntem servum tuum trajecerit, distinguitur. Nam si id a milite in campo, eoque ubi solitum est exercitari, admissum est, nulla culpa ejus intelligitur; si alius tale quid admisit, culpae reus est. Idem juris est de milite, si in alio loco, quam qui exercitandis militibus destinatus est, id admisit." [3]

§ 111. So with regard to games. In games which are public exercises of strength, bodily hurt may be inflicted; but such hurt does not bring liability if the party inflicting it act in good faith according to the rules of the game. Thus it was *casus* when in the old Roman game of ball a person was struck by the glancing of a ball thrown according to the ordinary usage of the game. Yet it was otherwise when the rules of the game were negligently transcended, so that injury was inflicted on those who were governing themselves by such rules.[4] So injuries *bonâ fide* inflicted in a public wrestling match were not the subject of suit, on the principle that no liability attaches to the regular and natural consequences of that which the law allows.[5] But if a new and dangerous game, whose character is unknown to third parties, is introduced, and as a consequence of this game injury is inflicted, the introducer of the game is liable for such injury, unless an independent disturbing will is interposed: "*Lusus quoque noxius in culpa est.*" It is a natural social consequence of such a game (*e. g.* a game involving the dangerous use of fire on a thoroughfare) that a crowd

Liability for dangerous games.

R. 16; Sparks *v.* Com. 3 Bush, 111; State *v.* Vance, 17 Iowa, 138; Burton's case, 1 Stra. 481. Supra, § 109.

[1] Bizzell *v.* Booker, 16 Ark. 308.

[2] See, also, Driscoll *v.* The Newark & Rosendale Co. 37 N. Y. 637; Wright *v.* Compton, 53 Ind. 342.

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

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

[5] L. 10; L. 7. § 4. D. eod.

should collect, and that in this crowd some one should be hurt. Hence for this consequence the introducer of the game is liable.

Dangerous instruments on thoroughfares.

§ 112. So with regard to leaving a dangerous instrument on a thoroughfare.[1] It is negligence to leave such an instrument on a place of public access, where persons are expected to be constantly passing and repassing, and where such persons are not required to be on their guard, or where children are accustomed to play;[2] but it is not negligence to leave such an instrument in a private inclosure, which, from its very privacy, excludes the public, and puts on their guard all who enter. In other words, to sum up the principle which these cases illustrate: If it appears that viewing men in the aggregate, according to the laws which control them when so massed, it is regular and natural that within a certain time certain injuries will flow from a particular negligence, then such injuries are imputable to such negligence.[3]

Leaving horses unattended.

§ 113. To horses left unattended the same distinction applies. A horse may be so left in an inclosed field without liability, for it is not usual or natural for a throng of persons to pass through such a field. It is otherwise, however, in a public thoroughfare through which persons of all ages and capacities are constantly jostling, without opportunity of always seeing their way before them, or of being careful as to what they touch.[4] Hence causal connection between negligence and damage is held to continue where a horse, being left without control on the public streets, is led by one child over another child who is hurt thereby;[5] and where a horse so left by himself is frightened by a passenger casually hustling it on the streets, and then inflicts injury on persons or property.[6] With

[1] See infra, §§ 315–16, 344, 851, 860, 861.

[2] See R. R. *v.* Stout, 17 Wall. 657.

[3] See Wharton on Evidence, § 1296, where it is said that "taking men in bodies, and contemplating their action as a mass, there are certain incidents which may be regarded as probable, and which, under certain conditions, are presumable." See this topic discussed in Whart. on Homicide, § 358 *et seq.*, and comments by Sir J. F. Stephen, in Digest of Crim. Law, ch. xxii. Sir Wm. Hamilton, in his Lectures on Metaphysics (Am. ed. p. 548), touches on the same line.

[4] See Dolfinger *v.* Fishback, 12 Bush, 475.

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

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

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

Extraordinary interruptions of natural laws.

§ 114. While it is conceded that no man is liable for injuries attributable exclusively to *casus* or the act of God, assuming these terms to be convertible, many conflicting definitions both of *casus* and the act of God have been proposed by the courts. Reserving the discussion of these definitions for a future chapter,[2] we must content ourselves at present with considering some of the cases in which the question of *casus* has been determined.

Casus has been held to exist where an accident arises or collision occurs (due diligence being shown) from foggy weather, or the removal of accustomed landmarks;[3] where a rat makes a hole in a box where water is collected in an upper room, so that the water trickles out, and flows upon goods in a lower room;[4] where plugs being properly made and of proper material a severe and unprecedented frost occurs, and the plugs are by the frost prevented from acting, and the pipes accordingly burst and flood a cellar;[5] where unprecedented snow storms choke a railway track;[6] where a fall of snow prevents a traveller from discovering a defect in a road;[7] where rails (due care in construction being shown) break through severe cold;[8] where a horse takes fright without any default in the driver, or any defect in the harness, or there being any known viciousness in the animal;[9] where a horse not known to be vicious by the defendant, who is riding on the horse, becomes restive and ungovernable, and runs

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

[2] Infra, § 553.

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

[4] Carstairs *v.* Taylor, L. R. 6 Exch. 217. See infra, § 787.

[5] Blyth *v.* The Birmingham Water Co. 11 Exch. 781.

[6] Pruitt *v.* R. R. 62 Mo. 527. See Vail *v.* R. R. 63 Mo. 230. Infra, § 588.

[7] Street *v.* Holyoke, 105 Mass. 82; Day *v.* Milford, 5 Allen, 98.

[8] Infra, § 630; Heazle *v.* R. R. 76 Ill. 501.

[9] Aston *v.* Heaven, 2 Esp. 533; Wakeman *v.* Robinson, 1 Bing. 213; 8 Moore, 63; and see supra, § 103; Brown *v.* Collins, 53 N. H. 442. See Jackson *v.* Belleview, 30 Wis. 250.

upon the foot pavement and there injures a passenger.[1] The same rule is applied where a mill-dam built on a proper model, and with the care good engineers in such matters are accustomed to use, is swept down by a freshet of unprecedented fierceness and volume.[2] So an unusual water-flood or storm, of a character not to be foreseen, which persons of ordinary business capacity would not anticipate, and which prevents the discharge of his duty, will be a defence for a carrier, if there be no want of diligence on his part;[3] but not so with the falling of the tide, causing a vessel to strand, for this could have been foreseen and provided against.[4]

§ 115. In a case put in the Digest, and accepted as authoritative by recent commentators, the builder of a house, in excavating the cellar, piled up a heap of earth against an adjacent house. A rain storm of extraordinary continuance, *assiduis pluviis*, set in, which so saturated the heap that it communicated such dampness to the adjoining wall that the latter fell in. Labeo decided that, on the ground of the extraordinary character of the rain, to which, and not to the heaping of the earth (which was a usual incident of building), the damage was attributable, no liability attached to the builder: *Quia non ipsa congestio, sed humor ex ea congestione postea damno fuerit.* The extraordinary and unprecedented character of the rain is spoken of as something *extrinsecus*, breaking the causal connection. . . . . And of this decision Javolenus approved.[5] That this is based on the *casus* of the rain coming with such unusual quantity and persistence is shown by another passage, in which it is declared that when, *through defective water-pipes laid down by another*, water reaches and saps my wall, such other person is liable for the damage done. "Si fistulae, per quas aquam ducas, aedibus meis applicatae damnum mihi dent, in factum actio mihi competit."[6] In the first

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

[2] Livingston *v.* Adams, 8 Cow. 175; Nichols *v.* Marshland, L. R. 2 Exch. D. (C. A.) 1, cited and discussed infra, § 148.

[3] Gray *v.* Harris, 107 Mass. 492; Topsham *v.* Lisbon, 65 Me. 449. See Knoll *v.* Light, 76 Penn. St. 268; Wallace *v.* Clayton, 42 Geo. 443; Angell on Carriers, 153. Infra, § 556.

[4] Bohannan *v.* Hammond, 42 Cal. 227.

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

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

case there was no liability, because the damage was done by an extraordinary condition extrinsic to the defendant's action; in the second case there was liability, because the bursting of the pipe was a natural consequence of its defectiveness.

§ 116. Responsibility (*imputatio*) ceases where *casus*, or, as we term it, the act of God,[1] intervenes. If there is nothing to be imputed to the defendant, there is nothing with which he is chargeable. "Ac ne is quidem hac lege tenetur, qui casu occidit (the action being, in this case, for damages under the Aquilian law), si modo culpa ejus nulla inveniatur."[2] "In hac actione, quae ex hoc capitulo oritur, dolus et culpa punitur. Ideoque si quis in stipulam suam, vel spinam, comburendae ejus causa, ignem immiserit, et ulterius evagatus et progressus ignis alienam segetem vel vineam laeserit, *requiramus num imperitia ejus aut negligentia id accidit.* Nam si die ventoso id fecit, culpae reus est; nam et qui occasionem praestat, damnum fecisse videtur. In eodem crimine est, et qui non observavit, ne ignis longius est procederit. *At si omnia quae oportuit observavit, vel subita vis venti longius ignem produxit, caret culpa.*"[3] Here, where the amount of care is not graduated by a special obligation, the term *quae oportuit* indicates that *casus* excuses only when every reasonable precaution has been taken. In the same connection we may notice an English case, where a servant (in breach of a police act) washed a van in a public street, and allowed the waste water to run down the gutter towards a grating leading to the sewer, about twenty-five yards off. It so happened that in consequence of the extreme severity of the weather, the grating was obstructed by ice, and the water flowed over a portion of the causeway, which was ill paved and uneven, and there froze. No proof was adduced to show that the master knew of the grating being obstructed. A horse while being led past the spot slipped upon the ice and broke its leg. It was ruled that the hurt was to be imputed to *casus*, as the consequence was too remote to be attributed to the wrongful act of the servant.[4]

Relations of responsibility to *casus*.

[1] For definitions see infra, §§ 553–556.

[2] § 3. L. de Leg. Aq.

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

[4] Sharp *v.* Powell, L. R. 7 C. P. 253; 20 W. R. 584; 26 L. T. N. S. 436.

Casus has been held, in an interesting case in Pennsylvania, to divest responsibility under the following circumstances: P. was the owner of land above a dam belonging to D. When constructed the dam did not back the water on P.'s land. Subsequently a peculiar grass commenced growing in the dam about February of each year, which obstructed the water, and in consequence it flowed back on P.'s land. In June the grass broke off and ceased to impede the current. In a suit for damages brought by P. against D. the court below charged that if accumulations of dirt or rubbish in the dam caused the growth of the grass, the defendants would be as liable as if the obstruction had been caused by dirt or rubbish alone; but if the grass would have grown to the same extent and caused the same injury in the channel if there had been no dam or accumulation of dirt, he would not be liable. This ruling was ruled by the supreme court to be correct. If the growth of the grass, so it was argued, was not occasioned by any act or negligence of the defendant, and was the result of natural causes over which he had no control, he would not be liable for injury therefrom to the plaintiff, although the obstruction was on the defendant's own land.[1]

§ 117. Where, however, according to the Roman law, does *imputatio* cease and *casus* begin? On this point we may again, even though at the risk of repetition, recur to a leading passage of the Digest already cited: "Si putator ex arbore ramum cum dejicerit, vel machinarius hominem praetereuntem occidit, ita tenetur, si is in publicum decidat, nec ille proclamaverit, ut casus ejus evitari possit. Sed Mucius etiam dixit, si in privato idem accidisset, posse de culpa agi; *culpam autem esse, cum quod a diligente provideri poterit, non esset provisum*, aut tum denunciatem esset, cum periculum evitari non posset. Secundum quam rationem non multum refert, per publicum an per privatum, iter fieret, cum plerumque per privata loca vulgo iter fiat. Quod si nullum iter erit, dolum duntaxit praestare debet, ne immittat in eum, quem viderit transeuntem, nam culpa ab eo exigenda non est, cum divinare non potuerit, an per eum locum aliquis transiturus sit." [2]

[1] Knoll *v.* Light, 76 Penn. St. 268.

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

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

1. By the application of rare talents.

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

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

§ 119. Another case, in the Digest, which has been regarded as leading, is the following: —

"Cum pila complures luderent, quidam ex his servulum, cum pilam praecipere conaretur, impulit, servus cecidit, et crus fregit. Quaerebatur, an dominus servuli Lege Aquilia cum eo, cujus impulsu ceciderat, agere posset. Respondi, non posse, *cum casu magis quam culpa videretur factum.*"[1] No doubt misfortunes such as those mentioned in the last extract could have been avoided by the exercise of the highest possible degree of care. But who can always remain in such a condition of mental tension as to insure such avoidance? Who, particularly, can maintain this tension while playing a game? Or how can we require from all men the quickness and keenness in the observing and avoiding of risks which are given to but few? Hence when the danger could only have been avoided by extraordinary and preternatural vigilance and acuteness, such as men under the cir-

[1] L. 52. § 4. D. ad Leg. Aquil.; Alfenus, Lib. 2. Digest; and see cases cited supra, §§ 114–16.

cumstances in question are not accustomed to apply, the result is attributed to *casus*.[1]

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

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

Act of public enemy. *Vis major.*

§ 121. It is also a defence, in cases of bailment, that the goods were forcibly taken or destroyed by a public enemy. But this defence will not avail, if the defendant did not employ due diligence to escape or repel the attack.[5]

Casus and *vis major* no defence to an action to return specific things or their equivalents.

§ 122. *Casus* and *vis major* are necessarily no defence to an action on an obligation to return things or their equivalents; for the destruction of the particular thing is no reason why its equivalent should not be presented. *Genus perire non censetur.* Hence no casualty can be set up to bar an obligation to pay a particular sum of money.[6] Yet at the same time, on an alternative obligation, it is admissible to defend by showing that

[1] See infra, § 123.

[2] § 8. 1. D. Leg. Aq.

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

[4] See supra, § 32, 46.

[5] Holladay *v.* Kennard, 12 Wall. U. S. 254; Watkins *v.* Roberts, 28 Ind. 167, and other cases cited infra, § 561.

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

all the articles alternatively specified in the obligation are casually destroyed.[1]

§ 123. *Casus* and *vis major* are no defence when they were induced by negligence or other fault. The Roman law is clear to this point.[2] Thus, if a ship collides with another in port through the violence of the storm, no negligence being imputable, this is *casus;* but if a rope by which she is attached to a quay is negligently cut, so that she is driven from her moorings, and thus exposed, then the storm is no defence in a suit against those by whose negligence she is thus cast adrift.[3] The same point has been repeatedly approved in our own courts.[4] Thus where a ship, becoming unmanageable through the negligence of the captain and crew at a point about three quarters of a mile from a lee shore, drifted ashore, and damaged the plaintiffs' sea-wall, the negligence was held the cause of the *casus*, and therefore the owners of the ship were held liable.[5]

Provoked *casus* no defence.

But where the injury is immediately imputable to *casus*, it is no reply that the defendant was guilty of negligence prior to the *casus*, unless the negligence was a cause (and not merely a condition) of the *casus*. If this were not so, *casus* could rarely, if ever, be a defence, as there are few, if any, cases of *casus* which, if the party had been perfectly prudent and prescient, he might not have avoided.[6] In New York and Missouri, however, the courts have gone a great way in holding that wherever negligence "contributes" to *casus*, then *casus* is no defence.[7]

§ 124. In a case cited to this point by Mr. Broom, in his Legal Maxims,[8] a policy of insurance on bags of coffee, on a voyage from Rio to New Orleans and thence to New York, con-

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

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

[3] L. 29. § 2. D. ad Leg. Aq.

[4] See Seigel *v.* Eisen, 41 Cal. 109; Caffrey *v.* Darby, 6 Vesey, 496; Davis *v.* Garrett, 6 Bing. 716; Parker *v.* James, 4 Camp. 112; Max *v.* Roberts, 12 East, 89; Wren *v.* Kirton, 11 Ves. 378. Infra, § 559.

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

[6] Railroad Co. *v.* Reeves, 10 Wall. 176; Denny *v.* R. R. 13 Gray, 481; Morrison *v.* Darn, 20 Penn. St. 171, and cases cited supra, § 116.

[7] Michaels *v.* R. R. 30 N. Y. 564; Bostwick *v.* R. R. 45 N. Y. 712; Read *v.* R. R. 60 Mo. 199; Pruitt *v.* R. R. 62 Mo. 528–42.

[8] 5th ed. p. 219.

tained the following exception: "Warranted free from capture, seizure, and detention, and all the consequences thereof, or of any attempt thereat, and *free from all consequences of hostilities*," &c. The insured ship, while on her voyage ran ashore, and was eventually lost south of Cape Hatteras. It appeared in evidence that at Cape Hatteras, until the secession of the Southern States of America, a light had always been maintained, and that the light had for hostile purposes been extinguished by the Confederates whilst in possession of the adjacent country. If the light had been maintained the ship might have been saved. Whilst she was ashore near the land a portion of the coffee was saved by certain officers acting on behalf of the federal government, and a further portion thereof might in like manner have been got ashore but for the interference of the Confederate troops, in consequence of which the entire residue of the cargo was wholly lost. The question upon the above facts arose, Had the goods insured, or any, and if so, what portion of them, been lost by the perils of the sea, or by perils from which they were by the policy warranted free? The court unanimously held that the insurers were liable as for a partial loss in respect of the coffee which remained on board incapable of being saved, — the proximate cause of the loss being a peril of the sea; but that as to so much of the coffee as was got ashore, and as to so much as would have been saved but for the interference of the troops, this was a loss by a consequence of hostilities within the warranty, so that in respect of it the insurers were not liable.[1]

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

In an insurance case before the New York Commissioners of Appeal, in 1875, Allison *v.* Corn Ex. Ins. Co., the perils insured against were of the "inland lakes, rivers, canals, and fires." Among the exceptions was damage from ice. The canal boat, which was the vessel insured, the insurance being for one year, was moored at the close of navigation in the canal basin at Oswego, and frozen in. When the ice broke up in the river in the spring it jammed and formed a partial dam, which set back the water so that it flowed over a sea-wall separating the river from the basin; and in consequence the stern of the plaintiff's boat was loosened while the bow remained fast in the ice, and the boat was twisted and injured. *Held*, that the exemption from liability for injuries occasioned by ice was not limited to the season of navigation; and (Earl

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

Casus no defence when it could be averted by prudence.

Wherever, in other words, a party undertakes to do a thing, he is obliged to provide in advance against casualties which may be reasonably expected to interfere with the performance of his engagement.[3] Thus a party contracting to make an excavation in a public street or highway, and refill the same, is bound to know the natural qualities of earth thus thrown out and replaced (*i. e.* that it will shrink and settle when soaked with water), to anticipate the result upon it of a rainfall, and to see that during and after a rain it is in a proper and safe condition, or to take such measures as will protect the public passing by from damage.[4]

§ 126. An interesting discussion of the question just mooted is to be found in a case in which the city of Philadelphia, holding under statute the control of the water power of the river Schuylkill, drew off, in a time of peculiar drought, so much water to

and Johnson, C. C., dissenting) that the ice was the proximate cause of the injury; and that defendant was not liable.

[1] Austin *v.* N. Y. Steam Co. 43 N. Y. 75; Armentrout *v.* R. R. 1 Mo. App. 158. Infra, § 559. See, however, Hoadley *v.* Traos. Co. 115 Mass. 304, commented on, infra, § 598.

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

[3] See infra, § 559.

[4] Johnson *v.* Friel, 50 N. Y. 679. For cases in reference to common carriage, see infra, § 559.

supply the city, that the navigation of the river above the dam was impaired. Was the drought a defence by which the city could justify its act? No doubt if the health of the city would have been imperilled by intermitting the supply, the city authorities would have been bound to continue the supply, even though navigation of the river should suffer. But if it appeared that the water given to the city was wastefully supplied, then the defence of necessity would *pro tanto* fail; in other words, the drought would not be a defence if its consequences could have been avoided by due diligence on the part of the city authorities. And so was it held by the supreme court.[1]

Necessary sacrifice of property, in order to avoid superior calamity.

§ 127. *Casus* may also include acts of voluntary destruction necessary to avoid a more sweeping and irremediable injury, as where a cargo is sacrificed in order to avoid a shipwreck, or a house is blown up in order to stop a conflagration.[2] But, as will presently be seen, actual necessity must be shown in order to justify such a sacrifice.

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

[2] Russell *v.* Mayor, &c. 2 Denio, 461. As to when necessity will justify sacrifice or invasion of property, see British Plate Man. *v.* Meredith, 4 Term R. 796, where Buller, J., said: "There are many cases in which individuals sustain an injury for which the law gives no action; for instance, pulling down houses or raising bulwarks for the preservation and defence of the kingdom against the king's enemies. The civil law writers indeed say that the individuals who suffer have a right to resort to the public for satisfaction; but no one ever thought that the common law gave an action against the individual who pulled down the house, &c. This is one of those cases to which the maxim applies, *Salus populi suprema lex.*" In The Mayor, &c. *v.* Lord, 18 Wend. 129, it is said by Chancellor Walworth, that "the rule appears to be well settled that in a case of actual necessity, — to prevent the spreading of a fire, the ravages of a pestilence, the advance of a hostile army, or any other public calamity, — the private property of an individual may be lawfully taken or destroyed for the relief, protection, or safety of the many, without subjecting those whose duty it is to protect the public interests, by whom or under whose direction such private property was taken or destroyed, to personal liability for the damage which the owner has thereby sustained." See, also, to the same general effect, Russell *v.* Mayor, &c. 2 Denio, 461; Hale *v.* Lawrence, 1 Zab. 714; American Print Works *v.* Lawrence, 1 Zab. 248; Surocco *v.* Geary, 3 Cal. 69; Meeker *v.* Van Rensselaer, 15 Wend. 397; McDonald *v.* Red Wing, 13 Minn. 38. The supreme judicial court of Massachusetts had also said, in Taylor *v.* Inhabitants of Plymouth, 8 Metc. 465, that "independently of the statute, the pulling down of a building in a city or com-

In this line, also, may be cited a case in which, in order to forward without delay goods to sufferers by the great fire of 1871 in Chicago, a railroad company was obliged to postpone forwarding other goods: and in which case it was held that such delay was not negligence.[1]

§ 128. The *onus* of establishing *casus* or *vis major* is on the defendant, when he seeks to avoid a *primâ facie* liability by setting up such defence.[2] The hypothesis of *casus*, it should be added, may be met by proving a system of similar occurrences, benefiting the opposing party, with which *casus* is inconsistent.[3]

Casus or *vis major*, burden of proof in.

§ 129. On the other hand, if the injury is shown to have resulted from a condition which is extraordinary and not to be expected, it is not enough simply to prove an injury to the plaintiff. Something that the defendants did, or that they omitted to do, must be proved to have been the cause of the injury.[4]

VI. INDISCRETION OR CONCURRENCE OF PARTY INJURED.

§ 130. "Contributory Negligence," as it is called in our own law, is discussed at such length in a future chapter,[5] that it is not necessary at present to do more than to state in what it consists, and on what it rests. A person who, by his own negligence, such is the general rule, causes damage to himself, cannot

pact town, in time of fire, is justified upon the great doctrine of public safety, when it is necessary." Compare opinion in Metallic Comp. Cast. Co. *v.* Fitchburg R. R. 109 Mass. 277; Chapman, C. J. And see Cent. Law J. Ap. 30, 1874, p. 212.

[1] Michigan Cent. R. R. *v.* Burrows, 33 Mich. 6.

[2] Byrne *v.* Boadle, 2 H. & C. 722; Vaughan *v.* Taff Vale R. C. 5 H. & N. 679; Skinner *v.* London, Brighton & S. C. R. C. 5 Exch. 787–9; Freemantle *v.* London & N. W. R. C. 10 C. B. N. S. 89; Great West. R. C. of Canada *v.* Braid, 1 Moo. P. C. N. S. 101. See Whart. on Ev. §§ 363, 1293.

[3] Whart. on Ev. § 38.

[4] Cotton *v.* Wood, 8 C. B. N. S. 569; Toomey *v.* Brighton Ry. Co. 3 C. B. N. S. 146; Hammack *v.* White, 11 C. B. N. S. 588; Welfare *v.* Brighton R. R. L. R. 4 Q. B. 693. In Livezey *v.* Philadelphia, 64 Pa. St. 106, the evidence was, that, in an extraordinary flood, a bridge was carried away and thrown upon land of a lower owner, and damaged it. It was held, that without more, a presumption that it was negligently constructed did not arise. It was further ruled, that when a bridge was washed by a flood on a non-navigable river, upon the land of a lower owner, that it was not the duty of the owner of *the bridge* to remove it.

[5] Infra, § 300.

recover compensation from another person, on the ground that if it had not been for the negligence of the latter the damage would not have occurred. But, to defeat such recovery, the negligence of the party injured must have been in itself of such a character as to have drawn on him the hurt, and he must have been an independent moral agent, he not acting compulsorily or without opportunity of reflection.

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

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

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

§ 131. But it must be remembered that the defence of contributory negligence is ineffective when the defendant was either primarily *in dolo*, or guilty of gross *culpa* which may be assimilated to *dolus*. Unintended injuries, as we have already seen, can only be imputed when they are the natural and ordinary consequences of negligence; nor does it vary the case if we accept, as is sometimes done, instead of the latter qualification, the proviso, that such consequences could have been reasonably foreseen. It is not a regular sequence of my negligence that another person, acting according to his own lights, should be independently negligent; nor is such independent negligence something which I could reasonably foresee. Hence it is that if a person, by a negligent act which is not within the range of ordinary calculation, meddles with dangerous agencies I may have put in operation, I am not liable for the injury he thereby sustains. But if I could foresee such interference; or if I design to injure a person who negligently comes in my way; or if I am careless in the use of dangerous agencies, so that mere trespass-

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

[2] R. S. I. 15. § 3. See Chicago R. R. v. Becker, 76 Ill. 25, adopting the argument in the text.

ers who wander within the range of these agencies are hurt, — then such negligence of the party hurt by me cannot be set up by me as a defence.[1]

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

"Contributory negligence" not based on maxim, *Volenti non fit injuria.*

§ 133. The true view is, that *Contributory negligence is a bar, because the plaintiff, by intervening, breaks the causal connection between the injury received by himself and the defendant's negligence.* — This rule, as will presently be seen, applies to all intervention of independent and responsible persons. If so, it applies to the intervention of the plaintiff himself, with the additional force derived

But rests on breaking of causal connection.

[1] See infra, §§ 300, 345.

[2] Op. cit. p. 61.

from the principle that no man is to be permitted to have a compensation for his own wrong.[1]

VII. INTERPOSITION OF INDEPENDENT RESPONSIBLE HUMAN AGENCY.

Causal connection is broken by interposition of independent agent.

§ 134. Supposing that if it had not been for the intervention of a responsible third party the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject matter as to which I am not contractually bound.[2] Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a non-conductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured. I may be liable to him for my negligence in getting him into difficulty, but I am not liable to others for the negligence which he alone was the cause of making operative.

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

Causal connection may be interrupted, says Baron, a distinguished contemporaneous commentator, by the intervention of an independent agency, though the act which was thus anticipated would of itself have been calculated to produce the particular evil. Hence it has been ruled that a person who mortally wounded a slave could not be held liable for the latter's death, when, before death ensued from such wounding, a third person came in and gave the slave another wound of which he immediately died.[3] The same ruling has been made in our own country, on an in-

[1] See infra, § 300.

[2] Of course if the thing to be done is one which I contracted to do, I am liable for the consequences of another's negligence interfering with the discharge of my engagement if I could have averted the damage. Eaton *v.* R. R. 11 Allen, 500; Bigelow's Cases on Torts, 611.

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

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

§ 136. In our own jurisprudence the same principle, though not applied with such logical consistency as in the Roman, has been constantly accepted, and not unfrequently expressed almost in the language in which it has been just stated.[4]

[1] Whart. Cr. L. (7th ed.) § 941; Whart. on Homicide, § 358 *et seq.*

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

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

[4] Allen *v.* Gaz Co. L. R. 1 Exch. D. 251; R. *v.* Ledger, 2 F. & F. 857; Bk. of Ireland *v.* Evans, 5 H. of L. Cas. 389; Mangan *v.* Atterton, L. R. 1 Exch. 239; Ashley *v.* Harrison, 1 Esp. 48; Fitzsimmons *v.* Inglis, 5 Taunt. 534; Hoey *v.* Felton, 11 C. B. N. S. 142; Walker *v.* Goe, 4 H. & N. 350; Toomey *v.* R. R. 3 C. B. N. S. 145; Welfare *v.* Brighton R. R. Co. L. R. 4 Q. B. 693. See Saxton *v.* Bacon, 31 Vt. 540; Stevens *v.* Hartwell, 11 Metc. 542; Shepherd *v.* Chelsea, 4 Allen, 113; Davidson *v.* Nicholls, 11 Allen, 514; Richards *v.* Enfield, 13 Gray, 344; Crain *v.* Petrie, 6 Hill (N. Y.), 522; Losee *v.* Clute, 51 N. Y. 494; Hofnagle *v.* R. R. 55 N. Y. 608; Lowery *v.* Tel. Co. 60 N. Y. 198; State *v.* Rankin, 3 So. Car. 438; Pensac. & G. R. R. *v.* Nash, 12 Florida, 497. And see particularly cases cited infra, § 439 *et seq.*, 934. In Cuff *v.* Newark & N. Y. R. R. 35 N. J. (6 Vroom) 17, the question was discussed with an ability and judiciousness which require special notice.

The following is extracted from the opinion of Depue, J., in Cuff *v.* R. R.: —

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

§ 137. For several reasons we must maintain that this rule is to be accepted as essential and absolute. These reasons are as follows: —

§ 138. It has already been seen that there are two views of causation, propounded by our courts, so far as concerns liability for negligence. The first view is that a person is liable for all the consequences which flow in ordinary natural sequence from his negligence; the second, that he is liable for all the consequences that could be foreseen as likely to occur. It makes no difference, so far as concerns the question before us, which of these views we accept. Can we regard the independent action of intelligent strangers as something that is in conformity with ordinary natural law, or as something that can be foreseen or preascertained? Of course, as a matter of theory, this opens interesting metaphysical and psychological questions which it would be inappropriate here to discuss. But as a matter of practice, can there be any question that, whatever may be the case in reference to an Omniscient eye, the actions of other persons, so far as we are concerned, viewing them as individuals, are not ordinarily the subjects either of accurate precalculation or of foreknowledge? Is this not eminently so with regard to the *negligences* of others? We may to some extent assume that a malicious man may, under certain circumstances, do malicious things. But while we know that the best business men are sometimes negligent, it is impossible for us to come in advance to any conclusion as to the points to which such negligence will apply.

Crain *v.* Petrie, 6 Hill, 522; Stevens *v.* Hartwell, 11 Met. 542.

"A. places a log in the highway, which B. casts into an adjoining close, — or puts an obstruction upon the sidewalk, which passers-by throw into the roadway of the street, and a traveller is injured by coming in contact with it. A. cannot be held for the trespass in the one case, nor for the injury in the other." Cuff *v.* R. R. supra.

"Natural and proximate cause," "I understand to be, that the cause alleged produced the injury complained of, without any other cause intervening." Mercur, J., Oil Creek R. R. *v.* Keighron, 74 Penn. St. 320.

"One of the most valuable of the *criteria* furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote." Miller, J., Ins. Co. *v.* Tweed, 7 Wall. 52.

To the same effect is the opinion of Strong, J., in Kellogg *v.* R. R., as quoted (see sentences italicized) infra, § 154.

To require us to act in such a way that no negligences on our part may be the conditions of negligences on the part of strangers, would be to require us to cease to be. If we do nothing, we negligently omit to do something that we ought to do. If we do something, owing to the imperfection of all things human, there will be some taint, no matter how slight, of imperfection in the thing we do. Yet, whether in doing or omitting, we touch more or less closely multitudes of persons each with a free will of his own, each with idiosyncrasies with which we may have no acquaintance, each of whom may by some negligence cross our path, and make action on our part, which is innocuous in itself, injurious. Reserving for another point the consideration of the consequences resulting from this indefinite extension of vicarious liability, we may now ask whether, on elementary principles, the action of an independent free agent, taking hold unasked of an impulse started by us, and giving it a new course productive of injury to others, does not make him the juridical starting-point of the force so applied by him, so far as concerns the persons so injured? For the spontaneous action of an independent will is ordinarily neither the subject of regular natural sequence, nor of accurate precalculation by us; and if not, it cannot be said to have been caused by us. In other words, so far as concerns my fellow-beings, their acts cannot be said to have been *caused* by me, unless they are imbecile, or act under compulsion, or under circumstances produced by me which give them no opportunity for volition. This distinction is brought out as fundamental by De Grey, C. J., in a remarkable case which has been already fully cited.[1] That case, it will be recollected, was that of a squib, which, when tossed by the defendant on a table in a market-place, was thrown by the person guarding this table at B., and by B. at C., who was struck on the eye and injured by the exploding of the squib. Did the intermediate parties act merely mechanically in sudden convulsive action, to avoid the squib exploding on themselves, or did they act either mischievously or inadvertently, having opportunity to consider the risk, but not using such opportunity? "It has been urged," says this learned chief justice, "that the intervention of a free agent will

Unreasonableness of making one man liable for another's negligence.

[1] Scott *v.* Shepherd, supra, § 95.

make a difference; but I do not consider Willis and Ryal (the intermediate parties) as free agents in the present case, but acting under a compulsory necessity for their own safety and self-preservation." He concedes, therefore, that if Willis and Ryal had been "free agents," the defendant would not have been liable. In other words, the intervention of a "free agent" breaks causal connection.

Its mischievous consequences.

§ 139. We may also be permitted to ask when this principle is proposed to us, where would such vicarious liability end? We none of us can do any act perfectly; and these imperfections necessarily multiply when we deal in large business concerns, such as mills, banks, shipping, and railroads. It is very important that when we negligently set natural forces in action we should be liable for the damage these misdirected forces produce. But if another person comes in, and of his own free will takes a new departure, how can we be made liable without extending our liability indefinitely? Waiving the point just noticed, that as we did not force him to do the thing we cannot be called its cause, there is no reason which will render us liable for the negligence of such second person supervening on our negligence, that would not bind us for the negligence of a third person supervening upon that of the second intruder. "Three actions for a single act," exclaims Blackstone, J., when commenting on this extension of liability in the case just cited, where, however, the extension was only defended on the ground that the intermediate parties were not free agents, "nay, it may be extended *in infinitum*." For, to adopt Chief Justice De Grey's statement, "the immediate act needs not be instantaneous, *but a chain of effects connected together will be sufficient*." If, for instance, a ball is negligently left by A. on a road, and B. negligently throws it at C., and C. negligently throws it at D., and D. neglects to put it out of the way, and E. stumbles on it and is hurt, then A. is liable for E.'s negligence, and so on without limit as to time. The consequence of this would be that the capitalist would be obliged to bear the burden, not merely of his own want of caution, but of the want of caution of all who should be concerned in whatever he should produce. If an injury occur through negligence, the "chain of effects" (assuming on this hypothesis that one person's free action is the "effect" of an-

other person's causation) would be traced back until a capitalist is reached, and he, being thus made the cause, would be made liable for all the subsequent negligences of others on the same subject matter. If this law be good, no man of means could safely build a steam-engine, or even a house. For there is no steam-engine so constructed, no house so built, but that they may be disarranged by meddlers so as to injure third parties.

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

Its inconsistency with other sanctions.

§ 141. The illustrations of this doctrine are numerous and of various degrees of intensity. Among these may be noticed the following:[2] —

[1] See infra, §§ 156–57.

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

§ 142. In a Massachusetts case[1] the evidence was that gunpowder was negligently sold by the defendant to a boy, who, in the absence of his parents, put it in a cupboard in his father's house with the knowledge of his aunt, who had charge of him and of the house while his parents were away. A week afterwards his mother gave him some of the powder and he fired it off with her knowledge; and some days later he took, with her knowledge, more of the powder out of the cupboard, fired it off, and was injured by the explosion. It was held that the causal connection between the injury and the original negligent sale was broken, and that the seller was therefore not liable to the child for the injury. "The testimony," said Gray, J., "introduced for the plaintiff at the trial discloses quite a different case from that alleged in the declaration, which was held sufficient when the case was before us on demurrer; and shows that the gunpowder sold by the defendants to the plaintiff had been in the legal custody and control of the plaintiff's parents, or, in their absence, of his aunt, for more than a week before the use of the gunpowder by which he was injured. Under these circumstances, that injury was not the direct or proximate, the natural or probable consequence of the defendant's act; and the jury should have been instructed, in accordance with the defendant's request, that there was no legal and sufficient evidence to authorize them to return a verdict for the plaintiff." And the same rule applies to other intervening negligences.[2]

Illustrations of doctrine that intervening negligence of third person breaks causal connection.

In a New York case the evidence was that L. contracted to build an arch culvert for the defendants, a railroad corporation, on their road, while the defendants agreed to furnish "centres" over which the arch was to be constructed. The defendants not having furnished centres, to complete the work, L. requested F., in the employ of defendants as foreman of carpenters, to take down one of the centres which had been used. H., the plaintiff's intestate, an employee of the defendants, was engaged, under the direction of F., in aiding to remove the centre when the arch fell in consequence of the mortar not having sufficiently set to justify such removal, and H. was killed. It was held by the court of appeals that even assuming that the defendants had been

[1] Carter *v.* Towne, 103 Mass. 507. [2] Supra, §§ 90, 91.

negligent in performance of their partof the contract, this negligence was not the natural or proximate cause of the accident; that it was the result simply of the negligent acts of L., or F., in removing the centre; and that for such acts the defendants were not liable.[1]

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

Again, assuming that a carrier is negligent in delaying in forwarding goods, he is not thereby liable for injury to the goods caused by the independent negligence of a subsequent carrier, though without the negligent delay of the first carrier the goods would not have been exposed to the particular injury.[3]

Once more: H., hiring a horse, leaves him to a boy to water, and the horse is injured by the boy's negligence. It may have been negligent for H. to leave the horse to the boy; but unless the injury was one which would naturally have flowed from so leaving the horse, H. is not liable for the damage.[4]

§ 144. *At the same time, the fact that another person contributed either before the defendant's interposition or concurrently with such interposition in producing the damage is no defence.*[5] Indeed, this proposition, instead of conflicting with the last, goes to sustain it. A. negligently

Concurrent negligence of another no defence.

[1] Hofnagle *v.* R. R. 55 N. Y. 608.

[2] See this illustrated in cases where horses are left negligently unguarded, supra, § 11; infra, § 147.

[3] Michigan Central R. R. *v.* Burrows, 33 Mich. 6.

[4] Chase *v.* Boody, 55 N. H. 574.

[5] Child *v.* Hearn, L. R. 9 Ex. 176; Lake *v.* Milliken, 62 Me. 240; Eaton *v.* R. R. 11 Allen, 500; Roberts *v.* Johnson, 58 N. Y. 613; Newman *v.* Fowler, 37 N. J. L. 89; Arimond *v.* Canal Co. 35 Wis. 45.

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

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

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

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

"It is certainly true, that where two or more *independent* causes concur in producing an effect, and it cannot be determined which was the efficient and controlling cause, or whether, without the concurrence of both, the event would have happened at all, and a particular party is responsible for only the consequences of one of such causes, in such case a recovery cannot be had, because it cannot be judicially determined that the damage would have been done without such concurrence. Marble *v.* City of Worcester, 4 Gray, 395. But it is equally true that no wrong-doer ought to be allowed to apportion or qualify his own wrong; and that, as a loss has actually happened whilst his own wrongful act was in force and operation, he ought not to be permitted to set up as a defence that there was a more immediate cause of the loss, if that cause was put into operation by his own wrongful act. To entitle such party to exemption, he must show not only that the same loss *might* have happened, but that it *must* have happened if the act complained of had not been done. Davis *v.* Garrett, 6 Bing. 716." Alvey, J., Balt. &c. R. R. *v.* Reaney, 42 Md. 117.

We may consequently hold, that "it is no defence for a person against whom negligence which caused damage is proved, to prove that without fault on his part the same damages would have resulted from the act of another." [1]

Nor can the negligence of another when induced by plaintiff.

§ 145. *Nor when a negligence subsequent to that of the defendant is the agent by which the defendant's negligence proves injurious can the subsequent negligence be a bar to the plaintiff's recovery if such subsequent negligence was likely, in the usual and natural order of things, to follow from the defendant's negligence.* — This proposition has been already adequately illustrated.[2] A case which sustains it in result though not in the reasoning of the court, may be here specifically noticed.[3] The defendants, a gas company, having contracted to supply the plaintiff with a service-pipe from their main to the meter on his premises, laid down a defective pipe from which the gas escaped. A servant of a gas-fitter, engaged by the plaintiff to lay down the pipes leading from the meter over the premises, took, and without the exercise, it was assumed, of due caution, a lighted candle for the purpose of finding out whence the escape proceeded. An explosion then took place, whereby damage was occasioned to the plaintiff's premises, to recover compensation for which the plaintiff brought his action against the defendants. It was correctly ruled, that the causal connection between the defendants' negligence and the damage was not broken by the intervention of the gas-fitter's servant. "The defendants," said Kelly, C. B., "having been guilty of negligence by which the accident was caused, the plain-

[1] Miller, J., Slater *v.* Mersereau, 64 N. Y. 147, citing Webster *v.* R. R. 38 N. Y. 260.

[2] See supra, § 108. And see, also, Lane *v.* Atlantic Works, 111 Mass. 140, where Colt, J., says: "The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act could have been foreseen." To this effect is cited McDonald *v.* Snelling, 14 Allen, 290; Powell *v.* Deveney, 3 Cush. 300; Barnes *v.* Chapin, 4 Allen, 444; Tutein *v.* Hurley, 98 Mass. 211; Dixon *v.* Bell, 5 M. & S. 198; Mangan *v.* Atherton, L. R. 1 Exch. 239; Burrows *v.* Gas Co. L. R. 5 Exch. 67. See, to the same effect, Wellington *v.* Downer, 104 Mass. 64; Elkins *v.* McKean, 79 Penn. St. 493, citcd infra, § 854.

[3] Burrows *v.* March Gas & Coke Co. L. R. 5 Exch. 67 (affirmed L. R. 7 Exch. 96). See, however, criticisms on this case in Bigelow's Cases on Torts, 613. And see Lannen *v.* Gas Co. 44 N. Y. 459.

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

The true reason is, that he who so negligently constructs gas-pipes that gas escapes from them and fills a room, is liable for all the regular and natural consequences of such negligence; among which consequences it is impossible to exclude the possibility of persons coming with lights into the room where the gas is collected. He has contracted to supply a proper and sufficient pipe, and he is liable because he has negligently failed to comply with his contract.[1]

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

[1] See remarks, infra, § 954.

Waiving in this case A.'s liability, based on the fact that B. was A.'s servant, we may say that if B. was ignorant of the gas being in the cellar, and if such ignorance was not properly chargeable to him as negligence, then A. was liable for the consequences of the explosion. But if B. had notice, or was bound to take notice, of the leakage, then B., in lighting the match in the cellar, was guilty of negligence, which breaks the causal connection between A.'s negligence in causing the leak and the explosion.[1]

§ 146. Other illustrations of the principle before us arise from the consequences of negligently leaving a horse unattended. Where, in a case already cited, the defendant left his horse and cart standing in the street without any person to watch them, and a stranger by striking the horse caused it to back upon a shop window, it was held in England that the defendant was liable for the damages.[2] So the same result was obtained where some children played with and were hurt by a horse and cart negligently left in a thoroughfare.[3] If the mischief in these cases was caused by simply that casual and irresponsible contact which is an ordinary incident of thronged streets, then the decisions reached are sustainable, on the principle that a negligent person is liable for all the ordinary and natural consequences of his negligence.[4] This is all that they actually decide; and it is substantially on this ground that the decision in the last case is put by Lord Denman. To extend them so far as to sustain the position that a person who leaves a horse on a street is liable for whatever a stranger may do with the horse, would extend the doctrine of vicarious liability to an extent inconsistent with both reason and authority.[5] That liability, as is elsewhere shown, is confined mainly to the relation of master and servant; and even in that relation is limited to the servant's acts when in the sphere of his employment. If my vicarious liability for another's negligence is established by the mere fact of my prior negligence,

[1] Lannen *v.* Gas Co. 44 N. Y. 459. See Allison *v.* R. R. 64 N. C. 382.

It should be added that the owner of a house cannot maintain an action against a gas company for damages to the reversion caused by negligence of a tenant in possession. Bartlett *v.* Gas Co. 117 Mass. 533.

[2] Illidge *v.* Goodwin, 5 C. & P. 190. See Weick *v.* Lander, 75 Ill. 93. Supra, §§ 112–13.

[3] Lynch *v.* Nurdin, 1 Q. B. 29. Supra, §§ 112, 113. And see Pastene *v.* Adams, 49 Cal. 87.

[4] See supra, § 73.

[5] See infra, § 156.

then I am not only liable for the conduct of strangers, as to whom I exercise neither selection nor control, but I am liable for all future negligences, in endless series, of which these negligences may be antecedents.

On the same reasoning he who puts in circulation a poisonous or dangerous agency is liable for the mischief it produces, no matter what may be the number of persons through whom it passes, provided that such persons act as unconscious agents of mischief.[1] "When the article is thrown into the current of trade, on the faith of the affirmation of its manufacturers that it is a fit oil for light and can be safely used in the family, or where it may be required for illumination, they cannot follow it, or avert its injuries, or determine how much of the responsibility is due to others," such others being ignorant of the danger.[2]

Intermediate parties in collisions.

§ 147. Suppose that A. jostles against B., and B. against C., and C. against D., and D. against E.; can E. recover against A. on the ground that A. negligently started the jostling? We have an approach to a solution of this question in a leading Massachusetts case,[3] where a horse attached to a sleigh was frightened and became uncontrollable by the sleigh pitching into a hole in the road, and after running a distance of fifty rods, knocked down and injured a stranger. It was held by a majority of the court that as the party injured had no connection with the sleigh, being neither owner, rider, nor driver, and was at a considerable distance from the defect when struck by the horse, he could not recover from the city. And this decision may be sustained, on the hypothesis that if due care had been taken by the driver of the sleigh the injury would not have taken place.[4]

So far as concerns the question of a series of jostlings, the issue depends, as did that in the squib case already frequently noticed by us, on the freedom of action of the intermediate agents. If a crowd is so closely packed that an impulse given to one end of it passes through the whole; or if from fright or intense excite-

[1] Supra, § 91.

[2] Agnew, C. J., Elkins *v.* McKean, 79 Penn. St. 493. Infra, § 853.

[3] Marble *v.* Worcester, 4 Gray, 395.

[4] As to case of damage to house No. 2 by negligence to house No. 1, see Balt. &c. R. R. *v.* Reaney, 42 Md. 117.

ment the power of free action is lost by the intermediate members, then he who gave the first impulse is liable for the final consequences of the shock. But if the shock is voluntarily renewed by a party capable of resisting it, then the latter starts a new line of causation, and is the party to be sued by those whom he immediately injures.[1]

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

§ 148. Of course if "a head of water," to adopt Ch. J. De Grey's illustration, "is cut down," and another's pond is overflowed, then, though the water may be swollen by several subsidiary streams, the party negligently letting the water loose is liable for the injury, supposing the stream flows directly from his field to that of the plaintiff. But supposing the stream flows into another pond, and the owner of that pond, neglecting to properly guard it, permits it to overflow, so that a series of ponds and then of meadows are in this way flooded, can the person last flooded recover damages from the person first "cutting down the head of water?" Could the owner of a river bank recover in this way from the person who many miles away opened a water-course that flooded a pond, that then flooded another pond, and then, after a series of accessions and diversions, when there was abundant opportunity on the part of others to have stopped the flood, did something towards raising the volume of the river? Could the owner of a sea-wall recover on the ground that the ocean had been thus unduly flooded? Of course when the question is so presented we say no; but if not, when does the liability stop? At what point, in this series of overflowings, does the causal connection of the first negligence with the last injury cease? And the true response is, that when there is a system of dams, and when the breaking of a lower dam is a natural consequence of the breaking of the first, the owner of the first dam is liable for damages caused by the breakage of the second, wherever the second dam was constructed with the diligence and care proper and usual in such work.[2]

Intermediate dams or water-courses in cases of freshets.

[1] See infra, § 155.

[2] Pollett *v.* Long, 56 N. Y. 200. See Arimond *v.* Canal Co. 35 Wis. 45.

But where the intermediate dam is so negligently constructed as not to bear such an accession of water as prudent engineers should provide against, then the owner of such intermediate dam starts a new causation, behind which a party subsequently injured cannot proceed.[1]

[1] In Rylands *v.* Fletcher, L. R. 3 H. L. 330 (hereafter discussed infra, §§ 789, 954), it was ruled that "if a person brings or accumulates on his lands anything which, if it should escape, *may cause damage to his neighbor*, he does so at his peril." This rule, as will be seen (see, also, Nichols *v.* Marsland, L. R. 10 Exch. 255; *S. C.* cited infra), has been qualified so as to exclude cases where the result was due to *casus* or other uncontrollable agencies. On its face the liability is limited to injuries to a "neighbor;" and there is a careful avoidance of expressions to indicate further liability.

In Nichols *v.* Marsland, L. R. 2 Exch. D. (C. A.) 1, the evidence was that on the defendant's lands were ornamental pools containing large quantities of water. These pools had been formed by damming up with artificial banks a natural stream, which rose above the defendant's land and flowed through it, and which was allowed to escape from the pools successively by weirs into its original course. An extraordinary rainfall caused the stream and the water in the pools to swell, so that the artificial banks were carried away by the pressure, and the water in the pools, being thus suddenly let loose, rushed down the course of the stream and injured the plaintiff's adjoining property. The plaintiff having brought an action against the defendant for damages, the jury found that there was no negligence in the maintenance or construction of the pools, and that the flood was so great that it could not reasonably have been anticipated; though, if it had been anticipated, the effect might have been prevented. It was ruled, affirming a judgment of the exchequer chamber, that this was in substance a finding that the escape of the water was caused by the act of God, or *vis major*, and that the defendant was not liable for the damage.

On this a writer in the London Law Journal comments: "The court, upon the argument of the rule, took the ground, that although the defendant stored the water, yet she was not liable, because some agent, over which she had no control, let the water out. Suppose a stranger, or the queen's enemies, or an earthquake, or lightning, broke the wall of a reservoir, would the person who stored the water be liable for the consequences? Counsel for the plaintiff, owing to the finding of the jury, felt driven to contend for the affirmative answer to this question, and thus to urge a proposition of rather alarming dimensions. The difficulty which strikes us in this case turns rather upon the question whether a very heavy fall of rain can properly be regarded as *vis major* with reference to the storage of water. The court supposed that the analogy between a rainfall and an invading army, or an earthquake or lightning, was complete. That seems to us not to be so; rain is only so much more water poured into a reservoir. It is of the same substance with that which the owner of the reservoir has undertaken to store and keep safe, and all that happens is an addition to the general bulk. Earthquake, lightning, and invaders are foreign elements operating

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

Intermediate buildings in cases of fire.

§ 150. The only test to which we can resort is that just noticed, that, in cases in which the damage is not a probable and ordinary result of the negligence, causal connection ceases when there is interposed between the negligence and the damage an object which, if due care had been taken, would have prevented the damage. If a stream passing through a series of fields is properly guarded in each field, a flooding of lower fields may be checked. If a house is properly built, if it is properly watched, if a proper fire apparatus is in operation, it can be prevented, when a fire approaches from a neighboring detached house, from catching the fire. This view has been adopted in Pennsylvania

upon the storage walls, and destroying them by an independent force. No doubt, if a stranger increased the bulk of water by wrongfully directing a stream into the reservoir, that might properly excuse the owner of the reservoir. But, then, the new water would come from an unexpected source, and the very act of bringing it thither would be a trespass on the part of the stranger. On the other hand, rain naturally and according to human experience descends from the clouds, and frequently in large quantities. As a matter of scientific calculation, we believe that every place in this country, within a given cycle of years is, certain to be subject to an excessive rainfall. However this may be, it may fairly be contended that there is nothing wonderful or contrary to probability in the descent of a large body of water from the clouds; and it is entirely consistent with what has happened and will again happen, that the descent of heavy rain will increase the bulk of stored water. At the trial, Lord Chief Justice Cockburn intimated that in his opinion the rain, although unprecedented — or rather, we suppose, unusual, for, of course, it was not unprecedented — did not amount to *vis major;* and that opinion might, perhaps, have been advantageously followed by the court." See Livingston *v.* Adams, 8 Cow. 175; and supra, § 115.

in a case[1] where an engine on a railroad negligently set fire to a warehouse belonging to the plaintiffs, and the fire from the house communicated to other buildings of the plaintiff, one thirty-nine feet from the warehouse, and the other eighty feet from it. It was held by the supreme court, on a question reserved, that the railroad company were not liable for damages to the last building and its contents.

In 1876,[2] the question was renewed before the same court in a suit where the fire, after originating in sparks dropped from a locomotive, spread to A.'s fence next the track, then across two fields to a tract of woodland belonging to A., six hundred feet from the railway. It was for damages done to the woodland that the suit was brought. The court below left it to the jury to determine whether the burning of the woodland was the "direct natural consequence of the defendants' negligence." The jury found a verdict for the plaintiffs, and on error the supreme court sustained the ruling of the court below.

A few weeks afterwards the question came again before the court in a case where the defendant's uncovered oil-tank took fire, and the oil overflowing set fire to the plaintiff's machinery forty feet distant, there being several intervening objects.[3] The question of proximate cause was left to the jury, who found for the plaintiff. The judgment was affirmed by the supreme court, on the ground that "negligence in such a case is to be found by the jury from a variety of circumstances, and they grow out of the hazard of the business, — a business so much the subject of peculiar regulation we are unable to say the case ought not to have gone to the jury. Much must be left, in such a case, to the knowledge of the jury who understand these peculiarities and hear the evidence."[4]

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

[2] Penn. R. R. *v.* Hope, 80 Penn. St. 373.

[3] Raydure *v.* Knight, 2 Weekly Notes, 713.

[4] Paxson, J., dissented from the majority of the court, saying (see 3 Weekly Notes, 109): "That the verdict in this case was wrong, and should have been set aside by the court below, is obvious. The undisputed testimony was that the plaintiff had ample time to have taken down his engine-house and remove it after, the fire commenced, and if he had done so he would have sustained no damage. He was, therefore, guilty of contributory negligence, and the court so told the jury in its answer to the defendant's seventh point. Notwithstanding this direction the jury disre-

§ 151. In New York, when the question was first agitated, it was held, on facts which will presently be specified, that the merely negligent originator of a fire was not liable for results not necessarily to be anticipated from the firing, but which were dependent on extrinsic agencies.[1] In 1872, it was attempted in the same state to push the principle still further in a case that was ultimately determined by the court of appeals.[2] The defendant, a railroad company, in time of great drought, negligently dropped from one of its locomotives live coals on a track, which coals set fire to a tie on the track. From this tie the fire was communicated to an old tie at the side of the track, and from thence to a mass of dry weeds and grass which had been there permitted by the defendant to accumulate. From this material, which had become very inflammable, the fire was communicated directly to the plaintiff's land, burning the trees and soil, which was the damage complained of. It was argued for the defendant that the damage was too remote, and Penn. R. R. *v.* Kerr, and Ryan *v.* N. Y. C. R. R. were relied on. But Folger, J., in giving the opinion of the court of appeals, held these cases to be inapplicable. "In Ryan's case," he said, "the opinion of the court was that the action could not be sustained, for the reason that the damage incurred by the plaintiff *was not the immediate but the remote result of the negligence of the defendant.* . . . . The facts in the Ryan case are familiar, but they can be repeated briefly. The defendant by its negligence in not keeping in sufficient good order its engine, or in not properly managing it, set fire to its own wood-shed, and the contents thereof. *The fire from this was communicated, through an intervening vacant space of one hundred and thirty feet,* to the building of the plaintiff standing on his premises, which were not in contiguity with those of the defendant, until it was destroyed;

garded the evidence, and found a verdict for the plaintiff. The failure of the court below to set the verdict aside is, of course, no ground of error; but it furnishes an additional reason why we should reverse the judgment if the record discloses any real error. . . . . I fear we are carrying the doctrine of negligence too far, and that with its extension, and the disposition of the modern juryman to be generous with the property of other persons, it will become unsafe for a man to embark in any business involving the use of an element of danger."

[1] Ryan *v.* R. R. 35 N. Y. 210.

[2] Webb *v.* R. R. 49 N. Y. 421; *S. C.* 3 Lans. 453.

and the pith of the decision was, *that this was a result which was not necessarily to be anticipated from the firing of the wood-shed and its contents; that it was not an ordinary, natural, and usual result from such a cause;* but one dependent upon the degree of heat, the state of the atmosphere, the condition and materials of the adjoining structures, and the direction of the wind, which are said to be circumstances accidental and varying. The principle applied was the converse of that enforced in Vanderburgh *v.* Truax, 4 Denio, 464, *which was that the consequence complained of was the natural and direct result of the act of the defendant.*" But in the present case, the fire negligently kindled by the defendant communicated directly to the plaintiff's land in a way that was natural and direct; and hence the defendant was held liable.[1]

In California, in 1875, the question was presented in a case when only one tract, belonging to another proprietor, intervened between the plaintiff's property and the defendants' road. The question of proximate cause was left to the jury, who found for the plaintiff; and the finding was sustained by the supreme court. "It would be strange," said McKinstry, J., "if, among the numerous cases in which resort has been had to the rule of the law of negligence to which we have referred, courts had not

[1] To the same effect is Vaughan *v.* Taff R. R. 3 H. & N. 742; 5 H. & N. 679; McGrew *v.* Stone, 53 Penn. St. 436; Annap. R. R. *v.* Gantt, 39 Md. 116; Balt. & Oh. R. R. *v.* Shipley, 39 Md. 252; Kellogg *v.* R. R. 26 Wis. 223, and cases hereafter cited. In Phil. & W. R. R. *v.* Constable, 39 Md. 150, the same result was reached in a case where the fire was communicated by the locomotive directly to H.'s lot, which was covered with dry grass, and from thence, 150 yards, to the plaintiff's land.

In Atchison, &c. R. R. Co. *v.* Stanford, 12 Kans. 354, sparks from a locomotive kindled fires on lands of two different owners. The streams of fire united, and after passing over the lands of other owners, reached plaintiff's land four miles away, and did damage thereon. It was held by the supreme court that the damages were not too remote, and the company was liable. "After a careful examination of this question," such is the conclusion, "we are satisfied, both upon reason and authority, that the damage is not too remote to be recovered. We have already decided that where the fire runs thirty rods from the place where it is first kindled, and there does the damage, the plaintiff may recover. St. Jo. & D. C. R. R. Co. *v.* Chase, 11 Kans. 47. Now if the plaintiff may recover when the fire has run thirty rods, why may he not recover when the fire has run forty rods, or a mile, or four miles? Will it be claimed that the ownership of the property over which the fire runs can make any difference?"

differed in their application of the rule; but for the purposes of this action it may be admitted that the rule was properly applied in Ryan's case. We are still confident, considering the long dry season of California, and the prevalence of certain winds in our valleys, that it may be left to a jury to determine whether the spreading of a fire from one field to another is not the natural, direct, or proximate consequence of the original firing." [1]

§ 152. In Massachusetts, where there is a special statute which will be presently noticed, the question was discussed in 1868 in a and case where the evidence was that the fire which destroyed the plaintiff's property proceeded from the defendant's locomotive, and came in a direct line and without any break to the plaintiff's property. But in reaching the plaintiff's land it went across the land of three or four different parties which lay between the plaintiff's land and the railroad track, and the distance to the plaintiff's land was about half a mile. It was fed on its way by grass, stubble, and woodland.[2] "The liability of the railroad," said Chapman, J., "*is not at common law, nor dependent on the defendant's want of care; but is under a statute very general in its terms, making a railroad corporation responsible in damages to any person whose building or other property may be injured by fire communicated by its locomotive engines, and giving the corporation an insurable interest in the property upon its route*, for which it may be held responsible, with authority to procure insurance thereon in its own behalf. . . . . The terms of the statute do not restrict the liability so as to exclude any cases where the fire is communicated from the engine, nor limit the insurable interest to any specific distance from the track." It is true that the opinion goes on to cite Ryan *v.* N. Y. Cent. R. R., and to express a dissent from the result there reached on common law grounds; but the case is made to rest mainly on the language of the local statute. Prior decisions of the same court [3] can be sustained at common law, on the ground that the burning of the plaintiff's property was caused by an irresistible sheet of flame kindled directly by the defendant's engine.

§ 153. In practical accordance with the conclusions in Penn-

[1] Henry *v.* R. R. 50 Cal. 183. See, also, Perry *v.* R. R. 50 Cal. 579.

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

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

sylvania and New York is a decision in Illinois,[1] in a case where a locomotive, when passing through a village, set fire to a warehouse and a lumber yard. The weather "was very dry and the wind blowing freely to the south." From the warehouse first ignited the flames "speedily set on fire the building of plaintiffs, situated about two hundred feet from the warehouse." The defendant demurred to the evidence, and the court trying the case sustained the demurrer. This was reversed by the supreme court, and rightfully, for there was no evidence that could lead to the presumption that the fire in the intermediate buildings could by due diligence have been extinguished, or that by due diligence the plaintiffs' building could have been protected from the fire; and the demurrer, by admitting the truth of the plaintiffs' evidence with all its intendments, admitted that the fire in the plaintiffs' building was naturally and in unbroken sequence communicated from the defendant's engine. The court, however (Lawrence, C. J.), went beyond this necessary consequence of the pleadings, and advanced positions which, if accurate, would make the first starter of a fire liable for all other fires which might be kindled from the flames he thus originated. Yet if so, why is he to be considered the primary cause? For, if we must go back through all intermediate negligences to the first act of negligence, there is no reason for stopping with the railway company. Either the road was anterior or posterior to the buildings which were thus ignited. If anterior, then, in view of the contingencies of railroad fires, it was negligence to erect such buildings under the very eaves of its smoke-pipes. If posterior, then it was negligence in the legislature to authorize the road to run its track close to buildings so combustible; and it was negligence in the village authorities not to require these buildings to be removed. Nor, if we trace the train of causation, as thus defined, at its other end, can we see, on the reasoning of the court, where this liability can be stopped. "A natural consequence, which any reasonable person could have anticipated," is the test given by Chief Justice Lawrence. But "anticipatedness," as we have already seen,[2] is not an exhaustive test; for it is reasonable for me to anticipate that other people may be negligent, yet this

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

[2] Supra, §§ 16, 77.

does not, in all cases of independent negligences, make me liable for the negligences I may speculatively anticipate; and "naturalness," without the limitations heretofore given,[1] is by itself insufficient, in cases where intervening negligences are set up.

As holding that an intervening negligence, in cases of this class, does not necessarily relieve the party guilty of an antecedent negligence, may be cited a ruling of the New Jersey court of appeals in 1877;[2] and this is undoubtedly true, since the party to whom a negligence is imputable is liable for the consequences of a second negligence, wherever the second negligence is an ordinary and natural outflow of the first.

§ 154. The same question was mooted before Miller and Dillon, JJ., at a circuit court of the United States in May term, 1874, and finally decided by the supreme court of the United States in 1877.[3] The defendant's steamboat negligently set fire, by means of a smoke-pipe without a spark-arrester, to an elevator *owned by the defendant*, from which the fire passed to the plaintiff's saw-mill and lumber, distant 388 feet from the elevator. "There was at the time an unusually high wind blowing from the elevator in the direction of the plaintiff's lumber and mill. The evidence tended to show that sparks and burning brands were carried directly from the elevator to the lumber and mill; and that the trees upon the bluffs, 600 feet distant from the elevator, were scorched and killed by the flames and heat from the elevator." Here, therefore, there was no question as to the intermediate negligence of a third party, or of contributory negligence by the plaintiff, while the defendant's negligence was indisputable. The intermediate building (the elevator) belonged to the defendant; so that if there was any negligence in not stopping the flames at the elevator, that negligence was the defendant's. The plaintiff, in such a fierce blast of fire as that which the evidence depicted, could not have saved a structure offering so expanded and combustible a surface as do a saw-mill and lumber yard. The distance from the plaintiff's property to the steamboat depot was not such, supposing the plaintiff to have been the second comer, to charge him in any sense with impru-

[1] See supra, § 73.

[2] Delaware, &c. R. R. *v.* Salmon, 39 N. J. L. (10 Vroom), 299; cited infra, §§ 878–9.

[3] Kellogg *v.* R. R. Cent. Law J. for June 4, 1874; *S. C.* on review, 94 U. S. (4 Otto), 469.

dence in selecting his site. The question of proximate cause was left to the jury, who found for the plaintiff, and judgment thereon was entered. On a writ of error to the supreme court, the judgment of the court below was affirmed. In the course of the opinion of the court, which is given by Strong, J., it is said: "The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market-place. 2 Blacks. Rep. 892. The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. These circumstances, in a case like the present, are the strength and direction of the wind, the combustible character of the elevator, its great height, and the proximity and combustible nature of the saw-mill and the piles of lumber. Most of these circumstances were ignored in the request for instruction to the jury. Yet it is obvious the immediate and inseparable consequences of negligently firing the elevator would have been very different if the wind had been less, if the elevator had been a low building constructed of stone, if the season had been wet, or if the lumber and the mill had been less combustible. And the defendants might well have anticipated or regarded the probable conse-

[1] Milwaukee R. R. *v.* Kellogg, 94 U. S. (4 Otto) 469; *S. C.* Cent. Law J. Oct. 5, 1877.

quences of their negligence as much more far-reaching than would have been natural or probable in other circumstances. We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or non-feasance. *They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it.*[1] The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. Here lies the difficulty. But the inquiry must be answered in accordance with common understanding. In a succession of dependent events an interval may always be seen by an acute mind between a cause and its effect, though it may be so imperceptible as to be overlooked by a common mind. Thus, if a building be set on fire by negligence, and an adjoining building be destroyed without any negligence of the occupants of the first, no one would doubt that the destruction of the second was dne to the negligence that caused the burning of the first. Yet in truth, in a very legitimate sense, the immediate cause of the burning of the second was the burning of the first. The same might be said of the burning of the furniture in the first. Such refinements are too minute for rules of social conduct. In the nature of things there is in every transaction a succession of events, more or less dependent upon those preceding; and it is the province of the jury to look at this succession of events or facts and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time."

§ 155. Following, therefore, the line presented by the supreme court of the United States in the case last cited, we may hold that though when there are conflicting inferences as to proximate cause the question is for the jury; yet "when there is a sufficient and independent cause operating between the wrong (of

[1] This is in full accordance with the position stated supra, § 136.

the defendant) and the injury" (of the plaintiff), the injury "is not chargeable to the misfeasance or non-feasance" of the defendant, and that "in such case the resort of the sufferer must be to the originator of the intermediate cause." To illustrate this we may recur to an hypothesis already noticed.[1] A., B., C., D., E., and F. are standing three feet apart. A. negligently jostles B., knocking him down, and B., instead of recovering himself, negligently falls on C., and C. negligently falls on D., and D., in the same negligent way, falls on E., and E. on F. A., let us assume, is a rich man, and F. sues A., naturally preferring to select him, as one who is able to pay, as the party to redress the hurt. But why, if we are to go thus back, stop with A.? Some antecedent negligence of some other person might be found which put A. in the position which occasioned him to jostle B., and hence, if we adopt this theory of indefinite vicarious liability, we are reduced to the alternative either of losing ourselves in the remote past in the search for the original negligence, or of perpetrating the injustice of selecting out of the long train of antecedents the one against whom a verdict can be most easily collected. The only relief we have from this absurdity is in holding that causal connection is broken by the intermediate negligence of a responsible independent agent. Nor is the principle changed if we substitute for B. a person, B. a house, supposing that B. the house is owned by persons whose duty it is to guard against fire. If there is negligence of any kind imputable to the owner of house B., or to those bound in any way to preserve house B. from catching fire, then the causal connection is broken. To hold that in case of such intermediate negligence the party guilty of such negligence is to be skipped, and satisfaction to be taken out of some prior antecedent who is a capitalist, would be to destroy non-capitalist as well as capitalist. The non-capitalist, leaving by the side of a railroad track a heap of combustible stuff, would indeed cease to be responsible to his neighbors on the other side for the flames which without his negligence would not have spread. But this irresponsibility, while making it a matter of indifference to him how negligent he may be in his own duties, gives him, with an outlaw's immunities, an outlaw's beggary. For he cannot honestly live unless honestly employed; and he cannot be employed

[1] Supra, § 147.

without an employer; and no employer will venture into an industry of which it is one of the conditions that capital is to be made liable for all damage, and the non-capitalist to be excused from the exercise of all care.[1]

In closing our discussion of this vexed question, we may adopt the language of a learned Michigan jurist.[2] "Though a building thus burned by the fire of the first might be at such a distance that its taking fire from the first might not *a priori* have seemed possible, yet, if it be satisfactorily shown that it did, in fact, thus take fire, *without any negligence of the owner, and without the fault of some third party, which could be properly recognized as the proximate cause and for which he could be held liable*, the principle of justice, or sound logic, if there be any, is very obscure, which can exempt the party through whose negligence the first building was burned from equal liability for the burning of the second."[3] Adding to the exceptions just stated cases in which *casus* intervenes, we may find in the terms thus reached a just limitation of the liability of a party negligently originating a fire. Such a party is liable for all the losses naturally and ordinarily flowing from his misconduct. He is not liable, however, (1) if the fire is communicated from the first object fired to others by *casus; e. g.* if a violent and unprecedented storm should sweep the flames out of their natural range. (2) Nor is he liable for damage extended by the negligent intervention of another. If, for instance, T., residing near a railroad, should think proper to carelessly store a large quantity of petroleum oil near his dwelling, and if on T.'s dwelling taking fire, this oil, by the fierceness of the flame, and the extraordinary force of the current, produces in adjacent buildings a conflagration which could not otherwise have been produced, the party originating the fire should not be held liable for the damage distinctively caused by the burning oil. It is not in the order of things that petroleum should be incautiously stored at a place where fire is habitually and lawfully employed, as on

[1] Supra, §§ 137–141. The conclusions of the text are amplified in an article in the Southern Law Rev. vol. 1 (N. S.) 729. For a learned reply, see Atchison, &c. R. R. *v.* Bales, 16 Kans. 252.

[2] Hoyt *v.* Jeffers, 30 Mich. 200, Christiancy, J.

[3] See, to same effect, Toledo R. R. *v.* Mathersbaugh, 71 Ill. 572.

a railway track; and the consequences produced by the firing of the petroleum are not such as follow probably and naturally from the issue of sparks from a locomotive. We cannot say this, however, as to fire communicated from dry leaves and grass collected in a field in the fall of the year. That such leaves should be so collected, and should be fired by sparks dropped on them, follow in the natural course of things.

So far are the authorities agreed. The point of departure is as to the tribunal by whom it is to be determined whether a particular consequent flows naturally and regularly from a particular antecedent. Of course, on a case stated, or a point reserved, the court has to determine whether the relation between antecedent and consequent was such as to involve liability. So, on the other hand, when the question is mixed with disputed facts, or depends upon conditions of fact, there can be no doubt that it must go to the jury, to be passed upon by them. The only point of difference is, whether the question is absolutely and finally to be determined by the jury, or is to be submitted to them under the instructions of the court, subject to the ultimate revision of the court. On the one side it is argued that it is sufficient to tell the jury that if the cause is "proximate," they can find for the plaintiff, and that it is exclusively for them to determine whether the cause is "proximate." On the other side it is insisted that the jury are to be told that, when there is intervening negligence, or *casus*, diverting, varying, or continuing the injurious element, the party originally negligent ceases to be liable for the final damage, unless such intervening negligence was such a natural incident of the original negligence that it ought to have been foreseen as probable by the party to whom such original negligence is imputable. Now, admitting that the question whether there was an intervening negligence is a mixed question of law and fact, I submit that it is not enough to tell the jury baldly that "proximate cause" is for them, but that they should be told, in the language just stated, that if there is either *casus*, or intervening negligence by which the original injurious force was diverted, varied, or continued, then if such intervening negligence was not such a natural incident of the original negligence that it should have been foreseen as probable by the latter's author, such author is not liable. There are several

reasons why the law should be thus specifically stated, and why the verdict of the jury should ultimately be revised by the court.

1. The question is one of immense importance to the community. It is impossible to conduct any great enterprise without some negligence, greater or less. No machinery is perfect. No organization is perfect. In the working of railroads, for instance, there must occur irregularities which can only be prevented by the exercise of caution and the application of checks which would strip railroads of their efficiency, or reduce them to a slowness and costliness of action which the community would not tolerate. The community, however, which exacts swiftness and economy, and which is greatly enriched by the agency, is bound to exercise caution corresponding to the danger. For a party — to pursue an illustration already noticed — to spread on the line of a railroad tanks of inflammable oil, is a negligence which should preclude him from recovering from the company in case his oil takes fire. If his oil does take fire, and devastates by its unrestrainable fury a neighboring village, he is to be regarded as starting a new line of causation, for whose consequences he alone is liable. If capitalists were to be held responsible for such intervening negligences, no capitalist could venture on enterprises of such risk; and the business of the country would be paralyzed. The same disasters would follow if the owners of such agencies should be held liable for *casus*, — *e. g.* for damages produced by an unprecedented hurricane, hurling cinders for miles from their original deposit.

2. The doctrine that the intervening negligence of a third party, when not an incident of the original negligence, breaks causal connection, belongs as exclusively to jurisprudence as is the doctrine that causal connection is broken by contributory negligence. A court can no more relieve itself from stating the former doctrine than it can relieve itself from stating the latter.[1]

[1] In this connection I again call attention to Mr. R. G. Hazard's powerful Treatise on Causation, Boston, 1869 (to which I owe a portion of the argument of the Appendix to the first edition of this work), and also to a prefatory note by him to the 2d edition of my pamphlet on Remote Fires, published by G. I. Jones & Co., St. Louis, 1877.

CHAPTER IV.

LIABILITY OF MASTER FOR SERVANT.

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§ 156. THE Roman law, in its treatment of vicarious liability, was affected by several considerations which do not apply to ourselves. In the first place, the office of servant, in the sense in which we now hold it, was then occupied exclusively by the slave; and consequently it was to the slave that attached the liabilities to which we subject the servant. Then, again, the Roman idea of the freeman had asso-

Limitations of Roman law.

ciated with it a haughty independence which was inconsistent with such a subordination of one freeman to another as the doctrine of *respondeat superior* assumes. Yet, as a third qualification, it was held that this notion of independence did not apply to the *filiusfamilias*, but that for the acts of the *filiusfamilias* the *paterfamilias* was under certain circumstances liable.

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

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

3. Where a person undertook by contract to perform a particular service, which required the coöperation of employees, he was liable for such negligence of such employees as occurred in the discharge of their duties.[2]

§ 157. Our own law, rejecting the idea of absolute subordination which the Roman law assigns to the relation of master

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

[2] See infra, § 714.

and servant, makes the master generally liable for the negligent conduct of the servant within the course of the latter's employment, recognizing, however, the servant's liberty to act out of such course, and relieving the master from liability when the servant thus acts not on his master's account but his own.[1]

By our own law master is liable for the servant's negligence in the course of his employment.

By many high authorities this conclusion is based on the assumption that the master "is bound to guarantee third persons against all hurt arising from the negligence of himself or of those acting under his orders, or in the course of his business."[2] But it is wiser to waive the questionable doctrine of constructive guarantee, and to fall back on the position that he who puts into operation an agency which he controls, while he receives its emoluments, is responsible for the injuries it incidentally inflicts. Servants are in this sense machinery; and for the defects of his servants, within the scope of their employment, the master is as much liable as for the defects of his machines.[3]

[1] Laugher *v.* Pointer, 5 B. & C. 547; Quarman *v.* Burnett, 6 M. & W. 499; Butler *v.* Hunter, 7 H. & N. 826; Overton *v.* Freeman, 11 C. B. 873; Peachy *v.* Rowland, 13 C. B. 182; Sadler *v.* Henloch, 4 E. & B. 570; Cuthberton *v.* Parsons, 12 C. B. 304; Gayford *v.* Nicholls, 9 Exch. 702; Grote *v.* Chester & H. R. R. 2 Exch. 251; Bagley *v.* R. R. L. R. 6 C. B. 415; Tuel *v.* Weston, 47 Vt. 635; Ramsden *v.* R. R. 104 Mass. 117; Wilton *v.* R. R. 107 Mass. 108; Phelon *v.* Stiles, 43 Conn. 426; Higgins *v.* Turnpike Co. 46 N. Y. 23; Johnson *v.* Bruner, 61 Penn. St. 58; Pittsb. &c. R. R. *v.* Donahue, 70 Penn. St. 119; Oil Creek R. R. *v.* Keighron, 74 Penn. St. 316; Balt. & Ohio R. R. *v.* Blocher, 27 Md. 277; Pickens *v.* Diecker, 21 Ohio St. 212; Passenger R. R. *v.* Young, 21 Ohio St. 518; Gass *v.* Coblents, 43 Mo. 377; Allison *v.* R. R. 64 N. C. 382; Smith *v.* Webster, 23 Mich. 298; Oliver *v.* N. Pac. Trans. Co. 3 Oregon, 184.

"The liability of any one," says Rolfe, B., "other than the party actually guilty of any wrongful act, proceeds on the maxim, *Qui facit per alium facit per se.* The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskilful or careless person to execute his orders should be responsible for any injury resulting from the want of skill, or want of care, of the person employed; but neither the principle of the rule nor the rule itself can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent acts the injury has been occasioned." Rolfe, B., in Reedie *v.* L. & N. W. R. R. 4 Exch. 255. See remarks of Coleridge, J., Lumley *v.* Gye, 2 E. & B. 216. See cases in Whart. Agen. § 129.

[2] Lord Cranworth, in Bartonshill Co. *v.* Reid, 3 Macqueen, 283.

[3] See Lord Brougham's remarks to this effect in Duncan *v.* Findlater, 6 Cl. & F. 903.

In no case, it should be added, is a master liable for a servant's act when such an act would not have been negligent if done by the master.[1]

§ 158. But whatever may be the reason of the rule, it is not only thoroughly settled, but is applied to all departments of service. Thus, "if the master is himself driving his carriage, and from want of skill causes injury to a passer-by, he is of course responsible for that want of skill. If, instead of driving the carriage with his own hands, he employs his servant to drive it, the servant is but an instrument set in motion by the master. It was the master's will that the servant should drive, and whatever the servant does, in order to give effect to his master's will, may be treated by others as the act of the master: *Qui facit per alium facit per se.*"[2] So an apothecary is liable for the negligence of his clerk in making up a prescription.[3]

A railroad corporation is to be regarded as constructively present in all acts performed by its agents and servants within the range of their ordinary employments.[4] And railroad companies, as well as other common carriers, are responsible not only for the negligences of their servants, but for their assaults and batteries upon passengers.[5] It is otherwise, however, as to assaults committed on persons not passengers.[6]

§ 159. It is no defence, in a suit by a third party against the master (though it is otherwise when the issue is based on *culpa in eligendo*, as in suits against a master by a servant for a fellow-servant's injuries), that the servant

Servant's character for care no defence.

[1] Holmes *v.* Mather, L. R. 10 Exch. 261.

[2] Judgm. Hutchinson *v.* R. R. 5 Exch. 350.

[3] Fleet *v.* Hollenkemp, 13 B. Mon. 227; Hansford *v.* Payne, 11 Bush, 380.

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

[5] Goddard *v.* R. Co. 57 Maine, 202; Hanson *v.* R. R. Co. 62 Me. 84. See infra, §§ 178, 646.

[6] Porter *v.* R. R. 41 Iowa, 358.

It has been ruled that a master is not liable, in exemplary damages, for the act of his servant, where the plaintiff would not have been entitled to recover such damages had the suit been against the servant. It has consequently been held that where a railroad conductor, acting in what he believes to be the performance of his duty to the company, removes a passenger who refuses to produce a ticket or to pay fare, although the removal be unlawful, the company is liable only to compensatory damages. Caldwell *v.* N. J. Steamboat Co. 47 N. Y. 282, distinguished; Townsend *v.* R. R. 56 N. Y. 295.

had previously a good character for skill and care.[1] But, as will be presently seen, the servant's bad character may be proved by the plaintiff in all cases where the issue is *culpa in eligendo*;[2] and in such cases rebutting evidence of good character is admissible.

Need be no specific directions.

§ 160. It is not necessary, in order to make the master liable, that there should be specific directions as to the particular act. It is enough if the general relation of master and servant, within the range of such act, exists. The question is simply whether the wrong inflicted was incidental to the discharge of the servant's functions. It may have been capricious. It may have contravened, as will presently be seen, the master's purposes or directions. But a master who puts in action a train of servants, subject to all the ordinary defects of human nature, can no more escape liability for injury caused by such defects, than can a master who puts machinery in motion escape liability, on the ground of good intentions, for injuries accruing from defects of machinery. *Out* of the servant's orbit, when he ceases to be a servant, his negligences are not imputable to the master. But within that orbit, they are so imputable, whatever the master may have meant.[3]

§ 161. Thus it has been judicially declared in England[4] that "the general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. That principle is acted upon every day in running-down cases. It has been applied also to direct trespass to goods, as in the case of holding the owners of ships liable for the act of masters abroad improperly selling the cargo."[5] It applies, also, to actions of false imprison-

[1] Tenney *v.* Tuttle, 1 Allen, 185; Shaw *v.* Reed, 9 W. & S. 72; Hays *v.* Millar, 77 Penn. St. 238. See Whart. on Ev. §§ 40–44.

[2] Infra, § 170.

[3] Barwick *v.* Eng. Joint Stock Bank, L. R. 2 Exch. 259; Tuberville *v.* Stamp, Raym. 266; Seymour *v.* Greenwood, 7 H. & N. 355; Patten *v.* Rea, 2 C. B. N. S. 606; Mitchell *v.* Crasweller, 13 C. B. 237; Storey *v.* Ashton, L. R. 4 Q. B. 476; Goddard *v.* R. R. 57 Me. 202; Arthur *v.* Balch, 23 N. H. 147; Howe *v.* Newmarch, 12 Allen, 49; Bryant *v.* Rich, 106 Mass. 180; Higgins *v.* R. R. 46 N. Y. 23; Hamilton *v.* R. R. 53 N. Y. 25; Passenger R. R. *v.* Young, 21 Ohio St. 518; Minter *v.* R. R. 41 Mo. 503; Pittsburg R. R. *v.* Ruby, 38 Ind. 312; Armstrong *v.* Cooley, 10 Ill. 509, and cases cited infra, § 171.

[4] Barwick *v.* Eng. Joint Stock Bank, L. R. 2 Exch. 259.

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

ment, in cases where officers of railway companies improperly or negligently expel, or confine, persons who are supposed to come within the terms of the by-laws.[1] "It is true," as has been said by Willes, J., in an opinion already cited, "that the master has not authorized the particular act, but he has put the agent in his place to do that class of acts; and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of the master to place him in."[2]

So, also, as is said by Maule, J.,[3] the master "is liable, even though the servant in the performance of his duty is guilty of a deviation or a failure to perform it in the strictest and most convenient manner. But where the servant (as will presently be seen more fully), instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant, and therefore is not responsible for the negligence of the servant in doing it."

§ 162. It has been already said that to make the master liable for the servant's negligence, this negligence must be in the course, or as it is sometimes called "scope," or "range," of the latter's employment. Beyond this limit the master is not liable.[4]

"Course," "scope," or "range" of employment.

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

While a steam-railway car was in motion, a boy between ten and eleven years of age got upon the steps of the car, and was holding to the railing, when a servant of the railway company, employed to clean the cars and secure them, and whose duty it

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

[2] Barwick *v.* Stock Co. *ut supra.*

[3] 13 C. B. 247.

[4] Infra, § 177; and see Holmes *v.* Mather, L. R. 10 Exch. 261; Bolingbroke *v.* Swindon, L. R. 9 C. P. 575; Abbott *v.* Rose, 62 Me. 194; Thames Steamboat Co. *v.* R. R. 24 Conn. 40; Mali *v.* Lord, 39 N. Y. 381; Aycriggs *v.* R. R. 1 Vroom, 460; Bard *v.* Yohn, 26 Penn. St. 482; Grandy *v.* Ferebee, 68 N. C. 356; Evansville R. R. *v.* Baum, 26 Ind. 70.

[5] The Thetis, L. R. 2 Adm. 365.

was to keep persons out of the same, while in the discharge of that duty, kicked the boy's hand and thereby loosened his hold and caused him to fall between the cars, which resulted in his being run over and killed. In a suit against the company by the administrator of the deceased to recover damages for the wrongful act, it was held, that while the act itself was not in the line of duty of any employee of the company, yet, if it was done whilst in the discharge of his duty to require persons to leave the cars and to prevent their remaining thereon, the company was liable.[1]

For the driver of a horse-car to invite and permit children to ride on its platform without pay, is an act sufficiently within the range of the driver's employment to make the road liable for injuries incurred by one of the children through the driver's negligence.[2] Yet this rule cannot be stretched so as to imply authority on the part of the engineer of a locomotive to invite a child on the machinery. Thus in a Pennsylvania case,[3] the evidence was that of a train of cars belonging to the defendants coming into a city, the engine, tender, and one car were detached from the remainder, and run under the charge of the fireman in the engineer's place, to a water-station belonging to the defendants. At the station, the fireman asked a boy ten years old, standing there, to turn on the water; whilst he was climbing on the tender to put in the hose, the remainder of the train came down with their ordinary force, and struck the car attached to the engine. The jar threw the boy under the wheel, and he was killed. In an action by the parents for his death, it was ruled that it not being in the scope of the engineer's or fireman's employment to ask any one to come on the engine, the defendants were not liable.[4]

[1] Northwestern R. R. *v.* Hack, 66 Ill. 238. See other cases infra, §§ 170, 648; and see Bayley *v.* R. R. L. R. 7 C. P. 415.

[2] Wilton *v.* R. R. 107 Mass. 108.

[3] Flower *v.* R. R. 69 Pa. St. 210.

[4] In the last cited case this point is thus satisfactorily discussed by Agnew, J.: . . . . "The business of an engineer requires skill and constant attention and watchfulness; and that of a fireman requires some skill and much attention. They are in charge of a machine of vast power, and large capacity for mischief. The responsibility resting on them, and especially on the engineer, is great, and neither should be permitted to delegate the performance of his duties to others. In doing so, without permission, they transcend their powers. There cannot, therefore, be any general author-

§ 164. Persons employed to repair a particular road have been held responsible for the negligence of their servants in leaving a heap of stones on the highway against which the plaintiff, on a dark night, drove, upsetting his cart, and being thereby damaged.[1]

When it appeared that a large corporation was transacting a business which required a particular kind of agent, and that A., with the apparent assent of the corporation, was acting as agent, the corporation was held liable for his torts within the range of such employment.[2]

§ 165. A stevedore employed to ship iron rails had a foreman whose duty it was (assisted by laborers) to carry the rails from the quay to the ship *after* the carman had brought them to the quay and unloaded them there. The carman not unloading the rails to the foreman's satisfaction, the latter got into the cart and threw out some of them so negligently that one fell upon and injured the plaintiff, who was passing by. It was held in the English common pleas (per Grove and Denman, JJ., Brett, J., dissenting), that the plaintiff on such a case was not to be nonsuited, but that there was a question for the jury whether the foreman was acting within the course of his employment, so as to render the stevedore responsible for his acts.[3]

§ 166. The defendant, a contractor under a district board, was engaged in constructing a sewer, and employed men with horses and carts, and the men so employed were allowed an hour for dinner, but were not permitted to go home to dine or

ity in the engineer and fireman which can embrace a request to perform the fireman's duty. Even an adult, to whom no injury would be likely to ensue, could not justify under the fireman's request. Much less can there be any presumption of authority to invite a boy of tender years to perform a service, which required him to clamber up the side of the engine or tender. It was a wrong on the part of the fireman to ask such a youth to do it. Whether the boy could be treated as a mere trespasser is scarcely the question. His youth might possibly excuse concurrent negligence, where there is clear negligence on the part of the company. Such were the cases of Lynch *v.* Nurdin, 1 A. & E. N. S. 39 (41 E. C. L. 422); Rauch *v.* Loyd, 31 Penn. St. (7 Casey) 358." See, to the same effect, Snyder *v.* R. R. 60 Mo. 413.

[1] Foreman *v.* Mayor of Canterbury, L. R. 6 Q. B. 214.

[2] Taff Vale R. R. *v.* Giles, 23 L. J. N. S. Q. B. 43.

[3] Burns *v.* Poulsom, L. R. 8 C. B. 563.

to leave their horses and carts; but one of the men went home, about a quarter of a mile out of the direct line of his work, to his dinner, and left his horse unattended in the street before his door. The horse ran away and damaged certain railings belonging to the plaintiff. It was held that it was properly left to the jury to say whether the driver was acting within the scope of his employment, and that they were justified in finding that he was.[1]

The plaintiff, a passenger on another road, on walking across a platform occupied by the defendants in company with other railroad companies, was injured by the negligence of a porter, a servant of the defendants, in dropping from a truck a portmanteau, which fell on the plaintiff. The defendants were held liable for the porter's negligence.[2]

Whether the act was in the course of employment is for the jury.

§ 167. When the act complained of was manifestly out of the course of the servant's employment, a nonsuit is proper. But where there is conflicting evidence, and when the extent of the employment is to be inferred from circumstances, the question goes to the jury under the supervision of the court.[3]

When the act is one which the master might have done himself, and when the servant is in the master's employ, there is a *primâ facie* case of liability made out.[4] But, as we will hereafter see,[5] a master is not liable for the negligence of his servants' subordinates, when it is within the scope of their power to act by subordinates, and when they have entire control of the work committed to them.[6]

Master not liable for

§ 168. But when the servant departs from the performance of his master's business, and wrongfully, though with the master's materials unlawfully taken, undertakes to

[1] Whatman *v.* Pearson, L. R. 3 C. P. 422.

[2] Tebbutt *v.* Bristol & Ex. R. R. Co. L. R. 6 Q. B. 73.

[3] McKenzie *v.* McLeod, 10 Bing. 385; Williams *v.* Jones, 3 H. & C. 256; Mitchell *v.* Crassweller, 13 C. B. 237; Whatman *v.* Pearson, L. R. 3 C. B. 422; Burns *v.* Poulsom, L. R. 8 C. B. 363; Foreman *v.* Mayor of Canterbury, L. R. 6 Q. B. 214; Holmes *v.* Mather, L. R. 10 Exch. 261; Abbott *v.* Rose, 62 Me. 194; Stevens *v.* Armstrong, 6 N. Y. 435; Courtney *v.* Baker, 60 N. Y. 1. See Whart. on Agency, §§ 158, 475.

[4] Jackson *v.* R. R. 47 N. Y. 274.

[5] Infra, § 189.

[6] See, also, Whart. on Agency, §§ 28, 579, 709, 756; Jewell *v.* R. R. 55 N. H. 89.

do something on his own account, the master ceases to be responsible for the servant's negligence.[1] independent wrongs.

In a leading case, which has pushed this exception to its furthest limit, the master has been held not to be liable for the negligence of a servant who burned a house down in trying to cleanse a chimney, it being shown that the servant's duty was not to cleanse the chimney, but only to light the fire.[2]

A railroad company is not liable for assaults committed by its servants on a person who is not in any sense a passenger,[3] although it is otherwise as to passengers.[4]

Where a coachman, after having used his master's horse and carriage in going upon an errand for his master, instead of taking them to the stable, used them in going upon an errand of his own, without his master's knowledge or consent, and, while doing so, he negligently ran into and injured the plaintiff's horse; it was ruled that his master was not liable.[5]

The defendant, a wine merchant, sent his carman and clerk with a horse and cart to deliver some wine, and bring back some empty bottles; but on their return, when about a quarter of a mile from the defendant's offices, the carman, instead of performing his duty, and driving to the defendant's offices, depositing the bottles, and taking the horse and cart to stables in the neighborhood, was induced by the clerk (it being after business hours) to drive in quite another direction on business of the clerk's, and while they were thus driving the plaintiff was run over, owing to the negligence of the carman; it was ruled that the defendant was not liable, for that the carman was not doing the act, in doing which he had been guilty of negligence, in the course of his employment as servant.[6]

[1] Mitchell *v.* Crassweller, 13 C. B. 237; Goodman *v.* Kennell, 3 C. & P. 168; Lamb *v.* Palk, 9 C. & P. 629; Sleath *v.* Wilson, 9 C. & P. 607; Peachey *v.* Rowland, 13 C. B. 182; Gray *v.* Pullen, 5 B. & S. 970; Sadler *v.* Henlock, 4 E. & B. 570; Williams *v.* Jones, 3 H. & C. 356, 602; Howe *v.* Newmarch, 12 Allen, 49; Bard *v.* Yohn, 26 Penn. St. 482; Little Miami R. R. *v.* Wetmore, 19 Ohio St. 110; Porter *v.* R. R. 41 Iowa, 358. See other cases in Wharton on Agency, § 479.

[2] McKenzie *v.* McLeod, 10 Bing. 385. See Williams *v.* Jones, 3 H. & C. 256.

[3] Porter *v.* R. R. 41 Iowa, 358. See Walker *v.* R. R. 23 L. T. N. S. 14.

[4] Supra, § 163; infra, § 169.

[5] Sheridan *v.* Charlick, 4 Daly, 338.

[6] Story *v.* Ashton, L. R. 4 Q. B. 476. "I am of opinion," said Cock-

In a case before the English common pleas division in 1877, the evidence was that it was the duty of a carman of the defendant, who was a brewer, with the defendant's horse and cart to deliver beer to the customers, and on his return collect empty casks, for each of which he received a penny. The carman having, without the defendant's permission, taken out the horse and cart for a purpose entirely his own, on his way back collected some empty casks, and while thus returning, the plaintiff's cab was injured by the carman's negligent driving. The carman was paid by the defendant as usual for each of the casks collected. It was ruled that the defendant was not liable.[1]

Nor for servant's malicious collateral acts.

§ 169. "Where a servant," says Lord Kenyon,[2] "quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, his master will not be liable for such acts."[3] An intentional wrong, however, by a

burn, C. J., "that the rule must be discharged. I think the judgments of Maule and Cresswell, JJ., in Mitchell *v.* Crassweller,[1] express the true view of the law, and the view which we ought to abide by; and that we cannot adopt the view of Erskine, J., in Sleath *v.* Wilson,[2] that it is because the master has intrusted the servant with the control of the horse and cart that the master is responsible. The true rule is, that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant. I am very far from saying, if the servant when going on his master's business took a somewhat longer road, that owing to this deviation he would cease to be in the employment of the master, so as to divest the latter of all liability; in such cases it is a question of degree as to how far the deviation could be considered a separate journey. Such a consideration is not applicable to the present case; because here the carman started on an entirely new and independent journey which had nothing at all to do with his employment. It is true that in Mitchell *v.* Crassweller,[3] the servant had got nearly if not quite home, while, in the present case, the carman was a quarter of a mile from home; but still he started on what may be considered a new journey entirely for his own business, as distinct from that of his master; and it would be going a great deal too far to say that under such circumstances the master was liable."

[1] Rayner *v.* Mitchell, 25 W. R. 633; L. R. 2 C. P. D. 357.

[2] McManus *v.* Crickett, 1 East, 106, adopted in Wright *v.* Wilcox, 19 Wend. 343.

[3] See, to same effect, Lyons *v.* Martin, 8 Ad. & El. 512; Holmes *v.* Mather, L. R. 10 Exch. 261; Mali *v.*

[1] 13 C. B. 237; 22 L. J. C. P. 100.
[2] 9 C. & P. 607, 612.
[3] 13 C. B. 237; 22 L. J. C. P. 100.

servant, when incidental to his service, and in supposed furtherance of his master's interests (no matter how mistaken in this respect, or how malicious or violent the servant may be), may be imputed to the master.[1] Thus a master is liable for his servant's act in running, wilfully or otherwise, into another's carriage, for the purpose of extricating his own.[2] So, where the driver of a horse-car upon the defendant's railroad, in order to make his trip on time and not for any purpose of his own, recklessly or maliciously undertook to crowd plaintiff's buggy, which was on the track in front of the car, off from such track, it has been ruled by the New York court of appeals, that the defendant, in whose employ the driver was, was liable for the injury resulting from such recklessness.[3] So, it has been held in Massachusetts, that a master who employs a servant to protect his property is liable for his servant's assaults, when so employed, in supposed furtherance of the employment, though against the master's express instructions.[4] And in England it has been explicitly ruled that no distinction in cases of this class is to be taken between fraudulent representations of a servant, and other wrongs.[5] Liability, also, attaches when the master is bound by contract to do a particular thing, with which duty the servant's misconduct interferes.[6]

Hence it may be for the jury to determine whether the disputed act proceeded from private malice, or was incidental to a discharge of the servant's duties. Thus, where a passenger in an omnibus is struck by the driver's whip, this is held to be

Lord, 39 N. Y. 381; Snodgrass *v.* Bailey, 3 Grant's Cas. 43; Moore *v.* Sanborne, 2 Mich. 519; Oxford *v.* Peter, 28 Ill. 434; and cases cited Whart. on Agency, § 479.

[1] Seymour *v.* Greenwood, 6 H. & N. 356; Mackay *v.* Bank, L. R. 5 P. C. 394; Arthur *v.* Balch, 23 N. H. 157; Hewett *v.* Swift, 3 Allen, 423; Corrigan *v.* Sugar Co. 98 Mass. 577; Shea *v.* R. R. 62 N. Y. 180; Rounds *v.* R. R. 64 N. Y. 129; Garretson *v.* Duenckel, 50 Mo. 104; Johnson *v.* Barber, 5 Gilm. 425; Day *v.* Owen, 5 Mich. 520; Smith *v.* Webster, 23 Mich. 298; Northwestern R. R. *v.* Hack, 66 Ill. 238; Craker *v.* R. R. 36 Wis. 657.

[2] Pollock, B., Seymour *v.* Greenwood, 6 H. & N. 359; Croft *v.* Allison, 4 B. & Ald. 590; Wolfe *v.* Mersereau, 4 Duer, 473; Limpus *v.* London Omnibus Co. cited infra, § 171.

[3] Cohen *v.* R. R. 15 Alb. L. J. 289.

[4] Barden *v.* Felch, 109 Mass. 154.

[5] Mackay *v.* Bank, L. R. 5 P. C. 394.

[6] Whart. on Agency, § 543; Tuel *v.* Weston, 47 Vt. 634; Ramsden *v.* R. R. 104 Mass. 117. Infra, §§ 178, 646 *a*.

primâ facie evidence of negligence by the driver in the course of his employment; and even if it appear that the blow was struck at the servant of another omnibus with whom there had been a dispute, and who had jumped on the omnibus step to get its number, it is a question for the jury whether the blow was struck by the driver in private spite, or in supposed furtherance of his employer's interests.[1]

A railroad company has been held liable for an assault of one of its porters in wrongfully removing a passenger from a car,[2] and for oppressive acts of a conductor, wilful or wanton, to a passenger.[3] A principal, also, who authorizes, without restrictions, a collecting agency to collect a debt, is liable for the misconduct of the agency in wrongfully arresting a debtor.[4]

When principal may be liable for *culpa in eligendo*.

§ 170. There may be cases, also, in which a master, not liable directly for his servant's misconduct, may be liable for *culpa in eligendo*, or negligence in the selection of the servant.[5] And even in suits where the master is directly liable for the servant's misconduct, evidence of *culpa in eligendo* may be relevant for the purpose of increasing damages.[6] Thus in an action against a railroad company to recover damages for injuries resulting from the negligence of an employee, after the fact of negligence has been established, evidence that the employee was intoxicated at the time of the injury,

[1] Ward *v.* General Omnibus Company, 42 L. J. C. P. 265; 28 L. T. N. S. 850, Exch. Cham., affirming the decision of C. P. 21 W. R. 358; 27 L. T. N. S. 761.

[2] Bayley *v.* R. R. L. R. 7 C. P. 415; and see infra, § 646 *b;* Hanson *v.* R. R. 62 Me. 84.

[3] Weed *v.* R. R. 17 N. Y. 362; and see, more fully, infra, § 178.

[4] "We think," said Lord, J., when this question arose in the supreme court of Massachusetts in 1877, "any person who employs such agents, with knowledge on his part, giving no special instructions, authorizes the agents to use, and becomes responsible for injuries caused by the use of, such means as they see fit to adopt in the prosecution of his business for his benefit, whether those means be honorable and proper, or whether resort is had to insolence and insult, or to misuse or abuse of legal process. They are his servants, to do his work in their own manner, though that manner may be unjustifiable or illegal." Caswell *v.* Cross, 120 Mass. 545.

[5] Infra, §§ 224, 237, 493. See, particularly, Wharton on Agency, §§ 34, 277, 479–483, 538. The master, however, cannot defend the servant's character unless it is attacked. Supra, § 159.

[6] Cleghorn *v.* R. R. 56 N. Y. 44; Wharton on Agency, § 277; Wharton on Ev. §§ 48–56.

and that he was a man of intemperate habits, which was known by the agent of the company having power to employ and discharge such employees, has been held proper, with the view of claiming exemplary damages upon the ground of gross negligence.[1]

§ 171. Where the servant is acting within the scope of his employment, the master is liable,[2] even for an act "the very reverse of that which the servant was actually directed to do."[3] Thus, in an English case,[4] the evidence was that a servant, employed by the defendants to drive their omnibus, drew his omnibus across the road in front of a rival omnibus of the plaintiff to block the latter, and in so doing collided with, and injured the plaintiff's omnibus. It was proved that the defendants' servant had express directions from his masters not to obstruct other omnibuses; and he proved that he did it on purpose, and to serve the plaintiff's driver as the latter had served him. On the trial of the case, the judge (Martin, B.) directed the jury that if the defendants' driver acted carelessly, recklessly, wantonly, or improperly, but in the course of his employment, and in doing that which he believed to be for the interest of the defendants, then the defendants were responsible for the act of their servant, and that the instructions given by the defendants to the driver not to obstruct other omnibuses, if he did not observe them,

It makes no difference that the negligence was in direct disobedience to master's private instructions.

[1] Cleghorn *v.* R. R. Co. 56 N. Y. 44; but see Wharton on Evidence, § 56.

[2] See supra, § 160.

[3] Kelly, C. B. in Bayley *v.* Manchester, Sheffield & Lincolnshire Ry. Co. Law Rep. 8 C. P. 153 (Exch. Ch.); aff. *S. C.* Law Rep. 7 C. P. 445; Burns *v.* Poulsom, Law Rep. 8 C. P. 563; Joel *v.* Morrison, 6 C. & P. 503; Whatman *v.* Pearson, Law Rep. 3 C. P. 422; Phil. R. R. *v.* Derby, 14 How. 468; Goddard *v.* R. R. 57 Me. 202; Locke *v.* Stearns, 1 Metc. 500; Howe *v.* Newmarch, 12 Allen, 49; Bryant *v.* Rich, 106 Mass. 180; Barden *v.* Felch, 109 Mass. 154; Weed *v.* R. R. 17 N. Y. 362; Jackson *v.* R. R. 47 N. Y. 274; Cosgrove *v.* Ogden, 49 N. Y. 255; Hestonville R. R. *v.* Gray, 3 Notes of Cases, 421; Penn. St. Nav. Co. *v.* Hungerford, 6 Gill & J. 291; Moir *v.* Hopkins, 16 Ill. 213; Oliver *v.* Trans. Co. 3 Oregon, 84; Priester *v.* Angley, 5 Rich. 44; Garretson *v.* Duenckel, 50 Mo. 104; Passeng. R. R. *v.* Young, 21 Ohio St. 518; Sherley *v.* Billings. 8 Bush, 147; Robinson *v.* Webb, 11 Bush, 464; Duggins *v.* Watson, 15 Ark. 118.

[4] Limpus *v.* London Gen. Om. Co. 1 Hur. & C. 526; Whart. on Agency, § 481; Smith's Mast. & Serv. (2d ed.) 183; Wood's Mast. & Serv. § 295, and cases cited supra, § 169.

were immaterial as to the question of the master's liability; but that if the true character of the driver's act was, that it was an act of his own, and in order to effect a purpose of his own, then the defendants were not responsible. Upon this direction being excepted to, the exchequer chamber held that it was correct.[1]

§ 172. *A special service, for a particular period or purpose,*[2] *is enough to constitute the liability*, provided the servant at the time is acting within the general scope of his employment, and is not obeying the directions of a third person[3] who has some title to give directions,[4] such person not being an intermediate agent of the master;[5] and is not wilfully acting for himself instead of for his master.[6]

Not necessary that the service should have been permanent.

§ 173. Hence it is a logical inference that the principle does not cease to operate when the servant is in the employ of a third person, if released for the particular work in question. Thus the fact that a person, who being in charge of a horse with the assent of its owner, and engaged on his business, caused an injury by negligent riding, was in the general employment of a third person, does not exempt the owner of the horse from lia-

Nor does it matter that the servant is in the general employ of third persons.

[1] See, also, Green *v.* Omnibus Co. 7 C. B. N. S. 290. And see Whiteley *v.* Pepper, L. R. 2 Q. B. D. 276; 25 W. R. 607, where a carman of defendant, a coal merchant, having forgotten the name of the person to whom he was ordered to deliver some coals, delivered them to the occupier of a house who told him that he had not ordered them, but would take them as they were there. By the negligence of the carman in not giving notice to the plaintiff that the iron gird or plate was up, the plaintiff was injured. It was held that the defendant was liable.

[2] Infra, § 177. McLaughlin *v.* Pryor, 4 M. & G. 48; 1 C. & M. 354; Croft *v.* Allison, 4 B. & Ald. 590; Taverner *v.* Little, 5 Bing. N. C. 678; Wheatley *v.* Patrick, 2 M. & W. 650; Wilson *v.* Peverly, 2 N. H. 548. In Caswell *v.* Cross, 120 Mass. 345, it was held that a party who employs a firm of collecting agents, in response to an advertising card, in which they announce that they will treat his debtors "with delicacy, so as not to offend them, or with such severity as to show that no trifling is intended," giving no special instructions, is liable for their misconduct in treating with a debtor.

[3] Murphy *v.* Caralli, 3 H. & C. 462; Coomes *v.* Houghton, 102 Mass. 211; Kimball *v.* Cushman, 103 Mass. 194.

[4] Garretzen *v.* Duenckel, 50 Mo. 104.

[5] Stone *v.* Cartwright, 6 T. R. 411; Brown *v.* Lent, 20 Vt. 529.

[6] Mitchell *v.* Crassweller, 13 C. B. 237; Storey *v.* Ashton, L. R. 4 Q. B. 476; Story on Agency, § 451, note by Green.

bility for the injury, unless the relation of the third person to the business was such as to give him exclusive control of the means and manner of its accomplishment, and exclusive direction of the persons employed therefor.[1]

So, as is said by Park, J.,[2] "there may be special circumstances which may render the hirer of job-horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner which occasions the damage complained of."

§ 174. It has been even held, in Pennsylvania, that a railroad company engaged in carrying oil, is liable for the negligent acts of the superintendent of an oil company, having temporary charge of the railroad company's cars, for the purpose of loading the cars with oil.[3] On the other hand, a master, by transferring a servant in his general employ to another for a special act, may cease to be liable for such servant's negligence in the performance of such act.[4]

§ 175. Nor is the case varied when the servants are appointed by middle-men.[5] Thus a railroad corporation on this principle is responsible for the negligence of its subalterns of the lowest grade, provided they are in the range of its appointments;[6] a municipal corporation, for negligence of sub-contractors;[7] the owner of a mine who controls it, for the negligence of under-servants who are appointed by a manager whom the owner appoints;[8] the owner of property who receives its profits, but deputes its intermediate management to an agent, for the negli-

Not necessary that appointment should spring directly from master.

[1] Kimball *v.* Cushman, 103 Mass. 194.

[2] Quarman *v.* Burnett, 6 M. & W. 499. Infra, § 177.

[3] Oil Creek R. R. *v.* Keighron, 74 Penn. St. 316. See infra, § 179.

[4] Rourke *v.* R. R. L. R. 2 C. P. D. (C. A.) 205. See Murray *v.* Currie, L. R. 6 C. P. 24.

[5] Wilson *v.* Peto, 6 Moore, 47; Althorf *v.* Wolfe, 22 N. Y. 355.

[6] Machu *v.* London & S. W. R. C. 2 Exch. 415. See Flower *v.* Penn. R. R. 69 Penn. St. 210, as to limit of servant's power of appointing subalterns.

[7] Hamburg Turnpike Co. *v.* City of Buffalo, 1 N. Y. Sup. Ct. 537; Buffalo & Hamb. Turnpike Co. *v.* Buffalo, 58 N. Y. 639.

[8] Laugher *v.* Pointer, 5 B. & C. 554.

gence of the laborers whom the agent appoints;[1] a warehouseman who appoints a master porter, for the negligence of the master porter's servants;[2] and the owner of a ship, for the negligence of the crew who are selected by the master at the owner's desire, the master being selected by the owner.[3] Nor need the master be cognizant of the fact of employment, if the employment were authorized by him.[4] But, as will be seen, the mere fact that an owner has the power of removing workmen appointed by a contractor not under the owner's control does not make the owner responsible for the workman's negligence.[5] Nor, when it is not within the scope of a servant's authority to appoint subordinates, is the master liable for the negligence of the subordinates.[6]

Where master is required by law to employ a particular officer.

§ 175 *a*. A principal who is required by law to employ a particular officer is not, as a usual thing, liable for the torts of the officer.[7] In such case, however, the master may be liable for *culpa in eligendo* if he has a range of persons from whom to select.[8] For the negligence of a pilot whom the owner is compelled by law to take, the

[1] Holmes *v.* Onion, 2 C. B. N. S. 790; Suydam *v.* Moore, 8 Barb. 358; Althorf *v.* Wolf, 22 N. Y. 355.

[2] Randleson *v.* Murray, 8 Ad. & El. 109.

[3] Martin *v.* Temperley, 4 Q. B. 298; Dunford *v.* Trattles, 12 M. & W. 529; Fenton *v.* City of Dublin Steam Packet Co. 8 Ad. & El. 835; Cuthbertson *v.* Parsons, 12 C. B. 304; Shuster *v.* McKellar, 7 E. & B. 724.

[4] Ibid. See Railroad *v.* Hanning, 15 Wall. 649.

[5] Reedie *v.* London & N. W. R. R. 4 Exch. 244. See Overton *v.* Freeman, 11 C. B. 867. Infra, § 182.

[6] Whart. on Agency, §§ 28, 579, 645, 709, 756; Jewell *v.* R. R. 55 N. H. 84.

[7] See Whart. on Agency, §§ 482, 538. See Wood, Master & Servant, § 311; Milligan *v.* Wedge, 12 Ad. & El. 737; De Forrest *v.* Wright, 2 Mich. 368.

[8] Whart. on Agency, §§ 34, 277, 479–483.

"The rule of *respondeat superior* does not exist when the power does not exist in the employer to select his servants, to discharge them if careless, unskilful, or incompetent, or control them while in his employ. Blake *v.* Ferris, 5 N. Y. 48; Peck *v.* Mayor, 8 Ibid. 222; Kelly *v.* Mayor, 11 Ibid. 432. Accordingly, where, as in New York city, a board of public instruction, although a branch of a municipal government, has complete control of all its employees and servants, and the municipal government has no control over the appointment, management, and discharge of such employees, the doctrine of *respondeat superior* does not apply between the municipal government and such employees, and the city is not responsible for the acts of such employees." Ham *v.* Mayor, Alb. L. J. Sept. 29,

owner is not liable.[1] It is otherwise when the owner is at liberty to select between a number of the pilots.[2]

There must be the power of supervision reserved.

§ 176. Where a servant is employed to do a lawful work, and no power of supervision is reserved to the master, but the whole control is vested in the servant, then, if there be no negligence in the selection of the servant,[3] the master is not liable for the servant's negligences in doing the work.[4] A brig, which was towed at the stern of a steamboat, employed in the business of towing vessels in the river Mississippi, below New Orleans, was, through the negligence of the master and crew of the steamboat, over whom those in charge of the brig had no control, brought into collision with a schooner lying at anchor in the river. A suit was brought by the owners of the schooner against the owner of the brig for the damages sustained by the collision; and the question was, whether he was liable therefor. It was held, upon full argument, that he was not, upon the ground that the master and crew of the steamboat were not the servants of the owner of the brig; were not appointed by him; did not receive their wages or salaries from

1877, citing Ferry *v.* Mayor, 8 Bosw. 504; Treadwell *v.* Mayor, 1 Daly, 123; Gildersleeve *v.* Board of Education, 17 Abb. 201; Coulter *v.* Same, 63 N. Y. 365; 2 Dillon on Mun. Corp. § 772; Maxmillian *v.* Mayor, 62 N. Y. 162.

[1] Lucey *v.* Ingram, 6 M. & W. 302.

[2] See Fletcher *v.* Braddick, 5 B. & S. 182; Bussy *v.* Donaldson, 4 Dal. 206; Sherlock *v.* Alling, 93 U. S. (3 Otto), 99. As to the general rule in respect to pilotage, see Abbott on Shipping, 5th Am. ed. 210; Angell on Carriers, 5th ed. § 193.

[3] See supra, § 170.

[4] Infra, § 182; Milligan *v.* Wedge, 12 Ad. & El. 737; Knight *v.* Fox, 5 Exch. 721; Burgess *v.* Gray, 1 C. B. 578; Reedie *v.* London & N. W. R. R. 4 Exch. 244; McGuire *v.* Grant, 1 Dutch. 356; Elder *v.* Bemis, 2 Metc. 599; Ballou *v.* Farnum, 9 Allen, 47; Corbin *v.* Mills, 27 Conn. 274; Burke *v.* R. R. 34 Conn. 474; McGuire *v.* Grant, 25 N. J. L. 356; Stevens *v.* Armstrong, 6 N. Y. 435; Williamson *v.* Wadsworth, 49 Barb. 294; Merrick *v.* Brainerd, 38 Barb. 574; Nashville, &c. R. R. *v.* Carroll, 6 Heisk. 347. Where the defendant employed a stevedore to unload his vessel, and the stevedore employed his own laborers, among whom was the plaintiff, and also one of the defendant's crew, named Davis, over whom he had entire control, and whom he paid, to assist in unloading; and where the plaintiff, while engaged in the work, was injured by the negligence of Davis; it was held that Davis was not the servant of the defendant so as to make the defendant responsible for Davis's negligence. Murray *v.* Currie, L. R. 6 C. P. 24.

him; he having no power to order or control them in their movements.[1] So where a train of cars of one railroad company, running on the road of another company, is under the exclusive control of the servants of the latter, the latter is solely liable for all damages occurring through negligence. On the other hand, if the servants of both companies jointly control the train, both companies are liable.[2] "The principle to be extracted from the cases is said to be, that a person, natural or artificial, is not liable for the acts or negligence of another, unless the relation of master and servant, or principal and agent, exist between them; and that when an injury is done by a person exercising an independent employment, the person employing him is not responsible to the person injured."[3]

As will be hereafter seen, a master cannot on this ground defend himself for injuries caused by acts incidental to the work,[4] nor for nuisances;[5] nor is a master liable for neglecting duties which he commits exclusively to the care of a competent deputy.[6]

§ 177. *The relationship of master and servant must exist as to the act the imperfect performance of which constitutes the negligence complained of.*[7] — When a servant is appointed for a special work, the master's liability, unless he has exhibited himself to the community as more largely responsible, is limited to such special work.[8] To constitute such liability there must be em-

[1] Sproul *v.* Hemingway, 14 Pick. 1.

[2] Nash. & C. R. R. *v.* Carroll, 6 Heisk. 347.

[3] Agnew, J., Allen *v.* Willard, 57 Penn. St. 374; affirmed by Earl, C., in McCafferty *v.* R. R. 61 N. Y. 184. See, to same effect, Maxmilian *v.* Mayor, 62 N. Y. 162; Ham *v.* Mayor, N. Y. Ct. of App. 1877; Alb. L. J. Sept. 29, 1877.

[4] Infra, § 186.

[5] Infra, § 187.

[6] See infra, § 181.

[7] McLaughlin *v.* Pryor, 4 Scott N. R. 655; 4 Man. & G. 84; Quarman *v.* Burnett, 6 M. & W. 499; the judgments of Abbott, C. J., and Littledale, J., in Laugher *v.* Pointer, 5 B. & C. 547; Dalyell *v.* Tyrer, E., B. & E. 898; Hart *v.* Crowley, 12 A. & E. 378; Taverner *v.* Little, 5 Bing. N. C. 678; Croft *v.* Alison, 4 B. & Ald. 590; Judgm., Seymour *v.* Greenwood, 7 H. & N. 358; *S. C.* 6 Ibid. 359; Smith *v.* Lawrence, 2 Moo. & Rob. 1; Sammell *v.* Wright, 5 Esp. N. P. C. 263; Scott *v.* Scott, 2 Stark. N. P. C. 438; Brady *v.* Giles, 1 M. & Rob. 494; Pickens *v.* Diercker, 21 Ohio St. 212. See, also, Herlihy *v.* Smith, 116 Mass 265.

[8] Brown *v.* Purviance, 2 Har. & G. 316.

ployment in the particular case.[1] Thus in a leading English case, A., the owner of a carriage, hired to draw his carriage, of B., a stable-keeper, a pair of horses for a day, the driver, C., to be appointed by the stable-keeper, and there being no evidence of any adoption or recognition by A. of C. as his servant. Through the negligence of C. injury occurred to D. It was held by Lord Tenterden, C. J., and Littledale, J., that A. was not responsible for C.'s negligence. "According to the rules of law," said Littledale, J., "every man is answerable for injuries occasioned by his own personal negligence; and he is answerable also for acts done by the negligence of those whom the law denominates *his* servants; because such servants represent the master himself, and their acts stand upon the same footing as his own. And in the present case, the question is, whether the coachman, by whose negligence the injury was received, is to be considered a servant of the defendant. For the acts of a man's own domestic servants there is no doubt that the law makes him responsible; and if this accident had been occasioned by a coachman who constituted a part of the defendant's own family, there would be no doubt of the defendant's liability; and the reason is, that he is hired by the master either personally, or by those who are intrusted by the master with the hiring of servants, and he is therefore selected by the master to do the business required of him." And this applies to "other servants whom the master or owner selects and appoints to do any work; or superintend any business, although such servants be not in the immediate employ or under the superintendence of the master."[2]

Relationship must exist as to special act.

In another English case,[3] the lessee of a ferry hired of the defendants for the day a steamer with a crew to carry his passengers across. The plaintiff, having paid his fare to H., passed across on the steamer, and while on board was injured by the

[1] Supra, § 172; Stevens *v.* Armstrong, 6 N. Y. 435.

[2] Laugher *v.* Pointer, 5 B. & C. 547.

But where (Smith *v.* Lawrence, 2 Man. & R. 1; see, also, Herlihy *v.* Smith, 116 Mass. 265) the owner of a carriage hired four post-horses and two postilions of A., a livery stable-keeper, for the day, to run from London to Epsom and back, and in returning, the postilions damaged the carriage of B., it was held that A., as owner of the horses and master of the postilions, was liable to B. for such damage. See Dansey *v.* Richardson, 3 E. & B. 144.

[3] Dalyell *v.* Tyrer, Ell., Bla. & Ell. 899; 28 L. T. Q. B. 52; Crocker *v.* Calvert, 8 Ind. 127.

breaking of a rope, owing to the negligence of the crew in the manner of mooring; and it was held that the crew remained the servants of the defendants, who were therefore liable for their negligence; and that, as the negligence was such as would have made the defendants liable to a mere stranger, and the plaintiff was on board with their consent, it was immaterial that he was a passenger under a contract with H.

The defendants, two elderly ladies, being possessed of a carriage of their own, were furnished by a job-master with a pair of horses, with a driver, by the day or drive. They gave the driver a gratuity for each day's drive, provided him with a livery hat and coat, which were kept in their house; and after he had driven them constantly for three years, and was taking off his livery in their hall, the horses started off with their carriage and inflicted an injury upon the plaintiff. It was held, that the defendants were not responsible, as the coachman was not their servant, but the servant of the job-master.[1] On the same reasoning the owner of a horse and carriage is not liable for an injury caused by the negliligent driving of a borrower, to a third person, if they were not being used at the time in the owner's business.[2] Yet, as has been already seen, a person may under such circumstances render himself personally liable by giving special directions to the driver, or by otherwise taking the management of the coach into his own hands.

A master, as we have seen,[3] is not liable for his servant's torts when out of service. A master, consequently, who gives his servant liberty for a day, to go to a fair, taking the master's horse and wagon, is not liable for injury done by the servant to third parties during the day with the horse and wagon.[4]

Liability, as master, may be imposed by a special statute, so as to make an employer liable to third parties. Thus, in a case determined by the English queen's bench division, in 1877, the evidence was that the defendant, a cab proprietor, let a cab, with the use of two horses, to a driver for a *per diem* compensation, the driver being left at liberty as to the time for starting from or returning to the defendant's stables. The driver's licensed

[1] Quarman *v.* Burnett, 6 Mee. & W. 499.

[2] Herlihy *v.* Smith, 116 Mass. 265.

[3] Supra, § 162; Rayner *v.* Mitchell, L. R. 2 C. P. D. 357.

[4] Bard *v.* Yohn, 26 Penn. St. 482.

number, but no name, was on the cab. The driver, having put down his last fare one evening, was returning to the stables, when, for purposes of his own, he drove a short distance beyond the stables, and on his way back he negligently drove over the plaintiff. It was ruled that this arrangement between defendant and his driver constituted the relation of bailor and bailee of the cab and horses; but that, so far as the public were concerned, the relation was, by the Metropolitan Public Carriage Act, 1869, that of master and servant.[1]

§ 178. By the Roman law, to adopt the exposition of a recent intelligent Swiss writer,[2] the *conductor operis* is liable for the wrongful acts (Schuld) of his workmen, which prevent the performance of his contract. Of this contract the first element is the due performance of the work assumed; the second is the careful handling and care of the locator's material given to be worked upon. Hence the contract may be violated either by imperfect execution either as to quality or time, or by the injury of the locator's material.[3]

Where a person undertakes to do a particular work, he is liable for his subordinate's negligence in performing such work.

The Roman law does not accept the theory which rests the conductor's liability in such case on a silent guarantee. Some passages from the Digest are cited, indeed, to sustain this theory; but as to the principal,[4] it has been well observed that if the jurist here apparently makes the *conductor operis* liable for the *damnum* of the *custos*, this is to be understood *cum grano salis;* the true meaning being, that the *conductor* becomes liable for neglect in respect to the choice or oversight of the *custos*.

In our own law the same results are reached. The master is "responsible *civiliter* for the wrongful act of the servant causing injury to a third person, *whether the act was one of negligence or of positive nonfeasance*, provided the servant was at the time acting for the master, and within the scope of the business intrusted to him."[5] Hence an agent who is bound by contract to

[1] Venables *v.* Smith, 36 L. T. Rep. N. S. 509.

[2] Wyss, Haftung für fremde Culpa. Zurich, 1867. Infra, § 714. As to assaults committed by servants of carriers, see supra, § 169; infra, § 646.

[3] See Ellis *v.* Sheffield Gas Co. 2 E. & B. 767. Infra, § 183.

[4] L. 41. D. h. t. 19. 2.

[5] Andrews, J., Rounds *v.* R. R. 64 N. Y. 133, citing Higgins *v.* Turnpike Co. 46 N. Y. 23. See, fully, Wharton on Agency, §§ 276, 474, 475.

do a particular thing (*e. g.* carry a passenger) is liable for the trespasses, frauds, and misfeasances of his ancillary agents in doing such thing.[1]

It has, however, been held that a person contracting to do a particular job does not, by accepting and paying for work done thereon by a mechanic without his prior authority, make himself liable for injuries caused to a third person by a negligent act committed by the mechanic while doing the work, but not a part or result of the work itself. "This would not be an adoption by the defendant of anything that was not a part of or result from the work thus accepted. It would not, of itself, establish the relation of master and servant, with all its incidental consequences." [2]

Nor does it make any difference that the service is gratuitous, or for the benefit of the plaintiff.

§ 179. If in such case the defendant would be liable for his own negligence, he is liable for the negligence of his servants, acting within the range of their employment. Thus where the defendant (a gas company), being informed that gas was escaping in the cellar of an occupied house, sent its employee to ascertain the location of the leak (it being responsible for the loss and repairs, if the leak was in the service pipe), and the person so sent, by lighting a match in the cellar, caused an explosion, by which the plaintiff was injured; it was ruled in New York, that the employee, although acting for the benefit of the occupants of the house as well as of the defendant, was the agent of the defendant only, and the defendant was liable for his negligence. If the employee, so argued the court, is incompetent or ignorant, it is negligence to select him or send him without proper instruction. If competent, the master is liable for his careless perform-

[1] Supra, § 169; infra, § 646 *b*. Wharton on Agency, § 543; Seymour *v.* Greenwood, 7 H. & N. 355; Bayley *v.* R. R. L. R. 7 C. P. 415; Chamberlain *v.* Chandler, 3 Mason, 242; Nieto *v.* Clark, 1 Cliff. 145; Goddard *v.* R. R. 57 Me. 202; Howe *v.* Newmarch, 12 Allen, 55; Simmons *v.* St. Co. 97 Mass. 361; 100 Mass. 34; Ramsden *v.* R. R. 104 Mass. 107; Bryant *v.* Rich, 106 Mass. 180; Weed *v.* R. R. 17 N. Y. 362; Rounds *v.* R. R. 64 N. Y. 129; Pittsburg, &c. R. R. *v.* Hinds, 53 Penn. St. 512; Balt. &c. R. R. *v.* Blocher, 27 Md. 277; New Or. R. R. *v.* Allbritton, 38 Miss. 242; Shevley *v.* Billings, 8 Bush, 147; Day *v.* Devens, 5 Mich. 520; Craker *v.* R. R. 36 Wis. 657; and distinctions noticed supra, § 169. As to railroad company's liability for its porter's negligence in delivering goods, see infra, § 612.

[2] Coomes *v.* Houghton, 102 Mass. 211.

ance of his employment. If the service was the business of the defendant, although beneficial to the occupants, the defendant was bound to exercise ordinary care and prudence. Even if the service was gratuitous, the company was bound to due diligence in discharge of the duties it undertook.[1] And in a Massachusetts case,[2] the owner of a carriage and horses was held liable for the negligent driving of his brother-in-law, to whom they were intrusted, the brother-in-law being at the time of the collision engaged in the owner's business, though not specially engaged as a servant, or receiving any compensation.[3]

Even a volunteer's negligence may be imputed to the master, when the master, or his authorized representative, accepts the services of the volunteer, or permits him to act.[4]

Master cannot by special contract with employee make the latter exclusively liable.

§ 180. An employer cannot, in matters he is bound to take charge of himself, relieve himself from liability for negligence by a contract with his employee that the latter shall be exclusively liable.[5]

If the employer has a public duty to perform, the liabilities connected with such duty he cannot shift.[6]

But he may relieve himself by transferring whole business to contractor.

§ 181. When, however, a contractor or other special agent takes entire control of a work, the employer not interfering, the employer, supposing there was no negligence in the selection of the contractor, is not liable to third parties for injuries to such parties by the contractor's negligence, or the negligence of his servants, supposing the act contracted for was lawful.[7]

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

[2] Kimball *v.* Cushman, 103 Mass. 194.

[3] See cases cited supra, § 173.

[4] Whart. on Agency, §§ 62–69, 85; Hill *v.* Morey, 26 Vt. 174.

[5] Brewer *v.* Peate, L. R. 1 Q. B. D. 321; Water Co. *v.* Ware, 16 Wall. 566; Milford *v.* Holbrook, 9 Allen, 21; Shipley *v.* Fifty Associates, 106 Mass. 194; Congreve *v.* Smith, 18 N. Y. 79; Congreve *v.* Morgan, 18 N. Y. 84; Storrs *v.* Utica, 17 N. Y. 108; Creed *v.* Hartmann, 29 N.Y. 960; Mullen *v.* St. John, 57 N. Y. 567; Clark *v.* Fry, 8 Ohio St. 358.

[6] Ibid. And see fully, infra, §§ 180, 956–980.

[7] Whart. on Agency, § 482; Cuthbertson *v.* Parsons, 12 C. B. 304; Rapson *v.* Cubitt, 9 M. & W. 710; Welfare *v.* R. R. 4 Q. B. 693; Reedie *v.* R. R. 4 Exch. 243; Allen *v.* Hayward, 7 Q. B. 960 (overruling Bush *v.* Steinman, 1 B. & P. 403); Rourke *v.* R. R. L. R. 1 C. P. D. 205; Chicago *v.* Robbins, 2 Black (U. S.), 417; Tibbetts *v.* R. R. 62 Me. 437; Clark *v.* R. R. 28 Vt. 103; Hilliard *v.* Richard-

Thus, for instance, where the owner of land employs a contractor to build a house for him, and while the building, under the contract, is in the contractor's exclusive possession, a stranger is injured by the negligence of the contractor's workman, the owner of the land is not liable for such injury.[1] "The test is, whether the defendant retained the power of controlling the work."[2] As a consequence, when a duty is absolutely and unreservedly transferred by a contractor to a sub-contractor, the contractor, unless there be *culpa in eligendo*, is not liable for the sub-contractor's negligence.[3] Thus the defendants, who were employed by A. to pave a district, sub-contracted with B. to pave a particular street. B.'s workmen, when paving such street, left some stones exposed in such a way that the plaintiff was injured by falling over these stones. No personal interference of the defendants with, or sanction of, the work of laying down the stones was proved. It was held in England that the defendant was not liable.[4] In New York, where the defendants, who had a license from the city to construct, at their own expense, a sewer in a public street, engaged another person by contract to construct the whole work at a stipulated price, it was held that they were not liable to third persons for any injury resulting from the negligent condition in which the sewer had been left over night by the workmen engaged in its construction.[5] It was further

son, 3 Gray, 349; Linton *v.* Smith, 8 Gray, 147; Forsyth *v.* Hooper, 11 Allen, 419; Lawrence *v.* Shipman, 39 Conn. 586; Kelly *v.* Mayor, 11 N. Y. 432; McCafferty *v.* R. R. 61 N. Y. 178; Cuff *v.* R. R. 35 N. J. L. (6 Vroom), 17; Painter *v.* Pittsburg, 46 Penn. St. 213; Wray *v.* Evans, 80 Penn. St. 102; Cincinnati *v.* Stone, 5 Ohio St. 38; West *v.* R. R. 63 Ill. 545; Pfau *v.* Williamson, 63 Ill. 16; Hale *v.* Johnson, 80 Ill. 185; Robinson *v.* Webb, 11 Bush, 464; Barry *v.* St. Louis, 17 Mo. 121; Palmer *v.* Lincoln, 4 Nebr. 136. See infra, § 279. For a notice of the American cases resting on Bush *v.* Steinman, see opinion of Thomas, J., Hilliard *v.* Richardson, 3 Gray, 340; and as to recent modifications of the English rule, see Bower *v.* Peate, cited infra, § 186. And see, also, Bigelow's Cases on Torts, 654.

[1] Steel *v.* S. E. R. R. 16 C. B. 556; Scammon *v.* Chicago, 25 Ill. 424; Felton *v* Deall, 22 Vt. 171.

[2] Crompton, J., in Sadler *v.* Henlock, 4 E. & B. 570; cited in Warburton *v.* Great West. R. Co. Law Rep. 2 Exch. 30; and Murray *v.* Currie, Law R. 6 C. P. 25. See Murphy *v.* Caralli, 3 H. & C. 462; Butler *v.* Hunter, 7 H. & N. 826, as cited in 1st edition of this work, § 181.

[3] See infra, § 189, and cases there cited.

[4] Overton *v.* Freeman, 11 C. B. 867.

[5] Blake *v.* Ferris, 5 N. Y. (1 Selden), 48. But see criticisms on this case in Storrs *v.* Utica, 17 N. Y. 104. See infra, §§ 817, 818.

held, in 1874, in the same state, that a railway corporation which has let by contract the entire work of constructing its road, and has no control whatever over the contractors, is not liable for injuries to third persons occasioned by negligent blasting of rocks by the employees of the contractor.[1] And as a general rule,[2] the servants of a contractor are the servants of his principal only where the latter has the right to select and control them.[3]

§ 182. A distinction of importance is here to be noticed. On the one hand we must remember that liability is not imposed on the principal, in such a case, by the fact that he reserves the right to retain in his hands sums sufficient to pay all damages that are not adjusted within thirty days from the time they are inflicted,[4] nor because he employs a clerk to supervise the work, he not interfering in its construction,[5] nor because he holds the right to suspend or reorganize the work;[6] nor because he reserves the right of dismissing the contractor,[7] or that of refusing to pay unless satisfied.[8] On the other hand, wherever the master exercises a con-

Control of mode of working imputes liability.

[1] McGafferty *v.* R. R. 61 N. Y. 178, distinguishing Hay *v.* Cohoes, 2 Comst. 159.

[2] Burke *v.* R. R. 34 Conn. 474.

[3] The rule is thus well expressed in Pennsylvania, by Sharswood, J. (Ardesco Oil Co. *v.* Gilson, 63 Penn. St. 162): "It may be considered as now settled that if a person employs others, not as servants, but as mechanics or contractors, in an independent business, and they are of good character, if there was no want of due care in choosing them, he incurs no liability for injuries resulting to others from their negligence or want of skill. Painter *v.* The Mayor of Pittsburg, 46 Penn. St. (10 Wright), 213. If I employ a well known and reputable machinist to construct a steam-engine, and it blows up from bad materials or unskilful work, I am not responsible for any injury which may result, whether to my own servant or to a third person. The rule is different if the machine is made according to my own plan, or if I interfere and give directions as to the manner of its construction. The machinist then becomes my servant, and *respondeat superior* is the rule. Godley *v.* Hagerty, 8 Harris, 387; Carson *v.* Godley, 2 Casey, 111." See infra, §§ 727, 774, 775. So, also, in California. Du Pratt *v.* Lick, 38 Cal. 691. See, also, De Forrest *v.* Wright, 2 Mich. 368.

[4] Tibbets *v.* Knox & Lincoln R. R. Co. 62 Me. 437; and see Corbin *v.* Mills, 27 Conn. 274.

[5] Brown *v.* Cotton Co. 3 H. & C. 511.

[6] Wray *v.* Evans, 80 Penn. St. 102. See Pack *v.* New York, 8 N. Y. 222.

[7] Reedie *v.* R. R. 4 Exch. 244; Blake *v.* Ferris, 5 N. Y. 48; Cuff *v.* R. R. 35 N. J. 17; Robinson *v.* Webb, 11 Bush, 466.

[8] Allen *v.* Willard, 57 Penn. St. 374.

trol over the *mode* of working, he is virtually the principal and the contractor is the servant.[1] Nor is this liability divested by the fact that there "is an intermediate party in whose general employment the person whose acts are in question is engaged;" "unless the relation of such intermediate party to the subject matter of the business; . . . . be such as to give him exclusive control of the means and manner of its accomplishment, and exclusive direction of the persons employed therefor."[2]

Where there is liberty there is liability.

§ 183. We strike, when pursuing the distinctions which have been taken by the courts in this relation, on the fundamental principle elsewhere fully discussed, that wherever there is liberty to act, there, to the party thus free, liability for a tort committed by him is imputable.[3] If the master is at liberty to act in the particular matter, then the tort is imputable to the master; if the servant is at liberty to act, then, if this liberty be one of entire emancipation in the particular relation from the master's control, the tort is imputable, not to the master, but to the servant.[4]

[1] Whart. on Agency, § 483; Murphy *v.* Caralli, 3 H. & C. 402; Quarman *v.* Burnett, 6 M. & W. 499; Murray *v.* Currie, L. R. 6 C. P. 24; Eaton *v.* R. R. 59 Me. 520; Stone *v.* Codman, 15 Pick. 297; Kimball *v.* Cushman, 103 Mass. 194–98; Pack *v.* New York, 8 N. Y. 222; Allen *v.* Willard, 57 Penn. St. 374; Schwartz *v.* Gilmore, 45 Ill. 455; Chicago *v.* Joney, 60 Ill. 383; Chicago *v.* Dermody, 61 Ill. 431; Luttrell *v.* Hazen, 3 Sneed, 20.

[2] Bigelow's Cases on Torts, 638, citing Kimball *v.* Cushman, 103 Mass. 194; Fenton *v.* Packet Co. 8 Ad. & El. 835.

Where a railway company entered into a contract with A. to construct a portion of their line, and A. contracted with B., who resided in the country, to erect a bridge on the line. B. had in his employment C., who acted as his general servant, and as a surveyor, and had the management of B.'s business in London, for which he received an annual salary. B. entered into a contract with C., by which C. agreed for £40 to erect a scaffold, which had become necessary in the building of the bridge; but it was agreed that B. should find the requisite materials, and lamps, and other lights. The scaffold was erected upon the footway by C.'s workmen, a portion of it improperly projected, and owing to that and the want of sufficient light, D. fell over it at night, and was injured. After the accident, B. caused other lights to be placed near the spot, to prevent a recurrence of similar accidents: it was held that an action was not maintainable by D. against B. for the injury thus occasioned. Knight *v.* Fox, 5 Exch. 721; to be distinguished from Steel *v.* R. R. 16 C. B. 550.

[3] See, fully, Whart. on Agency, §§ 277, 480, 538, 601; and see remarks of Cleasby, B., in Holmes *v.* Mather, L. R. 10 Exch. 261.

[4] Hilliard *v.* Richardson, 3 Gray, 349; De Forrest *v.* Wright, 2 Mich. 368.

§ 184. We shall presently see that a principal cannot evade liability for a nuisance by turning it over to a contractor. The same rule applies to all contracts to do an unlawful act,[1] and to contracts to do an act which the negligence of the contractor frustrates. Thus in a leading English case, an act of parliament authorized the cutting of a trench across a highway for the purpose of making a drain. Attached to the exercise of the right was the condition of filling up the trench after the drain had been completed. The defendant employed an independent contractor, by whose negligence the trench was improperly filled up, in consequence of which the plaintiff was injured. The court of exchequer chamber, reversing the decision of the queen's bench, held that the plaintiff was entitled to recover.[2] In the exchequer chamber, Erle, C. J., in giving the opinion for reversal, stated the law to be, "that a party who undertakes that a work shall be done is not released from liability for breach of his undertaking because he employed a contractor to do it, and the contractor's neglect caused the breach; the obligation imposed by that is analagous to that created by an undertaking, the omission to perform which is not excused by reason that the party employed a third person as contractor to do it for him, who failed;" and the distinction sustained by the cases he declared to be, that "where a contractor in the performance of his contract does a wrongful act *not according to his contract*, and causes damage thereby, in those cases the employer is not responsible."

When act is unlawful, principal is liable.

§ 185. When, also, the thing the contractor does is one which it is the duty of the employer to do either personally or through an agent, the employer is liable for the contractor's negligence.[3] And this is eminently the case when the contractor does the work under the employer's authorization.[4] In addition to this, we must remember that where a duty is owed to the public, the duty

Employer cannot thus be relieved of duty attaching to himself specifically.

[1] Picard *v.* Smith, 10 C. B. N. S. 470. See Whiteley *v.* Pepper, L. R. 2 Q. B. D. 276. Supra, § 71; infra, § 185.

[2] Gray *v.* Pullen, 5 B. & S. 970.

[3] Picard *v.* Smith, 10 C. B. N. S. 470; Bower *v.* Peate, L. R. 1 Q. B. D. 321; Gray *v.* Pullen, 5 B. & S. 970. See supra, § 178.

[4] See infra, § 279; Cincinnati *v.* Stone, 5 Ohio St. 38.

cannot be shifted by a principal placing the matter under the contractor's exclusive control.[1] So also, as we have seen,[2] a party who contracts to do a particular work is liable for his servant's negligence causing a defect in the performance of the work.

So employer is not relieved when negligence is within the scope of the employer's directions.

§ 186. He who directs an act to which a tort is incidental is liable for the torts which are incidental to the act.[3] "Common justice," said Clifford, J., in a case where this question was raised in the supreme court of the United States,[4] "requires the enforcement of this rule: as, if the contractor does the thing which he is employed to do, the employer is as responsible for the thing as if he had done it himself; but if the act which is the subject of complaint is purely collateral to the matter contracted to be done, and arises indirectly in the course of the performance of the work, the employer is not liable, because he never authorized the thing to be done."[5]

For the contractor's negligence, when such negligence is incidental to the act, the principal is liable in case.[6] Hence, a railway company may be held liable for a contractor's negligence when the person doing the wrongful act is the servant of the company, and acting under its direction; and though such person is not a servant as between himself and the company, but merely a contractor or lessee, still he must be regarded as a servant or agent when he is exercising a chartered privilege or power of the company, under its direction and with its assent, which he could not have exercised independently of the charter.[7]

[1] Supra, § 180.

[2] Supra, §§ 169, 178.

[3] Wharton on Agency, § 474; Caswell *v.* Cross, 120 Mass. 545.

[4] Water Co. *v.* Ware, 16 Wall. 566.

[5] See, also, Hole *v.* R. R. Co. 6 H. & N. 488; Ellis *v.* Gas Co. 2 Ell. & B. 770; Newton *v.* Ellis, 5 Ell. & B. 770; Lowell *v.* R. R. 23 Pick. 24; Robbins *v.* Chicago, 4 Wall. 679; Chicago *v.* Robbins, 2 Black (U. S.), 418.

[6] Gregory *v.* Piper, 9 B. & C. 591; Seymour *v.* Greenwood, 6 H. & N. 359. See Lesper *v.* Nav. Co. 14 Ill. 85; Willard *v.* Newbury, 22 Vt. 458; Batty *v.* Duxbury, 24 Vt. 155; Palmer *v.* Lincoln, 5 Nebr. 136.

[7] West *v.* R. R. Co. 63 Ill. 545.

In conformity with the principle before us, we may explain an English ruling by the queen's bench division in 1877, — Bower *v.* Peate, L. R. 1 Q. B. D. 321: —

The plaintiff and defendant were the respective owners of two adjoining houses, the plaintiff being entitled to the support for his house of the defendant's adjacent soil. The defendant employed a contractor to pull down his house, excavate the foundation,

§ 187. It is no defence for a party charged with maintaining a nuisance on his land, or on property under his control, in cases where the nuisance is incidental to a work which the principal puts out on contract, that the nuisance was caused by the contractor, and the work was under the latter's exclusive control.[1] Thus where a land occupier engages a contractor to fill his ice-house by the cord, and obtains license from the municipal authorities to incumber the street for that purpose, he cannot shield himself from liability for injuries caused by unlawfully obstructing the street with blocks and fragments of the ice, by the objection that his employee was a contractor and alone liable.[2] The same principle was declared in an English case, where a registered joint-stock company contracted with an individual for the laying down of their gas-pipes in the town of Sheffield, without having obtained any special powers for that purpose, so as to make the contractors primarily responsible. While making the necessary excavations, a heap of

Nor can a principal so evade liability for a nuisance.

and rebuild it, and in the specification according to which the contractor undertook to do the work there was the following clause: "The adjoining buildings must be well and sufficiently propped and upheld during the progress of the works by the contractor, who shall be required to take the responsibility, and to make good any damage occurring thereto." The plaintiff's house was damaged during the works, owing to the means taken by the contractor to support it being insufficient. The court held the defendant was liable, even if the undertaking as to risk, &c., had amounted (they said it did not so amount) to an express stipulation that the contractor should do, as part of the works contracted for, all that was necessary to support the plaintiff's house. And it was held by the court, that where injury to another is incidental to the discharge of a particular work, liability cannot be evaded by giving the work to a contractor. See comments on this case, London Law Times, August 18, 1877, and in Solicitors' Journal, reprinted in Alb. Law J. 1877, p. 195.

See, as agreeing with Bower *v.* Peate, Wiswell *v.* Brinson, 10 Ired. 554.

With Bower *v.* Peate compare Butler *v.* Hunter, 10 W. R. 214; Tarry *v.* Ashton, L. R. 1 Q. B. D. 314.

[1] Infra, §§ 817, 818; Upton *v.* Townend, 17 C. B. 71; Gray *v.* Pullen, 5 B. & S. 970; Ellis *v.* Gas Co. 2 E. & E. 767; Water Co. *v.* Ware, 16 Wall. 566; Sabin *v.* R. R. 25 Vt. 363; Congreve *v.* Morgan, 5 Duer, 495; Storrs *v.* Utica, 17 N. Y. 108; Congreve *v.* Smith, 18 N. Y. 79; Creed *v.* Hartmann, 29 N. Y. 591; Hardrop *v.* Gallagher, 2 E. D. Smith, 523; Silvers *v.* Nordinger, 30 Ind. 53; Mercer *v.* Jackson, 54 Ill. 397.

As to municipal corporations, see infra, § 265.

[2] Darmstaetter *v.* Moynahan, 27 Mich. 188; Detroit *v.* Corey, 9 Mich. 165.

stones was left in one of the streets over which the plaintiff fell in the dark, thereby sustaining damage. The plaintiff sued the company for a nuisance, alleging special damage to himself. It was objected that the suit should have been against the contractor. But Lord Campbell, C. J., held that the defendants were responsible, as principals in an unlawful act.[1] So, it must be remembered, to adopt the language of Willes, J., that it is not necessary "that the relation of principal and agent, in the sense of one commanding and the other obeying, should subsist, in order to make one responsible for the tortious act of another; it is enough if it be shown to have been by his procurement and with his assent. The cases where the liability of one for the wrongful act of another has turned upon the relation of principal and agent are quite consistent with the party's liability, irrespective of any such relation: as if I agree with a builder to build me a house, according to a certain plan, he would be an independent contractor, and I should not be liable to strangers for any wrongful act done by him in the performance of his work; but clearly I should be jointly liable with him for a trespass on the land if it turned out that I had no right to build upon it."[2]

Where the nuisance is one licensed by the government, it is necessary that negligence or illegality be shown.[3]

Unless such nuisance is imputable to negligence of contractor.

§ 188. Where a nuisance, however, is not necessarily incidental to the work directed by the principal, but is the exclusive result of the negligence of the contractor, there the fault is imputable to the contractor and not to the principal.[4] Thus the owner of land is ruled not to be liable for damages to a third person produced by a deposit of boards on a highway adjacent to the land, such deposit being made by a carpenter employed by the owner as contractor to build, the owner reserving no control over the contractor, and

[1] Ellis *v.* Sheffield Gas Co. 2 E. & B. 767. In this case the maxim, *Qui facit per alium facit per se*, may be said to have controlled. But the same result would have been reached if the suit had been against the company for negligence in not sufficiently guarding the ditches. See Gray *v.* Pullen, 5 B. & S. 970.

[2] Upton *v.* Townend, 17 C. B. 71.

[3] Infra, § 868.

[4] Cuthbertson *v.* Parsons, 12 C. B. 304; Matthews *v.* Water Works, 3 Camp. 403; Sabin *v.* R. R. 25 Vt. 363; McCafferty *v.* R. R. 61 N. Y. 178; Cuff *v.* R. R. 35 N. J. L. 17; Carman *v.* R. R. 4 Ohio St. 399; Kellogg *v.* Payne, 21 Iowa, 575.

having no notice that the boards are a nuisance, and no power of removal.[1] The distinction between the cases may be this: where the nuisance is incidental to the contract, the principal is liable, though the nuisance is on the highway, adjacent to the principal's land; but it is otherwise when the nuisance is not on the principal's land, nor incidental to the contract, but is the exclusive and collateral act of the contractor.[2]

It must be always kept in mind that the owner of property, who negligently permits to remain on it a nuisance which he has the power of removing, is liable to third parties for the damage thereby produced, on the principle, *Sic utero tuo ut non alienum laedas*.[3] As we have already observed, the principal is liable whenever retaining the right of supervision.[4]

When contractor is liable for sub-contractor.

§ 189. When an employer employs a contractor to do a particular work which involves the interposition of sub-contractors, and the first contractor engages with such sub-contractors to do the work, leaving the entire control of such work in the hands of the sub-contractors, the first contractor is not liable for the sub-contractors' negligence. This, when it is a part of the contract, either express or implied, that the work should be so sub-let, or when it is essential to the nature of the work that such should be the case, is a doctrine of the Roman law. The *conductor operis*, in such

[1] Hilliard *v.* Richardson, 3 Gray, 349; Bigelow's Cases on Torts, 636. And in Brown *v.* Accrington Cotton Co. 3 Hurl. & C. 511, one who had a building erected by contract was held not liable for injury occasioned to a workman in the building, by reason of its negligent construction, though the owner employed a clerk to superintend the construction, it appearing that he did not interfere in the work, and was not negligent in the appointment or retention of the clerk.

[2] Homan *v.* Stanley, 66 Penn. St. 465. See infra, § 818; Chicago *v.* Robbins, 2 Black (U. S.), 4; Stone *v.* R. R. 19 N. H. 427.

It has been ruled in Indiana, that the owner of a lot on which an excavation was made was liable for injuries sustained by a passenger, from neglect properly to fence in such excavation, though the land was at the time in the hands of a contractor exclusively charged with the work. Silvers *v.* Nordlinger, 30 Ind. 53. In this case, however, the neglect was in not fencing in the excavation, the duty to do which, not being by the contract attached to the contractor, remained with the owner. Infra, §§ 816–818; and see Congreve *v.* Morgan, 5 Duer, 495.

[3] Infra, § 786 *et seq.*

[4] Supra, § 176; and see Allen *v.* Hayward, 7 Q. B. 975.

case, is not liable to the *locator* for the negligence of the persons so employed by the conductor. The same rule exists in our own law.[1]

Nor is the contractor liable in such case to third parties for the sub-contractor's negligence.[2] To relieve the contractor, however, in such case, the sub-contractor must have the matter under his exclusive control.[3]

§ 190. *A municipal corporation is liable, as an ordinary rule, for the negligence of its servants in business matters.*[4]— Liability necessarily attaches where the work negligently performed by the agent is one from which the municipal corporation derives emolument. Thus, in a case elsewhere more fully discussed, the city of Philadelphia has been held liable to third parties for the negligence of its board of water-works in the waste of the water power of the river

Distinctive views as to municipal corporations.

[1] Supra, §§ 176, 181 ; Whart. on Agency, §§ 482–485.

[2] Knight *v.* Fox, 5 Exch. 721 ; Overton *v.* Freeman, 11 C. B. 867 ; Rapson *v.* Cubitt, 9 M. & W. 710 ; Slater *v.* Mersereau, 64 N. Y. 139 ; Cuff *v.* R. R. 35 N. J. L. (6 Vroom) 17. See Goslin *v.* Agricult. Hall Co. L. R. 1 C. P. D. (C. A.) 482. Supra, § 181.

[3] Allen *v.* Willard, 57 Penn. St. 374.

In Pearson *v.* Cox, 36 L. T. Rep. N. S. 495 ; L. R. 2 C. P. D. (C. A.) 369, the evidence was that the defendants, having contracted to put up certain buildings, when the outside work was completed a shelter put up for the protection of the public was removed. All the interior work had still to be done. S., a sub-contractor with the defendants, undertook the plastering, and a workman employed by S., whilst moving about in the course of his work, caused a tool to fall through the window, which struck and injured the plaintiff, who was passing in the street. The plaintiff brought his action for damages against the defendants. At the trial the jury found, in answer to a question left to them by the judge, that the injury to the plaintiff was caused by the negligence of the defendants in not providing due protection for the public. It was ruled (on motion to enter judgment on this finding for the plaintiff), that the defendants were not liable, as the accident not being one which might reasonably have been foreseen, there was no duty to guard against the occurrence of it, and if there was such a duty the sub-contractor, whose servant caused the injury, would be liable, and not the defendants.

[4] Foreman *v.* Mayor of Canterbury, L. R. 6 Q. B. 214; Grimes *v.* Keene, 52 N. H. 330 ; Hamburg Turnp. Co. *v.* Buffalo, 1 N. Y. Sup. Ct. 537; Henley *v.* Lyme, 5 Bing. 91; *S. C.* 1 Bing. N. C. 222; 2 Cl. & Fin. 331; Bailey *v.* New York, 3 Hill, 531; Pittsburg *v.* Grier, 22 Penn. St. 54; Weightman *v.* Washington, 1 Black, 39; Bigelow *v.* Randolph, 14 Gray, 543 ; Thayer *v.* Boston, 19 Pick. 511; Cincinnati *v.* Stone, 5 Ohio St. 38.

Schuylkill, from which water power the city receives large rents.[1] The same rule applies to negligence by sub-employees in performing a specific work directed or ratified by the corporation.[2] But in order to charge a municipal corporation with the negligence of its subalterns, these subalterns must be its agents as to the particular act.[3] When such, the rule *respondeat superior* applies.[4] Hence when a city, acting within its general powers, contracts for the grading of a public street, and, the work being done under the immediate supervision of certain officers whose official duty it is to superintend the work, damages to a third party result, not from any negligence or wrong-doing of the contractors, but from the performance of the work in the manner required by the contract, the contractors are the agents of the city, and the city is liable for such damages.[5] Municipal corporations, in fine, "are liable for negligence in managing or dealing with property or rights held by them for their own advantage or emolument."[6] And in such matters they are bound, as hereinafter stated, by their agents' acts.

The question of a municipal corporation's liability, for its negligence in respect to roads, is noticed in future sections;[7] and so as to their liability for abuse of property.[8]

§ 191. If an officer is independent of the municipal corporation, so far as concerns the orbit of his action, the corporation cannot at common law be made liable for his negligence in duties neither directed nor ratified by the corporation.[9] "While it is undoubtedly true," correctly declares Burrows, J., in a late case in Maine,[10] "aside from all statute remedies provided against them, cities, towns, and other *quasi* corporations will be liable for the

But a municipal corporation is not liable for the collateral negligence of independent officer.

[1] Phila. *v.* Gilmartin, 71 Penn. St. 140. Supra, § 127; infra, §§ 254, 846, 847 *a*, 935.

[2] Hawks *v.* Charlemont, 107 Mass. 414; Hamburg Turnpike *v.* Buffalo, 1 N. Y. Sup. Ct. 537; Buffalo & Hamb. Turnpike *v.* Buffalo, 58 N. Y. 639.

[3] Elliott *v.* Phila. 75 Penn. St. 347.

[4] Chicago *v.* Joney, 60 Ill. 383; Chicago *v.* Dermody, 61 Ill. 431.

[5] Sewall *v.* City of St. Paul, 20 Minn. 511.

[6] Gray, C. J., in Oliver *v.* Worcester, 102 Mass. 489, cited infra, § 251.

[7] Infra, § 956.

[8] Infra, § 250 *et seq.*

[9] Lee *v.* Sandy Hill, 40 N. Y. 442; Commissioners *v.* New York, 43 N. Y. 184.

[10] Morgan *v.* Hallowell, 57 Me. 377.

actual malfeasance of their officers, agents, and employees, when their acts are authorized or ratified by the corporation councils having control of the subject matter; as, for example, for all wrongs done to another party in the assertion of alleged rights of property in the corporation, and also for neglects in the performance of corporate duty, where there has been a special duty imposed, or a special authority conferred by and with the consent of the corporation; there is a strong line of decisions in which it is held, that for the neglects of their officers and agents in the performance of those duties imposed upon them by law for public purposes, exclusively independent of their corporate assent, they are liable only when a right of action is given by statute; that as to them, in such cases, the maxim *respondeat superior* does not apply; that negligence in the performance of such duties cannot be held to be the negligence of the corporation."[1] When the officer is clothed by statute with distinct and independent responsibilities and powers, not subject to supervision by the corporation, this qualification is indisputable,[2] even though the officer may be appointed by the corporation.[3] Thus it has been rightly determined in New Hampshire,[4] that a town is not liable by reason of the negligent conduct of a surveyor in the execution of his office; and it makes no difference, as to the rules to be applied in determining their liability, whether the defects arise from the neglect or fault of the surveyor, or from some other cause. So also, in Massachusetts, a municipal corporation is not liable in damages for an injury sustained by the collateral carelessness of a laborer or other agent employed by a highway sur-

[1] See Mitchell *v.* Rockland, 52 Me. 118; Bigelow *v.* Randolph, 14 Gray, 541; Eastman *v.* Meredith, 36 N. H. 284; Storrs *v.* Utica, 17 N. Y. 104, and the cases therein cited, for a full discussion of the distinction which obtains between ordinary corporations aggregate and *quasi* corporations in this respect. See infra, §§ 195, 258.

[2] Walcott *v.* Swampscott, 1 Allen, 101; Hafford *v.* New Bedford, 16 Gray, 302; Buttrick *v.* Lowell, 1 Allen, 172; White *v.* Phillipston, 10 Metc. 108; Morrison *v.* Lawrence, 98 Mass. 219; Fisher *v.* Boston, 104 Mass. 87; Jewett *v.* New Haven, 38 Conn. 368; Russell *v.* Mayor, 2 Denio, 461; Martin *v.* Brooklyn, 1 Hill (N. Y.), 545; Reilly *v.* Philad. 60 Penn. St. 467; Atwater *v.* Balt. 31 Md. 462; Wheeler *v.* Cincinnati, 19 Ohio St. 19.

[3] Ibid.; Maxmillian *v.* New York, 62 N. Y. 165.

[4] Hardy *v.* Keene, 52 N. H. 370.

veyor in repairing a highway;[1] nor is such a corporation liable for an assault and battery by a police officer when discharging his duties;[2] nor for misconduct by a subaltern of the fire department.[3] And such is the general rule.[4] At the same time it is conceded that a surveyor, by whom or under whose direction repairs may be made or work done upon or with reference to a highway, may be deemed the agent of the town to receive and charge the town with notice of an alleged defect, insufficiency, or want of repair existing under his special observation and superintendence. The fact that a defect, insufficiency, or want of repair of a highway existed through the fault of the surveyor who caused it, would be evidence from which the jury might find knowledge of its existence on the part of the town.[5] And where the officer is under the corporation's control, there his negligence is imputable to the corporation.[6]

No liability if negligence does not affect work.

§ 192. It may be added that if the negligence does not affect the work directed by the corporation, no liability reverts. Hence it may be generally stated, that municipal corporations are not responsible for the negligence of their employees, provided such negligence does not affect the work for the due execution of which the corporation is responsible. In such cases the rule "*respondeat superior*" does not apply.[7] On the other hand, when the work directed is done negligently, then the negligence is to be imputed to the person directing it, and the official *status* of the agent does not intercept the imputation. Thus it has been held in New Hampshire, that the superintendent of water-works of a city, who, in searching for a leak, digs a hole in the street, acts in this respect, not as a

[1] Walcott *v.* Swampscott, 1 Allen, 101, approved in Barney *v.* Lowell, 98 Mass. 571. See Hawks *v.* Charlemont, 107 Mass. 414, where it was held that a town was liable for negligences directly authorized by it.

[2] Buttrick *v.* Lowell, 1 Allen, 172.

[3] Hafford *v.* New Bedford, 16 Gray, 297; Jewett *v.* New Haven, 38 Conn. 368, and cases cited; infra, § 261. Hayes *v.* Oshkosh, 33 Wis. 314, otherwise.

[4] Bolingbroke *v.* Swindon, L. R. 9 C. P. 575.

[5] Hardy *v.* Keene, *ut supra.* Infra, § 967.

[6] See cases cited above; and see Alcorn *v.* Philad. 44 Penn. St. 348; and infra, § 259.

[7] White *v.* Phillipston, 10 Metc. 108; Bigelow *v.* Randolph, 14 Gray, 543; Child *v.* Boston, 4 Allen, 52; Barney *v.* Lowell, 98 Mass. 571.

public officer, but as a servant of the town, which is hence liable for his negligence.[1]

Nor for contractor's negligence.

§ 193. On the general principle already noticed by us,[2] a municipal corporation is not liable (unless, as has been seen, the act is a nuisance, or is incidentally ordered by the corporation) for negligences of a contractor in the performance of a work which is solely under the direction of the contractor, and of which the corporation reserves no supervision.[3]

§ 194. On the other hand, where the municipal corporation has the exclusive care and control over public streets, it is no defence that the work of repairing the streets has been given over to a particular contractor, if the city has notice, either express or constructive, of a nuisance which is thereby produced.[4]

Nor for matters *ultra vires*.

§ 195. Nor is a municipal corporation liable for its servants' negligence in matters not within its legal or constitutional power.[5]

§ 196. The liability of private corporations for negligence is

[1] Grimes *v.* Keene, 52 N. H. 330.

[2] Supra, § 181.

[3] Overton *v.* Freeman, 11 C. B. 867; Pack *v.* Mayor, &c. 4 Selden, 222; Kelly *v.* Mayor, 11 N. Y. 432; Painter *v.* Mayor, 46 Penn. St. 213; Reed *v.* Alleghany, 78 Penn. St. 300; Scammon *v.* Chicago, 25 Ill. 424; Chicago *v.* Dermody, 61 Ill. 431; Barry *v.* St. Louis, 17 Mo. 121.

"It is difficult," says Judge Strong, in a case where the question came up before the supreme court of Pennsylvania (Painter *v.* Mayor, *ut supra*), "to discover any substantial reason for good policy for holding the present defendants (the city of Pittsburg) responsible to the plaintiff. The negligence complained of was not theirs. It does not appear that they knew of it. The verdict determines that the fault was the contractors'. Over them the defendants had no more control than the plaintiff's husband had. They were not in a subordinate relation to the defendants, neither servants nor agents. They were in an independent employment. And sound policy demands that in such a case the contractor alone should be held liable. In making a sewer he has, necessarily, the temporary occupancy of the street in which the work was done, and it must be exclusive. His servants and agents are upon the ground, and he can more conveniently and certainly protect the world against injury from the work than can the officers of the municipal corporation."

[4] Chicago *v.* Robbins, 2 Black (U. S.), 418. See fully, infra, § 956 *et seq.*

[5] Mitchell *v.* Rockland, 52 Me. 118; Anthony *v.* Adams, 1 Metc. (Mass.) 660; Morrison *v.* Lawrence, 98 Mass. 219; Mayor *v.* Cunliff, 2 Comst. 165; Cuyler *v.* Rochester, 12 Wend. 165, and other cases cited in Dillon on Munic. Corp. (2d ed.) §§ 767–8. And see infra, §§ 258–9. See, however, Buffalo & Hamburg Turnpike Co. *v.* Buffalo, 1 N. Y. Sup. Ct.

hereafter independently discussed.[1] It may, however, be incidentally observed, that as corporations can only act through agents, there is necessity as well as policy in such case for enforcing the liability of the corporation for the agent within the restrictions specified above.[2] Private corporations.

§ 197. The law as to the liability of public officers and of their subordinates is also reserved for independent consideration.[3] Official subordinates.

537; Buffalo & Hamburg Turnpike Co. *v.* Buffalo, 58 N. Y. 639, cited infra, § 639.

[1] See infra, § 279.

[2] See, also, §§ 222, 241.

[3] See infra, § 288.

CHAPTER V.

MASTER'S LIABILITY TO SERVANT.

I. Who are servants accepting the risks of service, § 199.
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I. WHO ARE SERVANTS THUS ASSUMING THE RISKS OF SERVICE.

§ 199. WHERE an employment is accompanied with risks of which those who enter into it have notice, they cannot, if they are injured by exposure to such risks, recover compensation from their employer.[1] It has sometimes been said that this conclusion rests upon the principle, *Volenti non fit injuria;* it being argued that a party cannot recover damages for injuries inflicted on him by a negligence to which he assents. But this is not correct. No agreement that a party shall be held irresponsible for negligence is, as we shall repeatedly see,[2] valid. The better reason is, that a servant entering into an employment is a co-adventurer as to all such risks as are incidental to the service, and cannot recover from another that which, for a good consideration, he has undertaken to assume himself. And as to unusual risks, on the grounds of contributory negligence, he cannot recover if he threw himself knowingly on any defects which with ordinary prudence he could have avoided.[3]

[1] Supra, § 130; Griffiths *v.* Gidlow, 3 H. & N. 648; Clayards *v.* Dethick, 12 Q. B. 446; Summersell *v.* Fish, 117 Mass. 312; Baulec *v.* R. R. 3 Lans. 436; 62 Barb. 623; 59 N. Y. 356; Harrison *v.* R. R. 2 Vroom, 293; Mear *v.* Holbrook, 20 Ohio St. 137; Pitts. & F. W. R. R. *v.* Devinney, 17 Ohio St. 197; Chic. & N. W. R. R. Co. *v.* Swett, 45 Ill. 197; Ill. Cen. R. R. *v.* Sewell, 46 Ill. 99; C. & A. R. R. Co. *v.* Murphy, 53 Ill. 339; Honner *v.* R. R. 15 Ill. 550; Chicago R. R. *v.* Donahue, 75 Ill. 106; Young *v.* Shields, 15 Ga. 359; Central R. R. *v.* Grant, 46 Ga. 417.

[2] Infra, § 589.

[3] Infra, § 214. See, also, Clark *v.* Holmes, 7 H. & N. 937; Lawson *v.* Gray, 32 Jur. 274; Skipp *v.* R. R. 9 Exch. 223; Malone *v.* Trans. Co. 5 Biss. 315; Durgin *v.* Munson, 9 Allen, 396; Felch *v.* Allen, 98 Mass. 572; Haydenville *v.* Man. Co. 29 Conn. 558; Gibson *v.* R. R. 63 N. Y. 449; Balt. & O. R. R. *v.* Trainor, 33 Md. 542; McGlynn *v.* Brodie, 31 Cal. 376; Stone *v.* Man. Co. 4 Oregon, 52; Maher *v.* R. R. 64 Mo. 267; Thomas *v.* R. R. 51 Miss. 637; Camp Point Man. Co. *v.* Ballou, 71 Ill. 417; Toledo R. R. *v.* Eddy, 72 Ill. 138; Doggett *v.* R. R. 34 Iowa, 284.

The position of the text is expanded in an article prepared by me for the Southern Law Review, from which I condense, with some modifications, the following:—

The case of an operative, or other servant, who is injured when in his master's employ, and who sues his master for redress, may assume one of the following aspects:

1. The injury may be attributable to *casus*, or one of those extraordinary natural incidents for which human agency is not responsible.

2. Or it may be attributable exclusively to the interposition of a responsible third person.

§ 200. Such being the true foundation of the rule before us, it will be at once seen that a bailee, unless he is or ought to be acquainted with the defects of the thing bailed, is not, simply because he has taken it into his custody, precluded from recovery for damages sustained by him by occasion of such defects.[1] If he were a servant or a partner of the bailor, then he

Bailee not a servant.

3. Or it may be attributable to the operative's own negligence.

4. Or it may be attributable to the master's direct personal negligence.

5. Or it may be attributable to his negligence in the use of defective machinery.

6. Or it may be attributable to the negligence of fellow-servants of the sufferer.

The first three hypotheses we may throw out of consideration, as they preclude, in any view, recovery against the master. The fourth would sustain a recovery irrespective of all distinctions based on employment. The fifth and sixth may be considered together. A servant, so far as concerns his relations to third parties, is considered as part of a machine worked by the master. He may, so far as concerns his master, be a very wayward and perverse instrument. He may do injuries to third persons, in direct contradiction of his master's orders. But so far as he does negligent injuries within the orbit of his employment, his master is as much liable for them, as for injuries produced by defects in crank or wheel attributable to the master's personal negligence.

Three reasons are offered for the limitation which relieves the master from liability, where one servant sues for injuries received through the negligence of a fellow-servant in the common employment.

First, it is said that a servant, entering into a common employment with fellow-servants, contracts to bear injuries sustained through their negligence without having recourse to the employer. But even if we concede that every employee is a person capable of binding himself by contract, what is the form that the supposed

[1] A cab-driver obtained from a cab-proprietor a horse and a cab on the usual terms, which were, that the driver shall at the end of the day hand over to the proprietor eighteen shillings, retaining for himself all the day's earnings over that sum. The owner was to supply the horse's food, but to have no control over the driver after leaving the yard. In the case under trial, the horse with which the driver was furnished, which was fresh from the country and had never before been harnessed to a cab, bolted and overturned the cab and injured the driver. The jury found that the horse was not reasonably fit to be driven in a cab. The court of common pleas were divided as to liability. It was held by Byles and Grove, JJ., that the relation between them was that of bailor and bailee, and consequently that the proprietor was responsible for the injury sustained by the driver; but by Willes, J., that the relation was that of master and servant (or at most co-adventurer), and therefore that, in the absence of evidence of personal negligence or misconduct on his part, the owner was not responsible. Fowler *v.* Lock, L. R. 7 C. P. 272; 41 L. J. C. P. 99. See Horne *v.* Meakin, 115 Mass. 326.

would be a co-adventurer with the bailor as to the thing bailed, and he would be bound to inquire as to its defects, and, ordina-

contract assumes? Do I contract to bear negligences "gross" as well as "slight"? Even as to this fundamental distinction the authorities asserting a contract do not agree; some declaring that such contracts do not avail in cases of "gross" negligence, whatever that may be. Are negligences from whose consequences the master is sheltered simply the negligences of servants in the same workshop as myself, or are we to consider as fellow-servants the ten thousand co-employees of one of our colossal corporations, one of whose servants I may happen to be? Here, again, the authorities give no decisive instruction. A contract is an agreement to do a particular thing. But here there is no particular thing contracted to be done.

Secondly, to constitute a valid defence of this class, it is necessary that the party setting up the contract should be the party with whom the contract was made. But there are certain lines of cases, to which this exemption is applied, in which the employer exempted is not the person with whom the operative contracts. The person whom I sue may not be the person with whom I took service; and this is the case with a conspicuous English case, Wiggett *v.* Fox, 11 Exch. 832; as to which Pollock, B., in 1877 (Swainson *v.* R. R. 37 Law T. N. S. 104), remarked, "there was clearly no contract between the man who was killed and the contractors, Fox and Henderson." To a contract privity is essential; but A., an employer, is not privy to a contract of service made between B. and C., and if A. is liable to C., it is not on such a contract. And so was it ruled in Swainson *v.* R. R. *ut supra*. Another case of the same class is suggested by Pollock, B., in Swainson *v.* R. R. 37 L. T. N. S. 104. "Take the case," he says, "of two persons, A. and B., agreeing to work a mine together, each of them agreeing to contribute and pay the wages of five men. The ten men go down and work, and in the course of their common occupation one of A.'s five men is injured by the negligence of one of B.'s men. Could he recover against B.?" And this the learned judge virtually denies; declaring, at the same time, that A. and B. are not in common "the masters of both sets of men." Here we have another case of an operative precluded from recovering from an employer with whom he has made no contract of services. In the same direction is the argument of Cockburn, C. J., in Woodley *v.* Metropolitan R. R. 36 L. T. N. S. 419; L. R. 2 Exch.D. (C. A.) 381, where it was held that, although a railroad company was guilty of negligence in running trains without notice through a tunnel, yet a servant of a contractor, engaged by the railroad in excavating the tunnel, could not recover from the company for injuries received through negligence of the company's other servants. Cockburn, C. J., repudiates the idea of a contract, and puts the exemption of the company on the ground stated in the text. Johnson *v.* Boston, 118 Mass. 114, is still stronger than Wiggett *v.* Fox. In Johnson *v.* Boston, the plaintiff was one of a gang of men employed by Tinkham, a master-mason, whose business was to blast rocks and work at excavations. Tinkham was engaged by the city of Boston to drill and blast rocks in the construction of a sewer. The gang of men engaged by Tinkham were under the direction of a man named Har-

rily, to bear the consequences. But as he occupies no such relation, he is entitled to assume that the thing bailed comes to

rigan, who was not, however, called foreman, and who received the same wages as the other operatives. The blasting was to be done when directed by the foreman of the sewer, who was appointed by the defendant. The work was to be under the general direction of the defendant's agents. The men employed by Tinkham received from him $2.25 a day, and they were under his directions, he having the power of dismissal. The defendant paid Tinkham at the rate of $2.45 a day for each man employed by him. The plaintiff was injured by the negligence of one of the defendant's servants, who was blasting the sides of the sewer. It was held that the plaintiff could not recover. Yet there was no contract of service between the plaintiff and the defendant. Nor had the defendant the power of removing the plaintiff. See 22 Am. Law. Rev. 80, for an effective criticism of this case. As other cases in which the party setting up the exemption was not the party contracted with by the servant, see Mills *v.* R. R. 2 McArthur, 314, and Flower *v.* R. R. 69 Penn. St. 210.

A third essential is that the servant should be a competent contracting party, and should actually enter into the contract. But are servants, against whom this privilege of the master is set up, always competent to contract? Is not a minor, employed in a factory, supposed to assume the risk of incompetent fellow-workmen? Has it not repeatedly been held that a minor cannot recover from a master for negligences in the latter's apparatus or service? Is there a single case in which this result is reached, in which the negligence of fellow-servants is not more or less involved? A volunteer, also, who lends a hand to give a single turn to a single windlass finds himself as much barred, when he sues the master, by this limitation, as if he had been a trusted servant for years. To a contract by a servant, however, it is necessary that there should be a servant competent to contract. But the exception before us is sustained in cases in which the operative is not a servant, and in cases in which, even if a servant, he is not *capax negotii*.

A fourth essential is that the contract should be lawful. But by the consent of the great body of our American courts, contracts to relieve a party from the consequences of his negligence are held unlawful, as against the policy of the law. Even should we assume a contract to be entered into between an employee and an employer to relieve the latter from negligence, we must hold such a contract to be invalid.

It is clear, therefore, that in sustaining this exception we must cast aside the ground of an implied contract between the operative and the employer. We may proceed, therefore, to the second ground, namely, that the operative ought not to recover, because he has an opportunity of watching and reporting on his associates, and inquire how far this ground sustains the limitation before us.

Does the operative, in one case out of an hundred of those that come before the courts, have the opportunity of watching his associates? Is he not, by the laws of all difficult and important industries, so tied to his post that he has no time for such observations? Even supposing that he has time, has he the means or capacity? He is in another part of the same building; or he is in a different

him free from such latent defects as the bailor knew or ought to have known. Hence, if there be such defects, and he is injured

building; or while he is driving a locomotive, his fellow operative, by whose negligence he is to be injured, is turning a distant switch the wrong way; or while he is waiting to couple, his fellow operative neglects to put on the brakes; or while he is busy cleaning the deck of a great steamer, his fellow operative is so negligently managing the boiler that it bursts. Even if my fellow-servant stands by my side, I may be incapable, from my ignorance of his specialty, of criticising him; or his superiority in experience may be such as to make me disbelieve in my capacity for criticism. It is absurd to speak of the sufferer, in such cases as these, inspecting and reporting on the offender's misconduct. And it is still more absurd to make such a supposition, when the offender is the sufferer's superior, and when the subaltern knows that to report the negligences of a superior is to risk employment for self. We have, therefore, to reject the idea that the exemption before us rests upon the fact that the sufferer, in cases of this class, had the opportunity, before the injury, of observing and reporting on the conduct of the person by whom he is to be injured.

On what, then, are we to sustain this conclusion? The answer is, on the general principle that a party cannot recover for injury he incurs in risks, themselves legitimate, to which he intelligently submits himself. This principle has nothing distinctively to do with the relation of master and servant. It is common to all suits for negligence based on duty as distinguished from contract. For instance, a plaintiff cannot recover for damages incurred by him, —

(1) When on crossing a railway he strikes against a car negligently left on the road, he being previously advised of the position of the car. Infra, § 383.

Or (2) when he stumbles on an obstacle left negligently on a highway, he knowing of such obstacle previously. Infra, § 400.

Or (3) when, after being advised of the danger of attempting to rescue property at a fire, he undertakes the rescue. Infra, § 345.

(4) So we may assume the case of a farmer, who puts a tank of inflammable oil close to the fence of a railway over which an hundred locomotives pass daily. The oil takes fire and the farmer's barn is consumed. He cannot recover from the railroad company for negligently igniting the oil by its cinders. He knew, or ought to have known, that in the long run cinders would be negligently dropped, and if he took the risk of putting inflammable substances in a place where they would be ignited by the cinders, he must bear the consequences. Infra, § 877.

(5) A greenhouse is built in the close vicinity of barracks where there is constant artillery practice, of which the owner of the greenhouse knew when he selected its site. Through negligence, occur from time to time explosions unusually severe. Through the concussion of one of these explosions the glass of the greenhouse is broken. The owner cannot recover, as he intelligently exposed himself to the risk.

Does it make any difference whether or no the party injured, in either of the cases mentioned above, is a servant suing a master? Or, to take the converse, is there any case in which a servant is precluded from recovering

by them, he may recover from the bailor. A person hiring cattle may thus recover from the owner, if the cattle have latent

from the master, in which a person not a servant, but a mere volunteer, would not be precluded, under similar circumstances, from recovery? If so, we may throw aside all that belongs distinctively to the law of master and servant, and hold to the following propositions as sufficient for the settlement, not merely of the present line of questions, but of all cases in which one person is injured by dangerous agencies belonging to others.

1. A person having control of dangerous agencies must so restrain them that they will not injure other persons; and to prevent such injury he must use the diligence common to good business men in the specialty. This imposes on him the following duties.

2. He must notify persons visiting the place where such agencies are operating of their peculiar danger; and if such persons are children, having business with him, whom he permits to visit the place, he must provide guards in proportion to their peculiar risks.

3. Against mere trespassers, whose presence he has no reason to expect, and for whose protection he is under no duty to provide, he need take no precautions, on his own premises, beyond those which forbid a person, owning property which may be visited by others, from putting on it, not for any business purpose, but for punitive purposes of his own, man-traps, spring-guns, or other instruments likely to be fatal to life.

On the other hand, casting aside, as we are bound to do, the test of master and servant, we must regard each operative as one of a number of co-adventurers in a common industry; and hence he can no more sue the master for a co-operative's negligence than he could sue the co-operative for the master's negligence.

Or, to take another view, when an injury is imputable to the negligence of a co-operative in whose appointment, direction, or retention there is no defect, then such injuries are incidental to the work itself, and the burden of them must be borne by the sufferer in all cases where he voluntarily and intelligently takes part in the common work. Did we not hold this, there is scarcely a single case in which a servant, injured by negligent management of machinery, could be precluded from recovering from the master. For it would be absurd to say that the master shall not be liable for defects in his machinery, not imputable to his own negligence, but shall be liable, on the principle of *respondeat superior*, for a servant's negligence to a fellow-servant. For how can his machinery work without being started; and if it is not started by *casus*, or by third parties, or by himself, or by the injured party, must it not have been started by the injured party's fellow-servants? But if the master is not liable to the injured servant for the defects of machinery, when negligently started by the sufferer's fellow-servants, then the master's non-liability extends to the negligences of such fellow-servants. We are, therefore, reduced to the following dilemma, — either the master must be held liable to an injured servant in all cases not imputable to *casus*, or the intermeddling of strangers, which is absurd, or the master must be relieved from liability in cases where the sufferer is hurt by machinery negligently worked by fellow-servants, in whose appointment, management, and reten-

dangerous qualities by which the hirer is injured; a person hiring goods, for damages he receives from latent dangerous qualities in the goods.[1]

§ 201. It does not vary the case if it appear that the plaintiff, instead of being regularly employed by the defendant, voluntarily undertook, without an appointment, to act as the defendant's servant;[2] or that the plaintiff was requested to assist by a servant of the defendant, such servant not being authorized to appoint assistants.[3]

A volunteer assisting a servant stands in the same relation as a servant.

It is otherwise, however, when the volunteer, while assisting

tion no negligence is imputable to the master. The latter alternative we must accept, and it brings us back to the conclusion that the master's non-liability in such cases rests, not on contract, nor on the assumption that the suffering servant had the prior opportunity of watching and correcting the offending servant, but on the principle that a party who voluntarily and intelligently exposes himself to certain risks, such risks being the incidents to a lawful business, cannot recover if he is hurt by the exposure. *Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire.* L. 203. de R. J. (50. 17.)

[1] Infra, §§ 712, 726.

[2] Potter *v.* Faulkner, 1 B. & S. 800; Degg *v.* Midland R. R. 1 H. & N. 773; Flower *v.* Penn. R. R. 69 Penn. St. 210; New Orleans, &c. R. R. *v.* Harrison, 48 Miss. 112.

[3] Flower *v.* R. R. 69 Penn. St. 210; See Kansas R. R. *v.* Salmon, 11 Kans. 83.

In Pennsylvania, by the Act of Ap. 4, 1868, "when any person shall sustain personal injury or loss of life, while lawfully engaged or employed on or about the roads, works, depots, and premises of a railroad company, or in or about any car therein or thereon, of which company such person is not an employee, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employee. Provided, that this section shall not apply to passengers."

This act is constitutional, and is a police regulation, forbidding individuals from undertaking a dangerous employment except at their own risk, as if they were in the immediate employ of the railroad company. Kirby *v.* Penn. R. R. 76 Penn. 506. See, also, Mulherrin *v.* R. R. 81 Penn. St. 366.

In Iowa, a statute passed in 1862 provides that "every railroad company shall be liable for all damages sustained by any person, including employees of the company, in consequence of any neglect of its agents, or by any mismanagement of its engineer, or other employees of the company." It has been ruled by the supreme court that while the statute should be limited to employees engaged in the hazardous business of operating the road, that it would, nevertheless, include an employee engaged in connection with a dirt train, and who was injured while loading a car, by the falling of an impending bank. Hunt *v.* R. R. 26 Iowa, 363; Deppe *v.* R. R. Co. 36 Iowa, 52. See also, Muldowney *v.* R. R. 36 Iowa, 463.

the servants of the company, is at the same time furthering his own interests, as is the case with a person engaged in assisting the operatives on a railroad in taking out freight. Thus, in an English case, finally decided in 1877,[1] the evidence was that plaintiff sent a heifer (which was put into a horse-box) by defendants' railway to P. station. On the arrival of the train at the station, there was only one porter available to shunt the horse-box to the siding from which alone the heifer could be delivered to the plaintiff, and the plaintiff was allowed, in order to save delay, to assist in shunting the horse-box, and, while he was so assisting, he was run against and injured by a train which was negligently allowed to come out of the siding. There was evidence from which the jury might find that the plaintiff was assisting in the shunting with the assent of the station master. It was ruled by the queen's bench, and afterwards by the court of appeal, that the plaintiff was not a mere volunteer assisting the defendants' servants, but was on the defendants' premises with their consent for the purpose of expediting the delivery of his heifer, and that as it was not the plaintiff's duty to inquire as to the premises he visited, or to take any risks upon him, the defendants were liable to him for the negligence of their servants.

Agents of express companies, and peddlers paying passage by contract, not servants.

§ 202. The agent of an express company, doing business on a railroad, such agent having his passage paid for by contract, is not the servant of a railroad.[2]

So, it has been ruled that if a navigation or railroad company engaged in transporting freight and passengers for hire, as common carriers, rents a room to a person for selling liquors and cigars, at a stipulated price, and is to carry and board him as a part of the contract, he is not an employee, nor is he a member of the establishment, and the company is not released from liability for injuries he may sustain from the negligence of other employees of the company, but must stand by the rule applicable to passengers.[3]

So where a railroad corporation, in consideration of the payment to them by a person of a certain sum of money yearly, in

[1] Wright *v.* R. R. L. R. 10 Q. B. 298; *S. C.*, on appeal, L. R. 1 Q. B. D. 252.

[2] Yeomans *v.* Nav. Co. 44 Cal. 71.

[3] Ibid.

quarterly instalments, and of his agreement to supply the passengers on one of their trains with iced water, issued season tickets to him quarterly for his passage on any of their regular trains, and permitted him to sell popped corn on all their trains, it was held that his relation to them, while travelling upon their railroad under this contract, was that of a passenger and not of a servant.[1]

Injury must be received by servant when engaged in service.

§ 203. The master can only set up the relation of master and servant as a defence to a suit for hurts received by the servant when engaged in his employment. If the master's negligence is in a matter extraneous to his specific employment;[2] or if the hurt be received by the servant at a time when the servant is not engaged in his duties as servant, then the servant stands in the position of a stranger.[3]

§ 204. It is not necessary, however, that the injury, in order to give the master the benefit of the exception, should have been sustained by the servant when actually engaged in labor. It is

[1] Com. *v.* R. R. 108 Mass. 7.

[2] Sears *v.* R. R. 53 Ga. 630.

[3] Hutchinson *v.* R. R. 5 Exch. 353; Baird *v.* Pettit, 70 Penn. St. 477; Balt. &c. R. R. *v.* Woodward, 41 Md. 268; Washburn *v.* R. R. 3 Head, 638.

In a case in which this question was agitated in the supreme court of the United States, Packet Company *v.* McCue, 17 Wall. 508; see Balt. & O. R. R. *v.* Trainor, 33 Md. 542, the evidence was that the plaintiff, when standing on a wharf, was hired by the mate of a boat desiring to sail soon, and which was short of hands, to assist in lading some goods, which were near the wharf, he not having been in the service of the boat generally, though he had been occasionally employed in this sort of work. It was proved that he assisted in lading the goods, an employment which continued about two hours and a half. He was then told to go to "the office," which was *on* the boat, and get paid. He did so, and then set off to go ashore. While crossing the gangplank, in going ashore, the boat hands pulled the plank recklessly in and from under his feet, and he was thrown against the dock, injured, and died from the injuries. On a suit by his administratrix, for the injuries done to him, — the declaration alleging that he had been paid and discharged, and that after this, and when he was no longer in any way a servant of the owners of the boat, he was injured, — the defence was that he had remained in the service of the boat till he had got completely ashore, and that the injuries having been done to him by his fellow-servants, the owners of the boat (the common master of all the servants) were not liable. There was no dispute as to the facts, unless the question as to when the relationship of master and servant ceased was a fact. This question the court left to the jury. It was ruled by the supreme court that there was in this no error.

enough if it be sustained by him as one of the incidents and risks of his service. Thus, in a late English case,[1] the evidence was that the plaintiff was employed by a railway company as a laborer to assist in loading what is called a "pick-up train" with materials left by plate-layers and others upon the line. One of the terms of his engagement was, that he should be carried by the train from Birmingham (where he resided, and whence the train started) to the spot at which his work for the day was to be done, and be brought back to Birmingham at the end of each day. As he was returning to Birmingham, after his day's work was done, the train in which the plaintiff was, through the negligence of the guard who had charge of it, came into collision with another train, and the plaintiff was injured. It was ruled that, since the plaintiff was being carried, not as a passenger, but in the course of his contract of service, there was nothing to take the case out of the ordinary rule which exempts a master from responsibility for an injury to a servant through the negligence of a fellow-servant when both are acting in pursuance of a common employment.

II. MASTER DOES NOT WARRANT SERVANT'S SAFETY, BUT IS DIRECTLY LIABLE FOR HIS OWN NEGLIGENCE TO SERVANT.

§ 205. The relationship of employer to employee does not involve a guarantee by employer of the employee's safety.[2]

But where the personal negligence of the master has directly caused the injury, there the master's liability to the servant is the same as it would be to one not a servant.[3] Hence, when the master acts as a fellow-workman, he is liable for his negligence to one of his servants as much as if the relation of master and servant did not exist.[4] And for all acts of personal negligence to

[1] Tunney *v.* R. R. L. R. 1 C. P. 291.

[2] Riley *v.* Baxendale, 6 H. & N. 443; Priestly *v.* Fowler, 3 M. & W. 1; Wright *v.* N. Y. Cent. R. R. 25 N. Y. 562; Tinney *v.* B. & A. R. R. 62 Barb. 218; Toledo, &c. R. R. *v.* Conroy, 61 Ill. 162; Camp Point Man. Co. *v.* Ballou, 71 Ill. 417; Fairbank *v.* Haentzche, 73 Ill. 236; Keegan *v.* Kavanaugh, 62 Mo. 231; Deppe *v.* R. R. 36 Iowa, 52. As will hereafter be seen, the doctrine of warranty has been rejected as to passengers carried by common carriers. *A fortiori* should this be the rule as to servants. See infra, § 209.

[3] Roberts *v.* Smith, 2 H. & N. 213; Ashworth *v.* Stanwix, 3 E. & E. 701; Mellors *v.* Shaw, 1 B. & S. 437; Paulmier *v.* Erie R. R. Co. 34 N. J. 151; Ardesco Oil Co. *v.* Gilson, 63 Penn. St. 146.

[4] Ashworth *v.* Stanwix, 3 E. & E.

the servant the master continues liable.[1] The servant undertakes the risks of the employment, as far as they spring from such defects as are incident to all machinery and all service. But this does not include negligence of the master himself. If the master would be in such case liable to a stranger, he will be liable to the servant. And any agreement, express or implied, which would relieve the master from liability in this respect is, as we have already noticed, invalid.

III. WHAT MECHANICAL RISKS SERVANT ASSUMES.

§ 206. We have already seen that a servant, by accepting an employment, is assumed to have notice of all risks incidental to the employment, or of which he is informed, or of which it is his duty to inform himself. On the other hand, where there are special risks in an employment of which the employee is not, from the nature of the employment, cognizant, or which are not patent in the work, it is the duty of the employer specially to notify him of such risks; and on failure of such notice, if he is hurt by exposure to such risks, he is entitled to recover from the employer, in all cases where the employer either was cognizant or ought to have been cognizant of the risks.[2] Knowledge, it must be remembered, may be implied from facts, and facts are admissible to show knowledge.[3]

Servant assumes only those risks of which he has express or implied notice.

701; aff. in Rose *v.* R. R. 58 N. Y. 219; Matthews *v.* McDonald, 3 Macph. S. C. 506.

[1] Infra, § 234.

[2] Williams *v.* Clough, 3 H. & N. 258; Indermaur *v.* Dames, L. R. 2 C. P. 318; Paterson *v.* Wallace, 1 Macq. 751; Keegan *v.* R. R. 4 Seld. 178; Paulmier *v.* R. R. 34 N. J. L. 131; Wonder *v.* R. R. 32 Md. 411; Malone *v.* Hawley, 46 Cal. 409.

[3] Wharton on Ev. § 30; Murphy *v.* Phillips, 25 W. R. 647. The plaintiff, a sub-porter, employed by the defendant, was injured by the falling of a hoisting apparatus. It was held, that evidence that the apparatus had fallen before from a similar cause was admissible, to show knowledge of defect on the part of the defendant. Malone *v.* Hawley, 46 Cal. 409. So where a mechanic, employed by the inventor of a new machine to work it, was injured by the fall of part of the machine owing to its imperfect construction, it was ruled that if he did not know or have reason to know that it was dangerous to place his hand as he did, in order to move the machine as directed, and if the inventor knew or ought to have known it, and gave him no warning, he could recover for the injury in a suit against his employer. Walsh *v.* Peet Valve Co. 110 Mass. 23.

§ 207. The principle before us, it is true, is based by high authorities on contract. "A servant," so is it argued by Blackburn, J.,[1] "who engages for the performance of services for compensation, as an implied part of the contract, takes upon himself, as between himself and his master, the natural risks and perils incident to the performance of such services; the presumption of law being that that compensation was adjusted accordingly, or, in other words, that those risks are considered in the wages; and that where the nature of the service is such that, as a natural incident to that service, the person undertaking it must be exposed to risk of injury from the negligence of other servants of the same employer, this risk is one of the natural perils which the servant, by his contract, takes upon himself as between him and his master; and consequently that he cannot recover against his master for an injury so caused, because, as is said by Shaw, C. J.,[2] 'He does not stand towards him in the relation of a stranger; but is one whose rights are regulated by contract.' But, as we have seen, the hypothesis of an implied contract in such cases cannot be sustained.[3] The true reason for the exemption is to be found in the duty imposed upon every one notified of particular dangers, to avoid the dangers or to bear the consequences.[4]

Employee must be advised of latent defects.

§ 208. Hence, whenever the employer is cognizant of a latent risk of, which the employee has no knowledge or obvious means of knowledge, the employer is liable to the employee for hurt received by the latter through such risk;[5] and this follows even in cases where the servants

[1] Morgan *v.* R. R. 5 Best & S. 570; 33 L. J. Q. B. 260; affirmed in the Exch. Ch. L. R. 1 Q. B. 149; 35 L. J. Q. B. 23. See Roman law, infra, § 720.

[2] Farrell *v.* R. R. 4 Metcalf, 49; also printed in 3 Macq. H. L. Cas. 316.

[3] Supra, § 199, and note thereto.

[4] As leading to the same result, see Bartonshill Co. *v.* Reid, 3 Macq. (Sc.) 265; Priestly *v.* Fowler, 3 M. & W. 1; Skipp *v.* R. R. 9 Exch. 223; Seymour *v.* Meddox, 16 Q. B. 326; Britton *v.* R. R. L. R. 7 Exch. 130; Noyes *v.* Smith, 28 Vt. 59; Huddleston *v.* Machine Shop, 106 Mass. 282; Sullivan *v.* India Co. 113 Mass. 396; Ladd *v.* R. R. 119 Mass. 412; Hayden *v.* Man. Co. 29 Conn. 548; Wright *v.* R. R. 25 N. Y. 502; Laning *v.* R. R. 49 N. Y. 521; Balt. & O. R. R. *v.* Woodward, 41 Md. 298; Memphis R. R. *v.* Jones, 2 Head, 517; Moss *v.* Johnson, 22 Ill. 642; Strahlendorf *v.* Rosenthal, 30 Wis. 677; De Witt *v.* R. R. 50 Mo. 302.

[5] Gildersleeve *v.* R. R. 33 Mich. 133; Indian. R. R. *v.* Flanigan, 77 Ill. 365; Kroy *v.* R. R. 32 Iowa, 357.

knew the machinery to be defective, if the particular injury does not arise from the known defect.[1]

In a leading English case,[2] the plaintiff was employed by the defendants as a miner, to work in the coal mine. In the course of his employment he received an injury by reason of the sides of the shaft being left in an insecure condition. One of the defendants was the superintendent of the mine, and although he knew of the condition of the mine, continued it in such condition. The plaintiff himself was ignorant that the shaft was unsafe. Upon this, it was held that the action was maintainable against the defendants.[3]

So, in this country,[4] it is laid down that a railroad company, whose road-bed is so constructed as to expose its employees to a latent danger, is liable to such of said employees as are injured thereby. If such danger is not obvious, it is the duty of such company to warn those who are to incur it of its existence.

So in an action by a brakeman to recover damages for injuries received while coupling cars, which was a part of his duty, the company was held liable on the ground that the machinery was defective and dangerous, and so known to the company, but unknown to the brakeman.[5] But when the employee has notice of the defect, it is contributory negligence to risk it;[6] and such knowledge may be inferred from the facts of the case.[7]

§ 209. Nor is the exception confined to defects of machinery or structure. It applies to all dangers of which the servant is not cognizant. Thus, in an interesting case in California,[8] the evidence was that B., who was a carpenter, was employed by R. to go in a boat upon a submerged lot owned by him, and do certain work of his trade. While there at work, a shot was fired from a house on an adja-

Employee to be advised of extraneous latent dangers.

[1] Dyner *v.* Leach, 26 L. J. N. S. Exch. 221.

[2] Mellors *v.* Shaw, 1 Best & S. 437; 30 L. T. Q. B. 333. See, also, Huddleston *v.* Lowell Machine Co. 106 Mass. 282.

[3] See, also, Ashworth *v.* Stanwix, 3 E. & E. 701; 30 L. T. Q. B. 183; Roberts *v.* Smith & others, 2 Hur. & N. 213; 26 L. T. Exch. 319; Skipp *v.* R. R. 9 Exch. 223; 23 L. T. Exch. 23; Bartonshill Coal Co. *v.* Reid, 3 Macq. H. L. Cas. 266; Bartonshill Coal Co. *v.* M'Guire, Ibid. 300.

[4] Paulmier *v.* R. R. Co. 34 N. J. 151.

[5] Gibson *v.* R. R. 46 Mo. 163. So as to defective engines. Noyes *v.* Smith, 28 Vt. 59.

[6] Infra, §§ 214, 244.

[7] Railroad *v.* Jackson, 55 Ill. 492.

[8] Baxter *v.* Roberts, 44 Cal. 187.

cent lot, which wounded B., hence his action for damages. It appeared that R. knew his possession of the lot was resisted, and a resort to arms was imminent at any moment. He did not inform B. of this fact, and the latter had no reason to believe he was going into danger when employed to do the work. It was ruled by the supreme court that R. was liable, for the reason that the concealment of facts, or the failure to state them by employer to employee, which would tend to expose any hidden and unusual danger to be encountered in the course of the employment, to a degree beyond that which the employment fairly imports, renders the employer liable for injuries resulting therefrom to the employee.

So, of defects of which employer was not, but ought to have been, cognizant.

§ 210. It is the duty of the employer to make himself familiar with all defects in his machinery, of which a good business man in his line should be cognizant. "Where a servant," says Cockburn, C. J.,[1] "is employed on machinery, from the use of which danger may arise, it is the duty of the master to take due care and to use all reasonable means to guard against and prevent any defects from which increased and unnecessary danger may occur. No doubt when a servant enters on an employment, from its nature necessarily hazardous, he accepts the service subject to the risks incidental to it; or, if he thinks proper to accept an employment on machinery defective from its construction, or from the want of proper repair, and with knowledge of the facts enters on the service, the master cannot be held liable for injury to the servant within the scope of the danger which both the contracting parties contemplated as incidental to the employment." But it is subsequently added, that the risks necessarily involved in the service must not be aggravated *by any omission on the part of the master to keep the machinery in the condition in which, from the terms of the contract, or the nature of the employment, the servant had a right to expect that it would be kept.*[2]

Nor is it necessary that the employer should be advised of the

[1] Clarke *v.* Holmes, 7 H. & N. 937, 943.

[2] Per Cockburn, C. J., 7 H. & N. 944; Weems *v.* Mathieson, 4 Macq. Sc. App. Cas. 215. See, also, Columbus, &c. R. R. *v.* Troesch, 68 Ill. 545.

particular defects causing the injury. It is enough if the defects were of such a character that it was the duty of the employer to take notice of them.[1] Hence a plaintiff, employed by a railroad company as engine-driver, may recover damages against the corporation for personal injuries caused by a defect in the engine, which was due to the neglect of the agents of the corporation charged with keeping the engine in proper repair, although the directors and superintendent had no reason to suspect negligence or incompetence on the part of such agents.[2] But if the employee has notice of the risks, and neglects to notify the employer, this exonerates the employer.[3]

Employer is bound to provide safe working place and machinery.

§ 211. In factories, or other institutions in which numbers of workmen of all ages and capacities of intelligence are assembled, the duty obviously rests on the employer of seeing that the structure where the operatives are assembled, and the machinery prepared for their use, are fit for the work. We are not, indeed, as we will presently see, to exact a perfection of safety, which would in-

[1] Ibid.; Williams *v.* Clough, 3 H. & N. 258; Noyes *v.* Smith, 28 Vt. 59; Hayden *v.* Man. Co. 29 Conn. 548; Ryan *v.* Fowler, 24 N. Y. 410; English *v.* Brennan, 60 N. Y. 609; Louisville, &c. R. R. *v.* Robinson, 4 Bush, 509; Sullivan *v.* Bridge Co. 9 Bush, 81; Michigan R. R. *v.* Dolan, 33 Mich. 510; Le Clair *v.* R. R. 20 Minn. 9; Mobile & O. R. R. *v.* Thomas, 42 Ala. 673.

[2] Ford *v.* R. R. 110 Mass. 240.

In a case tried before the exchequer division of the English high court of justice in 1876, the plaintiff, a stevedore in the defendant's service, was engaged in loading defendant's ship with iron girders, which were being lifted on board by a chain attached to a donkey engine, when the chain suddenly snapped and a girder fell upon the plaintiff and injured him. Some of the links of the chain were worn, and some also were badly welded, which was the cause of the breaking of the chain; and it was proved by the defence that a person accustomed to chains could, on looking at the chain in question, have observed these defects; and also, that there were well known methods adopted by "chain testers" for examining and testing chains. The defendant, so it appeared, did not know of the defects in the chain. The chain had been in use on the defendant's premises for seven years, and had not been examined or tested in any way before the accident. It was ruled that the defendant, having failed in his duty to ascertain the condition of the chain, was liable for the injury sustained by plaintiff through the breaking of the chain. Murphy *v.* Phillips, 35 L. T. Rep. N. S. 477.

[3] Frazier *v.* R. R. 38 Penn. St. 104; Patterson *v.* R. R. 76 Penn. St. 389. Notice to a superintendent in charge is enough. Ibid. Infra, § 223.

volve the abandonment of all industries to which risk is an essential incident. But what is insisted on is that the master, so far as due care and diligence will go, should make the structure and machinery as safe as is consistent with the work they are meant to perform. It is sometimes said that the operative must make himself acquainted with the structure, and if he take the employment without such acquaintance, the risk is on himself. But this is imposing on the operative, as a rule, an impracticable duty. Many operatives are women and children; very few are specialists in the construction of buildings and machinery. The burden of this duty rests on the employer, who offers the structure for use, and who reaps the profits of success.[1]

The principle before us, however, must not be so extended as to involve a warranty by the employer of the employee's safety, nor are we bound to regard the employer's obligations as limited by contract, whether express or implied. The question is that of *duty;* and without making the unnecessary and inadequate assumption of implied warranty, it is sufficient for the purposes of justice to assert that it is the duty of an employer inviting employees to use his structure and machinery, to use proper care and diligence to make such structure and machinery fit for use.[2] It is with this limitation that we are to accept the proposition

[1] In several cases we have the position in the text based on the assumption of an implied contract. "An employer," it is said by Judge Hoar, "is under an implied contract with those whom he employs to adopt and maintain suitable instruments and means with which to carry on the business in which he requires their services; and this includes an obligation to provide a suitable place in which the servant, being himself in the exercise of due care, can perform his duty safely, or at least without exposure to dangers that do not come within the obvious scope of his employment." Coombs *v.* New Bedf. Cord. Co. 102 Mass. 572, citing Cayzer *v.* Taylor, 10 Gray, 274; Seaver *v.* Boston & Maine Railroad, 14 Gray, 466; Snow *v.* Housatonic Railroad Co. 8 Allen, 441; Gilman *v.* Eastern Railroad Co. 10 Allen, 233, and 13 Allen, 433; Feltham *v.* England, L. R. 2 Q. B. 33; and see Ford *v.* Fitchburg, 110 Mass. 240; O'Connor *v.* Adams, 120 Mass. 427. As to Roman law, see infra, § 720.

But this assumption does not cover cases in which there is no privity of contract, as where the injured party is a volunteer, or a sub-servant. The better course, as we have already seen, is to place the liability on the principle *Sic utere tuo ut non alienum laedas.*

[2] Railroad *v.* Fort, 17 Wall. 553; Sullivan *v.* Man. Co. 113 Mass. 396; O'Connor *v.* Adams, 120 Mass. 427. See Tinney *v.* R. R. 62 Barb. 218, cited infra, § 205.

that it is the duty of the master to furnish his employees with suitable and safe machinery and structures for their use, and that he is liable for injuries sustained by them through his breach of duty in this respect.[1]

§ 212. At the same time, we must remember that where a master personally or through his representatives exercises due care in the purchase or construction of buildings and machinery, and in their repair, he cannot be made liable for injuries which arise from casualties against which such care would not protect.[2] It is otherwise if there be a lack in such care, either by himself or his representatives.[3] The duty of repairing is his own; and, as we shall hereafter see, the better opinion is, that

[1] Holmes *v.* R. R. 4 Exch. 253; Mellors *v.* Shaw, 1 B. & S. 437; Dynen *v.* Leach, 26 L. J. Exch. 221; Williams *v.* Clough, 3 H. & N. 259; Lawler *v.* R. R. 62 Me. 466; Fifield *v.* R. R. 42 N. H. 225; Hard *v.* R. R. 32 Vt. 473; Snow *v.* R. R. 8 Allen, 441; Cooper *v.* Man. Co. 14 Allen, 193; Northcoate *v.* Bachelder, 111 Mass. 322; Ladd *v.* R. R. 119 Mass. 412; O'Connor *v.* Adams, 120 Mass. 427; Swords *v.* Edgar, 59 N. Y. 28; Plank *v.* R. R. 60 N. Y. 607; Patterson *v.* R. R. 76 Penn. St. 389; Mad River, &c. R. R. *v.* Barber, 5 Ohio St. 541; Chicago & N. W. R. R. *v.* Swett, 45 Ill. 197; Chicago & N. W. R. R. *v.* Jackson, 55 Ill. 492; Chicago, B. & Q. R. R. *v.* Gregory, 58 Ill. 198; Chic. & N. W. R. R. *v.* Ward, 61 Ill. 131; Toledo R. R. *v.* Conroy, 61 Ill. 162; Chic. & A. R. R. *v.* Sullivan, 63 Ill. 293; Toledo, &c. R. R. *v.* Fredericks, 71 Ill. 294; Indianap. &c. R. R. *v.* Flanigan, 77 Ill. 365; Columb. R. R. *v.* Arnold, 31 Ind. 175; Muldowney *v.* R. R. 36 Iowa, 463; Brabbits *v.* R. R. 38 Wis. 289; Wedgwood *v.* R. R. 41 Wis. 478; Le Clair *v.* St. Paul R. R. 20 Minn. 9; Gibson *v.* R. R. 46 Mo. 163; Lewis *v.* R. R. 59 Mo. 595; Keegan *v.* Kavanaugh, 62 Mo. 230; Whalen *v.* Church, 62 Mo. 326; Mobile, &c. R. R. *v.* Thomas, 42 Ala. 673; McGlynn *v.* Brodie, 31 Cal. 376; Malone *v.* Hawley, 46 Cal. 409. That the road-bed of a railroad must be kept in order, see Snow *v.* R. R. 8 Allen, 441; Paulmier *v.* R. R. 34 N. J. L. 151; Chic. & A. R. R. *v.* Sullivan, 63 Ill. 293. And so as to an elevator, English *v.* Brennan, 60 N. Y. 609; Avilla *v.* Nash, 117 Mass. 318. Though see Finney *v.* R. R. 62 Barb. 218, and cases there cited.

In Patterson *v.* Wallace, 1 Macq. H. L. Cas. 748, Lord Cranworth, C., said: "Where a master employs a servant in a work of a dangerous character, he is bound to take all reasonable precautions for the safety of that workman. This is the law of England no less than the law of Scotland. It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is stanch and secure when in fact the master knows or ought to know that it is not so, and if from any negligence in this respect damage arise, the master is responsible."

[2] Infra, § 232.

[3] Brown *v.* Accrington Co. 3 H. & C. 511; Seymour *v.* Maddox, 16 Q. B. 332.

he is directly liable for the negligence of agents when acting in this respect on his behalf.[1] If the master "knows, or, in the exercise of due care, might have known, that . . . . his structures or engines were insufficient, *either at the time of procuring them or at any subsequent time, he fails in his duty.*"[2]

Privity of contract is not necessary to sustain the suit when it is based on the master's duty to afford suitable accommodations for employees. A master is liable to a sub-servant, when duly appointed, for injuries sustained through the master's negligence in this relation.[3] And a railroad company has been held liable to an employee for injuries sustained by the latter, through imperfections in the road, caused by the negligence of other roads having the right of using the same track.[4]

It should be added that the master is not liable when, though the machinery was defective, the injury to the plaintiff was caused by the negligent interference of a fellow-servant.[5]

Employer not bound to adopt every possible improvement or guard.

§ 213. As has been just incidentally observed, an employer is not required to change his machinery in order to apply every new invention or supposed improvement in appliance, and he may even have in use a machine, or an appliance for its operation, shown to be less safe than another in use, without being liable to his servants for the non-adoption of the improvement, provided the servant be not deceived as to the degree of danger that he incurs.[6] Nor is

[1] Infra, § 232.

[2] Wells, J., Arkeson *v.* Dennison, 117 Mass. 412; *S. P.* Buzzell *v.* Laconia Co. 48 Me. 113; Avilla *v.* Nash, 117 Mass. 318. In Ryan *v.* Fowler, 24 N. Y. 410, the defendant was held liable for damage to the plaintiff, a servant, received by a fall from a defective privy, of whose defect the plaintiff should have known; and in Harrison *v.* R. R. 31 N. J. L. 293, for defects in a bridge (originally adequate) which might have been ascertained by inspection. See, also, on the general question involved, Greenleaf *v.* R. R. 29 Iowa, 14; Dewey *v.* R. R. 31 Iowa, 374. Supra, §§ 31–57; infra, § 635.

[3] Wright *v.* R. R. L. R. 1 Q. B. D. 252, cited supra, § 201; Coughtry *v.* Woollen Co. 56 N. Y. 124. See supra, § 201; infra, § 441.

[4] Smith *v.* R. R. 19 N. Y. 127. See Hayes *v.* R. R. 3 Cush. 270. See infra, § 231.

[5] Priestly *v.* Fowler, 3 M. & W. 1; Sawyer *v.* R. R. 27 Vt. 370; Malone *v.* Hathaway, 64 N. Y. 5; *S. C.* 55 N. Y. 608, reversing *S. C.* 2 N. Y. Sup. Ct. 664; and cases cited infra, § 224.

[6] Readhead *v.* R. R. L. R. 4 Q. B. 379; Wonder *v.* R. R. 32 Md. 410; Fort Wayne, &c. R. R. *v.* Gildersleeve, 33 Mich. 133; Greenleaf *v.* R. R. 29 Iowa, 14; Indianap. R. R. *v.* Flanigan, 77 Ill. 365. Infra, § 635.

an employer liable to his employee for injuries received by the latter from defects which the employer could only have known by the application of a system of constant guard and inspection incompatible with the nature of his business.[1]

§ 214. Hence, to turn specifically to the consideration of the employer's liability, an employee who undertakes the performance of hazardous duties assumes such risks as are incident to their discharge from causes open and obvious, the dangerous character of which causes he has had opportunity to ascertain.[2] The same rule applies

An employee, who, after having the opportunity of becoming acquainted

[1] Warner *v.* R. R. 39 N. Y. 468; De Graff *v.* R. R. 3 T. & C. (N. Y.) 255; Chicago R. R. *v.* Donahue, 75 Ill. 106. See Ingalls *v.* Bills, 9 Metc. 1; Simmons *v.* Nantucket, 97 Mass. 361; Ford *v.* R. R. 110 Mass. 240; Ladd *v.* R. R. 119 Mass. 412; Tinney *v.* R. R. 62 Barb. 218; Deppe *v.* R. R. 36 Iowa, 52.

In Mad River, &c. R. R. *v.* Barber, 5 Ohio St. 541, the court said: "If there was no neglect of due and ordinary care and diligence, on the part of the company, furnishing or continuing the use of the cars and machinery, and the injury was caused by latent defects, unknown alike to the company and to the conductor, and not discoverable by due and ordinary skill and diligence in the inspection of the cars and machinery, it would be a misadventure falling among the casualties incident to the business, and for which no one could be blamed." See, also, Salters *v.* Canal Co. 3 Hun, 338; Stark *v.* Patterson, 6 Phila. R. 225.

In an action by the personal representative of a workman against his employer for death caused by the caving in upon the workman of an embankment which was being cut down, under the supervision of such employer, the court, at trial, charged the jury, among other things, "that if the defendant could have done anything to preserve the life of the deceased, he should have done it." The defendant excepted, and the court qualified the charge by saying that he meant to have said "anything that could have prevented the accident," to which defendant also excepted. Held, that the charge was error. The fact that the defendant could have done something which would have prevented the accident was not the test of his liability; the question was, was he negligent; did he exercise ordinary care and prudence in conducting the excavation, in view of the position of the deceased; the probable consequences which would result from the falling of the overhanging earth while intestate was below? Judgment below reversed. Leonard *v.* Collins, N. Y. Ct. of Appeal; Opinion *per curiam*, Alb. L. J. July 21, 1877.

[2] Infra, § 244; Assop *v.* Yates, 2 H. & N. 768; Williams *v.* Clough, 3 H. & N. 258; Britton *v.* R. R. L. R. 7 Exch. 130; Saxton *v.* Hawksworth, 26 L. T. N. S. 851–2; Ogden *v.* Rummens, 3 F. & F. 751; Priestly *v.* Fowler, 3 M. & W. 1; Dynen *v.* Leach, 26 L. J. Exch. 221; Buzzell *v.* Man. Co. 48 Me. 121; Fifield *v.* R. R. 42 N. H. 241; Coombs *v.* New Bed. Cord. Co. 102 Mass. 586; Ladd *v.* R. R. 119 Mass. 412; Hayden *v.* Man. Co. 8 Conn. 548; Owen *v.* R. R. 1 Lansing, 108; Haskins *v.*

with the risks of his situation, accepts them, cannot recover for injuries thereby received.

as to perils, not incidental to the particular work, of which he has notice either express or implied.[1] "If he think proper to accept an employment on machinery defective from its construction or from the want of proper repair, and with knowledge of the fact enters upon the service, the master cannot be held liable for injury to the servant within the scope of the danger which both the contracting parties contemplated as incidental to the employment."[2] Hence an employee, knowing that he is to be employed in running damaged cars, cannot complain of injuries sustained by him from one of the cars being damaged.[3] Knowledge, in such issues, can be inferred from facts.[4] Thus in an English case, tried in 1871, the plaintiff was a sheet-roller in the service of the defendants at their steel works, and had been so for three years. The proof was that five steam-engines properly constructed were used in the factory. They were placed at unequal distances, and two men only were employed to attend to them all, as the plaintiff knew. During the necessary absence of both the engine tenders, without negligence on their part, an engine ran away, or revolved too fast, and caused a drum connected with it to fly to pieces, one of which, passing through a yard, entered the mill where the plaintiff worked, and hurt him. The runaway engine might have been stopped in time to prevent mischief if an attendant had

R. R. 65 Barb. 129; Wright *v.* R. R. 25 N. Y. 562; Laning *v.* R. R. 49 N. Y. 534; Gibson *v.* R. R. 63 N. Y. 448; Frazier *v.* R. R. 38 Penn. St. 104; Patterson *v.* R. R. 76 Penn. St. 388; Mullen *v.* St. Co. 78 Penn. St. 26; Wonder *v.* R. R. 32 Md. 410; Balt. & O. R. R. *v.* Woodward, 41 Md. 269; Mad River, &c. R. R. *v.* Barber, 5 Ohio St. 541; Gildersleeve *v.* R. R. 33 Mich. 84; Camp Point Man. Co. *v.* Ballou, 71 Ill. 417; Toledo R. R. *v.* Eddy, 72 Ill. 138; Greenleaf *v.* R. R. 29 Iowa, 14; Muldowney *v.* R. R. 39 Iowa, 615; Le Clair *v.* R. R. 20 Minn. 9; Sullivan *v.* Bridge Co. 9 Bush, 81; Johnson *v.* R. R. 55 Ga. 133; Vicksburg R. R. *v.* Wilkins, 47 Miss. 404; Howd *v.* R. R. 50 Miss. 178; Devitt *v.* R. R. 50 Mo. 302; Conroy *v.* Vulcan Iron Works, 62 Mo. 35; McGlynn *v.* Broderick, 31 Cal. 376; Kelly *v.* Belcher, 3 Sawyer, 500.

[1] Thayer *v.* R. R. 22 Ind. 29; Moss *v.* Johnson, 22 Ill. 642; Chicago, &c. R. R. *v.* Swett, 45 Ill. 201; Sewall *v.* R. R. 46 Ill. 99.

[2] Cockburn, C. J., Clarke *v.* Holmes, 7 H. & N. 937; adopted by Allen, J., Gibson *v.* R. R. 63 N. Y. 452 (1875).

[3] Chicago R. R. *v.* Ward, 61 Ill. 130.

In Toledo, &c. R. R. *v.* Conroy, 61 Ill. 162, an employee was held to be presumedly cognizant of defects of a bridge of which he would be ordinarily supposed to take notice. See, also, Deppe *v.* R. R. 38 Iowa, 592.

[4] Whart. on Ev. § 80.

been near. It was held that the plaintiff must be assumed to have been cognizant of the particular danger.[1]

In a Massachusetts case, tried in 1876, it was held that the plaintiff, a road-master employed by the defendant, a railroad corporation, who was injured in consequence (in part) of the want of a proper check-chain in the cars, but who was aware of the want of check-chains in some of the defendant's cars, could not on this ground recover, if he omitted to take notice whether or no the car in question had a check-chain.[2]

An employee, however, is not bound to inquire as to latent defects. He has a right to presume that this inquiry was made by his employer, on whom devolves the, duty.[3] And although the servant may know of the defects, this will not defeat his claim unless he know that the defects are dangerous.[4] The servant can be only said to assume a risk which is either announced to him in advance, or which is a natural and ordinary incident to the employment, or which from facts before him it was his duty to infer.[5]

§ 215. He who wantonly runs into danger cannot recover damages to compensate him for the hurt he thereby receives; and this principle holds good in suits against masters as well as in suits against strangers.[6] Thus, in an Indiana case, where an employee in a stave factory, in the absence and in violation of the directions of his employers, exchanged his assigned and usual place of work, as a catcher, — a place of little or no danger, — for that of sawyer, — a much more dangerous position — and while he was so acting as sawyer, a band wheel broke, and one of the pieces hit and injured the employee, it was ruled by the supreme court that the employee, by going from his proper place into one of greater

And so of employee unnecessarily exposing himself to collateral risks.

[1] Saxton *v.* Hawksworth, 26 L. T. N. S. 851, Exch. Cham.

[2] Ladd *v.* R. R. 119 Mass. 412. See, however, Ill. Cent. R. R. *v.* Welch, 52 Ill. 183.

[3] Gildersleeve *v.* R. R. 33 Mich. 122; Muldowney *v.* R. R. 36 Iowa, 463. See, also, Murphy *v.* Phillips, 35 L. T. N. S. 477. Supra, § 210.

[4] See Stark *v.* McLaren, 10 Ct. of Ses. (3d series) 31; Snow *v.* R. R. 8 Allen, 441; Huddleston *v.* Machine Shop, 106 Mass. 282; Patterson *v.* R. R. 76 Penn. St. 389.

[5] Ibid.; Roberts *v.* Smith, 2 H. & N. 213; Clarke *v* Holmes, 7 H. & N. 937.

[6] Supra, § 109; Dynen *v.* Leach, 26 L. J. Exch. 222; Clarke *v.* Holmes, 7 H. & N. 937; Clayards *v.* Dethick, 12 Q. B. 439; Felch *v.* Allen, 98 Mass. 572; Summersell *v.* Fish, 117 Mass. 312; Ill. Cent. R. R. *v.* Houck, 72 Ill. 285; William *v.* R. R. 43 Iowa, 396. See Steele *v.* R. R. 43 Iowa, 101.

danger, contributed to his injury, and was not entitled to recover damages for his injury.[1] But it is for the jury, in all cases of conflict of testimony, to determine whether or no the risk was unnecessary or wantonly assumed.[2] And where a servant, at the time of the injury, was performing his duty at his station, the defence now particularly before us fails. If engrossed in performance of his duty, he is not expected to be on the watch for unexpected contingencies.[3]

But this does not apply when employee is not competent to understand risks.

§ 216. A master who holds out to employ young servants must provide accommodations suitable to the youth of the persons whom he employs. In the ordinary nature of things they cannot look out for themselves; they are gifted neither with the discernment nor the experience which would enable them to discover defects which would be obvious to older operatives. To insure safety, therefore, precautions must be taken greater than those taken where no children are employed, for the reason that he who leaves a dangerous instrument in a place where children are apt to be, must guard it more carefully than he would if it were to be exposed only to adults.[4] Hence we may hold that where a child is employed, the employer must look out for the child, and must see that it is not exposed to dangers, arising from structure of building or machinery, which an operative of ordinary intelligence and experience would perceive.[5] *Notice* of

[1] Brown *v.* Byroads, 47 Ind. 435.

[2] Spong *v.* R. R. N. Y. Ct. of App. 1876, reversing *S. C.* 60 Barb. 30. See Clark *v.* Holmes, 7 H. & N. 348; Huddleston *v.* Machine Shop, 106 Mass. 282; Patterson *v.* R. R. 76 Penn. St. 318.

[3] Infra, § 219; Goodfellow *v.* R. R. 106 Mass. 461, citing Quirk *v.* Holt, 99 Mass. 164; Hackett *v.* Middlesex Manufacturing Co. 101 Mass. 101; Mayo *v.* Boston & Maine Railroad, 104 Mass. 137; Wheelock *v.* Boston & Albany Railroad Co. 105 Mass. 203. And so where the servant was cognizant of the defects, but not of their danger. Supra, § 214, and cases cited in last note to that section.

[4] See infra, §§ 313–5, 322.

[5] Supra, § 88; O'Byrne *v.* Burn, 16 Cas. in Ses. (2d ser.) 1025; Bartonshill Coal Co. *v.* Reid, 3 Macq. 266; Bartonshill Coal Co. *v.* McGuire, 3 Macq. 300; Grizzle *v.* Frost, 3 Fost. & F. 622; Railroad Co. *v.* Fort, 17 Wall. 554; Coombs *v.* New Bedf. Cord. Co. 102 Mass. 572; Huddleston *v.* Lowell Machine Shop, 106 Mass. 282; Northcote *v.* Bachelder, 106 Mass. 322; Roberts *v.* Baxter, 44 Cal. 187. See apparently contra, but really decided on another point, Flower *v.* Penn. R. R. 69 Penn. St. 210.

In Hayden *v.* Smithfield Man. Co. 29 Conn. 548, the court said: "An employee, having knowledge, cannot

danger is not enough. The child must have sufficient instruction to enable him to avoid danger.[1] The same remark applies to servants whose grade of intelligence or education is not such as to enable them to detect defects with which the master, from the fact that he must operate the machinery in which the defect exists, is or ought to be familiar.[2]

Question of employee's acquaintance with risks, for jury.

§ 217. Where, however, there is any doubt whether the employee was acquainted, or ought to have made himself acquainted, with the risk, the question of his negligence in this respect is for the jury.[3]

§ 218. Hence, it has been ruled in Massachusetts that the fact that, very near where an employee is working in a manufactory, machinery not connected with his work is in motion, the dangerous nature of which is visible and constant, is not conclusive that he has taken on himself the risk of being injured by it, in modification of the duty of his employer to provide for him a reasonably safe place in which to do his work; and if, through inattention to the danger, he meets with such an injury while doing his work, and sues his employer therefor, the questions whether he displayed due care on his own part, and whether there was a neglect of his employer to give him suitable notice of the danger, are for the jury.[4] Under such circumstances, as has been already seen, his youth and inexperience, and the directions previously given to him by agents of the employer about the manner of doing the work, are to be considered upon the question of due

claim indemnity except under particular circumstances. He is not secretly or involuntarily exposed, and likewise is paid for the exact position and hazard he assumes; and so he may terminate his employment, when, from unforeseen perils, he finds his reward inadequate or unsatisfactory. We need hardly remark that as this distinction rests upon knowledge in the employee, *it is quite obvious that he must have mind sufficient to acquire the necessary knowledge.*" The plaintiff in this case, being a child only ten years old, having been injured by being caught in exposed machinery, it was held to be a question for the jury whether he had a sufficient understanding of the hazards of the employment to bring him within the general rule.

[1] Sullivan *v.* India Co. 113 Mass. 396. See Walsh *v.* Peet Valve Co. 110 Mass. 23.

[2] Supra, § 211; Noyes *v.* Smith, 28 Vt. 59.

[3] Huddleston *v.* Lowell Machine Shop, 106 Mass. 282. See Northcote *v.* Bachelder, 106 Mass. 322; Porter *v.* R. R. 60 Mo. 160; Conroy *v.* Vulcan Iron Works, 62 Mo. 35; Dale *v.* R. R. 63 Mo. 455.

[4] Coombs *v.* New Bedford Co. 102 Mass. 572.

notice.[1] Where, however, an experienced operative, cognizant of the defects of machinery, puts himself within its range, and is injured, he is thereby in law, supposing the fact to be established, precluded from recovering from the employer.[2]

Employee acting instinctively under direct command is not barred.

§ 219. If an employee is in haste called upon to execute an order requiring prompt attention, he is not to be presumed to necessarily recollect the defect so as to avoid it. A prompt and faithful employee, suddenly called upon by a superior to do a particular act requiring immediate attention, cannot be supposed to remember at the moment the defect that would make his doing the act dangerous; and even if he should remember it, he may conclude, from the fact that he is ordered to do the particular act, that the defect, which would have interfered with the execution of such an order, is remedied. Although he may be proved to have previously known of the existence of the defect, yet it cannot, under such circumstances, be justly inferred that this knowledge was present to him at this particular time. "Under such circumstances," well reasons Judge Wright, in a case decided in Iowa, in 1870 "compelled as he necessarily would be to act with promptness and dispatch, it would be most unreasonable to demand of him the thought, care, and scrutiny which might be exacted where there is more time for observation and deliberation. Thus, if a ladder is usually found upon such cars, in the haste necessarily attendant upon uncoupling cars and stopping the train, he is not bound to deliberate and settle in his mind that a like means of ascending the car was on this one, though he knew by prior observation that it was wanting."[3] The reason is, that to a party acting instinctively or automatically, supposing he is without antecedent blame, causal responsibility cannot be imputed.[4]

[1] Ibid. Supra, § 216.

[2] Skipp *v.* R. R. 9 Exch. 223; Seymour *v.* Maddox, 16 Q. B. 326; Sullivan *v.* India Co. 113 Mass. 396; Ladd *v.* R. R. 119 Mass. 412; Dillon *v.* R. R. 3 Dillon, 319. Supra, § 215; though see Britton *v.* R. R. L. R. 7 Exch. 130.

[3] Greenleaf *v.* R. R. 29 Iowa, 47; and see, to same effect, Snow *v.* Housatonic Co. 8 Allen, 441; Reed *v.* Northfield, 13 Pick. 98; Un. Pac. R. R. *v.* Fort, 2 Dillon, 259; *S. C.*, under title Railway *v.* Fort, 17 Wall. 388; Mann *v.* Oriental Mill Co. 11 R. I. 184. See supra, § 94. Patterson *v.* R. R. 76 Penn. St. 389.

[4] Infra, §§ 304–8; and Goodfellow *v.* R. R. 106 Mass. 461.

It has further been ruled in Iowa, that the bare fact that an employee is directed by his superior in charge to

§ 220. It has recently been held that, when upon an employer being notified of defect in machinery, he undertakes to remedy it but fails to do so, the employee may recover, though he has full knowledge of the defect. The English rule in this respect is laid down in a case where machinery was required by statute to be fenced, but the protection was removed by decay or otherwise, and the owner, having notice of the defect, promised, either expressly or impliedly, to repair, and the servant continued in the service, in the reasonable expectation of the defect being repaired.[1] Under these facts, Pollock, C. B., said: "We think that in a case where machinery is by act of parliament required to be protected so as to guard the persons working in the mill from danger, and a servant continues in the employment, entering upon it when the machinery is in a state of safety, and if (in consequence of danger accruing from the protection being decayed or withdrawn) the servant complains of the want of protection, and it is promised to him from time to time that it shall be restored, we think during that period a master must be considered to take on himself the risk; and, therefore, if any accident occurs to the servant during that period, the master is responsible for it."[2]

When master promises to remedy the defect.

"I am of opinion," says Cockburn, C. J., in the same case at a later stage,[3] "that there is a sound distinction between the case of a servant who knowingly enters into a contract to work on defective machinery, and that of one who, on a temporary defect arising, is induced by the master, after the defect is brought to the knowl-

perform an act at a time and under such circumstances as that a person would reasonably apprehend danger therefrom, would not justify his disobedience of such orders, and that to assume such position of danger in obedience to such direction is not, of itself, negligence. Frandsen *v.* R. R. 36 Iowa, 372.

In Pennsylvania, it is said that "where the servant, in obedience to the requirement of the master, incurs the risk of machinery, which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable that it may be safely used by extraordinary caution or skill . . . . the master is liable for a resulting accident." But if the defect is "so great, that obviously, with the use of the utmost skill and care, the danger is imminent, so much so, that none but a reckless man would incur it, the employer would not be liable." Patterson *v.* R. R. 76 Penn. St. 389. See, to same effect, Le Clair *v.* R. R. 20 Min. 9.

[1] Holmes *v.* Clarke, 6 Hur. & N. 349.

[2] See, also, Couch *v.* Steel, 3 Ell. & Bla. 402; 23 L. J. Q. B. 121; Patterson *v.* R. R. 76 Penn. 389.

[3] Clarke *v.* Holmes, 7 Hur. & N. 942.

edge of the latter, to continue to perform his service under the promise that the defect should be remedied. In the latter case it seems to be that the servant by no means waives the right to hold the master responsible for any injury which may arise to him from the omission of the master to fulfil his obligation." [1]

It has been further argued that a servant does not, by remaining in his master's employ with knowledge of defects in machinery he is obliged to use, assume the risks attendant on the use of such machinery, if he has notified the employer of such defects, or protested against them, in such a way as to induce a confidence that they will be remedied, such confidence being based on the master's engagements, either express or implied.[2] The only ground on which the exception before us can be justified is, that in the ordinary course of events the employee, supposing the employer has righted matters, goes on with his work without noticing the continuance of the defect.[3] But this reasoning does not apply, as we have seen, to cases where the employee sees that the defect has not been remedied, and yet intelligently and deliberately continues to expose himself to it.[4] In such case, on the principles heretofore announced,[5] the employer's liability in this form of action ceases. He may be liable for breach of promise; but the causal connection between his negligence and the injury is broken by the intermediate voluntary assumption of the risk by the employee.

In any view, the promise to rectify, it should be remembered, in order to be operative to charge the master, must be made by a person authorized to represent the master for such purpose.[6]

No defence that corrective orders were given by master, but were disobeyed.

§ 221. In all cases in which it is the duty of the master to see that structure and machinery are in good order, the master cannot defend himself, when he is sued for injuries sustained by a servant from a defect, by showing that he had given orders to repair, which orders had been disobeyed.[7] Such evidence, however, is ad-

[1] See Mobile R. R. *v.* Thomas, 42 Ala. 672.

[2] Snow *v.* Housatonic R. R. 8 Allen, 341; Un. Pac. R. R. *v.* Fort, 2 Dillon, 259; Kroy *v.* R. R. 32 Iowa, 357; Greenleaf *v.* R. R. 33 Iowa, 52. See Laning *v.* R. R. 49 N. Y. 531; Patterson *v.* R. R. 76 Penn. St. 389.

[3] See supra, § 74.

[4] Conroy *v.* Vulcan Iron Works, 62 Mo. 35; *S. P.* Holmes *v.* Worthington, 2 F. & F. 533. See Couch *v.* Steel, 3 E. & B. 402; Ford *v.* R. R. 110 Mass. 240; Crichton *v.* Keir, 1 Macph. (Scotch) 407.

[5] See supra, § 130.

[6] McGowan *v.* R R. 61 Mo. 526.

[7] Avilla *v.* Nash, 117 Mass. 318.

missible when the diligence and care of the master are at issue.[1]

Negligence of middle-man when negligence of employer.

§ 222. Where the principal selects a superintendent to manage the concern, leaving the entire control to such middleman, there the superintendent or middle-man, on reasoning amplified hereafter, represents the principal, and his negligence, in this respect, is the principal's negligence.[2] Were this not the case, employees, sacrificed to the pernicious economy or recklessness of a middle-man, could have no redress, except upon proof of *culpa in eligendo*, to establish which, systematic unfitness, as we have seen, must be shown. For injuries caused by particular instances of mismanagement there could be no recovery, unless by proving the general unfitness of the middle-man. Yet, as the principal saves by every piece of cheap machinery put in, it is proper that he should bear the corresponding burden. And, apart from this view, it is against public policy for a capitalist, while reaping the profits of an adventure, to divest himself of its responsibility.

§ 223. Wherever an absent principal assigns the whole con-

[1] Durgin *v.* Munsen, 9 Allen, 396.

[2] Infra, § 235. See Laning *v.* N. Y. Cent. R. R. 49 N. Y. 521; Flike *v.* Bost. & A. R. R. 53 N. Y. 549; Harper *v.* R. R. 47 Mo. 574; Brothers *v.* Carter, 52 Mo. 375; Lottman *v.* Barnett, 62 Mo. 159; and observations made infra, §§ 229, 241.

In Malone *v.* Hathaway, 64 N. Y. 5, we have the following from Allen, J.: "Corporations necessarily acting by and through agents, those having the superintendence of various departments, with delegated authority to employ and discharge laborers and employees, provide materials and machinery for the service of the corporation, and generally direct and control under general powers and instructions from the directors, may well be regarded as the representative of the corporation, charged with the performance of its duty, exercising the discretion ordinarily exercised by principals, and within the limit of the delegated authority of the acting principal. These acts are, in such case, the acts of the corporation, and the corporation, within adjudged cases, must respond as well to the other servants of the company as to strangers. They are treated as the general agents of the corporation in the several departments committed to their care. A person thus placed by a corporation in such a position of trust and authority may be fairly considered as its representative *pro hac vice*. But when the principal is an individual, acting *sui juris*, and there is no evidence of a surrender of power and control to any subordinate, and is present himself superintending the establishment in person, no such presumption arises or responsibility attaches in respect of the acts of a competent and proper foreman, selected by him and in the employment of the principal." And see Chapman *v.* R. R. 56 N. Y. 579. Infra, § 232 *b*.

trol of his business and machinery to a general agent or middle-man, then notice to such agent or middle-man, of defects or negligences, is notice to the principal.[1] To corporations this doctrine must be rigorously applied. A corporation can only see through its agents, and what they ought to see it ought to see. It is true that we cannot justly say that notice to every subaltern is notice to the corporation. But when a corporation says, "This is my general agent," or "This is my agent for a particular purpose," then notice to such general agent, or to the special agent in the line of his specialty, is notice to the corporation.[2] But where a foreman is a fellow-servant with the injured party, there, unless agency for the purpose be proved, notice to the foreman is not notice to the master.[3]

Notice to middle-man notice to employer.

IV. WHAT NEGLIGENCE OF FELLOW-SERVANTS A SERVANT ASSUMES.

§ 224. The master is not liable to his servants for injuries to them produced by the negligence of a fellow-servant, engaged in the same business, provided there be no negligence in the appointment of such negligent servant, or in the retention of such servant after notice of his incompetency.[4] The reasoning on which this exception may be best sustained is the same as that which relieves the master from liability to the servant for injuries

Master not liable for negligence of fellow-servants who have not been negligently appointed or retained.

[1] Wigmore *v.* Jay, 5 Exch. 354; Searle *v.* Lindsay, 11 C. B. N. S. 429; Gallagher *v.* Piper, 16 C. B. N. S. 669; Feltham *v.* England, 7 Best & Smith, 676; L. R. 2 Q. B. 33; Wilson *v.* Merry, L. R. 1 Scotch App. 326; Hard *v.* Vt. & Can. R. R. Co. 32 Vt. 473; Albro *v.* Agawam Canal Co. 6 Cush. 75; Ford *v.* R. R. 110 Mass. 240; Laning *v.* R. R. 49 N. Y. 521; Corcoran *v.* Holbrook, 59 N. Y. 517, citing Flike *v.* R. R. 53 N. Y. 549; English *v.* Brennan, 60 N. Y. 609.

[2] See Hard *v.* R. R. 32 Vt. 473; Gilman *v.* R. R. 10 Allen, 239; Corcoran *v.* Holbrook, 59 N. Y. 517; Patterson *v.* R. R. 76 Penn. St. 389; Mobile *v.* Thomas, 42 Ala. 672; Brabbits *v.* R. R. 38 Wis. 289; Nashville R. R. *v.* Elliott, 1 Colo. 612; and see cases at large cited in Whart. on Agency, §§ 183–4.

[3] Albro *v.* Canal Co. 6 Cush. 75. Infra, § 235.

[4] Priestly *v.* Fowler, 3 M. & W. 1; Skipp *v.* R. R. 9 Exch. 223; Murray *v.* Currie, L. R. 6 C. P. 24; Havell *v.* Steel Co. 31 L. T. N. S. 433; Lovell *v.* Howell, L. R. 9 C. P. 161; Rourke *v.* Colliery Co. L. R. 9 C. P. 556; Wilson *v.* Merry, L. R. 1 Sc. App. 332; Kielly *v.* Belcher, 3 Sawyer, 500; Farrell *v.* R. R. 4 Metc. 49; Hayes *v.* R. R. 3 Cush. 270; Albro *v.* Agawam, 6 Cush. 75; Gillshannon *v.* R. R. 10 Cush. 228;

received through the ordinary risks of service.[1] The offending servant, the injured servant, and the master, are all co-adventur-

Gilman *v.* R. R. 10 Allen, 233; Seaver *v.* R. R. 14 Gray, 466; Summersell *v.* Fish, 117 Mass. 312; Johnson *v.* Boston, 118 Mass. 114; Hodgkins *v.* R. R. 119 Mass. 419; Burke *v.* R. R. 34 Conn. 474; Sizer *v.* R. R. 7 Lansing, 67; Wright *v.* R. R. 25 N. Y. 562; Laning *v.* R. R. 49 N. Y. 328; Hoffnagle *v.* R. R. 55 N. Y. 608; Scammon *v.* R. R. 62 N. Y. 251; McAndrews *v.* Burns, 39 N. J. L.; Ardesco *v.* Gilson, 63 Penn. St. 150; Wonder *v.* R. R. 32 Md. 410; Hardy *v.* R. R. 76 N. C. 5; Crutchfield *v.* R. R. 76 N. C. 320, Henderson *v.* Walker, 55 Ga. 481; Mobile R. R. *v.* Thomas, 42 Ala. 672; Ala. R. R. *v.* Waller, 48 Ala. 489; Indianap. &c. R. R. *v.* Love, 10 Ind. 29; Columbus, &c. R. R. *v.* Arnold, 31 Ind. 175; Pittsburg, &c. R. R. *v.* Ruby, 38 Ind. 294; Columbus *v.* Trosch, 68 Ill. 545; Ill. Cent. R. R. *v.* Kean, 72 Ill. 512; St. Louis, &c. R. R. *v.* Britz, 72 Ill. 256; Toledo R. R. *v.* Durkin, 76 Ill. 395; Anderson *v.* R. R. 37 Wis. 321; Davis *v.* Detroit Co. 20 Mich. 105; Mich. Cent. R. R. *v.* Doan, 32 Mich. 510; Murray *v.* R. R. 1 McMillan, 398; New Orleans R. R. *v.* Hughes, 49 Miss. 258; Howd *v.* R. R. 50 Miss. 178; Memphis R. R. *v.* Thomas, 51 Miss. 137; McDermott *v.* R. R. 30 Mo. 115; Gibson *v.* R. R. 46 Mo. 163; Harper *v.* R. R. 47 Mo. 569; Moss *v.* R. R. 49 Mo. 104; Dewitt *v.* R. R. 50 Mo. 302; Brothers *v.* Carter, 52 Mo. 372; Connor *v.* R. R. 59 Mo. 285; Lee *v.* Detroit, 62 Mo. 565; Proctor *v.* R. R. 64 Mo. 112; Union Pac. R. R. *v.* Young, 8 Kans. 638; Kansas P. R. R. *v.* Salmon, 11 Kans. 83; Yeomans *v.* Nav. Co. 44 Cal. 71; Hogan *v.* R. R. 49 Cal. 128. "A servant, when he engages to serve a master, undertakes as between himself and his master to run all the ordinary risks of the service, including the risk of negligence upon the part of a fellow-servant, when he is acting in the discharge of his duty, as servant of him who is the common master of both." Per Erle, C. J., L. R. 1 C. P. 296; Tunney *v.* Midland R. C. L. R. 1 C. P. 291. See, also, Murphy *v.* Smith, 19 C. B. N. S. 361; Gallagher *v.* Piper, 16 C. B. N. S. 669. In Tebbutt *v.* Bristol & Exeter Railway Co. L. R. 6 Q. B. 76, Hannen, J., says: "In such case the maxim 'Respondeat superior,' as a general rule, applies. The exception is, where the injured party stood at the time of the injury in such a relation to the master that it may reasonably be presumed he agreed to undertake the risk arising from the negligence of those whom the master employed." The distinction is thus put by Lord Cranworth, in Bartonshill Coal Company *v.* Reid, 3 Macq. at pp. 276, 277: "So far as persons external to the master and his servants are concerned, the master is to be considered as responsible for every one of those servants. . . . . But the case is different where the question arises within the circle of the master and his servants." And again: "The principle which makes the master liable to complaints made *ab extra* does not make him liable to complaints arising *intra*, the whole body consisting of himself and his workmen."

It is ruled in Kentucky, "that while exemption is conceded as to the common hazards incident to the acceptance of employment in connection with others, and which the employee

[1] Supra § 199.

ers in a common business; and unless as to duties which the master undertakes specifically (*e. g.* the furnishing of machinery, and the selection of co-operatives), the injured servant has no more claim against the master for the negligence of a co-servant, than he would have against the co-servant for the negligence of the master.[1]

Such is the reasoning on which the exemption of masters, in cases of the class before us, can be most satisfactorily based. It should be repeated, however, that this exemption is sometimes vindicated by resorting to two assumptions, often false in fact: (1) that servants contract to assume certain risks, when there is often no privity of contract; (2) that they have an opportunity of observing and reporting on their fellow-servants, when there is no such opportunity. But rejecting these reasons, and adopting that stated above (that one co-adventurer cannot recover from another co-adventurer, except for breach of duties which the latter specifically undertakes), then we can accept the following limitations proposed by the select committee of the English House of Commons, in 1877, on this very topic:[2] "(1) that where the actual employers cannot personally discharge the duties of masters, or where they deliberately abdicate their functions and delegate them to agents, the acts or defaults of the agents ,who thus discharge the duties and fulfil the functions of masters, should be considered as the personal acts or defaults of the principals and employers, and should impose the same liability on such principals and employers as they would have been subject to had they been acting personally in the conduct of their business, notwithstanding that such agents are technically in the employment of the principals; (2) that the doc-

is presumed to have undertaken to risk, the rule as applicable to cases of gross or wilful neglect on the part of another servant, by whose want of fidelity or criminal fault harm results to his fellow employee in the discharge of his duty, was rejected as inconsistent with principle, analogy, and public policy." Harding, J., Louisville & N. R. R. *v.* Filbern, 6 Bush, 579; relying on Louisville & N. R. R. *v.* Collins, 2 Duvall, 114; and Louisville & N. R. R. *v.* Robinson, 4 Bush, 507. But such wilful neglect "must involve either an intentional wrong, or such a reckless disregard of security and right, as to imply bad faith." Louisville & N. R. R. *v.* Filbern, *ut supra*.

[1] See note to § 199.

[2] See London Law Times, June 23, July 28, 1877; Central Law Journal, August 10, 1877.

trine of common employment has been carried too far where workmen employed by a contractor, and workmen employed by a person or company who has employed such contractor, are considered as being in the same common employment." As to the fiction of an implied contract, it fails, as we have already seen, to sustain many of the cases for which it is invoked, since there is no privity of contract between a volunteer, or sub-servant, and the master, yet neither volunteer nor sub-servant is permitted to recover from the master for injuries caused by the negligence of fellow-servants. It is essential, also, to a contract, that there should be competent contracting parties; yet among the servants to whom the exemption before us applies are often children, incompetent to contract.[1]

[1] See particularly arguments to this effect in note to § 199.

Judge Cooley, in an able exposition of this topic in the Southern Law Review for April, 1876, p. 109, gives this reason for the rule: "It is of the highest importance in that employment that every one who has a duty or service to perform upon which the safety of others may depend, whether in the capacity of master or servant, should be under all reasonable inducements to discharge or perform it with fidelity and prudence, and that no one should be tempted to imperfect vigilance by any promise the law might make to compensate him for injuries against which his own caution might, perhaps, have protected not himself alone, but others also. The inducement to vigilance is sufficiently furnished, in the case of the master, by compelling him to respond to third persons for all injuries, whether caused by his own negligence or by that of his servants; but in the case of servants it is supplied mainly by this rule, which, by denying him the remedy that is allowed to third persons, makes it his special interest to protect others, since it is only in so doing that he protects himself. . . . . Sound policy seems to require that the law should make it for the interest of the servant that he should take care not only that he be not himself negligent, but also that any negligence of others in the same employment be properly guarded against by him, so far as he may find it reasonably practicable, and be reported to his employer, if needful. And in this regard it can make little difference what is the grade of servant who is found to be negligent, except as superior authority may render the negligence more dangerous, and consequently increase at least the moral responsibility of any other servant, who, being aware of the negligence, should fail to report it." No doubt this reason is good as to a servant who acquiesces, after notice which it is his duty to have taken, in the negligence of a fellow-servant. But it does not apply in those cases in which, from the wide separation of their departments, the injured servant has no opportunity of becoming acquainted with the character of the injuring servant. See note to § 199.

In Iowa, by statute, railroad companies are made liable for all damages sustained by any person, including

§ 225. The several constituents of this exception will be now considered as follows: —

1. Who are "servants" precluded from recovery under this exception.

2. What are the class of injuries to which this exception relates.

3. Who are the "fellow-servants" whose negligence is thus considered part of the common risk.

4. What is the negligence in appointment and retention which precludes the master from taking advantage of this exception.

5. Whether the master is liable for the negligence of a middleman in appointment of improper servants.

6. Whether the master's liability is revived by his promise, upon notice of the negligence of an improper servant, to remove such servant.

§ 226. 1. As this point has been already generally discussed,[1] it is sufficient to say that to prejudice a person injured by the negligence of another, under this limitation, the relation of master and servant must be affirmatively made out.[2]

Who are "servants" so precluded from recovery.

employees of the company, in consequence of any neglect of the agents, or by any mismanagement of the engineers or other employees of the corporation. Hunt *v.* Northwestern R. R. Co. 26 Iowa, 363. See supra, note to § 201 *a*. The same provision exists in Georgia. Thompson *v.* R. R. 54 Ga. 509. In Missouri it is ruled by Proctor *v.* R. R. 64 Mo. 112, overruling Schultz *v.* R. R. 36 Mo. 13, that a statute giving a right of action against a railroad company, "whenever any person shall die from an injury resulting from or occasioned by the negligence, unskilfulness, or criminal intent of any officer, agent, servant, or employee, whilst running, conducting, or managing any locomotive, car, or train of cars" (1 Wag. Stat. p. 517, § 1), does not give a right of action in case of death happening through the negligence of a fellow-servant, the master not having been at fault in selecting or retaining in his employment an unskilful, negligent, or otherwise improper servant.

[1] Supra, § 201.

[2] In Smith *v.* Steele, 32 L. T. N. S. 195; L. R. 10 Q. B. 125, a pilot was engaged by defendants under the compulsory clauses of the Merchant Shipping Act of 1854, for a voyage in a vessel of which they were owners. While giving directions on board for coming out of dock, before the voyage commenced, the pilot was killed by the fall of a boat in consequence of the negligence of defendants' servants. In an action by the personal representatives of the deceased, it was held that the action lay against defendants. Blackburn, J., who delivered the opinion, said: "We think . . . . that the question in the present case is reduced to this, whether there is

When the injury was received by the injured servant prior to his co-service with the offending servant, he may, due negligence being shown, recover of the master.[1]

It need scarcely be added that the limitation is confined to the servant himself. Members of his family may recover from his master for injuries received by them through his fellow-servant's negligence.[2]

§ 227. 2. Not merely positive acts of misfeasances, but non-

between the owners of a ship and the pilot whom they are compelled to employ an implied contract that the pilot shall take upon himself the risk of injury from the negligence of the shipowners' servants." "An ordinary servant has . . . . the power of choosing whether he will enter into the employment of a master who does not agree to act personally in the management of his business, or, as an alternative, to be responsible for the negligence of those he employs. The pilot has no such choice; he must conduct the ship on the terms fixed by the statutes which regulate pilotage, and we can find nothing in those statutes to justify the conclusion that the pilot is to take upon himself the risk." In an action brought before the N. Y. Commission of Appeals, in 1875 (Svenson *v.* Atl. Mail, 11 Alb. L. J. 208), the plaintiff was injured while employed upon a barge which was engaged in lightering one of defendant's steamships. The answer of the defendant admitted that when the accident occurred it owned and had the control and management of the steamship. It appeared that the barge was not owned by defendant, and that plaintiff was employed and paid by its master. The steamship had a cargo of tobacco in bales. The custom of unloading tobacco, as proved upon the trial, is that four bales are hauled up from the hold of the steamer by her hands and thrown down, one at a time, on the deck of the lighter, where they are stowed away by the hands upon the lighter, and it is the duty of the men throwing down the bales to give some warning before letting them go; and this custom was observed in every instance but one, when the accident occurred. The deck of the lighter being almost full, plaintiff was engaged in trying to save a bale from falling overboard, when another bale of a new set of four was thrown down without warning, and hit plaintiff and broke his leg. The man who threw it down was standing on the steamship, and could have seen plaintiff if he had looked, but was conversing with some one behind him. *Held*, that the proof, together with the admission in the answer, was sufficient to authorize the jury to find that the man who caused the injury was a servant of the defendant and working for it at the time; that he and plaintiff were not fellow-servants within the meaning of the rule exempting an employer from liability for an injury to one employee by the act of another; and that said rule, therefore, did not furnish any objection to the maintenance of the action.

[1] Arkerson *v.* Dennison, 117 Mass. 407.

[2] Gannon *v.* R. R. 112 Mass. 234.

feasances, are within the scope of the exception. Neglect on the part of a fellow-servant to search for and correct a latent defect is a risk which the other servants of the same concern engage to assume as much as they do overt acts of negligence.[1]

What are the injuries to which the exception relates.

Negligences of employees in keeping time-tables do not impose liability on a railroad company for injuries sustained by co-employees;[2] though it is otherwise when the negligence is imputable to an employee who acts as vice principal for the master.[3]

A master's liability for defective apparatus is not relieved by the fact that a fellow-servant of the injured party coöperated in producing the injury.[4]

§ 228. 3. Keeping in mind that the master, the offending servant, and the injured servant, are co-adventurers in a common enterprise, it follows that no liability is imposed on the master by the fact that the servant receiving the injury is inferior in grade to the one by whose negligence the injury was caused, provided the latter was not at the time discharging the master's duties.[5] Thus, in an English case determined in 1875, the defendants were the owners of a colliery within the Coal Mines Regulations Act, and as such appointed a certificated manager, as required by that act. A miner employed in the colliery was killed by an explosion of fire-damp, the death being caused by the negligence of the man-

Need not be parity of service.

[1] Supra, § 201. Waller *v.* The South Eastern Railway Co. 2 Hur. & C. 102; 32 L. T. Exch. 205. See, also, Howells *v.* Steel Co. L. R. 10 Q. B. 62.

[2] Rose *v.* R. R. 58 N. Y. 217, cited infra, § 243.

[3] Little Miami R. R. *v.* Stevens, 20 Ohio St. 45. Infra, § 235.

[4] Perry *v.* Ricketts, 55 Ill. 234. Infra, § 232.

[5] Allen *v.* Gas Co. L. R. 1 Exch. D. 251; Rourke *v.* Colliery Co. L. R. 1 C. P. D. 556; *S. C.* 2 C. P. D. (C. A.) 207; Morgan *v.* R. R. L. R. 1 Q. B. 144; Feltham *v.* England, L. R. 2 Q. B. 33; Un. Pac. R. R. *v.* Fort, 2 Dillon, 259; *S. C.*, under title Railroad *v.* Fort, 17 Wall. 553; Lawler *v.* R. R. 62 Me. 463; Hurd *v.* R. R. 32 Vt. 473; Albro *v.* Agawam C. C. 6 Cush. 75; Gillshannon *v.* R. R. 10 Cush. 228; Seaver *v.* R. R. 14 Gray, 466; Hodgkins *v.* R. R. 119 Mass. 419; Wood *v.* Coal Co. 121 Mass. 252; Sherman *v.* R. R. 17 N. Y. 153; Laning *v.* R. R. 49 N. Y. 528; Flike *v.* R. R. 53 N. Y. 549; Chic. & A. R. R. *v.* Murphy, 53 Ill. 539; Wilson *v.* R. R. 18 Ind. 226; Columbus, &c. R. R. *v.* Arnold, 31 Ind. 177, qualifying Fitzpatrick *v.* R. R. 7 Ind. 436; Wonder *v.* R. R. 32 Md. 466; New O. R. R. *v.* Hughes, 49 Miss. 259; Robinson *v.* R. R. 46 Tex. 541.

ager. It was ruled by the queen's bench, that the fact that the manager was appointed pursuant to the act did not put him in any different position from that he would have held had he been simply appointed manager; and that he was a fellow-servant with the deceased; and the defendants were, therefore, not liable to the representatives of the deceased for his death.[1]

§ 229. By a learned English judge it is said that the exception exists wherever the plaintiff and the fellow-servant causing the injury are coöperating in the same business, so that the former knows that the employment of the latter is one of the incidents of their common service.[2] In this view, therefore, we may hold that the implied undertaking to accept a common risk constitutes in this sense fellowship of service.[3] Hence, disparity of position does not vary the rule, except in the cases presently noticed, where it is the duty of the master to protect the servant against the negligence complained of, or when the offending servant, in the subject matter of the negligence, acts as the master's representative.[4]

[1] Howells *v.* Landore Siemens Steel Co. L. R. 10 Q. B. 62, relying on Wilson *v.* Merry, L. R. 1 Sc. Ap. 326. See, to same effect, Murray *v.* Currie, L. R. 6 C. P. 24; Noyes *v.* Smith, 28 Vt. 59; Farwell *v.* R. R. 4 Metc. (Mass.) 49; Gillshannon *v.* R. R. 10 Cush. 228.

[2] Lush, J., in Feltham *v.* England, L. R. 2 Q. B. 36; cited Morgan *v.* Vale of Neath Ry. Co. Law Rep. 1 Q. B. 149; 5 B. & S. 570, 736. See McAndrews *v.* Burns, 39 N. J. L.; Columbus, &c. R. R. *v.* Troesch, 68 Ill. 545.

[3] Waller *v.* Co. 2 H. & C. 109; Bartonshill Coal Co. *v.* Reid, 3 Macq. 266; Gray *v.* Brassey, 15 Court of Ses. Cas. 2d series, 135; Lovegrove *v.* Ry. Co. 16 C. B. N. S. 699; Lovell *v.* Howell, L. R. 1 C. P. D. 161; Baird *v.* Pettit, 70 Pa. St. 477; Lalor *v.* R. R. 52 Ill. 401.

[4] "In order that workmen should be fellow-servants," to use the words of Lord Cranworth (Bartonshill Coal Co. *v.* Reid, 3 Macq. 295), "it is not necessary that the workman causing and the workman sustaining the injury should both be engaged in performing the same or similar acts. The driver and guard of a stage-coach, the steersman and the rowers of a boat, the workman who draws the red-hot iron from the forge, and those who hammer it into shape, the engineman who conducts a train, and the man who regulates the switches or the signals, are all engaged in common work. And so in this case, the man who lets the miners down into the mine, in order that they may work the coal, and afterwards bring them up, together with the coal which they have dug, is certainly engaged in a common work with the miners themselves. They are all contributing directly to the common object of their common employers in bringing the coal to the surface." "Unless the injury was caused by a fellow-workman, the principle of Priestly *v.* Fowler would not apply.

§ 230. In several states the broad position is taken that where an employee is injured by reason of negligence in the discharge of duty by another employee of the same master, the two being engaged in separate and distinct departments, having no immediate or necessary connection, the injured party may recover from the master.[1] In Illinois, a fireman on a locomotive has been held not to be a fellow-servant with the servants of the company having charge of a mail-catcher;[2] nor a laborer at a railroad carpenter shop with the driver of a locomotive;[3] nor the driver of a locomotive with its repairer;[4] nor a depot superintendent with an operative at the depot.[5] In Missouri, the supervisor of a railroad track is held not to be a fellow-servant with a laborer on the road.[6] In a case in Pennsylvania, where the plaintiff was employed as draftsman in the defendant's locomotive works, a carpenter employed in "jobbing" for defendant about the works was, by the direction of the defendant, superintending the excavation of a cellar under the building, and employing and paying hands. He had a large pile of dirt thrown on the public foot-walk; the plaintiff, in leaving the house after dark, after ceasing his day's work, fell over the dirt and was injured. It was held by the supreme court that the plaintiff and the carpenter were not fellow-servants in the same common employment,

The following instances were given in a Scotch case of the absence of such common employment: A dairy-maid in bringing milk home from the farm is carelessly driven over by the coachman; a painter or slater is engaged at his work on the top of a high ladder, placed against the side of a country house, and is injured by the carelessness of the gardener, who wheels his barrow against the ladder and upsets it; a clerk in a shipping company's office, sent on board a ship belonging to the company with a message to the captain, meets with an injury by falling through a hatchway, which the mate has carelessly left unfastened; a ploughman at work on land held by a railway company, and adjacent to a railway, is, while in the employment of the company, killed by an engine, which, through the default of the engine driver, leaps from the line of rails into the field. M'Norton *v.* Caledonian Ry. Co. 28 L. T. Rep. N. S. 376." London Law Times, Aug. 28, 1877.

[1] Fox *v.* Sandford, 4 Sneed, 36; Washburn *v.* R. R. 3 Head, 638; Nashville, &c. R. R. *v.* Elliott, 1 Cald. 616; Memphis, &c. R. R. *v.* Jones, 2 Head, 517; Haynes *v.* E. T. & Ga. R. R. Co. 3 Cald. 223; Nashville & C. R. R. *v.* Carroll, 6 Heisk. 347. See Railroad *v.* Fort, 17 Wall. 559.

[2] Chic., Burl. & O. R. R. *v.* Gregory, 58 Ill. 272.

[3] Ryan *v.* R. R. 60 Ill. 171; though see Wonder *v.* R. R. 32 Md. 466.

[4] Toledo R. R. *v.* Moore, 77 Ill. 210.

[5] Lalor *v.* R. R. 52 Ill. 401.
Lewis *v.* R. R. 59 Mo. 505.

so as to relieve the defendant from liability from the carpenter's negligence.[1] On the other hand, an engineer, regulating an engine for hauling coal, is a fellow-servant with a laborer hoisting the coal;[2] a mason erecting a staging is a fellow-servant with a laborer mixing mortar on a floor;[3] and a laborer employed to load cars is a fellow-servant with a guard on a train on which such laborer is to be carried from point to point on a railroad.[4] Hence we are to hold that if employees are under a common master *at the same time*, coöperating in a common business, to produce a common result, though in different departments, they are to be regarded as fellow-servants, in conformity with the English rule.[5] Thus in an English case, elsewhere cited,[6] the evidence was that the plaintiff was employed by the defendants as a carpenter and joiner, and in the course of such employment was engaged in painting an engine shed, near which was a turn-table. The servants of the company, in the course of managing the traffic, so negligently turned a carriage upon the turn-table that a ladder, supporting a plank upon which the plaintiff was standing, was thrown down, and the plaintiff was consequently injured; and, upon an action being brought by him against the company, it was held that he could not recover. In the exchequer chamber, Pollock, C. B., said: "I am only desirous to add, that it appears to me that if we were to decide this case in favor of the plaintiff, we should open the gates to a flood of litigation. In every large manufactory, where a number of workmen are employed in different departments of the same business, we should have it split up into any number of objects, although they all had the same common purpose. Thus, in one manufactory, the making of screws would be called one object, and the doing wood-work another, and so on; and then a person employed in a superior department would be said to have nothing to do with the porter in the same establishment." But whether an employment is common to the injuring and

[1] Band *v.* Pettit, 70 Penn. St. 477.
[2] Wood *v.* Coal Co. 121 Mass. 252.
[3] Kelley *v.* Norcross, 121 Mass. 508.
[4] Tunney *v.* R. R. L. R. 1 C. P. 291.
[5] Ibid.; see Byron *v.* Tel. Co. 26 N. Y. 39; Laning *v.* R. R. 49 N. Y. 521; Cooper *v.* Mullins, 30 Ga. 146.
[6] Morgan *v.* R. R. 5 B. & S. 570; aff. in Exchequer Ch. L. R. 1 Q. B. 145.

the injured employee is a question of fact and not of law. As a matter of law, one co-adventurer cannot recover from a second for injuries received from a third, unless the party inflicting the injury was at the time the representative of the party sued, or unless there was *culpa in eligendo*. What, however, constitutes a common employment or co-adventure depends, in part, upon the understanding of the parties, in part on business policy and usage, to be determined by the jury.[1]

What is common employment.

§ 231. When the injured party does not negligently encounter the risk, we may hold that, unless there be an employment under a common master, the party sued is liable, although the party injured was engaged in a common business with the offending party.[2] Hence it has been held that

Unity of master essential.

[1] The impolicy of the English rule may be thus illustrated: —

A compositor in a printing-office is injured by the negligence of a person having charge of an elevator used by a bindery in the same building with the compositor. If the bindery is a distinct establishment, the compositor can recover from the owner of the elevator, but he cannot recover if the bindery and the printing-office are under the same general management. In other words, the law discriminates in favor of the large capitalist and against the small. The small capitalist, driving a single line of business, is burdened with liability for the negligences of his employees to persons plying auxiliary industries; the monopolist, who gathers all these industries under his own control, is exempted from such liability, on the ground that one servant cannot recover from a common master damages for negligent injuries by a fellow-servant. The centralization of business, however, in a few colossal enterprises, which rulings such as those just stated favor, injures the community in two ways. It invests a few ruling capitalists with wealth and power dangerously great. It reduces men who would otherwise be principals in independent branches of industry to the position of subordinates; and not only comparatively impoverishes them, but it robs the community of the energy and skill which they would be stimulated to exercise only when guiding enterprises of their own.

[2] Smith *v.* Steele, L. R. 10 Q. B. 125; 32 L. T. N. S. 195; Warburton *v.* R. R. L. R. 2 Exch. 30; Murray *v.* Currie, L. R. 6 C. P. 24; Gillshannon *v.* R. R. 10 Cush. 228; Smith *v.* R. R. 19 N. Y. 127; Hunt *v.* R. R. 51 Penn. St. 475; Conlin *v.* Charleston, 15 Rich. 201; Carroll *v.* Minnesota, 13 Minn. 30.

In Abraham *v.* Reynolds, 5 H. & N. 143, "D., a servant of A. & B., who were employed by C. to carry cotton from a warehouse, was receiving cotton into his lorry, when, in consequence of the negligence of C.'s porters in lowering the bales from the upper floor of the warehouse, a bale fell upon him, and it was held that D. and C.'s servants, not being under the same control, or forming part of the same establishment, were not so employed upon a common object as to

an engineer of a railroad company which has obtained the right to run trains over the road of another company, can recover

deprive D. of a right of action against C. for such negligence. Abraham *v.* Reynolds, 5 H. & N. 143. So if a woman went into a grocer's shop to buy vinegar, and the grocer's boy, in giving what he supposed to be vinegar, poured oil of vitriol over her hands, could she be said to be the servant of the master of the shop because in one sense assisting in the operation? Per Baron Watson, Ibid. p. 146. So, too, in warping a vessel into dock, where mariners are at one end and dock laborers at the other dragging at a rope, either party would be entitled to bring an action for an injury received in consequence of the negligence of the others. Per Chief Baron Pollock and Baron Martin, Ibid. 148. Again, the same principle applies where a farmer's servant, in delivering corn at the warehouse of a corn merchant, is injured by the negligence of the corn merchant's servant. Per Baron Martin, Ibid. p. 149." London Law Times, Aug. 25, 1877, 288.

But in more recent cases, the authority of Abraham *v.* Reynolds has been much shaken. See Murray *v.* Currie, L. R. 6 C. P. 24; Rourke *v.* White Moss Colliery, 1 C. P. Div. 556; though see criticism in London Law Times, *ut supra.*

In Pennsylvania the supreme court held, — Catawisse R. R. *v.* Armstrong, 49 Penn. St. 186, — that where a person in the employ of one railroad company was injured by the cars of another company who had the right to run their trains over the other's road, the person so injured was not precluded from recovery on the ground that he was in the same general employ with the servants whose car caused such injury. This was followed by the Act of April 4, 1868, providing that the plaintiff should only in such cases recover on evidence on which he could have recovered had he been an employee. See supra, § 201, note 2.

The exemption was pressed to its extremest limit in a much contested English case, where the defendants, being the contractors for large works, employed M. to do part of the work by the piece for a certain sum, payable by monthly instalments, according to the work done, the defendants finding the tools. W., who was then in the defendants' service, was taken by M. from his work and put to assist in the piece-work at weekly wages, but in accordance with the general regulations at the defendants' works, W. was paid his wages weekly by the defendants with their other workmen, and M., who before the contract piece-work had also been in the defendants' employment at weekly wages, drew from the defendants money in that character, the whole being charged against him and deducted from the amount of the instalments when payable. W. having been killed while at work on the piece-work, by the negligence of the defendants' servants, it was held, that W. and M. were both the servants of the defendants, and therefore that the administratrix of W. could not maintain an action against the defendants for the negligence of the defendants' other servants, who were reasonably fit and competent for the service in which they were employed. Wiggett *v.* Fox, 11 Exch. 832; 25 L. J. Exch. 188. See Johnson *v.* Boston, 118 Mass. 114.

But although the ruling noticed, upon a modified report of the facts, was subsequently approved by Chan-

from the latter company for injuries produced by the negligence of one of its switch-tenders.[1] And the prevalent opinion is, that where a contractor has the absolute and exclusive power of appointing servants, such servants are not fellow-servants with the principal by whom the contractor is appointed.[2]

Master liable for negligence in repairing.

§ 232. It is important at this point to remember that the master is liable *where the negligence of the offending servant was as to a duty assumed by the master as to working place and machinery.* A master, as we have already seen, is bound when employing a servant to provide for the servant a safe working place and machinery.[3] It may be that the persons by whom buildings and machinery are constructed are servants of the common master, but this does not relieve him from his obligation to make buildings and machinery adequate for working use. Were it otherwise, the duty before us, one of the most important of those owed by capital to labor, could be evaded by the capitalist employing only his own servants in the construction of his buildings and machinery. In

nel, J., Abraham *v.* Reynolds, 5 H. & N. 143; it recently (1877) was rejected as authority by Cockburn, C. J., Rourke *v.* Coll. Co. L. R. 2 C. P. D. (C. A.) 207.

On the other hand, in Swainson *v.* R. R. 37 L. J. 105, we have Wiggett *v.* Fox sustained by Pollock, B., on the ground that "although Wiggett was engaged by the piece-work, it was a part of the arrangement between the latter and the plaintiff that the workmen should be paid their weekly wages by the defendant, so that, as was said by Martin, B., Moss was not a sub-contractor in the sense that an action would lie against him by a stranger." But see supra, § 199, note.

[1] Smith *v.* R. R. 19 N. Y. 127. In Swainson *v.* N. E. R. R. High Court Exch. Div. 25 W. R. 676; 37 L. J. N. S. 100, the evidence was that the railway signal service of the defendant company and the Great Northern R. R. Company at a joint siding was managed at joint expense, by a joint staff of servants, who were, however, engaged and paid by the latter company alone, whose uniform they wore, and who were not proved to be cognizant of the joint direction of the North Eastern Company. One of these servants, whilst engaged in his usual employment as pointsman at the siding, was killed by the negligence of an engine-driver in the service of the defendants alone. It was ruled by the High Court (Exchequer Division, Pollock & Huddlestone, BB.), that there was a common employment, and that the defendants were not liable in an action at the suit of the widow. See, however, a criticism of these cases in the London Law Times of June 23, 1877, p. 133, and supra, § 199, note.

[2] See Curley *v.* Harris, 11 Allen, 112; Young *v.* R. R. 30 Barb. 229.

[3] Supra, § 213.

point of fact this is the case with most great industrial agencies; but in no case has this been held to relieve the master from the duty of furnishing to his employee material, machinery, and structures, adequately safe for their work.[1]

He does not guarantee that either building, machinery, or organization should be perfect; but he is bound by the rule, *Sic utere tuo ut non alienum laedas*, to use such diligence and care in this relation as is usual with good business men in his line.[2] It is not enough for him to employ competent workmen to construct his apparatus. If an expert, he must inspect their work, and if not, he must employ another competent person as expert for the purpose.[3] If such, however, is his duty, he must not only see that the structure he provides is suitable at the outset, but that it is kept in repair. And the repairer's negligence in this respect is the master's negligence.[4]

[1] See cases cited supra, §§ 211–213 *et seq.*

[2] Ibid.

[3] See, to this effect, Shanny *v.* Androscoggin, 66 Me. 420; Toledo R. R. *v.* Moore, 77 Ill. 110.

[4] In a Massachusetts case, Ford *v.* Fitchburg R. R. Co. 110 Mass. 240, the plaintiff was an engineer, engaged in running a locomotive engine, and was injured by explosion of his engine, which was old and out of repair. It was objected to the maintenance of the action, that the want of repair of the engine was caused by the negligence of his fellow-servants; but Colt, J., in delivering the opinion of the court, said: "The rule of law which exempts the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow-servants, does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risk of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from the obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating it. They are charged with the master's duty to the servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require. In one, the master cannot escape the consequence of the agent's negligence; if the servant is injured in the other, he may."

In New York we have a different conclusion reached under the following facts:—

The death of the party, by whose administrator the action was brought,

§ 232 *a.* It has sometimes been said that a corporation is obliged to act always by servants, and that it is unjust to impute to it personal negligence in cases in which it is impossible for it to be negligent personally. But

Liability in this respect of corporations.

was caused by the fall of a mash-tub, in consequence of the timbers which supported it having become rotten from continued dampness. It was shown that the condition of the timbers could have been discovered by striking or boring into them. It appeared that the defendant employed a competent carpenter who had charge of the repairs of the brewery, and that the building, mash-tub, and its supports, were originally adequate and properly constructed. The issue under the instructions to the jury was narrowed down to the question, "whether there was negligence on the part of Bagley (the carpenter), an omission of that ordinary and reasonable degree of care and prudence which a man of ordinary and reasonable care and prudence will exercise in the conduct of his own affairs." The jury returned a verdict for the plaintiff, and the judgment thereon was affirmed at General Term (6 N. Y. Sup. 1). In the court of appeals this ruling was held erroneous, it being considered that Bagley's situation was that of foreman merely, and that the defendants were present and had general charge and responsibility of the different branches of the business, and the negligence of Bagley in the case was that of a fellow-servant, for which defendant was not liable. "When the servant," said Allen, J., "by whose acts of negligence or want of skill other servants of the common employer have received injury is the *alter ego* of the master, to whom the employer has left everything, reserving to himself no discretion, then the middle-man's negligence is the negligence of the employer, for which the latter is liable. The servant in such case represents the master, and is charged with the master's duty. Corcoran *v.* Holbrook, 59 N. Y. 517; Murphy *v.* Smith, 19 C. B. N. S. 361. When the middle-man, or superior servant, employs and discharges the subalterns, and the principal withdraws from the management of the business, or the business is of such a nature that it is necessarily committed to agents, as in the case of corporations, the principal is liable for the neglects and omissions of duty of the one charged with the selection of other servants, in employing and selecting such servants, and in the general conduct of the business committed to his care. This is the extent and effect of the decision in Laning *v.* N. Y. C. R. R. Co. 49 N. Y. 521, which I think has been greatly misapprehended. It was not intended in that case to disturb the general rule of law limiting the liability of masters to their servants for injuries received while in their service, or to enunciate any new proposition. A proposition there very much pressed upon the court was that a corporation has discharged the whole duty to its servants of a lower rank when it has employed skilful and competent general agents and superintendents, and that the negligence of such agents and superintendents is not the negligence of the corporation, nor is it liable therefor. Much of the opinion is given to a considcration of that proposition, and general remarks made in refutation of it have been applied to other circumstances, and

if this be true, it would relieve corporations from all liability to servants. The true view is, that, as the corporation can act

erroneous deductions made. The defendant was held liable, under the circumstances of that case, for the negligence and improper retention by Coleby of an incompetent and drunken employee, through whose incompetency and bad habits the plaintiff received the injury complained of; for the reason that Coleby was regarded as representing the defendant corporation, and performing its duties in the employment of laborers and servants, and notice to Coleby of the incompetence and unfitness of Westman was regarded as notice to the defendant." Malone *v.* Hathaway, 64 N. Y. 5. See *S. C.* 55 N. Y. 608; 2 N. Y. Sup. Ct. 664; *S. P.* Faulkner *v.* R. R. 49 Barb. 324. The ruling is much weakened by the dissent of Church, C. J., and Rapallo, J. With Malone *v.* Hathaway compare Wiggett *v.* Fox, supra, § 230.

The question whether, when a competent repairer is employed by the master, the master is liable to a servant for injuries received through defects imputable to negligence in repairing, is undoubtedly one of great difficulty. In Massachusetts, as we have noticed, the master has in such cases been held liable; yet even in Massachusetts we have rulings pointing in an opposite direction. See Durgin *v.* Munson, 9 Allen, 396, in which, however, the question was not whether the repairing was negligent, but whether a fellow-servant of the plaintiff was negligent in omitting to "chalk" an engine before putting on a turn-table. And see Northcote *v.* Bachelder, 111 Mass. 323. It was subsequently held in the same state, that the master is not liable for defective apparatus, if he used suitable material and employed competent workmen. Kelley *v.* Norcross, 121 Mass. 508.

In New York, as we have just seen (see, also, Warner *v.* R. R. 39 N. Y. 468), and in England (see Tarrant *v.* Webb, 18 C. B. 797; Wilson *v.* Merry, L. R. 1 Sc. Ap. 320), the tendency is to hold the master is relieved from liability if he has shown due diligence in the appointment and retention of the agent by whom the repairs are made.[1] In Wilson *v.* Merry, however, it was intimated that it was for the jury to determine whether the foreman was a vice principal; it being held that if he was, the master was bound. Wiggett *v.* Fox, 11 Exch. 332, cited to same effect, is so shaken as to be no longer authority. See, also, Morgan *v.* R. R. L. R. 1 Q. B. 149, cited supra, §§ 230, 231. But the better view is, that where the law is that it is the master's duty to supply his servants with reasonably safe furniture, structure, and machinery, then he cannot relieve himself from this duty by transferring it to agents, however competent. The duty is the master's, and if it is imperfectly discharged, on the master lies the burden. His agent's negligence is imputable to himself. He is not, indeed, liable for *culpa levissima;* nor is he an insurer. But whatever neglect his agents would be liable for, he will be liable himself. Shanny *v.* Androscoggin, 66 Me. 420; Ford *v.* R. R. 110 Mass. 240; Avilla *v.* Nash, 117 Mass.

[1] But if a laborer in a foundry is not a fellow-servant with a laborer in a cotton mill, as is held, in Morgan *v.* R. R. L. R. 1 Q. B. 149, why should a machinist in a repairing shop be a fellow-servant with a brakeman on a train?

only through superintending officers, the negligences of those officers, in respect to other servants, are the negligences of the corporation.[1]

§ 232 *b*. Of course it is not to be implied from what is said that the master is obliged to do all his work in person. This, in the great majority of cases requiring the employment of specialists, would be a greater negligence than would be the employment of subalterns whose carefulness and skill might not be of the highest grade. Nor, as has been erroneously intimated,[2] does the master *guarantee* the safety of his structures and machinery. All that is here urged is that the master's duty is not discharged, so far as concerns the question of repairs, by the appointment and retention of competent agents; but that for all negligent injuries for which the agent would be liable, the master would be liable.[3] For injuries produced by *casus*, or the interference of third parties, for which the agent would not be liable, the master is not liable. It should be remembered that (waiving the unsatisfactory and inadequate ground of implied

318 (though see Northcote *v.* Bachelder, 111 Mass. 322); Chic. & N. W. R. R. *v.* Taylor, 69 Ill. 461; Toledo R. R. *v.* Moor, 77 Ill. 210; Toledo R. R. *v.* Ingraham, 77 Ill. 309; Indianap. R. R. *v.* Flanigan, 77 Ill. 365; Louisville R. R. *v.* Filburn, 6 Bush, 574; Brabbits *v.* R. R. 37 Wis. 290; and see observations at end of § 224.

[1] Infra, § 279. See argument of Potter, J., Buckner *v.* R. R. 2 Lans. 506; *S. C.* 49 N. Y. 672; Malone *v.* Hathaway, 64 N. Y. 5; Whart. on Agency, § 670.

[2] Chic. &c. R. R. *v.* Jackson, 52 Ill. 492; cited infra, §§ 235, 279.

[3] Judge Cooley thus correctly states the law in his essay, already cited, on this topic, in the Southern Law Review for April, 1876, p. 114: —

"No employer, by any implied contract, undertakes that his buildings are safe beyond a contingency, or even that they are as safe as those of his neighbors, or that accidents shall not result to those in his service from risks which perhaps others would guard against more effectually than it is done by him. Neither can a duty rest upon any one which can bind him to so extensive a responsibility. There are degrees of safety in buildings, which differ in age, construction, and state of repair, as there are also in the different methods of conducting business; and these, not the servant only, but any person doing business with the proprietor, is supposed to inform himself about and keep in mind when he enters upon the premises. Negligence does not consist in not putting one's buildings or machinery in the safest possible condition, or in not conducting one's business in the safest way; but there is negligence in not exercising ordinary care that the buildings and machinery, such as they are, shall not cause injury, and that the business as conducted shall not inflict damage upon those who themselves are guilty of no neglect of prudence."

contract) the injured servant, in cases of this class, is entitled to recover, as against his master, by force of the maxim, *Sic utere tuo ut non alienum laedas.*[1] A man who invites others on his premises is bound to give notice of any dangerous defects of which it is his duty to be cognizant. He cannot say, "I shield myself behind a competent agent who was employed to repair, but who was derelict to his duty." The law allows no such subterfuge. He who owns dangerous agencies is bound to take cognizance of their danger, and in such case ignorance is imputed to him as negligence. If it were possible for him to have known, then he is supposed to have known that which was thus possible.

Master is bound to have adequate corps of servants.

§ 233. "The master of men in dangerous occupations," says a learned member of the supreme court of Maine,[2] "is bound to provide for their safety, and this obligation extends equally to the providing good and sufficient machinery, and to the procuring *skilled and judicious men, by whom it is to be controlled.*" A proper and competent staff of officers must be kept up.[3] A servant, however, who, knowing the deficiency of hands, undertakes to do duty, and assume the risk, cannot recover for injuries imputable to the deficiency.[4]

Master is liable when personally negligent, or negligent in establishing rules.

§ 234. A direct negligent interposition by a master, we have already seen,[5] makes him liable, even though in his negligence fellow-servants of the injured servant concur.[6] It is the duty, also, of the master to establish proper rules for the organization of the work under his control, and he becomes liable for injuries caused by his failure in this respect.[7]

[1] See supra, § 199, note, § 224, and infra, § 786 *et seq.*

[2] Appleton, C. J., in Lawler *v.* R. R. 62 Me. 466.

[3] Hays *v.* R. R. 5 Cush. 270. See Noyes *v.* Smith, 28 Vt. 59; Flike *v.* R. R. 53 N. Y. 549; Indianap. R. R. *v.* Carr, 35 Ind. 510; Wonder *v.* R. R. 22 Md. 411.

That a proper organization exists is always presumed; and the burden of proving the contrary is on the plaintiff. See Rose *v.* R. R. N. Y. Ct. of Ap. 1877.

[4] Mad River R. R. *v.* Barber, 5 Ohio St. 78.

[5] Supra, § 205.

[6] Mellors *v.* Unwin, 1 B. & S. 457; Ashworth *v.* Stanwix, 30 L. J. 183, Q. B.; 3 E. & E. 781; Matthews *v.* McDonald, 3 Macph. (Sc.) 506; Roberts *v.* Smith, 2 H. & N. 213; Flike *v.* R. R. 53 N. Y. 549; Rose *v.* R. R. 58 N. Y. 219; Ardesco *v.* R. R. 63 Penn. St. 146; Perry *v.* Ricketts, 55 Ill. 234; Horner *v.* Nicholson, 56 Mo. 220.

[7] Vose *v.* R. R. 2 H. & N. 728;

§ 235. It being settled that a master is liable for negligences of his own to his servants, it follows that he is in like manner liable for the negligences of any person whom he deputes, in his absence, as his authoritative representative. A master, therefore, is liable to his servants for the injuries sustained by them through the negligence of a middle-man under whose absolute control he places them.[1] In other words, "if a master employs inexperienced workmen, and directs them to act under the superintendence and to obey the orders of a deputy whom he puts in his place, they are not engaged in a common work with the superintendent,"[2] and the master is liable for the superintendent's negligence.[3] And this is eminently the case with corporations, which can only act through agents, general and special.[4]

And so when the offending servant bears the relation of master to the injured servant.

Kroy *v.* R. R. 32 Iowa, 357; Chicago, &c. R. R. *v.* Taylor, 69 Ill. 461.

[1] Supra, § 222. Murphy *v.* Smith, 19 C. B. N. S. 360; Howell *v.* Steel Co. L. R. 10 Q. B. 62; Grizzle *v.* Frost, 8 F. & F. 622; Bartonshill Coal Co. *v.* Reid, 3 Macq. 266; Railroad *v.* Fort, 17 Wall. 388; Gilman *v.* R. R. 10 Allen, 238; Mann *v.* Print Works, 11 R. I. 184; Lansing *v.* R. R. 49 N. Y. 521; Brickner *v.* R. R. 72 Lans. 506, 49 N. Y. 672; Flike *v.* R. R. 53 N. Y. 549; Malone *v.* Hathaway, 64 N. Y. 5; Corcoran *v.* Holbrook, 59 N. Y. 517; Mullan *v.* St. Co. 78 Penn. St. 26; Grundy *v.* Iron Works, 61 Mo. 492; Whalen *v.* Church, 62 Mo. 327; Cook *v.* R. R. 63 Mo. 397; Brabbits *v.* R. R. 37 Wis. 289; Washburn *v.* R. R. 3 Head, 638. See Ford *v.* R. R. 110 Mass., and cases cited, supra, § 232.

[2] Lord Cranworth, C., Bartonshill Coal Co. *v.* Reid, *ut supra.*

[3] See remarks of Byles, J. in Clarke *v.* Holmes, 7 H. & N. 937; and see Malone *v.* Hathaway, 64 N. Y. 5, cited § 222.

[4] Supra, § 232 *b*; infra, §. 279; Whart. on Agency, §§ 57, 670, 671; Rose *v.* R. R. 58 N. Y. 219; Wright *v.* R. R. 25 N. Y. 562; Brickner *v.* R. R. 2 Lans. 506; 49 N. Y. 672; Malone *v.* Hathaway, 64 N. Y. 5, cited supra, § 222; though see Northcote *v.* Bachelder, 111 Mass. 322.

"A corporation," says Judge Cooley, in an article already quoted from the Southern Law Review for April, 1876, p. 123, "can only manage its affairs through officers and agents; and if it is to be held responsible to its servants for negligence in any case, it must be because some of these are negligent. But whose negligence shall be imputed to the corporation as the negligence of the principal itself? Certainly not that of all its officers and agents, for this would be to abolish wholly, in its application to the case of corporations, a rule alike reasonable and of high importance.

So far as the board of directors are concerned, no question can be made that for any such purpose they represent the corporation; and its acts, as a board, are the acts of a principal. They constitute the highest and most authoritative expression of corporate volition, and the corporate duties are duties to be performed by the board. But such a board holds only periodical

In several American courts the liability of the master for a middle-man's negligence has been pushed so far as to make the master liable to a servant for all injuries inflicted by fellow-

meetings, and at other times the powers of the corporation are usually expected to be, and actually are, exercised by some officer or general superintendent, with large discretionary powers. Unless such officer or superintendent is to be considered as occupying, for all the purposes of the rule now under consideration, the position of the principal itself, it is obvious that there must be assumed in the case of corporations, and indeed in other cases where the whole charge of the business is delegated to another, some risks which the servant does not assume where the master himself takes general charge in person." See, also, Keeley *v.* Belcher Co. 2 Cent. L. J. 705.

In England the courts have taken a distinction not easily mastered. "Murphy *v.* Smith (19 C. B. N. S. 361; 12 L. T. Rep. N. S. 605), decided in 1865, was an action to recover damages for an injury sustained by the plaintiffs through the explosion of certain combustible materials in the defendant's factory. The defendant was a lucifer match manufacturer; S. was his foreman, and under him was D., who in the absence of S. managed the factory The plaintiff, a boy about sixteen years of age, was engaged by S. One part of the process of making lucifer matches consists in the mixing of the compound in which the ends of the matches are dipped. The mixture is free from danger until the chloride of potass is put to it, then it requires to be stirred with an experienced hand or it may explode. It was no part of plaintiff's duty to touch this mixture. On the occasion in question, however, he stirred up the mixture, an explosion ensued, and he was injured. D. was standing by at the time, but there was no evidence that the plaintiff was acting under D.'s orders, or that S. was not on the premises. The jury found that the accident was caused by the negligence of D., and that at the time he was acting as the manager of the establishment. A rule *nisi* to enter a verdict for the defendant, or a nonsuit, on the ground that there was no evidence of D.'s being acting manager, so as to take him out of the class of fellow-servants, and that even if he were there was no evidence of negligence on his part, was made absolute." London Law Times, Sept. 1, 1877, 301.

In this case it was conceded that a master was not liable for his vice principal's negligence. But now it is argued that the mere fact of the negligent party being vice principal does not charge the master, if the master was in any sense exercising a joint authority. Howells *v.* Steel Co. L. R. 10 Q. B. 62. "Nor does the fact that the employer is a corporation make any difference in the defendant's liability for the acts of his manager; Morgan *v.* Vale of Neath Railway Company, L. Rep. 2 Q. B. 33; Howells *v.* Landore Steel Company, supra; nor is it material that the manager is appointed pursuant to an act of parliament, for even in that case he is a fellow-servant; Howells *v.* Landore Steel Company, supra; nor that the person to whom the negligence was directly imputable was a servant o superior authority whose lawful directions the plaintiff was bound to obey; Feltham *v.* England, L. Rep. 2 Q. B. 33; and see Gallagher *v.* Piper, 33 L. J. 335, C. P." London Law Times, *ut supra.*

servants who were in a position superior to or beyond the influence of the injured party.[1] On the other extreme it is held in England that the master is only liable to one servant for a fellow-servant's negligence in cases where the master has transferred all his authority to the servant guilty of the negligence. Mere superiority (*e. g.* that of a foreman to an ordinary workman) does not change the rule.[2]

The better view is, that where a master is required to perform specific duties to his servants, he is liable for negligence in the discharge of such duties, no matter who may be the agents through whom he acts.[3] Hence the master will be bound by promises by his foreman that a particular workman will be safe in undertaking a particular risk;[4] and by directions given by his foreman to a workman to perform dangerous acts not within the latter's contract of service.[5] And whether the

[1] Pittsburg R. R. *v.* Devinney, 17 Ohio St. 197; Cleveland, &c. R. R. *v.* Keary, 3 Ohio St. 201; Chic. & N. W. R. R. *v.* Jewett, 45 Ill. 197; Lalor *v.* R. R. 52 Ill. 401; Chic. & N. W. R. R. *v.* Jackson, 52 Ill. 492; Louisville R. R. *v.* Collins, 2 Duvall, 117; Louisville R. R. *v.* Mahoney, 7 Bush, 235; Louisville R. R. *v.* Cavens, 9 Bush, 559; Louisville R. R. *v.* Bowler, Ky. Ct. of Appeals, 1876; Cooper *v.* Mullins, 30 Ga. 115. See Little Miami R. R. *v.* Stevens, 20 Ohio St. 45; where the conductor of a train, who negligently furnished the engineer with an old and abandoned time-table, was held so far to represent the company as to make the company liable to the engineer for damages sustained by him in following the defective time-table. See, however, Rose *v.* R. R. cited supra, § 227.

[2] Wilson *v.* Merry, L. R. 1 Sc. Ap. 326; Feltham *v.* England, L. R. 2 Q. B. 33; Gallagher *v.* Piper, 16 C. B. N. S. 669; Conroy *v.* R. R. Irish L. T. Rep. 1875, 217.

[3] Supra, § 234; Beaulieu *v.* Portland Co. 48 Me. 295; Lawler *v.* R. R. 62 Me. 463; Hurd *v.* R. R. 32 Vt. 473; Gillshannon *v.* R. R. 10 Cush. 228; Summersell *v.* Fish, 117 Mass. 312; O'Connor *v.* Roberts, 120 Mass. 227; Murray *v.* R. R. 1 McMullen, 235; Marshall *v.* Schricker, 62 Mo. 309. See Brickner *v.* R. R. 49 N. Y. 672; Corcoran *v.* Holbrook, 59 N. Y. 517; Weger *v.* R. R. 55 Penn. St. 473; Malone *v.* Hathaway, supra, § 222. In Bradley *v.* R. R. 62 N. Y. 99, it was ruled that a railroad corporation was liable for the negligence of its track-master in not performing his engagements in notifying a person employed by him of the approach of trains. See Wood's Master & Servant, ch. xvi.

We must keep in mind, in forming our conclusions on the question in the text, the observations made supra, § 230, note 1. The law certainly cannot intend to favor the monopolist of several industries by relieving him from liabilities which bear on those conducting single industries.

[4] Bradley *v.* R. R. 62 N. Y. 99.

[5] Railroad *v.* Fort, 17 Wall. 368; Brabbits *v.* R. R. 28 Wis. 290; Mann *v.* Print Works, 11 R. I. 184; Louis-

offending servant represented the master in authority, so as to impute his negligence to the master, is a question for the jury.[1]

§ 236. A servant who sees that a fellow-servant is habitually negligent or incompetent is bound to report the fact to their common master, and should he neglect so to do, he is barred from recovering from the master for injuries from which, had he been himself duly diligent, he would have been protected.[2] What is notice to a middleman has been already discussed.[3]

Servant omitting to report fellow-servant's habitual negligence cannot recover.

§ 237. 4. The question of negligence in appointment or retention of the injuring fellow-servant is ordinarily one of fact, to be determined by a jury, if there is any evidence on the subject which may properly be committed to their consideration.[4] The diligence to be exercised by the master is to be in proportion to the hazard of the service.[5] If the appointment of the offending servant was negligently made, then the master is liable to the injured servant for *culpa in eligendo*, supposing negligence by the offending servant be first proved.[6] In such cases *culpa in eligendo* must be averred.[7] Drunkenness, in persons occupying posts requiring watchfulness and intelligence, is a disqualification which it is always relevant to prove, if coupled with facts tending to show that the master either knew or ought to have known the charge.[8] Incompetency in the servant in a particular relation does not, by

Negligence in appointment or retention binds master.

ville R. R. *v.* Collins, 2 Duvall, 114. See Grizzle *v.* Frost, 3 F. & F. 622.

[1] See Wilson *v.* Merry, L. R. 1 Sc. Ap. 326.

[2] Indianap. R. R. *v.* Carr, 35 Ind. 310; Balt. & O. R. R. *v.* Trainer, 33 Md. 542; Brothers *v.* Carter, 52 Mo. 372.

[3] Supra, § 223.

[4] Tarrant *v.* Webb, 18 C. B. 797; Ormond *v.* Holland, E., B. & E. 102; Hard *v.* R. R. 32 Vt. 473; Wright *v.* R. R. 25 N. Y. 562; Warner *v.* R. R. 39 N. Y. 468; Laning *v.* R. R. 49 N. Y. 528; Columbus R. R. *v.* Webb, 12 Ohio St. 475. Infra, § 243.

[5] Ala. R. R. *v.* Waller, 48 Ala. 459.

[6] Ibid.; Whart. on Ev. 48; Potter *v.* Faulkner, 31 L. J. 30 Q. B. 30; Gilman *v.* R. R. 10 Allen, 238; Baulec *v.* R. R. 59 N. Y. 356; Huntingdon, &c. R. R. *v.* Decker, 82 Penn. St. 119; Weger *v.* R. R. 55 Penn. St. 460; O'Connell *v.* R. R. 20 Md. 212; Whaalen *v.* R. R. 8 Ohio St. 249; Ill. R. R. *v.* Jewell, 46 Ill. 99; Chic. & A. R. R. Co. *v.* Sullivan, 63 Ill. 293; Thayer *v.* R. R. 22 Ind. 26; Marquette & O. R. R. *v.* Taft, 28 Mich. 289; Harper *v.* R. R. 47 Mo. 567; Moss *v.* R. R. 49 Mo. 167; Lee *v.* Detroit, 62 Mo. 565.

[7] Robinson *v.* R. R. 7 Gray, 92; Harper *v.* R. R. *ut supra*.

[8] Chapman *v.* R. R. 55 N. Y. 579.

itself, establish negligence in the master; the plaintiff must prove, as part of his case, want of due care and diligence in appointment or retention, in order to make the master liable.[1] It should be remembered that when a servant is appointed after adequate proof of good character, his good character is presumed as a presumption of fact, to continue,[2] and the master may rely upon that presumption until notice of a change, or knowledge of such facts as would be deemed equivalent to notice, or such at least as would put a reasonable man upon his guard.[3] Proof of a general reputation for incompetency may be adduced as establishing a fact of which the master should have taken notice.[4]

Single acts of negligence do not prove incompetency.

§ 238. If single exceptional acts of negligence should prove an officer to be incompetent, no officer could be retained in service, for there is no person who is not at some time to some degree negligent.[5] Hence it has been properly held, that intelligent men of good habits, who are engineers, or brakemen, or switchmen on railroads, are not necessarily to be discharged by their employers for the first error or act of negligence such employees commit; nor will railroad companies necessarily be liable for a second error or negligent act of a servant, to all other servants of such companies, when the latter sustain damages by reason thereof.[6] The ques-

[1] Edwards *v.* R. R. 4 Cl. & F. 530; Mad River R. R. Co. *v.* Barber, 50 Ohio St. 568; Summersell *v.* Fish, 117 Mass. 312; Hayden *v.* Man. Co. 29 Conn. 557; Tarrant *v.* Webb, 18 C. B. 797; Baulec *v.* R. R. infra.

[2] Gahagan *v.* R. R. 1 Allen, 187; Louisville R. R. *v.* Collins, 2 Duvall, 114; Whart. on Ev. § 1287.

[3] Chapman *v.* Erie R. R. Co. 55 N. Y. 579.

[4] Gilman *v.* R. R. 10 Allen, 233; Whart. on Ev. § 48; Davis *v.* R. R. 20 Mich. 105. See Clarke *v.* Holmes, 7 H. & N. 937.

[5] See Davis *v.* R. R. 20 Mich. 105.

[6] Baulec *v.* R. R. Co. 62 Barb. 623, per Balcom, J. In Baulec *v.* R. R. 59 N. Y. 356, Allen, J., said: "The question in this case was, whether the single occurrence detailed by the witness, in connection with other circumstances and with his general character and conduct, was such as to make it necessary for the defendant, in the exercise of proper care and prudence, such as the law enjoins, to discharge this switchman. I am clearly of opinion that there was not sufficient evidence to carry the case to the jury. A verdict against the defendant, based upon this evidence, would have been against evidence, and, such being the case, it was the duty of the court to nonsuit. This case, as reported upon a former trial (5 Lansing, 436), and the decision there made, is quoted with apparent approval by Mr. Wharton in his recent Treatise on the Law of Negligence, and the principle there decided makes a part of the text of section 238 of that work. It is not

tion is, not whether there has not been a single act of negligence on the part of the person whose conduct is the subject of investigation, but whether this act of negligence, in connection with other circumstances, and with his general character and conduct, was such as to make his discharge by his employer a step of such prudence as is customary with diligent and prudent employers in the particular line of business. At the same time, such acts of negligence on the part of such employee are proper articles of evidence, it appearing that the acts were known, or should have been known, to the employer, or his agents in chief.[1] But unless the master has notice, or ought to have taken notice of the servant's misconduct or deterioration, his retention is not imputable as negligence to the master.[2] Ad-

enough to authorize the submission of a question, as one of fact, to a jury, that there is some evidence; a scintilla of evidence, or a mere surmise, that there may have been negligence on the part of the defendants, would not justify the judge in leaving the case to the jury. Per Williams, J., Toomey *v.* Railway Co. 3 C. B. N. S. 146." See Moss *v.* Pac. R. R. 49 Mo. 167.

[1] Whart. on Ev. § 56; Pittsburg, &c. R. R. *v.* Ruby, 38 Ind. 294; Baulec *v.* R. R. 59 N. Y. 356; though see contra, Frazier *v.* Penn. R. R. 38 Penn. St. 104; modified, however, in Huntingdon R. R. *v.* Decker, 82 Penn. St. 119. In Baulec *v.* R. R. 59 N. Y. 356, such evidence was held admissible. In Huntingdon, &c. R. R. *v.* Decker, *ut supra*, Mercur, J., said: "We see no error in admitting the evidence covered by the second and fourth assignments. It was clearly competent to prove Bowser's (the offending servant) accustomed disobedience of orders and his habitual drunkenness; that these facts were known to the superintendent, who had the entire control and management of the road, including the right to employ and to discharge conductors and hands. Where a railroad company employs a conductor who is unfit for the business, and knows this unfitness, it is chargeable with the consequences of the conductor's negligence even to one employed in the same general service. Knowledge of the superintendent, possessing the general powers stated, is knowledge to the company. Frazier *v.* Penna. R. R. Co. 2 Wright, 104; Caldwell et ux. *v.* Brown et al. 3 P. F. Smith, 453; O'Donnell *v.* Alleghany Valley R. R. Co. 9 Idem. 239; Ardesco Oil Co. *v.* Gilson, 13 Idem. 146; Patterson *v.* Pittsburg and Connellsville R. R. Co. 26 Idem. 389. When a conductor is shown to be habitually intoxicated, it raises a presumption of negligence in case of accident. Penn. R. R. Co. *v.* Books, 7 P. F. Smith, 339." But if the pleading rests, not on the negligence of the employer in retaining the employee, but on a specific act of negligence by the latter, then such evidence of prior negligence is inadmissible. Robinson *v.* Fitchburg R. R. 7 Gray, 92. See Collins *v.* Dorchester, 6 Cush. 396.

[2] Chapman *v.* R. R. 55 N. Y. 579; Baulec *v.* R. R. 59 N. Y. 356.

mission by an agent of the master is sufficient to prove knowledge by the master.[1]

Promotion from lower grade affords no inference.

§ 239. No presumption to be drawn from the fact that the employee whose negligence is under examination was promoted from a lower to a higher grade, if, in the same line of duty, the expectation of such promotion stimulates diligence. Corporations as well as individuals must be at liberty to raise men from lower to higher places; and such elevation of them cannot be imputed to the employers as negligence, unless the places from which they are raised are not such as to properly prepare them for the higher posts.[2]

Such incompetency not to be inferred from the litigated act.

§ 240. Negligence on the occasion of the injury is not by itself sufficient to charge the employer with negligence in appointing the negligent employee.[3] This position results from the express limitations of the exception under consideration. Of the application of these limitations we have an illustration in an English case, in which the defendant was a maker of steam-engines, and the plaintiff was in his employ. An engine was being hoisted, for the purpose of being carried away, by a travelling crane moving on a tramway resting on beams of wood supported by piers of brick-work. The piers had been recently repaired, and the brick-work was fresh. The defendant retained the general control of the establishment, but was not present; his foreman or manager directed the crane to be moved on, having just before ordered the plaintiff to get on the engine to clean it. The plaintiff having got on the engine, the piers gave way, the engine fell, and the plaintiff was injured. This was the first time the crane had been used and the plaintiff employed in this manner. It was ruled that there was no evidence to fix the defendant with liability to the plaintiff; for that, assuming the foreman to have been guilty of negligence on the present occasion, he was not the representative of the master so as to make his acts the acts of his master; he was merely a fellow-servant of the plaintiff, though with superior authority; and there was nothing to show that he was not a fit person to be employed as foreman:

[1] Chapman *v.* R. R. 55 N. Y. 579.
[2] Haskin *v.* R. R. 65 Barb. 129.
See Edwards *v.* R. R. 4 F. & F. 53.
[3] Supra, § 237.

neither was there any evidence of personal negligence on the part of the defendant, as there was nothing to show that he had employed unskilful or incompetent persons to build the piers, or that he knew, or ought to have known, that they were insufficient.[1]

Negligent appointments by middle-men or superintendents.

§ 241. 5. Wherever the nature of the business is such as to involve the appointment of subalterns by middle-men, and to withdraw the principal from the management of the business, then the principal is liable for the negligence of the middle-man in making the appointments, on the ground that the negligence is that of the principal, and not of a fellow-servant of the plaintiff.[2] In New York, the liability of the master, in such cases, was at first doubted.[3] But now it is settled that the master is as liable for the retention by his manager of incompetent subalterns, after notice of such incompetency, as he would be liable for their retention by himself, under similar circumstances.[4] *A fortiori* is this the case where the middle-man has direct authority to make such appointment. Thus, permission given by the company to an engineer to allow a fireman to act as an engineer, when he deemed the fireman competent, makes the company responsible for injuries resulting from a mistake or negligence of the engineer in permitting a fireman to handle the engine when incompetent for duty.[5] We may, therefore, accept as binding the ruling of the court of appeals of New York, that if the master delegates to an agent the duty of employing workmen, or of originally selecting physical appliances for the conduct of the business, the master is responsible to any servant who suffers injury from the negligence of that agent in the performance of that duty.[6] Indeed, if we do not accept this, it is hard to see

[1] Feltham *v.* England, L. R. 2 Q. B. 33.

[2] Supra, § 222, 229, 235; Brothers *v.* Carter, 52 Mo. 375.

[3] Wright *v.* R. R. 25 N. Y. 562. See *S. C.* 28 Barb. 80.

[4] Laning *v.* N. Y. Cent. R. R. 49 N. Y. (4 Sickles) 521; but see *S. C.* in 55 N. Y. 579; Bissel *v.* N. Y. C. R. 29 Barb. 613; Warner *v.* Cent. R. R. 49 Barb. 572; and see Gilman *v.* East. R. R. 13 Allen, 433; Noyes *v.* Smith, 28 Vt. 59; Frazier *v.* Penn. R. R. 38 Penn. St. 104; Walker *v.* Bolling, 22 Ala. 294; Chapman *v.* R. R. 55 N. Y. 579.

[5] Harper *v.* Indiana & St. Louis R. R. 47 Mo. 567.

[6] Laning *v.* N. Y. Cent. R. R. 49 N. Y. 521.

In a still later case it was expressly ruled by the same court, that a cor-

in what case a corporation, which can only appoint and dismiss through a general superintendent, can be liable for negligence in appointing or retaining.[1] On the other hand, if the master holds control of the business, and is known so to do, retaining in himself, according to the settled usage of the business, the power of dismissal and retention, it is not right that he should be chargeable, in a suit by one servant, with the negligence of another servant in the retention of an incompetent subaltern, when the servant injured could have brought the matter home to the master himself. A servant, to put the matter in other words, who sees an incompetent subaltern at work by his side, and neglects to notify the master of such incompetency, when there is opportunity so to do, and when the master exercises the power of revision, must be presumed to acquiesce in the retention of such subaltern; nor can he defeat this presumption by showing that he complained to a middle-man or managing agent of the subaltern's incompetency.[2]

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

It was declared, that as to such acts the agent occupies the place of the corporation, and that the corporation is to be deemed present, and consequently liable for the manner in which they are performed.

It was accordingly held (Allen, Grover, and Folger, JJ., dissenting), that where an agent of the defendant, a railway corporation, whose duty it was to make up and dispatch trains and to hire and station brakemen, sent out a heavy freight train with but two brakemen, when three were required, and where the train broke in two, and in consequence of the want of necessary brakemen the rear part ran backward and collided with another train which had been dispatched five minutes after the first, killing the fireman thereof, that the defendant was liable.

It was further, also, held (Allen, Grover, and Folger, JJ., dissenting), that the fact that the agent had employed a third brakeman to go upon the train, who failed to appear, did not excuse the company from liability. Such hiring was only one of the steps to be taken to discharge the principal's duty; that required the train to be supplied with sufficient help before it was dispatched. Nor is the company relieved, although negligence may be imputed to the defaulting brakeman. This would only make the negligence contributory with the brakeman, but would not affect the liability of the company. Flike *v.* Boston & Albany R. R. Co. 53 N. Y. 549.

[1] See cases supra, §§ 223–5; infra, § 280.

[2] Supra, § 236. Beyond this it would not be safe to push the case of Smith *v.* Howard (22 L. T. Rep. 130, 1870; Albany Law J., January 31, 1874), where the evidence was that

§ 242. 6. A master who, on being complained to of the negligence of a servant, gives reason to believe that such negligence will be corrected, cannot defend himself if such negligent servant works injury to other servants. In other words, A., a fellow-servant of the plaintiff, shows himself incompetent, and the plaintiff complains to the common master, who by promises of correction induces the plaintiff to remain in the service. The plaintiff is subsequently injured by A.'s negligence. Is the master liable? If a master is liable for injuries produced by defects in machinery which he has promised to rectify but does not,[1] *a fortiori* is he liable for the negligence of subordinates which he has promised to rectify but does not. For an employee, working at machinery, may generally by inspection determine whether the master has or has not kept his promise of remedying a defect. The machinery is patent; inspection will determine whether it has been repaired or its deficiencies made good. But this is not so with human agents. My fellow-servant may heretofore have been negligent; but it is likely that his negligence may have been corrected by his master's admonitions and threats, brought about by my remonstrances; nor can I tell by looking at him whether such has been the case. Hence, in such case, I am not guilty of negligence on my part, if, trusting in my master's assurances, I go on with my work; and if I am injured by my master's neglect in this respect, my master is liable to me for the injury.[2]

Master promising to correct is liable.

the plaintiff was employed by defendant to work at a steam-saw. It was necessary that he should have an assistant in the performance of his work, and the defendant's foreman engaged a boy for the purpose, who proved to be incompetent, and who, although complaint was made of his incompetence to the foreman, was retained in the service. It was the foreman's duty to engage or discharge the helper. An accident happened to the plaintiff, while working at the saw, through the boy's incompetence. Held, that in the absence of any proof to show that the foreman was incompetent for his position, there could be no recovery; it being the foreman's duty to engage and discharge the boy, his retaining him, after knowing of his incomptence, was merely an act of negligence by the plaintiff's fellow-servant, for which defendant was not responsible. See supra, § 222-229.

[1] See supra, § 220.

[2] See Laning *v.* R. R. 49 N. Y. 534; and particularly supra, § 220.

V. PROVINCE OF JURY AND COURT.

§ 243. Whether, in cases of conflict of testimony, due care has been exercised by the master is, as we have just seen, for the jury, subject to the supervision of the court.[1] The burden of proof is in all cases on the plaintiff. The presumption is that the master has done his duty, and the plaintiff must, in order to recover, prove at least a *primâ facie* case of negligence on the part of the defendant;[2] although it has been intimated that the burden shifts if promise to repair be shown.[3] Whether the servant was aware of danger, and needlessly encountered it, is for the jury, if the inferences conflict.[4]

Question for jury.

Burden on plaintiff.

Even where a defect in machinery is proved, there must be some evidence imputing or implying cognizance of it in the master,[5] in all cases in which the defect is not one which the master is bound, from the nature of his duty, to know.[6] It is ruled, however, that where the master omits a precaution prescribed by statute, this makes against him a *primâ facie* case of negligence.[7] If the plaintiff's case rests on the hypothesis that

[1] Fletcher *v.* R. R. 1 Allen, 9; Flynn *v.* Beebe, 98 Mass. 575; Avilla *v.* Nash, 117 Mass. 318; Wright *v.* R. R. 25 N. Y. 502; Laning *v.* R. R. 49 N. Y. 521; Penns. R. R. *v.* Ogier, 35 Penn. St. 60; Columbus R. R. *v.* Webb, 12 Ohio St. 275.

[2] Priestley *v.* Fowler, 3 M. & W. 1; Riley *v.* Baxendale, 6 H. & N. 445; Bartonsville Coal Co. *v.* Reid, 3 Macq. 252; Feltham *v.* England, L. R. 2 Q. B. 33; Noyes *v.* Smith, 28 Vt. 59; Hard *v.* R. R. 32 Vt. 473; Avilla *v.* Nash, 117 Mass. 318; Hayden *v.* Smithville Co. 29 Conn. 548; Wright *v.* R. R. 25 N. Y. 562; Warner *v.* R. R. 39 N. Y. 408; Rose *v.* R. R. 58 N. Y. 217; Patterson *v.* R. R. 76 Penn St. 389; O'Connell *v.* R. R. 20 Md. 212; Wonder *v.* R. R. 32 Md. 411; Columbus, &c. R. R. *v.* Troesch, 68 Ill. 545; Belair *v.* R. R. 43 Iowa, 662; Gibson *v.* R. R. 46 Mo. 16; Malone *v.* Hawley, 46 Cal. 409; Kansas Pac. R. R. *v.* Salmon, 11 Kans. 83; Mobile, &c. R. R. *v.* Thomas 42 Ala. 672.

[3] Clarke *v.* Holmes, 7 H. & N. 949.

[4] Clarke *v.* Holmes, 7 H. & N. 949; Snow *v.* R. R. 8 Allen, 441; Huddleston *v.* Machine Shop, 106 Mass. 282; Ford *v.* R. R. 110 Mass. 240; Laning *v.* R. R. 49 N. Y. 521; Johnson *v.* Bruner, 61 Penn. St. 58.

[5] Edwards *v.* R. R. 4 F. & F. 531; Flynn *v.* Beebe, 98 Mass. 575; Sullivan *v.* India Co. 113 Mass. 396; Duffy *v.* Upton, 113 Mass. 544; Warner *v.* R. R. 39 N. Y. 468; Columbus, &c. R. R. *v.* Troesch, 68 Ill. 545; Indianap. R. R. *v.* Love, 10 Ind. 554; Gibson *v.* R. R. 46 Mo. 163; Mobile, &c. R. R. *v.* Thomas, 42 Ala. 672.

[6] See supra, § 211.

[7] Couch *v.* Steel, 2 E. & B. 402; Cayser *v.* Taylor, 10 Gray, 410; Rail-

the risks encountered by him were out of the range of his duties, and were not such as he undertook to encounter, then the burden is on him to sustain this hypothesis.[1] But whether the master was negligent, in not taking cognizance of the defect, has been ruled to be for the jury, under the instructions of the court.[2]

§ 243 *a*. Whether the plaintiff, in such case, must negative contributory negligence on his own part, and must, in particular, show that he was not cognizant of the defects complained of, has been questioned. The better opinion, we have elsewhere argued,[3] is, that when the plaintiff's case shows negligence on the part of the defendant, and nothing more, the burden is on the defendant to prove contributory negligence. In suits by servants against masters, where the plaintiff's case discloses defects of which an ordinary observer, of the plaintiff's station, would be expected to take notice, then the plaintiff must show that he did not, and could not with ordinary care, know the defects.[4] Where the defects are latent, so that it is unlikely that the plaintiff could have known them, then he need not prove his ignorance.[5]

Burden as to contributory negligence.

§ 243 *b*. If the plaintiff, in either of the matters above stated as essential to the making out of his case, fails to present evidence sufficient to enable the question to go to the jury, he may be nonsuited.[6] Wherever, in other words, a verdict for the plaintiff, if rendered on the plaintiff's case alone, would be set

road Co. *v.* Mathias, 50 Ind. 65. Infra, §§ 803–8.

[1] Whart. on Ev. §§ 357, 359; Noyes *v.* Smith 28 Vt. 59; Hard *v.* R. R. 32 Vt. 473; Snow *v.* R. R. 8 Allen, 411; Kunz *v.* Stuart, 1 Daly, 431; Wright *v.* R. R. 25 N. Y. 562; Columbus R. R. *v.* Webb, 12 Ohio St. 475.

[2] Ibid. See Tarrant *v.* Webb, 18 C. B. 797; Ryan *v.* R. R. 23 Penn. St. 384; Donaldson *v.* R. R. 18 Iowa, 286.

[3] Infra, § 423. Whart. on Ev. § 361; though see Murphy *v.* Dean, 101 Mass. 455.

[4] Supra, § 217; Assop *v.* Yates, 2 H. & N. 768; Williams *v.* Clough, 3 H. & N. 258; Beaulieu *v.* R. R. 48 Me. 291; Rose *v.* R. R. 58 N. Y. 217; Hackett *v.* R. R. 101 Mass. 103; Walsh *v.* Peet Co. 110 Mass. 23; Patterson *v.* R. R. 76 Penn. St. 389; Columbus R. R. *v.* Webb, 12 Ohio St. 475. See Fort *v.* R. R. 3 F. & F. 322.

[5] Greenleaf *v.* R. R. 29 Iowa, 14; Thompson *v.* R. R. 54 Ga. 512;

[6] Assop *v.* Yates, 2 H. & N. 768; Skipp *v.* R. R. 9 Exch. 223; Owen *v.* R. R. 1 Lans. 108.

aside by the court, then a nonsuit should be ordered.[1] But where there is a conflict of inferences, the case should go to the jury.[2]

VI. CONTRIBUTORY NEGLIGENCE BY SERVANT.

§ 244. The rule that a party who puts himself in a situation of danger cannot recover for damages which he thereby sustains is the basis, as we have had ample opportunities of seeing, on which rests the conclusion that a servant cannot recover from a master for legitimate risks intelligently accepted.[3] A master, therefore, is not liable to his servant for an injury received by the latter through his negligent meddling with machinery, or other carelessness in discharge of his duties;[4] nor, as we have seen,[5] can a servant usually recover for injuries from risks of which he is cognizant, supposing he is competent to understand such risks.

VII. ACTION BY ONE SERVANT AGAINST ANOTHER.

§ 245. It has been said that one servant is not liable to a fellow-servant for negligence.[6] But unless the negligence be in the performance of a duty as to which the servant acts as the master's representative without liberty, this position cannot be sustained.[7]

Servant liable to fellow-servant for negligence.

[1] Clarke *v.* Holmes, 7 H. & N. 942; Beaulieu *v.* R. R. 48 Me. 291; Filer *v.* R. R. 49 N. Y. 50; Rose *v.* R. R. 58 N. Y. 217; Kunz *v.* Stuart, 1 Daly, 431. See Cotton *v.* Ward, 8 C. B. N. S. 568.

[2] In Rose *v.* R. R. supra, the evidence was that in consequence of the starting of several trains upon defendant's road too closely together, a collision was produced, resulting in the death of a brakeman upon one of the defendant's trains. Upon the trial the time-table was not produced, and no evidence was given as to any regulations of the company in regard to starting the trains, or by what or whose authority the trains started; nor did it appear that any agent or officer was intrusted with any general authority or discretion upon the subject. It was held that plaintiff as administrator had failed to establish negligence on the part of defendant, as it might have prescribed proper and safe rules which were violated by a fellow-servant with the deceased, and in the absence of proof to the contrary this was to be presumed; and that, therefore, a refusal to nonsuit was error.

[3] Supra, §§ 199, 224.

[4] Griffiths *v.* Gidlow, 3 H. & N. 648; Clayards *v.* Dethick, 12 Q. B. 439; Summersell *v.* Fish, 117 Mass. 312. Supra, § 215.

[5] Supra, § 214.

[6] Southcote *v.* Stanley, 1 H. & N. 247; Albro *v.* Jaquith, 4 Gray, 99. As to suits by servants against contractors, see infra, §§ 440, 441, 535, 818.

[7] See note by Green to Story on

In such case one servant is not liable to the common master, for his fellow-servant's negligence.[1]

VIII. SERVANT'S LIABILITY TO THIRD PERSON.

§ 246. A servant, as is elsewhere abundantly shown,[2] is not, when acting without liberty, liable to third parties for his negligence. It is otherwise, however, when he takes part personally in malicious or fraudulent acts;[3] and when he obeys illegal orders.[4] When personally engaged in a tort with his master, and when independently liable, he may be joined in the same suit.[5] And whenever he is personally vested with discretion and liberty to act, he may become independently liable.[6] Hence, an engineer has been held liable to parties injured by a fire caused by his negligence.[7] A servant is liable to his master, it may be added, when a third person has brought an action and recovered damages against the master for injuries sustained in consequence of the servant's negligence or misconduct.[8]

Servant acting independently liable to third parties.

Agency, § 453 *e*. Supra, § 200. And see Swainson *v.* R. R. 37 L. T. N. S. 104, where such liability is intimated by the court.

[1] Farrell *v.* R. R. 4 Metc. 49; New Orleans R. R. *v.* Hughes, 49 Miss. 258.

[2] Whart. on Agency, § 535.

[3] Ibid. § 540.

[4] Ibid. § 542.

[5] Ibid. § 546. See Phelps *v.* Wait, 30 N. Y. 78.

[6] Ibid. § 537.

[7] Gilson *v.* Collin, 66 Ill. 136.

[8] Smith's Master & Serv. 66; Grand Trunk R. R. Co. *v.* Latham, 63 Me. 177; Veazie *v.* R. R. 49 Me. 119; Portland *v.* Richardson, 54 Me. 46; Suydam *v.* Moore, 8 Barb. 358.

CHAPTER VI.

MUNICIPAL CORPORATIONS.

Generally liable, apart from statute, for so misusing any property belonging to them as to injure private persons, § 250.
Charter not to be construed to impose extraneous duties, § 257.
Not liable for negligence of third parties, § 259.
Not liable for omission or negligence in discharge of discretionary functions, § 260.
As in management of fire department, § 261.
Otherwise as to negligence in sewerage, § 262.
Liability for damagea arising from abuse of power, not to be confounded with liability for damages arising from its imperfect exerciae, § 264.
When, having power to remove a nuisance, liable for neglect, § 265.
"Towns," as distinguished from municipal corporations, § 266.
When municipal corporations are liable for neglect of servants, § 267.

[*The duties of municipal corporations in respect to highways are discussed in a separate chapter, infra*, § 956.]

Liable for negligent abuse of property.

§ 250. WHILE a municipal corporation is not liable in a private suit for injuries resulting from its neglect of a discretionary public duty, when it does acts for its own private advantage or emolument it becomes so liable, for the reason that "municipal corporations, in their private character as owners and occupiers of lands and houses, are regarded in the same light as individual owners and occupiers, and dealt with accordingly."[1]

§ 251. In New England where, as will be hereafter seen, from the peculiar division of the territory into towns, a distinctive jurisprudence on this topic has grown up,[2] the common law liability of municipal corporations for negligences of this class is strictly guarded. Thus in Massachusetts, "to render," as is well argued by Gray, J., "municipal corporations liable to private actions for omission or neglect to perform a corporate duty imposed by general law on all towns and cities alike, and from the performance

[1] Nelson, C. J., in Bailey *v.* New York, 3 Hill, 531; Brown *v.* N. Y. 3 Barb. 254; Cowley *v.* Sunderland, 6 H. & N. 565; Infra, § 830 *a*.

[2] See infra, §§ 266, 956.

of which they derive no compensation or benefit in their corporate capacity, an express statute is doubtless necessary. Such is the well settled rule in actions against towns or cities for defects in highways.[1] The same rule has been held to govern an action against a town by a legal voter therein, for an injury suffered while attending a town meeting, from the want of repair in the town-house erected and maintained by the town for municipal purposes only; or by a child, attending a public school, for an injury suffered from falling into a dangerous excavation in the school-house yard, the existence of which was known to the town, and which had been dug by order of the selectmen to obtain gravel for the repair of the highways of the town, and to make a regular slope from the nearest highway to the school-house.[2] But this rule does not exempt towns and cities from the liability to which other corporations are subject, for negligence in managing or dealing with property or rights held by them for their own advantage or emolument. Thus where a special charter accepted by a city or town, or granted at its request, requires it to construct public works, and enables it to assess the expense thereof upon those immediately benefited thereby, or to derive benefit in its own corporate capacity from the use thereof, by way of tolls or otherwise, the city or town is liable, as any other corporation would be, for any injury done to any person in the negligent exercise of the powers so conferred.[3] So where a municipal corporation holds or deals with property as its own, not for the direct benefit and immediate use of the public, but for its own benefit, by receiving rents or otherwise, in the same way as a private owner might, it is liable to the same extent as he would be for the negligent management thereof to the injury of others. In

[1] 5 Edw. 4, 2, pl. 24; Riddle *v.* Proprietors of Locks & Canals, 7 Mass. 169, 187; Mower *v.* Leicester, 9 Mass. 247; Holman *v.* Townsend, 13 Met. 297; Brady *v.* Lowell, 3 Cush. 121; Providence *v.* Clapp, 17 How. 161, 167.

[2] Eastman *v.* Meredith, 36 N. H. 284; Bigelow *v.* Randolph, 14 Gray, 541. How far this law is distinctive of New England will be seen infra, § 266.

[3] Henley *v.* Lyme, 5 Bing. 91; *S. C.* 3 B. & Ad. 77; 1 Scott, 29; 1 Bing. N. C. 222; 2 Cl. & Fin. 331; 8 Bligh N. S. 690; Weet *v.* Brockport, 16 N. Y. 161, note; Weightman *v.* Washington, 1 Black, 39; Nebraska City *v.* Campbell, 2 Black, 590; Perley, C. J., in Eastman *v.* Meredith, 36 N. H. 289–294; Metcalf, J., in Bigelow *v.* Randolph, 14 Gray, 543; Child *v.* Boston, 4 Allen, 41, 51.

Thayer *v.* Boston, 19 Pick. 511, it was held that a city was liable for the acts of its agents, previously authorized or afterwards ratified by the city, in obstructing a highway to the special and peculiar injury of an individual, by erecting buildings under a claim of title in the fee of the land, for which the city received rent. In Anthony *v.* Adams, 1 Met. 284, cited for the defendant, the town was held not liable, solely because the act which occasioned the injury was one which the town had not authorized, and was not required by law to do." He proceeds to cite with approval from Perley, C. J., the statement,[1] that "towns and other municipal corporations, including counties in this state, have power, for certain purposes, to hold and manage property, real and personal; and for private injuries caused by the improper management of their property, as such, they have been held to the general liability of private corporations and natural persons that own and manage the same kind of property." "So far as they are the owners and managers of property, there would seem to be no sound reason for exempting them from the general maxim which requires an individual so to use his own that he shall not injure that which belongs to another."[2] It was consequently held, that if, in repairing a building belonging to a city, and used in part for municipal purposes, but in considerable part also as a source of revenue by being let for rent, which is situated on a public common crossed by footpaths cared for by the city and used by the public for more than twenty years, the agents or servants of the city, acting by its authority, dig a hole in the ground adjoining, and negligently leave it open and unguarded, so that a person walking on one of the paths and using due care falls into it and is injured, the city is liable to an action at common law for the injury.

§ 252. In other states a larger liability is maintained. Thus, in New York, where it appeared that the common council of the city of Buffalo ordered the moving of one end of a bridge belonging to a turnpike company, in order to have it conform to certain street improvements, and employed contractors to do the work of removal under the superintendence of the city surveyor, and the contractors employed one S. to superintend such removal;

[1] Eastman *v.* Meredith, 36 N. H. 295, 296.

[2] Oliver *v.* Worcester, 102 Mass. 490.

and the evidence was that the work was negligently performed, whereby the bridge fell and was destroyed; it was ruled that the city was liable for the destruction of the bridge, and this whether the city had a lawful right to attempt its removal or not. The city, if it had no lawful right, was a trespasser, and liable as such for the illegal acts of its officers. If it had lawful power to do the act, it was bound to do it in a careful and skilful manner, and was liable for the negligence of its agents.[1]

In Missouri, though in earlier cases the liabilities of municipal corporations were much abridged,[2] the tendency now is to give redress, as against such a corporation, in all cases in which, for its own advantage, it negligently injures others.[3]

§ 253. In a Pennsylvania case, sustainable even on the narrow construction of the Massachusetts courts, it is ruled that a city, being in possession of a public wharf within its limits, exercising exclusive supervision and control over it, and receiving tolls for its use, is bound to keep it in proper condition, and is liable for special injury sustained by an individual in consequence of its neglect to keep the wharf in order.[4] But the courts have gone beyond this limit, maintaining the liability of municipal corporations, even as to acts for which they receive directly no emolument. Thus an incorporated district, authorized to pave and grade a public street, was held liable for an injury to a private right of way caused by the diversion of the water from the street upon the private way, on the ground that it had the power and was bound to make a proper provision for carrying off the water from the street.[5] So, in another case,[6] the county was made responsible for the acts and omissions of the commissioners in relation to an unsafe bridge which fell with the plaintiff's wagon and team. The bridge being on the line of two counties and maintained by both, it was after-

[1] Buffalo & Hamburg Turnpike Co. *v.* The City of Buffalo, 1 N. Y. Sup. Ct. 537; *S. C.*, under name Buffalo & Hamb. Turnpike Co. *v.* Buffalo, 58 N. Y. 639.

[2] See St. Louis *v.* Gurno, 12 Mo. 414; Hoffman *v.* St. Louis, 15 Mo. 651.

[3] Thurston *v.* St. Joseph, 51 Mo. 510.

[4] Pittsburg *v.* Grier, 21 Penn. St. (10 Harris), 54.

[5] Commissioners of Kensington *v.* Wood, 10 Barr, 93.

[6] Humphreys *v.* Armstrong Co. 56 Penn. St. (6 P. F. Smith), 204.

wards held that Armstrong County could recover contribution from Clarion County, notwithstanding the case was one of negligence.[1]

§ 254. In a case in Georgia,[2] the mayor and council of the city of Macon, having full power and authority to remove or cause to be removed any buildings, posts, steps, fences, or other obstructions or *nuisance*, in the public streets, lanes, alleys, sidewalks, or public squares of the city, it was held that under this power they are bound to keep the streets, lanes, alleys, and sidewalks in such condition that it is safe and convenient to pass them, and in case of failure that they are liable to any person injured by their neglect. It was further ruled, that a two-story brick wall of a house that had been burnt down some months previously, standing at the edge of the sidewalk, though private property, if it be so much dilapidated or decayed as to endanger the lives of persons passing the streets, is a nuisance, which the mayor and council are bound to have removed; and if they fail, and danger results to any person by reason of such neglect, the city is liable for the damages sustained. So, in the same state, a municipal corporation has been held liable for leaving a dangerous hole in one of its market places in which the plaintiff was hurt.[3]

So for negligently managing remunerative works.

§ 255. Wherever a municipal corporation undertakes a work for direct emolument, its liability, if in the exercise of its duty thus assumed it directly causes injury to a third person, is plain. Of this liability we have an interesting illustration in a case already cited,[4] where it was held that the city of Philadelphia was liable for the acts of its board of water-works for negligently drawing off, without necessity, so much water from the Schuylkill River as to endanger the navigation of the river.

§ 256. '*Quasi* municipal corporations, established for the purpose of establishing and carrying on, for emolument, specific public works, are indubitably subjected to the same liability.

[1] Armstrong *v.* Clarion, 66 Penn. St. 218.

[2] Parker *v.* Macon, 39 Ga. 725.

[3] Savanah *v.* Cullens, 38 Ga. 334.

[4] City of Phil. *v.* Gilmartin, 71 Penn. St. 140. See supra, §§ 127, 190; and see comments in Elliott *v.* Phil. 75 Penn. St. 347; see, to same effect, Wheeling Bridge case, 13 Howard, 560; Turnpike Company *v.* Wallace, 8 Watts, 316.

Thus in an English case,[1] already noticed, the house of lords, on final review, held that the trustees of the docks at Liverpool, incorporated by act of parliament, for the purpose of making and maintaining docks and warehouses for the use of the public, with authority to receive rates for such use, which were to be applied exclusively to the maintenance of the docks and warehouses, and the payment of the debt incurred in their construction, were liable to an action by an individual for an injury to his vessel in entering one of the docks, by striking upon a bank of mud which their servants and agents had negligently suffered to accumulate at and about the entrance.[2]

So as to *quasi* municipal corporations.

§ 257. A duty, however, not imposed specifically on a corporation, cannot be constructively attached so as to make its neglect the subject of a suit. Thus, it is held in Maine that no action can be maintained against a town for neglecting to repair a drain across its highways, *per quod* the water accustomed to flow through it was forced back upon the adjoining land, unless it appears that an obligation to construct the drain was imposed on the town by the statute or common law. It was also held that the common law requires a town to build a drain only where its highway would otherwise obstruct the flow of water in its natural channel, or cause it to collect and stand upon adjoining land to the injury of the owner.[3]

Charter not to be construed to impose extraneous duties.

So in another case in the same state,[4] where the health officers took possession of a vessel and used it with the consent of the owner as a hospital for a small-pox patient, and afterwards sent a person to fumigate and purify it, who accidentally caused a fire, by which the vessel was injured. The city was held not to be liable for the injury, because the health officers had no authority to take possession, and acted beyond their powers, and the city had no special property in the vessel.[5]

§ 258. In a New York action,[6] to recover compensation for

[1] Mersey Docks Trustees *v.* Gibbs, 11 H. L. Cas. 687; *S. C.* Law. Rep. 1 H. L. 93. See infra, § 272, for a fuller report.

[2] See, also, cases cited, infra, §§ 273–5–6.

[3] Estes *v.* China, 56 Me. 407. Supra, § 195.

[4] Mitchell *v.* City of Rockland, 52 Me. 118.

[5] See supra, § 195.

[6] Russell *v.* The Mayor of New

personal property destroyed by blowing up a building to arrest a fire, upon the order of the mayor and two aldermen, acting under a statute, it appearing that the duty being imposed by the statute on the officers and not on the city, and not by any city regulation, it was held that the city was not liable to respond in damages.

When liable for negligence of third parties.

§ 259. We have already seen that when a municipal corporation puts out work on contract it is not liable for the negligence of a contractor over whom it retains no supervision.[1] As to nuisances which it permits, it is always liable.[2] But where, in the lawful discharge of their duties, the officers of a municipal corporation give permission to a lot owner to connect his lot with a sewer, while the corporation, in the persons of such officers, is required to exercise reasonable care to prevent injury, and for the omission thereof is liable, yet, in the absence of proof of want of such care, upon the part of its officers, it is not liable for the negligence of the employees of the lot-owners.[3] Of course, as soon as it has notice of a defect produced by such licensee, it becomes liable.[4]

That a municipal corporation is not liable for the collateral negligence of its subalterns has been already shown.[5]

Not liable in discretionary matters.

§ 260. A municipal corporation is not liable in a private action for omissions or other imperfections in the exercise of discretionary functions for the benefit of the public at large.[6] "Municipal corporations undoubtedly are invested with certain powers, which, from their nature, are dis-

York, 2 Denio, 461; see, however, comments in Thurston *v.* St. Joseph, 51 Mo. 510.

[1] Supra, §§ 190–3.

[2] Supra, § 187.

[3] Masterton *v.* Mt. Vernon, 58 N. Y. 391; distinguishing Wendell *v.* Troy, 4 Keyes, 261; and see, to the same general effect, Hammond *v.* St. Pancras, L. R. 9 C. P. 316; Washburn Manuf. Co. *v.* Worcester, 116 Mass. 460; West Chester *v.* Apple, 35 Penn. St. 284. Infra, § 962.

[4] Infra, §§ 265, 962.

[5] Supra, § 191.

[6] Infra § 960; Dillon on Mun. Cor. (2d. ed.) § 753; Brown *v.* Vinalhaven, 65 Me. 402; Mower *v.* Leicester, 9 Mass. 247; Holman *v.* Townsend, 13 Metc. 297; Bigelow *v.* Randolph, 14 Gray, 541; Judge *v.* Meriden, 38 Conn. 90; Wilson *v.* N. Y. 1 Denio, 595; Mills *v.* Brooklyn, 32 N. Y. 489; Joliet *v.* Verley, 35 Ill. 58; Detroit *v.* Beckman, 34 Mich. 129; Lansing *v.* Toolan, Sup. Ct. Mich. 1877, 16 Alb. L. J. 164.

cretionary, such as the power to adopt regulations or by-laws for the management of their own affairs, or for the preservation of the public health, or to pass ordinances prescribing and regulating the duties of policemen and firemen, and for many other useful and important objects within the range of their charters. Such powers are generally regarded as discretionary, because in their nature they are legislative; and although it is the duty of such corporations to carry out the powers so granted and make them beneficial, still it has never been held that an action on the case would lie at the suit of an individual for the failure on their part to perform such a duty."[1] And this principle applies where a municipal corporation "has a discretion as to the time and manner of making corporate improvements; as, for example, building market-houses, improving its harbors, and the like."[2]

Nor for negligences in fire department.

§ 261. Hence, when there is no engagement by a municipal corporation to furnish water in sufficient quantities to extinguish fires, the corporation, in the absence of an express statute, is not liable for injuries sustained by reason of its negligence in providing or using or keeping in repair the water power and fire-engines and machinery which such corporation is authorized by law to procure and employ,[3] nor is it liable for a personal injury caused by the negligence of the officers of the fire department in performing their duties, although the department was established by a special statute which required its acceptance by the city.[4]

Thus in a Pennsylvania case,[5] the evidence was that an act of assembly empowered a city to make a sufficient number of reser-

[1] Weightman *v.* Washington, 1 Black, 39, 49, as adopted in Fisher *v.* Boston, 104 Mass. 94.

[2] Dillon on Munic. Corp. (2d. ed.) § 753, citing Wilson *v.* N. Y. 1 Denio, 595; Cole *v.* Medina, 27 Barb. 218; Lacour *v.* Mayor, 3 Duer, 408; Levy *v.* N. Y. 1. Sandf. 465; Griffin *v.* Mayor, 9 N. Y. 456; Kelley *v.* Milwaukee, 18 Wis. 83; Goodrich *v.* Chicago, 20 Ill. 445; White *v.* Yazoo City, 27 Miss. 357, and other cases.

[3] Fisher *v.* Boston, 104 Mass. 87; Hafford *v.* New Bedford, 16 Gray, 297; Eastman *v.* Meredith, 36 N. H. 284; Torbush *v.* Norwich, 38 Conn. 225; Jewett *v.* New Hav. 38 Conn. 368; Wheeler *v.* Cincin. 19 Ohio St. 19; Patch *v.* Covington, 17 B. Monr. 722; Brinkmeyer *v.* Evansville, 29 Ind. 187; Weightman *v.* Washington, 1 Black, 38. Supra, § 84.

[4] Fisher *v.* Boston, 104 Mass. 87.

[5] Grant *v.* Erie, 69 Pa. St. 420. Supra, § 84.

voirs "to supply water in case of fire," and that the city council, in pursuance of this power, constructed reservoirs but suffered one to be dilapidated so that it would not hold water. A fire occurred near this reservoir, and as no water could be obtained from it, the buildings were burned. The owner claimed damages, alleging negligence on the part of the city. It was ruled by the supreme court, that it was discretionary with the city to construct the reservoirs, and the city was not liable for neglect so to do; and that the city having in pursuance of the act constructed the reservoir, was not therefore bound to maintain it. The same conclusion has been reached as to negligence in providing water for a fire department;[1] as to negligence in working a steam fire-engine belonging to the city, and under the control of engineers paid by the city;[2] and as to negligence in the structure of hose, causing the hose, when working at a fire, to burst.[3]

If a municipal corporation should contract to furnish an individual with water enough to put out fire on his property, it would undoubtedly be liable for its neglect to perform its engagement in this respect. But when there is no such contract, and when it only undertakes to furnish water, so far as concerns the extinguishing of fires, for the public benefit, it cannot, without a statute, be made liable for defects in its organization in this respect, any more than it could be made liable to individuals for cases of sickness caused by defects in its sanitary arrangements, although it has undertaken to put an organization for this purpose in motion. Of course, in either case, it would be liable for a nuisance, if a nuisance be produced by its acts.

Otherwise as to negligence in building sewers.

§ 262. But even under the strict rule noticed as applied in Massachusetts, a city[4] is liable for negligently performing a special statutory duty, to meet which (as in case of a sewer) it is authorized to assess special taxes on parties benefited;[5] for neglect in the maintenance

[1] Wheeler *v.* Cincin. 19 Ohio St. 368.

[2] See Hayes *v.* Oshkosh, 33 Wis. 314; and see Torbush *v.* Norwich, 38 Conn. 225; Kelly *v.* Milwaukee, 18 Wis. 83.

[3] Fisher *v.* Boston, 104 Mass. 87.

[4] See article on Sewerage in Alb. Law J. for Dec. 26, 1874, p. 401.

[5] Rowe *v.* Portsmouth, 56 N. H. 291; Emery *v.* Lowell, 104 Mass. 13; *S. C.* 109 Mass. 197; Child *v.* Boston, 4 Allen, 41. *A fortiori* under the N. Y. law; Bailey *v.* New York, 3

in due order of its system of drainage and sewerage when once established, so as to overflow the property of individuals;[1] and under the still more liberal expansion of liability obtaining in other states, for negligence in the planning of sewers, by which, through the insufficiency of the pipes to carry off water, the plaintiff's house is overflowed.[2] It has been held in England that an action will lie against a local board of health, under the 11 & 12 Vict. c. 63, as a body, for negligently carrying out works within their powers, so as to cause injury to any person; and for so negligently and improperly constructing a sewer as to cause a nuisance by its discharge.[3] And again,[4] where commissioners acting under statutable powers had ordered new sewers to be constructed under a contract and plans which did not provide for a "penstock," or flat necessary to prevent the plaintiff's premises from being flooded, and the consequence was that the premises were flooded with sewerage; it was held that the commissioners were liable to be sued for negligence.[5] In such cases, however, negligence must be proved by the plaintiff; and the mere exercise of the defendant's statutory powers is not imputable as negligence.[6]

Hill, 531; *S. C.* 3 Denio, 433. See Nims *v.* Mayor, 3 N. Y. Supr. Ct; *S. C.* 59 N. Y. 500.

[1] Emery *v.* Lowell, 104 Mass. 13; *S. C.* 109 Mass. 197; Child *v.* Boston, 4 Allen 41; New York *v.* Furze, 3 Hill, 612; Lloyd *v.* New York, 1 Selden, 369; Barton *v.* Syracuse, 36 N. Y. 54; Thurston *v.* St. Joseph, 51 Mo. 510.

[2] Indian. *v.* Huffer, 30 Ind. 235; Rochester White Lead Co. *v.* Rochester, 3 Comst. 463.

[3] Southampton Bridge Co. *v.* Local Board of Health of Southampton, 8 Ell. & Bla. 801; 28 L. J. Q. B. 41.

[4] Ruck *v.* Williams, 3 Hur. & N. 308; 27 L. J. Exch. 357.

[5] See, also, Ward *v.* Lee, 26 L. J. Q. B. 142.

[6] Hammond *v.* St. Pancras, L. R. 9 Ch. 316; Masterton *v.* Mt. Vernon, 58 N. Y. 301. In Washburn Man. Co. *v.* Worcester, 116 Mass. 460, Gray, C. J., placed the decision on the principle, that "Where a city, or a board of municipal officers, is authorized by the legislature to lay out and construct common sewers and drains, and provision is made by statute for the assessment, under special proceedings, of damages to parties whose estates are thereby injured, the city is not liable to an action of law or bill in equity for injuries which are the necessary result of the exercise of the powers conferred by the legislature." In Michigan a municipal corporation is not liable for a negligent exercise of its discretion in planning sewerage, though it is liable for a defective execution of its plans. Supra, § 260. Detroit *v.* Beckman, 34 Mich. 129; Lansing *v.* Toolan, Sup. Ct. Mich. 1877, quoted infra, § 263; and see infra, § 969.

§ 263. It is true that the line between the *legislative* acts of a municipal corporation, for which it is not liable in suits of this class, and its *ministerial* acts, for which it is liable, is one which it is sometimes difficult to determine. In a case before the supreme court of Pennsylvania, for instance,[1] the evidence was that a power was conferred by its charter upon a municipal corporation "to build and erect from time to time, as might become necessary, sufficient close culverts in and over the common sewers established in the district." The municipality did proceed to build culverts in the exercise of the power granted by the act of incorporation. The plaintiff alleged, and gave evidence tending to prove, that the culverts were not sufficient to carry off the water falling in a heavy rain; that in consequence his store had been overflowed, and his stock of goods therein damaged. Chief Justice Lowrie, before whom the cause was tried, in the court of nisi prius at Philadelphia, without hearing any evidence for the defendants, entered a judgment of nonsuit, and the judgment was affirmed by the supreme court. The same judge, before whom the case had been tried, in delivering the opinion affirming the judgment, said: "We do not admit that the grant of authority to the corporation to construct sewers amounts to an imposition of a duty to do it. Where any person has a right to demand the exercise of a public function, and there is an officer, or set of officers, authorized to exercise that function, there, the right and the authority give rise to the duty; but when the right depends upon the grant of authority, and that authority is essentially discretionary, no legal duty is imposed." This ruling is unquestionably right; but it would have been better to have given more prominence to the reason that whether culverts of a particular size, or of a particular dimension, should be built, was a matter of legislative discretion in the corporation, as to which it could not be held responsible in a suit for damages. On the other hand, when a municipal corporation undertakes the work of sewerage, and does it so negligently as to impair individual rights, this is a ministerial act for which the corporation may be compelled to answer in damages to the party injured.[2]

Distinction between legislative and ministerial acts.

[1] Carr *v.* Northern Liberties, 35 Penn. St. 324.

[2] The authorities on this topic are thus excellently grouped and analyzed

§ 264. The liability for damages arising from abuse of power, however, is not to be confounded with liability for damages arising from its imperfect exercise. It must be remembered that the question whether a city shall be liable for flooding a house by bad drainage, and that

Abuse of power distinguishable from imperfect exercise.

by Ch. J. Cooley, in Ashley *v.* Port Huron, Supr. Ct. Mich. 1877.

"In Pontiac *v.* Carter, 32 Mich. 164, the question of the liability of a municipal corporation for an injury resulting from an exercise of its legislative powers was considered, and it was denied that any liability could arise so long as the corporation confined itself within the limits of its jurisdiction. That was a case of an incidental injury to property caused by the grading of a street. The plaintiff's premises were in no way invaded, but they were rendered less valuable by the grading, and there was this peculiar hardship in the case, that the injury was mainly or wholly owing to the fact that the plaintiff's dwelling had been erected with reference to a grade previously established and now changed. In the subsequent case of City of Detroit *v.* Beekman, 34 Mich. 125, the same doctrine was reaffirmed. That was a case of injury by being overturned in a street in consequence of what was claimed to be an insufficient covering of a sewer at a point where two streets crossed each other. It was counted upon as a case of negligence, but the negligence consisted only in this: that the city had failed to provide for covering the sewer at the crossing of a street for such a width as a proper regard for the safety of people passing along the street would require. If this case is found to be within the principle of the cases referred to, the ruling below must be sustained, and that, we think, is the only question we have occasion to discuss.

"The cases that bear upon the precise point now involved are numerous. In Proprietors of Locks, &c. *v.* Lowell, 7 Gray, 223, it was held that a city was liable in an action of tort for draining water through sewers and drains into a canal owned by a private corporation, thereby causing injury to the canal; the conclusion being planted on the right of the corporation 'to an unmolested enjoyment of the property.' In Franklin *v.* Fisk, 13 Allen, 211, it is said by Chapman, J.: 'When highways are established they are located by the public authorities with exactness, and the easement of the public, which consists of the right to make them safe and convenient for travellers, and to use them for public travel, does not extend beyond the limit of the location. A surveyor of highways, who fells a tree upon the adjoining land *extra viam*, is a trespasser (citing Elder *v.* Bemis, 2 Metc. 299); neither his office, nor the existence of the highway, gives him any authority to meddle with the land outside the limits of the highway.' In Haskell *v.* New Bedford, 108 Mass. 208, a city was held liable to the owner of a private dock into which, to his injury, the mud and filth from its sewer was discharged. In Wilson *v.* New York, 1 Denio, 595, on facts substantially like those in the present case, it was denied that plaintiff had any redress against the city. This decision was afterward questioned in the same court (Week *v.* Brockport, 16 N. Y. 161, 170, note), and in some other cases, to which reference will be made further on. In Lacour *v.* New

whether it shall be liable for an insufficient supply of water, are very distinct. The first depends upon the principle *Sic utere tuo*

York, 3 Duer, 406, it was decided that a municipal corporation, in the exercise of its authority over its property, was as much bound to manage and use it so as to produce no injury to others as would be an individual owner; and that if the necessary result of an excavation in a public street was to injure the building on adjoining ground, the corporation must respond for such injury. In Conrad *v.* Ithaca, 16 N. Y. 158, a municipal corporation was held liable to one whose building was carried away in consequence of the negligent construction of a bridge by the corporation over a stream flowing through it. In Rochester White Lead Co. *v.* Rochester, 3 N. Y. 463, the city was made to respond in damages for flooding private premises with waters gathered in a sewer. This case is commented on in Mills *v.* Brooklyn, 32 N. Y. 489, and distinguished from one in which the injury complained of arose from the insufficiency of a sewer which was constructed in accordance with the plan determined upon. Obviously, the complaint in that case was of the legislation itself, and of incidental injuries which it did not sufficiently provide against. The like injuries might result from a failure to construct any sewer whatever. But clearly no action could be sustained for a mere neglect to exercise a discretionary authority. Compare Smith *v.* Mayor, &c. 6 N. Y. Sup. Ct. (T. & C.) 685; 4 Hun, 637; Nims *v.* Mayor, &c. 59 N. Y. 500. Cases of flooding lands, by neglect to keep sewers in repair, of which Barton *v.* Syracuse, 37 Barb. 292, and 36 N. Y. 51, is an instance, are passed by, inasmuch as it is not disputed by counsel for the defendant in this case, that for negligent injuries of that description the corporation would be responsible. Those cases are supposed by counsel to be distinguished from the one before us in this: that here the neglect complained of was only of a failure to exercise a legislative function, and thereby provide the means for carrying off the water which the sewer threw upon the plaintiff's premises. The distinction is, that the obligation to establish open sewers is a legislative duty, while the obligation to keep them in repair is ministerial. But it is not strictly the failure to construct sewers to carry off the water that is complained of in this case; it is of the positive act of casting water upon the plaintiff's premises by the sewer already constructed.

"An action like the one at bar was sustained in Nevins *v.* Peoria, 41 Ill. 502; Aurora *v.* Gillett, 56 Ibid. 132; Aurora *v.* Reed, 57 Ibid. 30; Alton *v.* Hope, 68 Ibid. 167; Jacksonville *v.* Lambert, 62 Ibid. 509. The same is true of Pettingrew *v.* Evansville, 26 Wis. 223, where Dixon, Ch. J., is at some pains to distinguish the case from one of merely incidental injuries. The case of Vincennes *v.* Richards, 23 Ind. 381, appears by the report to have turned on this distinction; and see Cotes *v.* Davenport, 9 Iowa, 227. The doctrine of the foregoing cases is approved by Judge Dillon in his Treatise on Municipal Corporations, vol. 2, p. 799, note, where several Upper Canada cases are cited in its support. We refer to Merrifield *v.* Worcester, 110 Mass. 216, where the same distinction is somewhat considered by Wells, J. In St. Peter *v.* Dennison, 58 N. Y. 416, the action was against a contractor with the state for the enlargement of the canal, who, in blasting rock, had caused an injury to the

ut alienum non laedas. If, by a positive aggression, a city inflicts injury upon the estate of individuals, either by way of flooding or by such excavations as to cause the soil to fall in, then the city becomes liable; and this covers the case of defective sewerage. On the other hand, when we ask for damages against a city for injuries we claim to arise from an inadequate supply of water, or an inadequate police management, we are obliged, in order to sustain ourselves, to fall back upon the principle that a government that does not adopt all proper means for the relief of its subjects is liable in suits for damages to recompense them for injuries sustained by them from its neglect.[1] This principle, however, is the reverse of that which not only our own but the Roman jurisprudence proclaims. A government, whether state or municipal, cannot be made liable in suits for damages for injuries caused by its failure to supply its subjects even with necessities. Aside from other reasons, we must remember that, if we accept this principle, government would be made liable not merely for what it undertakes, but for what it ought to undertake; and the city, from being compelled to pay for everything that is wrong, would soon be unable to do anything that is right. No doubt hardships arise from a city's defective execution of its function in the dispensing of water and the control of fire. It must be kept in mind, however, that insurance against fire is vested, by all sound economical reasoning, in special insurance companies, and not in cities; and that for any persistent abuse of discretion in this respect, we have a correction in our periodical municipal elections.[2]

plaintiff while the latter was employed on other premises in the vicinity. The defendant claimed the same exemption which the state would have had under the same circumstances. Conceding that he might stand in the place of the states, the court held he was not entitled to protection." See, also, Merrifield *v.* Worcester, 110 Mass. 216; Brayton *v.* Fall River, 113 Mass. 218.

[1] See this distinction sustained in Goodrich *v.* Chicago, 20 Ill. 445; Lloyd *v.* Mayor of N. Y. 1 Seld. 369; Skinkle *v.* Covington, 1 Bush, 617; Mayor of N. Y. *v.* Bailey, 3 Denio, 433; Middle Bridge *v.* Brooks, 13 Me. 391.

[2] In Smith *v.* Philadelphia, 81 Penn. St. 38, which was a suit for damages arising from a deficient supply of water, caused by the bursting of pipes through frost, it was held that the plaintiff could recover only the water rent for the time during which the supply was deficient, and not for loss of rents of the premises. "The claim here," said the court, "is not for

§ 265. A municipal corporation having full power to remove a nuisance, but neglecting so to do, or producing a nuisance when in the discharge of its legal powers, such nuisance not being necessary to the exercise of such powers, is liable for injuries caused by such neglect.[1]

Liable for omission to remove nuisance.

§ 266. It has been stated that a municipal corporation is liable, apart from statute, for so misusing any remunerative franchise belonging to it as to injure a private person. This principle, however, is declared not applicable to the New England towns, which, it is ruled in Massachusetts, cannot be sued for neglect of general duty when the remedy is not given by statute.[2] And this view obtains not only in New England,[3] but throughout the country, so far as concerns townships, counties, school districts, road districts, and similar divisions of the state, though they have corporate capacity and power to levy taxes.[4] At the same time, it is declared by Metcalf, J., when illustrating the Massachusetts law,[5] that the rule is "of limited application. It is applied, in the case of towns, only to the neglect or omission of a town to perform those

Towns as distinguished from municipal corporations.

damages arising from the bursting of the water-pipes laid by the city, but for the loss of the water caused by the bursting of the pipes leading to the plaintiff's houses from the action of frost. The real claim is for the loss of the water and this will not implicate the city in any loss beyond the consideration paid for its use by the water rents, and these were allowed. The introduction of water by the city into private houses is not on the footing of a contract, but of a license which is paid for."

[1] Supra, § 187. Kelsey *v.* Glover, 15 Vt. 715; Willard *v.* Newbury, 22 Vt. 458; Chamberlain *v.* Enfield, 43 N. H. 356; Currier *v.* Lowell, 16 Pick. 170; Lowell *v.* R. R. 23 Pick. 24; Palmer *v.* Andover, 2 Cush. 607; Bacon *v.* Boston, 3 Cush. 179; Raymond *v.* Lowell, 6 Cush. 529; Drake *v.* Lowell, 13 Metc. 292; People *v.* Albany, 11 Wend. 542; New York *v.* Furze, 3 Hill, 614; Nebraska City *v.* Campbell, 2 Blackf. 592; Parker *v.* Macon, 39 Ga. 725. As to nuisances on roads, see infra, § 956 *et seq.*

[2] Mower *v.* Leicester, 9 Mass. 247; Bigelow *v.* Randolph, 14 Gray, 541. See Brown *v.* Vinalhaven, 65 Me. 402.

[3] See Eastman *v.* Meredith, 36 N. H. 284, and cases hereafter cited, § 906 *et seq.*

[4] Dillon on Munic. Corpor. 2d ed. § 762, citing Treadwell *v.* Commis. 11 Ohio St. 190; Hedges *v.* Madison Co. 1 Gilm. (Ill.) 567; Freeholders *v.* Strader, 3 Harr. (N. J.) 108; Van Eppes *v.* Commis. 25 Ala. 460; Larkin *v.* Saginaw Co. 11 Mich. 88; Bray *v.* Wallingford, 20 Connect. 416; Governor *v.* Justices, &c. 19 Ga. 97; Haygood *v.* Justices, 20 Ga. 845; Com. *v.* Brice, 22 Penn. St. 211.

[5] Bigelow *v.* Randolph, 14 Gray, 541.

duties which are imposed on *all* towns, without their corporate assent, and exclusively for public purposes; and not to the neglect of those obligations which a town incurs when a special duty is imposed upon it, with its own consent, express or implied, or a special authority is conferred on it at its request."[1] And the distinction, based as it is on the supposition that a town is a political division of the commonwealth, subsides, as has been seen, when a town, by taking upon itself, at its own request, specific remunerative duties, places itself in the attitude, not of an integral portion of the commonwealth, but of a subordinate business agency.

Liability for servants.

§ 267. The question of the liability of a municipal corporation for its servants has been already independently discussed.[2]

[1] See, also, remarks of Gray, J., supra, § 250.

[2] See supra, §§ 190–195.

CHAPTER VII.

PRIVATE CORPORATIONS.

Charter or license no defence to collateral nuisance, § 271.
Legislative authority to maintain public works and to receive tolls imposes the duty to keep such works in repair, § 272.
Remedies given by charter do not exclude remedies at common law, § 278.
Liability for acts of servants, § 279.

§ 270. PRIVATE corporations are generally subject to the same liabilities for negligence as are individuals. There are, however, several qualifications, peculiar to this branch of the law, which will now be noticed.

Charter no defence collateral nuisance.

§ 271. A charter or license from the state to permit a particular act to be done in a particular way is a defence for doing such act in the way prescribed, even though the result be a nuisance, or a dangerous alteration of a highway.[1] But where the work is done negligently, even an approval by the town engineer will be no defence, though the ordinance authorizing the work required that the work should be done to his satisfaction; he not being invested with the power of determining the ultimate question of negligence.[2] And generally, a license or charter from the sovereign will be no defence to proceedings for a nuisance when such nuisance is not necessary to the exercise of the power.[3] But the burden of proving negligence, when the corporation is licensed to do the particular act, is on the plaintiff.[4]

[1] Young *v.* Inhab. of Yarmouth, 9 Gray, 386, a case where it was held that the erection of telegraph poles, as approved by the selectmen of the town, under a general act of the legislature, could not be the basis of a suit against the telegraph company by a person who was injured by driving against one of the poles. See infra, as to steam-engines, § 869.

[2] Delzell *v.* R. R. 32 Ind. 46.

[3] Del. Canal Co. *v.* Com. 60 Penn. St. 367; State *v.* Buckley, 5 Harring. 508; Conn. *v.* Church, 1 Barr, 105; State *v.* Mulliken, 8 Blackf. 260; Com. *v.* Reed, 34 Penn. St. 275; Com. *v.* Kidder, 107 Mass. 188; People *v.* N. Y. Gas Light Co. 64 Barb. 55. Infra, § 868.

[4] Infra, § 870.

§ 272. Legislative authority to maintain public works and to receive tolls from them, imposes the duty to keep such works in repair. Such is the rule, as we have already seen,[1] as to municipal and *quas i*municipal corporations. But it is not necessary, in order to impose this liability, that the principle of municipal obligation should be invoked. The English law, as stated by Mr. Campbell,[2] is, that where "a person or corporation is by statute intrusted with the making and maintenance of works, and entitled to demand toll for the use of those works, there is then a duty upon that person or corporation to the public (or at least to all persons lawfully using the works),[3] to take care that the works are so constructed and maintained with reasonable efficiency for the public purpose for which they are authorized to be made."

Authority to receive tolls imposes duty to repair.

§ 273. Thus, in a conspicuous English case,[4] the plaintiff sued for damage to a ship and cargo caused by the ship grounding upon a bank of mud at the mouth of the dock. At the trial the Chief Baron Pollock directed the jury, that "if the cause of injury was a bank of mud in the dock, and if the defendants by their servants had the means of knowing the state of the dock, and were negligently ignorant of it, they were liable." A bill of exceptions was tendered to this ruling, and the jury having found for the plaintiffs, the question whether the chief baron's ruling was right in point of law came before the exchequer chamber, and afterwards, on appeal, to the house of lords.[5] It was argued for the defendants, at the final hearing, that, to establish a case of liability against them, it was not enough that they were proved to have the means of knowledge of the obstruction, unless they were also proved to have actual knowledge of the existence and dangerous nature of the bank. But this defence did not avail. And it was held that a body incorporated by statute, with the right to levy tolls for the profit of its members, in consideration of making and maintaining a dock or a canal, is liable in its corporate capacity to make good to the persons using it

[1] Supra, § 256.

[2] Negligence, § 17.

[3] Shoebottom *v.* Egerton, 18 L. T. N. S. 889.

[4] Mersey Docks and Harbor Trustees *v.* Gibbs and others, decided in 1865 in the house of lords, on appeal from the court of exchequer chamber. Reported L. R. 1 H. of L. 93; S. P., Parnaby *v.* Canal Co. 11 Ad. & El. 223.

[5] 7 H. & N. 329; 1 H. of L. 93.

any damage occasioned by neglect in not keeping the works in proper repair. Nor were the defendants regarded as relieved from liability on the ground that they were not authorized to receive tolls for their own profit, since by the constitution of the corporation the profits of their undertaking were dedicated to the benefit of the public, and of the shipping interest using the docks. It was held unanimously by the learned lords present, following the joint opinion of the consulted judges (delivered by Blackburn, J.), that the circumstance of the profits being thus ultimately applied to public purposes made no difference.[1]

§ 274. In another English case,[2] the defendants had, by act of parliament, the right to construct a canal and take tolls thereon; and had built the same across an ancient highway, having made a swivel bridge across the canal for the passage of the highway. A boatman having opened the swivel bridge to allow his boat to pass through in the night-time, a person walking along the road fell into the canal and was drowned. It was held that the defendants, having a beneficial interest in the tolls, were liable to an action, the same as any owner of private property would be, for a nuisance arising therefrom. "It has been urged," said Pollock, C. B., "that what was done by this Canal Company was done by them under the authority of an act of parliament passed many years ago, and with the same responsibility as attaches to the trustees of a highway, or other persons, acting in the performance of functions intrusted to them by statute. I do not think that argument can prevail. The owners of this canal were to be looked on as a trading company, who, though the legislature permits them to do various acts described in the statute, are to be considered as persons doing them for their own private advantage, and are, therefore, personally responsible if mischief ensues from their not doing all they ought, or doing, in an improper manner, what they are allowed to do."

[1] Mersey Docks Trustees, &c. *v.* Gibbs, L. R. 1 H. of L. 93; 11 H. L. Cas. 687; see, also, Coe *v.* Wise, L. R. 1 Q. B. 711. As to railway companies, see Grote *v.* Chester & Holyhead Ry. Co. 2 Exch. 251; and Virginia, &c. Ry. Co. *v.* Sanger, 15 Grat. 230.

[2] Manley *v.* R. R. 2 Hurls. & Nor. 840.

§ 275. Liability was also affirmed in a case[1] where it appeared that the trustees of a turnpike road converted an open ditch which used to carry off the water from the road into a covered drain, placing catchpits, with gratings thereon, to enable the water to enter the drain. Owing to the insufficiency of such gratings and catchpits, the water in very wet seasons, instead of running down the ditch, as it formerly did before the alteration by the trustees, overflowed the road, and made its way into the adjoining land, and injured the colliery of the plaintiff. Upon this it was held that the trustees were liable for such injury, as they were guilty of negligence in respect of such gratings and catchpits.[2]

§ 276. A corporation having statutory power to maintain and repair the towing-path of a river, and to take tolls therefor,

[1] Whitehouse *v.* Fellows, 10 C. B. N. S. 765; 30 L. J. C. P. 305.

[2] See, to same effect, Coe *v.* Wise, Law R. 1 Q. B. 711; Clothier *v.* Webster, 5 B. & S. 970 (a case of not filling up a trench).

Selden, J., in West *v.* Brockport, 16 N. Y. 161, says: "Whenever an individual or a corporation, for a consideration received from the sovereign power, has become bound by covenant or agreement, express or implied, to do certain things, such individual or corporation is liable, in case of neglect to perform such covenant, not only to a public prosecution by indictment, but to a private action at the suit of any person injured by such neglect." In Bessant *v.* R. R. 8 C. B. N. S. 368, sheep were damaged by straying through a fence which the railway company were, by their act, bound to maintain, as an accommodation work to a neighboring proprietor. It was held that in such a case the company warrant to the occupier the sufficiency of the fence for all purposes required for good husbandry.

In Coe *v.* Wise, L. R. 1 Q. B. 711, damage was caused to the plaintiff's land, by the bursting of a sluice, through the negligence of the resident engineer and sluice-keeper in the service of the commissioners, a body constituted by statute with the duty of making and maintaining the sluice. The commissioners were held liable. "These all seem to be cases," says Mr. Campbell, in his Treatise on Negligence, § 17, "where the question is not merely that of ordinary negligence. In considering the effects of these statutory duties, we must, however, consider whether the enactment is conceived in the interest of the public at large, or is merely in the nature of a covenant with the adjoining owners or occupiers. A statutory enactment of the latter class will not ground a remedy in favor of a stranger. Manchester, &c. Railway Company *v.* Wallis, 14 C. B. 213 (case of cattle straying on a highway adjoining the railroad). As to how the obligation to maintain fences, &c., may be constituted by award in pursuance of statute, see Lockhart *v.* Irish Northwestern Railway Company, 14 Irish C. L. 385."

is bound to take reasonable care of the towing-path, so that it may be in a fit condition to be used, and is liable for neglect in the performance of this duty.[1] And this results, apart from all other considerations, from the general principle that a person receiving toll for making or repairing a bridge, canal, or thoroughfare of any kind, is liable for defective work.[2] "It (the duty to repair) is a condition attendant upon a grant of the privilege to construct a public road or highway for profit, which from its very nature enures to the benefit of all who may have occasion to use the thoroughfare." [3]

§ 277. In a Massachusetts case,[4] where a statute provided that a turnpike corporation "shall be liable to pay all damages which may happen to any persons from whom toll is demandable, for any damage sustained by a traveller in consequence of a defect in the road," the supreme court was of opinion, and so ruled, that by this act it was intended to provide that whenever the traveller himself is not chargeable with negligence or rashness, but when from an unforeseen cause the road is actually defective and in want of repair, and an accident occurs without the default of either party, the company should be held liable. The ruling rested on the consideration that the toll is an adequate compensation for the risk assumed, and that by throwing the risk upon those who have the best means of taking precautions against it, the public will have the greatest security against actual damage and loss.

Remedies given in charter do not exclude common law remedies.

§ 278. Persons injured by such an abuse are not tied down to remedies given in charter. Thus it has been decided in Pennsylvania,[5] that the remedies against a canal company, provided by their act of incorporation, for injuries arising from the construction of the works, do not exclude the common law remedies for injuries arising

[1] Winch *v.* Conservators of the Thames, L. R. 7 C. P. 458; aff. on appeal, L. R. 9 C. P. 378; Mersey Docks *v.* Gibbs, Law Rep. 1 H. L. 93.

[2] Nichol *v.* Allen, 1 B. & S. 916; Mayor of Lyme Regis *v.* Henley, 1 Bing. N. C. 222; 2 Cl. & Fin. 331; Parnaby *v.* Lancaster Canal Co. 11 Ad. & El. 230; Mersey Docks *v.* Gibbs, Law Rep. 1 H. L. 93.

[3] Sharswood, J., Penn. & Ohio Canal Co. *v.* Graham, 63 Penn. St. 296.

[4] Yale *v.* The Hampden and Berkshire Turnpike Company, 18 Pick. 357.

[5] Schuylkill Navigation Company *v.* McDonough, 33 Penn. St. 73.

from an abuse of their privileges, or for the neglect of their duties, and that they are, therefore, liable for injuries sustained by a riparian owner, in consequence of an overflow of water caused by the pool of their dam being filled up by dirt, without regard to the question by whose act such filling up was occasioned.

Liability of such corporations for acts of servants.

§ 279. As a general rule, as has been shown in another chapter, a master is liable for his servants' negligences when in the scope of their employment.[1] As corporations can only act through servants, to corporations this rule is peculiarly applicable.[2] It may be added, that while a corporation which puts a work out on contract is not, with certain limitations, liable for the negligence of the contractor,[3] yet if a nuisance is produced which is necessarily incidental to the work, such nuisance not being authorized by the legislature, the corporation is liable for the damage thus produced.[4] And where the defendants were authorized by act of parliament to make an opening bridge over a navigable river, and they employed a contractor to construct it, it was held, that they were liable for damage caused by the defect of the bridge.[5]

Liability for negligence of upper to under employees.

§ 280. In one respect a corporation, which can only act through servants, is subjected to a heavier liability than an ordinary master, who may be presumed to direct his affairs himself. In the latter case it is natural for the employer to say, "If you had cause to complain of a fellow-servant, why did you not come to *me?*" "If a middle-man appointed a negligent servant, his negligence was not mine." But a corporation, which can only act through servants, cannot say this, if its principal and superior servants are those guilty of

[1] See supra, §§ 156–196.

[2] Supra, §§ 190, 223, 232*a*; Whart. on Agency, §§ 57, 670, 671.

[3] See fully supra, §§ 181, 193.

[4] Supra, §§ 186–187; Water Co. *v.* Ware, 18 Wall. 566.

[5] Hole *v.* R. R. 6 Hur. & N. 488; 30 L. T. Exch. 81.

"The law," says Mr. Broom (Com. Am. ed. p. 683), "requires that the execution of public works by a public body shall be conducted with a reasonable degree of care and skill; and if they, or those who are employed by them, are guilty of negligence in the performance of the works intrusted to them, they are responsible to the party injured." [1]

[1] Clothier *v.* Webster, 12 C. B. N. S. 790, 796. See Brownlow *v.* Metropolitan Board of Works, 16 C. B. N. S. 546; Gibson *v.* Mayor, &c. of Preston, L. R. 5 Q. B. 218; Parsons *v.* St. Matthew, Bethnal Green, L. R. 3 C. P. 56; Hyams *v.* Webster, L. R. 4 Q. B. 138.

the negligence. For such principal and superior servants may be the heads of their departments, and if so, their negligence to an employee is the negligence of the corporation itself, not the negligence of a fellow-servant.[1]

[1] See supra, §§ 222–3; Cleghorn *v.* R. R. 56 N. Y. 44; Chapman *v.* R. R. 55 N. Y. 579; Malone *v.* Hathaway, 64 N. Y. 5; Campbell *v.* Portland Sugar Co. 62 Me 566.

CHAPTER VIII.

PUBLIC OFFICERS.

A public ministerial officer is liable to individuals for injuries sustained by them from his official negligence, § 284.
Rule does not apply to judges, § 285.
Special damages necessary to sustain suit, § 286.
Officers not personally liable to contractors on official bonds, § 287.
Not usually liable for neglects of official subordinates, but otherwise as to private servants, § 288.
Sheriffs, constables, tax collectors, § 289.
Receivers of public money, § 290.
Commissioners of highways, § 291.
Postmasters, § 292.
Deputies and assistants liable for their own negligence, § 295.
Mail contractors, § 296.
Clerks, prothonotaries, and registering officers, § 297.

§ 284. As a general rule, wherever an individual has suffered injury from the negligence, in the discharge of a special duty to himself, of a ministerial officer who therein acts contrary to his official duty, an action lies on behalf of the party injured.[1] Nor is the fact that the defendant contracted faithfully to perform his duties, not to the plaintiff, but to the government, any defence, for the action is founded not on contract but on breach of duty.[2] On the other hand, where

Ministerial officer liable for his negligence to individuals.

[1] Whart. on Agency, § 547; Story on Agency, § 320, 321; infra, § 443; Kendall *v.* Stokes, 3 How. 87; Tyler *v.* Alfred, 38 Me. 530; Nowell *v.* Wright, 3 Allen, 166; Bartlett *v.* Crozier, 15 Johns. 250; Adsit *v.* Brady, 4 Hill, 630; Robinson *v.* Chamberlain, 34 N. Y. 389; Hover *v.* Barkhoof, 44 N. Y. 113; Sawyer *v.* Corse, 17 Grat. 230; Lipscomb *v.* Cheek, Phil. L. N. C. 332; Kennard *v.* Willmore, 2 Heiskell, 619. When a magistrate acts ministerially (*e. g.* in issuing process), he is liable for negligence. Tyler *v.* Alfred, 38 Me. 530; Noxon *v.* Hill, 2 Allen 215; Briggs *v.* Wardwell, 10 Mass. 356; Smith *v.* Trawl, 1 Root, 165; Rochester White Lead Co. *v.* Rochester, 3 N. Y. 73; Martin *v.* Parsons, 50 Cal. 498.

[2] Henley *v.* Mayor, &c. 5 Bing. 91; Burnett *v.* Lynch, 5 B. & C. 589; Farrant *v.* Barnes, 11 C. B. N. S. 553; Marshall *v.* York, 11 C. B. R. 655. See Winterbottom *v.* Wright, 10 M. & W. 109. Infra, § 440.

See generally on this topic a valuable article by Judge Cooley, in 3 South. L. R. N. S. 531.

"The case of Robinson *v.* Chamberlain, 34 N. Y. 389, was an action against a canal repair contractor, to recover damages which the plaintiff had sustained, because he had not discharged the duty imposed upon him by his contract, by permitting lock-

the officer owes no official duty to the party injured, and acts without authority in the matter complained of, he is not liable unless for breach of a contract duty.[1]

Liability, also, is limited to ministerial officers, who are required by law to discharge a particular duty to the plaintiff bringing suit, and is not to be extended to executive officers, in respect to matters as to which they have a discretionary power.

Malice, in suits of this class, need not be proved by the plaintiff; negligence alone is sufficient to sustain the suit.[2]

Not so judicial officers.

§ 285. Judges are, from the policy of the law, not liable for suits for negligence in the ordinary performance of their judicial duties.[3] If, however, a judge acts knowingly without jurisdiction, he exposes himself to suit. "Where there is clearly no jurisdiction over the subject matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case,

gates to be out of repair. It was held, that while the defendant had entered into contract with the state only, and received his compensation from the state, he was a *quasi* public officer, owing duties to the public, and, as such, was liable to every individual who sustained damage by his neglect of his duties. Judge Peckham, likening the canals to a public highway, says: 'A failure to keep a public highway in repair by those who have assumed that duty from the state, so that it is unsafe to travel over, is a public nuisance, making the party bound to repair liable to indictment for the nuisance, and to an action at the suit of any one who has sustained special damage.' This case was followed in Fulton Fire Insurance Company *v.* Baldwin, 37 N. Y. 648." Earl, C. J., Hover *v.* Barkhoof, *ut supra*.

[1] Kahl *v.* Love, 37 N. J. L. 5.

[2] Brasyer *v.* Maclean, 33 L. T. N. S. 1.

[3] Bacon's Max. 17; Floyd *v.* Barker, 12 Rep. 23; Barnardistone *v.* Soane, 6 How. St. Tr. 1093; Mostyn *v.* Fabrigas, Cowp. 161; Taafe *v.* Downs, 3 Mood. P. C. 36, n.; Ryalls *v.* R. 11 Q. B. 796; Houlsen *v.* Smith, 14 Q. B. 841; Evans *v.* Foster, 1 N. H. 374; Colman *v.* Anderson, 10 Mass. 356; Pratt *v.* Gardiner, 2 Cush. 68; Tracy *v.* Williams, 2 Conn. 113; Yates *v.* Lansing, 5 Johns. 282; Cunningham *v.* Bucklin, 8 Cow. 178; Ely *v.* Thompson, 3 A. K. Marsh. 76; Young *v.* Herbert, 2 Nott & Mc. 168. Even private arbitrators are protected. Pappa *v.* Rose, L. R. 7 C. P. 32, 525; Tharsis *v.* Loftus, L. R. 8 C. P. 1.

although upon the correctness of his determination in these particulars the validity of the judgment may depend."[1] A judge, also, in performing merely ministerial duties (*e. g.* in issuing writs when absolutely required by law to do so for the benefit of an individual), may make himself liable to suit by the individual aggrieved.[2]

§ 286. An individual cannot, for his own benefit and in his own name, sustain a suit against another for negligence in discharge of a public duty, when the damage is solely to the public.[3] The technical reason given for this in the English books is the inconvenience which would be produced if a person violating a general duty could be sued by each person in the community. A better reason is, that as the right infringed belongs to the sovereign, as representing the public at large, so the correlative duty is one for which the sovereign alone can sue.[4]

When suit lies, special damage to an individual necessary.

But at the same time, wherever an indictment would lie for negligent discharge of a duty to the community, then an action for negligence can be maintained by any party specially injured by such negligence.[5] This principle has been applied to suits against a municipal corporation for neglect in repairing certain banks and sea-shore, which it was obliged to do by charter, whereupon special damage occurred to the plaintiff.[6]

[1] Field, J., Bradley *v.* Fisher, 13 Wall. 350. See, to same effect, Ackerly *v.* Parkinson, 3 M. & S. 411; and see, also, Houlden *v.* Smith, 14 Q. B. 841. In Lange *v.* Benedict, noticed in 9 Alb. L. J. 102, 150, 154, it was ruled by the N. Y. Sup. Ct. that a judge of a court of general jurisdiction who attempts to enforce a judgment which he knows to have been satisfied, makes himself liable to an action; and see same Journal, Jan. 16, 1877.

[2] See 3 South. Law Rev. N. S. 533.

[3] 1 Bla. Com. 220. Loss of mere contingent probable profits not enough. Butler *v.* King, 59 Johns. 223; Bank *v.* Mott, 17 Wend. 556.

[4] Ashby *v.* White, Ld. Raym. 938.

[5] Clark *v.* Miller, 54 N. Y. 528; Hayes *v.* Porter, 22 Me. 37, — a suit against an inspector of meats for negligence through which a particular purchaser was damaged; Barry *v.* Arnould, 10 Ad. & El. 646, — a suit against a collector of customs for neglect in appraising.

[6] Henley *v.* Mayor of Lyme Regis, 5 Bing. 91; 3 B. & Ald. 77; 2 Cl. & Fin. 331.

"There is no doubt of the truth of the general rule, that where an indictment can be maintained against an individual or a corporation for something done to the general damage of the public, an action on the case can be maintained for a special damage thereby done to an individual, as in the ordinary case of a nuisance in the

But where there is a discretion allowed in the exercise of a public duty, then for a mistaken exercise of such discretion no suit lies.[1] On the other hand, the fact that discretion is allowed in the exercise of a duty to an individual will not preclude such individual from bringing suit against the officer, on the reasoning above given, for omission to exercise such discretion.

Officers not personally liable to contractors on official bonds.

§ 287. It is held in England, that a public officer of the crown, contracting in his official capacity, is not personally liable on the contracts so entered into. In such cases, therefore, the rule of *respondeat superior* does not apply; and wisely, for no prudent person would accept a public situation at the hazard of exposing himself to a multiplicity of suits by parties thinking themselves aggrieved.[2] And such, as will next be seen, is the law in the United States.

Not liable for the public acts of official subordinates.

§ 288. An official subordinate, when appointed and recognized as an independent officer by the law, must stand or fall by himself; and to him, unless otherwise provided by statute, the maxim *respondeat superior* does not apply.[3] "With regard to the responsibility of a public officer for the misconduct or negligence of those employed by or under him, the distinction generally turns upon the question whether the persons employed are his servants, employed voluntarily or privately, and paid by him and responsible to him, or whether they are his official subordinates, nominated perhaps by him, but officers of the government; in other words, whether the situation of the inferior is a public officer or private service. In the

highway, by a person digging a trench across it, or by the default of the person bound to repair *ratione tenurae*. Upon this ground the corporation of Lyme Regis was held to be bound to compensate an individual for the loss sustained by non-repair of sea-walls in a case which was decided by the court of common pleas." Hartwell *v.* Ryde Commis. 3 B. & S. 361.

[1] Infra, § 291; supra, § 260; and see 3 South. Law Rev. N. S. 536–7; and see O'Connor *v.* Pittsburg, 18 Penn. St. 391.

[2] Per Dallas, C. J., Gidley *v.* Lord Palmerston, 3 B. & B. 286, 287; per Ashhurst, J., Macbeath *v.* Haldiman, 1 T. R. 181, 182.

[3] Hall *v.* Smith, 2 Bing. 156; Findlater *v.* Duncan, 6 C. & F. 903; Nicholson *v.* Morrissey, 15 East, 384; Holliday *v.* St. Leonards, 11 C. B. N. S. 192; Lane *v.* Cotton, 1 Ld. Raym. 646; Whitfield *v.* Le Despencer, Cowp. 754; Dunlop *v.* Munroe, 7 Cranch, 242; McMillen *v.* Eastman, 4 Mass. 378; Franklin *v.* Low, 1 John. R. 396; Wriggins *v.* Hathaway, 6 Barb. S. C. 632; Schroyer *v.* Lynch, 8 Watts, 453.

former case the official superior is not liable for the inferior's acts; in the latter he is." [1]

"The exemptions of public officers from responsibility for the acts and defaults of those employed by or under them in the discharge of their public duties," says Jaynes, J., in a case where the question was ably discussed in Virginia,[2] "is allowed, in a great measure, from considerations of public policy. From like considerations it has been extended to the case of persons acting in the capacity of public agents, engaged in the service of the public, and acting solely for the public benefit, though not strictly filling the character of officers or agents of the government." [3]

Sheriffs, constables, tax collectors.

§ 289. So far as concerns the due execution of process, the sheriff is liable to persons injured by his neglect in exercising due diligence in the service. The burden, in all cases where failure is shown, is on the defendant to prove such diligence.[4] A sheriff, from the necessity of the case, is liable for the negligence of his deputies.[5] So far as concerns the owner of goods taken in execution, he is liable, when the goods are left in his hands, he giving security, only for the diligence of an ordinary bailee for hire; *i. e.* for the diligence that a good business man would under similar circumstances show.[6] This rule is applied in the Roman law to the tax collector who seizes cattle in satisfaction of taxes, and injures them, when holding them in pound, from neglecting to give them due

[1] American Leading Cases (3d ed.), 621.

[2] Sawyer *v.* Corse, 17 Grat. 230.

[3] Citing Hall *v.* Smith, 2 Bingh. R. 156 (9 Eng. C. L. R. 357); Holliday *v.* St. Leonards, Com. B. N. S. R. 192 (103 Eng. C. L. R. 192). . . . . See, also, Cornwell *v.* Vorhees, 13 Ohio R. 523; Hutchins *v.* Brackett, 2 Foster, 252.

[4] Wolfe *v.* Dorr, 24 Me. 104; Kittredge *v.* Fellows, 7 N. H. 399; Pierce *v.* Partridge, 3 Metc. 44; Barnard *v.* Ward, 9 Mass. 269; Dorrance *v.* Com. 3 Penn. St. 160; Dunlop *v.* Knapp, 14 Ohio St. 64; Robinson *v.* Chamberlain, 34 N. Y. 389; Ransom *v.* Hulcott, 18 Barb. 56. See Allen *v.* Carter, L. R. 5 C. P. 414; Lloyd *v.* Harrison, L. R. 1 Q. B. 502; Lipscomb *v.* Cheek, Phil. L. N. C. 332; Kennard *v.* Willmore, 2 Heiskell, 619; Brock *v.* Kemp, 6 D. (Scotch) R. 709, cited Campbell on Neg. § 20; Osgood *v.* Clark, 6 Foster, 307; Ferry *v.* Bass, 15 N. H. 222; Tucker *v.* Bradley, 15 Conn. 46. See Thompson *v.* Goding, 63 Me. 425.

[5] Campbell *v.* Phelps, 17 Mass. 244, and cases there cited; McIntyre *v.* Trumbull, 7 Johns. 35; Ogden *v.* Maxwell, 3 Blatch. C. C. 319.

[6] Browning *v.* Hanford, 5 Hill, 588; Moore *v.* Westervelt, 27 N. Y. 234.

food.[1] But there is no liability of such officers for loss by fire or force, when no negligence exists.[2]

Escape, being a topic belonging more properly to books of procedure, will not be here discussed.

Receivers of public money.

§ 290. At common law, irrespective of statutes, and of the limitations of official bonds, receivers of public money are liable for *culpa*, both *lata* and *levis;* for they are required to employ not merely the *diligentia* of an ordinary person, seeing what every person sees, but the *diligentia diligentis*, the diligence of an intelligent and faithful business man in his specialty, — a man sufficiently skilful and judicious to be able to undertake the specialty, and employing in undertaking it the diligence which a skilful and judicious expert would in such case employ.[3] But where he executes a bond, making his liability absolute and unconditioned, or where his liability is made absolute by statute, then he is bound to restore the value of money deposited with him, though it should appear that he lost the amount by pure accident, or was robbed of moneys paid over to him, to the amount sued for, by superior force, without his fault.[4]

Commissioners of highways.

§ 291. It being the duty, under the New York statute, of commissioners of highways to repair defective highways or bridges, after notice of their condition, with reasonable and ordinary care and diligence, if they have sufficient funds in their hands, or authority to procure such funds, neglect of this duty renders them liable in a civil action to any person specially injured thereby. Actual notice of the defective condition of a highway is not necessary, where the circumstances are such that ignorance on the part of the commissioners is in itself negligence.[5] For the general discussion of this subject, however, the reader is referred to another chapter.[6]

[1] L. 2. § 20. 47. 8.

[2] Bridges *v.* Perry, 14 Vt. 262; Browning *v.* Hanford, 5 Hill, 588.

[3] Lane *v.* Cotton, Ld. Ray. 646; Supervisors of Albany *v.* Dorr, 25 Wend. 440; *S. C.* on App. 7 Hill, 583. Supra, § 32.

[4] Boyden *v.* U. S. 13 Wall. 17; Bevans *v.* U. S. 13 Wall. 56; Com. *v.* Comly, 3 Penn. St. 372; Muzzy *v.* Shattuck, 1 Denio, 133; U. S. *v.* Prescott, 3 Howard, 578; U. S. *v.* Dashiel, 9 Howard, 578; State *v.* Harper, 6 Ohio St. 607.

[5] Hover *v.* Barkhoof, 44 N. Y. 113. Supra, § 284.

[6] Infra, § 956.

Trustees of public works, or other official bodies, as we have already seen, who are required to perform work by deputies, are not personally liable for the torts of such deputies, if there be not *culpa* in *eligendo*.[1] For personal negligences such trustees, even though their services are gratuitous, may be made liable in all cases in which private persons would, *mutatis mutandis*, be liable.[2] Where, however, there is a discretion vested in a public officer in respect to roads, he is not liable for a mistake in the exercise of such discretion.[3]

§ 292. Neither postmasters general nor local postmasters are liable, on the principles hereinbefore stated, for the negligence of their official subalterns.[4] The leading case on this subject[5] is a suit brought against Cotton and Frankland, who were together the postmaster general of England, to recover the value of exchequer bills belonging to the plaintiff, which were abstracted from a letter deposited by him in the London post-office to be transmitted by post. The letter was delivered at the office to one Breese, who was appointed by the defendants to receive letters, who was removable by them, but who received his salary from the receiver general out of the revenues of the post-office. In the opinion of the judges, it was assumed that the bills were abstracted by Breese, though it was found by the special verdict that they were abstracted by a person unknown. Three of the judges held that the defendants were not liable. The decision rested, in part, upon the ground that the post-office establishment was an instrument of government established for public convenience, under the management and control of the defendants as officers of the government, and

Post-masters.

[1] Supra, § 272; Whart. on Agency, § 550.

[2] Supra, § 272; Clothier *v.* Webster, 12 C. B. N. S. 790; Mersey Docks *v.* Gibbs, L. R. 1 H. L. 93.

[3] Infra, § 960.

[4] "The law is well settled, in England and America, that the postmaster general, the deputy postmasters, and their assistants and clerks, appointed and sworn as required by law, are public officers, each of whom is responsible for his own negligence only, and not for that of any of the others, although selected by him, and subject to his orders." Gray, J., Keenan *v.* Southworth, 110 Mass. 474; citing Lane *v.* Cotton, 1 Ld. Raym. 646; *S. C.* 12 Mod. 472; Whitfield *v.* Le Despencer, Cowp. 754; Dunlop *v.* Munroe, 7 Cranch, 242; Schroyer *v.* Lynch, 8 Watts, 453; Bishop *v.* Williamson, 2 Fairf. 495; Hutchins *v.* Brackett, 2 Foster, 252.

[5] Lane *v.* Cotton, 1 Ld. Ray. 646.

that Breese was himself an officer under the government, and liable as such for his own acts, and that he was not the agent or servant of the defendants. Lord Holt dissented, but chiefly on the question of Breese's agency for the defendants.

Subsequently, under Lord Mansfield, on an action brought against the postmaster general to recover the amount of a bank note stolen out of a letter by one of the sorters of letters, the same doctrine was reaffirmed.[1] "In truth," says Judge Story, "in England and in America, the postmasters are mere public officers, appointed by, and responsible to, the government; and the contracts made by them officially are public contracts and not private contracts, and are binding on the government, and not on themselves personally.[2] And this rule has been applied to the case of a deputy or local postmaster, and his assistants duly appointed and qualified, the latter being regarded as agents and servants of the government, who are liable for their own acts and defaults, and not as agents and servants of the postmaster, for whose acts and defaults he is to answer."[3]

§ 293. It is otherwise, however, if fault is imputable to the principal. Thus it has been said,[4] that "if an action should be properly framed for the purpose of charging the deputy postmaster with the default of the clerks or servants in office under him, it seems that his liability in such an action will depend upon the question, whether he has in fact been guilty of any negligence, in not properly superintending them in the discharge of their duties in his office.[5] For it has been held that a deputy postmaster is responsible only for the neglect of ordinary diligence in the duties of his office, which consists in the want of proper attention to his duties in person, or by his assistants if he has any, or in the want of that care which a man of common

[1] Whitfield *v.* Le Despencer, Cowp. 754.

[2] Story on Bailments, § 462; Dunlop *v.* Monroe, 7 Cranch, 242; 2 Kent Comm. Lect. 40, p. 610, 4th ed.; Story on Agency, §§ 302–307.

[3] Schroyer *v.* Lynch, 8 Watts R. 453; Wiggins *v.* Hathaway, 6 Barb. S. C. R. 632; Dunlop *v.* Monroe, 7 Cranch's R. 242; Bolan *v.* Williamson, 1 Brevard's R. 181; Franklin *v.* Low, 1 John. R. 396; Maxwell *v.* McIlvoy, 2 Bibb, 211; Jones on Bailments, 109.

[4] Story on Bailments, § 463.

[5] Dunlop *v.* Monroe, 7 Cranch, 242, 269; *S. C.* 2 Peters's Cond. 484; 2 Kent Comm. Lect. 40, pp. 610, 611, 4th ed.

prudence would take of his own affairs.[1] He is not, therefore, responsible for any losses occasioned by the negligence, or delinquencies, or embezzlements of his official assistants, if he exercises a due and reasonable superintendence over their official conduct, and he has no reason to suspect them guilty of any negligence or malconduct.[2] In short, such assistants are not treated as strictly his private servants; but in some sort, as public officers, although appointed by him." [3]

§ 294. It has been ruled that a deputy postmaster who employs an assistant without having him sworn to the faithful discharge of his duties, as required by law, is liable for such assistant's negligence in refusing to deliver a letter.[4]

§ 295. From the principle just stated, it may be inferred that deputy and assistant postmasters are personally liable to an individual for losses he receives from their personal negligences, in failing to duly deliver letters or other mailable matter received by them.[5]

Deputies liable for their own negligence.

§ 296. More difficulty arises as to the liability of mail contractors for their subalterns. It has in some cases been broadly asserted, though for reasons by no means consistent, that these officers are not liable for money lost through the carelessness of their agents who carry the mail.[6] On the other hand, this has been disputed in a Virginia case, distinguished for the ability with which it was argued by the learned judge who gave the opinion.[7] In that case it was held that a mail carrier is not an officer of the government, but is the private agent of the contractor for carrying the mail, and the contractor

Mail contractors.

[1] Schroyer *v.* Lynch, 8 Watts, 453; Wiggins *v.* Hathaway, 6 Barbour, 632.

[2] Ibid.

[3] Ibid.

[4] Bishop *v.* Williamson, 2 Fairf. 495. See Ford *v.* Parker, 4 Ohio St. 576. See infra, § 296.

[5] Lane *v.* Cotton, Salk. 17; Rowning *v.* Goodchild, 2 W. Bl. 908; *S. C.* 3 Wilson, 443; Whitfield *v.* Le Despencer, Cowp. 754; 2 Kent Comm. Lect. 40, pp. 610, 611, 4th ed.; Stock *v.* Harris, 5 Burr. 2709; 1 Bell Comm. p. 468, 5th ed.; Christy *v.* Smith, 23 Vt. 633; Teale *v.* Felton, 1 N. Y. 537; 12 How. 284; Ford *v.* Parker, 4 Ohio N. S. 576; Sawyer *v.* Corse, 17 Gratt. 230; Maxwell *v.* M'Ilvoy, 2 Bibb, 211; Bolan *v.* Williamson, 2 Bay, 551; Story on Bailments, § 463.

[6] Conwell *v.* Voorhees, 13 Ohio, 523; Hutchins *v.* Brackett, 2 Foster, 252. See criticism on these cases in Sawyer *v.* Corse, 17 Gratt. 233.

[7] Sawyer *v.* Corse, 17 Gratt. 230.

is liable to third persons for any injury sustained through the negligence or default of such agent in the performance of his duties. It was further determined (and this may enable us to reconcile this case with those elsewhere cited), that the Act of Congress of March 3, 1825,[1] requires that mail carriers shall be sworn, and it is the duty of the contractor to see that this is done. If the carrier is not sworn, such was the conclusion, he is the private agent of the contractor, for whose defaults the contractor is liable to third persons, even if on being sworn the contractor would not be liable for his acts.[2]

Clerks, prothonotaries, and registering officers.

§ 297. Whenever a particular officer is charged by law with the duty of making specific entries in dockets, records, or registries, he is liable to any person whom he may injure by his negligence.[3] And a prothonotary or clerk is liable for negligence in entry of or recording of bonds.[4] The same liability extends to negligent certificates.[5] Whether a certificate by a register or recorder makes him liable to all parties injured, or only to the party securing the certificate, is open to doubt;[6] though it has been ruled in Pennsylvania, that for a false certificate of searches a recorder of deeds is only liable to the party who has employed him to make the search or to such party's principal.[7]

[1] Brightly's Dig. p. 759, § 2.

[2] See supra, § 294.

[3] Williams *v.* Hart, 17 Ala. N. S. 102; Lyman *v.* Edgerton, 29 Vt. 305; Morange *v.* Mix, 44 N. Y. 315. Infra, § 528.

[4] Bevins *v.* Ramsey, 15 How. U. S. 179; State *v.* Sloane, 20 Ohio, 327; McNutt *v.* Livingston, 7 S. & M. 641. See this question discussed by Judge Cooley in 3 South. Law Rev. N. S. 541, 542.

[5] McCaraher *v.* Com. 5 W. & S. 21; Zeigler *v.* Com. 12 Penn. St. 227; Barnes *v.* Smith, 3 Humph. 82; Kimball *v.* Conolly, 3 Keyes, 57.

[6] See Schell *v.* Stein, 76 Penn. St. 398.

[7] Houseman *v.* Girard Building Co. 81 Penn. St. 256; Com. *v.* Harmer, 6 Phil. 90; 14 Am. L. Reg. 214; otherwise, as to Philadelphia, by Act of April 13, 1872.

CHAPTER IX.

CONTRIBUTORY NEGLIGENCE.

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I. GENERAL PRINCIPLES.

Plaintiff negligently exposing himself to a negligent injury cannot recover.

§ 300. THAT a person who by his negligence has exposed himself to injury cannot recover damages for the injury thus received, is a principle affirmed by the Roman law, and is thus stated by Pomponius: *Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire.*[1] The same view is taken concretely in several distinct passages in the Digest,[2] and is repeatedly reaffirmed in our own jurisprudence.[3] As has been already observed,

[1] L. 203. de R. J. (50. 17.)

[2] L. 3. § 3. D. de eo, per quem f. e. (2. 10); L. 4; L. 5. proem. ad L. A. (9. 2); L. 45. § 1. de art. E. V. (19. 1); Wening-Ingenheim, § 32.

[3] Butterfield *v.* Forrester, 11 East, 60; Sill *v.* Brown, 9 C. & P. 601; Vanderplank *v.* Miller, 1 M. & M. 169; Lygo *v.* Newbold, 9 Exch. 302; Great N. R. R. *v.* Harrison, 10 Exch. 376; Caswell *v.* Worth, 5 E. & B. 549; Griffiths *v.* Gidlow, 3 H. & N. 648; Guardians of Halifax *v.* Wheelwright, L. R. 10 Exch. 183; Smith *v.* Steamboat, L. R. 5 P. C. 308; Kennard *v.* Burton, 25 Me. 49; Webb *v.* R. R. 57 Me. 117; State *v.* R. R. 52 N. H. 528; Robinson *v.* Cone, 22 Vt. 213; Adams *v.* Carlisle, 21 Pick. 146; Lucas *v.* R. R. 6 Gray, 64; Garrett *v.* R. R. 16 Gray, 501; Gahagan *v.* R. R. 1 Allen, 187; Todd *v.* O. C. R. R. 3 Allen, 18; Warren *v.* Fitchburg R. R. 8 Allen, 227; Hackey *v.* Bost. & L. R. R. 14 Allen, 429; Murphy *v.* Deane, 101 Mass. 455; Wheelock *v.* Bost. & A. R. R. 105 Mass. 203; Lewis *v.* Smith, 107 Mass. 334; Patrick *v.* Pote, 117 Mass. 297; Birge

the doctrine of contributory negligence cannot be rested, as is sometimes claimed, on the maxim, *Volenti non fit injuria.* A

v. Gardiner, 19 Conn. 507; Rathbun *v.* Payne, 19 Wend. 399; Brand *v.* Troy & S. R. R. 8 Barb. 368; Wilds *v.* Hudson River R. R. 24 N. Y. 430; Grippen *v.* R. R. 40 N. Y. 34; Silliman *v.* Lewis, 49 N. Y. (4 Sickles) 255; Von Schaeck *v.* Hudson River R. R. 43 N. Y. 527; Dougan *v.* Champ. Trans. Co. 6 Lansing, 430; 56 N. Y. 1; Hackford *v.* N. Y. Cent. R. R. 6 Lansing, 381; Hewell *v.* N. Y. Cent. R. R. 3 Lansing, 83; Keating *v.* N. Y. Cent. R. R. 3 Lans. 469; Harper *v.* Erie R. R. 3 Vroom, 88; Morris. & E. R. R. *v.* Haslan, 33 N. J. (4 Vroom) 147; New Jersey Ex. Co. *v.* Nichols, 33 N. J. (4 Vroom) 434; Runyan *v.* Cent. R. R. 1 Dutch. 556; Simpson *v.* Hand, 6 Whart. 311; Penn. Can. Co. *v.* Bentley, 66 Penn. St. 30; Penn. R. R. *v.* Goodman, 62 Penn. St. 329; Ogle *v.* R. R. 3 Houston, 267; Culbreth *v.* R. R. 3 Houston, 392; Balt. & O. R. R. *v.* Fitzpatrick, 35 Md. 32; Union Steam, &c. Co. *v.* Nottingham, 17 Gratt. 115; Kline *v.* R. R. Ibid. 400; Pittsburg, &c. R. R. *v.* Krichbaum, 21 Ohio St. 118; Pittsburg, &c. R. R. *v.* Methuen, 21 Ohio St. 583; Aurora R. R. *v.* Grimes, 13 Ill. 585; Dyer *v.* Talcott, 16 Ill. 300; Chic. &c. R. R. *v.* George, 19 Ill. 510; Ill. Cent. R. R. *v.* Baches, 55 Ill. 379; Chicago, &c. R. R. *v.* Becker, 76 Ill. 25; Ohio & Miss. R. R. *v.* Gullett, 15 Ind. 487; Evansville, &c. R. R. *v.* Lowdermilk, 15 Ind. 120; Lofton *v.* Vogles, 17 Ind. 105; Evansville R. R. *v.* Hiatt, 17 Ind. 102; Indianapolis, &c. R. R. *v.* Rutherford, 29 Ind. 82; Lake Shore R. R. *v.* Miller, 25 Mich. 274; Kelly *v.* Hendrie, 26 Mich. 255; Baird *v.* Morford, 29 Iowa, 531; Wheeler *v.* Westport, 30 Wis. 392; Pitzner *v.* Shinnick, 39 Wis. 129; Dufer *v.* Culley, 3 Oregon, 377; Kahn *v.* Love, 3 Oregon, 206; Gay *v.* Winter, 34 Cal. 153; Needham *v.* San Francisco R. R. 37 Cal. 400; Flynn *v.* San Francisco R. R. 40 Cal. 44; Macon & West. R. R. Co. *v.* Baber, 42 Geo. 300; Central R. R. *v.* Dixon, 42 Geo. 327; Morrison *v.* Cornelius, 63 N. C. 346; Hugh *v.* Carrolton R. R. 6 La. An. 496; Hill *v.* Opelousas R. R. 11 La. An. 292; Myers *v.* Percy, 1 La. An. 374; Knight *v.* Pontchartrain R. R. 23 La. An. 462; De Armand *v.* N. O. &c. R. R. 23 La. An. 264; Walsh *v.* Miss. Valley Tr. Co. 52 Mo. 434. See discussion in Bigelow's Leading Cases on Torts, 724–25.

The question for the jury, it is said by a learned English judge, is "whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened.

"In the first case the plaintiff would be entitled to recover; in the latter not, as but for his own fault the misfortune would not have happened. Mere negligence, or want of ordinary care or caution, would not, however, disentitle him to recover, unless it were such that but for that negligence, or want of ordinary care or caution, the misfortune could not have happened, nor if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff." Per Wightman, J., Tuff *v.* Warman, 5 C. B. N. S. 585; and see, as sus-

person whose negligence causes an injury cannot be spoken of as "willing" a particular object, for negligence negatives an exercise of the will, and only exists when the will, as to the particular condition, is inactive. The true ground for the doctrine is that, by the interposition of the plaintiff's independent will, the causal connection between the defendant's negligence and the injury is broken.[1]

Negligence by agents imputable to principal.

§ 301. By the rule just announced, the relation of principal and agent and that of master and servant are necessarily affected. A principal who acts through a servant or other agent is, therefore, liable for his agent's negligence when in the sphere of his service.[2] Hence, a principal cannot usually recover for damages induced by his agent's negligence. As a general rule, also, a master is in the same way barred by his servant's negligence when in the range of his employment.[3] How far a driver's negligence is imputable to the party driven will be hereafter noticed.[4]

The rule, that a party contributing to an injury cannot recover damages from another person by whom the same injury is produced, must be accepted with the following qualifications: —

There must be a causal connection between the plaintiff's negligence and the injury.

The plaintiff, as a rule, must be a person to whom the alleged contributory negligence is imputable; excluding, therefore, —

taining above, Wetherly *v.* Regent's Canal Co. 12 C. B. N. S. 2, 8; Ellis *v.* R. R. 2 H. & N. 424; Martin *v.* R. R. 16 C. B. 179; Bridge *v.* Grand Junction R. C. 3 M. & W. 244; recognized in Davies *v.* Mann, 10 M. & W. 546; cited and explained per Lord Campbell, C. J., Dowell *v.* Steam Nav. Co. 5 E. & B. 195; Holden *v.* Liverpool Gas Co. 3 C. B. 1; Caswell *v.* Worth, 5 E. & B. 849; Clayards *v.* Dethick, 12 Q. B. 439; cited per Blackburn, J., Wyatt *v.* R. R. 6 B. & S. 720; Wise *v.* R. R. 1 H. & N. 63; Marriott *v.* Stanley, 1 Scott N. R. 392; Goldthorpe *v.* Hardman, 13 M. & W. 377; Pardington *v.* South Wales R. C. 1 H. & N. 392; Dakin *v.* Brown, 8 C. B. 92; Waite *v.* North Eastern R. R. E., B. & E. 719, 727. See Bigelow's Cases on Torts, 724, where the above definition is criticised.

[1] Supra, §§ 130–33.

[2] See supra, §§ 156, 157; Schular *v.* Hudson River R. R. 38 Barb. 653; Toledo, &c. R. R. *v.* Goddard, 25 Ind. 185; Buckingham *v.* Fisher, 70 Ill. 124.

[3] Supra, § 156.

[4] Infra, § 395.

Persons distracted by sudden terror;
Persons of unsound mind and drunkards;
Persons deprived of their senses;
Infants.
These points will be now successively considered.

§ 302. The doctrine of causal connection has been already largely discussed, and it has been shown that to make the act of a moral agent the juridical cause of an event, the act in question must be of such a character that, if not interrupted by causes independent of the actor's will, or by the intervention of other persons, it is likely, under ordinary circumstances, and on the long run, to produce the event in question.[1] Thus, applying this test to the question of contributory negligence: An express train is dashing along a road at full speed. A traveller drives his horse and wagon listlessly along a cross-road, neither looking up nor down, though there is abundant warning in the shape of sign boards, and though the usual cautions are given, on nearing the cross-road, on the part of those directing the train. Such negligence on the part of the traveller, at a given period of time, will be the cause of a collision, unless such collision be avoided by the skill of the engineer. Supposing the engineer not capable, except at the risk of greater damage, of avoiding the collision, then the traveller's negligence is the juridical cause of the disaster, and this is equivalent to saying that it is the proximate cause.

Causal connection necessary.

§ 303. It is therefore necessary, in such a question, to distinguish between juridical causes and conditions; or, as they are called in the scholastic jurisprudence, between proximate causes and remote causes.[2] Regarding juridical cause as here convertible with proximate cause, and condition as convertible with remote cause, the distinction may be stated as follows: A traveller leaves home in the morning for a distant point, in reaching which by the nearest line he must cross a railroad on a level, though by making a *detour* of a mile he could cross it on a bridge. In attempting the level crossing he is struck by a locomotive engine. His leaving home in the morning is a *condition* of this collision, but it is not its juridical cause. So his taking the level crossing

[1] Supra, §§ 73, 87; infra, § 323.

[2] See supra, § 85.

is another condition of the collision, but is not its juridical cause, if the level crossing is on a public road usually travelled. If, however, he does not look out, when approaching the crossing, and, consequently, heedlessly strikes an approaching train, then he is the juridical cause of the collision, and cannot recover in a suit against the company. Or, to take another illustration, a merchant selling kerosene is the condition, but not the cause, of this fluid igniting in a railway train in which it is forwarded to a distant market. But if such a merchant packs this inflammable fluid so negligently that, unless peculiar care is given to it by the carrier, it will, under certain circumstances, explode, and then sends the package to the carrier without notice of its contents, then this act of the merchant is the juridical cause of the subsequent explosion, and the merchant (independently of the question of his own liability in a suit against himself) cannot recover from the carrier, in a suit against the latter, for non-performance of the latter's duty of carriage. Hence may we state, as a general principle, that, in order to defeat recovery of damages arising from the defendant's negligence, the plaintiff's negligence must have been the proximate and not the remote cause of the injury; in other words, must be its juridical cause, and not merely one of its conditions.[1]

Persons distracted by terror.

§ 304. The plaintiff, as a rule, must be one to whom the alleged contributory negligence is imputable, excluding herefrom, (1) persons who, in a sudden emergency, are paralyzed by terror, or confused by the immediate necessity of choosing between two perilous alternatives. Suppose a traveller, not negligently on a railway track, suddenly finds a train rushing towards him, and in seeking in his terror to escape it, takes refuge on another track, where he is struck by a train which he had not been in a position to notice? Is he chargeable with negligence in not reasoning coolly and wisely in the terror of an emergency for which he is in no way responsible? The answer is, he is not; and hence, if the colliding train is chargeable with negligence, it cannot defend itself on

[1] Supra, § 85; Kline *v.* R. R. Co. 37 Cal. 400; Flynn *v.* R. R. 40 Cal. 14; Murphy *v.* Deane, 101 Mass. 466; Trow *v.* R. R. 24 Vt. 487; Birge *v.* Gardiner, 19 Conn. 507; Johnson *v.* R. R. 20 N. Y. 65; Indianap. R. R. *v.* Stout 53 Ind. 143.

the ground that the plaintiff contributed to the result. He did not, for that which he did when thus confused or paralyzed cannot be imputed to him as a fault.[1] The same distinction is to be asserted as to injuries occurring to a passenger who jumps in terror from a coach or car when suddenly told of peril. If this terror was caused by the defendant, the defendant cannot set up the plaintiff's imprudence as a defence.[2] As a rule, therefore, we may say that a person is not chargeable with contributory negligence, who, when unwarned peril comes on him, instinctively, under the influence of terror, encounters a danger which, had he remained passive, he might have escaped. The same remark applies to cases in which a party, compelled suddenly, when put in a position of danger by another's misconduct, to choose between two alternatives, chooses the alternative that ultimately proves the worse.[3]

§ 305. Yet, it must be remembered, that, as to cases such as these, the question may still arise whether the plaintiff's distracted action may not in some degree modify the case on the merits, though not operating to defeat, as an absolute bar, the plaintiff's claim on its own face. It is clear, for instance, that

[1] Larrabee *v.* Sewall, 66 Me. 376; Indianapolis, &c. R. R. *v.* Carr, 35 Ind. 510, and cases cited supra, §§ 89, 93, 94, 95, and infra, § 377.

[2] Frink *v.* Potter, 17 Ill. 406; R. *v.* Pitts, C. & M. 284; Eckert *v.* R. R. 43 N. Y. 502; Whart. Crim. Law (7th ed.), § 941 *a*. See supra, § 93, for other cases; and see Heazle *v.* R. R. 76 Ill. 501.

[3] Stokes *v.* Saltonstall, 13 Peters, 181; Railroad *v.* Pollard, 22 Wall. 341; Buel *v.* R. R. 31 N. Y. 314; Coulter *v.* R. R. 56 N. Y. 583; Johnson *v.* R. R. 70 Penn. St. 357; Galena, &c. R. R. *v.* Yarwood, 17 Ill. 509; Chicago R. R. *v.* Becker, 76 Ill. 25; Toledo R. R. *v.* O'Connor, 77 Ill. 391; Mobile, &c. R. R. *v.* Ashcraft, 48 Ala. 151.

In Coulter *v.* Am. Union Exp. Co. 5 Lansing, 67; *S. C.* 56 N. Y. 585, the plaintiff, while walking upon the sidewalk, was alarmed by the rapid driving of the defendant's express wagon upon the sidewalk behind her, so near as to give her reason for a belief that she was in danger, and, in springing on one side, struck and injured herself against a side wall. It was held that this act, the result of terror caused by the defendant, did not bar her recovery, even although she in fact would have received no injury from remaining in her position on the walk. See, also, Buel *v.* N. Y. Central R. R. 31 N. Y. 314. Infra, § 377.

In Georgia R. R. *v.* Rhodes, 56 Ga. 645, the evidence was that a baggage master, when a collision was apparently impending, jumped overboard and was injured. It was held no defence, in a suit against the company, that he was told by the conductor not to jump.

in a case such as that just put, the traveller struck by the second train, while he was seeking to avoid the first, is not chargeable with contributory negligence. Yet at the same time, recollecting how sudden must have been his appearance in front of the colliding train, is the company chargeable with negligence in not avoiding him? We must keep firmly in mind that this is not a question of contributory negligence, and that to class such a case under the head of contributory negligence is a mistake calculated to mislead. But though the doctrine of contributory negligence is here in no sense involved, we are not to fall into the opposite extreme of disregarding the principle that the liability of the colliding train, under such circumstances, is determinable by the test so often heretofore announced, — that of the diligent and skilful business man. What would a diligent and skilful engineer do under such circumstances? Would he, in the surprise of the moment, be able to arrest the train without risking its safety? It will be seen, therefore, that, while the traveller's wildness or confusion of action is not imputable to him as negligence, it is an important fact in determining the negligence of the officers of the railroad. An engineer not having notice of the plaintiff's mental state may reasonably expect him to avoid the track; and under such circumstances the company may not be liable for the collision. Such observations, however, do not apply in cases in which the precipitate action of the party injured in no way contributed to affect the action of the party injuring.

Persons of unsound mind, and drunkards.

§ 306. What has just been said applies equally to persons of unsound mind.[1] Negligence is not imputable to them, and the law intervenes to protect them, at least as tenderly as it does persons capable of taking care of themselves. *Pati quis injuriam*, so humanely speaks Ulpian, *etiamsi non sentiat, potest*,[2] and under this head this great jurist enumerates, among other cases, that of the *furiosus*, or person of deranged mind. Yet if this mental disturbance is caused by the sufferer's own fault, there may be circumstances in which such disturbance may be viewed as the juridical cause of the casualty.[3]

[1] See Chic. & A. R. R. *v.* Gregory, 58 Ill. 226. See supra, § 87, for other cases.

[2] L. 3. §§ 1–4. D. de injur. 47. 10.

[3] Thorp *v.* Brookfield, 36 Conn. 320; Toledo R. R. *v.* Riley, 47 Ill. 514.

An insane person is therefore distinguishable from a drunkard by the fact that, with the former, incapacity is involuntary, while in the latter, it is voluntary; and hence a drunkard may be guilty of contributory negligence by getting drunk before putting himself in a position of danger in which he receives injuries from which, had he been sober, he would have escaped.[1]

Here, also, as in the case just mentioned of the traveller distracted by sudden terror, the fact of such distraction, with the sudden incoherence of action in which it exhibits itself, is a circumstance to be considered in determining the negligence of the defendant. An engineer, seeing a man ahead of him apparently *compos mentis*, may reasonably expect him to avoid the track, and hence may not be guilty of negligence if a collision occur. On the other hand, an engineer who sees a helpless person incapable of moving on the track, is guilty of negligence if he does not make all prudent efforts to avoid the collision.[2]

§ 307. The same reasoning applies to persons deprived of their senses, *e. g.* those who are deaf or blind.[3] Thus it has been held that a person who, from his deafness or other causes, does not understand calls made on him to escape danger, is not chargeable with negligence in meeting a danger of which he is unconscious,[4] although the driver of a locomotive approaching such a person, and not conscious of his infirmity, might justly set up as a defence that he had no reason but to suppose that such person would get off the track in time to avoid collision. Whether, in this view of the law, a blind man is guilty of negligence in attempting to cross a bridge which was defective for want of a rail, without a guide, is said to be a question for the jury.[5] At the same time there are cases in which a person, knowing his incapacity, is chargeable with negli-

Persons deprived of their senses.

[1] Cassidy *v.* Stockbridge, 21 Vt. 391; Alger *v.* Lowell, 3 Allen, 402; Thorp *v.* Brookfield, 36 Conn. 320; Chic. &c. R. R. *v.* Gregory, 58 Ill. 226; Chic. &c. R. R. *v.* Bell, 70 Ill. 102. As to right of drunken person to recover in case of collision, see infra, § 332.

Drunkenness, not contributing to an injury, cannot be set up as a defence by the injurer. Maguire *v.* R. R. 115 Mass. 239.

[2] Telfer *v.* R. R. 30 N. J. 188; Whaalen *v.* R. R. 60 Mo. 323; Schieshold *v.* R. R. 40 Cal. 447. Infra, § 389 *a*.

[3] See Illinois Cent. R. R. *v.* Buckner, 28 Ill. 299; Ch. & R. I. R. R. *v.* McKean, 40 Ill. 218.

[4] Walter *v.* R. R. 39 Mo. 33.

[5] Sleeper *v.* Sandown, 52 N. H. 244. See infra, § 389 *a*.

gence should he put himself in a position in which danger is probable, without means on his part to avert it. Thus it has been held to be negligence for a deaf person to drive an unmanageable horse across a railroad track when a train is approaching. It is his duty, it was said, to keep a lookout and avoid the danger; and it is no excuse that the horse, in crossing, turned and ran up the track ahead of the engine, or was driven there to avoid it.[1] And so, as we have just seen, a drunken man, who drives recklessly, cannot defend his reckless driving by setting up drunkenness.[2]

Persons acting under superior duty.

§ 308. A person acting under a sense of duty of such a high and absorbing nature as to make him for the time unconscious as to danger may, in like manner, cease to be so juridically responsible as to be capable of contributory negligence.[3] Of this we have an interesting illustration in a New York case, where the evidence was that the plaintiffs' intestate, seeing a little child on the track of the defendants' railroad, and a train swiftly approaching, so that the child would be almost instantly crushed unless an immediate effort was made to save it, thereupon, in the sudden exigency of the occasion, rushed in to save the child, and succeeding in that, lost his own life by being run over by the train. It was held by the appellate court, that his voluntarily exposing himself to danger, for the purpose of saving the child's life, was not, as matter of law, negligence on his part precluding a recovery.[4]

Infants.

§ 309. At the first glance it would seem that infants, so far as they are incapable of discretion, fall, in this respect, within the same category as insane and distracted persons, and persons who are deaf or blind. So, indeed, it is expressly declared, in the celebrated passage from which an extract has been already given: "Sane sunt quidam qui facere non possunt: ut puta *furiosus, et impubes qui doli capax non est;* namque hi pati injuriam solent, non facere. Cum enim injuria ex affectu facientis consistat, consequens erit dicere, hos, sive pulsent, sive convicium dicent, injuriam fecisse non videri. Itaque

[1] Illinois Central R. R. Co. *v.* Buckner, 28 Ill. 299.

[2] See supra, § 306; infra, §§ 332, 402.

[3] As to servant's liability to third persons, see § 241.

[4] Eckert *v.* R. R. Co. 43 N. Y. 502. See infra, § 314.

pati quis injuriam, etiam si non sentiat, potest." [1] Nor, if the law is that a lunatic, who by his guardian's negligence is suffered to wander the streets, cannot be run over negligently without redress, can we understand why the same protection should not be extended to a child. Children are to an eminent degree both the present wards and the future guardians of the state; and public policy of the law requires that peculiar tenderness should be exercised in extending to them civic protection.[2] Hence, it is conceded on all sides that a child, so far as concerns the question of personal contributory negligence (as distinguished from the position, to be hereafter noticed, of the care required from the defendant, under the peculiar circumstances of the case), will not be precluded from recovery by the fact that he failed to exhibit diligence and care greater than were to be expected from him at his particular age.[3]

Imputability of parent's negligence to child.

§ 310. It is plain, therefore, that from a child diligence and care are only to be exacted in proportion to his age; although, when a young child runs into danger, even though the child is not personally negligent, a colliding driver will not be held liable for injuries he could not have avoided without encountering greater risks. But here we meet a question as to which there has been much conflict of opinion. Is a parent's negligence to be imputable to a child, so as to preclude a child's recovery, in cases of injury, when the parent has negligently permitted the child to go abroad? Following the reasoning just expressed, we must conclude that however great may have been the parent's negligence, if the defendant, discharging his duties carefully and diligently, could have avoided injuring the child, no amount of negligence by the child's parents is a defence to an action by the child for redress. And such is the view taken by several authoritative American courts.[4]

[1] L. 1. 2. § 3. D. de injur. 47. 10.

[2] See this fully argued in Wharton's Cr. Law, 7th ed. § 2508; and see, also, supra, §§ 88, 216.

[3] See cases cited infra, § 313. Railroad Co. *v.* Gladmore, 15 Wall. 401; Railroad *v.* Stout, 17 Wall. 657; Gray *v.* Stout, 66 Penn. St. 343: Daniels *v.* Clegg, 28 Mich. 33; Chicago R. R. *v.* Becker, 76 Ill. 25.

[4] Berge *v.* Gardiner, 19 Conn. 507; Daley *v.* Norwich R. R. 26 Conn. 598; Bronson *v.* Southbury, 37 Connect. 199; City *v.* Kirby, 8 Minn. 169; Boland *v.* Miss. R. R. 36 Mo. 490; Whirley *v.* Whittemore, 1 Head, 620; Rob-

It is conceded, however, by the courts who hold to the non-imputability of the parent's negligence to the child, in cases where the child brings suit, that when the parent brings suit for loss of the child's services, then the parent's contributory negligence may be a bar.[1]

§ 311. On the other hand, we have a strong line of cases, both in England and in the United States, to the effect that when a child is negligently permitted, by its parents or guardians, to stray on a thoroughfare or railroad track, this negligence may be regarded, even when the child brings suit through a guardian or *prochein ami*, as the contributory negligence of the child.[2]

inson *v.* Cone, 22 Vt. 213; Penn. R. R. *v.* Kelly, 31 Penn. St. 372; Rauch *v.* Lloyd, 31 Penn. St. 358; Phil. R. R. *v.* Spearen, 47 Penn. St. 300; Glassey *v.* R. R. 57 Penn. St. 172; North P. R. R. *v.* Mahoney, 57 Penn. St. 187; Phil. &c. R. R. *v.* Hazzard, 75 Penn. St. 367; Crissey *v.* R. R. 75 Penn. St. 83; Chic. R. R. *v.* Stratton, 78 Ill. 88; Bellefontaine R. R. *v.* Snyder, 18 Ohio St. 899; *S. C.* 24 Ohio St. 670; Norfolk, &c. R. R. *v.* Ormsby, 27 Grat. 455; Walters *v.* R. R. 41 Iowa, 71; Balt. City R. R. *v.* McDonald, 41 Md. 534 (citing Frech *v.* R. R. 39 Md. 575; North Cent. R. R. *v.* Price, 29 Md. 420). See the same view held in Gardner *v.* Grace, 1 F. & F. 359; Isabel *v.* R. R. 60 Mo. 475; and see infra, § 389 *a*; Chic. &c. R. R. *v.* Murray, 71 Ill. 601; Hunt *v.* Geier, 72 Ill. 393.

In Norfolk R. R. *v.* Ormsby, 27 Grat. 455, it was ruled that a child two years and ten months old cannot be chargeable with contributory negligence.

[1] Glassey *v.* R. R. 57 Penn. St. 172; Pittsburg R. R. *v.* Pearson, 72 Penn. St. 169; Bellefontaine R. R. *v.* Snyder, 24 Ohio St. 670; Jeffersonville R. R. *v.* Bowen, 49 Ind. 154; Hunt *v.* Geier, 72 Ill. 393. See Lynch *v.* Smith, 104 Mass. 52.

[2] Singleton *v.* E. C. R. R. 7 C. B. N. S. 287; Waite *v.* N. E. R. R. 2 B. & E. 719; Mangan *v.* Atherton, L. R. 1 Exch. 239; Brown *v.* R. R. 58 Me. 384; Leslie *v.* Lewiston, 62 Me. 468; Holly *v.* Gas Co. 8 Gray, 123; Callahan *v.* Bean, 9 Allen, 401; Wright *v.* Street R. R. 4 Allen, 283 (though see Lynch *v.* Smith, 104 Mass. 52); Mulligan *v.* Curtis, 100 Mass. 512; Hartfield *v.* Roper, 21 Wend. 615; Lehman *v.* Brooklyn, 29 Barb. 234; Mangum *v.* Brooklyn City R. R. 36 Barb. 529 (though see *S. C.* 38 N. Y. 455); Bank *v.* Broadway R. R. 49 Barb. 529 (though see Lannan *v.* Gas Light Co. 46 Barb. 264); Flynn *v.* Hatton, 4 Daly, 552; *S. C.* 43 How. Pr. 333; Morrison *v.* R. R. 56 N. Y. 302; Ross *v.* Innis, 26 Ill. 259; Chicago *v.* Starr, 42 Ill. 174 (though see Pitts., F. W. & C. R. R. *v.* Bumstead, 48 Ill. 221); Pitts., F. W. & C. R. R. *v.* Vining, 27 Ind. 513; L. & I. R. R. *v.* Huffman, 28 Ind. 287; Jeffersonville R. R. *v.* Bowen, 40 Ind. 545; Hathaway *v.* R. R. 46 Ind. 25. See Ewen *v.* R. R. 38 Wis. 613.

In Williams *v.* R. R. L. R. 9 Exch. 157, where a child of four and a half years old was sent on an errand, and shortly afterwards discovered lying on a level crossing which the defendants had neglected, as required by statute, to fence, it was held that on this

Of course the question whether the parents were negligent depends upon the facts of the particular case.[1]

§ 312. The English law on this point presents extraordinary contrasts. On the one side it is held that the negligence of a person having charge of a young child is imputable to the child, and there is no redress if the child is negligently run over;[2] on the other side, it is held that though oysters are negligently placed in a river bed, the owner of the oysters may have redress from persons by whom these oysters are negligently disturbed.[3] The child, had he been an oyster, would have been protected;

evidence the defendants could be held liable. See Bigelow's Cases on Torts, pp. 730–1.

[1] See Waite *v.* R. R. E., B. & E. 719.

[2] See cases cited in § 313. See, also, Kay *v.* R. R. 65 Penn. St. 269; Pitts. &c. R. R. *v.* Pearson, 72 Penn. St. 169; Phil. &c. R. R. *v.* Long, 75 Penn. St. 257; Penn. R. R. *v.* Lewis, 79 Penn. St. 33.

In Bahrenburgh *v.* R. R. N. Y. Ct. of Appeals, 1876, the plaintiff was an infant of little more than three years of age, who had left without permission his parent's house with his sister. When in the street they saw a young man about twenty years old, a clerk of their father's, driving a grocer's wagon, and asked him to let them ride, which he did. The plaintiff was seated at the end of the seat, and while crossing defendant's track was jolted out and fell on the track about twenty-five feet in front of an approaching car. The driver did not see him in time to stop the car, and it ran over him and inflicted the injuries complained of. There was nothing to prevent the driver seeing the child; several persons pointed him out, and it appeared that the car could have been stopped in ten or twelve feet. It was held that the driver was guilty of negligence in not discovering the plaintiff and in not stopping the car; that permitting the plaintiff to go on the street accompanied by his little sister only, if negligent, was not a proximate cause of the injury, and was too remote to be regarded, as at the time of the accident plaintiff was in charge of a person of suitable age; that, as matter of law, it was not negligence to allow the boy to ride upon the seat where and as he did, but was a question for the jury, and their decision is conclusive.

In Morrison *v.* R. R. 56 N. Y. 302, the plaintiff was a girl of twelve years, travelling on a railway car under her parents' charge. They arrived at their place of destination about dark; the name of the place was called, and the train stopped. The plaintiff arose with her parents to leave, but before they got out the cars had started, and were moving slowly by the station. Plaintiff and her parents knowing this passed out on the platform of the car while the train was moving, and after it had passed the platform of the station, her father took her under his arm and stepped from the car, when she was injured. It was held by the court of appeals (Church, Ch. J., and Andrews, J., dissenting), that as matter of law plaintiff was chargeable with contributory negligence.

[3] Mayor of Colchester *v.* Brooke, 7 Q. B. 377; Vennell *v.* Garner, 1 Cr. & Me. 21. See 4 Am. Law Rev. 405, for an able criticism on this topic.

not being an oyster, but a human being, the especial ward of the state, he is without redress.

Or, to take another illustration: an English engineer recklessly runs down a wagon containing a man driving a straying child whom he picked up in the road. The driver can recover from the railway company, but the child is barred, because its parents negligently permitted it to stray. The same conduct which is negligent to an adult, is non-negligent to a child, whenever the child was negligently permitted to go out.

§ 313. It is true that by the courts holding to the imputability of the parent's negligence to the child, the doctrine is often so construed as in practice greatly to reduce its mischief. Thus it has been held not to be contributory negligence to permit a child of six years old to go out by himself in a quiet street;[1] nor to permit a child of five years old to cross without an attendant a thoroughfare in which there is a horse railroad;[2] nor to permit a child of five years to remain alone in a room with an open door, he being enjoined not to go out.[3] And it has been conceded by the courts in question, as well as by those rejecting such imputability, that as to children capable of observing and avoiding danger, no rule of law can be laid down which interferes with the jury judging each case on its own merits.[4] But this still leaves the conflict of principle the more sharp. Is a person who is incapable of observing and avoiding danger without protection from the negligence of others, if he is exposed

[1] Cosgrove *v.* Ogden, 49 N. Y. 255.

[2] Barksdull *v.* R. R. 23 La. An. 180.

[3] Fallon *v.* R. R. 64 N. Y. 14. See Mangam *v.* R. R. 32 N. Y. 455.

[4] Lovett *v.* R. R. 9 Allen, 357; Mulligan *v.* Curtis, 100 Mass. 512; Lynch *v.* Smith, 104 Mass. 52; Steele *v.* Burkhardt, 104 Mass. 59; Oldfield *v.* R. R. 14 N. Y. 310; Drew *v.* R. R. 26 N. Y. 49; Mangam *v.* R. R. 38 N. Y. 455; Downs *v.* R. R. 47 N. Y. 83; *S. C.* Alb. L. J. Feb. 13, 1875; Ihl *v.* R. R. 47 N. Y. 317; McMahon *v.* R. R. 39 Md. 439; Karr *v.* Parks, 40 Cal. 193; Schierhold *v.* R. R. 40 Cal. 447. See, also, Daniels *v.* Cleg, 28 Mich. 33.

"That the measure and degree of care, the omission of which would constitute negligence, is to be graduated by the age and capacity of the individual, is expressly adjudged in Birge *v.* Gardiner, 19 Conn. 507; Daley *v.* R. R. 26 Conn. 591; Robinson *v.* Cone, 22 Vt. 213. Judge Andrews asserts the same doctrine in Reynolds *v.* R. R. 58 N. Y. 249." Allen, J., Turber *v.* R. R. 60 N. Y. 336. So in McGarry *v.* Loomis, 62 N. Y. 104, where it was held that where the child was not negligent, no negligence of the parent was imputable.

to such negligence by the negligence of his immediate custodian? Would not this abandon the helpless to wanton ill-treatment without any opportunity of redress? Would it not then be enough for an underling nurse at a hospital who goes to sleep instead of watching, to say that the patient, incapable of caring for himself, was sent to the hospital through the negligence of his friends? And can we say that the rash and brutal running down of a child of six years, which is one of the cases just cited, and for which a horse-car company was held liable because the child was comparatively discreet, would have been without redress had the person driven over been a child two years of age, or a lunatic escaped from a negligent guardian? Is this not equivalent to saying that the negligence which we punish when it injures a person who is capable of helping himself, we will not punish when it injures a person who is helpless? Does not the doctrine here criticised, amount in the concrete to this: that if a wandering child is under six he may be run down with impunity; but that if over six he may have redress? We should remember, on this issue of imputability, that the question is not whether, in consequence of the incapacity of the child or lunatic, a collision ensued which a prudent driver could not avoid. In such cases it is agreed on all sides that the driver is irresponsible. The question is, negligent driving being assumed, whether the driver is to be exonerated whenever the victim of his negligence is a child or a lunatic whose guardian has negligently permitted him to escape. No doubt that if the guardian sues the driver for damages for loss of the child's services, the answer may correctly be, "You cannot recover for yourself remuneration for your own misconduct." [1] But if the party injured has not himself been negligent, not only is there no principle of law preventing him from obtaining redress, but the first sanctions of humanity require that redress should be exacted. The protection of the helpless from spoliation is one of the cardinal duties of Christian civilization; and when those so helpless are young children, this duty is aided both by the instincts of nature and the true policy of the state. And in this aspect the care to be exercised by a driver as a prudent and skilful business

[1] Supra, § 310. Glassey *v.* Hestonville R. R. 57 Penn. 172; Bellefontaine R. R. *v.* Snyder, 24 Ohio St. 670.

man is in proportion to the apparent helplessness of the object which he sees on the road before him. A prudent and skilful driver has a right to presume that a person apparently capable of taking care of himself will avoid the track,[1] and in such a case the driver is not chargeable with negligence if a collision ensue. But a prudent and skilful driver (and this, as the doctrine heretofore so frequently vindicated, is the true test) will slacken his speed, if it can be done prudently, if he sees a helpless person on the track; and to a driver who does not attempt this negligence is chargeable.[2]

Incompatibility of such imputation with other legal sanctions.

§ 314. It may not be inappropriate, also, to notice the incompatibility of such imputation with the protection thrown by the law over infants in other branches of the law of negligence. A child, for instance, is negligently or improperly sent by his guardians or parents to work at dangerous machinery in a factory; and he is injured, when at work, through the negligence of the proprietor of the factory in not properly advising the child of the danger, or putting round him suitable guards. Is the proprietor to be exonerated because the parents or guardians of the child were negligent in thus sending the child to work? The supreme court of Massachusetts has, as has been seen, sanctioned, though somewhat falteringly, the doctrine of imputation; but when the question came up of a child mangled in a factory through the sordid negligence of those controlling the works, the notion of the imputability of the disaster to the child's parents was not even entertained.[3] And in a touching New York case, already cited, the humanity, as well as the strong juridical sense of the judges of the appellate court, broke through the trammels of imputation by which in other issues they had been bound.[4] A little child was on the track of a railroad, with a train approaching, and the child would have the next moment been killed had not the deceased rushed in and lost his life in saving that of the child. "The important question in this case," said Grover, J.,

[1] Phil. &c. R. R. *v.* Spearen, 47 Penn. St. 300; Telfer *v.* R. R. 30 N. J. 188.

[2] See supra, §§ 306–7; infra, § 389 *a*.

[3] Coombs *v.* New Bedf. Cord. Co. 102 Mass. 572. See other cases cited supra, § 216; and see the same general result reached in Bigelow's Cases on Torts, 730–1.

[4] Eckert *v.* R. R. 43 N. Y. 502.

"arises upon the exception taken by the defendant's counsel to the denial of his motion for a nonsuit, made upon the ground that the negligence of the plaintiff's intestate contributed to the injury that caused his death. The evidence showed that the train was approaching in plain view of the deceased, and had he for his own purposes attempted to cross the track, or with a view to save property placed himself voluntarily in a position where he might have received an injury from a collision with the train, his conduct would have been grossly negligent, and no recovery could have been had for such injury. But the evidence further showed that there was a small child upon the track, who, if not rescued, must have been inevitably crushed by the rapidly approaching train. This the deceased saw, and he owed a duty of important obligation to this child to rescue it from its extreme peril, if he could do so without incurring great danger to himself. Negligence implies some act of commission or omission wrongful in itself. Under the circumstances in which the deceased was placed, it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If, from the appearances, he believed that he could, it was not negligence to make an attempt so to do, although believing that possibly he might fail and receive an injury himself. He had no time for deliberation. He must act instantly, if at all, as a moment's delay would have been fatal to the child. *The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons.* For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence, which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life, it is not wrongful, and therefore not negligent, unless such as to be regarded either rash or reckless. The jury were warranted in finding the deceased free from negligence under the rule as above stated. The motion for a nonsuit was, therefore, properly denied. That the

jury were warranted in finding the defendant guilty of negligence in running the train in the manner it was running, requires no discussion." It was properly held, therefore, that a railroad is to be held liable for running over one who seeks to save a little child on its track whom it is about negligently to strike. Independently of the technical ground that liability for negligence to one thus intervening to save a wandering child involves liability for negligence towards the child itself, we reach here the broad principle that the life even of a "little" child, as the child in this case is described, is regarded so tenderly by the state that those who expose themselves for its safety will be protected and their injuries redressed. The test given above by Judge Grover is fit for general application. The duty of those directing a train is, when they see a young child on the path, to use every effort to save the child's life, unless in so doing they must take measures which "constitute rashness in the judgment of prudent persons." And this brings us back to the doctrine of the text. There is no imputability of the parents' negligence to the child. Whether the child was personally negligent is to be determined by its own capacity.[1] And those directing the train are to be held negligent if they could have avoided the collision without jeopardy to the safety of their passengers. To little children on the track they are to exercise far greater caution than to persons apparently *sui juris*. The latter may be expected to move promptly off the track; not so necessarily the former. And hence we may cordially accept the doctrine laid down by the supreme court of the United States, that the care to be exerted to avoid collision with an infant is to be greater than that in respect to an adult. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. The caution required is according to the maturity and capacity of the child, a matter, as we have seen, to be determined in each case by the circumstances of the case.[2]

§ 315. But in cases where a child mischievously meddles

[1] See supra, §§ 88, 309.

[2] Supra, § 309; R. R. *v.* Gladmore, 15 Wall. 401; R. R. *v.* Stout, 17 Wall. 401.

with a machine or other dangerous agency, or with structures in public streets,[1] another phase of facts presents itself, and a result is reached which, though differing superficially from that last stated, accords with it in principle. In the cases just mentioned, the railroad engineer, or the driver of a carriage, is held liable if by the exercise of due diligence he could have avoided running over the child. Supposing, however, a well is left open, or machinery is exposed, and a child is thereby damaged? Again we say, notwithstanding the high authority to the contrary,[2] that the negligence of the child's parents has nothing to do with the issue. That issue is, was it negligence to leave the well or machinery exposed? And this issue must be determined by the test whether such an exposure is consistent with the mode of action of a prudent and skilful business man. In applying this test, we must necessarily view the community as a mass.[3] To make a machine that would not be dangerous if tampered with by a meddlesome child, would be impossible; and therefore a good business man does not undertake to make a machine that would not be dangerous if tampered with by a meddlesome child. In other words, it is not a condition of the diligence of a good specialist that he should construct a machine with which a meddlesome child could not injure himself; but it is part of a condition of the diligence of a good specialist that he should not negligently start in the streets a machine which destroys a child no matter how meddlesome. And so it is part of the diligence just spoken of not to leave a dangerous machine (which it is not negligence to place in a private apartment) in a public street, where it may be unconsciously hustled by passengers or meddled with by idlers or children.[4]

Otherwise as to children meddling with machines.

§ 316. In conformity with this view, it has been correctly held in Illinois, in a case where a city negligently left an open tank in a street into which fell a young child, negligently suffered to go at large, that the city was liable.[5] And in the same state it has been held that a carrier is liable for injury to a child

[1] See supra, § 389 *a*.

[2] Holly *v.* Bost. Gas Light Co. 8 Gray, 123.

[3] See supra, §§ 88, 108, 216.

[4] Supra, § 112; infra, § 344; Keffe *v.* R. R. 21 Minn. 207.

[5] Chicago *v.* Mayor, 18 Ill. 360. So, also, Robinson *v.* Cone, 22 Vt. 213; Kerr *v.* Forgue, 54 Ill. 482.

negligently exposed by the parents but whom the carrier might have protected by due diligence.[1]

§ 317. In an English case,[2] where the defendants placed the shutter of their cellar against the wall of a public street, and the dress of a child, who was playing in the street and jumping off the shutter, caught the corner of the shutter, which fell upon and injured him, it was ruled that the defendants were not liable to an action by the child; the ground of the decision being that the leaning of a shutter against a wall on a public street is not in itself negligence.[3] The reasoning, in this case, is in harmony with the rules already stated, supposing that leaning a shutter against a house, in the way complained of, was consistent with the care required of good householders; a question of which the jury are the judges.

§ 318. In a case in Connecticut,[4] where the defendant set up a gate on his own land, by the side of a lane, through which the plaintiff, a child between six and seven years of age, with other children in the same neighborhood, were accustomed to pass from their places of residence to the highway, and *vice versa;* and the plaintiff in passing along such lane, without the permission of any one, put his hands on the gate and shook it, in consequence of which it fell on him and broke his leg; in an action for this injury, the court instructed the jury that if the defendant was guilty of negligence he was liable for the injury, unless the plaintiff in doing what he did was guilty of negligence or misbehavior, or of the want of proper care and caution; and in determining this question they were to take into consideration the age and condition of the plaintiff, and whether his conduct was not the result of childish instinct and thoughtlessness. After a verdict for the plaintiff, it was held that the charge was unexceptionable. The result is to be sustained on the hypothesis that the jury found that the gate, in view of the fact that it fenced a road where children were constantly passing, was not built with sufficient care.

[1] See Ohio R. R. *v.* Stratton, 78 Ill. 88.

[2] Abbott *v.* Macfie, and Hughes *v.* Macfie, 33 L. J. Exch. 177.

[3] See Chicago *v.* Starr, 42 Ill. 174. Similar in principle is Chester *v.* Porter, 47 Ill. 66, where the decision is right, though the reason wrong.

[4] Birge *v.* Gardiner, 19 Conn. 507; *S. P.* Phil. Hyd. Works *v.* Orr, Sup. Ct. Penn. 1877.

§ 319. On the other hand, in a case in Maine,[1] where the evidence was that a child of nine years, in the daytime, jumped from a sidewalk, lawfully constructed by a railroad company on the side of its railway bridge, upon a properly constructed draw, when the same was being lawfully closed, it was ruled that no liability attached to the company. And the conclusion is correct on the principle above expressed. If the railroad company, in view of the kind of travel likely to pass on the walk, exercised due prudence in its construction, no liability for negligence could arise. But if the sidewalk, in view of the fact that it was to be travelled not only by the strong and cautious, but by the inexperienced and feeble, was so constructed that for the latter it was unsafe, then the company should have been held liable.[2]

§ 320. The same reasoning prevents us from accepting as authoritative an English case,[3] where the evidence was that the defendant exposed in a public place for sale, unfenced and without superintendence, a machine which might be set in motion by any passer-by, and which when in motion was dangerous. The plaintiff, a boy four years old, by direction of his brother, seven years old, placed his fingers in the machine, while another boy was setting it in motion, and the fingers were crushed. It was held that the plaintiff could not maintain an action. But why? Was it not negligence to leave a dangerous machine in a public place, exposed to the usual throng of visitors and passengers? Certainly the rule is that a person so exposing in such a place anything likely to prove dangerous if touched or jostled, even by children, is liable for the consequences.[4]

§ 321. So, also, we must refuse assent to a New York case, where a child three years of age was injured by falling from a piazza — a part of the private premises of the family in a tenement house — known to the child's parents to be defective and insecure, by reason of natural decay; and where this was held a case of contributory negligence on the part of the parents in charge of a child too young to exercise discretion to avoid such a

[1] Brown *v.* R. R. 58 Me. 384.

[2] See infra, § 996.

[3] Mangan *v.* Atterton, L. R. 1 Exch. 239.

[4] See this illustrated, supra, § 112; and see R. R. *v.* Stout, 17 Wall. 657.

danger.[1] It may have been that the defendant was not responsible for the repair of the piazza; and if so, no negligence was imputable to him. But if he owned the tenement house, filled with families, and was bound to keep it in due repair, no negligence of parents in permitting a child to run out on the piazza could protect him, if through his fault the child fell from the piazza. He knew to what use the house was to be put, and he was bound to keep it in a suitable condition for such use.[2]

Negligence of child to be graduated to its capacity.

§ 322. Supposing the suit to be brought by the child, or its guardian, for compensation for the injuries it has received, then, as will be gathered from what has been said, the question of contributory negligence depends upon the capacity of the child.[3] A child cannot be charged with negligence in not looking out for a train when it does not know what a train is. The diligence and care required are in proportion to the lights of the person judged.[4] At the same time we must remember that it far from follows that because no negligence is chargeable to a child run over or otherwise injured, therefore negligence is chargeable to the party injuring. A child may be laid on a railroad, for instance, and may be run over, without any negligence being chargeable to the engineer, who may not see the child, or who may not have time to stop the train. The distinction between the case of a child and an adult is, as has been already noticed, this: that an engineer seeing a helpless person before him is bound to make efforts to avoid a collision in proportion to such helplessness.[5] So far, however, as concerns stationary agencies, precautions are

[1] Flynn *v.* Hatton, 4 Daly, 552; reported in full in 43 How. Pr. 333. As limiting this case, see Jaffe *v.* Harteau, 56 N. Y. 398; and see infra, § 729.

[2] See, also, Holly *v.* Gas Co. 8 Gray, 123 (cited supra, § 45; and see comments in 1st edition of this work, § 322; and 4 Am. Law Rev. 405); Bronson *v.* Southbury, 37 Conn. 199; B. & I. R. R. *v.* Snyder, 18 Ohio N. S. 399; Lynch *v.* Smith, 104 Mass. 52.

[3] Supra, §§ 87, 313.

[4] See cases cited supra, §§ 310, 313, 322; and see Railroad Co. *v.* Gladman, 15 Wall. 401; Lynch *v.* Smith, 104 Mass. 52; Lane *v.* Atlantic Works, 111 Mass. 136; Elkins *v.* R. R. 115 Mass. 190; Hunt *v.* Salem, 121 Mass. 294; Penn. R. R. *v.* Kelly, 31 Penn. St. 372; Smith *v.* O'Connor, 48 Penn. St. 218; Daniels *v.* Cleg, 28 Mich. 35; Chic. R. R. *v.* Murray, 71 Ill. 601; Hunt *v.* Geier, 72 Ill. 393; Paducah R. R. *v.* Hoehl, 12 Bush, 47.

[5] Infra, § 389 *a*; supra, §§ 315–6–7.

required to guard them from children only in cases where children are likely to interfere.[1]

§ 323. We again fall back to one of the primary rules in this branch of jurisprudence, viz., that *where the plaintiff's negligence is remote and the defendant's proximate; or, in other words, where the plaintiff's negligence was a condition of the injury but not its juridical cause*, then the plaintiff is not precluded from recovery.[2] A person, it has been seen, is juridically the cause of an injury, if his act (or omission), supposing that there is no intervention of disturbing independent moral agents, would be, according to the usual course of events, followed by such injury. This, as is shown by a distinguished contemporary German jurist,[3] is the true application of Aristotle's exposition of causation, which is accepted by the Roman jurists, and is equivalent to the distinction between proximate and remote causation, as expressed by Anglo-American law. It is not enough, to apply this definition to negligence, to declare that if the injury would not have occurred had it not been for the plaintiff's negligence, then the plaintiff's negligence is to be regarded as the cause of the injury. Of multitudes of antecedents can it be truly said, that if they had not existed the injury would not have occurred; yet of how few of such antecedents can it be said that they juridically caused the injury. A gas company, to take one of the cases which the present discussion presents, neglects to close a leaking pipe, and in consequence of the leakage the plaintiff is injured. Had the plaintiff not been in the town at the time,— had the plaintiff never been born,— had there been no gas in the particular pipe,— had there been no gas company in the particular town,— had gas never been invented,— then the injury would not have occurred. That the plaintiff was in the town at the time,— that the plaintiff existed, — that there was gas in the leaking pipe, — that there was gas in the town,— that there was gas anywhere,— all these are *conditions* of the plaintiff's injury, without which it would not have

Remote negligence not contributory.

[1] Supra, § 315; Penn. R. R. *v.* Morgan, 82 Penn. St. 134.

[2] See supra, § 73; Chicago, &c. R. R. *v.* Becker, 76 Ill. 25; Manly *v.* R. R. 74 N. C. 655.

[3] Bar, Lehre von Causalzusammenhange, Leipzig, 1871. See supra, § 302.

existed; but no one of these is a juridical cause of the injury. To constitute a juridical cause, therefore, it is not sufficient to say that it is enough that without the existence of the condition in question the injury would not have taken place.

§ 324. Nor, advancing a step further, can we say, as has already been shown,[1] that a condition involving negligence on part of a party is to be regarded as a juridical cause of the injury. The negligence, to make it a juridical cause, must be such that by the usual course of events it would result, unless independent disturbing moral agencies intervene, in the particular injury. It may be negligence in me to cross a railroad on a level when by going a mile round I could cross on a bridge. Yet this negligence, in case I am struck by a train, is not the juridical cause of the collision, if I keep a good lookout when I reach the road. I may negligently leave my goods in a warehouse; but this is not the juridical cause of their destruction, if such destruction comes, not as a natural and usual result of my negligence, but through the negligence of another who sets fire to the warehouse. In other words, to put the same doctrine into the language made familiar to us by the adoption of the terms "proximate" and "remote," my "remote" negligence will not protect a person who by "proximate" negligence does me an injury.

§ 325. Modern Roman jurists have expressed this distinction by the maxim, *Injuria non excusat injuriam*,[2] and such is the rule imposed upon us by both philosophy and humanity. On the one side, a man who puts himself in a place where an injury, in the usual course of events, will occur to him, cannot recover damages from the person through whom such injury proceeds, supposing the latter by due prudence could not have avoided inflicting the injury. So a person who knowingly contributes to a wrong cannot recover from a co-contributor. On the other side, a person who, in the immediate transaction, was without fault himself, is entitled to redress for all injuries inflicted on him by another, when by the latter the infliction of the injury could have been avoided by the care which prudent persons, under the circumstances, are accustomed

Injuria non excusat injuriam.

[1] Supra, § 97.

[2] See this defended in Alston *v.* Herring, 11 Exch. 822.

to exercise. And no matter how negligent I may have been in putting myself in a particular position, I can recover for injuries inflicted on me by a party who could have avoided injuring me by the exercise of the ordinary care which, as has been just stated, is usual with prudent persons under the circumstances.[1]

§ 326. From this rule the English law does not materially depart. On the one side it refuses relief in all cases where the plaintiff may be viewed as consenting to the injury.[2] On the other side, we have numerous cases in which a party negligently putting himself in a position of risk is held entitled to recover from parties who, when he is in that position, inflict on him an injury which, by ordinary prudence, they could have avoided.[3] It is true that we occasionally meet with judicial expressions such as the following: "Although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong."[4] But the maturer view of the English courts is, that "though the plaintiff has been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet, if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him."[5]

[1] Infra, §§ 342–43. See Wilder *v.* R. R. 65 Me. 332; Priest *v.* Nichols, 116 Mass. 401; Whirley *v.* Whiteman, 1 Head, 610; Nashville, &c. R. R. *v.* Carroll, 6 Heisk. 347; Pacific R. R. *v.* Houts, 12 Kans. 328; and cases hereafter cited.

[2] Carr *v.* Lancashire & Yorkshire Ry. Co. 7 Exch. 707; Austin *v.* Manchester, &c. Ry. Co. 10 C. B. 454; McCawley *v.* Furness, L. R. 8 Q. B. 59.

[3] See Davies *v.* Mann, 10 M. & W. 548; Lygo *v.* Newbold, 9 Exch. 302; Clayards *v.* Dethick, 12 Q. B. 439; Thompson *v.* R. R. 2 B. & S. 106; Frech *v.* R. R. 39 Md. 574; and cases cited supra, § 300; infra, § 346.

[4] Parke, B., in Bridge *v.* Grand Junction R. C. 3 M. & W. 248, cited in Broom's Com. 688. See Radley *v.* London & N. W. R. R. L. R. 9 Exch. 71; *S. P.*, reversed in exchequer, L. R. 10 Exch. 100; Davies *v.* Mann, 10 M. & W. 548; North *v.* Smith, 10 C. B. N. S. 572; Martin *v.* R. R. 16 C. B. 179; Cornman *v.* R. R. 4 H. & N. 781; Marriott *v.* Stanley, 1 M. & G. 568; Schloss *v.* Heriott, 14 C. B. N. S. 59; Senior *v.* Ward, 1 E. & E. 385.

[5] Lord Penzance, Radley *v.* R. R. L. R. 1 App. Cas. (1876) 759, relying on Davies *v.* Mann, 10 M. & W. 546; Tuff *v.* Warman, 5 C. B. N. S. 573; Lords Cairns, Blackburn, and Gor-

§ 327. Of the principles thus expressed the following illustrations may be selected: —

The plaintiff negligently left his donkey in a highway, tied by the fore feet. The defendant, when he could by ordinary care have avoided the donkey, drove over it in broad daylight and killed it. Had this occurred in the night time, then such a result may be spoken of as one which, in the usual course of events, would have been likely to have occurred, and which a prudent driver could not have ordinarily avoided. But it is not in the ordinary course of events that a prudent driver, on a wide highway, in broad daylight, should strike down a donkey whose power of escape was thus obviously limited. And so it was held that the plaintiff's negligence, in thus leaving the donkey on the highway, could not be set up by the defendant as a defence.[1]

§ 328. So, in a case already noticed, where oysters were negligently left in the channel of a navigable river, it was held that the officers of a vessel, knowing them to be there, were not justified in running against and destroying them, when there was room to pass without so doing.[2]

§ 329. On persons using the tremendous power of steam, it is peculiarly important that this caution should be imposed. I may be negligently trespassing on a railroad, but this trespass, while it might expose me to arrest, will not justify the company should its servants mangle or kill me by their engine, when they could, with ordinary prudence, have avoided the collision. Hence it has been repeatedly held, that it is no defence to a suit for damages in a collision, that the plaintiff was at the time in a place where he ought not to have been, if the collision could have been avoided by the defendant in the exercise of the ordinary prudence which belongs to a good business man in his particular sphere.[3]

§ 330. Violations of the law, when not of such a character as

don, acc. See, for facts of case, infra, § 335.

[1] Davies *v.* Mann, 10 M. & W. 549.

[2] Colchester *v.* Brook, 7 Q. B. 377.

[3] Infra, § 388; and see Greenland *v.* Chapin, 5 Exch. 243; Vennell *v.* Garner, 1 Cro. & Mee. 21; Tuff *v.* Warman, 2 C. B. N. S. 740; 5 C. B. N. S. 573; Inman *v.* Reck, L. R. 2 P. C. App. 25; Blanchard *v.* St. Co. 59 N. Y. 292.

to require the application of immediate and violent remedies for their check, are to be punished by the officers of the law, and not by private individuals negligently wielding dangerous instrumentalities; and in addition to this view, if a person violating the law cannot sue for injuries, few persons could sue for injuries, for there are few persons who are not, in some way or other, violating some law, penal, sanitary, or municipal. Hence, it is properly held that the mere fact that the plaintiff was at the time transgressing some law or ordinance of state or police, is no defence, unless such transgression was the proximate cause of the injury.[1] Thus, in an action against a town for injury from a defect in a road, the plaintiff is not precluded from recovery by the fact that at the time he was attempting to pass another carriage, in violation of a statute;[2] nor, in a suit for a negligent collision, is he barred by the fact that he was at the time driving at a speed forbidden by a municipal ordinance,[3] though in cases of this class the lawlessness of the plaintiff's act may be put in evidence as part of the defendant's case.[4]

That the plaintiff was at the time violating the law is no bar.

It has been also held to be no defence to an action for negligently driving against the plaintiff's wagon that the plaintiff placed his horse and wagon in a street in a city transversely to the course of the street, while loading articles which a city ordinance permits to be loaded only in vehicles placed lengthwise and as near as possible to the sidewalk.[5]

Nor is it a defence to an action against a railroad company for damage received from a defective engine, that the plaintiff was at the time violating the rules of the company.[6] It is otherwise, however, where the lawlessness directly produces the injury, as where a party is injured by driving across a bridge faster than a walk.[7]

[1] The Farragut, 10 Wall. 334; Tuttle *v.* Lawrence, 119 Mass. 276; Smith *v.* Conway, 121 Mass. 116; Hoffman *v.* Ferry Co. 47 N. Y. 176; Blanchard *v.* St. Co. 59 N. Y. 292; Klipper *v.* Coffey, 44 Md. 117; and cases cited infra, § 335 *et seq.*

[2] Damon *v.* Scituate, 119 Mass. 66.

[3] Hall *v.* Ripley, 119 Mass. 135.

[4] Ibid.; Smith *v.* Gardner, 11 Gray, 418; Spofford *v.* Harlow, 3 Allen, 176; Steele *v.* Burkhardt, 104 Mass. 59. Infra, § 338.

[5] Steele *v.* Burkhardt, 104 Mass. 59; Greenwood *v.* Callahan, 111 Mass. 298. See Gale *v.* Lisbon, cited infra, § 336.

[6] Ford *v.* R. R. 110 Mass. 240. Supra, 244.

[7] Heland *v.* Lowell, 3 Allen, 407.

Violation of Sunday statutes.

§ 331. Considerable conflict of opinion has existed as to whether a person travelling on Sunday, in violation of statutes prohibiting such travel, can recover damages from parties by whom, when he is so travelling, he is negligently injured. If the position taken in the last section be correct, the plaintiff, in such case, is not precluded from recovering by the fact that he was at the time violating the statute. And so has it been sometimes ruled.[1] In other states, however, a plaintiff has been held precluded from recovery, under the statute, unless he was travelling either for the purpose of attending public worship, or from necessity, or for charity.[2] It has been even held that a party who gratuitously assisted another in cleaning out his wheel-pit on Sunday, could not recover for injuries sustained by him when in such work.[3]

[1] Phil. &c. R. R. *v.* Towboat Co. 23 How. 218; Carroll *v.* R. R. 58 N. Y. 137; Mahoney *v.* Cook, 26 Penn. St. 342; Augusta R. R. *v.* Renz, 55 Ga. 126; Sutton *v.* Wauwautosa, 29 Wis. 21, citing Woodman *v.* Hubbard, 5 Foster, 67; Norris *v.* Litchfield, 35 N. H. 271; Corey *v.* Bath, Ibid. 530; Merritt *v.* Earle, 29 N. Y. 115; Bigelow *v.* Reid, 51 Maine, 325; Hamilton *v.* Goding, 55 Ibid. 428; Baker *v.* The City of Portland, 58 Ibid. 199; Mahoney *v.* Cook, 26 Penn. 342; Kerwhacker *v.* Railway Co. 3 Ohio St. 172; Phila. &c. Railway Co. *v.* Phila. &c. Tow Boat Co. 23 How. (U. S.) 209; Bird *v.* Holbrook, 4 Bing. 628. See Dutton *v.* Ware, 17 N. H. 34; Whelden *v.* Chappel, 8 R. I. 230; Hill *v.* Wilker, 41 Ga. 449.

In Frost *v.* Plumb, 40 Conn. 111, the defendant hired a horse of the plaintiff on Sunday to go on that day to the town of S. He went several miles beyond, and while doing so caused the death of the horse by overdriving. It was ruled, in an action of trover joined with case, that the plaintiff could recover, notwithstanding the statute prohibition of all secular business on Sunday.

[2] McClary *v.* Lowell, 44 Vt. 116; Johnson *v.* Warburgh, Sup. Ct. Vt. 1876; Hinckley *v.* Penobscot, 42 Me. 89; Cratty *v.* Bangor, 57 Me. 433; Bryant *v.* Biddeford, 59 Me. 193; Bosworth *v.* Swansey, 10 Metc. 363; Jones *v.* Andover, 10 Allen, 18; Feital *v.* R. R. 109 Mass. 398; Conolly *v.* Boston, 117 Mass. 64. Infra, § 405.

[3] McGrath *v.* Merwin, 112 Mass. 467, citing Myers *v.* Meinrath, 101 Mass. 366; Hall *v.* Corcoran, 107 Mass. 251.

In Doyle *v.* R. R. 118 Mass. 195, it was held that a party who travels from one town to another on the Lord's day for the sole purpose of visiting a friend, whom he knows to be sick and thinks may be in need of assistance, is travelling from charity, and is entitled to go to the jury on the question whether he was travelling lawfully or not, although he offers no evidence of the ground of his belief that his friend was in need of assistance. In Smith *v.* R. R. 120 Mass. 490, the plaintiff proved that he was at the time going to ascertain whether a house which he had hired, and into which he intended to move the next

§ 332. It is otherwise when the injury results as an ordinary effect from plaintiff's misconduct. Hence a party from whose negligence an injury to himself flows in ordinary and natural sequence, cannot recover from a party whose negligence contributes to the injury.[1] Thus an intoxicated person, or a person driving recklessly, cannot recover for an injury caused by a collision with an object negligently on the road, because in the usual course of events a person who is drunk, or drives recklessly, precipitates himself against whatever is in his way; and as something, in any ordinary drive, will be in his way, the question of the defendant's negligence is immaterial.[2]

Otherwise when plaintiff's misconduct produces the damage.

§ 333. The same principle is illustrated by the rule that where a train or carriage is approaching at full speed, a person who recklessly throws himself in its way cannot recover, because, in the natural course of events, the train or carriage being in that condition, its speed cannot be suddenly arrested, and a person darting unexpectedly on its path may be injured.[3] But it would be otherwise if it could be shown that the driver saw the person approaching in time to have prudently avoided a collision.

So, to anticipate a point to be hereafter discussed, a person who crosses a railroad without looking out cannot recover in cases where the engineer, unless by the exercise of more than the ordinary care of a good and skilful engineer, could not have avoided a collision; nor is the company responsible for not taking extreme precautions not required by such ordinary care, nor by statute.[4]

§ 334. It is true that in this relation a conflict of opinion has arisen which has expressed itself in the antithesis between "contributory" negligence and "comparative" negligence. "Comparative" negligence is declared to be the test in Illinois, it being held in that state that where the defendant's negligence was "great," and the plaintiff's

"Comparative" and "contributory" negligence.

day, had been cleaned, but the court held that this was neither a work of charity nor of necessity.

[1] See as to road cases, infra, § 995.

[2] Butterfield *v.* Forrester, 11 East, 60; Clayards *v.* Dethick, 12 Q. B. 446. See supra, § 307.

[3] Woolf *v.* Beard, 8 C. & P. 373.

[4] Supra, § 212; infra, §§ 389, 635; Stuckley *v.* R. R. L. R. 1 Exch. 20.

"slight," the plaintiff is not precluded from recovering. "Contributory" negligence is declared to be the test elsewhere.[1]

Plaintiff's prior, no excuse to defendant's subsequent, negligence.

§ 335. Yet when we come to analyze the cases, even when ruled by courts holding to "contributory" as distinguished from "comparative" negligence, we find that it is generally agreed that the negligence of one party is no reason in itself why he should be punished by the negligent misconduct of another. If I infringe the rights of another, then I am to be proceeded against by law; nor can such other person take the law in his hands by neglecting the precautions necessary to prevent him, or his machinery, from negligently injuring me. If I should negligently tamper with his machinery, then, indeed, I cannot recover from him redress for any injury I sustain by my impertinent meddling. But though I may be a trespasser on his property, this does not excuse him in recklessly exploding gunpowder under my feet, or in firing a battery at my head.[2] In other words, negligent as I may be, if by due prudence he could avoid hurting me, he is liable for the hurt his negligence inflicts.[3] Such is the conclusion reached in a much contested English case finally decided by the House of Lords in 1876. The appellants were colliery owners, and had a siding adjoining the respondents' line, on to which the respondents were in the habit of bringing the appellants' empty

[1] See summary by Cole, J., in O'Keefe *v.* R. R. 32 Iowa, 367; and see, also, Johnson *v.* Tillson, 36 Iowa, 89.

For cases in which the doctrine of comparative negligence is maintained, see Chic. &c. R. R. *v.* Gregory, 58 Ill. 272; Ind. R. R. *v.* Stables, 62 Ill. 315; Chic. &c. R. R. *v.* Murray, 62 Ill. 426; Ind. R. R. *v.* Galbreath, 63 Ill. 436; Chic. &c. R. R. *v.* Lee, 68 Ill. 576; Toledo, &c. R. R. *v.* McGinnis, 71 Ill. 346; Rockford R. R. *v.* Hillmer, 72 Ill. 235; Grand Tower R. R. *v.* Hawkins, 72 Ill. 386; Ind. &c. R. R. *v.* Flanagan, 77 Ill. 365; Toledo, &c. R. R. *v.* O'Connor, 77 Ill. 391; Sterling Bridge *v.* Pearl, 80 Ill. 251; Kewanee *v.* Depew, 80 Ill. 119. For rule in Kentucky, see Louisville, &c. R. R. *v.* Mahoney, 7 Bush, 255; Sullivan *v.* R. R. 9 Bush, 81; Jacobs *v.* R. R. 10 Bush, 263.

[2] See infra, § 344.

[3] "It would be difficult to say, with any show of reason or justice, that because a man is acting in a negligent way, everybody would be licensed to carelessly and recklessly injure him, and then plead his negligence as a defence to their reckless and wanton conduct." Vories, J., Meyers *v.* R. R. 59 Mo. 231, citing Morrissey *v.* Ferry Co. 43 Mo. 380; Brown *v.* R. R. 50 Mo. 461; Karle *v.* R. R. 55 Mo. 476; and see Whalen *v.* R. R. 60 Mo. 323; Manly *v.* R. R. 64 N. C. 655. See infra, §§ 342–43.

trucks from their line, which the appellants removed as they thought fit. The respondents brought such trucks at any time without notice to the appellants. On a Saturday, after working hours at the appellants' colliery, they brought on to the siding a truck loaded to such a height that it would not pass under a bridge which crossed the siding. On the following Monday, before daylight and before work was resumed, they pushed on to the siding other trucks, which pushed the loaded truck against the bridge and damaged it. It was held by all the law lords,[1] that while there was evidence on which a jury might find the appellants guilty of contributory negligence, yet if the respondents could have avoided the accident by reasonable care and diligence they were still liable, notwithstanding the negligence of the appellants.[2]

§ 336. In this country, in addition to the rulings already cited,[3] we have numerous cases based on the same principle. Thus a traveller who, in meeting another, turns to the left, but causes no injury to others thereby, is not so negligent as to be barred from maintaining an action against the town for negligence in respect to a defective highway;[4] or for suing for a negligent collision.[5] And generally, the mere fact that a party is a trespasser, as will soon be more fully seen, will not expose him to negligent injuries from others which ordinary and proper prudence on their part could have averted.[6]

§ 337. It is settled also, as we shall hereafter see, that in suits against a town for injuries, caused by a defective road, though the party injured saw an obstruction or defect in advance, this is not conclusive evidence of negligence on his part in moving for-

[1] See opinion quoted supra, § 326.

[2] Radley *v.* R. R. 35 L. T. Rep. N. S. 637; L. R. 1 App. Cas. (1876) 759; *S. C.*, in Exch. Ch. L. R. 10 Exch. 100. See cases cited infra, §§ 342–43.

[3] Supra, § 327 *et seq.*

[4] Gale *v.* Lisbon, 52 N. H. 174; and see Steele *v.* Burkhardt, 104 Mass. 59; Greenwood *v.* Callahan, 111 Mass. 298; Tuttle *v.* Lawrence, 119 Mass. 276; Smith *v.* Conway, 121 Mass. 216. See supra, § 331.

[5] Infra, § 820 *h*; Spofford *v.* Harlow, 3 Allen, 176; Welch *v.* Wesson, 6 Gray, 505.

[6] Trow *v.* R. R. 24 Vt. 497; Isbell *v.* R. R. 27 Conn. 404; Bronson *v.* Southbury, 37 Conn. 699; New Jersey Ex. Co. *v.* Nichols, 3 Vroom, 166; Stiles *v.* Geesey, 71 Penn. St. 441; Balt. & O. R. R. *v.* Trainor, 33 Md. 166; Kerwhacker *v.* R. R. 3 Ohio St. 172. Infra, § 820 *b*.

ward.[1] He may be forced to choose between meeting the obstacle or defect and encountering some other evil, and he may be required to make this choice under circumstances of surprise or shock in which coolness of judgment and accuracy of perception cannot be exacted.[2] He may have reasonable cause to believe he can pass the obstruction or danger in safety, and may use reasonable care in the attempt; in which case he is not precluded from recovering by the fact that the attempt was made by him.[3]

§ 338. We have the principle of the text expressly vindicated in a line of cases already noticed,[4] in which it was decided that the plaintiff's negligence and lawlessness in placing his wagon crosswise instead of lengthwise in the street was no defence to a suit brought by him against a party who negligently ran into the wagon. "It is true generally," said Chapman, C. J.,[5] "that, while no person can maintain an action to which he must trace his title through his own breach of the law, yet the fact that he is breaking the law does not leave him remediless for injuries wilfully or carelessly done to him, and to which his own conduct has not contributed."[6]

[§§ 339, 340, 341, 342, *containing illustrations of the principle just stated, are omitted in this edition for the purpose of condensation.*]

§ 343. Hence, also, it is no defence to a suit for negligence in letting fall a keg from a window that the plaintiff was negligently in the street;[7] nor to a suit for destroying cattle, that the cattle were trespassers;[8] nor to a suit for leaving a danger-

[1] As to suits against towns, see infra, § 403; as to suits against other parties, see Thomas *v.* West. Union Tel. 100 Mass. 157; Mahoney *v.* R. R. 104 Mass. 73.

[2] See supra, § 94.

[3] Horton *v.* Ipswich, 12 Cush. 488; Mahoney *v.* R. R. 104 Mass. 73.

[4] Supra, § 331.

[5] Steele *v.* Burkhardt, 104 Mass. 59.

[6] See, as holding that where the negligence of the defendant was the proximate, and that of the deceased the remote, cause of the injury, the action is maintainable, notwithstanding the deceased may not have been entirely without fault, Lane *v.* Atlantic Works, 107 Mass. 104; Britton *v.* Inhab. 107 Mass. 347; Hibbard *v.* Thompson, 109 Mass. 288.

[7] Corrigan *v.* Sugar Refinery, 98 Mass. 577.

[8] Corwin *v.* R. R. 13 N. Y. 42; Sheaf *v.* R. R. 2 N. Y. Supreme Ct. 388; Fanning *v.* R. R. 2 N. Y. Supreme Ct. 585; and other cases cited infra, § 396.

ous machine in a place frequented by children, that a child hurt in the machine was a trespasser;[1] nor to a suit for running over a traveller, that the traveller was unlawfully on the road;[2] nor to a suit for neglecting a patient, that the patient's neglect was that which the physician neglected.[3] And generally if the negligence of the party injured was the efficient cause of the injury, or if both parties are equally to blame, or, if the injured party might by the exercise of ordinary care have escaped injury, he cannot recover. But if the defendant could, by exercise of ordinary care, have avoided the injury to the plaintiff, he is liable, although the injured party may himself have been in some default, and might have escaped injury by the exercise of extraordinary care.[4]

[1] R. R. *v.* Stout, 17 Wall. 657.

[2] See infra, § 388.

[3] Hibbard *v.* Thompson, 109 Mass. 288. Infra, § 787. See generally, in addition to authorities cited in succeeding sections, Davies *v.* Mann, 10 M. & W. 546; Radley *v.* R. R. L. R. 9 Exch. 71; *S. C.* L. R. 10 Exch. 100; L. R. 1 Ap. Cas. (1876), 754; Ch. & Alt. R. R. *v.* Pondrom, 51 Ill. 333; State *v.* Balt. & O. R. R. 24 Md. 84.

In New Jersey Railroad Company *v.* Palmer, 33 N. J. 90, the plaintiff was a passenger on the defendants' steam ferry and railroad from New York to Newark, by the ten o'clock P. M. boat. The boat had come up close to the bridge on the Jersey City side, and had been fastened by the chains to the bridge, and the front chains on the boat had been let down, and the plaintiff was in the act of stepping from the boat to the shore, in the immediate rear of the other passengers, when his foot was caught between the boat and the bridge, and badly crushed. Held, that the plaintiff was not barred on ground of contributory negligence, although at the very instant of stepping from the boat to the bridge he did not examine particularly to see if there was a vacant space between boat and bridge.

[4] Radley *v.* R. R. L. R. 1 App. Cas. (1876) 759. See supra, § 326; Scott *v.* R. R. 11 Irish C. L. 377; Wilder *v.* R. R. 65 Me. 332; Norris *v.* R. R. 35 N. H. 271; State *v.* R. R. 52 N. H. 528; Trow *v.* R. R. 24 Vt. 487; Spofford *v.* Harlow, 3 Allen, 176; Isbel *v.* R. R. 27 Conn. 393; Kerwhacker *v.* R. R. 3 Ohio St. 172; Railroad Co. *v.* Elliott, 4 Ohio St. 475; Wright *v.* Brown, 4 Ind. 95; Railroad Co. *v.* Caldwell, 9 Ind. 397; Railroad Co. *v.* Adams, 26 Ind. 76; Railroad Co. *v.* Still, 19 Ill. 499; Railroad Co. *v.* Collins, 2 Duvall, 114; Hamilton *v.* R. R. 36 Iowa, 31; Ill. Cent. R. R. *v.* Cragin, 71 Ill. 177; St. Louis R. R. *v.* Britz, 72 Ill. 256; Ill. Cent. R. R. *v.* Hammer, 72 Ill. 347; Brown *v.* R. R. 50 Mo. 461; Meyers *v.* R. R. 59 Mo. 531; Manley *v.* R. R. 64 N. C. 655; Foster *v.* Holly, 38 Ala. 76; Whirley *v.* Whiteman, 1 Head, 610; Nashville, &c. R. R. *v.* Carroll, 6 Heisk. 347; Pacific R. R. *v.* Houts, 12 Kans. 328. Thus a passenger who insisted on riding on the outside of a coach, though requested by the driver to take his seat inside, was held entitled to recover for injuries caused by the negligence of the driver, the position of the plaintiff not having con-

§ 344. An important distinction has been already observed,[1] which it is desirable at this point to reiterate. It is negligence for me to run down even a trespasser when by proper care I could avoid him. It is otherwise, however, with regard to the meddling by strangers in my absence with my machinery, or other property of such character. I can readily, in exercise of the ordinary diligence, keep myself from injuring a person meeting me on the highway, or even on my own grounds. But I cannot, by the exercise of such diligence, produce a machine or construct a building in meddling with which an intruder may not be hurt. Hence the same grade of diligence which could avoid the one injury could not avoid the other.[2] With regard to real estate and buildings other questions arise, which will be noticed in future sections.[3] It is enough now to say that a possessor of lands or tenements is not at liberty, as will presently be seen, to plant in them dangerous instruments which may seriously injure trespassers, but he is under no duty to keep his premises in a safe condition for others than those whom he invites, and he is therefore not liable to trespassers for injuries they may receive from defects, not amounting to traps, in such premises.[4]

Distinction between injuries inflicted on a trespasser by another person and injuries he inflicts on himself.

II. CONTRIBUTORY NEGLIGENCE AS TO SPECIAL CASES.

§ 345. 1. It has just been said that there is an essential distinction to be taken between the case of a trespasser who is wantonly injured when trespassing, and a trespasser who, by his own meddlesomeness in interfering with an agency comparatively innocent, brings injury on himself. This proposition will be now more fully illustrated.

Trespassers.

§ 346. A trespasser, notwithstanding his trespass, may have

tributed to the accident. Keith *v.* Pinkham, 43 Me. 501. See other cases cited supra, § 323 *et seq.*, and infra, §§ 354, 388; 2 Redf. on R. R. (5th ed.) 256.

[1] See supra, §§ 112, 315.

[2] See infra, § 761.

[3] Infra, §§ 347, 351.

[4] See, also, infra, §§ 821–22. See discussion in Hargrave *v.* Deacon, 25 Mich. 6, by Campbell, J. In Zoebisch *v.* Tarbell, 10 Allen, 385, where a person fell down a trap-door, where he had no lawful occasion to be, he was held to have no cause of action, he having without invitation unnecessarily intruded on the defendant's premises. And see Frost *v.* Grand Trunk R. W. Co. 10 Allen, 387.

redress for negligent injuries inflicted on him, and in such case the maxim applies, *Injuria non excusat injuriam.*[1] Even though he is liable to an action for the injury which he does, he does not necessarily forfeit his right of action for an injury which he has sustained, unless such injury result from imperfections or defects, which the owner is not, as a prudent man, required to guard against, so far as concerns persons visiting his premises without invitation.[2]

Trespasser may recover for negligent hurts.

§ 347. The owner or occupier of land or other property may bear either of the four following relations to a party injured by something connected with such property: —

(1) I may properly inclose dangerous machinery on my own premises, such machinery being an essential industrial factor. If a person intrudes on such machinery, and is injured, I am not required to make good his loss. If machinery, in order to be put in operation, has to be protected against such casualties, no machinery could be put in operation, because no such protection could be afforded. Hence comes the well established rule, that *a trespasser who meddles with an instrument not in itself dangerous cannot recover damages for the injuries his meddlesomeness has brought on himself.* On this point it is now necessary only to refer to other sections where the position as just stated is vindicated at length.[3]

But not when meddling with machines.

It should at the same time be remembered, that he who places a dangerous instrument in a place where it is likely to be meddled with inadvertently is liable for the consequences.[4]

§ 348. (2) I may tolerate my neighbors making short cuts over

[1] Supra, § 323; Radley *v.* R. R. L. R. 1 App. Cas. (1876) 759, cited supra, § 326; Alston *v.* Herring, 11 Exch. 822; Dimes *v.* Pertley, 15 Q. B. 276; Roberts *v.* Rose, L. R. 1 Exch. 82; Davies *v.* Mann, 10 M. & W. 546; R. R. *v.* Stout, 17 Wall. 659; Birge *v.* Gardiner, 19 Conn. 507; Brown *v.* Lynn, 37 Penn. St. 510; Morrissy *v.* Wiggins Ferry Co. 43 Mo. 380; Augusta, &c. R. R. *v.* McElmurray, 24 Ga. 75.

[2] Barnes *v.* Ward, 9 C. B. 392, 420; In re Williams *v.* Groucott, 4 B. & S. 149, 157; Binks *v.* South Yorkshire R. C. 3 B. & S. 244; Hounsell *v.* Smyth, 7 C. B. N. S. 731; Hardcastle *v.* South Yorkshire R. C. 4 H. & N. 67. With Barnes *v.* Ward, supra, compare Stone *v.* Jackson, 16 C. B. 199; Holmes *v.* North Eastern R. C. L. R. 4 Exch. 254; Indermaur *v.* Dames, L. R. 1 C. P. 274; and see fully, supra, §§ 323–26; infra, § 347.

[3] See supra, §§ 109, 110, 112, 315, 340, 344; and see Gilbert *v.* Nagle, 118 Mass. 278.

[4] Infra, § 860.

my land, either fenced or unfenced, or it may be a fact of which I may be cognizant, or ought to be cognizant, that my land is visited by persons for innocent purposes, or for the purpose of committing trifling trespasses. If so, I have no right to place spring-guns or man-traps on my land, and I am responsible for the consequences if I do so.[1] Hence, in an English case,[2] the defendant, for the protection of his property, some of which had been stolen, set a spring-gun, without notice, in a walled garden, at a distance from his house, and the plaintiff, who climbed over the wall in pursuit of a stray fowl, having been shot, the defendant was held liable in damages. It is true that in a subsequent case this decision was doubted,[3] because it proceeded on the ground, that setting spring-guns without notice was, independently of the statute then in force, an unlawful act; though the earlier English cases indicate that even at common law, before the statute, persons without notice could recover for damages thus received.[4] In this country, while a house may be thus protected from burglars, no man has a right to place on his land any instruments to injure persons merely straying on such land.[5]

May recover for hurt through traps or spring-guns.

The same rule exists, as will soon be abundantly shown, as to the application of dangerous agencies, such as fire and steam, to trespassers. It is no defence to the reckless running down of cattle, that the cattle were trespassing on the road;[6] nor to the reckless striking of a traveller by a locomotive, that the traveller was loitering on the track;[7] nor to the negligent injury of a passenger, that he was trespassing in a car.[8] In other words, where the defendant has been guilty of letting loose a destructive engine, public or private,

And so as to fire and steam sent out recklessly.

[1] State *v.* Moore, 31 Conn. 479; Gray *v.* Coombs, 7 J. J. Marsh. 478.

[2] Bird *v.* Holbrook, 4 Bing. 628, cited 1 Q. B. 37; Wootton *v.* Dawkins, 2 C. B. N. S. 412. See, also, Judgm., Mayor *v.* Brooke, 7 Q. B. 339. See, as to the right to kill vermin, Aldrich *v.* Wright, 53 N. H. 398.

[3] Judgm., Jordin *v.* Crump, 8 M. & W. 789, where the court agree in opinion with Gibbs, C. J., in Deane *v.* Clayton, 7 Taunt. 489, which was an action for killing plaintiff's dog by a spike placed by defendant *with notice*.

[4] See Jay *v.* Whitefield, cited 3 B. & A. 308; Townsend *v.* Wathen, 9 East, 277.

[5] See supra, § 340; State *v.* Moore, supra; Gray *v.* Coombs, supra; Johnson *v.* Patterson, 14 Conn. 1.

[6] See infra, § 397 *et seq.*

[7] See infra, §§ 388–390.

[8] See infra, § 354.

producing the damage complained of, he cannot excuse himself on the ground of a prior negligence of the plaintiff.[1]

§ 349. Nor am I justified in making excavations either on the path which I have permitted other persons to traverse, or so near a public road that travellers, in the ordinary aberrations or casualties of travel, may stray or be driven over the line and be injured by falling into the excavation.[2]

And so for excavations by roadside.

[1] See Collis *v.* Selden, L. R. 3 C. P. 495; Seymour *v.* Maddox, 16 Q. B. 326; Southcote *v.* Stanley, 1 H. & N. 247; Corby *v.* Hill, 4 C. B. N. S. 565; Chapman *v.* Rothwell, E., B. & E. 168, 170; Bolch *v.* Smith, 7 H. & N. 736; Wilkinson *v.* Fairrie, 1 H. & C. 633; White *v.* Phillips, 15 C. B. N. S. 245; Brass *v.* Maitland, 6 E. & B. 470, 484; Farrant *v.* Barnes, 11 C. B. N. S. 553; Hutchinson *v.* Guion, 5 C. B. N. S. 149; France *v.* White, cited infra, § 350; R. R. *v.* Stout, 17 Wall. 657; Balt. & O. R. R. *v.* Boteler, 38 Md. 568.

[2] For cases of excavations near public roads, so near as to make owner liable for injuries of persons ignorantly and innocently trespassing, see Firmstone *v.* Wherley, 2 D. & L. 208; Barnes *v.* Ward, 9 C. B. 392; Hardcastle *v* R. R. 4 Hurl. & N. 67; Corby *v.* Hill, 4 C. B. N. S. 566; Hadley *v.* Taylor, L. R. 1 C. P. 53; Norwich *v.* Breed, 30 Conn. 535; Mullen *v.* St. John, 57 N. Y. 567; Harman *v.* Stanley, 66 Penn. St. 464; Boynton *v.* R. R. 29 Ohio St.; Young *v.* Harvey, 16 Ind. 314; Hargreaves *v.* Deacon, 25 Mich. 5. See Bigelow's Cases on Torts, 688, 689; and see Howland *v.* Vincent, 10 Metc. 371, there criticised; and Hounsell *v.* Smyth, 7 C. B. N. S. 731; Bolch *v.* Smith, 7 H. & N. 736; and Dinks *v.* R. R. 3 B. & S. 244, where it is held that the excavation must be so near the highway as to expose travellers to danger. In Hadley *v.* Taylor, L. R. 1 C. P. 53, the plaintiff, in passing along a highway at night, fell into a "hoist-hole," which was within fourteen inches of the public way, and unfenced. The hole formed part of an unfinished warehouse, one floor of which the defendants were permitted to occupy whilst a lease was in course of preparation, and the aperture was used by the defendants in raising goods from the basement to an upper floor. It was held, that the defendants had a sufficient occupation of the premises to cast upon them the duty of protecting the hoist-hole; and that the hole was near enough to the highway to constitute a nuisance.

The rule is the same as to private ways permitted by a land-owner. The defendant, the owner of a lot in the centre of a populous village, lying near a public square, for many years permitted the public to pass over such lot without molestation, to effect a short cut between two opposite streets, and there known as Buel Street, to an alley known as Exchange. There was no fence, nor any other visible boundary; and when subsequently, in the erection of a building upon this lot, defendant made an excavation, which was left uncovered, and the public were permitted to pass over the lot after the erection of the building was begun, as they previously had done, the plaintiff, while passing over this lot at night, without his own negligence, fell into this excavation and was injured. It was held by the New York court of appeals that defendant

But beyond this my liability to trespassers, voluntary or involuntary, does not go. I may make what excavations I choose on my own land, without fencing them in, provided they are not on a line over which I permit travellers to pass, or so near a public road that into them a traveller may unwittingly fall.[1]

Liability to persons invited.

§ 350. (3) If I invite persons into my house for no specific business purpose, and, therefore, as no part of a contract, I say to them, "Take me as you find me. I do not pretend to guarantee anything. If the house is not too old and rickety for me, it is not too old and rickety for you, if I give you *bonâ fide* what I keep for myself. At all events, you can no more complain, if you choose to come into my house, on my invitation, that you have to encounter the same risks in it I am accustomed to encounter, than you can complain if you drop in to dine with me, that I give you pot-luck." Hence, it is properly held that a man does not undertake to make his house safe so far as concerns mere visitors. He is governed by the rule, *Sic utere tuo ut non alienum laedas*. His duty is non-contractual; it is simply that a visitor on coming to his house is to be exposed to no greater risks than a person visiting such a house is ordinarily exposed to.[2] And so far as concerns dangers incidental to a dwelling-house, unless these dangers are occult, but known to the owner, and thus partaking of the nature of a trap, he is not bound to give notice of them to the visitor.[3] But for anything in the nature of a trap, or concealed source of mischief, the owner is liable.[4]

was liable for the injury so caused. Beck *v.* Carter, 1877. Infra, §§ 824, 824 *a*.

[1] Infra, § 824 *a*; Hardcastle *v.* R. R. 4 H. & N. 67; Stone *v.* Jackson, 16 C. B. 199; Frost *v.* R. R. 10 Allen, 387; Knight *v.* Abert, 6 Barr, 472; Cox *v.* Market Co. 18 Am. L. R. 103. As to railway platforms and approaches, see infra, §§ 642–653, 821–825.

[2] Infra, §§ 824 *a*, 825–6; Southcote *v.* Stanley, 1 H. & N. 247; Smith *v.* Dock Co. L. R. 3 C. P. 326; Chapman *v.* Rothwell, E., B. & E. 168; Bolch *v.* Smith, 7 H. & N. 736; Wilkinson *v.* Fairrie, 1 H. & C. 633; Gautrat *v.* Egerton, L. R. 2 C. P. 371; Peirce *v.* Whitcomb, 48 Vt. 127; Elliott *v.* Pray, 10 Allen, 378; Pittsburg R. R. *v.* Bingham, 29 Ohio St., cited infra, §§ 822–7; Stroub *v.* Loderer, 53 Mo. 38; Louisville, &c. R. R. *v.* Murphy, 9 Bush., 522.

[3] Campbell on Negligence, § 32; Southcote *v.* Stanley, 1 H. & N. 247; Smith *v.* Dock Co. L. R. 3 C. P. 326; Welfare *v.* R. R. L. R. 4 Q. B. 693. See Axford *v.* Prior, C. P. 14 W. R. 611; and see fully, infra, §§ 824–7.

[4] Supra, § 348; infra, §§ 826–7; Bolch *v.* Smith, 7 H. & N. 736; Sullivan *v.* Waters, 14 Ir. Cr. C. L. 460; White *v.* France, L. R. 2 C. P. D.

§ 351. When I make a contract with a particular person, if I do not faithfully discharge the conditions of the contract, I am liable for the injury to him thence arising. My engagements, therefore, are of a still higher character than those mentioned under the last head. It is not "Come in, and take what you can find;" it is, "Come in, and if you will inspect my goods, or take a seat in my carriage or boat, I agree to give you suitable accommodations to make your arrangements." Hence, a shop-keeper is bound to exhibit the diligence of a good business man in his specialty in providing, suitable accommodations for those coming in to inspect his goods; a carrier, similar accommodations to those coming in to buy his tickets. And this includes safe access to the place of business.[1] And this protection has been extended to a person rightfully on a wharf for the purpose of carrying mail-bags to a steamboat from the post-office, the wharf-owner being bound to

Persons coming on business.

308, June, 1877. In this case, the plaintiff, a licensed waterman, having complained to a person in charge that a barge of the defendant's was being navigated unlawfully, was referred to defendant's foreman. While going along defendant's premises in order to see the foreman, the plaintiff was injured by the falling of a bale of goods so placed as to be dangerous, and yet to give no warning of danger. Held (1), that the plaintiff was not a bare licensee, but was on defendant's premises by the invitation of defendant, and for a purpose in which both plaintiff and defendant had a common interest; and (2), that the injury was caused by a trap or concealed source of mischief, within the meaning of Bolch *v.* Smith, 10 W. R. 387; 7 H. & N. 736. "Under these circumstances," said Denman, J., "we think the verdict for the plaintiff was warranted by the authority of Corby *v.* Hill, 6 W. R. 575; 4 C. B. N. S. 556, and Indermaur *v.* Dames, L. R. 1 C. P. 274; *S. C.* L. R. 2 C. P. 311, and other cases. He was there on lawful business, in which both the plaintiff and defendant had an interest, and he was there by the invitation of the defendant's servants, who referred him to their foreman in a matter relating to the defendant's business. He was proceeding to the place mentioned by those who directed him, and the bale which caused the injury was placed in such a position as to be dangerous, and yet to give no warning of danger to any one passing by the spot where it fell, so that it was in the nature of a trap or concealed source of mischief, within the meaning of those words as used in Bolch *v.* Smith, 10 W. R. 387; 7 H. & N. 736; and in the case of Sullivan *v.* Waters, cited by the counsel for the defendant; so that, whether the plaintiff could be properly described as a bare licensee or not, the defendant would be liable."

[1] Infra, §§ 652–7, 821, 829; Paddock *v.* R. R. 18 L. T. N. S. 60; Chapman *v.* Bothwell, E., B. & E. 168; Bigelow's Cases on Torts, 704; Freer *v.* Cameron, 4 Rich. 228. As to railway platforms, see infra, § 653. As to approaches to vessels, see infra, § 656.

keep the wharf in good order for persons having a lawful right to pass over it on business.[1] So, as to a person crossing a railroad track, owned exclusively by the company, by invitation of the company, the company is bound to use all practicable diligence and care to prevent a collision.[2]

Visitors entering or leaving premises by passages other than those allowed.

§ 352. A person visiting another's premises must go by the way such other designates. To attempt to approach or leave by any other way than that designated makes the visitor, if there be anything to indicate that such other way is not intended to be used, a trespasser; and in case he is injured by the imperfection of such passage, he cannot recover damages from the owner.[3]

Carrier bound to protect and

§ 353. 2. *Passengers on railways.* — It will be hereafter seen that the element of insurance, which by our common law enters into contracts by common carriers for

[1] Wendell *v.* Baxter, 12 Gray, 194. See Carleton *v.* Franconia Co. 99 Mass. 216; Parnaby *v.* Lancaster Co. 11 Ad. & El. 223.

[2] Lunt *v.* R. R. L. R. 1 Q. B. 277; Sweeny *v.* R. R. 10 Allen, 368. In Watkins *v.* R. R. 37 L. T. N. S. 195, Denman, J., said: "I am of opinion that a railway company, keeping open a bridge over their line for the use of their passengers, is bound to keep that bridge reasonably safe, and that if in practice the friends of passengers are allowed by the company's servants to see passengers off by the trains, and to cross the bridge without asking special permission, the duty of the company in that respect cannot be put down towards them otherwise than it is towards those whom they accompany for such not unreasonable purpose. I think that this view is consistent with the cases of Corby *v.* Hill, 4 C. B. N. S. 556, and Smith *v.* London & St. Katharine's Docks Company, 18 L. T. Rep. N. S. 403; L. Rep. 3 C. P. 326. I regard the passenger's friend so permitted to go along the bridge by constant acquiescence on the part of the railway company as not being in the nature of a person barely licensed to be there, but as being invited to go to the same extent as the passenger whom he accompanies, and is there on lawful business in which the passenger and the company have both an interest. I consider, also, that the case of Indermaur *v.* Dames, 16 L. T. Rep. N. S. 293; L. Rep. 2 C. P. 311, is in favor of this view, though not exactly in point, inasmuch as the person injured, who was the plaintiff in that case, was actually engaged on business in which the defendant and plaintiff had a common interest, whereas here the plaintiff was not there on business, though reasonably accompanying a passenger who was, which seems to me to make no substantial difference for the purposes of the present question." See infra, § 642.

[3] Chapman *v.* Bothwell, E., B. & E. 168; Hounsel *v.* Smith, 7 C. B. N. S. 73; Elliott *v.* Pray, 10 Allen, 378; Zoebisch *v.* Tarbell, 10 Allen, 385; Sweeny *v.* R. R. 10 Allen, 368; Bancroft *v.* R. R. 97 Mass. 275. See Stratton *v.* Staples, 59 Me. 94; Stroub *v.* Soderer, 53 Mo. 38. See infra, §§ 824–7.

the transport of goods, does not touch such contracts for the transport of passengers. It will also be shown that the duty of the common carrier of passengers is that of a good business man skilled in the particular duty he has in charge.[1] The duty of the passenger is reciprocal. He must conform to the rules the carrier prescribes for the safety of the common enterprise. He must omit no reasonable precaution which is incumbent on him so far as concerns the maintenance of such safety. For any neglect on his part which may injure the carrier or fellow-passengers, to come to the subject immediately before us, he is liable; and for injuries to himself, caused by his own neglect, he cannot recover from the carrier.[2] When we proceed, however, to the question how such neglect, or "contributory negligence," is to be defined, a series of subordinate distinctions arrest us, which will now be considered.

safely carry passenger.

§ 354. Is a trespasser in a carriage subject to a different rule in this respect from a pay passenger? No doubt there is authority for maintaining that he is.[3] Certainly if a trespasser, instead of taking his seat within the carriage, in such a way that he can be seen by the carrier, secretes himself in some part of the carriage not intended for passengers, he cannot, if he be injured from being in this position, claim damages from the carrier. A carrier, in undertaking to carry passengers safely, undertakes to carry them safely if they place themselves under his direction in particular places prescribed for the purpose; and he will not be held liable for damages accruing to an interloper, who, unnoticed by him, hides in the crevices of a locomotive or in the hold of a ship. But if a trespasser take his seat openly in a carriage, in the place assigned to passengers generally, there is no reason why a different standard of care should be applicable to him than is applicable to other passengers. Waiving for the present the point elsewhere discussed, that even a trespasser, supposing him to continue such, is not withdrawn from the protection of that law which

Duty to trespassers in carriages.

[1] See, also, supra, § 31.

[2] As to liability of carriers for misconduct of their agents, see supra, §§ 169, 178; and see, generally, Sullivan *v.* Phil. & Read. R. R. 6 Casey, 234; Penn. R. R. *v.* Zebe, 33 Penn. St. 525; McDonald *v.* Chic. & N. W. R. R. 26 Iowa, 124.

[3] Lygo *v.* Newbold, 9 Exch. 302. But see supra, § 345.

requires that no man shall negligently injure another,[1] the carrier, if he permits such trespasser to continue in the carriage, cannot regard him, after such permission, as a trespasser. The carrier has a right to expel the trespasser at once from the carriage. If the carrier omits to do this, and if the person in question remains voluntarily with the carrier's assent, then the trespass passes into a *quantum meruit* contract of carriage. On the one side, the person so entering the carriage is bound to the carrier for reasonable pay for the carriage. On the other side, the carrier is bound, from the time he assents thus to carry such person, to exercise towards him the diligence, prudence, and skill of a good carrier in that particular kind of transport; in other words, the particular kind of diligence, prudence, and skill which the carrier is bound to exercise towards all other passengers. Nor can any other rule be adopted without great practical inconveniences. Who is a trespasser? Is a person a trespasser who, in neglect of the rules of the company, postpones buying his ticket in the ticket-office? Is a person a trespasser who, relying on the supposed good-will of the company, takes his seat hoping to slide through without paying fare? Is it a trespass to enter and remain in a car expecting to pay when required? If not, who can decide whether such expectation may not have been in the breast of every one who takes his seat without paying in the car?[2] Because, therefore, (*a*) no one can, without liability, injure by his negligence those specifically and with notice to himself under his charge, no matter how ill may be their deserts; (*b*) the carrier, who, instead of expelling a trespasser, permits him to remain in the carriage, enters into a contract of common carriage with such person; and (*c*) there is no test by which we can distinguish the trespasser thus taking a seat in the carriage from the *bonâ fide* traveller who expects to

[1] See supra, § 345.

[2] For instance, it cannot be questioned that a person who, by mistake, gets on a passenger car other than the one he intended to take passage in, is a passenger on the car he is in, and is entitled to the protection the law gives to other passengers. The company is entitled to recover for the distance it carries him, and is bound to treat him with the same care as other passengers. When he is put out at his own request, the same care is to be used in putting him out as in putting out any other passenger. Col. &c. R. R. *v.* Powell, 40 Ind. 37. See infra, § 646 *b*.

pay when required, we must hold that in such case the trespasser, whom the carrier does not expel from the carriage, stands, so far as concerns protection from neglect, on the same footing as the ordinary passenger.[1]

Duty to free passengers.

§ 355. Is a free passenger to be placed in a different position, so far as concerns his rights to protection from neglect, from a pay passenger? This question, also, was at one time answered in the affirmative; the courts being led astray by the mistaken view of mandates which will be hereafter pointed out.[2] But there is now an almost uniform acquiescence in the true view that a person who undertakes to do a service for another is required to exhibit to such other person the care usual among good specialists of the class, when dealing with the particular agencies.[3] Even should it be understood that the service is free, the confidence accepted is an adequate consideration to support the duty.[4] Eminently is this the case with what are called "free" passengers on the great lines of common carriage. As has been already observed, there is, in such cases, not merely confidence tendered and accepted, but some sort of business consideration, though this be a mere courteous interchange of accommodations. For these and other reasons noticed under the last head, the carrier is bound to exhibit the same diligence and skill towards passengers of this class as he is to passengers who pay money for their tickets.[5]

[1] See Phil. & Read. R. R. *v.* Derby, 14 How. (U. S.) 468; Lovett *v.* R. R. 9 Allen, 557; Holmes *v.* Wakefield, 12 Allen, 580; Wilton *v.* R. R. 107 Mass. 108; Rounds *v.* R. R. 64 N. Y. 129; and cases cited infra, §§ 641 *a*, *b*.

[2] Infra, §§ 485, 501, 641.

[3] See remarks of Ames, J., in Gill *v.* Middleton, 105 Mass. 479; citing Benden *v.* Manning, 2 N. H. 289; Thorne *v.* Deas, 4 Johns. R. 84; Elsee *v.* Gatwood, 5 T. R. 143; Shields *v.* Blackburne, 1 H. Bl. 158.

[4] Smith's Lead. Cas. (6th ed.) 193, adopted in Broom's Com. 680; infra, §§ 438, 641.

[5] Infra, §§ 436, 437, 641; Collett *v.* L. & N. W. R. R. 16 Q. B. 989; Phil. & Read. R. R. *v.* Derby, 14 How. (U S.) 468; New World *v.* King, 16 How. (U. S.) 464; Wilton *v.* Middlesex R. R. 107 Mass. 108; Nolton *v.* West. R. R. 15 N. Y. 444; Carroll *v.* R. R. 58 N. Y. 126; Gillenwater *v.* M. & I. R. R. 5 Ind. 540; Ohio & Miss. R. R. *v.* Muhling, 30 Ill. 23; Rose *v.* R. R. 39 Iowa, 246. A drover, travelling with a free pass, for the purpose of taking care of his stock, has been, by the supreme court of the United States, expressly ruled to be a passenger for hire. Infra, §§ 589, 595; New York R. R. *v.* Lockwood, 17 Wall. 357; 1 Am. Law T. R. N. S. 21; Indianap. R. R. *v.* Horst, 93 U. S. (3 Otto) 291; so, also, Penn. R. R. *v.* Henderson,

§ 356. Even supposing that the passenger is passed "free" by mistake, he is entitled, in case of injury by negligence, to recover. In England, for instance, railroads are by statute required to carry, in certain trains, children under three years of age without charge, and are entitled to half the fare charged for an adult in respect of all children between three and twelve years of age. The plaintiff's mother, carrying in her arms the plaintiff, a child of three years and two months old, took a ticket for herself by one of these trains on the defendants' railway, but did not take a ticket for the plaintiff; in the course of the journey an accident occurred through the negligence of the defendants, and the plaintiff was injured. At the time the plaintiff's mother took her ticket no question was asked by the defendants' servants as to the age of the child, and there was no intention on the part of the mother to defraud the company. It was held by the court of queen's bench that the plaintiff was entitled to recover against the defendants for the injury he had received.[1] And it has been held in Massachusetts that a passenger standing with due care on the platform of a horse-car, invited there by the driver and without paying fare, may recover from the company for injuries caused by the driver's negligence.[2]

Agreement to save carrier harmless.

§ 357. As will be hereafter more fully noticed, it has been ruled that a passenger who receives a free passage, on a contract that he will himself assume all risks of accident, and that the company is not to be liable for injuries to him occurring through negligence of itself or its servants, cannot recover damages from the company for injuries sustained by him through its servant's negligence.[3] But so far as concerns drover's tickets, it is well settled in this country that such a contract is no defence to an action for injuries to the person caused by negligence.[4] And so far as concerns tickets which may

51 Penn. St. 315. Union Pac. R. R. *v.* Nichols, 8 Kans. 505, can only be sustained on the ground that the alleged "free" passenger was a servant of the company.

[1] Austin *v.* R. R. L. R. 2 Q. B. 442.

[2] Wilton *v.* R. R. 107 Mass. 108.

[3] Gallin *v.* R. R. L. R. 10 Q. B. 212; Kinney *v.* R. R. 34 N. J. (5 Vroom) 513; *S. C.* 3 Vroom, 407; Wells *v.* R. R. 24 N. Y. 181; Perkins *v.* R. R. 24 N. Y. 208; Indiana Cent. R. R. *v.* Mundy, 21 Ind. 48; Illinois Cent. R. R. *v.* Reed, 37 Ill. 484.

[4] Penn. R. R. *v.* Henderson, 51

be assumed to be absolutely free, it is hard to see how we can sustain contracts to exempt the carrier from liability for negligence. It would be barbarous to say that because a free passenger agrees to be neglected, a railroad company will be justified in applying to him otherwise than carefully the tremendous agency of steam.[1]

§ 358. How far a person visiting a depot as an escort is entitled to the protection of a passenger is elsewhere discussed.[2] Duty to escorts.

§ 359. It has been shown [3] that he who negligently injures another, to whom he owes a specific duty, cannot defend himself on the ground that the party so injured came negligently within the range of such duty. This doctrine is peculiarly applicable to the engagements of a common carrier, and as to these it may be generally declared that when the proximate cause of the injury to the plaintiff is the carrier's neglect of duty to the plaintiff, the carrier cannot relieve himself by setting up such antecedent negligence of the plaintiff as is not a direct and immediate cause of the injury.[4] Passenger not chargeable with remote negligence.

§ 360. Is a passenger who is injured when leaning out of the window of a railroad carriage chargeable with such contributory negligence as precludes him from recovery? In other words, by so leaning out of the window does he expose himself to risks which the carrier does not undertake to cover? Certainly, in view of the nearness with which cars on double tracks and switches must necessarily pass to each other, as well as of the contingency of other objects being grazed, the carrier cannot be viewed as undertaking Passenger leaning out of a carriage window.

Penn. St. 315; and other cases cited infra, § 589.

[1] Infra, § 641 *a*.

[2] Infra, § 642.

[3] See supra, §§ 130, 164, 335.

[4] See § 335 *et seq.*; Chic., B. & Q. R. R. *v.* Paine, 59 Ill. 534; C. & A. R. R. Co. *v.* Pondrom, 51 Ill. 333; Louisville & N. R. R. *v.* Yandall, 17 B. Mon. 586; Louisville & N. R. R. *v.* Sickings, 5 Bush, 1; Same *v.* Collins, 2 Duvall, 114; Same *v.* Robinson, 4 Bush, 507; Louisville, C. & L. R. R. *v.* Mahony, 7 Bush, 235. See Jackson *v.* R. R. 36 L. T. N. S. 485; L. R. 2 C. P. D. 125.

That a person injured by the negligence of the driver of a horse-car was intoxicated at the time of the accident will not prevent his maintaining an action for damages unless his intoxication contributed to the injury. Maguire *v.* Middlesex R. R. 115 Mass. 239. Supra, § 306.

to protect the passenger from collisions except in the space occupied by the car. It is true that for a carrier to permit his road to be so constructed that his carriage passes within only an inch or two of a tunnel wall, or of trains on a parallel track, may be such negligence as will make him liable for damages to a passenger who, leaning perhaps an inch out of the window, is injured by striking against the object within whose close proximity the car is thus brought.[1] It may in such case be well argued that no carrier, dealing with so powerful an element as steam, has a right to expose others to such high risks. But supposing there is a foot distance between the carriage and such colliding object, can a passenger, who thrusts out his arm to this distance from the car window, recover from the company for the injury, supposing the collision to have been otherwise negligently produced by the company?

§ 361. In a leading case on this point this question is discussed as follows: "A passenger, on entering a railroad car, is presumed to know the use of a seat and the use of a window: that the former is to sit in, and the latter to admit light and air. Each has its separate use. The seat he may occupy in any manner most comfortable to himself; *the window he has a right to enjoy, but not to occupy.*[2] Its use is for the benefit of all, not for the comfort of him alone who by accident has got nearest to it. . . . . His negligence consists in putting his limbs where they ought not to be, and liable to be broken, without his ability to know whether there is danger or not approaching. . . . . In conclusion, we have simply to reassert, that when a traveller puts his elbow or arm out of a car window voluntarily, without any qualifying circumstances impelling him to it, it must be regarded as negligence *in se;* and when that is the state of the evidence, it is the duty of the court to declare the act negligence

[1] In accordance with this view, it has been held in Illinois, where a passenger allows his arm, which is resting on the sill of a car window, to slightly project outside, and thereby has his arm broken in passing a freight train, that the negligence of such person is remote, compared with the negligence of the company in permitting its freight cars to stand so near the track of its passenger train; and that a recovery may be had for the injury sustained. Chic. &c. R. R. Co. *v.* Pondrom, 51 Ill. 333. See, also, Spencer *v.* R. R. 17 Wis. 487.

[2] See, as to use of windows, Gee *v.* Metropolitan R. R. L. R. 8 Q. B. 165.

in law."[1] The same view has been sustained by other courts of high authority.[2]

§ 362. No doubt, in each of the cases where such contributory negligence of the passenger has been held to prevent the passenger's recovery, the facts were such as to show that the passenger thrust out his arm to a distance which a railroad company, in pursuance of its duties as such, is not bound to keep clear. But suppose the company so lays its tracks, or builds its tunnels, or plants its posts, that passing cars will be struck if swerving an inch or two from their prescribed track? Suppose a passenger, whose arm projects this single inch from the car window, is thereby struck and injured? Can there be any question that for a railroad company to run its lines so closely is, in view of the perilousness of the dangers to be encountered, a lack of that prudence which a good business man must show in a degree proportioned to the importance and risks of the duty he undertakes? If the permitting of such close grazing of car against post, tunnel, or car on parallel line is negligence *per se;* then the fact that the plaintiff, by the far remoter and less palpable negligence, if it be such, of leaning an inch out of the window, is not precluded from recovery.[3]

[1] Laing *v.* Colder, 8 Penn. St. 479.

[2] See Todd *v.* Old Colony Railroad Company, 3 Allen, 18, and 7 Allen, 207; Holbrook *v.* Utica & Schenectady Railroad Company, 12 N. Y. 236; Ohio & Miss. R. R. *v.* Schiebe, 44 Ill. 460; Lafayette & Indianapolis Railroad Company *v.* Huffman, 27 Ind. 288; Indianapolis & Cincinnati Railroad Company *v.* Rutherford, 29 Ind. 82; Telfer *v.* Northern Railroad Company, 30 N. J. Law Rep. 190; Louisville & N. R. R. *v.* Sickings, 5 Bush, 5. In Maryland, while the above rule has been affirmed, it has been held that where there is a conflict of testimony as to how the plaintiff's arm came to be thus exposed, whether as stated by him, or by the witnesses for the defence, this is a question of fact to be determined exclusively by the jury. Pitts. & C. R. R. Co. *v.* Andrews, 39 Md. 329.

In New J. R. R. *v.* Kennard, 21 Penn. St. 203, it was held to be the duty of the company to put wire screens to windows wherever there was risk of grazing; and that in default of this the company was liable for injuries produced by such grazing. But this was overruled in P. & C. R. R. *v.* McClurg, 56 Penn. St. 294.

[3] As illustrating this, I refer to an interesting case (Chic., Burl. & Q. R. R. *v.* Gregory, 58 Ill. 272) hereafter more fully detailed. The deceased was a fireman on a locomotive belonging to the defendants, and while passing a station in the night-time, he was struck and killed. The circumstances showed that he was acting in the line

§ 363. A traveller shuts the open door of a car, when the conductor might have been called to do so, and in so doing is injured through the negligence of the company. Is the company liable for his injury? This was once answered in the negative in England, for the reason that the plaintiff had no right, in order to escape a slight inconvenience, to run any risk.[1] But this ruling, which would virtually make *culpa levissima* a bar to recovery, is contrary to principle;[2] and has been subsequently repudiated by English judges of authority.[3] It has also been questioned whether a passenger can recover from the company for injuries sustained by him, when in order to look out of a window he presses the door of which the window is part, so that the door, being negligently fastened, flies open. That he can recover has been determined in England, on reasoning which cannot be easily refuted.[4]

Pressing against or meddling with door or window.

§ 364. It may no doubt be said to be negligence, viewing the term in its widest sense, for a passenger to stand on the platform of a car propelled by steam. But while there standing, if a collision occur through the company's negligence, the company cannot, as a rule, defend itself on the ground that he was standing on the platform, unless it appear that after being warned specifically of danger he recklessly persisted in staying, and unless it also appear that the injury he suffered was one which fell on him because he was in that par-

Standing on platform of car.

of his duty, looking out for signals, and while so doing, and in the exercise of due care and caution, he was struck by a "mail-catcher," which had been placed near the track by the company. Two other accidents had previously occurred from the same cause, of which the company had notice. It was ruled that the company was guilty of negligence in having omitted to place the "mail-catcher" a safe distance from the track.

[1] Adams *v.* R. R. L. R. 4 C. P. 739.

[2] Supra, § 58.

[3] Brett & Keating, JJ., in L. R. (8 Q. B. 161, 168. See, also, Siner *v.* R. R. L. R. 4 Exch. 117. In Fordham *v.* R. R. L. R. 4 C. P. 619, the company was held liable for the negligence of a guard in slamming a door without warning on a passenger's hand.

[4] Gee *v.* R. R. L. R. 8 Q. B. 185. See infra, § 629. In Jackson *v.* R. R. L. R. 2 C. P. D. 125, it was held by the court of appeals that when a passenger is forced out of his place by the overcrowding of the car, he is not chargeable with contributory negligence in so moving.

ticular position.[1] Even standing on the top of a car is not contributory negligence when directed by the conductor.[2]

§ 365. Of course the special risks which are distinctively encountered by persons standing on platforms vary with the character of the road, the probability of collision, and the speed of the train. Horse-cars passing through cities are peculiarly liable to be struck by passing wagons; yet even as to horse-cars it has been ruled that standing on the platform is not such negligence as to necessarily preclude recovery.[3] Thus in California, it is held that the fact that the plaintiff was standing on the rear platform of a street-car, with his hand on the railing, at the time his hand was injured by the negligent driving against it of the defendant's dray, is not such contributory negligence as defeats the plaintiff's right to recover.[4] So, in Missouri, it has been ruled that at common law the fact that a street railway passenger voluntarily puts himself on the front platform of the car, when there is room inside, will not relieve the company from liability for injuries there received by him through the company's negligence.[5] So, in Massachusetts, it was declared, in a case already cited, that for a passenger to stand on the platform of a horse-car is not negligence, when invited or permitted by the driver, even though the passage be free.[6] Nor, in case of a child, permitted by a driver to remain on the platform, is there any contributory negligence to be imputed to the child.[7]

§ 366. At the same time it must be remembered that to occupy exposed positions, which have not been intended or designed for such occupation, may be contributory negligence.[8] It be-

[1] Meesel *v.* R. R. 8 Allen, 234; Angusta R. R. *v.* Renz, 55 Ga. 126. See Lambeth *v.* R. R. 66 N. C. 494; Zemp *v.* R. R. 9 Rich. 84.

[2] Indianap. R. R. *v.* Horst, 93 U. S. (3 Otto) 291.

[3] Ginna *v.* R. R. cited infra, § 367.

[4] Seigel *v.* Eisen, 41 Cal. 109. See infra, § 639.

[5] Burns *v.* R. R. 50 Mo. 139.

[6] Wilton *v.* R. R. 107 Mass. 108. See infra, § 369, and see Maguire *v.* R. R. 115 Mass. 239, where it was held that standing on the front platform of a horse-car, when there is room inside, is not of itself conclusive evidence that a person injured by the negligence of the driver of the car was not in the exercise of due care.

[7] Pittsburg R. R. *v.* Caldwell, 74 Penn. St. 421. See Hestonville R. R. *v.* Gray, 3 Notes of Cases, 421.

[8] Todd *v.* R. R. 3 Allen, 18; 7 Allen, 207; Galena & C. R. R. *v.* Yorwood, 15 Ill. 468; Penn. R. R. *v.* Zebe, 23 Penn. St. 318; Jacobus *v.* R. R. 20 Minn. 125.

comes therefore, in such a case, a question of fact, how far the position taken by the plaintiff was thus exposed.[1] That to stand on an exposed place, when required by the conductor, is not contributory negligence, we have already seen.[2]

§ 367. In New York, by statute, a plaintiff who stands on a platform in disobedience of express notices, and unless forced to by the crowding of the cars, cannot recover for injuries sustained by the negligence of the company. It has been held that this statute does not apply to a passenger to whom the conductor had not assigned a seat in the car, although there were seats remote from the place where he entered.[3]

Passing from car to car when in motion.

§ 368. Passing from car to car, when the train is moving, if followed by an injury to the plaintiff in consequence of such exposure, bars his recovery. Yet if with the permission of the conductor he thus passes from car to car, on some proper errand, exposure of this class may be regarded as an incidental risk of the duty of common carriage assumed by the carrier.[4] Whether it is negligence for a passenger in a steam railway train to leave his seat, while the train is still in motion, but in the station, and stand inside of the car, is for the jury.[5]

Getting on a train negligently.

§ 369. To get on a train when in motion, without invitation and without necessity caused by the company, is negligence which precludes a person from recovering from the company damages for injuries sustained by him in the attempt.[6] If, however, the officers of the train invite a pas-

[1] Johnson *v.* R. R. 70 Penn. St. 359.

[2] Indianap. R. R. *v.* Horst, 93 U. S. (3 Otto) 291.

[3] Willis *v.* R. R. 34 N. Y. 670. See, also, Ginna *v.* R. R. N. Y. Ct. of App. 1877, Alb. L. J., February 10, 1877, where it was held that a passenger being on the front platform of a horse-car was not such contributory negligence as to defeat a recovery, although he was there voluntarily, and it was not a physical impossibility for him to enter the car, but he could not do so without unreasonable discomfort to himself and those already in the car, and the fare was taken from him by the conductor without insisting that he should find a place within the car; and this was not affected by the fact that the conductor directed the passengers on the platform to "move in," the door being shut and no attempt being made to open it so that passengers could go in. And see Quinn *v.* R. R. 51 Ill. 495.

[4] McIntyre *v.* R. R. 43 Barb. 532. See Marquette *v.* Chic. & N. W. R. R. 33 Iowa, 563; Galena *v.* Chic. R. R. 15 Ill. 468.

[5] Barden *v.* R. R. 121 Mass. 426.

[6] Harvey *v.* R. R. 116 Mass. 269; Phillips *v.* R. R. 41 N. Y. 177; Ohio R. R. *v.* Stratton, 78 Ill. 88; Ill. Cent.

senger to board the train when in motion, the negligence is to be imputed to them.[1]

§ 370. As to horse-cars a less stringent rule is applied, from the fact that the danger in getting on or off a horse-car when in motion is comparatively slight; and it has consequently been ruled that getting on a horse-car when in motion cannot be held to be negligence in law, but that in such case the question of negligence is ordinarily one of fact.[2]

§ 371. Negligence in getting off a train may be viewed in a variety of aspects, some of which will be now noticed. As a general rule, it is negligence for a passenger to alight in a time and way not permitted by the company,[3] though if the negligence is imputable to the servants of the company the plaintiff may recover.[4] When there has been an invitation to alight, this course justifies the passenger in alighting.[5] In respect to children, peculiar care is exacted from conductors in this relation.[6] When a platform is provided, pas-

Negligently alighting.

R. R. *v.* Chambers, 71 Ill. 519; Ill. Cent. R. R. *v.* Slatton, 54 Ill. 133; Knight *v.* R. R. 23 La. An. 462; Hubener *v.* R. R. 23 L. An. 492; Johnson *v.* R. R. 70 Penn. St. 357; Lewis *v.* R. R. 38 Md. 588. See as indicating exceptions, Texas, &c. R. R. *v.* Murphy, 46 Tex. 356.

[1] Ibid. Contributory negligence is imputable to a plaintiff who arrives at the depot before the cars, with plenty of time to go upon the platform, but who deliberately waits upon the ground on the opposite side of the track, and when the cars come along attempts to get aboard from that side, after dark. Mich. Cent. R. R. Co. *v.* Coleman, 28 Mich. 441.

[2] Phillips *v.* R. R. 49 N. Y. 177; Morrison *v.* R. R. 56 Ibid. 302; Mettlistadt *v.* R. R. 4 Robt. 377; Burrows *v.* R. R. 63 N. Y. 302; Eppendorff *v.* R. R. N. Y. Ct. of Appeals, 1877. Supra, § 365.

[3] See Bridges *v.* North London R. R. L. R. 6 Q. B. 392; *S. C.*, reversed in H. of L. L. R. 7 H. L. 214; Frost *v.* Grand Trunk R. R. 10 Allen, 387; Penn. R. R. *v.* Zebe, 33 Penn. St. 318; Ohio & M. R. R. *v.* Schiebe, 44 Ill. 460; Keokuk Packet Co. *v.* Henry, 50 Ill. 460; Ill. Cent. R. R. *v.* Able, 59 Ill. 264; Rockford, &c., R. R. *v.* Coultes, 67 Ill. 398. See Railroad *v.* Pollard, 23 Wall. 341.

In Morrison *v.* R. R. 56 N. Y. 302, it was held that though where a passenger upon a railroad receives an injury in attempting to alight from a car while in motion, this cannot be held, as matter of law, under all circumstances, contributory negligence, it is not in every case a question of fact for a jury. See, also, opinion of Allen, J., in Filer *v.* R. R. 49 N. Y. 47.

[4] Pittsburg, &c. R. R. *v.* Caldwell, 74 Penn. St. 421; Crissey *v.* R. R. 75 Penn. St. 83.

[5] Bridges *v.* R. R. L. R. 7 H. L. 274; Pabst *v.* R. R. 2 McArthur, 42.

[6] Crissey *v.* R. R. 75 Penn. St. 83; Phil. &c. R. R. *v.* Hassard, 75 Penn. St. 367.

sengers are required to use it, if practicable, and are negligent if they alight at other places.[1]

In a Massachusetts case, it appeared that the plaintiff was a passenger on the defendants' cars, and alighted from the cars at night, at a station of the defendants, on one of two platforms extending along each side of the track to a highway (which, as the plaintiff knew, crossed the railroad), and having a step at the end next the highway; that, instead of walking along the platform, he voluntarily stepped from it, with the intention of going obliquely across the track to the highway, and when he stepped off fell into a cattle guard dug across the track, and was injured; that the night was so dark that he felt with his feet to find the edge of the platform; and that he did nothing to ascertain what he would meet on stepping from the platform. It was held by the supreme court he was not in the exercise of due care, and could not recover.[2]

It has been ruled, however, that while it is negligence for a passenger, when a railroad has provided platforms and other conveniences for alighting, to step off at other places where the train happens to stop, yet when the company is in the habit of receiving and discharging passengers at the latter places, it cannot charge a person descending at such a place, when the train stops, with negligence.[3]

§ 372. Although railroad companies are bound to stop at the stations for which they have received passengers a sufficient length of time to enable passengers, using due diligence, to alight, yet the failure of a company so to do, it has been held in New York, will not justify a passenger in getting off the car while it is in motion.[4]

[1] See Mich. Cent. R. R. *v.* Coleman, 28 Mich. 441.

[2] Forsyth *v.* R. R. 103 Mass. 511. And see, also, Owen *v.* R. R. 36 L. T. N. S. 850; and see infra, § 647.

[3] Keating *v.* R. R. 49 N. Y. (4 Sick.) 673; Delamartyr *v.* R. R. 24 Wis. 578. See Foy *v.* R. R. 18 C. B. N. S. 225, and infra, § 647.

[4] Burrows *v.* R. R. 63 N. Y. 560. "The fault of the company in omitting to allow sufficient time to alight without safety, does not justify the passenger in imprudently exposing himself to danger by getting off the cars while in motion. The cases in which a recovery has been allowed, notwithstanding that the passenger undertook to leave a car while in motion, are exceptional, and depend upon peculiar circumstances. In Penn. R. R. *v.* Kilgore, 32 Penn. St. 292, the train started while the plaintiff, a female and her three young children

§ 373. Where the evidence was that a steam train, upon which the deceased was a passenger, had stopped at a station and remained a sufficient length of time to enable passengers to leave it in safety, but the deceased, not availing of that opportunity, waited until the train was again in motion, and then, without the interference or suggestion of any of the employees of the company, attempted to leave the train, and, while doing so, was thrown under the cars and received injuries of which he died; the company, it was ruled in Illinois, was not liable, there appearing to have been no negligence on part of its officers.[1]

Even as to horse-cars, if a passenger attempts to alight without any notice of his intention to the servants of the railroad company in charge of the car, and without their knowledge or being negligent in not knowing that he is doing so, the company, it is held in Massachusetts, is not liable for injuries received by him through a fall occasioned by the sudden starting of the car during his attempt.[2]

§ 374. Complicated questions arise where a train overshoots a platform, and a passenger attempts to alight. Is such an attempt contributory negligence, in case of an injury, on the part of the plaintiff? If the plaintiff descends deliberately, knowing the facts, without invita-

Alighting hastily when beyond a platform.

were engaged in alighting. Two of the children had alighted, and one of them had fallen, and the plaintiff with the other child, while the cars were in the act of starting, sprang upon the platform and was injured. In Filer *v.* R. R. 49 N. Y. 47, the cars, as they approached the station which was announced, moved very slowly, but did not stop. The plaintiff was waiting on the platform of the car, and the company's brakeman said to her, "You had better get off, they are not going to halt any more." Rapallo, J. Burrows *v.* R. R. 63 N. Y. 560. To same effect, see Gavett *v.* R. R. 16 Gray, 501.

[1] Ill. C. R. R. Co. *v.* Slatton, 54 Ill. 133, and see Morrison *v.* R. R. 56 N. Y. 302. See, also, New Orleans, &c. Railroad Company *v.* Statham, 42 Miss. 607, where it is held that if a passenger is sick, unable to walk, and requires assistance to get from the car, and longer delay at the station is necessary for him to be safely removed, he should give timely notice of the same to the conductor. It is further said that sick persons, and persons unable to take care of themselves, should provide for themselves proper assistance while travelling in railroad cars; it is not the duty of railroad companies to supply such assistance. See supra, § 307. It is not, it was further said, the duty of conductors to see to the debarkation of passengers; though they should have the stations announced, and stop long enough for passengers to get off.

[2] Nichols *v.* R. R. 106 Mass. 463.

tion from the conductor, the tendency of opinion is that, if injured, he is not entitled to recover from the company.[1]

§ 375. It should, however, be remembered that contributory negligence cannot be set up as a defence when such alleged negligence was the result of nervous excitement and tremor produced by the defendant's misconduct.[2] "It has been long established," says a learned English judge,[3] "that if a person, by a negligent breach of duty, expose the person toward whom the duty is contracted to obvious peril, the act of the latter in endeavoring to escape from the peril, although it may be the immediate cause of the injury, is not the less to be regarded as the wrongful act of the wrong-doer.[4] And this doctrine has been extended in more recent times to a 'grave inconvenience,' when the danger to which the passenger is exposed is not in itself obvious." [5]

[1] Siner *v.* R. R. L. R. 3 Exch. 150; L. R. 4 Exch. 117; and see Lucas *v.* R. R. 6 Gray, 64; Penn. R. R. *v.* Aspell, 23 Penn. St. 147; Heil *v.* Glanding, 42 Penn. St. 493; Jeffersonville R. R. *v.* Hendricks, 26 Ind. 228; Columbus R. R. *v.* Farrell, 31 Ind. 408; Memphis, &c. R. R. *v.* Whitfield, 44 Miss. 486.

[2] Infra, § 377; supra, §§ 93–5, 304.

[3] Field, J., Robson *v.* R. R. L. R. 10 Q. B. 271.

[4] Jones *v.* Boyce, 1 Stark. N. P. 493.

[5] Citing Adams *v.* R. R. L. R. 4 C. P. 744; Gee *v.* R. R. Co. supra; and see The George and Richard, L. R. 3 A. & E. 479.

In Robson *v.* R. R. above cited, the plaintiff was a passenger by the defendants' railway to B., a very small station; and on the arrival of the train at the station, the engine and part of the carriage in which plaintiff was riding were driven past the end of the platform, which is short, and came to a stand-still. The door of the plaintiff's compartment was beyond the end of the platform. "Upon the train stopping, plaintiff rose and opened the door, and stepped on to the iron step; she looked out and saw the station-master, who is the only attendant kept there, taking luggage out of or putting luggage into a van. She did not see the guard or any other railway servant, and she stood on the step looking for somebody to help, until she became afraid of the train moving away; and, no one then coming, she tried to alight by getting on to the footboard; she had her back to the carriage, and she had hold of the door with her right hand, and got one foot on to the footboard, and whilst endeavoring to get the other foot on to the footboard she lost her hold of the carriage door, and slipped, and fell, and was injured. She had a small bag on her left arm, and an umbrella and two small articles in her left hand, but nothing in her right hand. The judge having nonsuited the plaintiff on the above evidence, with leave to enter a verdict for the plaintiff," it was ruled, first, that there was evidence from which a jury might have properly found that the plaintiff was invited, or

§ 376. In a case finally decided in 1877, the proof was that the train drew up at a station with two of the carriages beyond the platform; and it was proved on the part of the company that the servants of the company called out to the passengers to keep their seats; on the other hand, this warning was not heard by the plaintiff and other passengers in one of these carriages. After waiting some little time, and the train not having put back, the plaintiff got out, and in so doing fell and was injured; for which injury she brought an action against the company. It was held by the court of appeals, reversing the decision of the exchequer division, that there was evidence of negligence on the part of the defendants to go to the jury.[1]

had reasonable ground for supposing she was invited, to alight by the company's servants; and that the defendants had failed in their duty toward the plaintiff, and had not provided a reasonable substitute for a platform. *Held*, secondly, that the jury might not improperly have found that the expectation of being carried beyond the B. station was reasonably entertained by the plaintiff, and that the inconvenience would have been such as not to render it imprudent on her part to expose herself to the danger incurred in alighting; and that the defendants were therefore liable for the injury resulting from the plaintiff's act, which had been caused by their negligent breach of duty. And that the nonsuit was therefore wrong, and the verdict ought to be entered for the plaintiff.

[1] Rose *v.* R. R. Law Rep. 2 Exch. D. (C. A.) 248.

In a prior English case, the evidence was that the plaintiff was a passenger on the defendants' line of railway by a train which arrived at night at the station for which the plantiff was bound. The part of the platform at that station at which passengers could alight was of sufficient length for the whole train to have been drawn up alongside of it, but in addition to that part the platform extended some distance, gradually receding from the rails. When the train drew up the body of it was alongside the platform, but the last carriage, in which the plaintiff rode, was opposite the receding part of the platform, and about four feet from it. The night was very dark, and the place where the last carriage stopped was not lighted, though the rest of the station was well lighted with gas. There was no express invitation given to the plaintiff by the company's servants to alight, but the train had been brought to a final stand-still, and did not move on again until it started on its onward journey. No warning was given to the plaintiff that the carriage was not close to the platform, or that care would be necessary in alighting. The plaintiff opened the carriage door, and, stepping out, fell into the space between the carriage and the platform, and sustained injuries, for which she brought an action against the company. It was ruled by the court of exchequer that there was evidence of negligence on the part of defendants' servants to go to the jury. It was further declared that bringing a railway carriage to a stand-still at a place which is unsafe for a passenger to alight, under

§ 377. The rule, just noticed, that the carrier is liable for injuries received by a passenger who, in alarm caused by the carrier's negligence, jumps from the carriage,[1] has been extended to cases where the train negligently passes a station where a passenger is due, and where, in the anxiety of the moment, he jumps from the car in an unsuitable place.[2] Thus in a New York case,[3] the evidence was that the plaintiff, by the company's negligence, was suddenly put to an election between leaving the cars while they were moving slowly, or submitting to the inconvenience of being carried by the station where she desired to stop; and it was ruled that the company was liable for the consequences of the choice, provided it was not exercised wantonly or unreasonably. It is a proper question, it was ruled, for a jury, whether the adoption of the former alternative is ordinary care and prudence, or a rash and reckless exposure to peril. Under such circumstances, where the decision is required to be made upon the instant, the passenger, it was declared, ought not to be held to a rigid accountability for the highest degree of caution.

Passenger suddenly put to an election and leaping from car.

§ 378. A company is liable for negligence in starting from a station before the passengers ticketed for it have disembarked, so that one of them, alighting after the train has started, is hurt.[4] No matter what may be the form in which the election may be put, it is negligence

Starting before passengers have disembarked.

circumstances which warrant the passenger in believing that it is intended he shall get out, and that he may do so with safety, without any warning of his danger, amounts to negligence on the part of the company, for which, in the absence of contributory negligence on the part of the passenger, an action may be maintained. Cockle *v.* R. R. L. R. 7 C. P. 321; following Praeger *v.* R. R. 24 L. T. N. S. 321, and qualifying Siner *v.* R. R. L. R. 4 Exch. 117.

[1] See supra, §§ 93–5, 304, 375, for cases; Jones *v.* Boyce, 1 Stark. 493; and see Eldridge *v.* R. R. 1 Sandf. 89; Buel *v.* R. R. 31 N. Y. 31; Twarnley *v.* R. R. N. Y. Ct. of App. 1877; 18 Alb. Law J. 256

Ingalls *v.* Bills, 9 Met. 1; Southwest R. R. *v.* Paulk, 24 Ga. 356; R. R. *v.* Aspell, 23 Penn. St. 147; and see Bridges *v.* R. R. L. R. 6 Q. B.; L. R. 7 H. of L. 213; Robson *v.* R. R. supra, § 375.

[2] Penn. R. R. *v.* Kilgore, 32 Penn. St. 292; Ill. Cent. R. R. *v.* Able, 59 Ill. 131. And see Robson *v.* R. R. supra, § 375.

[3] Filer *v.* R. R. 49 N. Y. 47; see *S. C.* 59 N. Y. 30; and see, as in some points diverging, Damont *v.* R. R. 9 La. An. 44.

[4] Toledo, &c. R. R. *v.* Baddely, 54 Ill. 19; and see Penn. R. R. *v.* Kilgore, 32 Penn. St. 292.

to compel the passenger to alight at an unusual and unsuitable place.[1]

When passenger is excused by invitation to alight.

§ 379. We have already touched generally on the excuse given to a passenger by an invitation from the officers of a train.[2] We may here call specific attention to the rule that the calling of the name of a station, on coming to a stop, is to be regarded as an invitation to alight; and a passenger who on such summons leaves the car, taking due caution to look around him when practicable, may recover from the company in case he be injured by ignorantly stepping on an unsuitable place.[3]

Whether the speed is such as to make it negligence to step from a car is for jury.

§ 380. It must be kept in mind that whether it is negligent for a person to step from a train when it is in motion is a question often of mixed law and fact, dependent upon many considerations (such as that of the plaintiff's capacity of judging, when suddenly put to an election),[4] which a jury is the proper tribunal to weigh.[5] It may be generally said that although if a passenger, without any directions from the conductor, voluntarily incurs danger by jumping off the train while in motion, the carrier is not responsible for injury resulting therefrom; yet, if the motion of the train is so slow that the danger of jumping off is not reasonably apparent, and the passenger acts under the instructions of the conductor, then the defence of contributory negligence is unavailing.[6] And it is for the jury to say whether the danger of leaving or boarding a train when in motion is so ap-

[1] Curtis *v.* R. R. 29 Barb. 285; Memphis, &c. R. R. *v.* Whitfield, 44 Miss. 466. See Ill. Cent. R. R. *v.* Slatton, 54 Ill. 133; supra, § 372.

[2] See supra, § 371. When a train overshoots a platform, calling out the name of a station without cautioning the passengers not to alight at that spot, is negligence. Weller *v.* London, B. & S. R. R. Law Rep. 9 C. P. 126. But "Calling out" is only an intimation that the train is approaching the station. Honeyman, J., in Weller *v.* R. R. L. R. 9 C. P. 134; quoting Keating, J., in Cockle *v.* R. R. L. R. 5 C. P. 468. See Alb. L. J. Aug. 1, 1874, p. 72; Columbus R. R. *v.* Farrell, 31 Ind. 408.

[3] See supra, § 376; infra, § 650; Lewis *v.* R. R. L. R. 9 C. P. 66; Southern R. R. *v.* Kendrick, 40 Miss. 374.

[4] See supra, § 377.

[5] Filer *v.* R. R. 49 N. Y. 42, 47; 59 N. Y. 551; *S. C.*, on a third trial, reported in Alb. L. J. for Feb. 10, 1877; Crissey *v.* Hestonville, 75 Penn. St. 83; Wyatt *v.* R. R. 55 Mo. 485; Burham *v.* R. R. 56 Mo. 338; Doss *v.* R. R. 59 Mo. 27.

[6] Lambeth *v.* R. R. Co. 66 N. C. 494.

parent as to make it the duty of the passenger to desist from the attempt.[1] At the same time calling out name of station does not excuse a passenger in leaping from a car when in rapid motion;[2] nor in taking any step in itself reckless, and which might be avoided by inquiry or examination.[3]

Being in wrong car.

§ 381. The company cannot defend itself on the ground that the plaintiff, at the time of the injury, was not in the car to which he was assigned.[4]

Persons approaching road bound to look out.

§ 382. 3. *Collision of traveller with train.* — It is the duty of a person who attempts to cross a railroad to listen for signals, to notice all signs that may be put up as warnings, and to look up and down the road.[5] It follows, therefore, that if a traveller, by looking along the

[1] Johnston *v.* R. R. 70 Penn. St. 357; Ill. Cent. R. R. *v.* Able, 59 Ill. 131.

[2] Damont *v.* R. R. 9 La. An. 441.

[3] See Bridges *v.* R. R. supra; Cockle *v.* R. R. supra.

[4] Penn. R. R. *v.* McCloskey, 23 Penn. St. 526. See Keith *v.* Pinkham, 43 Me. 501; Carroll *v.* R. R. 1 Duer, 571; Jacobus *v.* R. R. 20 Minn. 125.

[5] Stubley *v.* R. R. L. R. 1 Exch. 13; Skelton *v.* R. R. L. R. 2 C. P. 631; Cliff *v.* R. R. 5 Q. B. 258; Webb *v.* R. R. 57 Me. 117; State *v.* Manchester, &c. R. R. 52 N. H. 528; Wilson *v.* Charlestown, 8 Allen, 138; Allyn *v.* R. R. 105 Mass. 77; Wilcox *v.* R. R. 39 N. Y. 358; Besiegel *v.* R. R. 40 N. Y. 9; Baxter *v.* R. R. 41 N. Y. 430; Belton *v.* Baxter, 54 N. Y. 245; Gillespie *v.* City, 54 N. Y. 468; McCall *v.* R. R. 54 N. Y. 642; Reynolds *v.* R. R. 58 N. Y. 249; Telfer *v.* R. R. 30 N. J. 138; North Penn. R. R. *v.* Heileman, 49 Penn. St. 60; Hanover R. R. *v.* Coyle, 55 Penn. St. 396; Penn. Canal Co. *v.* Bentley, 66 Penn. St. 30; Lehigh Valley R. R. *v.* Hall, 61 Penn. St. 361; Penn. R. R. *v.* Beale, 73 Penn. St. 504; Balt. & Ohio R. R. *v.* Breinig, 25 Md. 378; Lake Shore R. R. *v.* Miller, 25 Mich. 274; Kelly *v.* Hendrie, 26 Mich. 255; Bellefontaine R. R. *v.* Hunter, 33 Ind. 365; R. R. *v.* Graham, 46 Ind. 240; Chicago & Alton R. R. Co. *v.* Gretzner, 46 Ill. 74; Chicago & N. W. R. R. *v.* Sweeny, 52 Ill. 325; Ill. Cent. R. R. *v.* Baches, 55 Ill. 371; St. Louis, Alton, &c. R. R. *v.* Manly, 58 Ill. 300; Chicago, &c. R. R. *v.* Jacobs, 63 Ill. 178; Chicago, &c. R. R. *v.* Notzki, 66 Ill. 455; Chicago R. R. *v.* Hatch, 79 Ill. 137; Chicago, &c. R. R. *v.* Lee, 68 Ill. 576; Chicago, &c. R. R. *v.* Bell, 70 Ill. 102; Chicago, &c. R. R. *v.* Ryan, 70 Ill. 211; Ill. Cent. R. R. *v.* Godfrey, 71 Ill. 500; New Orl. R.R. *v.* Mitchell, 52 Miss. 808; De Armand *v.* R. R. 23 La. An. 264; Hearne *v.* R. R. 50 Cal. 482. See infra, § 798; and see Ellis *v.* R. R. L. R. 9 C. P. 551.

In Cleveland, &c. R. R. Co. *v.* Crawford, 24 Ohio St. 631, McIlvaine, J., said: "The failure to look or listen for an approaching train, though such failure may contribute to the injury, cannot, under all circumstances, be regarded as negligent. Whether it is or not depends on the circumstances of the particular case. . . . . The exercise of ordinary care to avoid an injury is all the law requires; and no one can be held to be negligent who

road, could have seen an approaching train in time to escape, it will be inferred, in case of collision, that he did not look, or looking, did not heed what he saw; and in such case the road, under

exercises such care. True, when the danger is imminent and human life is at stake, great precaution should be exercised; but this is only ordinary care under the circumstances; because persons of ordinary prudence, under such circumstances, exercise great caution and care. When, therefore, a person about to cross a railroad track, under a given state of circumstances, exercises that degree and amount of care which prudent persons usually exercise under like circumstances, he is without fault. In other words, when the circumstances are such that prudent persons would not ordinarily look or listen for an approaching train, there is no negligence in omitting to look or listen."

Whether the plaintiff exercised due care in lookout, is ordinarily for the jury. Gaynor *v.* R. R. 100 Mass. 208, 212; Wheelock *v.* R. R. 105 Mass. 203; Chaffee *v.* R. R. 104 Mass. 108; French *v.* R. R. 116 Mass. 537; Craig *v.* R. R. 118 Mass. 431; Sheehy *v.* Burger, 62 N. Y. 558; Massoth *v.* R. R. 64 N. Y. 524; Haycroft *v.* R. R. 64 N. Y. 636; Ewen *v.* R. R. 38 Wis. 613. Though a finding in this respect against the weight of evidence will he set aside by the court. Hinckley *v.* R. R. 120 Mass. 257.

In a clear case of negligence, a nonsuit will be ordered. Johnson *v.* R. R. 20 N. Y. 65; Davis *v.* R. R. 47 N. Y. 400; Reynolds *v.* R. R. 58 N. Y. 248; Mitchell *v.* R. R. 64 N. Y. 655.

In Pennsylvania, the burden of proving a failure to look out, is with the defendant, unless shown by plaintiffs' case. Penn. R. R. *v.* Weber, 76 Penn. St. 157; Weiss *v.* R. R. 79 Penn. St. 387.

In Flemming *v.* Western Pacific Railroad Co. 49 Cal. 253, the supreme court of California held, as matter of law, that it was contributory negligence for a person driving a wagon with a four-horse team when approaching a railroad crossing with which he is familiar, and which he intends to pass, while the atmosphere is so filled with dust that he cannot see fences within a few feet of him, to attempt to cross without stopping his team to listen for an approaching train.

In Pennsylvania Railroad Co. *v.* Ackerman, 74 Penn. St. 265, it was held, that the distance from the track at which the traveller should pause and listen depends upon the circumstances.

In Weiss *v.* Pennsylvania Railroad Co. 79 Penn. St. 157, it was declared, that where a man's horse is running away, he is not absolutely bound to "stop, look, and listen."

In Butterfield *v.* R. R. Co. 10 Allen, 532, the plaintiff was acquainted with the highway and railroad. If he had looked he would have seen the train. It came from the west, and for half a mile west of the highway the track was in plain sight. "It was a stormy night, raining, blowing hard from the northwest, and snowing some. He had his hand up, holding his hat on his head, and this prevented him from seeing the train. . . . . He was listening for the cars, his attention was called to the subject, and he expected to hear the bell or whistle, but there was no bell rung or whistle blown." "Plaintiff's neglect to use his own eyes was palpable negligence." Chapman, C. J.

See, also, Cliff *v.* The Midland Railway Co. L. R. 5 Q. B. 258. Infra, § 798.

ordinary circumstances, is not liable.[1] At the same time he is not required to get out of his team to look out; nor is it necessary for him, if in moving he can obtain a clear view in time to escape danger, "to stop for the purpose of listening."[2] But where he is walking on a track, at a place where he has no legal right to be (*i. e.* where there is no crossing) then it is peculiarly incumbent on him to take every precaution to avoid danger, since on such a place those running the train have no reason to expect him, or to prepare for his presence.[3]

Workmen under orders.

§ 383. A workman engaged in his work, under orders, with a special understanding that trains approaching the spot where he is working are to slacken speed, is not ex-

[1] Allyn *v.* R. R. 105 Mass. 77; Wheelock *v.* R. R. 105 Mass. 203; French *v.* R. R. 116 Mass. 540; Haight *v.* R. R. 7 Lans. 596; Morse *v.* R. R. 55 Barb. 490; Wilcox *v.* R. R. 39 N. Y. 358; Griffin *v.* R. R. 40 N. Y. 34; Davis *v.* R. R. 47 N. Y. 400; Weber *v.* R. R. 58 N. Y. 456; Chicago, &c. R. R. *v.* Van Patten, 64 Ill. 510; Toledo R. R. *v.* Jones, 76 Ill. 311; Toledo R. R. *v.* Miller, 76 Ill. 278; Toledo, &c. R. R. *v.* Goddard, 25 Ind. 185; Bellefontaine R. R. *v.* Hunter, 33 Ind. 356; R. R. *v.* Graham, 46 Ind. 240; Toledo, &c. R. R. *v.* Shuckman, 50 Ind. 42; St. Louis R. R. *v.* Mathias, 50 Ind. 65; Carlin *v.* R. R. 37 Iowa, 316; Black *v.* R. R. 38 Iowa, 515; Haines *v.* R. R. 41 Iowa, 227; Benton *v.* R. R. 42 Iowa, 192; Butler *v.* R. R. 28 Wis. 256; Lake Shore R. R *v.* Miller, 25 Mich. 274; North Penn. R. R. *v.* Heileman, 49 Penn. St. 60; Penn. R. R. *v.* Beale, 73 Penn. St. 504; Penn. R. R. *v.* Weber, 76 Penn. St. 157; Flemming *v.* R. R. 49 Cal. 253.

In Indiana the courts go to the utmost limits on this line. See Bellefontaine R. R. *v.* Hunter, 33 Ind. 356.

[2] Grover, J., Davis *v.* N. Y. Cent. R. R. 47 N. Y. (2 Sickles) 400; Duffy *v.* R. R. 32 Wis. 269; though in such case the question of contributory negligence is for the jury. Penn. R. R. Co. *v.* Ackermann, 74 Penn. St. 565.

As to care required in approaching horse railways, see infra, § 639.

[3] Lang *v.* R. R. 42 Iowa, 677; Finlayson *v.* R. R. 1 Dillon, 579.

In Pennsylvania Railroad Co. *v.* Weber, 72 Penn. St. 27, it was held that it is not necessary to prove affirmatively that a person injured when crossing a railroad on a public highway had stopped and looked up and down the railroad; whether he used the proper precautions is to be determined by all the circumstances of the case. See infra, § 798.

Where a person approaches a railroad crossing, with a single track and infrequent trains, and sees a train, with the rear toward him, going, apparently, in an opposite direction, and is deceived by appearances, and his attention distracted by the actions of persons at a distance attempting to warn him of his danger from the train which is backing rapidly and quietly toward him, and a wagon has crossed just before him, it will be left to the jury to say whether there is want of proper care. Ibid.; Bonnell *v.* R. R. 39 N. J. L. (10 Vroom)

pected to be on the lookout; and hence, if injured by a train coming on him suddenly, without notice, he can recover from the company.[1] Such a workman would make "slow progress with his work, if required constantly to watch for the approach of trains. Under such circumstances the law imposes the duty upon the company to use all necessary precaution, and to give proper signals to warn of danger."[2]

Neglect of signals by trains does not excuse traveller from look-out.

§ 384. Ordinarily, the fact that the train neglected to make statutory or customary warnings does not relieve a person approaching an open crossing from the duty of lookout on approaching the road. "Where a person, knowingly about to cross a railroad track, may have an unobstructed view of the railroad, so as to know of the approach of a train a sufficient time to clearly avoid any injury from it, he cannot, as a matter of law, recover, although the railroad company may have been also negligent, or have neglected to perform a statutory requirement."[3] It has also been ruled that a plaintiff cannot excuse himself by the assumption that lookout is unnecessary at times where by a city ordinance the running of trains is forbidden.[4]

Railroad company's neglect to obey statute may

§ 385. Yet it is easy to conceive of cases in which a traveller may say, "My only way of detecting the approach of a train is by the signals the law requires the company to give when approaching a crossing: there are

[1] See supra, § 245.

[2] Ill. Cent. R. R. *v.* Shultz, 64 Ill. 172.

[3] Cole, J., in Artz *v.* R. R. 34 Iowa, 160, citing Havens *v.* R. R. 41 N. Y. 296; Ernst *v.* R. R. 39 N. Y. 61; *S. C.* 35 Ibid. 9; Wilcox *v.* R. R. Co. 39 Ibid. 358; Baxter *v.* R. R. 41 Ibid. 502; Nicholson *v.* R. R. 41 Ibid. 525; Grippen *v.* R. R. 40 Ibid. 34; Gonzales *v.* R. R. Co. 38 Ibid. 440; Wilds *v.* R. R. 29 Ibid. 315; *S. C.* 24 Ibid. 430. So, also, Gorton *v.* R. R. 45 N. Y. 660; Havens *v.* R. R. 41 N. Y. 296; McCall *v.* R. R 54 N. Y. 642; Gray *v.* R. R. 65 N. Y. 561; Morris, &c. R. R. *v.* Henton, 4 Vroom (N. J.), 189; Runyan *v.* R. R. Co. 1 Dutch. (N. J.) 558; North Penn. R. R. *v.* Heileman, 49 Penn. St. 60; Galena, &c. R. R. *v.* Loomis, 13 Ill. 548; Chic. &c. R. R. *v.* Still, 19 Ill. 499; Ill. Cent. R. R. *v.* Buckner, 28 Ill. 303; Ill. Cent. R. R. *v.* Phelps, 29 Ill. 447; Chic. &c. R. R. *v.* Evans, 42 Ill. 283; Chic. &c. R. R. *v.* Gretzner, 46 Ill. 74; Chic. &c. R. R. *v.* Fens, 53 Ill. 115; Chic. &c. R. R. *v.* Harwood, 80 Ill. 88; Rockford, &c. R. R. *v.* Byam, 80 Ill. 528; Evansville R. R. *v.* Hiatt, 17 Ind. 102; Pittsburg, &c. R. R. *v.* Vinning, 27 Ind. 513; Harlan *v.* R. R. 64 Mo. 480; Fletcher *v.* R. R. 64 Mo. 480; and cases cited infra, § 804.

[4] Callighan *v.* R. R. 59 N. Y. 651.

justify inference of safety.

no such signals; I may therefore infer that no train is approaching." Where there is no other way, beside the ear, of determining the approach of a train, an inference of this kind may be of weight in rebutting contributory negligence.[1]

Liability when view of crossing is obstructed.

§ 386. Hence when the view of the road is obstructed, or when other circumstances make a lookout inadequate, the omission of signals may be negligence making the company liable. Therefore if the railroad, at a crossing, is obstructed in the view of travellers, so as to preclude them from seeing the approach of a train, or there are complicating circumstances calculated to deceive or throw them off their guard, then, whether the omission on part of the company to use bell or whistle is sufficient proof of negligence to sustain a verdict against the company is a question of fact for the jury.[2] And it may be negligence in a railroad company to suffer weeds or underbrush to grow up in such a way as to obstruct the view of a crossing.[3] But it is otherwise when the materials put on the road are incidental to the business of the road; though the existence of such obstructions would have a bearing upon the question of the contributory negligence of

[1] See infra, § 804; and see Cliff *v.* R. R. L. R. 5 Q. B. 258; Elkins *v.* R. R. 115 Mass. 190; Balt. &c. R. R. *v.* Trainor, 33 Md. 542; Tabor *v.* R. R. 16 Mo. 353.

In Galena & Chicago Union R. R. Co. *v.* Loomis, 13 Ill. 548, the court held, "that if, without signals, the injured party might, with care, have seen the train and known that it was approaching, he could not recover. A failure to ring the bell or sound the whistle does not raise a presumption that this was the cause of the injury." Chicago & Miss. R. R. Co. *v.* Patchin, 16 Ill. 198; Galena & Chicago Union R. R. Co. *v.* Dill, 22 Ill. 264; Illinois Central R. R. Co. *v.* Phelps, 29 Ill. 447, and cases cited infra, § 804.

The confusion of the rulings on the point stated in the text is illustrated by the cases of Peoria, &c. R. R. *v.* Siltman, 67 Ill. 72; and Chicago, &c. R. R. Co. *v.* Elmore, Ibid. 176. The instruction to the jury in the first case was this: "That if they believe, from the evidence, that a bell was not rung or the whistle sounded at a distance of eighty rods from the crossing, and kept ringing or whistling until the crossing was reached, and the plaintiff was lulled into security by reason of such neglect on the part of defendants, then the plaintiff would have the right to recover, even though he were guilty of slight negligence." The supreme court held this to be erroneous. In the second case, an instruction substantially the same was held no ground for reversal.

[2] Infra, § 801; Mackey *v.* R. R. 35 N. Y. 75; Richardson *v.* R. R. 45 N. Y. 846; Dimick *v.* R. R. 80 Ill. 338; Roberts *v.* R. R. 35 Wis. 680.

[3] Indianap. R. R. *v.* Smith, 78 Ill. 112.

plaintiff and that of the degree of care with which trains approaching the crossing should be driven.[1]

§ 387. Flagmen, or other servants of the company, are presumed to act as its agents in giving notice; and hence a person who, in compliance with a notice that he can cross, crosses the track, though it may be in view of an approaching train, may recover of the company in case of injury.[2] It has been also held that license to walk on a track may be inferred from long usage, and that persons so licensed are not trespassers.[3]

Company liable if their servants invite travellers to cross the road.

§ 388. That the plaintiff's negligence in approaching track is no defence if the engineer could have prudently avoided collision, results from the position already laid down, that a trespasser cannot be run down with impunity simply because he is a trespasser.[4] To railroad trains, in view of the destructive power they carry with them, this position is peculiarly applicable. Hence it is justly held that though a person be injured while unlawfully on the track, or contributes to the injury by his own carelessness or negligence, yet if the injury might have been avoided by the use of ordinary care and caution by the railroad company, they are liable for damages for the injury.[5]

Plaintiff's negligence no defence if collision could be avoided.

[1] Cordell *v.* R. R. N. Y. Ct. of App. 1877, reversing *S. C.* 6 Hun, 461.

"That the plaintiff did not chance to look up in the sky and over the cars which obstructed his view of the railroad tracks to the north, and see the lantern in the hands of the man standing upon the approaching train, is not conclusive evidence of negligence, or, *per se*, an omission of a proper precaution. Davis *v.* N. Y. C. & H. R. R. R. Co. 47 N. Y. 400. There was no error in refusing the nonsuit." Allen, J., Weber *v.* R. R. 58 N. Y. 456.

[2] Lunt *v.* R. R. L. R. 1 Q. B. 277. Infra, § 798; Chaffee *v.* R. R. 104 Mass. 108; Wheelock *v.* R. R. 105 Mass. 203. Infra, §§ 393, 798.

[3] Murphy *v.* R. R. 38 Iowa, 539; Brown *v.* R. R. 50 Mo. 461.

[4] See supra, § 345; infra, § 798.

[5] Blanchard *v.* St. Co. 59 N. Y. 292; Klein *v.* Jewett, 26 N. J. Eq. 474; Penn. R. R. *v.* Lewis, 79 Penn. St. 33; Chicago R. R. *v.* Wilson, 63 Ill. 167; Indianap. R. R. *v.* Galbraith, 63 Ill. 436; Murphy *v.* R. R. 38 Iowa, 539; Brown *v.* R. R. 50 Mo. 461. See, to same effect, in addition to cases cited supra, § 345 *et seq.*; Budge *v.* R. R. 3 M. & W. 244; Railroad *v.* Whitton, 13 Wall. 176; Trow *v.* R. R. 24 Vt. 487; Daley *v.* R. R. 26 Conn. 591; Lackawanna R. R. *v.* Chenewith, 52 Penn. St. 382; Gray *v.* Scott, 66 Penn. St. 345; Kerwhacker *v.* R. R. 3 Ohio St. 172; Col. &c. R. R. *v.* Terrey, 8 Ohio St. 570; Railroad Co. *v.* Caldwell, 9 Ind. 397; Railroad Co. *v.* Adams, 26 Ind. 76; Bellefontaine R. R. *v.* Hunter,

§ 388 *a*. At the same time we must remember that a person walking on a railroad track, unless under contract of some sort with the company, or by their invitation, or on a highway crossing,[1] has no right to expect that the road should be kept fit for travellers so walking;[2] and though he, as one of a general body of citizens, has, without opposition from the company, been in the habit of so using the track, this does not require any antecedent arrangements to be made in his behalf by the company. He cannot expect adaptations to be made in running the trains, in consequence of his probable presence, and, while he cannot be recklessly run down, he cannot look to any precautions being taken to meet in advance the contingency of his presence.[3] The company is usually only liable for a running down of the plaintiff which could have been avoided by the company without disarranging its business, or in case its servants had notice that the plaintiff was unable to move out of the way, supposing that in such case the collision could have been avoided without risk to the train.[4] Nor is a railway company chargeable with negligence in not making signals or ringing bells for the purpose of warning trespassers from the track, unless such trespassers are seen on the road.[5]

Relations in this respect of trespassers.

33 Ind. 365; Ind. &c. R. R. *v.* Stables, 62 Ill. 313; Pittsburg, &c. R. R. *v.* Knuttson, 69 Ill. 103; R. R. *v.* Collins, 2 Duvall, 114; Brown *v.* R. R. Co. 50 Mo. 461; Balt. &c. R. R. *v.* Trainor, 33 Md. 542; Balt. &c. R. R. *v.* Fitzpatrick, 35 Md. 32; Railroad Co. *v.* State, 36 Md. 366; L. & N. R. R. *v.* Burke, 6 Cold. 45; Rothe *v.* Railway Co. 21 Wis. 256; Butler *v.* M. & St. P. R. R. Co. 28 Wis. 487; Macon, &c. R. R. *v.* Davis, 18 Ga. 679; Cent. R. R. *v.* Davis, 19 Ga. 437; Hicks *v.* R. R. 64 Mo. 430.

[1] Penns. Co. *v.* Krick, 47 Ind. 369.

[2] See supra, § 346; infra, §§ 824, 825.

[3] Sweeny *v.* R. R. 10 Allen, 373; Hickey *v.* R. R. 14 Allen, 429; Weber *v.* R. R. 58 N. Y. 456: Phil. &c. R. R. *v.* Hummell, 44 Penn. St. 375; Gillis *v.* R. R. 59 Penn. St. 129; Jeff. &c. R. R. *v.* Goldsmith, 47 Ind. 43; Ill. Cent. R. R. *v.* Hammer, 72 Ill. 347; Ill. Cent. R. R. *v.* Hall, 72 Ill. 222; Ostertag *v.* R. R. 64 Mo. 421.

"Except at crossings, where the public have a right of way, a man who steps his foot upon a railroad track does so at his peril. The company have not only a right of way, but such right is exclusive at all times and for all purposes. This is necessary not only for the proper protection of the company's rights, but also for the safety of the travelling public. It is not right that the lives of hundreds of persons should be placed in peril for the convenience of a single foolhardy man who desires to walk upon the track." Mulherin *v.* R. R. 81 Penn. St. 366.

[4] Ibid. Infra, § 389 *a*.

[5] Tonawanda R. R. *v.* Munger, 5

§ 389. When a person dashes across a railroad on an open crossing so suddenly and unexpectedly that the train cannot be checked in time to save him except at risks which a prudent engineer would not assume, the company is not liable for the consequences of the collision, even though there may have been failure in the statutory duty of giving notice.[1]

Collision not negligence if stoppage cannot be made without undue risk.

§ 389 *a*. An engineer who sees before him on the track a person apparently capable of taking care of himself has a right to presume that such person on due notice will leave the track, if there be opportunity to do so; and the engineer will not in such cases be chargeable with negligence if, in consequence of such person not leaving the track, the train cannot be checked in time to avoid striking him.[2] But it is otherwise with persons apparently not capable of taking care of themselves, such as

Distinction between persons apparently helpless, and those capable of helping themselves.

Denio, 255; Aurora R. R. *v.* Grimes, 13 Ill. 585; Chic. &c. R. R. *v.* Gretzner, 46 Ill. 74. Infra, §§ 803, 804.

In Nashville, &c. R. R. *v.* Smith, 6 Heiskell, 174, the evidence was that John Smith, the deceased, when drunk, walked upon defendants' track after dark, and then laid down on the rails and went to sleep. While sleeping, he was run over and killed by defendants' train. It appeared that the engine to this train did not have a head-light; neither was the whistle sounded nor the brakes put down, nor was his presence on the track known by those in charge of the train. The court held that the company were liable, inasmuch as the statutory requirements of brake and whistle were not complied with. Either the Tennessee statute goes to the extraordinary extreme of prescribing signals to be given at places not crossings, or the ruling in this respect is wrong. But the omission of the company to provide a head-light is a ground on which the conclusion may be safely rested. As to duty to slacken speed when a person is seen on the track, see infra, § 803.

[1] Supra, § 384; Chicago, &c. R. R. *v.* Gretzner, 46 Ill. 74; Toledo R. R. *v.* Jones, 76 Ill. 311.

[2] Infra, § 803; Jones *v.* R. R. 67 N. C. 125; Phil. & Read. R. R. *v.* Spearen, 47 Penn. St. 300; Telfer *v.* R. R. 30 N. J. 188; R. R. Co. *v.* Graham, 46 Ind. 240. See R. *v.* Longbottom, 3 Cox C. C. 439; R. *v.* Walker, 1 C. & P. 320.

Thus it is not the duty of a railroad engineer, on nearing a public road-crossing, to stop his train for the purpose of avoiding a collision with a wagon and team he may see approaching the crossing, though by applying the brakes he could do so in time to avoid a collision. The engineer in such a case has a right to suppose, when he sees the wagon at a distance approaching the crossing, and the proper signal is sounded, that the person in charge of the team, in obedience to the known custom of the country, will stop, and not attempt to pass immediately in front of a swiftly advancing train. The converse, also,

very young children and persons lying helpless on the track;[1] and so when the engineer has reason to believe that a person is laboring under some disability, or that he does not hear or comprehend the signals.[2] Of course where the engineer is led to believe that a child on the road is leaving the track, he is justified in moving on.[3]

So far as concerns the care required of the traveller, it has been ruled that the age of the plaintiff is to be considered in determining whether he has exercised due care.[4]

Surprise caused by cars running irregularly.

§ 390. If a person watching on a road takes due precautions to avoid collision, but the collision occurs from the train being moved unexpectedly to the surprise of the person so watching, he can recover if there was negligence in so moving the train.[5] So it has been held to be negligence for a company to run a train of cars between a car whose passengers are disembarking and the station which such passengers are striving to reach.[6]

§ 391. Nor, as has been seen, does the fact that the plaintiff was a trespasser relieve the company from liability for the con-

is true, that should the engineer, on approaching the crossing, see a team on the track when it would not be likely to get across in time to avoid the train, he should use every means in his power to check his train and prevent the collision. St. Louis, &c. R. R. *v.* Manly, 58 Ill. 300. See, also, remarks of Christiancy, C. J., in Lake Shore R. R. *v.* Miller, 25 Mich. 277.

[1] R. *v.* Longbottom, 3 Cox C. C. 439; R. *v.* Walker, 1 C. & P. 320; East Tenn. R. R. *v.* St. John, 5 Sneed, 524; Chicago R. R. *v.* Becker, 76 Ill. 25; Balt. City R. R. *v.* McDonell, 41 Md. 534; Isabel *v.* R. R. 60 Mo. 475. Supra, §§ 42, 307, and cases cited infra, § 803.

[2] Frech *v.* R. R. Co. 39 Md. 574.

[3] Penn. R. R. *v.* Morgan, 82 Penn. St. 134.

[4] Railroad Co. *v.* Gladman, 15 Wall. 401; Lynch *v.* Smith, 104 Mass. 52; Lane *v.* Atlantic Works, 111 Mass. 136; Elkins *v.* R. R. 115 Mass. 190; Dowd *v.* Chicopee, 116 Mass. 93. Supra, § 322.

[5] McWilliams *v.* Detroit Co. 31 Mich. 274; Chic. &c. R. R. *v.* Dignon, 56 Ill. 810. Infra, 810. See, also, Bilbee *v.* R. R. 18 C. B. N. S. 584, where it appeared that the defendants' railway crossed a carriage road on a level; there were locked carriage-gates and swing gates for foot-passengers, the trains were frequent, the crossing was on a level, and a bridge near it over the line obstructed the view in that direction. Two trains passed about the same time, and whilst the plaintiff's attention was directed to one the other knocked him down. See, also, New Jersey R. R. *v.* West, 3 Vroom, 91. Infra, § 811.

[6] Klein *v.* Jewett, 26 N. J. Eq. 474; see infra, § 811.

sequences of darting their cars to and fro without notice over a passage way. Thus where the end of a railroad track was over a passage way in a yard from a rolling-mill through which wheelbarrows and trucks frequently passed from the mill, and a car was negligently pushed over the end of the track, and killed a boy playing in the passage, it was held no defence that the boy had been frequently warned not to be in the passage on account of danger from the trucks. His not heeding the warning was not contributory negligence.[1]

Creeping under cars.

§ 392. For a person to attempt to pass under cars about to start is such negligence as precludes him from recovering from the railroad company for damages, even though it appear that the engine started without the usual signal from the engineer.[2] Still more strongly is contributory negligence inferred where the attempt is made to pass under the cars when in motion.[3]

Passing between cars about to start.

§ 393. And so when the plaintiff, having warning that a freight train was about to start, undertakes to pass through it on his way to a passenger train.[4] *A fortiori* is this the case with passing through or between cars when in motion.[5] But when travellers, with the assent of the officers of the road, are in the habit of walking over, before, or through cars obstructing a crossing, there being no other convenient way of getting past the crossing, the officers of the train must give some signal of intended starting.[6]

Leaving horse unattended.

§ 394. It has been ruled in Massachusetts,[7] that the fact that a horse was frightened and not under the control of any one, at a time when it was struck by a railroad train on a highway crossing, is not conclusive, as matter

[1] Gray *v.* Scott, 66 Penn. St. 345; supra, § 314.

[2] Central R. R. *v.* Dixon, 42 Ga. 327. See Lewis *v.* R. R. 38 Md. 392. In Rauch *v.* Lloyd, 31 Penn. St. 358, it was held that when the plaintiff was a child, and the position of the cars in the street was illegal, the plaintiff's conduct in thus attempting to cross was not contributory negligence.

[3] McMahon *v.* R. R. 39 Md. 439.

[4] Chicago, &c. R. R. *v.* Dewey, 26 Ill. 255.

[5] Gahagan *v.* R. R. 1 Allen, 187; Chicago, &c. R. R. *v.* Coss, 73 Ill. 394.

[6] Grant *v.* R. R. 2 McArth. 280; Balt. &c. R. R. *v.* State, 36 Md. 366; Brown *v.* R. R. 50 Mo. 461. See Sprong *v.* R. R. 58 N. Y. 56; Kay *v.* R. R. 65 Penn. St. 269. Supra, § 387.

[7] Southworth *v.* R. R. 105 Mass. 342. See Herrick *v.* Sullivan, 120 Mass. 576.

of law, of such a want of care on the part of its owner as to defeat an action brought by him against the railroad corporation to recover for the injury as caused by their negligence. In such case the jury, so it is held, should be instructed, that if it should appear that the distance from the track was such that even a quiet horse might be alarmed on finding himself left, without attendant or fastening, near an engine dashing up, a case of contributory negligence was made out.[1] And in California, where the plaintiff left a span of horses in close proximity to a railroad, at a time when a train might be expected, and afterwards, upon the horses moving on the nearing of the train, tried to rescue them, and was injured, it was held that he was precluded from recovery.[2]

Negligence of persons by whom plaintiff is carried.

§ 395. If there is a collision between two carriages or trains, belonging to different owners, a passenger in one carriage or train cannot recover from the owner of the other, if the collision was caused by the negligence of his own carrier;[3] though if there was negligence in both carriers, the preponderance of authority is that he may recover from either carrier or from both.[4] Thus in a late New York case,[5] the evidence was that the tracks of two horse railroad companies crossed each other at an acute angle; a car upon each track was approaching the intersection from opposite directions, and a collision occurred. It was held, that if the acts of the defendant's servants contributed to the injury, the defendant was liable, although the negligent acts of the persons in charge of the other car were also contributory. The comparative degrees in the culpability of the two will not, it was said, affect the liability of either. If both were negligent in a manner contributing to the result, they are liable jointly or severally.[6]

[1] See supra, §§ 103–7; and infra, § 838.

[2] Deville *v.* R. R. 50 Cal. 383.

[3] Thorogood *v.* Bryan, 8 C. B. 115; Catlin *v.* Hills, 8 C. B. 123. See, as bearing in same direction, Smith *v.* Smith, 2 Pick. 621; Cleveland R. R. *v.* Terry, 8 Ohio St. 370; Puterbaugh *v.* Reaser, 9 Ohio St. 484.

[4] Colegrove *v.* R. R. 20 N. Y. 492; aff. *S. C.* 6 Duer, 382. See cases in following notes.

[5] Barrett *v.* R. R. Co. 45 N. Y. 628. See Bennett *v.* R. R. 36 N. J. 225.

[6] Bennett *v.* R. R. 36 N. J. 225; Chapman *v.* R. R. 19 N. Y. 341; Metcalf *v.* Baker, 11 Abb. (N. Y.) Pr. N. S. 431; Danville Co. *v.* Stewart, 2 Metc. (Ky.) 119; Louisville R. R. *v.* Case, 9 Bush, 728; and see, to same

§ 396. 4. *Owner of cattle, &c., in suit against railroad for running them down.* — As will be hereafter seen, by the common law the owner of cattle is obliged to keep them

Cattle permitted to stray.

effect, Eaton *v.* R. R. 11 Allen, 341; Cleveland R. R. *v.* Terry, 8 Ohio St. 570; Webster *v.* R. R. 38 N. Y. 260; Knapp *v.* Dagg, 18 How. Pr. 165; Lockhart *v.* Lichtenthaler, 46 Penn. St. 151; Mann *v.* Wieand, 4 Weekly Notes, 6. This view is disputed in Thorogood *v.* Bryan, and Catlin *v.* Hills, supra; Rigby *v.* Hewitt, 5 Exch. 240; The Maverick, 1 Sprague, 23.

In Armstrong *v.* R. R. L. R. 10 Exch. 47, the evidence was that an inspector of the wagon department of the L. & N. W. Railway Company was travelling under a free pass from them in one of their carriages on a journey from Leeds to Manchester. Near C. station, and on the line of the defendants, over which the L. & N. W. Railway had running powers, the train in which the plaintiff was travelling came into collision with a number of loaded wagons which were being shunted from a siding by the defendants, and he was injured. There was evidence of negligence on the part of the driver of the plaintiff's train, in travelling at too great a speed, so as to be unable to stop when he came in sight of the danger signal, which had been hoisted by the defendants. The jury found that the accident was caused by the joint negligence of the defendants and the L. & N. W. Railway Company. *Held*, approving of the decision in Thorogood *v.* Bryan, 8 C. B. 115, that the plaintiff was so far identified with the L. & N. W. Railway Company that he could not recover.

On the other hand, as questioning Thorogood *v.* Bryan, see The Milan, 5 L. T. R. N. S. 590, Lush, Adm. 388; notes to Ashby *v.* White, 1 Sm. L. C. 6th ed. 266; Redfield on Carriers, § 364. It may be doubted, also, whether Thorogood *v.* Bryan can stand, in view of the recent utterances of the House of Lords in Radley *v.* R. R., cited supra, § 326. See criticism of above rulings in Bigelow's Cases on Torts, 727.

The Solicitors' Journal, in commenting on the above stated conflict of opinion, says: "It is evident that the idea of having intrusted one's safety to the skill and care of another is inadequate; some more extensive proposition is needed. Perhaps it may be laid down that wherever a person makes use of the property or services of another, he cannot complain against a third person on account of any mischief caused by that person's negligence, to which the defective state of that property, or the negligence of the person rendering the services, contributes. No proposition less extensive than this will, we think, cover the decided cases and the principles on which the decisions were based; indeed, it must be added that the use which will have this effect need not be an act of deliberate choice, but is satisfied by a use or enjoyment in fact; and further, that its effect does not depend on the existence of any peculiar relation between these persons, except that which is constituted by the user of the property or services."

The rule in case of collision by water will be found stated in Angell on Carriers, 5th ed. § 636, note; and see, as sustaining imputability in such cases, Kennard *v.* Burton, 12 Me. 39; Otis *v.* Thom, 23 Ala. 469; Duggins *v.* Watson, 15 Ark. 118.

within inclosures, and he is liable for any damage they may do by straying at large; nor can he recover for any damage received by them as a consequence of their so straying.[1] To what extent this portion of the common law is in force in the United States is discussed in another chapter.[2]

Straying cattle cannot negligently be run down.

§ 397. But though cattle are trespassing on a railroad, it is negligence for which the company is liable for the engineer to run them down, when this can be avoided by precautions which a prudent and skilful engineer would take. Undoubtedly it has been held by respectable courts that for the owner of cattle to permit them to run at large is such contributory negligence as precludes him from recovery from the company for their loss by a negligent collision.[3] But this, on the reasoning heretofore given,[4] cannot be sustained. Negligence does not throw those chargeable with it outside the pale of the law; and railroad companies, from the risks they are exposed to from the negligence of others, should be the last to deny this rule. If a railroad company can defend running over man or beast on the plea that the man or the beast was negligently on the track, then a trespasser, negligently playing with switches, could excuse himself on the ground that the railroad was negligently run. The true rule is, that if the engineer could, by the exercise of the prudence and diligence of a good business man in his particular department, have escaped the collision, then the consequences of the collision cannot be avoided by the company on the ground that the cattle injured were trespassers.[5] At

[1] Infra, § 883.

[2] Infra, § 883.

[3] Tonawanda R. R. *v.* Munger, 5 Denio, 255; *S. C.* 4 Comst. 349, as cited infra; Wilds *v.* R. R. 24 N. Y. 430; Indianapolis, &c. R. R. *v.* McClure, 26 Ind. 370, as explained by Ray, C. J., in Bellefontaine R. R. *v.* Hunter, 33 Ind. 356, cited supra; Jeffersonville, &c. R. R. *v.* Adams, 43 Ind. 402, and cases cited at end of this section. See Williams *v.* R. R. 2 Mich. 259; and infra, § 893.

[4] Supra, § 345.

[5] Eames *v.* R. R. 98 Mass. 560; Perkins *v.* R. R. 29 Me. 307; Towns *v.* Cheshire, 21 N. H. 364; Cornwell *v.* R. R. 28 N. H. 161; Mayberry *v.* R. R. 47 N. H. 391; Bemis *v.* R. R. 42 Vt. 375; Hance *v.* R. R. 26 N. Y. 428; Shepard *v.* R. R. 35 N. Y. 641; Vandegrift *v.* Rediker, 2 Zab. 185; Locke *v.* R. R. 15 Minn. 351; Parker *v.* R. R. 34 Iowa, 399; Searles *v.* R. R. 35 Iowa, 490; Louis. & Nash. R. R. *v.* Wainscott, 3 Bush, 149; Cin. &c. R. R. *v.* Smith, 22 Ohio St. 227; Needham *v.* R. R. 37 Cal. 417; Jones *v.* R. R. 70 N. C. 696; Memp. &c. R. R. *v.* Blakeney, 43 Miss. 218; New Orl. R. R. *v.* Field, 46 Miss. 573; Owens *v.* R. R. 58 Mo. 386; Toledo R. R. *v.* Bray, 57

the same time railroad companies, as will hereafter be seen,[1] are, independent of statutory requisitions, not bound to fence their tracks, or to take other measures to prevent the incursions of cattle.[2]

§ 398. But, independently of the questions just discussed, is to be noticed that which arises when a statute requires a railroad company to fence in its track. This is a positive duty, the neglect to comply with which renders the

Liability imposed by fencing statutes.

Ill. 514; Toledo R. R. *v.* Ingraham, 58 Ill. 120; Rockford, Rock I. &c. R. R. *v.* Lewis, 58 Ill. 49; Rockford R. R. *v.* Irish, 72 Ill. 404; Rockford R. R. *v.* Rafferty, 73 Ill. 58; Chic., B. & Q. R. R. *v.* Seirer, 60 Ill. 295; Indianap. R. R. *v.* Peyton, 76 Ill. 340; Jeffersonville, &c. R. R. *v.* Underhill, 48 Ind. 389; Ind. &c. R. R. *v.* McBrown, 46 Ind. 229, and cases cited infra, § 893. But an engineer is not bound to stop a train on seeing cattle on a pasture. Peoria R. R. *v.* Champ, 75 Ill. 577.

In New York it has been held that the plaintiff's negligence in letting his cattle run at large may bar recovery. Tonawanda *v.* R. R. *ut supra;* though see Sheaf *v.* R. R. 2 N. Y. Sup. Ct. 388; Fanning *v.* R. R. Ibid. 585.

In Massachusetts it is said, that as to cattle trespassing on a railroad track, the company is not liable "for anything short of a reckless and wanton misconduct of those employed in the management of the train." Gray, C. J., Maynard *v.* R. R. 115 Mass. 460; citing Tonawanda R. R. *v.* Munger, 5 Denio, 255; Vandegrift *v.* Rediker, 2 Zab. 185; Tower *v.* R. R. 2 R. 1, 404; Cincinnati, &c. R. R. *v.* Waterson, 4 Ohio St. 424. In Darling *v.* R. R. 121 Mass. 118, the evidence was that a horse escaped from its pasture into a highway, and went on a railway track through an opening which it was the duty of the company to have fenced. The horse was killed by a passing train. It was held that the plaintiff could not recover. "The horse," said Gray, C. J. "being an estray unlawfully at large on the highway, was a trespasser on the defendant's railroad, and the defendant owed no duty to the plaintiffs, and was not liable to them, *either for a neglect to maintain the fences required by law,* or for the striking of the horse by the engine, unless there was reckless and wanton misconduct on the part of those employed in the management of the train. The evidence, viewed as favorably as possible for the plaintiffs, merely showed that the train was moving at a usual and proper rate of speed, *and that the engineer did not stop or slacken the train in order to avoid or give way to an animal which was unlawfully on the road. This he was not bound to do.*" See McDonnell *v.* R. R. 115 Mass. 564; and to same effect, Jefferson, &c. R. R. *v.* Underhill, 48 Ind. 389; Jefferson, &c. R. R. *v.* Huber, 42 Ind. 173.

[1] See infra, § 398, 893–6.

[2] Buxton *v.* R. R. L. R. 3 Q. B. 549; R. R. *v.* Skinner, 19 Penn. St. 358; Jackson *v.* Rutland & B. R. R. 25 Vt. 150; Lord *v.* Wormwood, 29 Me. 282; Perkins *v.* R. R. 29 Me. 307; Munger *v.* Tonawanda R. R. 4 N. Y. 349; Cecil *v.* R. R. 47 Mo. 246; Toledo R. R. *v.* Wickery, 44 Ill. 76; Price *v.* R. R. 2 Vroom, 229. In Needham *v.* S. F. & S. J. R. Co. 37 Cal. 417, this point is discussed at large to the above effect.

company *primâ facie* liable, in case, through such neglect, cattle not trespassers wander on the road and are injured.[1] Even where a statute makes a railroad responsible for injury done, through its neglect in fencing, to cattle running at large, it has been held to be no defence that such cattle were not legally running at large, but were required to be inclosed by a local county regulation.[2] But if there is a statute requiring owners to fence in their cattle, or if by the common law in a particular state such duty is imposed upon the owner, then if he let his cattle wander in the neighborhood of a railroad, he cannot complain if, through the neglect of the company in fencing, his cattle enter on the track, and there (without the fault of the company) are killed.[3]

[1] See infra, §§ 887, 891–2; Hinman *v.* R. R. 28 Iowa, 491; Swift *v.* R. R. 29 Iowa, 243; Toledo R. R. *v.* Nelson, 77 Ill. 160; Toledo, &c. R. R. *v.* Weaver, 34 Ind. 398; Toledo, &c. R. R. *v.* Cory, 39 Ind. 48; Walsh *v.* R. R. 8 Nev. 110; McCoy *v.* R. R. 40 Cal. 532; Bay City *v.* Austin, 21 Mich. 390; Corwin *v.* R. R. 13 N. Y. 42; 34 N. Y. 427; Nall *v.* R. R. 59 Mo. 112.

[2] See infra, § 892; Stewart *v.* R. R. 32 Iowa, 561; Spence *v.* R. R. 25 Iowa, 139; Fernow *v.* R. R. 22 Iowa, 528; Fritz *v.* R. R. 34 Iowa, 337.

The fact that plaintiff's horses entered the close of another, through an insufficient fence upon the highway, and passed from thence upon the defendants' road, does not affect his right of recovery. Chic. & N. W. R. R. *v.* Harris, 54 Ill. 528. And in this case, upon objection that the plaintiff was so far in fault in permitting his horses to run at large, when prohibited by the statute, that he should not be permitted to recover, it appearing the escape of the horses was involuntary on his part, that he made reasonable efforts to reclaim them soon after their escape, but was unsuccessful, continuing the search for them until dark of the night they were injured, and when last seen by him, while endeavoring to get them up, they were going in an opposite direction from the railroad, it was held, the negligence of the defendants was so much greater than that of the plaintiff, that, when compared, that of the latter was slight, and rendered the defendants liable for the injury. Ibid.

[3] Perkins *v.* R. R. 29 Me. 307; Eames *v.* R. R. 98 Mass. 560; Maynard *v.* R. R. 115 Mass. 458; McDonnel *v.* R. R. 115 Mass. 564; Corwin *v.* R. R. 13 N. Y. 42; Shepard *v.* R. R. 35 N. Y. 641; Bellefontaine R. R. *v.* Bailey, 11 Ohio St. 333; Central R. R. *v.* Lawrence, 13 Ohio St. 66; Joliet, &c. R. R. *v.* Jones, 20 Ill. 221; Terre Haute, &c. R. R. *v.* Augustus, 21 Ill. 186; Chic. &c. R. R. *v.* Cauffman, 28 Ill. 513; Chic. &c. R. R. *v.* Seirer, 60 Ill. 295; Chic. &c. R. R. *v.* Magee, 60 Ill. 529; Toledo, &c. R. R. *v.* Head, 62 Ill. 233; Peoria R. R. *v.* Champ, 75 Ill. 577; Pitzner *v.* Shinnick, 39 Wis. 129. See Lawrence *v.* Combs, 31 N. H. 331; Chapin *v.* R. R. 39 N. H. 53; Mayberry *v.* R. R. 47 N. H. 391; Jackson *v.* R. R. 35 Vt. 150; Ellis *v.* R. R. 55 Mo. 33. As to Indiana, see Ind. R. R. *v.* Shimer, 17 Ind. 295; Jef. &c. R. R. *v.* Adams, 43 Ind. 402; Ind. &c. R. R. *v.* Wolf, 47 Ind. 250. See fully, infra, §§ 889–91.

It must be remembered that cattle are at least as dangerous instruments in relation to railway trains as railway trains to cattle; and where on both sides there has been a neglect to fence, then neither side has any merits in a suit against the other. But unless the owner is put in the wrong, by violation of statutory or common law duty, then he is not prevented from recovery by the fact that he left his own lot, in which he placed his cattle, unfenced.[1]

§ 399. 5. *Owner of goods and cattle in suit against carrier for bad carriage.* — This topic is so mingled with that of the carrier's duty in this respect, that it is reserved for consideration in a separate chapter.[2]

§ 400. 6. *Traveller injured on highway.* — The question of contributory negligence on highways will be hereafter incidentally noticed when the general subject is discussed.[3] At present one or two points may be distinctively stated.

Traveller voluntarily striking defect on road cannot recover for injury.

A person who knows a defect on a highway or public bridge, and voluntarily undertakes to test it when it could be avoided, cannot recover against the municipal authorities for losses incurred through such defect.[4] In such cases the question of due care, when there are conflicting inferences, is for the jury.[5]

[1] Wilder *v.* R. R. 65 Me. 332; Rogers *v.* R. R. 1 Allen, 17; Browne *v.* R. R. 12 Gray, 55; Corwin *v.* R. R. 3 Kern. 42; Gardner *v.* Smith, 7 Mich. 410; Kellogg *v.* R. R. 26 Wis. 223; Ind. R. R. *v.* Wolf, 47 Ind. 250; McCoy *v.* R. R. 40 Cal. 532; Keech *v.* R. R. 17 Md. 32; Cecil *v.* R. R. 40 Mo. 248.

[2] Infra, §§ 563, 614–19.

[3] See infra, § 960 *et seq.*

[4] Infra, § 968; Horton *v.* Ipswich, 12 Cush. 488; Wilson *v.* Charlestown, 8 Allen, 137; Lyman *v.* Amherst, 107 Mass. 339; Frost *v.* Waltham, 12 Allen, 85; Centralia *v.* Krouse, 64 Ill. 19; Lovenguth *v.* Bloomington, 71 Ill. 238; Jackson *v.* Greene, 76 N. C. 282.

[5] See Sears *v.* Dennis, 105 Mass. 310; Bly *v.* Haverhill, 110 Mass. 520; Williams *v.* Leyden, 119 Mass. 237; Cremer *v.* Portland, 36 Wis. 92; Oliver *v.* Lavalle, 36 Wis. 592; Kenworthy *v.* Ironton, 41 Wis. 647.

In Massachusetts, under the Gen. Sts. c. 44, § 22, the person injured cannot recover if all the evidence in the case is equally consistent with either care or negligence on his part. Crafts *v.* Boston, 109 Mass. 519.

In the same state, under the same statute, it is held that, though a plaintiff knows of the defect, but, being frightened, runs over the sidewalk in the dark, giving no thought to the sidewalk or the manner of going over it, this does not necessarily show such want of due care as will, as matter of law, prevent recovery. Barton *v.* Springfield, 110 Mass. 131.

The burden, in the same state, is

Yet where there is no such conflict, but there is undisputed proof of an attempt, on part of the plaintiff, to tread on places he knows to be dangerous, he should be nonsuited, or the jury directed to find against him.[1]

Going off prepared track.

§ 401. As will be seen, it is the duty of the traveller to follow the prepared track.[2] Where, however, this is imperceptible, on account of snow-drifts, a passenger may follow the line of travel on a road without contributory negligence.[3] But where a traveller, without sufficient reason, avoids a sidewalk, and takes the middle of the street, he cannot recover against the public authorities for injuries sustained by him in his excursion.[4]

Traveller bound to look out.

§ 402. That a traveller is bound to look ahead at the road he is travelling is a fundamental principle, which lies at the base of this branch of the law.[5] It is settled that a person travelling on a highway is bound to keep such a lookout for patent defects as is usual with prudent drivers.[6] Yet even here there are distinctions to be observed. It is not negligence to travel a road in the dark, when there can be no lookout.[7] Nor is it necessary that the traveller should have perfect eyesight, though it may be negligence in a blind man to undertake to travel unattended.[8] The same rule applies to drunken men[9] as a question of fact, to be determined by the concrete case.[10] And it has been said that a boy of fifteen is not bound to exercise the care required from an adult.[11] A road

on the plaintiff, to prove due care. Dowd *v.* Chicopee, 116 Mass. 93. Infra, §§ 423, 990.

[1] Durkin *v.* The City of Troy, 61 Barb. 437. See Willey *v.* Belfast, 61 Me. 569; Rockford *v.* Hildebrand, 61 Ill. 155: Riest *v.* Goshen, 42 Ind. 339.

[2] Infra, § 968.

[3] Infra, § 968; Coggswell *v.* Lexington, 4 Cush. 307. See Gerald *v.* Boston, 108 Mass. 580; Hayden *v.* Attleborough, 7 Gray, 338.

[4] O'Laughlin *v.* Dubuque, 42 Iowa, 539.

[5] Davenport *v.* Ruckman, 37 N. Y. 568.

[6] Hill *v.* Seekonk, 119 Mass. 85. See French *v.* R. R. 116 Mass. 537; Dowd *v.* Chicopee, 116 Mass. 93; Patrick *v.* Pote, 117 Mass. 297; Snow *v.* Provincetown, 120 Mass. 580; Kewanee *v.* Depew, 80 Ill. 251; Craig *v.* Sedalia, 63 Mo. 417.

[7] Williams *v.* Clinton, 28 Conn. 264.

[8] See infra, § 995; supra, §§ 42, 307.

[9] Cassidy *v.* Stockbridge, 21 Vt. 391; Alger *v.* Lowell, 3 Allen, 402. Supra, §§ 306, 332.

[10] Cramer *v.* Burlington, 42 Iowa, 315.

[11] Dowd *v.* Chicopee, 116 Mass. 93. Supra, § 322.

must be safe for those of imperfect as well as for those of mature strength.[1] Whether the plaintiff knew of the risk is for the jury.[2]

Not conclusive defence that traveller knew of the defect.

§ 403. A traveller may be entitled to presume that a defect observed by him may have been removed. Aside from this, his forgetfulness, in many cases, may be imputed to causes other than negligence. And even supposing him to be negligently absent-minded or forgetful, the town on this ground cannot be excused for putting obstacles in his way.[3] Again: if necessary, the danger may be rightfully braved, and the town held liable for the consequences; but it is otherwise when the traveller, from mere foolhardiness, knowing a defect exists, rushes against it, when he also knows that it could be avoided by taking another side of the road.[4] But the fact that a road is defective does not oblige him to take another less convenient road which is safe.[5]

Unskilfulness of driver. Defectiveness of carriage.

§ 404. Public roads are meant to be driven in by drivers of all classes. When, however, unskilfulness is such as to unfit for ordinary purposes of driving, and when it causes the damage, then it is a bar to recovery.[6] The same remarks are applicable to the use of a defective carriage.[7]

§ 405. As has been already noticed,[8] under the statutes of sev-

[1] Infra, § 996; supra, § 389 *a*.

[2] Kelley *v.* Fond du Lac, 31 Wis. 179; Kenworthy *v.* Ironton, 41 Wis. 647.

[3] Supra, § 337; Folsom *v.* Underhill, 36 Vt. 580; Fox *v.* Sackett, 10 Allen, 553; Whitaker *v.* W. Boylston, 97 Mass. 273; Smith *v.* Lowell, 6 Allen, 39; Snow *v.* R. R. 8 Allen, 441; Thomas *v.* Tel. Co. 100 Mass. 157; Whitford *v.* Southbridge, 119 Mass. 564; Fox *v.* Glastenbury, 29 Conn. 204; Humphreys *v.* Armstrong Co. 56 Penn. St. 204; Rice *v.* Desmoines, 40 Ill. 638; Achtenhagen *v.* Watertown, 18 Wis. 331. Infra, § 997.

That the question is for the jury, see Woods *v.* Boston, 121 Mass. 337.

[4] Hubbard *v.* Concord, 35 N. H. 52; Horton *v.* Ipswich, 12 Cush. 488; Wilson *v.* Charlestown, 8 Allen, 137; James *v.* San Francisco, 6 Cal. 528.

[5] Infra, § 996.

[6] Flower *v.* Adams, 2 Taunt. 314; Butterfield *v.* Forrester, 11 East, 60; Reed *v.* Deerfield, 8 Allen, 522; Bigelow *v.* Rutland, 4 Cush. 247; Dimock *v.* Sheffield, 30 Conn. 129; Dreher *v.* Fitchburg, 22 Wis. 677.

[7] Infra, § 987; Hammond *v.* Mukwa, 40 Wis. 35.

[8] Supra, § 331.

eral New England States, prohibiting travelling on Sunday except from necessity or charity, a traveller cannot recover from the town for injuries sustained when travelling, unless from necessity or charity.[1] This, however, does not apply to a person walking on a highway on Sunday for exercise,[2] nor to a person going to religious worship, no matter how eccentric such worship may be.[3] But, as has been already seen,[4] the rule just stated is exceptional, and cannot be sustained consistently with those broad principles of the law of negligence which have just been detailed.

Sunday travel.

§ 406. 7. *Participant injured in public games.* — The Roman law gives us the following illustration of this principle: "Si quis in colluctatione vel in pancratio vel pugiles dum inter se exercentur alius alium occiderit, siquidem in publico certamine alius alium occiderit, cessat Aquilia, quia gloriae causa et virtutis, non injuriae gratia videtur damnum datum. Hoc autem in servo non procedit, quoniam ingenui solent certare: in filio fam. vulnerato procedit: plane si cedentem vulneraverit erit Aquiliae locus."[5] In other words, no liability attaches to the wounding or killing (if the rules of the game be preserved, and no malice shown) of a freeman in a wrestling match or other public game. While the trial of strength continues, it is the understanding of the game that each party exerts all the strength at his command; and each party goes into the game with full notice that this will be done. When, however, the game is ended, then the conqueror must exhibit *diligentia* in his treatment of his prostrate antagonist. And the game, to protect its participants, must be a *bonâ fide* match, *gloriae et virtutis causa*. A wrestling match with a slave did not fall under this head; it was no "gloria" to overcome a slave in such a trial. It was otherwise, so argues Pernice,[6] with the game of

Liability in public games.

[1] Bosworth *v.* Swansey, 10 Met. 363; Jones *v.* Andover, 10 Allen, 18.

[2] Hamilton *v.* Boston, 14 Allen, 475; Stanton *v.* R. R. 14 Allen, 485; Com. *v.* Josselyn, 97 Mass. 411; Conolly *v.* Boston, 117 Mass. 64.

So it is ruled in Vermont, that visiting children, properly away from home, on Sunday, is not within the statute. McClary *v.* Lowell, 44 Vt. 116.

[3] Feital *v.* R. R. 109 Mass. 398. Supra, §§ 330.

[4] Supra, §§ 331.

[5] L. 7. § 4. Leg. Aq.; Pernice, p. 54.

[6] Op. cit. p. 54.

ball, as appears by the following extract: "Cum pila complures luderent quidem ex his servulum cum pilam percipere conaretur impulit: servus cecidit et crus fregit. Quaerebatur: an dominus servuli lege Aq. cum eo cujus impulsu ceciderat agere potest? Respondi non posse, cum casu magis quam culpa videretur factum."[1] Here the presumption indicates *casus*. In this case, however, the game is not limited to the *ingenui*. The case is therefore one in which slave and freeman stand alike; the one having no greater privilege than the other. Here also, from the nature of the game, the idea of *diligentia* is excluded; the players of one side seeking to hinder the players of the other side from catching the ball, and a struggle therefore accepted which cannot go on without the risk of bruises and falls. In such case a hurt received in the usual course of the game cannot be regarded as *culpa*. In games, therefore, which are sanctioned by long usage, and by indirect if not direct legal sanction, there is no application of the maxims, *Lusus quoque noxius in culpa est*,[2] and *Non debet esse impunitas lusus tam perniciosus*.[3]

III. RELATIONS OF LAW AND FACT.

§ 407. This topic will be hereafter distinctively discussed.[4]

IV. BURDEN OF PROOF.[5]

[1] L. 52. § 4. D. h. t.

[2] L. 10. § 4. D. Leg. Aq.

[3] L. 50. § 10. D. h. t. See, also, Penn. *v.* Lewis, Addison, 279; Fenton's case, 1 Lewin, 179; Whart. Cr. Law (7th ed.), § 1012. And see, as to fireworks, infra, § 881.

[4] Infra, § 423.

[5] See infra, § 423.

CHAPTER X.

IGNORANCE AS A DEFENCE.

I. Ignorance of law, § 410.
Reasons why such ignorance is no defence, § 410.
Law presumed to be known by all, § 411.
Courts have no capacity to determine such ignorance, § 412.
Public safety endangered by contrary view, § 413.
Distinction between ignorance of a specialist and that of a non-specialist, § 414.
II. Ignorance of fact, § 415.
Facts as to which defendant ought to be cognizant, § 415.
Facts with which he does not claim to be cognizant, § 416.

I. IGNORANCE OF LAW.

§ 410. IGNORANCE is a defence so constantly made to suits for negligence that it demands from us particular and distinct consideration. The first phase in which it presents itself is that of ignorance of law; and here the rule is both emphatic and uniform. Ignorance of the law is no defence to suits either criminal or civil. As, however, the amount of damages often depends largely on the jury's conception of the reasonableness of this rule, it is proper to pause to consider on what this reasonableness rests.

Presumptive knowledge of law.

§ 411. 1. That *the law of the land is known by all subjects*, is a postulate often assumed to establish the conclusion that persons are liable for the consequences of a negligent mistake of law. But this postulate, although accepted as legal fiction, is so preposterously false in fact that juries will not readily adopt it as a meritorious basis of a suit.[1] No man knows all the laws of the land in which he lives, to say nothing of the laws of foreign lands, and the law of nations, which the laws of his own land under certain circumstances embrace. The most eminent and experienced judges, for instance, when called upon to act without study or counsel in their private business (*e. g.* as in making of their own wills), show, by their blunders and inadvertencies, that there is no man who, in the

[1] See authorities cited in Whart. on Ev. § 1240.

ordinary affairs of life, can possess himself of the laws of the land, except by deliberation and study. The reason for this is to be found not merely in the incapacity of the actor himself, but in the character of the law, of which he is supposed to be master. For that law is not only so extensive, viewing it in all its branches, as to exceed the bounds of ordinary comprehension, but is so progressive as to involve conclusions as yet imperfectly expressed. The idea of Blackstone, that the common law of England consists of a fund of established though unwritten jurisprudence, from which each judge draws what is necessary for every litigated case, is now universally dismissed as incorrect. By each new decision the law as previously announced is extended. By many new decisions the law as previously announced is overruled. In many new cases the law penetrates to new fields, invoking for them new rules. The law applicable to multitudes of combinations of acts, therefore, is a law which is not determined until those particular combinations of acts are specifically judicially scanned; and even then we cannot be certain what this law is until it has been affirmed by the highest territorial court having jurisdiction.

§ 412. 2. *It is necessary to society that ignorance of the law should be no excuse for an act the law pronounces to be unlawful; because ignorance of the law is a subject which the courts have no capacity to determine.* — This is the position taken by Mr. Austin,[1] in those lectures which form the most philosophical treatise on general jurisprudence which has as yet sprung from English pen. "The only *sufficient* reason for the rule in question," he declares, "seems to be this: that if ignorance of law were admitted as a ground of exemption, the courts would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impracticable. If ignorance of law were admitted as ground for exemption, ignorance of law would always be alleged by the party, and the court, in every case, would be bound to decide the point. But in order that the court might decide the point, it were incumbent upon the court to examine the following questions of fact: 1st. Was the party ignorant of the law at the time of the alleged wrong? 2d. Assuming that he was

Ignorance of law not capable of proof.

[1] Lectures, 3d ed. i. 498.

ignorant of the law at the time of the wrong alleged, was his ignorance of the law *inevitable* ignorance, or had he previously been placed in such a position that he might have known the law, if he had duly tried? It is manifest that the latter question is not less material than the former. . . . . Now, either of these questions were next to insoluble. Whether the party was *really* ignorant of the law, and was so ignorant of the law that he had no *surmise* of its provisions, could scarcely be determined by any evidence accessible to others. And for the purpose of determining the *cause* of his ignorance (its *reality* being ascertained), it were incumbent upon the tribunal to unravel his previous history, and to search his whole life for the elements of a just solution. The reason for the rule in question would, therefore, seem to be this: It not infrequently happens that the party is ignorant of the law, and that his ignorance is inevitable. But if ignorance of law were a ground for exemption, the administration of justice would be arrested; for, in almost every case, ignorance of law would be alleged. And, for the purpose of determining the *reality* and ascertaining the cause of his ignorance, the court were compelled to enter upon questions of fact, insoluble and interminable." But however strong this position may have been in Mr. Austin's time, it has lost its force since the passage of statutes by which parties can be examined as to their motives, their knowledge, and their ignorance. Ignorance of the law is now as capable of proof as is any other mental state.

§ 413. 3. *The safety of society would be endangered if ignorance of the law were a legal excuse for an illegal act.* — Here we strike directly at the subject matter of the present treatise. To the safety of society it is requisite that those employed either as managers or operatives in any industry should be *experts* in their respective specialties; and hence that they should be experts in the law by which they are bound, whether that law consists in statutes, or customs, or prior adjudications, or in conclusions from such statutes, customs, or adjudications. The safety of society requires that a switch-tender should know the law of his road bearing on him, which is the law by which the law of the land would gauge in this respect his conduct; that a common carrier should know the law of the land in respect to his particular class of

Policy of the law requires that specialist should know the law of his specialty.

bailments; that the trustee should know the law of the land in respect to the way he should invest the funds of his *cestui que trust.* If, however, the courts should admit ignorance of law as relieving either switch-tender, or common carrier, or trustee from responsibility, then, in order to become irresponsible, it would simply be necessary for switch-tender, common carrier, or trustee to become totally ignorant of the law. Immunity, therefore, would rise in proportion to incompetency; and the most incompetent, and therefore mischievous, agents would be those whom the law would most thoroughly protect.

But non-specialists only liable for *culpa lata.*

§ 414. *This important distinction, however, remains, that a person not claiming to be an expert in law is chargeable, in matters requiring such knowledge, only with* culpa lata, *or gross negligence, if he prove ignorant; whereas a person claiming to be an expert, and failing in such knowledge, is chargeable with* culpa levis, *or the negligence of a specialist.*[2] — I throw, for instance, business into the hands of an agent who does not profess to be an expert in the law. In such case he is not liable to me for negligence for not possessing a

[1] The ethical side of this question is finely developed by Pascal, in his Fourth Provincial Letter: "What a blessing," he argues with exquisite satire, "would this view (that of the irresponsibility of those ignorant of law) be to many. You would never, in this view, meet with people with fewer sins. For, in the first place, they never think of law at all; their viciousness has extinguished their reason; their life is spent in a perpetual round of pleasure or passion; yet the excesses which I supposed increased their guilt, you tell me insure their acquittal. I always supposed that the less a man thought of moral law the more culpable he was; but now I learn that the more entirely he relieves himself from a knowledge of his duty, the more approvedly is his duty performed. What folly is it then to have any sense of duty at all. The only truly wise man is the utter villain, the one who has no conscience." And he sustains himself by Aristotle's well known remarks on the same point: "All wicked men are ignorant of what they ought to do and what they ought to avoid; and it is this very ignorance which makes them wicked and vicious. Accordingly, a man cannot be said to act involuntarily merely because he is ignorant of what it is proper for him to do in order to fulfil his duty. This ignorance in the choice of good or evil does not make the action involuntary; it only makes it vicious. The same thing may be affirmed of the man who is ignorant generally of the rules of his duty; such ignorance is worthy of blame and not of excuse."

I cite here, with some adaptations, from McCrie's translation of Pascal; and see Black *v.* Ward, 27 Mich. 191.

[2] See Whart. on Ev. § 1241.

knowledge that he did not pretend to; in other words, he is not chargeable with *culpa levis*. I may prove that he entered into the agency without such knowledge, yet this will not be enough to base a verdict against him. He will be only liable in this respect for the gross negligence, or *culpa lata*, which consists in not knowing what every one ought to know. But if I employ him as an expert in law, then he is negligent if he enters upon the employment without due knowledge, and consequently is chargeable not only with *culpa lata*, but in addition to this, with *culpa levis*, or with negligence as a specialist.[1] At the same time it is essential to remember that *the knowledge required of a specialist is not perfect knowledge*, — for if this were exacted no specialist could escape the imputability of negligence,— but *such knowledge as specialists of the class in question are, under the particular circumstances, accustomed to possess.*[2]

II. IGNORANCE OF FACT.

§ 415. That ignorance of fact may be an excuse is a maxim of the Roman law as well as of our own.[3] Certain modifications, however, arise, which it is desirable specifically to notice: —

Specialists liable for ignorance of facts they ought to know.

1. *Facts of which the party ought to be cognizant as a specialist.*[4] — He who accepts an office or agency is bound not only to exercise due diligence in possessing himself with the facts, knowledge of which is necessary to enable him to discharge his duties, but is guilty of negligence if he accepts the trust without a preliminary acquaintance with the particular specialty. Claiming to be an expert, he must have the education of an expert; and if an injury occurs in consequence of his ignorance, he is responsible for the consequences. A trustee, for instance, undertaking to act as such, not only must obtain a proper knowl-

[1] See supra, § 26 *et seq.*; infra, §§ 510, 520, 749; Miller *v.* Proctor, 20 Ohio St. 442; and see Whart. on Ev. § 1241.

[2] See supra, § 52; and particularly infra, § 744–9, and Montriou *v.* Jefereys, 2 C. & P. 113; where Abbott, C. J., declared that neither attorney nor counsel nor judge is expected to know all the law, nor to be liable for mistakes into which cautious men may fall.

[3] See authorities cited in Wharton's Crim. Law, § 83, and Broom's Maxims, *in loco*.

[4] See Whart. on Ev. § 1243.

edge of the investments he makes for his beneficiary, but must be, when he assumes the trust, adequately acquainted with the ordinary modes in which good trustees do business. If loss occurs to his principal from his incapacity in either of these respects, he is liable to make good the loss.[1] Nor is this all. He must, as he proceeds with his duties, possess himself with the facts necessary to enable him to discharge his engagements judiciously. To omit this exposes him to make good the loss accruing to his principal from his neglect. This, however, does not involve an implied undertaking on his part to be possessed of any knowledge which a good business man in his department would not be likely to obtain. Thus he cannot be held responsible for failure to prognosticate natural casualties, such as are called the act of God, or revolutions produced by the interposition of independent moral agencies. Hence, while the officers of a railroad undertake to have a knowledge of all facts of which the diligence of good railroad men could have possessed them, they cannot be held responsible for ignorance of facts which such diligence could not have discovered, — such, for instance, as the weakness of particular bars of iron or beams of wood, which were purchased by them as of good quality, and whose defects were latent.[2] So as to physicians. A professed physician is guilty of negligence when he enters upon his duties without the preparation usual with good physicians under his particular circumstances, or when he omits, when attending, to acquaint himself with the peculiarities of his patient's case. But he is not required to possess himself with a knowledge not attainable in the place in which he lives, and not usual with good physicians of his class.[3] But ignorance, by a specialist, of anything necessary to make him competent for his work, subjects him to liability. Thus persons selling dangerous compounds, required by statute to be subjected to certain tests, cannot set up as a defence that they were ignorant of the fact that the tests were not satisfied. Nor can they shelter themselves behind the certificate of an authorized inspector.[4]

§ 416. 2. *Facts of which a person does not claim as a specialist*

[1] See supra, § 26 *et seq.*; infra, § 518.

[2] See supra, § 26 *et seq.*

[3] See infra, § 730–7.

[4] Hourigan *v.* Nowell, 110 Mass. 470.

to be cognizant. — A person, for instance, not claiming to be skilled in medicine, and giving notice of his ignorance, cannot, if called upon to act as a medical attendant, be made responsible for his ignorance of the specialty, unless it appear that he displaced, by his rash acceptance of the post, a more competent person from undertaking its duties.[1] And generally, we may hold that where a person is employed, not as a specialist, but as a non-specialist, undertaking a business of which he professes to know nothing, he then can only be held liable for gross negligence, or *culpa lata*, consisting of ignorance of facts which every ordinary person ought to know.[2]

But not required to know facts out of his specialty.

[1] See infra, §§ 730–7.

[2] Supra, §§ 26–45–48.

CHAPTER XI.

PROVINCES OF COURT AND JURY. — BURDEN OF PROOF.

Negligence is to be inferred from facts, § 420.
In actions not based on contract, burden of negligence is on plaintffff, § 421.
Against bailees, for tort, plaintiff must prove tort, § 422.
Burden of contributory negligence is on defendant, § 423.
But plaintiff, when his own case shows contributory negligence, may be nonsuited, § 427.
Employee against employer, § 428.
Casus, § 429.
Gratuitous depositaries, § 430.

§ 420. It has been ruled in a multitude of cases that negligence, when the evidence is conflicting, is a mixed question of law and fact.[1] When the facts are disputed, so it is said, the question is for the jury; when they

Negligence is to be inferred from facts in evidence.

[1] Among the cases the following may be noticed: Freemantle *v.* R. R. 10 C. B. N. S. 89; Jackson *v.* R. R. L. R. 1 C. P. D. (C. A.) 126; Stuart *v.* Machias, 48 Me. 477; Hill *v.* R. R. 55 Me. 438; Stratton *v.* Staples, 59 Me. 94; Estes *v.* R. R. 63 Me. 308; Norris *v.* Litchfield, 35 N. H. 277; State *v.* R. R. 52 N. H. 528; Raymond *v.* Lowell, 6 Cush. 524; Mayo *v.* R. R. 104 Mass. 137; Lane *v.* Atlantic Works, 107 Mass. 104; Gaynor *v.* R. R. 100 Mass. 208; Goodale *v.* Worc. Ag. Soc. 102 Mass. 401; Conn. *v.* R. R. 108 Mass. 7; Gerald *v.* Boston, 108 Mass. 580; Lyman *v.* Inhab. 107 Mass. 339; Craig *v.* R. R. 118 Mass. 431; Foot *v.* Wiswell, 14 Johns. 304; Field *v.* R. R. 32 N. Y. 339; Hackford *v.* R. R. 53 N. Y. 654; Morrison *v.* R. R. 56 N. Y. 302; Moore *v.* R. R. 4 Zabr. 268; Kay *v.* R. R. 65 Penn. St. 269; Johnson *v.* R. R. 70 Penn. St. 357; Crissey *v.* R. R. 75 Penn. St. 83; Adams Express Co. *v.* Sharpless, 77 Penn. St. 516; Balt. &c. R. R. *v.* Fitzpatrick, 35 Md. 32; Lake Shore R. R. *v.* Miller, 25 Mich. 274; Greenleaf *v.* R. R. 29 Iowa, 14; Johnson *v.* R. R. 11 Minn. 96; Anderson *v.* St. Nav. Co. 64 N. C. 399; Lambeth *v.* R. R. 66 N. C. 494; Felder *v.* R. R. 2 McMullen, 402; Smith *v.* R. R. 37 Mo. 292; O'Flaherty *v.* R. R. 40 Mo. 70; Morrisey *v.* Wiggins Ferry Co. 43 Mo. 380; 47 Mo. 523; Knight *v.* R. R. 23 Lou. An. 462; Lesseps *v.* Same, 17 Lou. R. 221; Fleytas *v.* Same, 18 Ibid. 339; Carlisle *v.* Holton, 3 Lou. An. 48; Gerke *v.* Cal. Va. Co. 9 Cal. 251; Wolf *v.* Water Co. 10 Cal. 545; Rich *v.* R. R. 18 Cal. 358; Karr *v.* Parks, 40 Cal. 188; McNamara *v.* R. R. 50 Cal. 581; Whirley *v.* Whiteman, 1 Head, 610; Un. Pac. R. R. *v.* Rollins, 5 Kans. 180; Kansas P. R. R. *v.* Butts, 7 Kans. 315; Green *v.* Hollingsworth, 5 Dana, 173; Matheny *v.* Wolffs, 2 Duv. 137.

are undisputed, it is for the court.[1] In applying these maxims, however, we are embarrassed by the fallacy elsewhere noticed more fully,[2] arising from the ambiguity of the terms "law" and "legal." Negligence, we must remember at the outset, is not a fact which is the subject of direct proof, but an inference from facts put in evidence. A witness is asked, not whether A. was negligent at a particular juncture, but what were the facts of the case, and from these, negligence, if there be any, is to be inferred. Now negligence may be disputed when the facts are undisputed, and the question, in such case, when the dispute is real and serious, is eminently one for the jury under the direction of the court.[3]

[1] In disputed questions of railroad, negligence, the settled rule in England is, that whether "negligence can be inferred from a given state of facts is itself a question of fact for the jury, and not a question of law for the court or the presiding judge." Amphlett, J., Jackson *v.* R. R. L. R. 1 C. P. D. (C. A.) 127, citing Bridges *v.* R. R. L. R. 7 H. L. 213. But in such cases, to leave the case to the jury, there must be conflicting evidence. Bramwell, J., Ibid. 130. And see R. R. *v.* Stout, 17 Wall. 659; Trow *v.* R. R. 24 Vt. 495; Sexton *v.* Vt. 44 N. Y. 430; Morrison *v.* R. R. 56 N. Y. 302; West Chester R. R. *v.* McElwee, 67 Penn. St. 311; Johnson *v.* R. R. 70 Penn. St. 357; McKee *v.* Bidwell, 74 Penn. St. 218; Crissey *v.* R. R. 75 Penn. St. 83; Boland *v.* R. R. 36 Mo. 491; Dolfinger *v.* Fishback, 12 Bush, 475. See discussion in Bigelow's Cases on Torts, pp. 594–6, and article in 7 Am. Law Rev. 682.

[2] Whart. on Ev. § 1239.

[3] "As was said by Mr. Justice Johnson, in Ireland *v.* O. H. & S. Plank Road Co. 3 Ker. 533, 'It by no means necessarily follows, because there is no conflict in the testimony, that the court is to decide the issue between the parties as a question of law. The fact of negligence is very seldom established by such direct and positive evidence that it can be taken from the consideration of the jury and pronounced upon as a matter of law. On the contrary, it is almost always to be deduced as an inference of fact from several facts and circumstances disclosed by the testimony, after their connection and relation to the matter in issue have been traced, and their weight and force considered. In such cases the inference cannot be made without the intervention of a jury, although all the witnesses agree in their statements, or there be but one statement which is consistent throughout. Presumptions of fact, from their very nature, are not strictly objects of legal science, like presumptions of law.' In Kellogg *v.* N. Y. C. R. R. Co. 24 How. Pr. 177, Mr. Justice Mason, after quoting approvingly the foregoing opinion of Mr. Justice Johnson, adds: 'What constitutes negligence in such cases is determined by an inference of the mind from the facts and circumstances of the case, and as minds are differently constituted, the inference from a given state of facts and circumstances will not always be the same. I admit the facts may be so clear and decided that

It is true that the inference is, in a general sense, one of "law," as to the principles of which it is the duty of the court to advise the jury; but the "law" is in such case logical, and not distinctively juridical. What has been said elsewhere with regard to the inference of intent,[1] applies with equal force to negligence. Neither intent, nor the absence of intent (which is the gist of negligence), is arbitrarily to be inferred by the judge, as a necessary juridical conclusion, from any facts, no matter how strong. The conclusion is *inductive*, not *deductive;* it is a probable inference from circumstances, not a certain deduction from absolute rules.[2] No doubt we have frequent cases in which courts have ruled that certain facts constituted "legal negli-

the inference of negligence is irresistible, and in every such case it is the duty of the judge to decide; but when the facts, or the inference to be drawn from them, are in any degree doubtful, the only proper rule is to submit the whole matter to the jury, under proper instructions.' So in Gaynor *v.* O. C. & N. R. Co. 100 Mass. 21, Colt, J., in delivering the opinion of the court, said: 'Courts must take notice of that which is matter of common knowledge and experience, and when the plaintiff's case fails to disclose the exercise of ordinary care, as judged of in the light of such knowledge and experience, he shows no right to a recovery. Ordinarily, however, it is to be settled as a question of fact in each case as it arises, upon a consideration of all the circumstances disclosed, in connection with the ordinary conduct and motives of men, applying as the measure of ordinary care the rule, that it must be such care as men of common prudence usually exercise in positions of like exposure and danger. When the circumstances under which the plaintiff acts are complicated, and the general knowledge and experience of men do not at once condemn his conduct as careless, it is plainly to be submitted to the jury. What is ordinary care in such cases, even though the facts are undisputed, is peculiarly a question of fact, to be determined by the jury under proper instructions. It is the judgment and experience of the jury, and not of the judge, which is to be appealed to.'" Crockett, J., Ferandez *v.* R. R. Sup. Ct. Cal. 1876; reported in Central L. J. Jan. 26, 1877.

[1] Whart. on Ev. § 1258.

[2] Another instance of the confusion arising from the double meaning of the term "law" is to be found in R. R. *v.* Stout, 17 Wall. 637, where Hunt, J., speaks of certain conclusions as to negligence being conclusions of "law," but where it is plain from what follows that he means *logical* as distinguished from *juridical* law. The same observation applies to the remarks of Cockburn, C. J., in Welfare *v.* R. R. L. R. 4 Q. B. 696 (quoted in Bigelow's Cases on Torts, 594), where he says that it is "a matter of universal knowledge and experience that in a great city persons do not employ their own servants to do repairs on the roofs of their houses or buildings," and then holds that this is to be assumed by the courts. This is *law*, but *social*, not *juridical* law.

gence," or "negligence at law." Thus we are told in Pennsylvania that not to look out on approaching a railroad "is negligence *per se*, and a question for the court;"[1] but when we follow the rulings, on the same topic, of the court by whom this proposition is announced, we find that it is one of induction, varying with circumstances, and fading away entirely when looking out would have been useless or was impossible.[2] If, however, we qualify the proposition above given, so as to make it read, "It is a law of probable reasoning that a person who does not look out when approaching a railroad is negligent," then the cases are consistent. The true position is this: Negligence (with the exception hereafter to be noticed) is always a logical inference, to be drawn by the jury from all the circumstances of the case, under the instructions of the court. In all cases in which the evidence is such as not to justify the inference of negligence, so that a verdict of negligence would be set aside by the court, then it is the duty of the court to instruct the jury to negative negligence.[3] In all other cases, the question is for the jury, subject to such advice as may be given by the court as to the force of the inferences.[4] The only exception to this rule is that elsewhere discussed, where a statute declares that a party doing or omitting certain things is to be treated as negligent. In such cases all that the jury has to decide is whether the thing in question was done or omitted. If so, negligence is juridically imputed, and this must be declared by the court.[5]

[1] Penn. R. R. *v.* Beale, 13 Penn. St. 504. See supra, § 382; and see other cases cited, Bigelow's Cases on Torts, p. 592.

[2] See supra, §§ 382–3–4.

[3] Infra, § 423.

[4] That a court may tell a jury that the plaintiff's case is barred by contributory negligence, see Gonzales *v.* R. R. 38 N. Y. 440; Wilcox *v.* R. R. 39 N. Y. 359; Reynolds *v.* R. R. 58 N. Y. 252; Morris *v.* Haslam, 33 N. J. L. 147; Pittsburg, &c. R. R. *v.* McClurg, 56 Penn. St. 299; Lewis *v.* R. R. 38 Md. 579; Delany *v.* R. R. 33 Wis. 67; Rothe *v.* R. R. 21 Wis. 256; Fleming *v.* R. R. 49 Cal. 253. See Bonnell *v.* R. R. 39 N. J. L. Infra, § 427.

[5] See supra, § 385; infra, § 804. See article in Central Law J. vol. ii. No. 51; and Bigelow's Cases on Torts, p. 592; and see, generally, discussion in Whart. on Ev. § 1238.

In Brooks *v.* Somerville, 106 Mass. 271, it was said by Ames, J.: "It is too well settled to be now brought in question, that there may be a state of things in the trial of a cause, in which it is the duty of the court either to instruct the jury that there is no evidence upon which the plaintiff is entitled to recover, or on which the other party can maintain his defence. Such

§ 421. "To warrant," [1] says Erle, C. J.,[2] "a case of this class being left to the jury it is not enough that there may be some evidence. A mere *scintilla* of evidence is not sufficient, but there must be proof of well-defined negligence." The plaintiff, therefore, must give some proof from which there may be a logical inference of negligence, and the mere happening of an accident is not sufficient evidence to be left to the jury.[3] The same rule, as has already

In actions for injuries not based on contract, the burden of proof of negligence is on the plaintiff.

a course of proceeding in a proper case is not an invasion of the province of the jury. The rule of law upon which it depends is simple and intelligible in itself, although, in the wide diversity of the cases in which it is discussed, there is some practical difficulty in its application, and perhaps some apparent conflict in the decisions upon the subject. Thus, upon this subject of negligence, it has been held as matter of law, that an attempt to cross a railroad train by going between two cars in motion (Gahagan *v.* Boston & Lowell Railroad Co. 1 Allen, 187); leaving a train of cars after it had started (Lucas *v.* Taunton & New Bedford Railroad Co. 6 Gray, 64); leaping from a train while in motion (Gavett *v.* Manchester & Lawrence Railroad Co. 16 Gray, 501); crossing a railroad track in front of an approaching train without looking up (Butterfield *v.* Western Railroad Co. 10 Allen, 532; Wilds *v.* Hudson River Railroad Co. 24 N. Y. 430); if without any reasonable excuse, are facts upon which the jury should be told that they cannot find that the party so conducting was in the exercise of due and reasonable care. But in all of these cases there was no dispute about the facts; nothing material was left in doubt; there was no question as to the credibility of witnesses; and nothing was left to be inferred in the way of explanation or excuse. In such cases, the court may properly decide that no case is proved which could in law support a verdict for a plaintiff, and that the testimony furnishes nothing for the consideration of the jury. In Denny *v.* Williams, 5 Allen, 1, this court has said that it is not necessary, in order to apply the rule, that there should be absolutely no evidence, provided the *scintilla* of evidence be so slight that the court would feel bound to set aside any number of verdicts resting on no other foundation." See, also, Fisk *v.* Wait, 104 Mass. 71.

[1] See Whart. on Evidence, § 359.

[2] Cotton *v.* Wood, 8 C. B. N. S. 568.

[3] Scott *v.* London & St. Cath. R. Docks, 3 H. & C. 596; Ellis *v.* R. R. L. R. 9 C. P. 551; Hammack *v.* White, 11 Com. B. N. S. 588; 31 L. J. C. P. 129; Toomey *v.* London & Brighton Railway Co. 3 Com. B. N. S. 146; Morgan *v.* Sim, 11 Moore P. C. 312; Batchelder *v.* Heagan, 16 Shep. 32; Kendall *v.* Boston, 118 Mass. 234; Hall *v.* Brown, 54 N. H. 495; Losee *v.* Buchanan, 51 N. Y. 476; Marshall *v.* Welwood, 38 N. J. L. 339; Allen *v.* Willard, 57 Penn. St. 374; Adams Ex. Co. *v.* Sharpless, 77 Penn. St. 517; Penns. R. R. *v.* Goodman, 62 Penn. St. 329; McCully *v.* Clarke, 40 Penn. St. 399; McGinity *v.* Mayor, 5 Duer, 674; Chicago *v.* Mayor, 18 Ill. 349; Owens *v.* R. R. 58 Mo. 386; Herring *v.* R. R. 10 Ired. 402; Grand Rapids R. R. *v.* Judson, 34 Mich. 506; Gliddon *v.* McKinstry, 28 Ala. 408. As to burden of proof in actions for negligent communication of

been shown in the discussion of cases of collision with persons crossing railroads and with stock, obtains in this country.[1] "No one," says Judge Field, in 1872, in the supreme court of the United States, "is responsible for injuries resulting from unavoidable accident, when engaged in a lawful business. A party charging negligence as a ground of action must prove it. He must show that the defendant, by his act or by his omission, has violated some duty imposed on him, which has caused the injury complained of."[2] But the very nature of the accident may of itself, and through the presumptions it carries, supply the requisite proof.[3] It is also to be observed that when the defendant's act, causing injury, was *per se* illegal or wrongful (*e. g.* blasting near a highway), this is sufficient to make out the plaintiff's case.[4]

As against bailees, in tort, plaintiff must prove tort.

§ 422. When a plaintiff sues on contract, it is enough for him to prove the contract and its non-performance.[5] This rule has sometimes been extended to suits against bailees for torts, though the better opinion is, that in such cases the plaintiff, in addition to the duty, must prove the tort on which his action is based.[6] Slight proof, however, is in such case sufficient to sustain an inference of negligence. Hence the breakage of goods in the hands of a carrier makes out a *primâ facie* case of negligence.[7] When, however,

fire, see infra, §§ 867, 870; in railway collision with cattle, § 899.

[1] Comstock *v.* Des Moines R. R. 32 Iowa, 376; Walsh *v.* Virg. & T. R. R. 8 Nev. 110; B. & O. R. R. *v.* Fitzpatrick, 35 Md. 32. See Frech *v.* R. R. 39 Md. 574; Mitchell *v.* R. R. 30 Ga. 22.

[2] Parrott *v.* Wells, 15 Wall. 524.

[3] Addison, Torts, 1870, pp. 17, 366, 400; Byrne *v.* Boodle, 2 H. & C. 722; Czech *v.* Gen. St. Nav. Co. L. R. 3 C. P. 120; Templeman *v.* Haydon, 12 Com. B. 507; Bigelow's Cases on Torts, 596. That negligence may be inferred from the nature of an injury, see, in addition, Kearney *v.* R. R. L. R. 5 Q. B, 411; *S. C.* L. R. 6 Q. B. 759; Mullen *v.* N. Y. 57 N. Y. 567; Carroll *v.* R. R. 58 N. Y. 126; Stokes *v.* Saltonstall, 13 Peters, 181.

In a late New York case, the evidence was that the plaintiff was a passenger in one of defendants' stages. As she was getting out, the horses started, and by reason thereof she was thrown down and injured. In an action to recover damages, it was held, that the facts showed *primâ facie*, either that the horses were unsuitable for the business, or that the driver was incompetent. Roberts *v.* Johnson, 58 N. Y. 613.

[4] Infra, § 861; Hay *v.* Cohoes Co. 2 Comst. 158; Wright *v.* Compton, 53 Ind. 337.

[5] Whart. on Ev. §§ 356–57, 363.

[6] Ibid.

[7] Ketchum *v.* Merch. Un. Ex. 52 Mo. 390; Steele *v.* Townsend, 37 Ala. 247; Graham *v.* Davis, 4 Ohio St. 363. When both a railway itself, and

the plaintiff's case indicates a peril of navigation, or *casus*, within the exception of a bill of lading, or a case otherwise amounting to a defence, then the plaintiff is bound to negative the exception before the defendant is thrown on his defence.[1]

In suits against warehousemen, for tort, there must be something from which to infer negligence, though a very slight inference is sufficient to shift the burden.[2]

Ordinarily, proof of mere loss of a thing bailed (except in cases of innkeepers and common carriers of goods) will not throw the burden of disproving negligence on the defendant.[3]

But where a bailee returns an article bailed in an injured condition, and gives no explanation how the injury occurred, the burden of proof is upon him to show that there was no negligence.[4]

the carriages in which the passengers are conveyed, are under the exclusive control of the company, the very fact of a train's running off the line is *primâ facie* proof of negligence on the part of such company or its officers, and sufficient to throw upon them the burden of explaining how it happened, and of showing that it occurred without any fault or neglect on their part. Carpue *v.* R. R. 5 Q. B. 751. See, also, Cotton *v.* Wood, 8 C. B. N. S. 568; 29 L. J. C. P. 333; Toomey *v.* R. R. 3 C. B. N. S. 146. See Lewis *v.* Smith, 107 Mass. 334; Adams Ex. Co. *v.* Stettaners, 61 Ill. 184.

In Cass *v.* R. R. 14 Allen, 448, it was held that in an action of *contract* against warehousemen for a failure to deliver goods upon demand, the burden of proof is on them to show that the goods have been lost without their fault.

See Empire Transportation Co. *v.* Wamsutta Oil Co. 63 Penn. St. 14, where part of the measure of duty resting upon defendants as common carriers was to have perfect car-couplings. The defendants' oil-train caught fire, and by reason of a defective coupling the car, containing plaintiff's oil, could not be uncoupled, but was consumed, with its contents, although it could otherwise have been saved. The jury were instructed to find for the plaintiff.

[1] Transp. Co. *v.* Downer, 11 Wall. 134.

[2] Russ. Man. Co. *v.* N. H. St. Co. 50 N. Y. 121; Empire Co. *v.* Oil Co. 63 Penn. St. 14. See infra, § 576.

[3] Story on Bailments (Bennett's ed.), § 410, citing 1 Bell Com. § 889; 2 Kent's Com. Lect. 40; Adams *v.* Carlisle, 21 Pick. 46; Carsley *v.* White, 21 Pick. 254; Briud *v.* Dale, 8 C. & P. 207; Gilbart *v.* Dale, 5 Ad. & El. 543; Cooper *v.* Barton, 3 Camp. 5; Newton *v.* Pope, 1 Cow. 109.

[4] Logan *v.* Matthews, 6 Barr, 417; and see Bush *v.* Miller, 13 Barb. 481; Cummins *v.* Wood, 44 Ill. 416; Story on Bailments, § 410.

"The nature of an accident may itself afford *primâ facie* proof of negligence; Curtis *v.* R. R. 18 N. Y. 534, 544; Story on Bailments, § 338; 5 Exch. 787; 3 H. & C. 596; 13 Pet. 181; 5 Ad. & El. 747; 11 Pick. 106; 2 Camp. 79; and we think, as the case stood, the judge erred in not submitting the question of negligence to the jury." Rapallo, J., Russell Man. Co. *v.* N. H. St. Co. *ut supra.*

In a late New York case, proof was

Contributory negligence, — burden on defendant to prove.

§ 423. That the plaintiff, by his negligence, so contributed to the injury as to break the causal connection between such injury and the defendant's act, is a matter of defence, which, in the ordinary process of proof, it is incumbent on the defendant to make out. So, indeed, has it frequently been held.[1] Nor, as a rule, does the defence avail the defendant unless established by a preponderance of evidence.[2]

§ 424. On the other hand, it is argued by high authority, that "Wherever there is negligence on the part of the plaintiff, contributing directly, or as a proximate cause, to the occurrence from which the injury arises, such negligence will prevent the plaintiff from recovery; and the burden is always upon the plaintiff to establish either that he himself was in the exercise of due care, or that the injury is in no degree attributable to any want of proper care on his part."[3]

given of the non-delivery of the goods to the consignee, and that some months after shipment the box which had contained them was picked up empty. No explanation of the non-delivery was shown. It was ruled that these facts warranted the submission of the question of negligence to the jury; and a refusal so to do was error. Maquin *v.* Dinsmore, 56 N. Y. 168.

Whether in an action on the ground of negligence against a common carrier upon a bill of lading, containing an exemption from liability from loss by fire, the burden of proof is on the carrier to show that the loss occurred within the terms of the exemption, and that the loss occurred without fault on his part. See supra, § 128; infra, § 429.

[1] Whart. on Ev. § 361; Railroad Co. *v.* Gladman, 15 Wall. 401; Ind. R. R. *v.* Horst, 93 U. S. (3 Otto) 392; Oldfield *v.* R. R. 3 E. D. Smith, aff. 14 N. Y. 310; Johnson *v.* R. R. 20 N. Y. 65; Wilds *v.* Same, 24 N. Y. 430; Durant *v.* Palmer, 5 Dutch. 44; Penn. Canal Co. *v.* Bentley, 66 Penn. St. 30; Frech *v.* R. R. 39 Md. 574; Smoot *v.* Wetumpka, 24 Ala. 112; Wheeler *v.* Westport, 30 Wis. 392; Strahlendorf *v* Rosenthal, 30 Wis. 675; Karasich *v.* Hasbrouc, 29 Wis. 569; Castello *v.* Landwehr, 28 Wis. 522; Kansas Pac. R. R. *v.* Pointer, 14 Kans. 37; Thompson *v.* R. R. 51 Mo. 190; St. Anthony Falls Co. *v.* Eastman, 20 Minn. 377; McQuilken *v.* R. R. 50 Cal. 7. See Donaldson *v.* R. R. 21 Minn. 293; Cleveland, &c. R. R. *v.* Rowan, 66 Penn. St. 393; Penn. R. R. *v.* Weber, 76 Penn. St. 157; Weiss *v.* R. R. 79 Penn. St. 387; Paducah, &c. R. R. *v.* Hoehl, 12 Bush, 42; Texas, &c. R. R. *v.* Murphy, 46 Tex. 356; Knaresborough *v.* Mining Co. 3 Sawyer, 500.

[2] Indian. R. R. *v.* Horst, 93 U. S. (3 Otto) 391.

[3] Wells, J., Murphy *v.* Deane, 101 Mass. 466, citing Trow *v.* R. R. 24 Vt. 487; Birge *v.* Gardiner, 19 Conn. 507. See Dowell *v.* Gen. Steam Nav. Co. 5 E. & B. 195.

To the same effect is Dickey *v.* Tel. Co. 43 Me. 492; Warren *v.* R. R. 8

§ 425. It must be remembered, that as a person is presumed to be careful until the contrary appear,[1] the plaintiff, after proving the defendant's negligence, ought to be entitled to rest on this presumption of his own carefulness. At all events, very slight inferences should be sufficient to throw on the defendant the burden of proving the plaintiff's negligence. In any view, whether a person injured by another's negligence was exercising ordinary care is for the jury, if there be any dispute as to the facts, or the inferences from facts.[2]

Allen, 227; Hickey *v.* R. R. 14 Allen, 429; Allyn *v.* R. R. 105 Mass. 77; Wheelock *v.* R. R. 105 Mass. 403; Davis *v.* Chicopee, 116 Mass. 93; Button *v.* R. R. 18 N. Y. 248; Warner *v.* R. R. 44 N. Y. 465; Gillespie *v.* City, 54 N. Y. 468; Evansville, &c. R. R. *v.* Hiatt, 17 Ind. 102; Hathaway *v.* R. R. 46 Ind. 25; Jackson *v.* R. R. 47 Ind. 454; Higgins *v.* R. R. 52 Ind. 110; Galena, &c. R. R. *v.* Fay, 16 Ill. 558; Baird *v.* Morford, 29 Iowa, 531; Reynolds *v.* R. R. 32 Iowa, 140; Patterson *v.* R. R. 38 Iowa, 279; Daniels *v.* Clegg, 28 Mich. 33; Lake Shore R. R. *v.* Miller, 25 Mich. 274. See Jones *v.* R. R. 67 N. C. 122.

When we scrutinize the Massachusetts cases we find that they do not exact from the plaintiff that he should prove due care on his part by direct affirmative evidence. The inference of such care, it is held, may be drawn from the absence of all appearance of fault, either positive or negative, on his part, in the circumstances under which the injury was received. See Mayor *v.* R. R. 104 Mass. 137.

In Hinckley *v.* R. R. 120 Mass. 262, Devens, J., said: "While, however, the plaintiff is to show he was in the exercise of due care, and that no negligence of his contributed to the injury, this may be shown by proving facts and circumstances from which it may be fairly inferred, and, if all the circumstances under which an accident took place are put in evidence, and upon an examination of them nothing is found in the conduct of the plaintiff to which negligence may be fairly imputed, the mere absence of fault may justify the jury in finding due care on his part. Mayo *v.* R. R. 104 Mass. 137. But if there is only a partial disclosure of the facts, and no evidence is offered showing the conduct of the party injured, in regard to matters specially requiring care on his part, the data for such an inference are not sufficient. It can only be warranted when circumstances are shown which fairly indicate care, or exclude the idea of negligence on his part. Crafts *v.* Boston, 109 Mass. 519."

It should be added, that where the burden is on the plaintiff, "in applying the rule that a person who seeks to recover for a personal injury, sustained by another's negligence, must show himself free from fault, the law discriminates between children and adults, the feeble and the strong, and only requires of each the exercise of that degree of care to be reasonably expected, in view of his age and condition. O'Mara *v.* R. R. 38 N. Y. 445; Mowrey *v.* R. R. 51 Ibid. 666; Shearman & Redfield on Neg. 59." Andrews, J., Reynolds *v.* R. R. 58 N. Y. 252.

[1] See Whart. on Ev. § 255.

[2] Webb *v.* Portland R. R. 57 Me.

§ 426. The conflict, therefore, which is just noticed, is only superficial. No doubt, where, in an action for injuries caused by failure of duty on part of the defendant, such failure of duty and injury are shown by the plaintiff, and there is nothing that implies that he brought on the injury by his own negligence, then the burden is on the defendant to prove that the plaintiff was guilty of such negligence. On the other hand, when the plaintiff's own case exposes him to suspicion of negligence, then he must clear off such suspicion.[1]

Plaintiff, when his own case shows contributory negligence, may be nonsuited.

§ 427. If, therefore, the plaintiff, in his own case, shows that he brought the injury on himself by his own carelessness, he may be nonsuited.[2] But unless such a case be presented, the question of the plaintiff's negligence, like that of the defendant's, is for the jury.[3]

Employee against employer.

§ 428. The burden of proof is upon the employee to show both the negligence of the employer and his own care, whenever the injury occurs in the discharge of his

117; Bradley *v.* R. R. 2 Cush. 539; B. & O. R. R. *v.* Fitzpatrick, 35 Md. 32; Southworth *v.* O. C. & N. R. R. 105 Mass. 342; Brown *v.* Hannibal & St. Jo. R. R. 50 Mo. 461; Quimby *v.* Vt. Cent. R. R. 23 Vt. 387; Briggs *v.* Taylor, 28 Vt. 180; Pfau *v.* Reynolds, 53 Ill. 212; Mayo *v.* Bost. & M. R. R. 104 Mass. 137; Cleveland, &c. R. R. *v.* Rowan, 66 Penn. St. 393; Hill *v.* Haven, 37 Vt. 501; McNarra *v.* R. R. 41 Wis. 69.

[1] See argument of Sharswood, J., in Hays *v.* Gallagher, 72 Penn. St. 140.

[2] Holden *v.* Liverpool, 3 C. B. 1; Central R. R. *v.* Moore, 4 Zabr. 824; Brown *v.* R. R. 58 Me. 384; Holly *v.* Bost. Gas Light Co. 8 Gray, 123; Gahagan *v.* R. R. 1 Allen, 187; Trow *v.* R. R. 24 Vt. 487; Henning *v.* R. R. 13 Barb. 9; Thringo *v.* Cent. Park Co. 7 Rob. 616; Brooks *v.* Somerville, 106 Mass. 271, cited supra, § 420; Wilds *v.* R. R. 24 N. Y. 430; Hackford *v.* R. R. 53 N. Y. 654, cited supra, § 420; Marietta, &c. R. R. *v.* Picksley, 24 Ohio St. 48; Morrison *v.* R. R. 63 N. Y. 643; Langhoff *v.* R. R. 19 Wis. 497; Rothe *v.* R. R. 21 Wis. 258; Penns. R. R. *v.* Matthews, 36 N. J. 531; McQuilken *v.* R. R. 50 Cal. 7; Fleming *v.* R. R. 49 Cal. 253. But on this issue the plaintiff will not be nonsuited unless, upon his own showing, he is guilty of negligence which contributed to the injury; nor will the verdict be set aside unless the jury are clearly wrong in their conclusion. Bonnell *v.* R. R. 39 N. J. L. (10 Vroom); McMahon *v.* R. R. 39 Md. 438. See Riest *v.* Goshen, 42 Ind. 339.

[3] Beers *v.* R. R. 19 Conn. 570; Belton *v.* Baxter, 54 N. Y. 245; Gillespie *v.* City, 54 N. Y. 468; Delaware, &c. R. R. *v.* Toffey, 38 N. J. L. 525; Weaver *v.* Gary, 28 Ohio St.; Pitzner *v.* Shinnick, 39 Wis. 129; Smith *v.* R. R. 61 Mo. 588, and cases cited § 158; and see § 420.

duties to his employer.[1] But he is not bound to do more than raise a reasonable presumption of negligence on the part of the defendant.[2] Such a presumption, however, cannot be drawn from the mere fact of the explosion of a steam boiler.[3]

When *casus* or necessity is set up.

§ 429. The question in reference to *casus* has been already independently discussed.[4]

In suits against gratuitous depositaries.

§ 430. The burden of exculpation, in suits against gratuitous depositaries cannot be properly thrown on the defendant, unless there is some presumption of negligence raised by the plaintiff's case.[5]

[1] Campbell *v.* R. R. 53 Ga. 488; Atlanta R. R. *v.* Campbell, 56 Ga. 586.

[2] Greenleaf *v.* R. R. 29 Iowa, 14; Dale *v.* R. R. 63 Mo. 456.

[3] Toledo R. R. *v.* Moore, 77 Ill. 218.

[4] See supra, § 128; and see, to the effect that burden is to prove *casus*, Union Ex. Co. *v.* Graham, 26 Ohio St. 595; U. S. Ex. Co. *v.* Backman, 28 Ohio St. 144.

[5] Infra, § 477.

BOOK II.

NEGLIGENCE IN DUTIES BASED ON CONTRACT.

CHAPTER I.

GENERAL RULES AS TO NEGLIGENCE BASED ON CONTRACT.

Whoever by contract assumes a duty to another person is liable, in an action on the case, to such other person for damages arising from the negligent performance of such duty, § 435.
Confidence bestowed and accepted is a sufficient consideration, § 437.
But such confidence must be immediate between the parties, § 438.
Though contractor is liable to third parties when he retains control of the thing contracted for, § 440.
Or when contractee is agent for the party injured, § 441.
Nor can such a suit be maintained on the defendant's gratuitously undertaking a duty on which he does not enter, § 442.
Action lies against those on whom public duty is imposed, § 443.

§ 435. *Whoever by contract assumes a duty to another person is liable, in an action on the case, to such other person for damages arising from the negligent performance of such duty.* — Where a contract creates a duty, the neglect to perform that duty, as well as the negligent performance of it, is a ground of action for tort. Hence it is at the election of the party injured to sue either on the contract or the tort.[1] For "if the law," says Lord Brougham, "casts any duty upon a person, which he refuses or fails to perform, he is answerable in damages to those whom his refusal or failure injures;"[2] and although, as we will presently see, this liability, if based on con-

Contract sustains a suit for the duty.

[1] Addison on Torts (1870), p. 913; Boorman *v.* Brown, 3 Q. B. 526; 11 Cl. & F. 1; Robinson *v.* Threadgill, 13 Ired. 39; Central, &c. *v.* City, 4 Gray, 485; Ives *v.* Carter, 24 Conn. 392; Butts *v.* Collins, 13 Wend. 154; Newman *v.* Fowler, 37 N. J. L. 89.

[2] In Ferguson *v.* Earl of Kinnoul, 9 Cl. & Fin. 289.

tract, must be limited to persons whose confidence in the party owing the duty is immediate, yet with this limitation, which is involved in the strict meaning of the term "duty," the proposition may be generally accepted.

Contract based on employment.

§ 436. The same rule obtains as to duties based on employment, though there be no specific contract. "Where there is an employment, which employment itself creates a duty, an action on the case will lie for a breach of the duty, although it may consist in doing something contrary to an agreement made in the course of such employment by the party upon whom the duty is cast." [1]

Confidence is a sufficient consideration.

§ 437. "The confidence induced by undertaking any service for another is a sufficient consideration to create a duty in the performance of it." [2] This principle, in fact, lies at the root of the whole law of mandates, to be hereafter discussed.[3] So, as is stated by a learned Massachusetts judge: "For an injury occasioned by want of due care and skill in doing what one has promised to do, an action may be maintained against him in favor of the party relying on such promise and injured by the breach of it, although there was no consideration for the promise." [4] And again, by another judge of the same court: "If a person undertakes to do an act or discharge a duty by which the conduct of others may properly be regulated and governed, he is bound to perform it in such manner that those who are rightfully led to a course of conduct or action, on the faith that the act or duty will be duly and properly performed, shall not suffer loss or injury by reason of his negligence." [5] And even where a valuable consideration is insisted on, an interchange of offices may be such a consideration.[6]

[1] Jervis, C. J., Courtenay *v.* Earle, 10 C. B. 83; Brown *v.* Boorman, 11 Cl. & F. 44. See Holmes *v.* R. R. L. R. 4 Exch. 254; Indermaur *v.* Dames, L. R. 2 C. P. 311. Infra, § 547.

[2] Mr. Smith, in his note to Coggs *v.* Bernard, Smith's Lead. Cas. (6th ed.) 193; adopted in Broom's Com. 680.

[3] Infra, §§ 490–501, 503, 547, and cases there cited; and also infra, § 641.

[4] Ames, J., Gill *v.* Middleton, 105 Mass. 479, citing Benden *v.* Manning, 2 N. H. 289; Thorne *v.* Deas, 4 Johns. R. 84; Elsee *v.* Gatward, 5 T. R. 143; Shiells *v.* Blackburne, 1 H. Bl. 158.

[5] Bigelow, C. J., in Sweeny *v.* R. R. 10 Allen, 368, adopted by Hoar, J., in Coombs *v.* New Bed. Cord. Co. 102 Mass. 572.

[6] Second Nat. Bk. *v.* Ocean Bk. 11 Blatchf. 362.

Illustrations of this principle will be found in abundance in those portions of the following pages which treat of duties based on contracts.[1] The most familiar are those arising from the engagements of common carriers. "Every person who enters upon the performance of the work of carrying merchandise or passengers is bound to exercise due and proper care and skill in the performance of the work, *whether the work is done under a contract or gratuitously;*[2] and every person who has been injured by the negligent performance of the work of carrying is entitled, as we have seen, to an action against the carrier, *although he is no party to the contract* under which the work was done."[3] So a medical man is responsible to a person neglected by him for the negligence, though the contract to employ the medical man was made with a friend of the person neglected.[4] A lawyer, also, who undertakes to conduct a suit gratuitously, cannot set up want of consideration as a defence to an action for damages caused by his negligence.[5]

Such confidence must be immediate.

§ 438. "Privity of contract," indeed, to employ one of the old terms, is not in such case essential.[6] If a carrier employed by me to transport my servant on the cars neglects his duty, my servant cannot sue him on the *contract*, because there is no privity of contract between the two; and if the contract is to be sued upon, it must be by myself.[7]

[1] Infra, § 501. See, as differing from text, Gulledge *v.* Howard, 23 Ark. 61; Dart *v.* Lowe, 5 Ind. 131; Johnson *v.* Reynolds, 3 Kans. 257; Bakewell *v.* Talbot, 4 Dana (Ky.), 216.

[2] See Austin *v.* R. R. L. R. 2 Q. B. 442; Gill *v.* Middleton, 105 Mass. 477; Bland *v.* Womack, 2 Murph. (N. C.) 373; Delaware Bk. *v.* Smith, 1 Edm. (N. Y.) 351; Anderson *v.* Foresman, Wright, 568.

[3] Addison on Torts (1870), p. 914; citing Collett *v.* R. R. 16 Q. B. 989, where a railway company was held liable for negligence in carrying officers of the post-office, whom they were bound to carry safely by statute; and Marshall *v.* R. R. 11 C. B. 655; Gerhard *v.* Bates, 2 E. & B. 476; Behn *v.* Kemble, 7 C. & B. N. S. 260; Hall *v.* Cheney, 36 N. H. 26; and cases of free passengers, cited supra, § 355; infra, §§ 547, 641. See this question discussed at large in Bigelow's Cases on Torts, § 613 *et seq.*

[4] Pippin *v.* Shepherd, 11 Price, 40; Gladwell *v.* Steggall, 5 Bing. N. C. 733; 6 Exch. 767. See Longmeid *v.* Holliday, 6 Exch. 767. Infra, §§ 730–737.

[5] Stephens *v.* White, 2 Wash. (Va.) 203.

[6] Dalyell *v.* Tyer, E., B. & E. 899. See Sawyer *v.* Corse, 17 Gratt. 230.

[7] "The general rule of law," says Gray, C. J., in delivering the judgment of the court in a late Massachusetts case, "is, that a person who is

But the servant, being the party injured, may sue the carrier in an action on the case, in which privity of contract is not necessary, but which is based on injuries directly received;[1] and in such a suit the servant alone can sue.[2] So I may engage a physician to attend a hospital; and if he neglects his duty to a particular patient in that hospital, who thereby suffers, he is liable to me in an action on the contract, but to the patient, in an action on the case.[3]

Yet the confidence must be immediate or the action fails. In other words, there must be causal connection between the negligence and the hurt; and such causal connection is interrupted by the interposition, between the negligence and the hurt, of any independent human agency.[4] I sell, for instance, — as is the case in the leading illustration hereafter given of this principle, — a carriage to A., and after the carriage has been in A.'s use it breaks down and injures B. Now if I sold to A., as will hereafter be seen, as B's agent, then I may be liable to B. But if I sell to A. as the sole recognized vendee, then, when the carriage passes to A., the duty of inspecting and testing it is transferred to A., and if injury occurs to B. from A.'s neglect in this respect, then A. is the party whom B. is to sue. This in some cases may work hardly; but unless we cut off liability at this point, liability could not be cut off at all. A carriage maker would not only be liable to his vendee's vendees *ad infinitum*, but to all the passengers whom these successive vendees might carry. And the view before us has the advantage of compelling the owner of machines, dangerous or otherwise, to be careful as to such machines. He must see that they are in good order, and if he neglects his duty he is liable for the neglect. On

not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract; and consequently that a promise made by one person to another for the benefit of a third person, who is a stranger to the consideration, will not support an action by the latter." Exchange Bk. *v.* Rice, 107 Mass. 37. See infra, § 535.

[1] Marshall *v.* York, &c. R. R. 11 C. B. 655.

[2] Alton *v.* Midland R. R. 19 C. B. N. S. 213; Fairmount R. R. *v.* Stutler, 54 Penn. St. 375.

[3] Pippin *v.* Shepherd, 11 Price, 40; Gladwell *v.* Steggall, 5 Bing. N. C. 733; 6 Exch. 767. The same view is expressly recognized in the Roman law in respect to mandates.

[4] See this fully exhibited, supra, § 134 *et seq.*; infra, § 535. And see Goslin *v.* Agricultural Hall, L. R. 1 C. P. D. (C. A.) 482; Bigelow's Cases on Torts, 613 *et seq.*

no one else could this duty be either justly or effectively imposed.[1]

Thus a contractor is employed by a city to build a bridge in a workmanlike manner; and after he has finished his work, and it has been accepted by the city, a traveller is hurt when passing over it by a defect caused by the contractor's negligence. Now the contractor may be liable on his contract to the city for his negligence, but he is not liable to the traveller in an action on the case for damages. The reason sometimes given to sustain such a conclusion is, that otherwise there would be no end to suits. But a better ground is that there is, no causal connection, as we have seen, between the traveller's hurt and the contractor's negligence. The traveller reposed no confidence on the contractor, nor did the contractor accept any confidence from the traveller. The traveller, no doubt, reposed confidence on the city that it would have its bridges and highways in good order; but between the contractor and the traveller intervened the city, an independent responsible agent, breaking the causal connection.[2]

In the leading case on this topic a contract was made with the postmaster general to furnish certain roadworthy carriages; and after the delivery of the carriages, the plaintiff was injured in using one of them, the carriage having been defectively built. No doubt, had the carriage been built for the plaintiff, he could have recovered from the contractor. But there was no confidence exchanged between him and the contractor; and between them, breaking the causal connection, was the postmaster general, acting independently, forming a distinct legal centre of responsibilities and duties.[3]

So when a contract is made with a machinist to furnish a ma-

[1] See, for a contrary view, ingeniously put, Bigelow's Cases on Torts, 617.

[2] See supra, § 134; Collis *v.* Selden, L. R. 3 C. P. 495; Pickard *v.* Smith, 10 C. B. N. S. 480. A subcontractor engaged on an unfinished building was held not liable to a custom-house officer, who was in the habit of passing that way (not being the regular entrance) to perform his duty in visiting a bonded vault, and who in doing so fell into an opening and was damaged. Castle *v.* Parker, 18 L. T. N. S. 367.

[3] Winterbottom *v.* Wright, 10 M. & W. 115. See this case criticised in Bigelow's Cases on Torts, 614 *et seq.*; Davidson *v.* Nichols, 11 Allen, 514. As to telegraphs, see infra, § 768. As to agents, infra, § 535.

chine safe for particular purposes, and the machine, after delivery, proves unsafe, and injures a third person. The latter cannot recover from the machinist, though the machinist could be sued by the owner of the machine on the contract.[1] It would be otherwise, however, as we will see, if the machinist had placed on a thoroughfare, without notice, a dangerous machine, likely to injure all who touched it.[2]

An extreme illustration of the principle before us is to be found in an English case, in which the declaration alleged that defendant wrongfully and negligently hung a chandelier in a public house, knowing that the plaintiff and others were likely to be therein and under the chandelier, 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.[3] A demurrer to the declaration was sustained; and we may accept the ruling on the ground that the plaintiff reposed no special confidence on the defendant, and the defendant accepted no such confidence from the plaintiff. Had the chandelier been under the defendant's control, or had the vendee of the chandelier been in any sense the agent of the plaintiff, the ruling, as we will see, would probably have been otherwise.[4]

§ 439. Where A. employed B., a solicitor, to do an act for the benefit of C., A. having to pay B., and there was no intercourse of any kind between B. and C., it was held that C. could not maintain a suit for negligence against B.[5] This is a strong case; for where a special act is to be performed by contract for the benefit of a particular individual, it is hard to suppose a case in which the person performing the act and the person benefited do not meet in such a way as to raise an implied duty on the part of the former to the latter. Hence, whenever there is any evidence to show a duty accepted and a trust imposed, a jury may infer such duty or trust, even though the parties have never

[1] Losee *v.* Clute, 51 N. Y. 494; Loop *v.* Litchfield, 42 N. Y. 358. Infra, §§ 774, 775. See, also, Davidson *v.* Nichols, 11 Allen, 514.

[2] See infra, § 860.

[3] Collis *v.* Selden, L. R. 3 C. P. 495.

[4] See, as a still more recent case to the same effect, Cattle *v.* Stockton Water Works, L. R. 10 Q. B. 453; and see, also, Dicey on Parties, c. 4, rule 11.

[5] Robertson *v.* Flemming, 4 Macq. H. L. Ca. 177.

met.[1] But in support of the necessity of a personal relationship between the person neglected and the person neglecting the reasons are obvious. Practically, were such a limitation not imposed, a physician would be liable for neglect to all persons who may have lost the services of the person neglected; and disappointed legatees might sue solicitors for neglect in drawing wills. And even if this objection be waived, we fall back upon the general principle, already so frequently announced, that where, between the negligence and the damage, an independent causality intervenes, there the connection between the first negligence and the damage is broken.[2]

Contractor liable to third parties when he retains control of the thing contracted for.

§ 440. Certain apparent exceptions, however, exist to the rule that a contractor is not liable to third parties for negligence. (1) The first of these exceptions exists when the contractor retains control of the thing producing the injury. We shall have fuller opportunity hereafter, when we discuss the scope of the rule, *Sic utere tuo ut non alienum laedas*, of seeing that wherever a party controls a thing that is a nuisance, he is liable to third parties for any damage to them which due prudence on his part might have averted.[3] That liability to the plaintiff under such circumstances, for the mischief thus produced, is not diverted by the fact that the defendant had contracted with a third party to do the particular thing, is illustrated by the following cases: —

An architect and superintendent of the construction of a building is liable for the killing of a workman caused by the falling of a wall which resulted from the giving way of the supports on which it rested, although the appliance was put to work under the immediate direction of another person employed by the owner of the building, it appearing that the manager of the jackscrew was employed under the advice of the architect, and subject to his direction, and that he knew and approved of the method adopted for effecting the raising.[4]

In a case decided by the New York court of appeals in

[1] Lord Campbell, C. J., 4 Macq. H. L. C. 177, 178; 1 Smith L. Ca. 6th ed. 193. Supra, § 438.

[2] See supra, § 134.

[3] Infra, §§ 786, 818, 824, 839.

[4] Lottman *v.* Barnett, 62 Mo. 159. See, as to liability of architects, Bigelow's Cases on Torts, 659. Infra, § 512.

1874;[1] the evidence was that the firm of O. and M. contracted with the defendant, a mill company, to place an iron cornice on its mill, the defendant agreeing to erect the scaffolding necessary for the purpose; and that the defendant erected the scaffolding, and O. and M. began to put the cornice in place; but while doing so the scaffold fell, killing a workman in the employ of O. and M. who was upon it. It was held that the defendant was liable for the injuries thus received. "At the time of the injury," says Rapallo, J., distinguishing the case from those previously cited, "the scaffold belonged to the defendant, had been erected by it, was in its possession, and was being used on its premises, with its permission, for the very purpose for which it had been furnished, and by the persons for whose use it had been provided. . . . . It is evident from the nature and position of the structure that death, or great bodily harm, to those persons would be the natural and almost inevitable consequence of negligently constructing it of defective material or insufficient strength. It was clearly the duty of the defendant and its agents to avoid that danger by the exercise of proper care."[2]

[1] Coughtry *v.* Globe Woollen Co. 56 N. Y. 124, reversing *S. C.* 1 N. Y. Sup. Ct. 452.

[2] Citing Thomas *v.* Winchester, 3 Selden, 397; Godley *v.* Hagerty, 20 Penn. St. 387; Cook *v.* Floating Dock, 1 Hilt. 436. In Coughtry *v.* Woollen Co. Rapallo, J., thus notices Winterbottom *v.* Wright and Longmeid *v.* Holliday: —

"The cases cited on the part of the defendant and referred to in the opinion are not, we think, analogous in principle to the present one. The leading case of Winterbottom *v.* Wright, 10 M. & W. 109, clearly illustrates the distinction. Apart from his contract with the postmaster general to keep the mail coach in repair, Wright, the defendant, had no connection whatever with the occurrence out of which the injury to the plaintiff arose. He did not own or run the coach; it was not in his possession or under his control, and he did not invite any one to enter it. His only liability, in case of a breach of his contract to repair, was to the party with whom he had contracted so to do. In the case of the lamp, Longmeid *v.* Holliday, 6 E. L. & Eq. 562 (6 Exch. 761); the wheel, Loop *v.* Litchfield, 42 N. Y. 351; the boiler, Losee *v.* Clute, 51 N. Y. 494; the defective article had been sold and delivered to the purchaser; the seller, or maker, had ceased to have any control over it; and, in the absence of fraud on his part, responsibility to third persons for what was subsequently done with the article devolved upon those having charge of it. A tradesman who sells an article which he at the time believes and warrants to be sound, but which is actually unsound, is not liable for an injury subsequently sustained by a

§ 441. (2) Ordinarily, if I sell to A. an instrument which in certain contingencies is dangerous, and A. gives that instrument to B., I am not liable, on the principles just stated, for damage sustained by B. in consequence of the imperfection of the instrument. It is otherwise, however, if A. is B.'s agent, or when I contemplate, at the time of the bargain, B. as the party to be affected, in which cases I may be regarded as owing a duty to B., for negligence in the discharge of which I may be liable.[1]

Or when contractee is agent for party injured.

third person, not a party to the contract of sale, in consequence of such unsoundness. This case is entirely different"

[1] On this ground, as well as on the ground of fraud, may be sustained the much discussed case of Langridge *v.* Levy, 2 M. & W. 519; 4 M. & W. 337, where the evidence was that the defendant made a false representation as to the soundness of a gun to the plaintiff's father, and the plaintiff, having used the gun relying on this, was injured by the bursting of the gun; and where the defendant was held liable to the plaintiff. See, also, Lumley *v.* Gye, 2 E. & B. 216; and see George *v.* Skivington, L. R. 5 Exch. 1, where the plaintiff and his wife sued the defendant, an apothecary, alleging, in the declaration, that the defendant, in the course of his business, professed to sell a chemical compound, made of ingredients known only to him, and by him represented to be fit to be used for a hair wash, without causing injury to the person using it, and to have been carefully compounded by him; that the plaintiff thereupon bought of the defendant a bottle of the wash to be used by G., his wife, a co-plaintiff, as the defendant then knew, and on the terms that it could be safely so used, and had been carefully compounded; and the breach was that the defendant had so negligently and unskilfully conducted himself in preparing and selling the hair wash, that, by reason thereof, it was unfit to be used for washing the hair, whereby the wife, who used it for that purpose, was injured. The declaration was held good on demurrer.

In Lumley *v.* Gye, it was said by Coleridge, J.: "Courts of justice should not allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds which our law, in a wise consciousness, as I conceive, of its limited power, has imposed on itself of redressing only the proximate and direct consequences of wrongful acts."

In Cattle *v.* Stockton Water Works, L. R. 10 Q. B. 458, two of the last cited cases are thus noticed by Blackburn, J.: "The two cases which go furthest in allowing a right of action to one injured in consequence of a breach of a contract with a third person, or of a breach of duty to a third person, are Langridge *v.* Levy, 2 M. & W. 519, affirmed in error, 4 M. & W. 337; and Lumley *v.* Gye, 2 E. & B. 216. In the first, the plaintiff was a son, whose hand was shattered by the bursting of a gun which had been sold to the father for his, the son's, use, with a false and fraudulent representation that it was a safe one. But the court below and the court in error both carefully point out, as the ground of their judgment, that, 'as there was

(3) It may also be noticed that when a party is required by statute to do a particular thing, he may be sued by any parties who may be injured by his default.[1] So he who starts a nuisance is liable to third persons for the nuisance which he starts.[2] And he who sets afloat a dangerous agency, whose qualities are concealed, is liable for the injuries it produces to his vendee's vendee.[3]

Vendor or contractor liable for illegality or nuisance.

§ 442. Nor can a suit be ordinarily maintained for damages arising from the defendant gratuitously undertaking to do a thing on the performance of which he does not enter. *Voluntatis est suscipere mandatum, necessitas est consummare.* As a general rule, a mere volunteer cannot be made responsible for damages in undertaking to execute an office on which he does not enter.[4] Thus B. who voluntarily undertakes to insure A.'s vessel, which vessel is lost, is not responsible to A. for neglecting to make the insurance, there being no relationship of principal and agent between the two.[5] Indeed, if we do not maintain this exception, few persons who make general offers of service to others could escape actions on the case for negligence. Yet if there are several persons undertaking to execute a particular commission, and the defendant, pressing to do it, excludes others by whom it would have been faithfully performed, it is hard to see why a confidence thus accepted and abused should not be the basis of an action on the case for negligence.[6]

Volunteer not liable for omission to act.

fraud, and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured.' In Lumley *v.* Gye, the majority of the court held that an action would lie for maliciously procuring a third person to break her contract with the plaintiff. But all three of the judges who gave judgment for the plaintiff relied upon malicious intention. It would be a waste of time to do more than refer to the elaborate judgments in that case for the law and authorities on this branch of the law."

[1] Supra, § 439. See question discussed as to telegraph companies' liability to sendee, infra, §§ 757, 758.

[2] Infra, §§ 780–793; supra, § 187.

[3] Infra, § 853.

[4] Balfe *v.* West, 13 C. B. 466; McGee *v.* Bast, 6 J. J. Marsh. 456; Reid *v.* Humber, 49 Ga. 307. See Simpson *v.* Lamb, 17 C. B. 603.

[5] Thorne *v.* Deas, 4 Johns. R. 84.

[6] See Elsee *v.* Gatwood, 5 T. R. 143.

§ 443. Where a statute requires an act to be done or abstained from by one person for the benefit of another, then an action lies in the latter's favor against the former for neglect in such act or abstinence, even though the statute gives no special remedy. In such cases applies the maxim, *Ubi jus ibi remedium*.[1] Thus, in an action against a public officer for neglect, whereby the plaintiff was injured, it is no defence that the defendant contracted not with the plaintiff, but with the government; the action being founded not on contract but on breach of duty.[2] Even the imposition of a penalty by the statute does not oust the remedy by indictment, nor, *a fortiori*, by suit for negligence,[3] unless the penalty be given to the party injured in satisfaction for injury.[4]

Party disobeying statute liable for neglect.

[1] Anon. 6 Mod. 27; Mitchell *v.* Knott, 1 Sim. 499; Braithwaite *v.* Skinner, 5 M. & W. 327; Couch *v.* Steel, 3 E. & B. 402; Fawcett *v.* R. R. 16 Q. B. 610; Ricketts *v.* R. R. 12 C. B. 160; Buxton *v.* R. R. L. R. 3 Q. B. 549; Ellis *v.* Sheffield Gas Co. 2 E. & B. 767. See Gray *v.* Pullen, 5 B. & S. 981; R. *v.* Longton Gas Co. 2 E. & E. 651; Clothier *v.* Webster, 12 C. B. N. S. 790; Mersey Docks *v.* Gibbs, 11 H. L. Cas. 686; Thompson *v.* R. R. 2 B. & S. 106; Coe *v.* Wise, L. R. 1 Q. B. 711; Walker *v.* Goe, 4 H. & N. 350; Ohrby *v.* Ryde Com. 5 B. & S. 743; Cane *v.* Chapman, 5 A. & E. 647; Collins *v.* Middle Lev. Com. L. R. 4 C. P. 479.

[2] See cases cited supra, § 285; and also Winterbottom *v.* Wright, 10 M. & W. 107; Burnett *v.* Lynch, 5 B. & C. 589; Marshall *v.* York, 11 C. B. R. 655; Farrant *v.* Barnes, 11 C. B. N. S. 553; Sawyer *v.* Corse, 17 Gratt. 230; Weightman *v.* Washington, 1 Black (U. S.), 39; Jones *v.* New Haven, 34 Conn. 1; Adsit *v.* Brady, 4 Hill (N. Y.), 630; Hutson *v.* Mayor, 9 N. Y. 69; Robinson *v.* Chamberlain, 34 N. Y. 389; Fulton Ins. Co. *v.* Baldwin, 37 N. Y. 648. See supra, § 81.

[3] Couch *v.* Steel, 3 E. & B. 402.

[4] See St. Pancras *v.* Battersbury, 2 C. B. N. S. 477; Kennett & Avon Canal Co. *v.* Witherington, 18 Q. B. 531; Stevens *v.* Jeacocke, 11 Q. B. 741; Coe *v.* Wise, L. R. 1 Q. B. 711. Supra, § 81.

CHAPTER II.

DEPOSITUM.

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§ 450. DEPOSITUM or deposit, according to the definition of the Roman law, is a contract by which one party, the deponent, leaves a movable thing with another, the depositar, or depositary, for safe keeping, under the obligation that it shall be returned.[1] In our own law the definition is substantially the same, with the exception that the bailment is averred to be gratuitous.[2] Definition.

[1] So Vangerow, § 630; Holtzend. Ency. *in tit.*

[2] Judge Story (Bailments, § 41) declares that "a deposit is usually defined to be a naked bailment of goods, to be kept for the bailor without reward, and to be returned when he shall require it. Perhaps," he proceeds, however, to say, "a more correct definition would be, that it is a bailment of goods to be kept by the bailee without reward, and delivered according to the object or purpose of the original trust; for, in some cases, the deposit may be for the benefit of a third person, and to be delivered to him when demanded, and not to be returned to the bailor. The definition of the Roman law, as we shall presently see, is singularly brief, and pregnant in meaning." He then quotes Pothier, who defines it to be "a contract, by which one of the contracting parties gives a thing to another to

§ 451. The delivery is complete when it is made to an agent of the depositary, for the latter's use; though it is otherwise when the delivery is to an agent not employed by the master in the particular work, and in fraud of the master.[1] It is not necessary that there should be an actual delivery. If the depositary has the thing in his possession at the time the obligation is entered into, the law supposes a delivery coincident with the obligation. Thus, when after an article is hired, the purpose of the hiring is completed, the hirer who retains the article with the owner's consent holds it as a depositum.

Delivery.

§ 452. The contract is for the benefit of the deponent, and is on principle gratuitous; though the fact that a voluntary remuneration is subsequently made does not cause the thing bailed to cease to be a depositum.[2] The *use* of the depositum is from the nature of the contract forbidden to the depositary.

In essence gratuitous.

§ 453. A peculiar protection is cast by the Roman law over deposits made in terror of some impending calamity; as when goods are intrusted to a neighbor or friend in cases of fire, or civil war, or riot, or shipwreck, or probable plunder. Public policy, it is argued, requires that deposits of this kind should be viewed with more tenderness, and guarded with higher sanctions, than is the case with those in which the deponent voluntarily and with full liberty of selection chooses his own depositary, and hence becomes in part responsible for any breach of trust on the part of the latter. By the Roman law, the depositary, in cases of such necessary deposit (*depositum miserabile*), is held liable for *culpa levis*, and by the Old Code was condemned to pay double damage for his neglect. By the Code Napoleon, the *depositum miserabile* is distinguished as the *dépôt nécessaire*, and is invested with peculiar protection; and a similar distinction is made by the Prussian Code. The reason is obvious. If goods can be obtained on gratuitous de-

Deposits in times of necessity, *e. g.* fire, shipwreck, riot, &c.

keep, who is to do so gratuitously, and obliges himself to return it, when he shall be requested." See Jenkins *v.* Bacon, 111 Mass. 373.

[1] Foster *v.* Essex Bank, 17 Mass. 479.

[2] Holtzend. *ut supra*. "The custody," says Judge Story (Bailments, § 57), "must be gratuitous, which results, indeed, from the very definition already given." See Finucane *v.* Small, 1 Esp. 315; 2 Kent Com. Lect. 40, p. 565 (4th ed.); Pothier Traité de Dépôt, n. 13, 31.

posit in times of shipwreck, conflagration, or riot, then wreckage, incendiarism, and riot may be promoted, in order to obtain gratuitous deposits of goods. The law is bound not only to avert this, but to establish the principle, that in peculiar cases of disaster, peculiar consideration and protection are due to those on whom the shock falls.

Deposits with innkeepers.

§ 454. By the Roman law, as well as by our own, the innkeeper, on the principle that with him the deposit is a *dépôt nécessaire*, is liable for the goods of his guest, unless torn from him by inevitable accident or superior force.[1] The modern Roman law extends the same shelter to *travellers* (Reisende) who take *chambres garnies* or furnished chambers, and to visitors at bathing apartments; but not to guests at coffee-houses and restaurants. It is not necessary, to entitle the deponent to recover under this system, that he should be the *owner* of the deposit. It is enough if he has an interest therein. On this topic, however, the discussion is more appropriate to another head.[2]

Deposits of gold or currency.

§ 455. The law of deposit has been extended by modern Roman jurists to embrace the case where fungible articles (*e. g.* gold or currency) are left with the depositary, with an obligation of general as distinguished from special return (tantumdem ejusdem generis); in which case the depositary has the use of the deposit, and has to bear its risks. Our own law in this respect will be noticed in a subsequent section.[3]

Duty of depositary.

§ 456. The duty of the depositary consists in the safe custody and return of the deposit, with all its incidents, in the shape in which it was received.[4] It must be returned

[1] See Doorman *v.* Jenkins, 2 Ad. & E. 256; 2 N. & M. 170.

[2] See infra, §§ 675–93.

[3] Infra, § 469.

[4] Thibaut *v.* Thibaut, 1 La. 493. See Goodenow *v.* Snyder, 3 Greene (Iowa), 599; Howard *v.* Roeben, 33 Cal. 399; Jenkins *v.* Bacon, 111 Mass. 373.

In an Alabama case, the gratuitous bailee of a naked deposit of bank bills deposited them with a person of good credit, who made a general deposit of them with a bank of good credit, and when called on to return them delivered the proper sum in bills of the same bank, but not the identical ones received by him. It was ruled that the original bailee was not liable for the depreciation of the bills on account of the failure of the bank which issued them. Henry *v.* Porter, 46 Ala. 293.

in such shape; depositum in this respect differing from *mutuum*, where the article may be returned in value.

Degree of diligence exacted from.

§ 457. If the return of the deposit, in the shape in which it was received, is not possible, then the depositary, for the reason that the thing has not been used by him, and has produced him no benefit, is said to be liable only for *culpa lata*, or gross negligence.[1]

When we analyze the cases, however, we will find that they fall into two classes: First, those in which deposits are made with persons not in the habit of receiving such deposits, and in such cases it is clear that the depositary is only liable for gross negligence, *i. e.* for the lack of the diligence non-specialists show in such matters. Secondly, where the deposit is made with persons accustomed to receive such deposits, in which case the diligence shown must be determined by the usage of good business men of the particular class, in respect to such duties.[2] The diligence and care which such men under such circumstances are accustomed to exhibit, he must apply.[3]

[*For the purposes of condensation*, §§ 458–9–60 *are omitted in this edition. They contain a critical examination of the Justinian Digest in this relation, vindicating the conclusion which rejects the test of* diligentia quam suis. *In this edition* (*referring the student to the prior edition for the reasoning*) *it may be sufficient to state the conclusion.*]

§ 461. Judge Story, while mistaking, as has been shown,[4] the

[1] Holtz. *in loco;* Doorman *v.* Jenkins, 2 N. & M. 170; 2 Ad. & El. 256; Giblin *v.* McMullen, Law Rep. 2 P. C. 317, Foster *v.* Essex Bk. 17 Mass. 500; Smith *v.* First Nat. Bk. 99 Mass. 605; Spooner *v.* Mattoon, 40 Vt. 300; Edson *v.* Weston, 7 Cowen, 278; Lebenstein *v.* Pritchell, 8 Kans. 13, and cases cited infra; Lancaster Bank *v.* Smith, 62 Penn. St. 47; Scott *v.* Nat. Bk. of Chester, 72 Penn. St. (22 P. F. Smith) 471; Lefarge *v.* Morgan, 11 Martin, 462; Levy *v.* Pike, 25 La. An. 235; Maury *v.* Coyle, 34 Md. 235. As to duties of depositary, see Hobson *v.* Woolfolk, 23 La. An. 389. See, also, infra, § 496, as to the analogy drawn from mandates.

[2] Supra, § 46.

[3] See cases already cited, and see Rooth *v.* Jenkins, 2 A. & E. 256; Tracy *v.* Wood, 3 Mason, 132; Penobscot Boom Co. *v.* Baker, 16 Me. 233; Dougherty *v.* Posegate, 3 Clarke (Iowa), 88; Whitney *v.* Lee, 8 Metc. (Mass.) 91; First Nat. Bk. *v.* Ocean Bk. 60 N. Y. 278; Chase *v.* Mayberry, 3 Harr. (Del.) 266; Wiser *v.* Chesley, 53 Mo. 547; Mechanics' Bk. *v.* Gordon, 5 La. An. 604; Dunn *v.* Brunner, 13 La. An. 452; McKay *v.* Hamblin, 40 Miss. 472; and see supra, § 470.

[4] See first edition of this work, §§ 458–9.

meaning of the Justinian Digest in this relation, is unquestionably right in holding that the depositary's liability is not to be gauged by the test of his conduct in his own affairs. He may let his own affairs go to ruin; he may be ready to leave his door unlocked so that every one can pass through his premises; he may choose as to his own affairs not to see what every one else sees; but he cannot take this course as to deposits. He is here bound to see what every one sees; and his blindness in this respect as to his own affairs is no defence when he is charged with showing this blindness as to the affairs of others. The language of Sir W. Jones,[1] intimating a contrary view, is therefore not merely inconsistent with the Roman standards, but is, as Judge Story properly holds, unsustainable in principle. At the same time, it must be again remembered, this want of the *diligentia in suis* may be proved as part of the evidence by which gross negligence, and sometimes even fraud, may be made out. And so, on the other hand, when gross negligence by a depositary is charged, the defendant, as evidence from which such gross negligence may be inferentially qualified, may show that the care that he bestowed on the deposit was the same that he bestowed on his own goods. And this is eminently the case when there is ground to suppose that the deponent selected the depositary from any special confidence in the latter's mode of doing business.[2]

§ 462. *Generally, therefore, it is no defence that depositary was guilty of like negligence with his own goods.* — Of the abstract proposition we have a direct illustration in a case where the depositary of a horse put him in a field with his own cattle, around which there was a defective fence, through which the horse fell into a field, where he was killed. Here the defect in the fence was something that everybody of ordinary observation could see; and hence the depositary, neglecting to see it, was held guilty of

No defence that depositary was equally negligent in his own affairs.

[1] Jones on Bailm. 31, 32, 46, 47.

In Dr. Baron's Pandekten, a work of high excellence, published in Leipzig in 1872, it is declared that the depositary is as a rule liable only for *culpa lata*, or gross negligence; though when he forces himself into the trust he becomes a quasi insurer. Baron's Pandekten, § 277. So, also, Vangerow, § 630; Hasse, p. 195.

[2] This is the case in Giblen *v.* McMullen, L. R. 2 P. C. Ap. 317, elsewhere noticed; infra, §§ 466, 467.

gross negligence, and therefore responsible for the loss of the horse.[1]

§ 463. As a general rule, liability is imposed on a depositary if he place money deposited with him in a place so conspicuous and accessible to others that persons of ordinary observation would see that when so placed it would be exposed to theft; nor is it any defence that the depositary placed his own goods in the same situation.[2] But if he exercise the prudence usual to persons in his circumstances he is not liable.[3]

Fraud as related to negligence in case of deposit.

§ 464. As has been already shown, the idea of fraud is incompatible with that of negligence; and when fraud or evil intent is proved, then negligence cannot be maintained. Judge Story,[4] it is true, intimates that by the Roman law gross negligence is considered as *per se* fraud; but this arises from a misconception of the term *dolus*. *Dolus* is no doubt used in a limited sense as equivalent to malice or evil intent; and this is always the case when *dolus* is applied in opposition to *culpa*. But *dolus* is not unfrequently expanded so as to include such general recklessness as indicates a mind defiant of law, just in the same way that under the general head of "crimes" we sometimes include "misdemeanors," and then make misdemeanors include negligences. This is shown abundantly by Hasse, in his authoritative treatise,[5] and is illustrated by a passage already quoted from Mr. Austin, in which he tells us that "by the Roman lawyers rashness, heedlessness, or negligence is in certain cases considered equivalent to *dolus*." So, also, Wening-Ingenheim, in a treatise already cited, tell us: "*Culpa* in the Roman law in its widest sense, sometimes includes *dolus;* in which case *culpa* superficially includes what in German we call *Schuld*, or guilt."[6] At the same time this learned expositor is careful to add, that when the classical jurists use *dolus* in opposition to *culpa*, the first implies evil intent; the second,

[1] Rooth *v.* Wilson, 1 Barn. & Ald. 50.

[2] Doorman *v.* Jenkins, 2 Ad. & E. 256; *S. C.* 4 N. & M. 170; Tracy *v.* Wood, 3 Mason, 132.

[3] Spooner *v.* Mattoon, 40 Vt. 300; Foster *v.* Essex Bank, 17 Mass. 479; Story on Bailments, §§ 23, 62; 1 Parsons on Contracts, 570, 571; 2 Kent's Com. 560.

[4] Bailments, § 66.

[5] See supra, §§ 6, 22.

[6] Wening-Ingenheim, Schadenersatze, § 38. Supra, § 7.

such a withdrawal of attention from duty as produces, without positive intention, damage to another.[1]

§ 465. From what has been already seen, want of evil intent is no defence if negligence be proved, for the good reason that negligence does not exist when there is a positive evil intent.[2] Of this frequent illustrations may be drawn from our own adjudications. Thus, it has been held to be gross negligence for the depositary of a painted cartoon, pasted on canvas, to keep it so near a damp wall that the painting gradually, and it was presumed under the continuous inspection of the depositary, peeled off, though there was no ground for charging the depositary with bad faith, or with any other fault than that he omitted "intelligere quod omnes intelligunt."[3] Yet, if the cause of the peeling was something that persons not experts would not detect, then the depositary (supposing the deposit to be gratuitous and free) would not be liable for gross negligence. For slight or special negligence (*culpa levis*) he could only be held liable, in case it should appear that he was an expert, undertaking the bailment as one specially versed in the business.

Want of evil intent no defence.

§ 466. Of course, as has been already noticed, where there is a special contract, this absorbs the ordinary common law engagement of a depositary. Of such special contracts, the most familiar case is that of the statutory receiver of public money; an officer who, as has been seen, is usually, under his bond or statutory appointment, treated as an insurer.[4] If, indeed, in any case a binding contract is made to keep in a particular way, then the goods must be kept in this way; and the depositary is liable not only for gross negligence, but for such special negligence (*culpa levis*) as consists in his not keeping his engagement as a good business man should.[5]

Deposits for "safe keeping."

But a contract for "safe keeping," or to "securely keep," is not to be strained to mean a degree of diligence beyond the de-

[1] See supra, § 11.

[2] See supra, § 11.

[3] Mytton *v.* Cook, 2 Str. 1099. Judge Story justly excepts to Sir W. Jones's commentary on this case, that the depositary would be exculpated if it appeared that he kept his own pictures of the same sort in the same way.

[4] See supra, § 290.

[5] See Co. Lit. 89 *a*; Story Bailments, §§ 68–9.

positary's opportunities;[1] for this, if there be a special trust based upon the depositary's peculiar facilities and modes of doing business, is one of the cases in which the test *diligentia quam suis* must rule.[2]

The depositary cannot evade liability by special agreement.

§ 467. Nor can a depositary who undertakes to hold a deposit from another relieve himself from liability for negligence by special agreement. However indulgently such an agreement might be regarded in England, in this country it falls within the scope of the well established line of decisions which prescribe that a carrier cannot, by special agreement, be absolved from proper diligence. With depositaries, even though gratuitous, the policy of the law requires that negligence should not be by private agreement licensed; and indeed if such an agreement does not spring from fraud, it is likely to induce fraud.[3]

Negligence graduated by value.

§ 468. That the question of negligence is to be determined by the nature and value of the thing deposited is evident from the very definition of gross negligence, or *culpa lata; non intelligere id quod omnes intelligunt.* Everybody knows that a bank note is more liable to accident and theft than a bag of corn. A degree of negligence, therefore, that would not be gross with a bag of corn would be gross with a bank note.[4] Hence, in a Massachusetts case decided in 1873, where the evidence was that the plaintiff, on starting on a long voyage, requested the defendant to buy and keep for him a government bond for $500, which bond the defendant, having undertaken the bailment, subsequently sent by mail to the defendant's wife, when it was lost on the way, it was held that the defendant's act in thus forwarding the bond was so negligent as to make him liable to the plaintiff.[5] The defendant, it was argued by the court, had undertaken to deliver the bond to the

[1] Ross *v.* Hill, 2 C. B. 877; Eddy *v.* Livingston, 35 Mo. 487.

[2] Giblen *v.* McMullen, L. R. 2 P. C. Ap. 317; Foster *v.* Essex Bk. 17 Mass. 479; Whitney *v.* Lee, 8 Metc. 91; Smith *v.* First Nat. Bk. 99 Mass. 605; Knowles *v.* Atlan. & St. R. R. 38 Me. 55. See, however, Kettle *v.* Bromsall, Willes, 118, and Southcote's case, 4 Rep. 83 *b*–84 *a*.

[3] See Lancaster Bk. *v.* Smith, 62 Penn. St. 47. Infra, § 663.

[4] Giblen *v.* McMullen, L. R. 2 P. C. App. 317; Ross *v.* Hill, 2 C. B. 877; United Soc. of Shakers *v.* Underwood, 9 Bush, 609.

[5] Jenkins *v.* Bacon, 111 Mass. 373.

plaintiff, and it was negligence to attempt to deliver it to any one else.[1]

Special deposits of money or securities.

§ 469. Ordinary deposits of currency, to be repaid in an equal amount of currency, fall under the head of *mutuum*, or loan, consisting of a deposit of a fungible article, such as gold or other money, with the obligation that the value should be returned in equal quantity and quality.[2] Of course in this case the question of negligence does not arise, as the depositary is virtually a debtor, bound absolutely for the whole of the debt. It is otherwise in case of a special gratuitous deposit of bullion or securities with a banker to be gratuitously kept by him. This is the case of an ordinary depositum, which the depositary is bound to restore intact, and in the keeping of which he is liable for the want of that diligence and care which good business men are under the circumstances accustomed to apply.[3] Hence in such case the bank is not liable for an embezzlement of the deposit by a cashier or other officer, provided due care was used in selecting such officer, and precautions were taken for the keeping of the deposit such as, under the circumstances, to good business men in such department, would appear adequate.[4]

Bankers' liability for gratuitous special deposit.

§ 470. As, however, the practice of depositing money and securities with bankers is not uncommon, it is proper here to consider it more minutely, and at the outset one or two considerations should be kept in mind. The first is, that the keeping of such special deposits is not a banker's distinctive business, and that there must be evidence showing the adoption of the duty by the bank.[5] The securing of such deposits belongs to a special department, the managers of which keep capacious vaults, fire-proof and well guarded, suited for this particular business and for no other. On the

[1] See, to same effect, Kowing *v.* Manly, 49 N. Y. 193; Stewart *v.* Frazier, 5 Ala. 114; though in some respects *contra*, Heugh *v.* R. R. L. R. 5 Exch. 51.

[2] D. xii. 1 — de rebus cred.; Cod. iv. 1. *eo tit.*

[3] Supra, § 457.

[4] Giblen *v.* McMullen, L. R. 2 P. C. Ap. 317; Foster *v.* Essex Bank, 17 Mass. 479; Smith *v.* First Nat. Bk. 99 Mass. 605; Scott *v.* Nat. Bk. of Chester Valley, 72 Penn. St. 472; Bank of Carlisle *v.* Graham, 79 Penn. St. 106. See 4 Weekly Notes, 205; De Haven *v.* Kensington Bk. 81 Penn. St. 95; Johnson *v.* Reynolds, 3 Kansas, 257; Jennings *v.* Reynolds, 4 Kansas, 110.

[5] Infra, § 474.

other hand, banks, conducting the ordinary banking business, are supposed to invest their funds or loan them to their customers, keeping only a small portion in their vaults. Hence, when a person takes a package of money or securities to a bank, and says, "Keep this for me," he asks the bank to do something not in its particular line of business, and something, therefore, as to which he cannot claim the diligence and caution of specialists in keeping safe deposits, but simply the diligence and caution which is usual with bankers in reference to this particular kind of duty.[1] Secondly, it is of the essence of special deposits, such as those of which we now speak, that not only should it be understood on both sides that the receiving of such deposits is an extra business act, but that the service should be gratuitous. The obligation of the banker in fact is, "I take no risk and receive no pay." Nor can such a practice be regarded as against public policy. Public policy, in fact, should invite rather than discourage the separation of banking business from that of what is called "safe deposit" insurance. The interests of the community are best subserved when branches of business so distinct, and requiring such distinct kinds of apparatus, are kept in separate hands. And even though no safe deposit company be accessible in the place where the deposit is made, yet, as the two kinds of business are in their nature distinct, the bank cannot be considered, unless it make a special contract to the contrary, as bound to treat a special deposit in any other way than would other bailees of the same class accepting the same gratuitous confidences.[2] And thirdly, comes up, after all, the question of *ultra vires;* whether the bank by its charter was authorized to take gratuitous deposits.[3] Of course, when a bank takes deposits for reward, it becomes a warehouseman, and is required to show the diligence of a good business man in his department, and must provide suitable accommodations and exercise suitable care. In such case, however, the test of diligence is, after all, what is usual with good business men under similar circumstances.[4]

[1] See supra, § 457.

[2] See First Nat. Bk. *v.* Ocean Bk. 60 N. Y. 281; Whart. on Agency, § 678 *et seq.;* Johnson *v.* Reynolds, 3 Kans. 257; Hale *v.* Rawallie, 8 Kans. 136; Lobenstein *v.* Pritchett, 8 Kans. 213.

[3] See infra, § 474.

[4] See Third National Bk. *v.* Boyd, 44 Md. 47; First Nat. Bk. *v.* Ocean Bk. 60 N. Y. 278; see Second Nat. Bk. *v.* Ocean Bk. 11 Blatch. 362.

§ 471. To this conclusion, though by a line of reasoning somewhat distinct from that in the text, arrived in 1869 the English privy council, in a case already cited, on the following facts:[1] Certain debentures *payable to bearer* were deposited with a bank as a special deposit without pay, and these debentures were placed by the bank in its strong room, where it kept valuable papers and specie belonging to itself and its customers. The debentures were stolen by a clerk of long standing, whose character had previously been excellent, and who had given no cause to suspect either his fidelity or diligence. One point only was made to show negligence by the bank. The clerk in question had been permitted to go to the strong room alone. After the discovery of the loss, the bank made arrangements by which the strong room could only be visited by two officers in company. The supreme court of Victoria, in which colony the deposit was made and the case tried, held that there was no evidence of negligence to go to the jury, and this was affirmed by the privy council. "It is clear, according to the authorities," said Lord Chelmsford, "that the bank in this case was not bound to more than ordinary care of the deposit intrusted to them, and that the negligence for which alone they could be made liable would have been the want of that ordinary diligence which *a man of common prudence generally exercises in his own affairs.*" It would be more correct to have said, in place of the words italicized, "a person of common prudence, not a specialist, is accustomed to exercise as to matters committed to his charge." And indeed Lord Chelmsford brings us to this point, by saying that "it may be admitted not to be sufficient to exempt a gratuitous bailee from liability that he keeps goods deposited with him in the same manner as he keeps his own, though this degree of care will ordinarily repel the presumption of gross negligence."

§ 472. In Massachusetts, in 1821, in a case of special deposit, the test of *diligentia quam suis* was advanced by the court, though obviously merely as evidential matter, by which in the particular issue gross negligence could be negatived. For Parker, C. J., after stating this test, glances from it, and rests his

[1] Giblen *v.* McMullen, L. R. 2 P. C. App. 317.

judgment on the ground that unless there be gross negligence, no liability attaches to the depositary.[1] For the accepting of such a deposit, he argues, is outside of the usual business of the bank. "The bank cannot use the deposit in its business, and no such profit or credit from the holding of the money can arise as will convert the bank into a bailee for hire or reward of any kind. The bailment in such case is purely gratuitous and for the benefit of the bailor, and no loss can be cast upon the bank for a larceny, unless there has been gross negligence in taking care of the deposit."

§ 473. A similar case came before the supreme court of Pennsylvania in 1872.[2] Certain bonds were deposited as a gratuitous special deposit with the officer of a bank who was both clerk and teller, but who absconded after he had stolen and appropriated the proceeds of the bonds. Had there been gross negligence by the bank in the keeping of these bonds? This was held to depend upon the question whether there was gross negligence in the bank in retaining the delinquent in office; or, in other words, upon whether the bank, in selecting or retaining the delinquent officer, had exercised the diligence customary with good business men under the circumstances. To the test, *diligentia quam suis* as an absolute standard, apply the objections we have already noticed as of general force.[3] I may be capriciously careless about my own goods, but I cannot be permitted to be capriciously careless about the goods of others committed to me on deposit. The true test is, the usage of business men generally, not the practice of a particular person in his own affairs.[4] At the same time, when gross negligence is charged, it is admissible, as we have already seen,[5] as part of the evidence leading to an inference of such negligence, to show that the defendant bestowed less care on the deposit in question than he did with other property of his own of the same class.[6]

But if there be gross negligence (*i. e.* the lack of such care

[1] Foster *v.* Essex Bank, 17 Mass. 479. See, as adopting the same test, Bk. of Carlisle *v.* Graham, 79 Penn. St. 106; Henry *v.* Porter, 46 Ala. 293.

[2] Scott *v.* National Bk. of Chester Valley, 72 Penn. St. (22 P. F. Smith), 472.

[3] Supra, § 54.

[4] Supra, §§ 457–60.

[5] Supra, § 461.

[6] Griffiths *v.* Zepperwich, 28 Ohio St.

and diligence as are customary with good business men under the circumstances), then the depositary is liable. A case of this kind was decided by the supreme court of Pennsylvania in 1869.[1] The evidence was that the teller of the bank delivered the special deposit to a wrong person. Was this gross negligence? Certainly no person of ordinary sense would give a valuable package to a stranger without due inquiry; yet this was what was here done by the teller of the bank. He, therefore, did what no person of ordinary sense would usually do, which is one of the tests of *culpa lata*. Chief Justice Thompson, in giving the opinion of the supreme court, assumes the non-liability of the gratuitous special depositary, except for gross negligence. "The case on hand was a voluntary bailment, or more accurately speaking, a bailment without compensation, in which the rule of liability for loss is usually stated to arise on proof of gross negligence," and the bank, having been guilty, through its servant, of gross negligence, was held liable.

A still stronger case of negligence was adjudicated by the supreme court of Kentucky in 1873.[2] The suit was not against the bank, but against the defendants as directors of the bank. The plaintiffs in their petition alleged that certain bonds were specially deposited by them with the bank, in a certain package, and that all the aforementioned bonds, aggregating in value the sum of $55,660.40, were wrongfully taken from plaintiffs' package of special deposit by the officers of the Bank of Bowling Green, and by them converted to the use and emolument of said bank by sale as aforesaid, without right or authority from these plaintiffs or any of them, *and of such wrongful conversion and appropriation, defendants, and each of them had, or could have had, by the most ordinary diligence and investigation*, ample notice. It was further alleged that the defendants, acting as directors, "did, on various occasions, declare dividends when the condition of the bank did not justify the same, and so appropriated to themselves, they being the largest stockholders, large sums of money actually realized from the conversion of the plaintiffs' property as aforesaid." To this a demurrer was filed, which

[1] Lancaster Bk. *v.* Smith, 62 Penn. St. (12 P. F. Smith), 47.

[2] United Soc. of Shakers *v.* Underwood, 9 Bush, 609.

was overruled by the supreme court, the petition being held to disclose a good cause of action.[1]

Negligence of officer not imputable to bank unless within range of officer's duties.

§ 474. Of course, when a bank is sued, the primary question is whether the officer, receiving the deposit, acted, in this respect, within the range of his duties. We have already noticed that the keeping of deposits is, in our commercial centres, specially assumed by safe deposit companies; and it is clear that a bank cannot be held liable for the act of one of its subordinates in receiving such deposits, unless its charter gives it power to receive deposits, or unless it has directly or implicitly authorized the servant in question to receive the deposit. That national banks are not liable for gratuitous deposits of coins, plate, bonds, or other valuables, has been ruled by several courts of high authority,[2] though in Pennsylvania the power of national banks so to bind themselves is accepted.[3] In any view such banks have power to receive such deposits on collateral security, or for a consideration, in any legitimate banking operation.[4]

[1] See, also, Griffiths *v.* Zepperwich, 28 Ohio St., where the evidence tended to show that the plaintiff's bonds, when deposited, were inclosed in a tin box, fastened with a padlock, of which the plaintiff retained the key; that defendants had a small burglar-proof safe in their vault, in which they kept similar bonds of their own and other depositors, which were all inclosed in paper envelopes, but that plaintiff's box, and similar bonds of another depositor, also inclosed in a box, were kept in the vault, outside of the burglar-proof safe, such other depositor consenting that his box should be thus kept. Held, that the court did not err in refusing to instruct the jury that these facts, if proved, would be conclusive evidence of a want of good faith, or of gross negligence, and would require a verdict for the plaintiff; nor was it error to instruct the jury that they might properly take the character of plaintiff's package or box into consideration.

[2] Wiley *v.* First National Bk. 47 Vt. 546; First Nat. Bk. *v.* Ocean Bk. 60 N. Y. 278; Third National Bk. *v.* Boyd, 44 Md. 47. See 14 Am. Law Reg. N. S. 342.

[3] Bk. of Carlisle *v.* Graham, 79 Penn. St. 106. See 4 Weekly Notes, 205. Looking at the almost universal practice of banks of all kinds to accept special deposits of valuable securities from their customers, and the evidence in this case that such was the habit of this bank with the privity and knowledge of the directors and officers, we are of opinion that a liability for safe keeping is raised by the receipt given to the plaintiff in this case for her bonds." Ibid. See, also, Foster *v.* Essex Bk. 17 Mass. 479. And as to agency in such cases, see Whart. on Agency, § 670 *et seq.*

[4] Ibid.; Erie Bk. *v.* Smith, 3 Brewst. 9; Maitland *v.* Citizens' Bk. 40 Md. 540. And see, also, Second Nat. Bk. *v.* Ocean Bank, 11 Blatch. 362.

§ 475. It is said by Lord Coke,[1] "that if a man find goods, an action on the case lies for his ill and negligent keeping of them, but not trover or conversion, because this is but a nonfeasance." "This," adds Judge Story,[2] "seems to be the true doctrine of the law; for, although a finder may not be compellable to take goods which he finds, as it is a mere deed of charity for the owner; yet when he does undertake the custody, he ought to exercise reasonable diligence in preserving the goods." But though this is true in all cases where there are such earmarks or other signs attached to the found goods as raise an implied trust for the owner, the rule cannot be applied to the case of a *bonâ fide* finder and retainer of an article found by him, as to which no owner is discoverable. In such case there is no possible privity on which a bailment can be made to rest.[3]

Liability of finder for negligence in keeping goods.

§ 476. A depositary, selected for his peculiar qualifications, is liable, even though he receive no pay, for the lack of diligence usual to good business men under the circumstances. As illustrating this test may be mentioned the cases elsewhere noticed, where a depositary places the deposit in a place which men of ordinary business capacity, under the same conditions, would agree to be unsafe. In the same connection may be mentioned a case already cited which was decided by the English privy council on an appeal from the supreme court of Victoria. Certain debentures, it will be remembered, were accepted by the depositaries, bankers in Victoria, on gratuitous deposit. These debentures were placed by them in a strong room, which was adequately guarded against thieves, where they kept their own securities and those of other customers. The debentures were embezzled by a clerk, who previously had borne a high character, and who, on account of this character, had been intrusted with the care of the strong room. The peril was evidently not one "quod omnes intelligunt." The case therefore was not *culpa lata* according to the Roman law, or gross negligence according to our own. And so was it adjudged.[4]

What "gross negligence" here means.

[1] Isaak *v.* Clark, 2 Bulst. 306; Roll. 126.

[2] Bailments, § 87.

[3] See supra, § 439.

[4] Giblen *v.* McMullen, L. R. 2 P. C. Ap. 317. See, also, McFarland *v.* Sodowsky, 3 Dana (Ky.), 205.

With this may be taken Chancellor Kent's statement,[1] that "gross neglect is the want of that care which *every man of common sense, under the circumstances*, takes of his own affairs;" or, as it would be more proper to say, "in the affairs committed to him." If he has a fire-proof, then he should put valuables committed to him in this fire-proof. If he has no fire-proof, then, small articles of great value should be placed in the safes of others, if such safes are accessible. On the other hand, if a depositary has no peculiar means of safely storing the goods, or of obtaining their safe storing, then he is only liable for the lack of giving such security as his own dwelling affords.

Burden of proof.

§ 477. Even though the deposit be gratuitous, the burden has been said to be on the depositary, in case of loss, to prove that he was not guilty of gross negligence, it being enough for the plaintiff to prove deposit and demand.[2] But this is on the assumption that the plaintiff declares on contract. In tort, there must be some proof to sustain an inference of negligence. The plaintiff must prove that he deposited the goods with the defendant; that the goods were not restored by the defendant; and that this non-restoration was produced by a lack of diligence on part of the defendant. It is true that this lack of diligence may be inferred from the nature of the transaction; but still in some way must it be shown by the plaintiff to put the defendant on his exculpation.[3]

Gratuitous warehousemen.

§ 478. A man who receives goods into his warehouse gratuitously is a bare depositary, and is consequently, on the strict rule which has been stated, liable only for *culpa lata*, or the negligence that consists in not seeing what every ordinary person sees.[4] Yet it is impossible to glance at depositaries of this class without seeing that there are few cases of warehousing which are really gratuitous. We can conceive, indeed, of a man owning a warehouse to say to a friend, "If you deposit your goods here, you must do so at your own peril; I

[1] 2 Com. 560.

[2] Parry *v.* Roberts, 3 Ad. & El. 118; Beauchamp *v.* Powley, 1 Moo. & R. 38; Nelson *v.* Mackintosh, 1 Stark. 237; Wiser *v.* Chesley, 53 Mo. 547. See supra, § 421–2.

[3] See Garside *v.* Proprietors, 4 T. R. 581; Lamb *v.* West. R. R. 7 Allen, 98; Cass *v.* Bost. & L. R. R. 14 Allen, 448; Harper *v.* Hartford & N. H. R. R. 37 Conn. 272.

[4] See Schmidt *v.* Blood, 9 Wend. 268. See infra, § 573.

will receive no compensation and take no risk." If such be the understanding between the parties, then he who thus receives goods can only be held responsible for the lack of those ordinary precautions which any person of common business capacity, not an expert in the particular department, would be expected to take. But it is absurd to speak of railroad warehousing as governed by an understanding such as this. Warehouses are as essential to railroads as are platforms; and a railroad which has no warehouses cannot expect to receive freight when in competition with a railroad which has warehouses. No forwarder would, if he had a choice, voluntarily send his goods by a railroad whose custom it is to discharge its loads, when they reach their destination, on an open street. That the railroad does not do this, but, on the contrary, has warehouses in which it deposits goods at their destination until called for, is part of the inducements it holds forth to receive freight. Warehousing, therefore, in such case, even though not specially charged for, is not strictly gratuitous. But even if it were, the warehouseman would be in the position of one undertaking to do a particular act in a particular way, making himself liable for negligence in failing to do such act in such a way. He is therefore, as will be seen, required in this respect to exercise the diligence of a good business man in this particular line.[1]

[1] See infra, § 573. See, also, Great N. R. R. *v.* Swaffield, L. R. 9 Exch. 132; Notara *v.* Henderson, L. R. 7 Q. B. 225; and on the question of lien, an article in London Law Times, reprinted in Chic. Legal News, Aug. 15, 1874.

CHAPTER III.

MANDATUM.

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§ 482. A MANDATE is an obligation by which one person engages to perform a specific service either for the obligee or for a third person. Such is practically the definition of Gaius: —

Definition.

"Mandatum consistit sive nostra gratia mandemus sive aliena, id est sive ut mea negotia geras, sive ut alterius mandem tibi, erit inter nos obligatio, et invicem alter alteri tenebimur, ideoque judicium erit in id quod paret te mihi bona fide praestare oportere." [1]

To express this concretely, a mandate (*mandatum*, Vollmachtsvertrag) is a consensual contract, in which one party (mandans, mandator, mandant, dominus *scil.* negotii) commissions another (mandatarius, procurator, in Anglo-American law. the mandatary) to undertake a particular business for him, which commission the party so invited agrees to undertake.

The same definition appears, as will presently be seen, in several passages in the *Corpus Juris*.

As the definitions of Judge Story and Chancellor Kent differ

[1] De mandato, iii. § 155.

from the above by inserting the qualification of gratuitousness,[1] it is necessary, since that question is of prime importance in the present discussion, to pause for a moment, to consider how far the qualification is sustained by the authorities to which the illustrious jurists just cited appeal.

§ 483. It is admitted that the scholastic jurists, who wrote on the revival of learning in the twelfth and thirteenth centuries, unite in maintaining the affirmative. But in weighing the authority of these jurists, several important considerations, already cursorily noticed,[2] are to be kept in mind.

Scholastic jurists hold that mandates are necessarily gratuitous.

First, the text of the *Corpus Juris*, which contains the law established by the business jurists of Rome, remained in an unsettled state until the beginning of the present century. Then, again, it was not until the foundation under Savigny of the historical school of Roman jurisprudence, that any systematic attempt was made to get at the meaning of the terms used in the *Corpus Juris*, so far as concerns the *animus imponentis;* and even by Savigny, great as was his critical genius, this work of exegesis was only begun. And once more, it was not until 1816, that the Commentary of Gaius, so valuable as a classical exposition of the Digest, was, through the joint labors of Savigny and Niebuhr, recovered.

Secondly, while the genius of the Roman jurists whose opinions are collected in the Digest was eminently concrete, practical, and regulative, confining itself to questions actually arising in business litigation, that of the Bolognese and other *renaissance* glossators was eminently speculative and scholastic, occupying itself (in default of practical issues, which, in the slow revival of business, arose only in the rudest forms) with the discussion of imaginary and often frivolous distinctions such as no practical jurisprudence can enforce. To this tendency, which jurisprudence in that scholastic age shared with theology and ethics, we owe many copious and subtle disquisitions on alleged legal duties

[1] By Chancellor Kent (2 Com. 569) a mandate is held to exist "when one undertakes, without recompense, to do some act for another in respect to the thing bailed." By Story (Bailments, § 137), it is "a contract by which a lawful business is committed to the management of another, and by him undertaken to be performed without reward."

[2] See supra, § 59–62.

which, in modern business life, are as unknown as they really were in the business life of imperial Rome. Among these may be mentioned (1) the hypothesis of intense diligence (*diligentia diligentissimi*), with its antithesis of *culpa levissima*, or infinitesimal negligence, which have been already discussed; (2) the rule immediately before us, expelling from the class of mandates all but gratuitous commissions, — an exclusion which, as Sir William Jones, followed by Judge Story,[1] remarks, practically makes the Roman law of mandates inapplicable to our modern jurisprudence.

Thirdly, the line of interpretation struck by the first scholastic commentators was naturally followed by a long procession of successors. Even Pothier (1699–1772), writing before renovative historical criticism began its work, adopted as authoritative the scholastic distinctions on the two topics just stated, though in both respects his opinions, as will be soon seen, have now ceased to be authoritative even in France.[2]

Views of the scholastic jurists accepted by Holt, by Jones, by Kent, and Story.

§ 484. Still higher authority than even Pothier have we to set aside before we strike from the definition of mandates the qualification of "gratuitous." Lord Holt, in deference no doubt to Vinnius, one of the ripest of the scholastic jurists (1588–1657), whom he refers to by name, declares that a mandate must be without a reward,[3] and in this he is supported by Sir W. Jones.[4] Chancellor Kent, in a definition which Judge Story prefers to others as "more neat and distinct,"[5] declares that a mandate, as has been already seen, "is when one undertakes, without recompense, to do some act for another, in respect to the thing bailed;" and this definition is defended by Judge Story at large. But if it can be shown that the qualification "gratuitous," or "without reward," is accepted by these high authorities simply on the faith of a gloss originating with the scholastic jurists, and that though it may be sustained by one or two classical fragments, torn from their context, it is inconsistent not only with the general scope of the *Corpus Juris*, when discussing this

[1] Bailments, § 218,

[2] See fully supra, § 59–62.

[3] Coggs *v.* Bernard, 2 Ld. Ray, 909, 913.

[4] Jones on Bailments, 521.

[5] Bailments, § 137.

title, but with the necessary conditions of the mandate itself, as a leading business transaction; then the conclusions in this respect even of Lord Holt, Sir W. Jones, Chancellor Kent, and of Judge Story, illustrious as is the memory of these great jurists, must fall, for the reason that these conclusions are drawn from erroneous postulates. Nor is this criticism merely destructive; for if so it would not be here undertaken. It is really constructive, for it brings to bear on our present practical jurisprudence what would otherwise have been either inapplicable or unintelligible, — the whole Roman law of mandates.

§ 485. *By the Corpus Juris mandates are not necessarily gratuitous; and the law declared in reference to mandates is applicable to every business commission which one person undertakes to transact for another at the latter's request.* — To establish this point it will be sufficient to appeal to the consent of present authoritative expositors of the Roman law.

But not consistent with *Corpus Juris.*

§ 486. The first I would cite is Dr. J. Baron, because not merely of his high present authority, but of the freshness of his commentary.[1] Hiring (Dienstmiethe), so this jurist tells us, may be compared with the mandate, for each requires one person (in one case the operative, in the other case the mandatary) to work in the interest of another. The opinion once was that the two were distinguished by the fact that in the first case the labor was for reward, in the other case, without reward. No doubt some passages in the Digest suggest such a distinction.[2] In other passages, however, where a reward is clearly part of the contract, the transaction is spoken of as a mandate, — the complaint by which this reward was to be recovered by legal process being called sometimes *cognitio extraordinaria*, sometimes as *actio mandati*.[3] This apparent contradiction is to be explained as follows: Services may be performed by one person for another either without or with reward. In the first case (without reward) the contract (Vertrag) is unilateral (einseitig); in the second case (with reward) it is bilateral

Nor by modern Roman commentators.

[1] Pandekten von Dr. J. Baron, auserordentichem Professor an der Universität zu Berlin, Leipzig, 1872, §§ 299, 306.

[2] L. 1. § 4. D. mand. 17. 1; L. 22. D. pr. V. 19. 5. § 13. I. mand. 3. 26.

[3] L. 6 pr. L. 7; L. 26. § 8; L. 56. § 3. D. mand. 171; L. 1. L. 17 C. eod. 4. 35.

or mutual (gegenseitig). The forms or titles of the Roman law (mandate and hiring, *Dienstmiethe*) do not wholly correspond to this antithesis. Mandate includes unilateral contracts for gratuitous services. The *locatio cond. operarum* is a bilateral or mutual contract, confined to the services for reward of day laborers and other operatives. For contracts for services *with reward* in other relations (such as the services of scientific experts, of agents for the management of property, of attorneys in fact) the Roman law had no distinctive title. All these agencies, with the exception of that of hiring (*loc. cond. operarum*), were included under the head of mandate. Some of the Roman jurists, in view of this inexactness, held that to recover the *honorarium* (in mandate) the *actio mandati* was unsuitable, and resorted to the *extraord. cognitio*, or special equitable remedy. Hence the difference between mandate and hiring exists not in gratuitousness, but in the nature of the work performed: the latter, hiring (*loc. cond. operarum*), applying to day laborers and other operatives; the former, mandate, to other kinds of agency.[1]

§ 487. As arriving at the same result, though by a distinct line of reasoning, may be cited a learned article on Mandate in Holtzendorff's Encyclopædia, published in 1871; and the authoritative treatise of Koch on Obligations.[2]

§ 488. Ortolan, in his Explication Historique des Instituts de l'Empereur Justinian (eighth edition, published in 1870, § 1576), says: "L'admission d'une récompense pécuniare, dans le mandat, sous la qualification d'honoraires, n'a pas été restreinte des professions dites liberales. Elle a été étendue a toute sorte de mandat s'il s'agit d'un fait qui n'a pas coutume de faire l'objet d'un louage: '*Si tale est factum quod locari non possit*,' par opposition à: '*Si tale sit factum quod locari solet*,' et qu'un salaire ait été specialement convenu. Ce salaire pourou qu'il ne s'agisse pas d'une offre incertaine (*salarium incertae pollicitationis*) est dû par le mandant, et le payement peut en être poursuivi; mais le connaissance en appartient, comme dans le cas précédent, au magistrat, *extra ordinem*. '*De Salario quod promisit, apud* .....

[1] See infra, § 719.

[2] Koch, Forderungen, iii. 524. See Cod. 4, 35; Mand. 1. Const. Sever. et Anton.; 17 Const. Dioclet. et Max. and other citations.

praesidens provinciae cognitio praebebitur.'" As giving an implied approval to the same view may also be cited Demangeat.[1]

§ 489. By recent English commentators on the Roman law this view is now accepted. Thus Mr. Poste, in commenting on the definition of Gaius, says: "The gratuitous character of mandatum[2] is rather nominal than real. The professor of a liberal art could receive a remuneration, which, however, was disguised under the name of *salarium* or *honorarium*, and could not be sued for by action of mandate before an ordinary judge, but was a matter for the extraordinary cognizance of the praetor or chief minister of justice." To the same effect is the translation of Gaius, with notes, by Dr. Abdy and Dr. Walker, published in Cambridge in 1874.[3] As omitting the term "gratuitous" from the definition of mandate, may also be mentioned the definition of Erskine, as cited by Judge Story.[4]

§ 490. Every lawful kind of business may be the subject of a mandate. It includes, for instance, to take some of the illustrations of the Roman law, the management of a suit at law, the erection of a building, the manufacture of raw material.[5] At this point the boundary between mandatum and the hiring of labor (*locatio conductio operarum*) becomes indistinct. It is true that the scholastic jurists distinguish by saying that mandatum is theoretically gratuitous, and is capable of being rewarded only by a voluntary *honorarium*. But we have already seen that this distinction, like others based on the supposed gratuitousness of the *honorarium*, is fictitious; this being illustrated by the fact that in mandatum the *honorarium* could be recovered by an equitable process, the *extraordinaria cognitio* of the praetor. The true distinctive feature of the hiring of labor (*locatio conductio operarum*) is, that by the *Corpus Juris* it is regarded as for a specific period or specific

What kinds of business mandates include.

[1] Cours de Droit Rom. iii. 333, Paris, 1866, cited at large in the first edition of this work.

[2] Gaius Inst. Poste's ed. Oxford, 1871, p. 353.

[3] P. 227 *et seq.*

[4] Bailments, § 137. In the Prussian and Austrian codes (A. L. R. I. 13, § 5; and L. 11, §§ 869, 870; Oesterr. G. B. § 1004) no trace of gratuitousness is retained; and even the French Civil Code declares, to adopt Judge Story's translation, that "a mandate or procuration is an act by which one gives to another a power of doing something for the mandant and in his name." Bailments, § 137.

[5] L. 12. § 13. 17. D. mand. xvii. 1.

work, to the limits of which both parties are bound, and is for manual service.

§ 491. It is only by accepting the views just expanded that we can comprehend the classification of mandates given in the Digest. This classification, to adopt the rendering in Holtzendorff, is as follows: —

Classification of mandates.

Mandates may be, —

I. For the interest of the mandant (employer) or of a third party; *mandatum mea* or *aliena gratia.*

II. For the interest both of mandant and mandatary (employer and employee); *mandatum mea et tua gratia*, words which would be meaningless if we should accept the scholastic idea that all mandates are gratuitous.

III. For the interest of one of the contracting parties and a third person; *mandatum mea et aliena* or *tua et aliena gratia.*

§ 492. Baron gives the following, which he fully substantiates, though on one point, it will be seen, his exegesis varies from that in Holtzendorff, and in other respects his analysis is more exhaustive: —

Mandates must be, —

I. *Lawful;* a mandate *contra bonos mores* is void.[1]

II. *Practicable;* a mandate to attend to business already completed is void.[2]

III. *Not exclusively in the interest of the mandatary*, but in the interest of the mandant (or employer) or of a third person, or of such third person (or of the mandant) in connection with the mandatary; *mandatum inter nos contrahitur sive mea tantum gratia tibi mandem sive aliena tantum sive mea et aliena sive mea et tua sive tua et aliena; quodsi tua tantum gratia tibi mandem, supervacuum est mandatum, et ob id nulla ex eo obligatio nascitur.*[3] The inoperativeness of the *mandatum tua gratia* arises from two causes: First, it is mere *advice.* Secondly, the advisor (Rathgeber) declines to enter into an obligation binding either on himself or another, and hence he is only liable (*a*) when his advice is fraudulently given for the purpose of misleading another, and who thereby suffers damage;[4] or, (*b*) when by con-

[1] L. 6. § 3; L. 22. § 6. D. h. t. 17. 1. § 7. I. h. t. 3. 26.

[2] L. 12. § 14. D. h. t. 17. 1.

[3] L. 2. pr. D. h. t. 17. 1. § 1–7. I. h. t. 3. 26; L. 2. § 1–6. § 4. 5; L. 8 § 6. D. h. t. 17. 1.

[4] L. 47. pr. D. de r. j. 50. 17.

tract, either express or implied, he agrees to bear the consequences of submission to his advice.[1]

Diligence exacted from the mandatary.

§ 493. If the definition of mandate above given be correct (a contract in which one person commissions another person to conduct a particular business, which commission such other person accepts), then there is no difficulty in reconciling with sound jurisprudence, and with the exigencies of modern business life, the conclusions of the Roman jurists as to the degree of diligence to be exhibited by the mandatary, and the degree of negligence for which he is liable. These conclusions, as generally stated,[2] are as follows: The mandatary is bound to carry out his instructions so as best to subserve the interests of the mandant;[3] when the business is one which requires his personal direction, he is liable for the negligence of his subalterns as he would be for his own; when the business is one which requires the interposition of sub-agents, he is liable for the negligence of such sub-agents on the ground of *culpa in eligendo*, supposing that he knows, or could in any way know, their inadequacy;[4] and he is liable not merely for gross negligence, but for that form of special negligence (*culpa levis*) which is the antithesis of diligence of the specialist, and which is always assumed when a specialist neglects to exercise the diligence incumbent on him. Thus in the Codex, under the title of *Mandati*, we have the following from Gaius: —

"Procuratorem (which word is used as convertible with mandatary) non tantum pro his; quae gessit, sed etiam pro his quae gerenda suscepit, et tam propter exactam ex *mandato* pecuniam quam non exactum, tam dolum, *quam culpam* sumptuum ratione bona fide habita, praestare necesse est."[5]

And so from Zosimus: —

"A procuratore dolum *et omnem culpam*, non etiam improvisum casum praestandum esse, juris autoritate manifeste declaratur."[6]

[1] L. 6. § 5. D. h. t. 17. 1.

[2] Baron's Pandekten, Leipzig, 1872, § 306.

[3] L. 5; L. 46. D. h. t. 17. 1. Supra, § 170.

[4] L. 8. § 13. D. h. t. 17. 1; L. 21. § 3; L. 28. D. neg. gest. 3. 5; and other passages cited by Baron. See supra, § 170. Darling *v.* Stanwood, 14 Allen, 504; Hum *v.* Bank of La. 4 Robinson, La. 109; Buckland *v.* Conway, 16 Mass. 396; Wharton on Agency, § 34.

[5] L. 11. C. mand. 4. 35.

[6] L. 13. C. mand. 4. 35.

The same view is taken in the article already quoted from Holtzendorff, citing passages from the Digest which are directly in point.[1]

§ 494. Nor is this conclusion (that the mandatary, procurator, or employee is, by the Roman law, liable for special negligence, *i. e.* for the want of that diligence which a good business man would show under the particular circumstances) peculiar to those who hold that by the *Corpus Juris* "gratuitousness" is not an essential element of the mandate. Hasse was unwilling to break through the traditionary rule, that to mandates gratuitousness is usually incident; yet, according to Hasse, nothing is plainer than that the *Corpus Juris* makes the mandatary liable for *culpa levis* as well as *culpa lata.*[2]

§ 495. We may safely assume, concludes Hasse, that by the Roman law *diligentia* and *custodia plena* are to be exhibited in mandates; and the question next arises how is this position to be reconciled with other views adopted in relation to the same subject matter. The classification the Romans here accepted seems based exclusively on the benefit the contracting parties derived from the contract. If the contract was for the benefit of the person sued, he was liable for *culpa* (negligence) as well as *dolus* (fraud); if it was not for his benefit, then he was liable only for *dolus*, and *culpa* so gross as to be assimilated to *dolus*. This view underlies the whole of L. 5. § 2, commod., as well as of the passages relating to the negotiorum gestio, and to the tutel. The same test is applied in L. 17. § 2, *de praescript. verb.* to the several cases of *contractus innominatus;* and the distinction is reiterated in L. 108. § 12. D. de legat. I. Commodatum demands *diligentia*, whenever, as is usually the case, the benefit is exclusively for the commodatar or borrower. (In such case the commodant is responsible for *culpa levis.*) On the other hand, when the contract is for the exclusive use of the commodant or lender, then the commodatar or borrower is responsible only for *culpa lata.*

§ 496. But it may be asked, in view of the fact that the depositary, in depositum, is usually liable only for *dolus* and *culpa lata*

[1] L. 8 § 10; L. 10. § 1. D. mand. 17. 1.

[2] For a condensation of Hasse's argument, see first edition of this work, § 494.

because he usually receives no compensation for his care, and is only liable for *culpa levis* when he receives compensation, why does not the same distinction hold good in mandatum? Hasse answers this by reverting to an important distinction between *depositum* and *mandatum*. It is this: When I give my goods to another to take care of, this is a *depositum*. If, however, I commission the same person to dwell in my house during my absence, and watch over my goods, this is a *mandata custodia*. Hence in *mandatum* the employee represents the person of his employer; while in *depositum* he simply takes his employer's goods without any such confidential relations. Now there is a radical difference, both according to the Roman conception of law and our own, between these two cases. When goods are given to me to take care of, I not claiming to be in any sense a specialist, then I am expected to bestow on these goods the care that persons, not specialists, are wont to give. It is otherwise when to me, as a business man, is committed a matter of business falling within my specialty. In the latter case, I am bound to apply special care; in the former, only the care of one not a specialist.[1]

§ 497. Every head of a family can conduct his own household affairs, and watch over his own stores and servants, according to his own notions of carefulness. To no one is he required to render an account in this respect. He, however, who undertakes to manage another's affairs, acts as accountable to that other. He cannot without liability omit precautions which his principal, or another agent whom that principal might have appointed, might have applied. Between the two cases just supposed the *depositum* takes an intermediate position. If I give my goods in deposit to another, I can only hold him liable for damage if I can show that he acted unconscientiously to me, and was either grossly negligent, or did not bestow on my goods the care which, as an ordinary non-expert, he bestowed on his own. The depositary pursues his own mode of business. If he takes the

[1] We have this illustrated in the following passage from the Codex (L. 21. c. mand.): "In re mandata non pecunia solum, cujus est certissimum mandati judicium, verum etiam existimationis periculum est. Nam suae quidem quisque rei moderator atque arbiter non omnia negotia, sed pleraque ex proprio animo facit; aliena vero negotia exacto officio geruntur, nec quicquam in eorum administratione neglectum ac declinatum culpa vacuum est."

goods of another person, he does not in any way represent that other person. He is not selected, it may be added, because of any peculiar business gifts he possesses; for if such special gifts are involved in the contract, then the contract is not depositum, but a special contract, imposing special duties on the obligee. He is simply a cipher, — a person, so far as this particular transaction is concerned, with no special characteristics, except those of taking ordinary care of a deposit, and he is therefore simply to apply the diligence which any ordinary person applies, and to see the dangers which any ordinary person sees. It is true that if he treats the deposit with greater negligence than he treats his own goods, then he is chargeable with *dolus*. But ordinarily his liability is simply for *culpa lata*.[1]

§ 498. On the other hand, the employee, in mandatum, even in cases where he receives no remuneration (and cases where there is no remuneration, indirect or direct, are in mandatum very rare, and a case in which an action would not lie for such remuneration is scarcely supposable),[2] is liable for special negligence, or the want of the diligence of a good business man, not merely because the employee can receive compensation for his services, but because, by undertaking the work, he assumes to be a good business man capable doing the work well. For his negligence either in not acting as a good business man should, or for in advance not disclosing his inability so to act, he is liable for *culpa levis*.

§ 499. Undoubtedly, if we take a superficial view of English and American decisions on this point, we would hold that a mandatary is only responsible for gross negligence.[3]

§ 500. Yet when we come to scrutinize more closely the cases, we find that instead of differing with the authoritative Roman

[1] See infra, § 498.

[2] It must be remembered that in the Roman law there was a special equitable process to recover the *honorarium*, even in the nominally gratuitous mandates. Supra, § 486.

[3] See particularly Shiells *v.* Blackburne, 1 H. Black. 158; Tracy *v.* Wood, 3 Mason, 132; Storer *v.* Gowen, 18 Me. 174; Beardslee *v.* Richardson, 11 Wend. 25; Tompkins *v.* Saltmarsh, 14 S. & R. 275; Conner *v.* Winton, 8 Ind. 35; Kemp *v.* Farlow, 5 Ind. 462; Skelley *v.* Kahn, 17 Ill. 170; Stanton *v.* Bell, 2 Hawks, 145; McCombs *v.* R. R. 67 N. C. 193; McNabb *v.* Lockhart, 18 Ga. 495; Lampley *v.* Scott 24 Missis. 528; Richardson *v.* Futrell, 42 Missis. 525; McLean *v.* Rutherford, 8 Mo. 109; Jourdan *v.* Reed, 1 Iowa, 135; Southern Exp. Co. *v.* McVeigh, 20 Grat. 264.

law on this interesting issue, they repudiate the scholastic glosses, based on the fiction of non-remuneration, and hold to the position that a mandatary, even though he agrees to act without pay, is required, if he claim to be an expert, to act with the diligence belonging to his assumed profession. Whatever he claims to do, that he must do. If he claim to be a business man in the particular specialty, then he must act with the diligence of a good business man in such specialty.[1] If he claim to be inexperienced in the specialty, then he must act with the diligence of a good business man inexperienced in the specialty. Indeed, when we examine Judge Story's exposition[2] as modified in his second edition, we will find that he retreats from the predicate of gross negligence, so far as to make it applicable only in those cases in which the mandatary claims to have no special aptitude for the particular work.[3]

Mandatary where specialist bound to diligence of specialist.

[1] See Graves *v.* Tieknor, 6 N. H. 537; Bland *v.* Womack, 2 Murph. (N. C.) 373; Delaware Bk. *v.* Smith, 1 Edm. (N. Y.) 351; Anderson *v.* Foresman, 1 Wright (Ohio), 598; Jenkins *v.* Motlow, 1 Sneed (Tenn.), 248; Kirtland *v.* Montgomery, 1 Swan (Tenn.), 452; Colyar *v.* Taylor, 1 Coldw. (Tenn.) 372; Waterman *v.* Gibson, 5 La. An. 672; Fowler's Succession, 7 La. An. 207; Eddy *v.* Livingston, 35 Mo. 487.

[2] Bailments, § 182 *a*. "Mr. Chancellor Kent," says Judge Story, "has well observed: 'It is a little difficult to reconcile the opinions on this point of a gratuitous undertaking to do some business for another; but the case of Shiells *v.* Blackburne contains the most authoritative declaration of the law, in favor of the more limited responsibility of the bailee. There are, however, a number of instances, in which such a mandatary becomes liable for want of due care and attention. Thus it has been held to be an act of negligence, sufficient to render a gratuitous bailee responsible, for him to have turned a horse after dark into a dangerous pasture, to which he was unaccustomed, and by which means the loss of the horse ensued.'" 2 Kent Comm. Lect. 40, p. 572, 4th ed. See Rooth *v.* Wilson, 1 Barn. & Ald. 59; Wilson *v.* Brett, 11 M. & W. 113; Maury *v.* Coyle, 34 Md. 235; Beardsly *v.* Richardson, 11 Wend. 25.

[3] "The true rule of the common law," Judge Story adds, "would seem to be, that a mandatary who acts gratuitously in a case, where his situation or employment *does not naturally or necessarily imply any particular knowledge or professional skill*, is responsible only for bad faith or gross negligence. If he has the qualifications necessary for the discharge of the ordinary duties of the trust which he undertakes, and he fairly exercises them, he will not be responsible for any errors of conduct or action into which a man of ordinary prudence might have fallen. *If his situation or employment does imply ordinary skill, or knowledge adequate to the undertaking, he will be responsible for any losses or injuries resulting from the want of the exercise of such skill or knowledge.* If he is known to possess

§ 501. A common carrier who receives no pay is, on the definition of Judge Story, a mandatary; yet a common carrier who receives no pay is required, as has been fully exhibited,[1] to show the same degree of diligence, so far as the preservation of life and limb is concerned, to the passenger who does not pay at all, as to the passenger who pays third class, second class, or first class. Of course when we come to diligence in the accumulation of comforts, gradation is allowed; but as to diligence in respect to the safety of the passenger, and his punctual transportation, which is the only diligence which is the antithesis of negligence, we will be driven, if we graduate the degree of diligence by the money paid, to hold that the carrier is to graduate his care of his passengers in proportion to what they pay. This, however, the policy of the law precludes. Whatever may have been the early speculations on the subject, it is now settled that the same grade of neglect, so far as concerns life, limb, and punctual transportation, which makes the carrier liable to a first class passenger, makes him liable to the passenger whom he undertakes to carry free;[2] and that, to adopt another illustration, the same grade of neglect, so far as concerns the essentials of recovery, which makes a physician liable to his richest patient, makes him liable to the pauper in the hospital.[3]

Pecuniary consideration not essential.

no particular skill or knowledge, and yet undertakes to do the best which he can under the circumstances, all that is required of him is the fair exercise of his knowledge, and judgment, and capacity.[1] *This general responsibility may be varied by a special contract of the parties, either enlarging, or qualifying, or narrowing it; and in such cases the particular contract will furnish the rule for the case.*" And he says in another place: "*Where the act to be done requires skill, and the party who undertakes it either has the skill, or professes to have it, there he may well be made responsible for the want of due skill, or for the neglect to use it.*" Story on Bailments, § 177.

In Mariner *v.* Smith, 5 Heisk. 203, it was ruled that the liability of bailee without reward is to be determined by his performance *bonâ fide* of the fairly understood terms of the contract, ascertained by the express contract explained by the surrounding and attendant circumstances, or of failure to perform the terms of the contract as it was understood by the parties at the time.

[1] Supra, §§ 355, 438, 487; infra, § 641.

[2] See cases cited § 355.

[3] See infra, §§ 730–7.

[1] See 2 Kent Comm. Lect. 40, pp. 571, 572, 573, 4th edit.; Percy *v.* Millaudon, 20 Martin, 75 to 79; Shiells *v.* Blackburne, 1 H. Black. 158; Tompkins *v.* Saltmarsh, 14 Serg. & R. 275; Foster *v.* Essex Bank, 17 Mass. 479; Dennis *v.* McCogg, 32 Ill. 429.

§ 502. Indeed when we come to examine the terms "recompense" and "reward," as used by Chancellor Kent and Judge Story, we will see that these terms, if meant to limit the Roman definition of mandatum, fail to have such effect. Why not say "pecuniary consideration," unless to include a kind of "recompense" or "reward" that is not pecuniary? Is not an interchange of kind offices a "recompense" and a "reward?" Are not services of some kind generally expected in return for free passes; or, in a service purely charitable, is there not, to revert to the case of medical attendance, experience gained by the practitioner, and an advance in the confidence of the community? Indeed, if we take reward in the large sense used by Locke, there is scarcely any performance of an assumed duty which is without reward.[1] And if we scrutinize the motives of human action, we must conclude that there is no act done by a reasonable man without the expectation of some good consequences; to his mind, an adequate recompense and reward.

Ambiguity of terms "recompense" and "reward."

§ 503. But waiving this criticism, we are entitled to plant ourselves on the position heretofore more fully declared, that a confidence bestowed and accepted is a sufficient consideration to support an action for neglect.[2]

Confidence a sufficient consideration.

§ 504. The leading case of Shiells *v.* Blackburne,[3] which has been so often cited as confining the mandatary's liability to gross negligence, will be found, on examination, to sustain the position just declared. In that case, to adopt Judge Story's statement, a merchant had undertaken gratuitously, but not, as it should seem, officiously, to enter certain goods of the plaintiff at the custom-house, with his own goods of the like kind; and by mistake he entered them by a wrong name, so that all the goods were seized and lost, both the plaintiff's and his own. An action

[1] "Which good and evil, pleasure and pain, attending our observance or breach of the law, by the decree of the lawgiver" (moral or legal) "is what we call reward or punishment." Hum. Understand. b. 11, c. 27.

[2] See, fully, supra, § 437 *et seq.*; Smith's note to Coggs *v.* Bernard, Smith's Lead. Cas. 6th ed. 193; Ames, J., in Gill *v.* Middleton, 105 Mass. 479; Benden *v.* Manning, 2 N. H. 289; Mobile & Ohio R. R. *v.* Hopkins, 41 Ala. 486; Phil. & Read. R. R. *v.* Derby, 14 How. U. S. 483; Durnford *v.* Patterson, 7 Martin (La.), 460; Shillibeer *v.* Glyn, 2 M. & W. 145.

[3] 1 H. Black. 158.

was brought by the plaintiff to recover damages for this misfeasance; and upon full consideration the court held, that, as there was not any gross negligence, the action would not lie. "The defendant," said Heath, J., acted *bonâ fide*. "If a man applies to a surgeon to attend him in a disorder for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action. The surgeon would also be liable for such negligence, if he undertook gratis to attend a sick person, because his situation implies skill in surgery. But if the patient applies to a man of a different employment or occupation for his gratuitous assistance, who either does not exert all his skill, or administers improper remedies to the best of his ability, such person is not liable. It would be attended with injurious consequences, if a gratuitous undertaking of this sort should subject the person who made it, and who acted to the best of his knowledge, to an action." "A wrong entry at the custom-house," said Wilson, J., "cannot be considered as gross negligence, when, from the variety of laws, &c., reliance must be placed on the clerks in the office." So Lord Loughborough professed to agree with Sir William Jones, "that where a bailee undertakes to perform a gratuitous act, from which the bailor is alone to receive benefit, then the bailee is only liable for gross negligence." "But," added Lord Loughborough, "if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence. If in this case a ship-broker, or clerk in the custom-house, had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries. But when an application, under the circumstances of this case, is made to a general merchant to make an entry at the custom-house, such a mistake as this is not to be imputed to him as gross negligence." It will be seen, therefore, that the departure of the judges in the opinions just quoted from the Roman law, as held by the Justinian jurists of business Rome (as distinguished from the subsequent scholastic jurists), is purely verbal. The special negligence of an expert in his specialty is described by the great Roman jurists first referred to as *culpa levis*. It is called "gross

negligence" by the judges in Shiells *v.* Blackburne. But the doctrine set forth in Shiells *v.* Blackburne is precisely that both of the Justinian jurists and of the jurists of Germany and France at the present day.

§ 505. The same observations are applicable to Coggs *v.* Bernard.[1] In that famous case the defendant undertook to carry without pay some hogsheads of brandy from one cellar to another; but through his negligence one cask was staved and the brandy lost. The court, though the mandate was "gratuitous" and the defendant not a common carrier, ruled, that as he held out to be a person fit for the particular business, he was liable for negligence in failing to do what he undertook.

§ 506. In another case to the same effect,[2] a master of a ship took gratuitous charge of and received on board of his vessel a box containing doubloons and other valuables belonging to a passenger, who was to have worked his passage, and failed to arrive in time to join the ship. The captain, after the voyage began, opened the box in the presence of the passengers, to ascertain its contents, and whether there were contraband goods in it or not; and he placed the valuables so taken in a bag in his own chest in his cabin, where his own valuables were kept. After his arrival in port, it was found that the bag was missing. He was held responsible for the loss, on the ground that he had imposed upon himself the duty of carefully guarding against all perils to which the property was exposed; and undertaking to carry the goods, he was bound to carry them prudently.

§ 507. In an analogous case decided by Judge Story,[3] A. undertook gratuitously to carry two parcels of doubloons for B. from New York to Boston, in a steamboat, by the way of Providence. A., in the evening (the boat being to sail early in the morning), put both bags of doubloons, one being within the other, into his valise with money of his own, and carried it on board the steamboat, and put it into a berth in an open cabin, although notice was given to him by the steward that they would be safer in the bar-room of the boat. A. went away in

[1] See, fully, Smith's Leading Cases, 6th ed., for this case, with admirable notes by both English and American editors.

[2] Nelson *v.* McIntosh, 1 Stark. 237. See Gray *v.* Packet Co. 64 Mo. 47.

[3] Tracy *v.* Wood, 3 Mason, 132.

the evening and returned late, and slept in another cabin, leaving his valise where he had put it. Early the next day, however, just as the boat was leaving the wharf, he discovered, on opening his valise, that one bag was gone; and he gave an immediate alarm, and ran up from the cabin, leaving the valise open there with the remaining bag, his intention being to stop the boat. He was absent for a minute or two only, and on his return the other bag also was missing. An action being brought against him by the bailor for the loss of both bags, the question was left to the jury whether there was not such negligence as gave the plaintiff the right to recover. Under the instruction of the court, the jury found a verdict for the plaintiff for the first bag lost, and for the defendant for the second.

§ 508. The same conclusion may be drawn from the case heretofore cited, where a gratuitous mandatary undertook the care of a horse, and turned him out in a dark night on a dangerous and strange pasture. For injuries produced by this negligence the mandatary was held responsible, on the ground that one undertaking the care of a horse should, unless accepted by the owner as unacquainted with the duty, be capable of applying and should apply the care of a good hostler.[1]

§ 509. It may be also declared generally, that receiving money to collect or pay, or letters to deliver, implies not merely capacity for the duty but a pledge of diligence; and the mandatary who neglects to apply such diligence is liable, when the trust has been undertaken and actually entered upon, though his offer was gratuitous.[2]

Directors of banks and other corporations.

§ 510. Here arises the important question, What is the liability of the unsalaried directors of banks and other corporations for negligence in the performance of their trust? Now, if the argument of the preceding sections be correct, the issue is not affected by the absence of money salary. Whatever be the consideration which induces a person to undertake the control of another's affairs, he is required, if

[1] Rooth *v.* Wilson, 1 Barn. & Ald. 59.

[2] Supra, §§ 437–8; 1 Parsons Cont. 5th ed. 447; Shillibeer *v.* Glyn, 2 M. & W. 145; Jenkins *v.* Bacon, 111 Mass. 373; Smedes *v.* Bank, 29 Johns. 372; Robinson *v.* Threadgill, 13 Ired. 39; Durnford *v.* Patterson, 7 Mart. (La.) 460; Mariner *v.* Smith, 5 Heisk. 203.

there is confidence bestowed and accepted, to show the diligence a good business man is accustomed to show in the exercise of such a trust. A man holding himself out to the public as a business man, capable of properly acting as a bank director, is liable for *culpa levis* in not showing the diligence a good bank director should. What this diligence is, is of course determined in part by the charter of the bank, in part by general commercial law, in part by business usage. This doctrine is virtually the same with that adopted by the supreme court of Louisiana in an interesting case.[1] "The directors of banks, from the nature of their undertaking, fall within the class of cases where ordinary care and diligence only are required. It is not contemplated that they should devote their whole time and attention to the institution to which they are appointed, and guard it from injury by constant superintendence. Other officers, on whom compensation is bestowed for the employment of their time in the affairs of the bank, have the immediate management. In relation to these officers, the duties of directors are those of control, and the neglect which would render them responsible for not exercising that control properly, must depend on circumstances, and in a great measure be tested by the facts of the case. If nothing has come to their knowledge to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible." "Upon the ground, however," comments Judge Story, "of gross negligence or wanton disregard of duty, the directors of a bank were, in the same case, held responsible to the stockholders for losses to the bank occasioned by acts of the following character: (1) Permitting the president and cashier to discount notes from the funds of the bank, without the assent and intervention of five directors, as required by the rules and regulations of the bank. (2) Permitting purchases to be made of the stock of the bank out of the funds of the bank by the president and cashier, at a rate above the known true value thereof, or allowing them to take and use the money of the bank, contrary to the rules and

[1] Percy *v.* Millaudon, 20 Mart. 68.

regulations thereof. (3) Not opposing an illegal measure of the board of directors to discharge the cashier and his sureties from the responsibility on the official bond of the former. How far similar doctrines will be adopted in courts sitting under the jurisprudence of the common law remains for future discussion in those courts, as I am not aware that the question has as yet been directly litigated therein. But there can be little doubt that these doctrines are just conclusions from the general law of mandates."[1]

If we substitute "culpa levis," or "special negligence," for "gross negligence," in the last paragraph, we will find that it coincides with the views heretofore expressed as those of the authoritative jurists of business Rome. In short, to repeat once more the rule, a mandatary, whether with or without pay, who accepts and undertakes to perform a trust or mandate, must exhibit diligence proportioned to what he undertakes. If he claims to be a business man, experienced in the specialty, he must show the diligence a good business man in such specialty is accustomed to show. If he disclaims having such special business capacity, he is liable only for lack of the diligence which a good non-expert in such cases is accustomed to show.[2]

Mandates of nonfeasance and of misfeasance.

§ 511. As a general rule, a mandatary is liable for nonfeasance; *i. e.* for not exercising the care he is bound to exercise. Questions, however, frequently arise, whether a person who loosely engages to do an act for another, and then forgets to do it, there being no reward, is liable for injuries arising from his failure to do the thing promised. The question here is, whether a confidence was offered and accepted, and whether the mandant, on this confidence, omitted to attend to the commission personally. If so, notwithstanding some intimations to the contrary in an able New York opinion,[3] the mandatary is liable for any damage he causes, by his neglect, to the mandant. But for a fuller examination of the principles

[1] Percy *v.* Millaudon, 20 Mart. 68, 79, 80, 81, 92; and see, to same effect, Godbold *v.* Bank, 11 Ala. 191; United Soc. of Shakers *v.* Underwood, 9 Bush, 609, cited supra, § 473. See, also, Koehler *v.* Iron Co. 2 Black, 715; Hodges *v.* New Eng. Co. 1 R. I. 312; Salmon *v.* Richardson, 30 Conn. 360; Conant *v.* Bank, 1 Ohio St. 310, and Bigelow's Cases on Torts, 619.

[2] See supra, §§ 45, 410–15.

[3] Thorne *v.* Deas, 4 Johns. 84. See, also, Elsee *v.* Gatward, 5 T. R. 143.

on which this conclusion rests, we must revert to a prior section.[1]

§ 512. An architect is liable to his employer for negligence in the discharge of his duty, nor is it a defence that a contractor is jointly liable.[2] He may be liable, also, to third parties for injuries to such parties, under the rule, *Sic utere tuo ut non alienum laedas*.[3] Architects.

[1] Supra, § 442.

[2] Newman *v.* Fowler, 37 N. J. L. 89.

[3] Supra, § 440.

CHAPTER IV.

TRUSTEES, ASSIGNEES, ATTORNEYS IN FACT, GUARDIANS, EXECUTORS, AND OTHER AGENTS.

General liability of, § 515.
Test of *diligentia quam suis* not applicable, § 516.
Proper test is, the diligence shown by a good business man when exercising a trust such as that under discussion, § 518.
As to special lines of business general agents bound to diligence in selection of subordinates, § 519.
Agent liable for illegal investments, § 521.
For choice of unsuitable sub-agents in investing, § 523.
For neglecting to invest, § 524.
For speculating with principal's fund, § 525.
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Special agents bound to have special qualifications, § 527.
Persons searching for taxes, § 528.
Patent agents, § 529.
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Agents appointed to collect funds, § 532.
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Volunteer agents, § 534.
Liability of agents to third parties, § 535.

TRUSTEES, ASSIGNEES, ATTORNEYS IN FACT, GUARDIANS, AND EXECUTORS.

General liability.

§ 515. TRUSTEES, assignees, attorneys in fact, and executors are, in the view already expressed, mandataries, and are hence subject generally to the law that obtains as to mandates. When representing, however, the general interests of their principals, they are distinguished from special mandataries (*i. e.* persons employed to do a particular work) in this: that the special mandatary is, as a rule, required to be an expert in his specialty; whereas the general mandatary is only to be expected to be a good business man in general, one whose duty is, in specialties in which he is not an expert, judiciously to select specialists as sub-agents.

Not governed, as to diligence, by the test *diligentia quam suis.*

§ 516. It is frequently said by the scholastic jurists and by those who follow them, that agents are governed by the test of *diligentia quam suis;* in other words, an agent, it is maintained, is only required to show in his principal's affairs the same diligence as he shows in his own. But not only is this in conflict with the Roman standards, but it militates against all sound business instincts. A trustee, for instance, may speculate with his own funds, and this may turn out

for his good; but whether unsuccessful or successful, he cannot be permitted to speculate with his principal's funds.[1] So a trustee may be so timid as to his own affairs that rather than expose his money to risk he holds it locked up in his safe; but the fact that he thus locks up his own money will be no defence when he is charged with negligence in not investing the money of his principal. So a trustee may in his own affairs exhibit a nervous abhorrence of litigation, and may prefer to lose rather than sue; but this supine timidity will not be excusable if exercised in the discharge of his trust.[2]

§ 517. By Mommsen, a distinguished contemporary German jurist, whose essays on negligence have been already frequently quoted, this position is vindicated by reasons which, though bearing equally on special agencies, are not out of place here. No matter, he argues, how shrewdly sagacious and how brilliantly successful a trustee may be in his own affairs, he discharges his duty when conducting the affairs of others if he exhibits in them the diligence which a good business man (not an extraordinary business man) is accustomed to show in the same specialty. And this accords with right reason. A man may venture boldly in his own affairs, but he is not justified in venturing boldly in the affairs of others. Again, as Hasse well argues, we are bound to put out of the question, in all continuous agencies, the idea of continuous extraordinary and exceptional exertion. It is conceded that this is the case when we take the diligence of others as the standard; for, to other persons, taking them as an aggregate, extraordinary genius is not to be attributed. The same rule is to be applied when the standard is the person employed, viewing him concretely. *Diligence* is what is to be exacted from him; not *genius*. For diligence, if rightly exercised, enables him to bring his faculties into play, not tumultuously, not under such excitement or precipitancy as to exhaust him, but in an orderly way, and at the right season. His performance must be adapted to his capacity; it is negligence for him to undertake more than

[1] Ihmsen's Appeal, 43 Penn. St. 431; Norris's Appeal, 71 Penn. St. 106; Moffatt *v.* Loughridge, 51 Miss. 211.

[2] Whart. on Agency, § 275. See, however, Blosser *v.* Harshbarger, 21 Grat. 214, as to how far this last point may be affected by circumstances. As to guardians, see specially, Chambersburg Ass. Appeal, 76 Penn. St. 203.

he can do, but not negligence to do only what he can do safely. His duty is not to expend in a single effort his strength, but to husband it so that it may be sufficient for the whole of the undertaking assumed by him. If his capacity is of a high order, then undoubtedly this capacity must be used, for he is not diligent unless it be so used. I may lawfully in my own affairs alternate intense exertion with languor, and engage in bold speculations with their contingencies of success and failure, but I cannot do this in the affairs of another. For in conducting another's affairs I must show uniform diligence and fidelity, not being permitted to compensate deficient diligence at one time by excessive diligence at another. A single negligence makes me liable to my principal, though in a thousand other points my diligence is unquestioned. I may, for instance, guard a deposit of money with adequate care for a year, yet if in a single half hour I am negligent, and it is in consequence stolen, I am liable for the whole. But to expect me to guard this deposit for the whole time by precautions such as the most suspicious vigilance would suggest for a period of peculiar excitement and danger, is absurd; and hence what I am chargeable with as a continuous thing, is the duty which alone I am capable of discharging,— the *diligentia diligentis patrisfamilias*, — in other words, the diligence a good business man is accustomed to use when dealing with the particular specialty.[1] Hence, as Hasse justly concludes, two points, in deciding such a question, are to be kept in mind. First, did the party charged do what a good business man under the circumstances is accustomed to do; for this, as a rule, is sufficient. Then, secondly, if he possesses peculiar aptitude for the particular work, the question is, what would a good business man, *with this peculiar aptitude*, under the circumstances, do?[2] If I employ an eminent architect to plan and superintend a building, then I can with right require that he should employ his peculiar talent in the work. If he fail to do this, he fails to act as a diligent and competent specialist, of the character he exhibits himself as possessing, and by this failure he makes himself liable to me for the accruing loss. Yet at the same time I cannot require from him an activity beyond his strength, though in his own

[1] See, to same effect, Wood *v.* Cooper, 2 Heisk. 441.

[2] Supra, § 32.

affairs such an activity may sometimes be exceptionally exhibited by him. In fine, a person whose manner of work is peculiarly neat, rapid, and persistent must exhibit this manner of work when employed by others, not because he does so in his own affairs, but because he must when working for another employ *diligentia diligentis;* and if he fails to use the strength which he is capable of using without extraordinary effort, then the *diligentia diligentis* is not applied by him. He cannot excuse himself on the ground that he works as well as others, because they work according to their gifts, and he must work according to his. Hence we must conclude: (1) that an employee is not required, because sometimes he shows exceptional and extraordinary diligence in his own affairs, to show in his employment anything more than the diligence which a good business man would exercise in such specialty; but (2) that if he possesses certain aptitudes, he must diligently employ these aptitudes, and a failure to do so makes him liable for damages resulting from such failure.

§ 518. Hence,[1] rejecting the test of *diligentia quam suis*, we must fall back on that which has already been established as obtaining in mandates generally, — that of good and conscientious business men, when possessed of the qualifications of the mandatary in question. What are such good and conscientious business men accustomed to do when charged with trusts of this class? This, in all cases of general agency, whether that agency be by general deed of trust, or by assignment *inter vivos*, or by testamentary appointment, is the only rule that either reason or authority sustains.[2]

Test is, the diligence usual to good business men of the class.

[1] See Whart. on Agency, § 273.

[2] Jones on Bailm. 9, 10, 23; Ibid. 86, 119; 1 Bell Comm. § 389, p. 364; Ibid. § 411, p. 387 (4th ed.), § 10; Chitty on Com. & Manuf. 215; Chapman *v.* Walton, 10 Bing. 57; 1 Liver. on Agency, 331–341 (ed. 1818); Paley on Agency, by Lloyd, 77, 78; Matthews *v.* Discount Corp. L. R. 4 C. P. 228; Johnson *v.* Newton, 11 Hare, 160; Savage *v.* Birckhead, 20 Pick. 167; Lawler *v.* Keaquick, 1 John. Cas. 174; Leverick *v.* Meigs, 1 Cow. 645; Dillebaugh's Est. 4 Watts & S. 177; Twaddle's Appeal, 4 Barr, 15; Ihmsen's Appeal, 43 Penn. St. 431; Hughes' Appeal, 53 Penn. St. 506; Neff's Appeal, 57 Penn. St. 91; Chambersburg Ass. Appeal, 76 Penn. St. 203; Derbyshire's Est. 81 Penn. St. 18; Clark *v.* Craig, 29 Mich. 398; Baehr *v.* Wolf, 59 Ill. 470; Madeira *v.* Townsley, 12 Mart. 84; Brousard *v.* De Clouet, 18 Mart. 260; Fant *v.* Miller, 17 Grat. 187; Kerns *v.* Wallace, 64 N. C. 187; State *v.* Robinson, 64 N. C. 698; McCants *v.* Wells, 3 Richards. 569; Miller *v.* Proctor, 20 Ohio St. 442. See fully supra, §§ 54–57.

Hence an agent acting in good faith is not to be made personally responsible, if in times of danger and difficulty he makes the best disposition in his power for the preservation of moneys in his charge, though it involve the exchange of funds of a less portable for those of a more portable kind, as of small bills for large ones.[1] Nor is he liable if prevented from executing his trust by the interposition of process he cannot control.[2] At the same time, as was shown in the last section, if he was employed on account of special aptitudes he possessed, these aptitudes he must apply in his trust.

A general agent, unfamiliar with specialties, is bound only to diligence in selection and retention of subagents.

§ 519. A general agent may have under his control a variety of specialties with which he is practically unacquainted. An assigned estate, for instance, may include within its assets a manufacturing concern, or a ship at sea, or a country store. Now there may be cases in which a general agent is selected because he is an expert in some particular specialty, and when, therefore, he is expected to give his particular attention to such specialty. Such cases, however, in general agencies, are exceptional; and the rule is that general agents, who have special branches of business passing to them in the trust, must conduct such special branches of business through experts in such business, and that they exhibit negligence if they fail so to do. This may be illustrated by conditions so familiar as to attend almost all general agencies. A general agent, be he assignee, trustee, guardian, or executor, has currency in hand belonging to his trust. Is he to keep this in his own house? This would be negligent, and would make him liable in case of loss, except under extreme circumstances of *vis major*. His duty is to deposit such funds in bank; and this duty is satisfied, apart from statutory limitations, if the bank, at the time of deposit, is in good reputation, and if there is nothing in way of public rumor subsequently occurring which would lead a good business man to withdraw his funds.[3]

[1] Wood *v.* Cooper, 2 Heisk. 441.

[2] Baehr *v.* Wolf, 59 Ill. 470.

[3] Johnson *v.* Newton, 11 Hare, 160; Wilks *v.* Groom, 3 Drew. 584; 3 Leading Cases in Equity, *740; 2 Story's Eq. Jur. §§ 1269, 1270; Commonwealth *v.* McAllister, 28 Penn. St. 480; *S. C.* 30 Penn. St. 536; Bile's Appeal, 24 Penn. St 337; Yoder's Appeal, 45 Penn. St. 394; McElhenny's Appeal, 46 Penn. St. 347; Heckert's Appeal, 69 Penn. St. 264. See Miller *v.* Proctor, 20 Ohio St. 442.

§ 520. The same observation is applicable to lawsuits. A general agent is not usually a practising lawyer; and if he be so, it is not always prudent for him to act as the exclusive counsel of his principal. His duty, however, is complied with, if he select for such business competent counsel in good standing; and if he follow their opinion, and commit himself to their directions, he having no notice requiring him to dismiss them, he is absolved, even though their views of the law are erroneous, and their conduct negligent, as to matters under their control.[1]

The maxim that every person is presumed to know the law is not always applicable to trustees; on the contrary, they may be exonerated from losses resulting from their ignorance of the law, in cases where they exercise proper diligence and precaution, and act upon the advice of counsel.[2]

As a general principle, therefore, we may hold that an agent whose business has to be conducted through ancillary agents is not liable to his principal for the negligence of such ancillary agents, unless he be chargeable with negligence in their selection or retention.[3]

§ 521. A general agent is liable for negligence in dealing with his principal's funds in the following cases: —

§ 522. In many states a trustee is forbidden by statute to invest in any except certain enumerated securities. If, in defiance of this provision, he invests in extra-statutory securities, he is liable for any loss thereby accruing to his principal, while to his principal he is responsible for any profit so made.[4] The same rule applies as to investments which by the law determined by courts are improvident.[5] A receipt, also, by a trustee, of uncurrent or depreciated funds, in payment of a debt, subjects such trustee to liability for the loss.[6]

Liability for illegal investments.

[1] Miller *v.* Proctor, 20 Ohio St. 442.

[2] Miller *v.* Proctor, supra. See supra, § 414.

[3] Whart. on Agency, §§ 277, 538, 601. Supra, § 170; and see, to same effect, Calhoun's Est. 6 Watts, 185; Moore's App. 10 Penn. St. 435.

[4] See Nyce's Est. 5 Watts & S. 254; Worrell's App. 23 Penn. St. 44; Norris's Appeal, 71 Penn. St. 106.

[5] Ackermann *v.* Emmott, 4 Barb. S. C. 626; Hemphill's Appeal, 18 Penn. St. 303; Worrell's Appeal, 23 Penn. St. 44; Ihmsen's Appeal, 43 Penn. St. 431.

[6] Whart. on Agency, § 279; Webster *v.* Whitworth, 49 Ala. 201. See Moffatt *v.* Loughridge, 51 Miss. 211. See Wharton on Agency, §§ 231, 573, 760.

§ 523. An agent is also liable when he is negligent in the choice or retention of sub-agents through whom the funds are impaired. Here we fall back on the general law of mandates as already exhibited. A general mandatary, whether with or without reward, is required to show the diligence of a good business man in the choice of subalterns. If he fail to do this, and there is a consequent loss to his principal, then he is liable for such loss.[1]

For unsafe depositaries.

§ 524. The usage being for trustees to invest funds in their hands when proper to be capitalized, a trustee is liable for neglect in making such investment;[2] and so where he omits to invest, in mixing the money with his own, or in keeping it carelessly, he is chargeable with interest.[3] In cases of gross negligence, interest may be compounded.[4]

For neglecting to invest.

§ 525. An agent who speculates with his principal's funds is liable for any profits made if successful, and for the sum lost with interest if the speculation be disastrous.[5]

For speculating with principal's funds.

[1] See Whart. on Agency, §§ 277, 538, 601; Miller *v.* Proctor, 20 Ohio St. 442; Foster *v.* Preston, 8 Cowen, 198; Taber *v.* Perrott, 2 Gal. 565; Commercial Bank *v.* Martin, 1 La. An. 344; Chambersburg Ass. Appeal, 76 Penn. St. 203; Macdonnell *v.* Harding, 7 Sim. 173; Matthews *v.* Brise, 6 Beav. 239; Massey *v.* Banner, 4 Mad. 413.

[2] Challen *v.* Shipham, 4 Hare, 555; Robinson *v.* Robinson, 1 De G., M. & G. 247; Whart. on Agency, § 246.

[3] Bartlett *v.* Hamilton, 46 Me. 425; Manning *v.* Manning, 1 John. Ch. R. 527; Mumford *v.* Murray, 6 John. Ch. R. 1; Williamson *v.* Williamson, 6 Paige, 298; Jacot *v.* Emmett, 11 Paige, 142; De Peyster *v.* Clarkson, 2 Wend. 77; Dyott's Estate, 2 W. & S. 557; Merrick's Est. 2 Ashm. 485; Lomax *v.* Pendleton, 3 Call, 538; Graver's App. 50 Penn. St. 189; Handley *v.* Snodgrass, 9 Leigh, 484; Yundt's Est. 13 Penn. St. 575; Lane's Appeal, 24 Penn. St. 487; Peyton *v.* Smith, 2 Dev. & Bat. Eq. 325; Kerr *v.* Laird, 27 Miss. 544; Turney *v.* Williams, 7 Yerg. 172; Ringgold *v.* Ringgold, 1 H. & G. 11. See, fully, Hill on Trustees (4th Am. ed.), 572–77.

[4] Barney *v.* Saunders, 16 How. U. S. 342. See Hill on Trustees (4th Am. ed.), 344, for cases at large; though see Norris's App. 71 Penn. St. 123, where Paxson, J. (affirmed by supreme court), says: "I know of no instance in which any man has ever yet paid compound interest by judgment of a court of this state;" and see Whart. on Agency, § 246.

[5] Whart. on Agency, §§ 231, 573, 760; Hockley *v.* Bantock, 1 Russ. 141; Robinson *v.* Robinson, 1 De G., M. & G. 256; Docker *v.* Somes, 2 M. & K. 655; Palmer *v.* Mitchell, 2 M. & K. 672; Chedworth *v.* Evans, 8 Ves. 46; Oliver *v.* Piatt, 3 Howard, 333; Wiley's Appeal, 8 W. & S. 244; Hart *v.* Ten Eyck, 2 Johns. Ch. 62; and see Dutton *v.* Willner, 52 N. Y. 313; Leak *v.* Sutherland, 25 Ark. 219; Mason *v.* Banman, 62 Ill. 76; Ackenburg *v.* McCool, 36

§ 526. By the usual chancery practice a trustee is entitled, in matters of doubt, to obtain a decree of the court having jurisdiction of his accounts as to the propriety of an investment; and a decree so made will be a protection to him in case of loss, if it appear that the case was fairly presented to the court.[1]

Decree of court a protection.

§ 527. The law as to special agents has been already partially anticipated.[2] To special as well as to general agencies we may apply the rule, that *diligentia quam suis*, or the degree of diligence shown by the agent in his own affairs, is not the standard to be applied to him when managing the affairs of his principal.[3] He may choose to exhibit a super-business intensity in his own affairs (*e. g.* when his own business requires, giving up his hours of sleep); but he is not bound to exhibit this super-business intensity in the affairs of his principal. So he may choose to neglect his own affairs (which is frequently the case with lawyers, as will presently be more fully seen); but this will not excuse him for neglecting the affairs of his principal.[4] He is bound, on the principles heretofore fully exhibited, to display, as a specialist, selected as such, the diligence of a good specialist in his specialty.[5] He is liable, therefore, not only for *culpa lata*, or gross negligence, but for *culpa levis*, or special negligence, which is the negligence of a specialist in his specialty. Illustrations to this effect will be presently discussed more fully when we examine the duties of lawyers and physicians. At present the following cases may be incidentally noticed.

Special agents bound to diligence of good specialist.

§ 528. An agent who is specially appointed to search for taxes is required to apply to the work the diligence of a good and faithful expert in such specialty.[6]

Person searching for taxes.

§ 529. A patent agent undertakes to be familiar with and dili-

Ind. 473. See Norris's Appeal, 71 Penn. St. 106.

[1] See Hill on Trustees, 4th Am. ed. 579; though see Horn *v.* Lockhart, 17 Wall. 570.

[2] See supra, § 515.

[3] See Ihmsen's Appeal, 43 Penn. St. 431; Whart. on Agency, § 275.

[4] Davis *v.* Garrett, 6 Bing. 716; Max *v.* Roberts, 12 East, 89; Jones *v.* Hoyt, 25 Conn. 386.

[5] See Lee *v.* Walker, Law Rep. 7 C. P. 121; Hanna *v.* Holton, 78 Penn. St. 334; Pownall *v.* Bair, 78 Penn. St. 403; Whart. on Agency, § 273.

[6] See supra, § 297; Morange *v.* Mix, 44 N. Y. (5 Hand) 315.

gently to exercise the function of patent agency. Hence he is "bound," says a learned English judge in a trial in the common pleas, in 1872, "to bring reasonable and ordinary care and knowledge to the performance of his duty as such skilled agent."[1] "He is not bound to be accurately acquainted with the whole law of patents; but I think he is bound to know the law as to the practice of obtaining patents." And in consequence of this an agent who, in ignorance of such practice, negligently delayed perfecting a patent until too late, was held liable to his principal.[2]

Patent agents.

§ 530. The liability of insurance agents is to be gauged by the same tests. The agent is not liable for that *levissima culpa* which consists in not obtaining the most favorable terms possible.[3] But he is bound to exercise the diligence and sagacity accustomed to be shown by a good business man in his specialty.[4]

Insurance agents.

§ 531. A commission merchant, also, is bound to the diligence customary among good business men of his department, and he is liable for any failure to come up to this standard.[5]

Commission merchants.

§ 532. So is it where an agent undertakes the collection of a particular debt. Thus where an express company received for collection, for which it was to be paid the usual commission, a bill of exchange drawn in one state and payable in another, and which required, therefore, demand and protest on the day of payment in order to charge the drawer or indorsers; the company was held liable for negligence in its agents in making the demand and protest, whereby the other parties were discharged.[6] And no doubt the standard of dili-

Agents appointed to collect funds.

[1] Brett, J., in Lee *v.* Walker, Law Rep. 7 C. P. 125.

[2] Ibid.

[3] Whart. on Agency, §§ 202, 203, 435, 704, 705, 782; Moore *v.* Morgue, Cowp. 479; Comber *v.* Anderson, 1 Camp. 523.

[4] Park *v.* Hammond, 6 Taunt. 495; *S. C.* 4 Camp. 344; Story on Agency, §§ 187, 191; Smith *v.* Lascelles, 2 T. R. 189; Morris *v.* Summerl, 2 W. C. C. R. 203; De Tastet *v.* Crousillat, 2 W. C. C. R. 136; and see further observations, and cases cited in Whart. on Agency, §§ 202, 251, 704.

[5] Whart. on Agency, § 778; Story on Agency, § 188; Russell *v.* Hankey, 6 T. R. 12; Caffrey *v.* Darby, 6 Ves. 496; Littlejohn *v.* Ramsay, 16 Mart. 655; Hosmer *v.* Beebe, 14 Mart. 368; Leverick *v.* Meigs, 1 Cow. 645.

[6] Am. Ex. Co. *v.* Haire, 21 Ind. 4; Whitney *v.* Merch. Un. Ex. Co.

gence in such a case is that which would be exercised by a good and experienced business man in such department of business when charged with a duty such as that in litigation.

§ 533. In application of the same principle, it has been properly ruled in Illinois,[1] that a contractor who undertakes to erect a building for another must exercise skill, judgment, and vigilance, and if from a want of skill, or from carelessness, the building falls or becomes injured, or is delayed in its completion beyond the time agreed upon, he is liable, though he is not required to guard against unusual and extraordinary tempests and inevitable accidents produced by the uncontrollable action of nature.

Contractor undertaking to erect building.

§ 534. *Negotiorum gestio*, in its narrow sense, exists, according to the Roman law, when the agent (*negotiorum gestor*) undertakes the business of another (*dominus*) without invitation from the latter, or without being bound so to act by official duty. Cases of this character arise: (1) when the owner or principal (*dominus*) is absent, and has left no one in charge of his affairs;[2] (2) when the intervener acts at the solicitation of a third party; (3) when he takes charge of certain property erroneously believing it to be his own; and (4) when he takes a business upon him *de son tort*, from a mistaken belief that he was appointed so to do.[3] When he officiously forces himself into

Volunteer agency.

104 Mass. 152; Bradstreet *v.* Everson, 72 Penn. St. 124. See other cases cited infra, § 753; Whart. on Agency, §§ 272–275, 544.

In a case decided by the supreme court of Pennsylvania, in January, 1877, Morgan *v.* Tener, 3 Weekly Notes, 398, the evidence was, that, in 1857, P. placed a claim in the hands of A. for collection, and received a receipt for it, "to be forwarded by us for collection, by suit or otherwise, at our discretion." A. forwarded the claim to S., who, in 1859, without A.'s knowledge, compromised the claim, and fraudulently retained the proceeds. P. made frequent inquiries of A., who, in good faith, and in ignorance of S.'s action, replied that the claim was uncollectible. In 1869, learning the real facts, P. brought suit against A. for the amount of the claim. It was ruled that A. was not merely a forwarder of the claim, but that it was in his hands for collection, and he was, therefore, liable for the fraud of S.

[1] Schwartz *v.* Daegling, 55 Ill. 342. See infra, § 816.

As to architects, see supra, § 512. As to liability of contractor to third parties, see §§ 439–441, 535.

[2] L. I. 2. D. h. t. 3. 5. See, fully, Whart. on Agency, §§ 356–375, where this topic is discussed at large; and see Dennis *v.* McCogg, 32 Ill. 429.

[3] See these cases given in D. 3. 5. Cod. II. 19. tit. de neg. gest.; and see

the agency to the exclusion of another, he is liable for all losses occurring through his mismanagement.[1] It is otherwise, however, when his intervention is benevolent and necessary to prevent impending loss, in which case he is only liable for *dolus* or *culpa lata*.

Liability of agents to third parties.

§ 535. The mere fact that I am the agent, in doing the injurious act, of another, does not relieve me from liability to third persons for hurt this act inflicts on them.[2] Judge Story,[3] indeed, tells us that for *omissions* of the agent the principal alone is liable, while for misfeasances the agent is also liable; but this distinction, as has been already shown, can no longer be sustained.[4] The true doctrine is, that when an agent is employed to work on a particular thing, and has surrendered the thing in question into the principal's hands, then the agent ceases to be liable to third persons for hurt received by them from such thing, though the hurt is remotely due to the agent's negligence;[5] the reason being that the causal relation between the agent and the person hurt is broken by the interposition of the principal as a distinct centre of legal responsibilities and duties.[6] But wherever there is no such interruption of causal connection; in other words, wherever the agent's negligence directly injures a stranger, the agent having liberty of action in respect to the injury, then such stranger can recover from the agent damages for the injury.[7] Some difference of opinion exists, it is true, as to whether the agent and the princi-

particularly, Vangerow, §§ 664, 666; Baron, § 309.

[1] See supra, § 69.

[2] Supra, §§ 439, 440, 441; Witte *v.* Hague, 2 D. & R. 33; Cary *v.* Webster, 1 Str. 480; Mitchell *v.* Harmony, 13 How. (U. S.) 115; Richardson *v.* Kimble, 28 Me. 463; Hewett *v.* Smith, 3 Allen, 420; Hawkesworth *v.* Thompson, 98 Mass. 77; Wright *v.* Wilcox, 19 Wend. 343; Phelps *v.* Wait, 30 N. Y. 78; Montfort *v.* Hughes, 4 E. D. Smith, 591; Johnson *v.* Barber, 5 Gilm. 425; Lottman *v.* Barrett, 62 Mo. 159; Harriman *v.* Stowe, 57 Mo. 93; and cases cited infra, §§ 579–584.

[3] Agency, § 308.

[4] See supra, §§ 78–83.

[5] See cases cited, supra, §§ 439–441.

[6] See supra, § 148.

[7] Whart. on Agency, § 537. See infra, § 780. In Harriman *v.* Stowe, *ut supra*, a husband, acting as his wife's agent, was held liable for his negligence in the construction of a trap-door on the wife's house, through which trap-door the plaintiff fell.

A contractor, employing laborers, is liable for negligent misconduct to such laborers. Sullivan *v.* Bridge Co. 9 Bush, 81.

pal can be jointly sued for injuries caused by the agent's negligence when acting within the scope of his authority. But as a general rule, where the servant and master are severally liable for tort, they may be joined as defendants in the same suit.

[1] See Whart. on Agency, § 546; though see Parsons *v.* Winchell, 5 Cush. 592.

CHAPTER V.

COMMON CARRIERS OF GOODS.

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I. GENERAL PRINCIPLES.

§ 545. A common carrier of goods is one who undertakes to transport from place to place for reward the goods of such as choose to employ him.[1] Definition.

[1] Story on Bailments, § 495; 2 Kent Com. Lect. 40. In Liver Alkali Co. *v.* Johnson, L. R. 9 Exch. (Exch. Ch.) 338, the defendant was a barge owner, and let out his vessels for the conveyance of goods to any customers who applied to him. Each voyage was made under a separate agreement, and a barge was not let to more than one person for the same voyage. The defendant did not ply between any fixed termini, but the

§ 546. Hence we may class as common carriers: —

Drivers and owners of stages, plying between different places, and transporting goods for hire.[1]

Hackney coach and cab drivers, when they undertake to carry baggage and passengers.[2]

Omnibus drivers and owners, under the same conditions.[3]

Street as well as steam railway companies, not merely as to freight, but as to trunks and parcels which they allow their servants to carry for hire.[4]

Receivers running a railroad under decree of court.[5]

Ferrymen.[6]

Porters,[7] teamsters, and wagoners who carry parcels for hire, for all who apply, from point to point, though this is not their principal business.[8]

Boatmen on canals,[9] and bargemen,[10] under the same limitations.

Steamboat companies who allow their officers to carry parcels

customer fixed in each particular case the points of arrival and departure. In an action against the defendant by the plaintiffs for not safely and securely carrying certain goods, it was ruled that the defendant, in exercising this employment, had incurred the liability of a common carrier, and was liable, though the goods were lost without negligence on his part. As to gratuitous parcels, see infra, § 621. As to Alabama statute, see South W. R. R. *v.* Webb, 48 Ala. 585.

A carrier, who says he will "charge little or nothing," is not a carrier without hire. Gray *v.* Packet Co. 64 Mo. 47. See supra, § 506.

[1] Coggs *v.* Bernard, 2 Ld. Ray. 909; Forward *v.* Pittard, 1 T. R. 27; Gordon *v.* Little, 8 S. & R. 533; Beckman *v.* Shouse, 5 Rawle, 179; Powell *v.* Myers, 26 Wend. 591.

[2] See Ross *v.* Hill, 2 C. B. 877; Case *v.* Storey, L. R. 4 Exch. 317; Dickinson *v.* Winchester, 4 Cush. 114. See infra, § 612.

[3] Dibble *v.* Brown, 12 Geo. 217; Parmelee *v.* McNulty, 19 Ill. 556.

[4] Levi *v.* Lynn & Bost. Horse R. R. 11 Allen, 300; Blumenthal *v.* Brainerd, 38 Vt. 402; Farmers' & Mech. Bank *v.* Champ. Trans. Co. 23 Verm. 186.

[5] Paige *v.* Smith, 99 Mass. 395; Nichols *v.* Smith, 115 Mass. 332; Blumenthal *v.* Brainerd, 38 Vt. 402. See Sprague *v.* Smith, 29 Vt. 421.

[6] Infra, § 706.

[7] As to porters, see discussion in Angell on Carriers, 5th ed. 67.

[8] McClure *v.* Richardson, 1 Rice, 215; Gordon *v.* Hutchinson, 1 Watts & S. 285; Gisbourne *v.* Hurst, 1 Salk. 249; Robertson *v.* Kennedy, 2 Dana, 431. See Angell on Carriers, 5th ed. 64.

[9] Arnold *v.* Halenbake, 5 Wend. 33; De Mott *v.* Larraway, 14 Wend. 225; Humphreys *v.* Reed, 6 Whart. 435; though see Beckwith *v.* Frisbie, 32 Vt. 559.

[10] See Liver Alkali Co. *v.* Johnson, L. R. 7 Exch. 267, cited supra. See Angell on Carriers, 5th ed. § 81.

when such carrying is within the range of the charter of the company.[1]

And expressmen.[2]

It is otherwise with the proprietors of tow-boats or tug-boats.[3]

II. LIABILITY BASED ON DUTY.

Foundation of action is duty.

§ 547. Whether a carrier's liability rests primarily on the duty to carry goods or passengers safely, or upon the contract entered into as evidenced by the ticket, has been in England the subject of some doubt. In the court of common pleas,[4] it is held that an action for a loss of luggage through the defendant's negligence is based not on the contract specifically, but on the defendant's duty. The case was one of a servant suing in an action on the case for loss of luggage, the master having paid for the ticket; and Jervis, C. J., said: "But upon what principle does the action lie at the suit of the servant for his personal suffering? *Not by reason of any contract between him and the company, but by reason of a duty implied by law to carry him safely.* If, under the circumstances of the case, the plaintiff could have recovered in respect of a personal injury sustained by him, there is no reason why he should not also in respect of the loss of his luggage. If the liability of the defendants arises, not from the contract, but from a duty, it is perfectly unimportant by whom the reward is to be paid; *for the duty would equally arise, though the payment was by a stranger.*"[5]

[1] Farmers' & Mech. Bk. *v.* Champ. Trans. Co. 23 Vt. 186; Bennett *v.* Filyow, 1 Flor. 403; Hall *v.* Connecticut River St. Co. 13 Conn. 319; Saltus *v.* Everett, 20 Wend. 267; Harrington *v.* McShane, 2 Watts, 443. Infra, § 638.

[2] See infra, § 697. It has been held that the sale or leasing to individuals, by a carrier, of rights to transact on his vehicle such business as may be done thereon, and the exclusion of others therefrom, are reasonable regulations, which the courts are bound to enforce. The D. R. Martin, 11 Blatch. 234.

[3] The Merrimac, 2 Sawyer, 586; Wells *v.* St. Co. 2 Comst. 208; Brown *v.* Clegg, 63 Penn. St. 51; Hays *v.* Millar, 77 Penn. St. 238. Infra, § 725.

[4] Marshall *v.* Newcastle & Berwick Ry. Co. 11 C. B. 655, in 1851.

[5] See supra, §§ 436, 437.

In the same case, Williams, J., said: "It seems to me that the whole current of authorities, beginning with Govett *v.* Radnige, 3 East, 62, and ending with Pozzi *v.* Shipton, 8 Ad. & E. 963; 1 P. & D. 4, establishes that an action of this sort is, in substance, not an action of *contract*, but an action of *tort* against the company, as car-

§ 548. In 1867, in the queen's bench, in a case where a company was held liable for injuries to a child, who had paid no fare, when in his mother's custody, though he was a few months over the age at which children travelling with their parents cease to go free of charge (there being no fraud on the mother's part, and she having paid her own fare),[1] Blackburn, J., said: "I think that what was said in the case of Marshall *v.* Newcastle & Berwick Railway Co. was quite correct. It was there laid down that the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely." By Cockburn, C. J., Shee, J., and Lush, J., the case was rested on the ground of contract, without, however, negativing the liability on ground of duty.[2]

§ 549. But whatever may be our speculations on the technical point thus noticed, we must agree that a money payment, adjusted to a particular piece of goods, or to a particular traveller, is not necessary in order to establish a carrier's liabilities.[3] In addition to the cases hereafter cited to this effect, we may mention a Wisconsin ruling, that if a carrier, in consideration of carrying grain in bags on freight, agrees to carry the empty bags of his customers free, or if there is a custom for carriers to return empty bags, he is liable as carrier for the bags.[4]

riers. The earliest instance I find of an action of this sort is in Fitzherbert's Natura Brevium, writ de trespass on the case, in which it is said, 'If a smith prick my horse with a nail, &c., I shall have my action upon the case against him, without any warranty by the smith to do it well; for it is the duty of every artificer to exercise his art rightly and truly as he ought.' There is no allusion there to any contract." See, also, Wyld *v.* Pickford, 8 M. & W. 443; Gladwell *v.* Steggall, 5 N. C. 733; 8 Scott, 60; Pippin *v.* Sheppard, 11 Price, 400; Great Northern Railway *v.* Harrison, 10 Exch. 376; Great West. Ry. Co. of Canada *v.* Braid, 1 Moo. P. C. N. S. 101.

[1] Austin *v.* Great West. Ry. Co. L. R. 2 Q. B. 442. Supra, §§ 436, 437.

[2] "It seems to me, therefore, that although the law will raise a contract with a common carrier, to be answerable for the careful conveyance of his passenger, nevertheless he may be charged in an action on the case for a breach of his duty." Holroyd, J., Ansell *v.* Waterhouse, 6 M. & S. 393.

[3] Infra, §§ 613, 622, 641.

[4] Pierce *v.* R. R. 23 Wis. 387. See supra, § 506; and see Gray *v.* Packet Co. 64 Mo. 47.

III. WHEN INSURERS OF GOODS.

§ 550. By the Praetorian edict, common carriers, as well as innkeepers, are liable for the *custodia*, in its narrow sense, of goods given to their charge by travellers.[1] Roman law. Nor is it necessary that the carriage should be for pay; the same rule applies when it is gratuitous.[2] Actual delivery into the carrier's hands is unnecessary; if the traveller brings his goods to the carrier's boat or carriage for transport, this is enough.[3] Whether the edict applies to carriers by land as well as those by water, has been much discussed; though if the carrier by land is liable for *custodia* in its narrow sense, as has been already declared, the question is merely verbal.[4] As to all matters of *casus*, the carrier of goods must exercise the *diligentia* of a *bonus et diligens paterfamilias*.[5]

§ 551. As to misfortunes by water carriage, the Roman law adopts the Rhodian Code,[6] which, when a peril of the sea requires that certain goods should be thrown overboard, averages the loss among all who are benefited by the act. The principle is extended by the jurists to losses through piracy; and even to injuries to the ship itself.[7]

§ 552. It has been just seen that by the Roman law a common carrier's duty as to goods as well as persons, in cases of *casus*, is simply that of a good business man in his particular department, and hence that the common carrier can defend himself, in such cases, by setting up such casualty as a good business man in such department is not likely to foresee and avert. To impose a higher liability than this, it is argued by modern German and French jurists, who adopt the same rule, would be to require an intensity of exertion, the strain of which no business could bear; By our own law common carriers are insurers of goods.

[1] Vangerow, §§ 646, 848; Baron, § 298.

[2] L. 6. pr. D. 4. 9.

[3] L. 1. § 8. D. 4. 9.

[4] See, to this point, Baron, § 298. In Nugent *v.* Smith, L. R. 1 C. P. D. 423, it was erroneously supposed by the court that common carriers were, by the Roman law, insurers. Such was the view of the scholastic commentators of the Middle Ages, but not of the classical Roman jurists, as the citations in the text will show.

[5] See supra, § 31, as defining this.

[6] Tit. D. 14. 2; *de lege Rhodia de jactu.*

[7] L. 2. § 3. D. h. t. 14. 2.

would shift upon particular industries the load of *casus* which should be distributed on all industries alike; would confuse the business of common carrying with that of insurance; and would add a purely speculative factor in the adjustment of freights. That there is force in this reasoning is shown not only by its acceptance throughout the Continent of Europe, but by the fact that in England and the United States common carriers now almost universally limit by special contracts their liability to the extent just specified, and that these special contracts have been, as will be seen, sustained by the courts. At the same time, it may not be out of place here to observe that by the North German Code, while a railroad company's liability for goods is qualified in the mode just stated, its liability, in case of injury to passengers, is absolute. Unless such injury is caused by the passengers themselves, the company is obliged to compensate them according to a fixed scale. For our immediate purposes, in this section, however, it is sufficient to state that by our own common law, the common carrier of goods is responsible for all losses except those caused by the act of God, or by *vis major*.[1]

IV. ACT OF GOD; INEVITABLE ACCIDENT; VIS MAJOR.

Definitions.

§ 553. So far as the terms "*Act of God*," "*Inevitable accident*," are coincident with *casus*, they have been already illustrated.[2] Their technical and distinctive meaning, in our own law, remains for our consideration. "I consider," said Lord Mansfield,[3] "it" (the act of God) "to mean something in opposition to the act of man." "The law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightnings, and tempests."[4] But are

[1] See Story on Bailments, § 489; Angell on Carriers (5th ed.), 42; Condict *v.* R. R. 54 N. Y. 500; Mobile, &c. R. R. *v.* Weiner, 49 Miss. 725; Sloan *v.* R. R. 58 Mo. 220; Chicago, &c. R. R. *v.* Shea, 66 Ill. 471. It has been ruled, however, in Tennessee, that a common carrier, who has been guilty of no negligence, is not liable for delay in the transportation of goods occasioned by an accident not inevitable, if the goods are finally safely delivered. Nashville, &c. R. R. *v.* Jackson, 6 Heisk. 271.

[2] Supra, § 116.

[3] Forward *v.* Pittard, 1 T. R. 27. Supra, § 114.

[4] See, to same effect, Proprietors of

"act of God," and "inevitable accident," convertible terms? No doubt they were so viewed by Sir William Jones, who introduced the second phrase in order to avoid the difficulty of particularizing certain eminently unexpected events as God's acts, leaving all other events to be viewed as human. But cases have not been infrequent in which this paraphrase has been rejected, and in which accidents which have been supposed to be inevitable have nevertheless been held not to be "acts of God," and hence not grounds on which the liability of the carrier could be discharged.[1]

The better opinion, however, is, that when a loss is imputable to a storm, the consequences of which could not have been averted by the diligence usual among good seamen, the carrier is not liable.[2]

the Trent & Mersey Nav. Co. *v.* Wood, 3 Esp. Cas. 127, 131; 4 Doug. 289; McArthur *v.* Sears, 21 Wend. 190; Chicago, &c. R. R. *v.* Shea, 66 Ill. 471.

[1] See McArthur *v.* Sears, 21 Wend. 198; Merritt *v.* Earle, 31 Barb. 38; *S. C.* 29 N. Y. 115; Hays *v.* Kennedy, 41 Penn. St. 378.

[2] Infra, § 558. In Nugent *v.* Smith, L. R. 1 C. P. D. 423 (Court of Appeals), 1877, Cockburn, C. J., said: "It is somewhat remarkable that previously to the present case no judicial exposition has occurred of the meaning of the term 'act of God,' as regards the degree of care to be applied by the carrier in order to entitle himself to the benefit of its protection. We must endeavor to lay down an intelligible rule. That a storm at sea is included in the term 'act of God' can admit of no doubt whatever. Storm and tempest have always been mentioned, in dealing with this subject, as among the instances of *vis major* coming under the denomination of 'act of God.' But it is equally true that it is not under all circumstances that inevitable accident arising from the so-called 'act of God' will, any more than inevitable accident in general, by the Roman and continental law, afford immunity to the carrier. This must depend on his ability to avert the effects of the *vis major*, and the degree of diligence which he is bound to apply to that end. It is at once obvious, as was pointed out by Lord Mansfield in Forward *v.* Pittard, 1 T. R. 27, that all causes of inevitable accident, '*casus fortuitus*,' may be divided into two classes; those which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause, and those which have their origin either in the whole or in part in the agency of man, whether in acts of commission or omission, of nonfeasance or of misfeasance, or in any other cause independent of the agency of natural forces. It is obvious that it would be altogether incongruous to apply the term 'act of God' to the latter class of inevitable accident. It is equally clear that storm and tempest belong to the class to which the term 'act of God' is properly applicable. On the other hand, it must be admitted that it is not because an accident is occasioned by the agency of

§ 554. Fire, though part of a general conflagration such as no prudent business man could have expected, is no avoidance, unless it was caused by lightning.[1]

Fire not "act of God."

nature, and therefore by what may be termed the 'act of God,' that it necessarily follows that the carrier is entitled to immunity. The rain which fertilizes the earth, and the wind which enables the ship to navigate the ocean, are as much within the term 'act of God' as the rainfall which causes a river to burst its banks and carry destruction over a whole district, or the cyclone that drives a ship against a rock or sends it to the bottom. Yet the carrier, who, by the rule, is entitled to protection in the latter case, would clearly not be able to claim it in the former. For here another principle comes into play. The carrier is bound to do his utmost to protect the goods committed to his charge from loss or damage, and if he fails herein becomes liable from the nature of his contract. In the one case he can protect the goods by proper care, in the other it is beyond his power to do so. If by his default in omitting to take the necessary care, loss or damage occurs, he remains responsible, though the so-called 'act of God' may have been the immediate cause of the mischief. If the ship is unseaworthy, and hence perishes from the storm which it otherwise would have weathered; if the carrier by undue deviation or delay exposes himself to the danger which he would otherwise have avoided, or if, by his rashness, he unnecessarily encounters it by putting to sea in a raging storm, the loss cannot be said to be due to the act of God alone, and the carrier cannot have the benefit of it. This being granted, the question arises as to the degree of care which is to be required of him to protect him from liability in respect of loss arising from the act of God. Not only, as has been observed, has there been no judicial exposition of the meaning of the term 'act of God,' as regards the degree of care to be applied by the carrier, in order to entitle himself to its protection, but the text writers, both English and American, are for the most part silent on the subject, and afford little or no assistance." . . . . "In our own law on this subject judicial authority, as has been stated, is wanting, and the text writers, English and American, with one exception, afford little or no assistance. Story, however, in speaking of the perils of the sea, in which storm and tempest are, of course, included, and, consequently, to a great extent, the instances of inevitable accident at sea, which come under the term, 'act of God,' uses the following language: 'The phrase, "perils of the sea," whether understood in its most limited sense as importing a loss by natural accidents peculiar to that element, or whether understood in its more extended sense as including inevitable

[1] Forward *v.* Pittard, 1 T. R. 27; Hyde *v.* Trent Co. 5 T. R. 389; Gatliffe *v.* Bourne, 4 Bing. N. C. 314; Mershon *v.* Hobensack, 2 Zab. 372; Gilmore *v.* Carman, 1 Sm. & M. 279; Potter *v.* McGrath, Dudley, 159; Hollister *v.* Nowlen, 19 Wend. 234; Condict *v.* R. R. 54 N. Y. 500; Am. Trans. Co. *v.* Moore, 5 Mich. 568; Cox *v.* Peterson, 30 Alab. 608; Hibler *v.* McCartney, 31 Alab. 502. But see Ins. Co. *v.* Ind. & Cin. R. R. Disney, 480; Lamb *v.* R. R. 46 N. Y. 271.

§ 554 *a*. The carrier is liable for losses to the goods through thefts either by his servants or by strangers, though he may have exercised all practicable diligence to prevent such loss.[1]

Liable for thefts of servants or strangers.

accidents occurring upon that element, must still in either case be understood to include such losses only to the goods on board as are of an extraordinary nature, or arise from some irresistible force, or from inevitable accident, or from some overwhelming power which cannot be guarded against by the ordinary exertions of human skill and prudence. Hence it is that if the loss occurs by a peril of the sea, which might have been avoided by the exercise of any reasonable skill or diligence at the time when it occurred, it is not deemed to be in the sense of the phrase such a loss by the perils of the sea as will exempt the carrier from liability, but rather a loss by the gross negligence of the party.' Story, it will be observed, here speaks only of 'ordinary exertion of human skill and prudence, and the exercise of reasonable skill and diligence.' I am of opinion that this is the true view of the matter, and that what Story here says of perils of the sea applies equally to the perils of the sea coming within the designation of 'acts of God.' In other words, that all that can be required of the carrier is that he shall do all that is reasonably and practically possible to insure the safety of the goods. If he uses all the known means to which prudent and experienced carriers ordinarily have recourse, he does all that can be reasonably required of him, and if, under such circumstances, he is overpowered by storm or other natural agency, he is within the rule which gives immunity from the effects of such *vis major* as the act of God. I do not think that because some one may have discovered some more efficient method of securing the goods which has not become generally known, or because it cannot be proved that if the skill and ingenuity of engineers or others were directed to the subject, something more efficient might not be produced, that the carrier can be made liable. I find no authority for saying that the *vis major* must be such as 'no amount of human care or skill could have resisted,' or the injury such as 'no human ability could have prevented,' and I think this construction of the rule erroneous."

Mellish, L. J. (who also delivered an opinion to the same end as the others), stated that James, L. J., concurred that the decision of the court below must be reversed, and desired to add the following observation: "The act of God is a mere short way of expressing this proposition: A common carrier is not liable for any accident as to which he can show that it is due to natural causes directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him."

The burden of proof is on the carrier, after a loss is shown, to show that it was by one of the excepted perils for which carriers are not liable. The plaintiff may then show that the loss might have been avoided by reasonable skill and attention, but the burden of proof is on him to establish the negligence. Hubbard *v.* Harnden Ex. Co. 10 R. I. 244. Supra, § 128.

[1] Story on Bailments, § 528, citing Jones on Bailm. 107; De Rothschild *v.* Royal Mail, 7 Exch. 734; King *v.*

Hidden rocks known to navigators not *casus*.

§ 555. Nor is he excused, in case of loss, by proof of a hidden rock against which a ship founders, if it appear that such rock was known to navigators.[1]

Otherwise when obstruction is unknown.

§ 556. Yet on the other hand, where the rock is unknown to navigators, and could not, by the exercise of the diligence belonging to good seamen of the class in question, have been known by those navigating the particular ship, it is viewed as the act of God;[2] and so where a vessel is damaged by running against a snag recently brought up by a freshet, of which snag the officers of the vessel had no notice.[3] It is otherwise, it is said, as to

Shepherd, 3 Story, 356; Trent Nav. Co. *v.* Wood, 3 Esp. 127; *S. C.* 4 Doug. 287; Barclay *v.* Cuculla, 3 Doug. 389; Gibbon *v.* Paynton, 4 Burr. 2298; Schieffelin *v.* Harvey, 6 Johns. 170; Watkinson *v.* Laughton, 8 Johns. 213.

The question has been lately raised, What degree of proof is necessary, under the English Carriers' Act, in order to impute to the carriers a loss by the theft of their servants? In Vaughton *v.* R. R. L. R. 9 Exch. 93, Pigott, B., said: "In the present case I think the evidence given was more consistent with the guilt of the defendants' servants than with that of any person not in their employment, for the defendants' servants had greater opportunities than others. That being so, there was a case for the jury, the *onus* of answering which was on the defendants. They might have answered it by calling the servants toward whom suspicion was directed, but they determined not to call witnesses; they preferred to leave the matter unexplained." In McQueen *v.* R. R. L. R. 10 Q. B. 569, a nonsuit was granted in a case in which the defendants produced no witnesses (a theft being probable) to show that the theft was not by the defendants' servants, and Cockburn, C. J., said: "The question of probability or improbability can only be considered as an ingredient or element in the consideration of the general case. But it always presupposes that a *primâ facie* case has been established. I think a verdict for the plaintiff would be unsatisfactory which rested on no better evidence than that produced in this case. It really comes to this, and no more than this, that there is a greater degree of probability that the defendants' servants took the drawings, by reason of their greater facility of access and opportunity of stealing, than that a stranger took them; it is merely a question between the railway company's servants and any one else, and there is nothing whatever to point to the railway company's servants particularly, except facility of access." See, however, Gogarty *v.* R. R. 8 Ir. C. L. R. 344, cited L. R. 10 Q. B. 571, 572; and see Central Law J. Oct. 1, 1875; and see, also, American Steamship Co. *v.* Bryan, Sup. Court Penn. 1877; 3 Weekly Notes, 528.

[1] See Williams *v.* Grant, 1 Conn. 487.

[2] Pennewill *v.* Cullen, 5 Harrington, 238; Williams *v.* Grant, 1 Conn. 487. Supra, § 114.

[3] Smyrl *v.* Niolon, 2 Bailey, 421; Faulkner *v.* Wright, 1 Rice, 108.

snags on western rivers which steamboats are forced to pass.[1]

Ambiguity of terms "act of God," and "inevitable accident."

§ 557. No doubt, as we have already noticed, many learned judges have contended that the words "inevitable accident," which were suggested by Sir William Jones as a more respectful mode of expressing the act of God, do not, in fact, have the same import; and no doubt the distinction thus made rests on the position above quoted of Lord Mansfield, that we are only to regard an event as, in the eye of the law, the act of God, when it has in no way been induced by the act of man.[2] But are there any events which the law has to investigate of which this can be predicated? And if there are, is not the range of such events narrowing in such a marked way from age to age that the test is incapable of fixed and definite application? Are not many occurrences which once were held out of the orbit of human calculation now shown to be within such orbit? Has not science been steadily contracting the domains of the pseudo-supernatural? We may take, for instance, the very cases of storm and of inundation, which Lord Mansfield speaks of as eminently the act of God as distinguished from the act of man. Science has not yet told us how to create a storm; but science has taken some steps toward telling us how to prognosticate a storm. If a rock that may be prognosticated is not "an act of God," why is a storm that may be prognosticated? If only an event which no human foresight could anticipate is an act of God, why is a hurricane an act of God, when by our weather signals we are able to anticipate hurricanes? So with regard to inundations, which have, with storms, been singled out as acts of God. But if an act of God is something that no human intervention could either forecast or prevent, can we say this of inundations, which by extraordinary labor and cost might be stopped before they could reach a railway track? If only such acts of God as neither human effort could avert nor human foresight anticipate can excuse carriers,

[1] Collier *v.* Valentine, 11 Mo. 299, 310. See Angell on Carriers, 5th ed. 182.

[2] See Redfield on Railways, § 167. If, as has been argued, the "act of God" is that which is not the act of any one else (Dexter *v.* Norton, 55 Barb. 279), then, as we increase the area of the acts of inferior agents, we diminish the number of what we call in law "acts of God."

then, with our present opportunities, a carrier cannot be said to be excusable by any *casus* that is not a miracle. And the same objection exists to the use of the term "inevitable accident." If we suppose the highest exertion of scientific research, and the extremest caution, to be applied, there is no accident that is "inevitable." Certainly there is no accident that could not be averted by the mere passive policy of declining to go to the spot where such accident might occur. Hence, we must concur in holding that it is not essential, to relieve a carrier, that a disaster caused by storm should be inevitable, but it is enough if the disaster could only have been avoided by the exercise of such care as is unusual among prudent business men.[1]

Carrier not liable for extraordinary and improbable perils.

§ 558. Even when the rule is that *casus* must be "inevitable" to be a defence, the tendency of authority is to treat as inevitable such disasters caused by storms and sudden extremes of temperature as could not have been averted except by an intensity of diligence beyond that which is usually exerted by a common carrier who brings to the duties in question experience and capacity adequate to their discharge.[2] Of this the following cases may be taken as illustrations: —

[1] See § 557. *Casus*, we are told by Wening-Ingenheim, in his thoughtful treatise on Schadensersatze, includes, in the original sense of the word, something more than the German word Zufall, or accident, — *casus* sometimes including occurrence (Fall) as well as accident (Zufall). For this he cites Horat. II. Od. 10. v. 10. Epist. I. 19. 18; L. 4. D. de vulg. et pupill. subst. (28. 6); L. 64. § 9, solut. matr. (24. 3.) But in its usual signification, *casus*, he declares, includes every event (*factum*) which is independent of us, whether this independence exists because the event was out of natural sequence, or because we were not capable of averting it. The latter condition is often spoken of by the Romans as *vis major, damnum, fatale, casus majores, fortuna.* L. 2. § 7. de adm. rer. ad civ. pert. (50. 8); and other citations given by Wening-Ingenheim, § 56. They frequently, when the latter restricted meaning is intended, add *fortuitus* to *casus.* Const. 4. Cod. de inst. et sub. (6. 25); Const. 5. Cod. de pign. act. (4. 24); L. 6. D. de adm. et per. tut. (26. 7.)

It is used to express the condition of him who is bound to *custodia*, or to the absolute return of goods. L. 29. pr. de petit. heredit. (5. 3); L. 13. § 1. de liber. caus. (40. 12); L. 14. § 1. de per et commod. rei vend. (18. 6); L. 14. § 16. de furtis (47. 2); cited by Wening-Ingenheim, § 56, p. 116.

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

[2] See, fully, Nugent *v.* Smith, L. R. 1 C. P. D. 423; Hubbard *v.* Harnden's Ex. Co. 10 R. I. 244; Denny *v.* R. R. 13 Gray, 481; Morrison *v.* Davis, 20

A freshet occurs by which a road is flooded. Undoubtedly, by extreme precautions, the road could have been protected by banks which no possible flood could have beaten down. This is not done, and the goods are damaged by a flood higher than any previously recorded. Excessive diligence, *diligentia diligentissimi*, could no doubt have prevented this loss; but excessive diligence, the employment of which would obstruct rather than promote business enterprise, the law, even as to common carriers, does not exact. Hence the flood, under such circumstances, is held to be a defence, on the ground that not to have anticipated it was not negligence.[1]

A sudden frost closes the navigation of a river a month earlier than in any prior recorded seasons. Excessive diligence might have guarded against this, and it cannot be regarded as an act of God, in Lord Mansfield's sense, or an inevitable accident; yet, if it is not such a casualty as a good business man, versed in this particular department, would have guarded against, the carrier, notwithstanding the idea of insurance, can set it up as a defence.[2]

A sound rail on a railway is broken by extreme and unlikely cold. This cold is a defence to a suit for an injury produced by the breaking of the rail, though it is possible to conceive of a rail so constructed that it cannot break.[3]

Fruit trees are frozen by a sudden access of unusual cold. In

Penn. St. 175; Nashville, &c. R. R. *v.* David, 6 Heisk. 261.

[1] Read *v.* Spalding, 5 Bosw. 395; *S. C.* 30 N. Y. 630; Michaels *v.* N. Y. Cent. R. R. 30 N. Y. 564; Morrison *v.* Davis, 20 Penn. St. 171; R. R. *v.* Reeves, 10 Wall. 176; Pruitt *v.* R. R. 62 Mo. 527; Withers *v.* R. R. 3 H. & N. 969. Infra, § 634.

[2] Crosby *v.* Fitch, 12 Conn. 410; Bowman *v.* Teall, 23 Wend. 306; Swetland *v.* B. & A. R. R. 102 Mass. 276; Wing *v.* N. Y. & E. R. R. 1 Hilton, 235.

[3] Infra, § 633–35. McPadden *v.* R. R. 44 N. Y. 478.

"A common carrier is in most respects an insurer; but he is not such in respect to what is called the *vis major*, or act of God. For example, he does not insure against storm or lightning, or the perils of the sea. The same principle has been held to apply to delays in transportation caused by the freezing of canals or rivers." Chapman, C. J., in Swetland *v.* Boston & A. R. R. 102 Mass. 282, citing Parsons *v.* Hardy, 14 Wend. 215; Bowman *v.* Teall, 23 Wend. 306; Harris *v.* Rand, 4 N. H. 259. Supra, § 114.

On the whole topic before us the student is referred to the judgments delivered in Nugent *v.* Smith, L. R. 1 C. P. D. 423, quoted supra, § 553; and to Angell on Carriers (5th ed.),

such case the carrier is not liable if due care has been taken of the trees.[1]

Otherwise when peril is induced by negligence.

§ 559. That no accident is a defence if induced by the carrier's negligence is a familiar principle of the Roman law, which has been already noticed.[2] In our own jurisprudence the distinction has been repeatedly affirmed. Such has been held to be the case where a ship has defective appointments, or a negligent crew, in consequence of which she cannot breast a storm, or fails to avoid a collision;[3] where a proper chart is not taken, in consequence of which neglect the vessel founders upon a rock;[4] where a water-power company aggravates a drought by a wasteful discharge of water;[5] where a boiler is negligently filled over night, in consequence of which a steam-pipe is cracked with frost, and floods the goods;[6] where the carrier wantonly deviates from the usual course, and when out of the course encounters the disaster;[7] where articles frozen by an unusual and sudden snap of cold could have been preserved by the exercise of proper care when the cold began;[8] where the violence of a storm, leading to the damaging of a vessel, could have been anticipated or counteracted;[9] and generally, whenever the *casus* was encountered by the carrier's negligence or error.[10] At the same time it has been ruled, that where a loss is attributable to a peril from which the carrier is by law exempt, liability is not imposed on him by the fact that the goods

§ 154. Mr. Wallace's definition (1 Smith's Lead. Cas. 233, Am. ed), that "the act of God is the extraordinary violence of nature," is defective, in not fixing the grade of violence which "extraordinary" indicates.

[1] Vail *v.* R. R. 63 Mo. 230; and see McPadden *v.* R. R. 44 N. Y. 478.

[2] Supra, §§ 123–7.

[3] Converse *v.* Brainerd, 27 Conn. 607; Arnentrout *v.* R. R. 1 Mo. Ap. 158; Backhouse *v.* Sneed, 1 Murphy, 173; Bailiffs of Romney Marsh *v.* Trinity House, L. R. 5 Exch. 208, and other cases cited supra, §§ 123–7.

[4] See Williams *v.* Grant, 1 Conn. 487.

[5] Supra, § 126.

[6] Siordet *v.* Hall, 4 Bing. 607; *S. C.* 1 M. & P. 561.

[7] Davis *v.* Garrett, 6 Bing. 716; *S. C.* 4 M. & P. 540; Crosby *v.* Fitch, 12 Conn. 410; Powers *v.* Davenport, 7 Blackf. 497; Hand *v.* Bayoes, 4 Whart. 204.

[8] Wing *v.* N. Y. & E. R. R. 1 Hilton, 235.

[9] New Jersey St. Co. *v.* Tiers, 4 Zab. 697.

[10] Seigel *v.* Eisen, 41 Cal. 109; Vail *v.* R. R. 63 Mo. 230; Condict *v.* R. R. 54 N. Y. 500. Supra, § 125. See Denny *v.* R. R. 13 Gray, 481; Pennsylvania Railroad *v.* Mitchell, 4 Weekly Notes, 3; Nashville, &c. R. R. *v.* David, 6 Heisk. 261.

would not have been exposed to the peril but for his negligent delay.[1] It has also been held that with a seaworthy ship, a carrier is not precluded from setting up the act of God when the storm is one which a stronger vessel could have withstood.[2]

Where it is within the carrier's power to notify the shipper of an obstruction by weather, he must do so.[3]

§ 560. *Vis major* is frequently used as equivalent to "superior force of public enemy." It is clearly a defence that the goods were seized by a public enemy, or by a pirate appearing in sufficient force to command submission.[4] It makes no difference whether the goods were destroyed as a military measure to prevent their falling into the hands of an enemy, or as a matter of public necessity for the safety of the people in the neighborhood, provided irresistible force was used.[5] And it is a good defence that the goods were taken from the carrier's possession by legal process.[6] As has been seen, it is no defence that the goods were stolen,[7] nor that they were left behind in consequence of a strike among the defendants' employees,[8] though it may be otherwise when the delay was caused by a strike whose violence the company had no power to subdue, and which was conducted by strangers and servants previously discharged.[9]

Vis major.

§ 561. If the exposure to a public enemy was the natural result of the carrier's negligence, the excuse of *vis major* is of no avail.[10]

[1] Denny *v.* R. R. 13 Gray, 481; Hoadley *v.* Northern Transportation Co. 115 Mass. 304; Morrison *v.* Davis, 20 Penn. St. 171. See Railroad *v.* Reeves, 10 Wall. 176; McClary *v.* R. R. 3 Neb. 44. See, however, *contra*, Read *v.* Spaulding, 5 Bosw. 395; 30 N. Y. 630; Peck *v.* Weeks, 34 Conn. 145; Angell on Carriers (5th ed.) § 416. See infra, § 598.

[2] Amies *v.* Stevens, 1 Stra. 128; adopted in Colt *v.* McMechen, 6 Johns. 160; Angell on Carriers, § 173.

[3] Great W. R. R. *v.* Burns, 60 Ill. 284.

[4] Magellan Pirates, 25 Eng. L. & E. 595; *S. C.* 18 Jur. 18; Hubbard *v.* Harnden's Ex. 10 R. I. 244; Lewis *v.* Ludwick, 6 Cold. 368.

[5] Weakly *v.* Pearce, 5 Heisk. 401; Nashville, &c. R. R. *v.* Estis, 7 Heisk. 622.

[6] Savannah, &c. R. R. Co. *v.* Wilcox, 48 Ga. 432.

[7] De Rothschild *v.* Royal Mail Co. 7 Exch. 734; Schieffelin *v.* Harvey, 6 Johns. 170. Supra, § 555.

[8] Blackstock *v.* R. R. 1 Bosw. 77; 20 N. Y. 48; Pittsburg, &c. R. R. *v.* Hazen, Sup. Ct. Ill. 4 Am. Law T. 83.

[9] Pittsburg, &c. R. R. *v.* Hazen, Sup. Ct. Ill. 4 Am. Law T. 83.

[10] See Colt *v.* McMechen, 6 Johns. 160; Railroad *v.* Reeves, 10 Wallace,

§ 562. "In the case of sea-going vessels, Congress has, by the Act of 1851, relieved ship-owners from all responsibility for loss by fire, unless caused by their own design or neglect; and from responsibility for loss of money and other valuables named, unless notified of their character and value; and has limited their liability to the value of the ship and freight, where losses happen by the embezzlement or other act of the master, crew, or passengers; or by collision, or any cause occurring without their privity or knowledge; but the master and crew themselves are held responsible to the parties injured by their negligence or misconduct. Similar enactments have been made by state legislatures. This seems to be the only important modification of previously existing law on the subject, which in this country has been effected by legislative interference. And by this it is seen, that though intended for the relief of the ship-owner, it still leaves him liable, to the extent of his ship and freight for the negligence and misconduct of his employees, and liable without limit for his own negligence." [1]

Carriers by water relieved by statute from liability for fire.

Under this act, it is held in New York, there is no question of partial or limited liability in case of loss by fire. The first section relieves the owner from all liability where the loss is not caused by his "design or neglect." If it is so caused, his common law liability remains intact, and he is liable for the whole loss.[2] The provisions of the third section, limiting the liability of the owner to the amount of his interest in the ship and her freight for the voyage, and those of the fourth section, which, in case of a loss by several freighters exceeding such amount, authorize the taking of proceedings to apportion the sum for which the owner is liable among the parties entitled thereto, have reference, so it has been held, solely to losses occasioned otherwise than by fire happening without "the knowledge or privity" of the owner.[3]

176; Holladay *v.* Kennard, 12 Wall. 254; Denny *v.* R. R. 13 Gray, 481; Morrison *v.* Davis, 20 Penn. St. 175; South. Ex. Co. *v.* Craft, 49 Miss. 480.

[1] Bradley, J., in N. Y. Cent. R. R. *v.* Lockwood, 17 Wall. 357.

[2] See, to this point, Michaels *v.* R R. 30 N. Y. 564; Condict *v.* R. R. 54 N. Y. 500.

[3] Knowlton *v.* Prov. & N. Y. S. S. Co. 53 N. Y. 76. See Headrick *v.* R. R. 48 Ga. 545.

V. CARRIER NOT LIABLE FOR DAMAGES TO GOODS ARISING FROM THEIR INHERENT DEFECTS, OR FROM BAD PACKING, NOR FROM MISMANAGEMENT OF OWNER.

§ 563. A carrier is not liable for losses to goods arising from their inherent defects, whenever such defects are incidental to the property.[1] Inherent defects.

§ 564. In conformity with this view, it is held that a shipowner is not liable for injury to goods arising from some inherent and undisclosed dangerous or destructive quality.[2] If such were not the law, the owner of an explosive compound could obtain its value by putting it on board a railway train in which the compound would be sure to explode. To create the carrier's liability in such case, there should be notice to him of the peculiar characteristics of the thing shipped.

§ 565. *A fortiori*, the owner of vicious live-stock, who delivers them without notice of their viciousness to a common carrier for transport, cannot recover for damages caused by their viciousness.[3] Should the cattle be injured, and should the injury be caused directly by their viciousness, and not by any fault of the carrier, the carrier is not liable.[4] Nor is it necessary that the plaintiff should have known their viciousness; for it is negligence in him not to know it. But if the cause is the defendant's negligence, the fact of the cattle being restive or vicious is no defence; for the carrier is liable for any damage that could have been averted by the exercise of such diligence in his particular duty as a good business man in his special department would adopt.[5] Of course the animal's viciousness is no defence when such restiveness or viciousness was provoked by the negligence of the defendant.[6] But if the damage Vicious and restiva animals.

[1] Blower *v.* R. R. L. R. 7 C. P. 662, and cases there cited; Story on Bailments, § 492 *a*; Smith's Mercantile Law (8th ed.), 354. See, also, Rohl *v.* Parr, 1 Esp. 445; Hunter *v.* Potts, 4 Camp. 403; Rixford *v.* Smith, 52 N. H. 355; Ship Invincible, 3 Sawyer, 176.

[2] Brass *v.* Maitland, 6 E. & B. 470; Hutchinson *v.* Guion, 5 C. B. N. S. 149; Talley *v.* R. R. Law Rep. 6 C. P. 44, 51; Gorham Man. Co. *v.* Fargo, 35 N. Y. Super. 434; 45 How. Pr. 90.

[3] Infra, §§ 619–621.

[4] Angell on Carriers, §§ 210, 211, 212; Redfield on R. R. § 186, and cases there cited; Clarke *v.* R. & S. R. R. 14 N. Y. 570; Hall *v.* Renfro, 3 Metc. (Ky.) 51; Rixford *v.* Smith, 52 N. H. 355. Infra, § 907.

[5] Conger *v.* Hudson R. R. 6 Duer, 375. See supra, § 345; infra, § 621.

[6] Gill *v.* Manchester R. R. L. R. 8 Q. B. 186; Phillips *v.* Clark, 2 C. B.

came from the interference of the owner, this relieves the defendant.[1] And in any view it must be remembered, as will be hereafter seen,[2] that live-stock cannot be in the strict sense "goods," as this term is considered in relation to common carriers.

Bad packing.

§ 566. The owner or consignor of goods sent in package to a common carrier is bound to pack them securely. If he fail to do so, and they are consequently damaged in consequence of such bad package, then he cannot recover against the carrier.[3] On the other hand, a carrier is liable for his negligence in stowing away goods in his carriage or vessel, though the mere fact that goods are packed so closely in a railroad car that they cannot be unloaded quickly in case of fire is in itself no conclusive proof of negligence in packing.[4] If, in case of bad packing by the owner, the carrier could, by the exercise of the diligence belonging to a careful and diligent business man in his particular department, have averted the mischief, the plaintiff is entitled to recover, as the carrier has no right negligently to injure even things negligently packed.[5] Eminently is this the case with the packing of live-stock. The owner or his agent may acquiesce in their being packed negligently; but the carrier, who should be an expert in packing, is bound to know whether the packing is negligent or not, which the owner cannot be expected

N. S. 156. See Blower *v.* Great West. R. Co. Law Rep. 7 C. P. 655; Kendall *v.* S. W. Ry. Co. Law Rep. 7 Exch. 373; Rooth *v.* N. E. R. R. Law Rep. 2 Exch. 173; Kendall *v.* R. R. L. R. 7 Exch. 373. In Nugent *v.* Smith, L. R. 1 C. P. D. 423, it was held that a carrier by sea was not liable for the loss of a mare, which was caused partly by excessive bad weather and partly by the struggling of the mare, without any negligence on part of the defendants. See citation supra, § 553; infra, § 619.

[1] Infra, § 621.

[2] Infra, § 615.

[3] See cases cited in 2 Redfield on R. R. § 186; Brass *v.* Maitland, 6 E. & B. 470; Ohio & M. R. R. *v.* Dunbar, 20 Ill. 623; Rixford *v.* Smith, 52 N. H. 355; Culbreth *v.* Phil., W. & B. R. R. 3 Houston, 392; Whalley *v.* Wray, 3 Esp. 74; Brind *v.* Dale, 8 C. & P. 207; Brown *v.* Clayton, 12 Ga. 566.

[4] Pemberton Co. *v.* R. R. 104 Mass. 144. Where packages or casks are injured by the fault of the carrier, it is the duty of the carrier to repair them, if possible, before the owner can be compelled to receive them; and if he refuse to do this, the owner may refuse to receive the goods, and may recover the value, and this without offering to pay the freights, since the carrier has not completed his undertaking. Breed *v.* Mitchell, 48 Ga. 533.

[5] Hudson *v.* Baxendale, 2 H. & N. 575; Phillips *v.* Clark, 5 C. B. N. S. 882; Briggs *v.* Taylor, 28 Vt. 180.

to know accurately; and hence, if from negligence which the carrier knows and accepts, the cattle are injured, the carrier is liable.[1] When the loss is attributable to any mismanagement of the owner, the carrier is of course relieved.[2]

§ 567. Whoever sends perishable articles by a carrier does so subject to the vicissitudes to which they may be exposed. Hence the owner of such articles cannot recover from the carrier for decay with which the carrier's negligence had nothing to do, even though such decay was precipitated by delay of a voyage caused by stress of weather.[3] *A fortiori* is this the case when the articles were in bad condition at the beginning of the carrying.[4]

Decay of perishable articles.

§ 568. It is possible for a consignor so to pack his wares that there shall be no leakage or breakage; and hence, perhaps, comes the ordinary proviso in bills of lading, that for leakage and breakage the carrier shall not be responsible. But this does not relieve the carrier from due diligence in stowage, which he owes under all circumstances, no matter how imperfectly the thing carried may be packed.[5]

Leakage and breakage.

VI. DUTY OF CARRIER AFTER ARRIVAL OF GOODS, AND HEREIN OF WAREHOUSEMEN.

§ 569. Carriage, whether by land or by water, has its risks peculiar to itself. The ordinary carrier by water has to provide a seaworthy vessel and competent crew and officers, so as to protect the goods from the ordinary dangers of the seas. The steam carrier by land or water is bound to extraordinary skill and vigilance, such as are imposed on no other bailee, in order that the extraordinary risks of steam transportations may be properly met. On the one hand, the carrier by land or by water is in little danger of fire communicated from outside by the negligence of strangers. On

Risks of warehousing distinct from those of carriage.

[1] Ritz *v.* R. R. 3 Phila. Rep. 82; Powell *v.* R. R. 32 Penn. St. 414. Infra, §§ 617–20.

[2] Betts *v.* Trust Co. 21 Wis. 81; Miltimore *v.* R. R. 37 Wis. 190; Sloan *v.* R. R. 58 Mo. 220.

[3] Story on Bailments, § 492 *a*; Brig Collenberg, 1 Black, 170; Nelson *v.* Woodruff, 1 Black, 156; Clark *v.* Barnwell, 12 How. U. S. 272; Powell *v.* Mills, 37 Miss. 691.

[4] Ship Howard *v.* Wissman, 18 How. U. S. 231.

[5] Phillips *v.* Clark, 5 C. B. N. S. 882; Nelson *v.* Woodruff, 1 Black, 156.

the other hand, this is one of the chief dangers to which the warehouseman is exposed. Warehouses are necessarily in places where other buildings, often of a class which readily take fire, are numerous; and from which fire could be readily caught without any fault of the warehouseman. It is true that from fire the warehouseman can protect himself to a certain extent by precautions he is bound to adopt in proportion to the importance and value of the goods of which he takes charge. His building should be in this proportion strong and fire-proof;[1] and, in order to defend the property committed to him from depredations, it should be adequately guarded.[2] It is also necessary that he should have a supply of servants adequate to the prompt delivery of goods.[3] But in order that the warehouse should be accessible, it is necessarily exposed to risks of fire by contagion which cars when on transit, or ships when at sea, do not ordinarily encounter. And a necessary risk, such as is incident to the nature of the service, a bailor cannot throw upon a bailee, unless the latter undertakes to carry it by a special contract in the nature of insurance.

Such liabilities should not be confused.

§ 570. No sound reason exists for extending the specific liability of common carriers (*e. g.* liability for fire caused by the negligence of strangers) after the carriage has ceased, and the goods have arrived at their destination.

[1] If by the negligence of a warehouseman the goods are injured while in his possession, he will be responsible therefor, notwithstanding the goods are subsequently wholly lost or destroyed while in his possession, without his fault, as, by a flood or fire, or other inevitable accident. Powers *v.* Mitchell, 3 Hill (N. Y.), 545.

[2] It is the duty of the carrier to use reasonable care in storing and securing the goods. Notara *v.* Henderson, L. R. 7 Q. B. 225; 39 L. T. 167; Gaudet *v.* Brown, L. R. 5 P. C. 134; Great N. R. R. *v.* Swaffield, L. R. 9 Exch. 132. Infra, § 609.

[3] So if, by the negligence of the servant of the warehouseman, the goods are not delivered when called for by the consignee, and the goods be destroyed by an accidental fire, the warehouseman is responsible. Stevens *v.* R. R. 1 Gray, 277. On the other hand, warehousemen are not responsible for the neglect of their servants to rescue goods from destruction by an accidental burning of the warehouse in the night-time, at which such servants are casually and voluntarily present, and not then in the employment of the defendants. Such persons are not then servants, in the meaning of the law, but only individuals, neighbors, citizens. Aldrich *v.* R. R. 100 Mass. 31 (1868). See Henshaw *v.* Rowland 54 N. Y. 242; Great N. R. R. *v.* Swaffield, L. R. 9 Exch. 132. Infra, § 649.

The insurance feature, which the English common law, in this respect differing from all other juridical systems, has grafted on the contract of common carriage of goods, is, it must be recollected, not only exceptional, but so onerous that the courts have permitted it to be discharged by agreements, now almost universal, between the consignor and the carrier. As to passengers, this extreme liability has never been maintained; and though as to goods there may be reasons for its retention when the parties do not agree to the contrary, yet these reasons belong exclusively to the transit condition of goods. Then, indeed, loss from fire is hardly supposable, except through a relaxation of that vigilance on the carrier's part which should increase in intensity in proportion to the perils of the service. But at depots and in warehouses fire is readily communicated, in spite of every precaution from the warehouseman, from buildings from which, from the nature of the case, the depot or warehouse cannot be detached; and to throw upon the warehouseman the burden of such risks would be to throw an unnecessary burden on transportation itself, and require the exaction of insurance prices. Then, again, by the usages of business, fire insurance is a distinct branch of industry, which persons having goods in buildings exposed to fire are expected to resort to, failing to do which, they may be supposed to take the risk on themselves. Then, once more, it is important for the general interests of transportation that goods, when they reach their place of destination, should be promptly called for; that the consignor should notify the consignee, and the consignee should at once take measures for their delivery to himself, so that transportation should not be clogged by the accumulation of goods at termini. And finally, because there is so great a difference between the duty of the carrier and that of the warehouseman, it is expedient that the line should be strictly drawn on the merits, and that goods on transit should be placed under the protection of the first class of duty, while those which have reached their terminus should be placed under the protection of the second class of duty.[1]

§ 571. It has been undoubtedly held by high authority, that when the consignee, in the exercise of the diligence of a good

[1] See supra, § 478; infra, § 609.

business man, has not had reasonable opportunity of removing the goods, the liability of the carrier as such, as the insurer of the goods, does not merge in the liability of the warehouseman.[1] But supposing it to be the duty of the consignee, as is declared by Judge Hubbard in a leading Massachusetts case, to call for the goods "on their arrival at the places of destination;[2] the arrival at the place of destination, when followed by unlading and warehousing, shifts the burden of mere *casus* from the carrier to the consignee. In other words, according to the doctrine thus held, the carrier's lia-

Time when liability of carrier passes into that of warehouseman.

[1] Blumenthal *v.* Brainard, 38 Vt. 483; Winslow *v.* R. R. 42 Vt. 700; Moses *v.* R. R. 32 N. H. 523; Jewell *v.* R. R. 55 N. H. 84; Graves *v.* R. R. 38 Conn. 143; Fenner *v.* R. R. 44 N. Y. 502; Zinn *v.* R. R. 49 N. Y. 442; Sherman *v.* R. R. 64 N. Y. 254; McMillan *v.* R. R. 16 Mich. 79; Buckley *v.* R. R. 18 Mich. 121; Wood *v.* Crocker, 18 Wis. 348; Parker *v.* R. R. 30 Wis. 689; Derosia *v.* R. R. 18 Minn. 133; Pinney *v.* R. R. 19 Minn. 253; Leavenworth R. R. *v.* Maris, 16 Kans. 331; Jeffersonville R. R. *v.* Cleveland, 2 Bush, 418; Rome, &c. R. R. *v.* Sullivan, 14 Ga. 277; Ala. &c. R. R. *v.* Kidd, 35 Ala. 269; Mobile, &c. R. R. *v.* Prewitt, 46 Ala. 63; Maignan *v.* R. R. 24 La. An. 333. See, to same effect, Angell on Carriers (5th ed.), §§ 280, 303 *et seq.*

In Mitchell *v.* R. R. L. R. 10 Q. B. 256, Blackburn, J., argued that while there were several cases where the question has been discussed whether the liability of the carrier, after the arrival of the goods, and before delivery to the consignee, remains that of a carrier, or is changed into that of a warehouseman, the question was fully considered in the cases of Bourne *v.* Gatliffe, 4 Bing. N. C. 314; Exch. Ch. 3 M. & G. 643; in H. L. 11 Cl. & F. 45; and Cairns *v.* Robins, 8 M. & W. 258; where is was decided that, until the lapse of a reasonable time for the removal of the goods, the liability as of a carrier still continues. There is no case, he held, in support of the proposition, that, because the consignor is in fault, by delaying to remove the goods, therefore the carrier or bailee held the goods at the risk of the owner only. It may be laid down generally, so it was argued, that he holds them as bailee, and as such is responsible to the owner of the goods, whoever he may be, and he is bound, therefore, to take ordinary care of them.

In New York it has been held, by the commissioners of appeals, that, if the consignee lives at or in the immediate vicinity of the place of delivery, the carrier must notify him of the arrival of the goods; but if the consignee is absent, unknown, or cannot be found, the carrier may place the goods in its warehouse, and, after keeping them a reasonable time, if the consignee does not call for them, its liability as a common carrier ceases. If, after the arrival of the goods, the consignee has a reasonable opportunity to remove them, and does not do it, he cannot hold the carrier as an insurer. Fenner *v.* R. R. 44 N. Y. 505; Pelton *v.* R. R. 54 N. Y. 214.

[2] Thomas *v.* R. R. 10 Met. 472.

bility, as such, terminates when the goods are unloaded at their place of destination, and are ready for removal by the consignee.[1] But even on this view, the carrier cannot, by his own misconduct in misleading the consignee, relieve himself from his special liability in this respect.[2]

In any view, notice to consignee or owner of the arrival of the goods is sufficient to reduce the carrier's duties to those of the warehouseman.[3] And the question of "reasonable time" in which the consignee must call is largely determined by custom.[4]

When common carrier becomes forwarder.

§ 572. Where a common carrier takes goods to forward and deliver, if within his route, if not, to deliver to a connecting line or a stage at the most convenient point, his liability as a common carrier ceases when the goods arrive at such convenient point of intersection. The common carrier then becomes a forwarder, and he ceases to be an insurer of the safety of the goods forwarded.[5]

Diligence required of warehouseman.

§ 573. The diligence required of a warehouseman is that which good and capable warehousemen are accustomed to show under similar circumstances. The utmost kind of diligence which the law requires or ought to require, aside from cases of special contract or confidence, in cases of bailment of the class immediately before us, is that which good

[1] As adopting this view, see Norway Co. *v.* R. R. 1 Gray, 263; Sessions *v.* R. R. 16 Gray, 132; Rice *v.* R. R. 98 Mass. 112; Stowe *v.* R. R. 113 Mass. 521; Rice *v.* Hart, 118 Mass. 221; Culbreth *v.* R. R. 3 Houston, 392; West. R. R. *v.* Camp, 53 Ga. 596: Porter *v.* R. R. 20 Ill. 407; Chic. &c. R. R. *v.* Scott, 42 Ill. 133; New Alb. &c. R. R. *v.* Campbell, 12 Ind. 55; Bansemar *v.* R. R. 25 Ind. 434; Francis *v.* R. R. 25 Iowa, 60; Mohr *v.* R. R. 40 Iowa, 579; Hilliard *v.* R. R. 6 Jones (N. C.), 343; Neal *v.* R. R. 8 Jones, 482; Jackson *v.* R. R. 23 Cal. 268. See Morris, &c. R. R. *v.* Ayres, 5 Dutch. 394; Hand *v.* Baynes, 4 Whart. 204; McCarty *v.* R. R. 30 Penn. St. 247; Angell on Carriers (5th ed.), § 303.

[2] The Peytona, 2 Curtis C. C. 21; Stevens *v.* R. R. 1 Gray, 277; Wood *v.* Crocker, 18 Wis. 345.

[3] Mitchell *v.* R. R. L. R. 10 Q. B. 256; Roth *v.* R. R. 34 N. Y. 548, Goodwin *v.* R. R. 50 N. Y. 154; Mich. Cent. R. R. *v.* Ward, 2 Mich. 538 (by statute); Louisville, &c. R. R. *v.* Mahan, 8 Bush, 184.

[4] Cork Distillers' Co. *v.* R. R. L. R. 7 H. L. 269; Kimball *v.* R. R. 6 Gray, 542; Nichols *v.* Smith, 115 Mass. 332; Hurd *v.* St. Co. 40 Conn. 48; Russell Man. Co. *v.* St. Co. 50 N. Y. 121; Graff *v.* Bloomer, 9 Penn. St. 114; Pittsburg, &c. R. R. *v.* Nash, 43 Ind. 423.

[5] Pratt *v.* R. R. Sup. Ct. U. S. 1877; Plantation No. 4 *v.* Hall, 61 Me. 517; Snider *v.* Ex. Co. 63 Mo. 376. See infra, § 703.

business men, experienced and faithful in the particular department, are accustomed to exercise when in discharge of their duties.[1] Applying this test to the warehouseman, his duty is plain. He must erect a building strong, fire-proof, and watched, in proportion to the risks he is subject to and the value of the goods with which he is likely to be intrusted, having of course in view the position in which his building is to stand, and his capacity of thus burdening himself without incurring unjustifiable expense.[2] To require more of him than this would be to oppose an unnecessary obstacle to the easy transport of goods. For him to apply a less degree of diligence will render him liable for any losses which his laches in this respect may produce.[3]

If goods placed with him are injured by his negligence, he is liable for the loss; nor is it any defence that after the depreciation occurred, the goods were destroyed by *casus* for which he was not responsible.[4]

Railroad warehouseman bound without specific pay.

§ 574. This diligence is required from the railroad warehouseman, even though he receive no specific separate pay for it, as long as there is a known owner of the goods who can be held liable for the expenses of storage, or until it appears that such owner, on being notified of the arrival of the goods, refuses to take them. As to the first point, since a depot and a warehouse of some kind are essential to railroad business, the temporary storing of goods, until the consignee can call for them, is a necessary part of railroad transport, which, when this transport is paid for, as a whole, cannot be said to be gratuitous.[5] For, as has been well argued in Alabama,[6] though no charges for storage are demanded by the company, the accommodation is one that has a strong tendency to

[1] See supra, § 57.

[2] See Garside *v.* Trent & Mersey Nav. Co. 4 T. R. 581; Smith *v.* R. R. 7 Foster, 86; Farm. & Mech. Bank *v.* Champ. Transp. Co. 23 Vt. 211; Ostrander *v.* Brown, 15 Johns. 39; Eagle *v.* White, 6 Whart. 505; Hemphill *v.* Chenie, 6 W. & S. 62; Norway Plains Co. *v.* R. R. 1 Gray, 263; Nichols *v.* Smith, 115 Mass. 332; Brown *v.* R. R. 54 N. H. 535; Moulton *v.* R. R. 10 R. I. 218; New Alb. &c. R. R. *v.* Campbell, 12 Ind. 55; Pike *v.* R. R. 40 Wis. 583; Ala. & Tenn. R. R. *v.* Kidd, 35 Ala. 209; McCombs *v.* R. R. 67 N. C. 193; Southern Ex. Co. *v.* McVeigh, 20 Gratt. 264; Kremer *v.* Smith, 6 Cold. (Tenn.) 356. Supra, § 478.

[3] Infra, § 728.

[4] Powers *v.* Mitchell, 3 Hill (N. Y.), 545.

[5] See supra, § 478.

[6] Mobile, &c. R. R. Co. *v.* Prewitt, 46 Ala. 68.

bring business to the company, because goods transported by them thus find a safe deposit until they can be removed by the owner. Hence, when such companies assume to act as warehousemen for their customers, they must be regarded as warehousemen for hire, and bound to use the diligence of good warehousemen in keeping the goods deposited in their warehouses.[1]

Should the goods be detained without fault of the carrier, beyond the period in which a good business man (for such the consignee is bound to be) would call for them, then, as the carrier can recover from the owner the expenses of warehousing and safe keeping,[2] the bailment continues to be one in which the diligence of a good warehouseman, as above expressed, is required.[3]

But when the goods are apparently abandoned by the owner, it stands to reason that the warehouseman cannot be expected to apply such high degree of diligence. He cannot be expected to choke his warehouse with such goods; it will be enough if he places them in other and less expensive places of storage.[4]

§ 575. It should be kept in mind that the distinction which has been just stated does not apply when the carrier undertakes to transport the goods consigned to a point *beyond* his route. In such case he is bound as carrier, though the goods, at the time of the injury, were in his warehouse, from which it was his duty to transfer

Liability of common carrier continues as to goods he engages to forward.

[1] See Story on Bailments, §§ 3, 10; Lane *v.* R. R. 112 Mass. 455.

[2] Great N. R. R. *v.* Swaffield, L. R. 9 Exch. 132

[3] Illinois Cent. R. R. *v.* Alexander, 20 Ill. 23; Mobile, &c. R. R. *v.* Prewitt, 46 Ala. 63. Supra, §§ 478, 571. Warehousemen are not responsible for neglect of their servants to rescue goods in the warehouse from being consumed in an accidental fire at night, at which such servants are present, though not in the course of their employment. Aldrich *v.* R. R. 100 Mass. 31.

[4] See Smith *v.* R. R. 7 Foster, 86; Heugh *v.* R. R. L. R. 5 Exch. 51; Mobile, &c. R. R. *v.* Prewitt, 46 Ala. 63. It has been ruled in Massachusetts, that when carriers have agreed with the consignee of goods to store them for him for a certain time, they have a right, if he does not come for them within that time, to deliver them to a responsible independent warehouseman, and thus discharge their own liability; after such delivery, should an action be brought by the consignee against them for the warehouseman's negligence, the jury may be justified in finding that the warehouseman was his agent and not theirs, although they gave him an order on the warehouseman for the goods, and although the warehouseman paid the freight to them. Bickford *v.* Metropolitan Steamship Co. 109 Mass. 151.

them to a connecting road.[1] When the goods are delivered to a disconnected and subsequent carrier, then liability of any kind ceases.[2] And it is a sufficient delivery to a subsequent carrier if they are deposited in a place designated by such carrier.[3]

Burden of proof.

§ 576. Some conflict of opinion exists as to whether, in a suit against a warehouseman for damages, the burden is on the plaintiff to prove negligence.[4] But even if we follow the authorities requiring such proof from the plaintiff, yet a very slight presumption will throw the burden of exculpation on the defendant.[5] The negligence of the warehouseman must be the *cause* of the injury.[6]

VII. AUXILIARY AND CONNECTING LINES.

§ 577. How far and to what extent one line of transportation is to be viewed as auxiliary to another, and what relations between two lines make them partners, depend upon considerations which it is out of the range of the present volume to discuss. It will at once be seen that in each case the question involves not

[1] Infra, § 577 *et seq.;* Nashua *v.* R. R. 48 N. H. 339; Barter *v.* Wheeler, 49 N. H. 9; McDonald *v.* R. R. 34 N. Y. 397; Goold *v.* Chapin, 20 N. Y. 259; Fenner *v.* R. R. 44 N. Y. 508; Van Santwoord *v.* St. John, 6 Hill, 167; Hooper *v.* R. R. 27 Wis. 81; Conkey *v.* R. R. 31 Wis. 619; Wood *v.* R. R. 32 Wis. 398; Irish *v.* R. R. 19 Minn. 376. See Morris & Essex R. R. *v.* Ayres, 29 N. J. L. R. (5 Dutch.) 393; Brintnall *v.* R. R. 32 Vt. 665; Blumenthal *v.* Brainerd, 38 Vt. 413; Moses *v.* R. R. 32 N. H. 523; McMillan *v.* R. R. 16 Mich. 100; Parker *v.* M. & S. R. R. 30 Wis. 689; Condict *v.* R. R. 50 N. Y. 500.

[2] See infra, §§ 577–582; Converse *v.* N. & N. Trans. Co. 33 Conn. 166.

In Railroad Co. *v.* Manuf'g Co. 16 Wall. 318, it was ruled that when goods are delivered to a common carrier to be transported over his railroad to his depot in a place named, and there to be delivered to a second line of conveyance for transportation further on, the common law liability of common carriers remains on the first carrier until he has delivered the goods for transportation to the next one. To the same effect is Muschamp *v.* R. R. 8 M. & W. 421.

[3] Pratt *v.* R. R. Sup. Ct. U. S. 1877, 16 Alb. L. J. 331; Merriam *v.* R. R. 20 Conn. 354.

[4] Garside *v.* Proprietors, 4 T. R. 581; Lamb *v.* R. R. 7 Allen, 98; Cass *v.* R. R. 14 Allen, 448. See supra, §§ 422, 477.

[5] Boies *v.* R. R. 37 Conn. 272; Lechtenhein *v.* R. R. 11 Cush. 70; Brown *v.* Waterman, 10 Cush. 117. Supra, §§ 422, 477.

[6] Roberts *v.* Gurney, 120 Mass. 33.

In a suit against a forwarder for negligence, the burden of proof is on the plaintiff to establish the same. Plantation No. 4 *v.* Hall, 61 Me. 517.

merely the special contract between the lines in question, but the nature of the notice received by the owner; and therefore not only must each case be determined by the law to be drawn from a special and complicated collocation of facts, but the law to be so invoked must be remanded to the department of contracts, and not to that of torts. For our present purposes, the statement of a few leading principles must suffice.[1]

Company liable for negligence of its agents or partners.

§ 578. Whenever the relation of partnership or agency between auxiliary lines is exhibited to a consignor or passenger, then the receiving road is liable for negligence of the auxiliary roads within the scope of the contract. The application of this rule, which relates to the carriers of passengers as well as of goods, to the practice of modern transportation is obvious; and that it should be so applied is as much for the benefit of the line originally undertaking a contract for carriage, as it is for the consignor or owner of goods. Two competing lines of road, for instance, strike out westward from one of our eastern cities. One road says: "I have my agents who, when the goods reach my terminus, will take them up and transport them to St. Louis." Another simply says: "I will carry these goods to my chartered limits, and there you must find an agent who will represent you directly and carry your goods to St. Louis on a new and independent contract of carriage." So inconvenient is the latter course, that the road which is cut off from connecting agencies acting for its interest finds its consignments limited to points on its own road, while the road that has the largest and most ramified connections absorbs the most extra-terminus freight. But this benefit carries with it its liabilities. *Jure naturae aequum est, neminem cum detrimento alterius et injuria fieri locupletiorem.* If business is obtained by holding out to the public that certain connecting carriers are partners or agents, then the carrier holding this forth is bound, to those committing goods to him on this representation, for losses occurring to such parties through the negligence of such connecting carriers. Thus, to take this relation in one of its most rudimentary shapes, the railroad company that employs porters to carry passengers' baggage to their cabs, and holds itself out, though only by usage, as employing these porters for

[1] See, on this topic, Angell on Carriers, 5th ed. § 531 *et seq.*

this purpose, is liable for the negligence of such porters.[1] But what the porter does, in delivering a trunk from a baggage car to a cab, is on principle the same as is done by a connecting road in carrying freight or luggage from the terminus of the contracting road to its final destination; the difference between the two cases being not in the law applicable to the relation of agency, but to the degree of proof by which this agency is made out. In the porter's case, the proof may be slight, consisting generally of local usage, and rarely of any public offer by the principal carrier. But in cases of connecting roads, this proof consists not merely of usage, but of specific contracts to forward over auxiliary lines, and often, in addition to these, of notices to this effect, conspicuously posted, on which the confidence of the business community is reposed. Hence it has been justly held, that where this relationship is either publicly proclaimed, or is specially set forth by the receiving carrier undertaking to forward goods to a distant terminus through auxiliary carriers, and where an auxiliary carrier takes the goods from the receiving carrier and injures them through negligence, then the receiving carrier is liable for such negligence.[2]

Auxiliary carrier may be liable for negligence.

§ 579. The auxiliary carrier may make himself primarily responsible to the owner for his negligence. It is true that the receiving carrier, when the contract has been executed exclusively with him, is so far solely liable

[1] Butcher *v.* R. R. 16 C. B. 13; Richards *v.* R. R. 7 C. B. 839. See infra, § 612.

[2] Infra, § 604; Muschamp *v.* R. R. 8 M. & W. 421; Crouch *v.* R. R. 14 C. B. 255; *S. C.* 2 H. & N. 491; Scothorn *v.* R. R. 8 Exch. 341; Wilby *v.* R. R. 2 H. & N. 703; Bank of Ky. *v.* Adams Ex. Co. 93 U. S. (3 Otto) 174; Lock Co. *v.* R. R. 48 N. H. 339; Barter *v.* Wheeler, 49 N. H. 9; Noyes *v.* R. R. 27 Vt. 110; Cutts *v.* Brainard, 42 Vt. 566; Weed *v.* R. R. 19 Wend. 534; Wilcox *v.* Parmelee, 3 Sandf. 610; Ackley *v.* Kellogg, 8 Cowen, 223; Mer. Mut. Ins. Co. *v.* Chase, 1 E. D. Smith, 115; Wibert *v.* R. R. 12 N. Y. 245; Foy *v.* R. R. 24 Barb. 382; Maghee *v.* R. R. 45 N. Y. 514; Cary *v.* R. R. 29 Barb. 35; King *v.* R. R. 62 Barb. 160; Root *v.* R. R. 45 N. Y. 525; Burnell *v.* C. R. R. 45 N. Y. 184; Quimby *v.* Vanderbilt, 17 N. Y. 306; Penn. R. R. *v.* Berry, 68 Penn. St. 272; Balt. & Ohio R. R. *v.* Green, 25 Md. 72; C., H. & D. R. R. *v.* Pontius, 19 Ohio St. 221; Ill. Cent. R. R. *v.* Copeland, 24 Ill. 332; Ill. Cent. R. R. *v.* Johnson, 34 Ill. 389; Peet *v.* Chicago & N. W. R. R. 19 Wis. 118; Angle *v.* R. R. 9 Iowa, 487; Cin. H. & D. R. R. *v.* Spratt, 2 Duvall, 4; Kyle *v.* Laurens, 10 Richards. 382; Bennett *v.* Filyaw, 1 Flor. 403. See West. R. R. *v.* McElwee, 6 Heisk. 208; Louisville, &c. R. R. *v.* Campbell, 7 Heisk. 253.

that the owner, in respect to the remedy on the contract, can have recourse to him alone.[1] But the analogy of the law in other cases leads us to conclude that although there is no privity of contract between the auxiliary carrier and the owner of the goods, yet, when the auxiliary carrier undertakes the duty of transporting the goods or passengers, having authorized the receiving carrier to act as his agent, though on an engagement by which he is to receive his pay from the receiving carrier, then he is liable to owners or passengers for negligence in discharge of the duty thus assumed by him as common carrier.[2] He is not, however, liable for injury to goods which cannot be traced to him.[3]

Combination of carriers may be sued jointly.

§ 580. When several carriers agree on a general system of connecting common carriage, each line being authorized to act as the agent of the others, and they so hold themselves forth, they may be sued jointly for the negligence, or the carrier by whom the negligence is committted may be sued, according to the law just stated, singly for negligence.[4]

Question as to applicatory law.

§ 580 *a*. When such combination of carriers extends its operation through several states, it has been ruled that the law of the state where the negligence was

[1] Mytton *v.* R. R. Co. 4 H. & N. 615; Bristol, &c. R. R. *v.* Collins, 7 H. L. Cas. 794; Coxon *v.* R. R. 5 H. & N. 274.

The same position is assumed by several American courts. Ill. Cent. R. R. *v.* Frankenberg, 54 Ill. 88; Toledo, &c. R. R. *v.* Merriman, 52 Ill. 123; Cin. &c. R. R. *v.* Pontius, 19 Ohio St. N. S. 22; Coates *v.* U. S. Exp. Co. 45 Mo. 238; Southern Exp. Co. *v.* Shea, 38 Ga. 519. See § 535.

[2] See Marshall *v.* York, N. & B. R. R. 11 C. B. 655; Pozzi *v.* Shipton, 8 A. & E. 963; Martin *v.* R. R. L. R. 3 Exch. 9; Barter *v.* Wheeler, 49 N. H. 9; Gass *v.* R. R. 99 Mass. 220; Burroughs *v.* R. R. 100 Mass. 26; Burtis *v.* R. R. 24 N. Y. 269; 55 N. Y. 636; Root *v.* R. R. 45 N. Y. 530; Campbell *v.* Perkins, 8 N. Y. 430; Hart *v.* R. R. 8 N. Y. 37; Kessler *v.* R. R. 7 Lansing, 62; North Trans. Co. *v.* McClary, 66 Ill. 233; Knight *v.* R. R. 56 Me. 234, where it is ruled that a through ticket over three several distinct lines of passenger transportation, issued in the form of three tickets on one piece of paper, and recognized by the proprietors of each line, is to be regarded as a distinct ticket for each line. It was further held that the rights of a passenger purchasing such a ticket, and the liabilities of the proprietors of the several lines recognizing its validity, are the same as if the purchase had been made at the ticket office of the respective lines. See supra, § 535.

As to baggage, see infra, § 603.

[3] Kessler *v.* R. R. 7 Lansing, 62.

[4] Barter *v.* Wheeler, 49 N. H. 9. See Darling *v.* R. R. 11 Allen, 295; Gass *v.* R. R. 99 Mass. 220; Burroughs *v.* R. R. 100 Mass. 26; Pratt *v.* R. R. 102 Mass. 557. Supra, § 535.

committed is to prevail.[1] On the other hand, where a railroad located in Wisconsin received goods marked for a certain point, and delivered them to a connecting line within the state, to be carried to the point for which they were marked, and they were lost; and it appeared that there was no statute that affected the case, and that there was no liability under the common law of Wisconsin; we have a decision to the effect that the suit was to be governed by the law as it obtained in Wisconsin, notwithstanding that it was commenced in Illinois, where a different doctrine prevailed.[2] And we have rulings that generally the question of liability of the receiving road is determined by the law of the place of contract.[3]

Receiving carrier undertaking only for himself liable only for his own negligence.

§ 581. Where the receiving carrier does not hold out carriers who subsequently undertake the carriage as his agents, and when there is no contract between him and such subsequent carriers by which they undertake to transport the goods for him as his agents, then, unless he bind himself for the through delivery, he is liable only for his own route, and, when the contract requires, for safe delivery to the subsequent carrier.[4] In the latter case, however, the burden is on the receiving carrier to show that he delivered the goods to the auxiliary carrier.[5]

How far sale of through ticket or receipt of

§ 582. Whether such proof, so as to impose liability on the receiving carrier for the negligence of the auxiliary carrier, is supplied by a mere sale of a through ticket or receipt of through fare or freight by the principal car-

[1] Barter *v.* Wheeler, 49 N. Y. 9; Whart. Con. of L. § 479.

[2] Milwaukee, &c. R. R. *v.* Smith, S. C. Ill. Chicago Leg. News, Feb. 20, 1875.

[3] Hall *v.* N. J. St. Nav. Co. 15 Conn. 539; Penn. R. R. *v.* Fairchild, Sup. Ct. Ill. 7 Chic. Leg. News, 164. See Cohen *v.* R. R. L. R. 2 Exch. D. (C. A.) 253.

[4] Garside *v.* Trent & Mersey Nav. Co. 4 T. R. 581; R. R. *v.* Man. Co. 16 Wall. 318; Brintnall *v.* R. R. 32 Vt. 635; Nutting *v.* R. R. 1 Gray, 502; Burroughs *v.* R. R. 100 Mass. 26; Converse *v.* Trans. Co. 33 Conn. 166; Hood *v.* R. R. 22 Conn. 1; Van Santwoord *v.* St. John, 6 Hill (N. Y.), 158; Penn. R. R. *v.* Schwarzenberger, 45 Penn. St. 208; Reed *v.* R. R. 60 Mo. 199; Snider *v.* R. R. 63 Mo. 376; U. S. Ex. Co. *v.* Rush, 24 Ind. 403; Chic. &c. R. R. *v.* Mountford, 60 Ill. 175; Detroit R. R. *v.* Bank, 20 Wis. 122; Schneider *v.* Evans, 25 Wis. 241; West. R. R. *v.* McIlwee, 6 Heisk. 208; Louisville R. R. *v.* Campbell, 7 Heisk. 253.

[5] Kent *v.* R. R. L. R. 10 Q. B. 1. Infra, § 612.

through fare imposes such liability.

rier, has been much doubted. In England, and in several of the United States, the affirmative has been held; it being determined that where a company receipts for transport to a point on another road, this makes the receiving company (there being no custom or contract to the contrary) liable for injuries on the auxiliary roads, though such injuries were in no sense induced by the misconduct of its own servants, but were imputable solely to the misconduct of the servants of the auxiliary road.[1]

In several states, however, it has been ruled that the bare receipting of goods or issuing of tickets to an extra-terminus point, and receiving the full freight to such point, does not bind the receiving carrier beyond his own line.[2] In such case, to bind the receiving carrier, an agreement to deliver to the ultimate destination must be proved.[3]

[1] Bristol, &c. R. R. *v.* Collins, 7 H. L. C. 794; Webber *v.* R. R. 3 H. & C. 771; Muschamp *v.* R. R. 8 M. & W. 421; Coxon *v.* R. R. 3 H. & N. 274; Blake *v.* R. R. 7 H. & N. 987; Thomas *v.* R. R. L. R. 6 Q. B. 266; John *v.* Bacon, L. R. 5 C. P. 437; Bk. of Ky. *v.* Adams Ex. 93 U. S. (3 Otto) 174; Ill. Cent. R. R. *v.* Copeland, 24 Ill. 332; Angle *v.* R. R. 9 Iowa, 487; East Tenn. &c. R. R. *v.* Nelson, 1 Cold. 276; East Tenn. &c. R. R. *v.* Rogers, 6 Heisk. 143.

[2] Farmers' &c. Bk. *v.* Trans. Co. 23 Vt. 186; Sprague *v.* Smith, 29 Vt. 421; Brintnall *v.* R. R. 32 Vt. 665; Gass *v.* R. R. 99 Mass. 220; Burroughs *v.* R. R. 100 Mass. 26; Hood *v.* R. R. 22 Conn. 502; Naugatuck R. R. *v.* Waterbury, 24 Conn. 468; Root *v.* R. R. 45 N. Y. 524; Penn. R. R. *v.* Schwarzenberger, 45 Penn. St. 208. See, as to baggage, Stimson *v.* R. R. 98 Mass. 82; McMillan *v.* R. R. 16 Mich. 120; Penn *v.* Sullivan, 25 Ga. 228. See Chic. &c. R. R. *v.* Montfords, 60 Ill. 173.

[3] Morse *v.* Brainerd, 41 Vt. 550; Burroughs *v.* R. R. 100 Mass. 5.

In New Hampshire it has been ably argued that such liability is not imposed on the primary road as a matter of law, but that whether the receiving road has, under the circumstances of the case, undertaken the duty of carrying passengers or goods to the ultimate destination, is a question which, if there be no written contract, is to be determined by the usage of the parties, and the special facts of the particular case. Gray *v.* Jackson, 51 N. H. 9; and see, to same effect, Hempstead *v.* R. R. 28 Barb. 485.

As a company is not liable for an accident caused on its own line by the sole negligence of another company which had running powers over it (Wright *v.* R. R. L. R. 8 Exch. 137. Infra, § 584), it has been consequently argued that the contracting company would be equally free from liability for an accident caused on another company's line by the negligence of a third company having running powers over that line. See Solicitors' Journal, June, 1876.

An express company, as we will

Selling a ticket by the receiving road, with the coupon tickets of other roads attached to it in such a way as to be easily separated, does not, on the face of it, make the receiving road liable for the negligences of any auxiliary roads, bound by such coupons.[1]

Carrier who undertakes through transport cannot by agreement relieve himself from liability for negligence of auxiliary roads.

§ 582 *a.* The weight of opinion in the United States is that a carrier, whether he be an express company or otherwise, who undertakes to forward goods to an extra-terminal point, cannot relieve himself by a contract with the consignor that he should be not liable for the negligence of other roads, from liability for such negligence.[2] At the same time, as we have seen, when there is no combination or association between the carriers, or public claim by a receiving carrier that connecting carriers are his agents, and when in receiving goods for an ultimate terminus he expressly notifies the parties contracting with him that he is not liable for anything outside of his own route, then this limitation, if brought home to the consignor, will be sustained.[3]

hereafter see, is liable for the negligence of railroad companies which it employs as agents in the transport of goods. Infra, § 698.

[1] Knight *v.* R. R. 58 Me. 234; Milner *v.* R. R. 53 N. Y. 363. See infra, § 604.

[2] Infra, § 698; Bk. of Kentucky *v.* Adams Ex. 93 U. S. (3 Otto) 174; Noyes *v.* R. R. 27 Vt. 110; Cincin. &c. R. R. *v.* Pontius, 19 Ohio St. 221; Wheeler *v.* R. R. 31 Cal. 46; Peet *v.* R. R. 19 Wis. 118; Kyle *v.* R. R. 10 Rich. Law (S. C.), 382.

For case of relief from loss by fire before goods reached primary road, see Evansville, &c. R, R. *v.* Androscoggin Mills, 22 Wall. 574.

[3] See cases cited supra, § 581. In Illinois we have the following: "Although the cases elsewhere are not harmonious, the rule adopted and uniformly adhered to in this state is, the acceptance of goods delivered for carriage, marked to a point beyond the terminus of the carriers' lines, will be construed *primâ facie* as a contract for through transportation. Notwithstanding the goods may be thus marked, the carrier, by express contract, may limit its obligation to carry safely over its own lines, or only to points reached by its own carriages, and for safe storage and delivery to the next carrier in the route beyond. A clause in the receipt given to the owner for the goods, restricting the carrier's obligations in this respect, if understandingly assented to by the shipper, will as effectually bind him as though he had signed it. That the contract between the shipper and the carrier is a matter of evidence: I. C. R. R. *v.* Copeland, 24 Ill. 332; Ill. Cent. R. R. *v.* Johnson, 34 Ill. 389; Ill. Cent. R. R. *v.* Frankenberg, 54 Ill. 88; People ex rel. *v.* Chic. & Alton R. R. 55 Ill. 95; C. & N. W. R. R. Co. *v.* People, 56 Ill. 365; C. & N. W. R. R. Co. *v.* Montfort, 60

An *express* company, it is settled, is liable for the negligence of the employees of the roads over which it runs.[1]

§ 583. An agreement by the owner with the receiving carrier, when the goods are carried by a succession of auxiliary carriers, and when they are undertaken for the ultimate terminus by the receiving carrier, that there should be no liability for fire or accident without negligence, has been held to pervade the whole transport of the goods though the accident occurs on one of the auxiliary roads.[2]

Valid agreement by receiving carrier for a connecting series of roads relieves all the roads.

Ill. 176; U. S. Express Co. *v.* Harris, 67 Ill. 137." Erie R. R. *v.* Wilcox, Sup. Ct. Ill. 1877.

[1] See infra, §§ 697–99.

[2] Collins *v.* Brist. & Ex. R. R. 5 H. & N. 969, reversing *S. C.* 1 H. & N. 517, in the exchequer chamber, and affirming *S. C.* 11 Exch. 790; *S. C.* under name of Bristol, &c. R. R. *v.* Collins, 7 H. L. C. 794; Maghee *v.* R. R. 45 N. Y. 514; Manhat. Oil Co. *v.* R. R. 54 N. Y. 197; Levy *v.* Exp. Co. 4 So. Car. 234.

In England this view is now finally accepted.

In Hall *v.* R. R. L. R. 10 Q. B. 437 (see summary in Solicitors' Journal, June, 1876), the plaintiff obtained from the North British Railway a free pass to travel with cattle on a journey which extended on to the defendants' line. The free pass exonerated the company issuing it from all risk. The plaintiff was injured on the defendants' line by their negligence, and the question was whether he could sue them. It was held that when he presented his pass to the defendants, and travelled under it, he so travelled upon the same terms with them as with the company which issued it. The plaintiff, such was the case, claimed to travel on the North Eastern line without paying any fare, and therefore on the same terms on which he travelled free on the North British line.

"When he engaged," says Blackburn, J., "to travel at his own risk, he *engaged with the North British Company* that he should be carried on to Newcastle exactly on the same terms as if the North British line extended to Newcastle. But what is wanted is an engagement with the *North Eastern*; if the words *mean* that (they do not express it), it is the doctrine of separate contracts." See, however, as to Pennsylvania, Cam. & A. R. R. *v.* Forsyth, 61 Penn. St. 81.

As hearing on the above point may be cited Hinckley *v.* R. R. 56 N. Y. 429, where it was held that the rule, that a common carrier in forwarding goods beyond the end of his route is bound to follow with fidelity the precise instructions of the consignor, or to suffer the risk of a deviation therefrom, applies in cases where, in the absence of express stipulations, the instructions become part of the contract.

It has been also held in Ohio, that a common carrier who undertakes to transport goods over the whole or any part of his own route, and then to forward them to a designated destination beyond, is bound to transmit, with their delivery to the carrier next *en route*, all special instructions received

§ 584. We have just seen that a receiving company is liable for the negligences of auxiliary roads whom it makes its agents.[1] The contract with the plaintiff is, "that he should be carried throughout the journey for which the ticket was issued with reasonable care."[2]

Company when liable for lessee's negligence.

It is true it has been recently held in England that a contracting line is not liable for the negligence of other lines over which it has no control, even though the injury sustained be to its own passengers on its own road, leased in part to the colliding line.[3] In this country, however, it has been held that a company which leases its road and franchises to another company is liable for an injury resulting from the negligent use of the track by the servants of the latter company.[4]

VIII. LIMITATION OF LIABILITY BY CONTRACT.

Carrier limiting his liability to a specific amount.

§ 585. Suppose a carrier (an expressman, for instance) executes, with his customer, an agreement that the former's liability, in case of damage, shall be limited to a specific amount. Is such an agreement valid in cases where both parties know that the figures are much below the true value of the goods? Does it relieve the carrier in cases of loss by negligence? Following the authorities to be presently noticed, we must hold that while such a contract is valid, so far as it operates to release the carrier from his obligations as an insurer, it cannot avail to protect him from the consequences of negligence, unless by statutory prescription.[5] But here a subordinate distinction is to be observed. If the

by him from the consignor; and in default thereof, in any material or substantive particular, to stand responsible for, and make good the loss to which such negligence shall have contributed. Little Miami R. R. Co. *v.* Washburn, 22 Ohio St. 324.

[1] See supra, § 582–3.

[2] Bovill, C. J., in John *v.* Bacon, Law Rep. 5 C. P. 441, 442; Thomas *v.* R. R. L. R. 6 Q. B. 266.

[3] Wright *v.* R. R. L. R. 8 Exch. 137.

[4] R. R. *v.* Barron, 5 Wall. 90, 104; Wyman *v.* R. R. 46 Me. 162; Nelson *v.* R. R. 26 Vt. 721; McElroy *v.* R. R. 4 Cush. 400; Chic. &c. R. R. *v.* Whipple, 22 Ill. 105; Toledo R. R. *v.* Humbold, 40 Ill. 143; Peoria R. R. *v.* Lane, 5 Cent. Law J. 462. See infra, § 901; Tracy *v.* R. R. 38 N. Y. 433.

[5] As to the last point, see Brown *v.* R. R. 4 Weekly Notes, 21; Willis *v.* R. R. 62 Me. 488; and see U. S. Express Co. *v.* Backman, 28 Ohio St. 144.

shipper of goods, of peculiarly high value, is silent as to their real value, when shipped subject to such a contract, this, even though there was no inquiry by the carrier and no artifice to deceive, is "such an imposition upon the carrier as relieves him from a liability for the total value of the goods, unless something more in his conduct is shown than negligence to carry safely and to deliver promptly."[1] At the same time, in cases where there is no such suppression of value, it may be held that a stipulation in a printed receipt, restricting the liability of the carrier to a specific sum, is inoperative, where the stipulation is unreasonably stringent, and where negligence is established;[2] though it is otherwise when the object is to protect the carrier against unreasonable and fanciful valuations, and when it establishes a just and reasonable standard.[3] Of course, "wherever the owner of a package represents the contents of it to the carrier to be of a particular value" (the carrier not knowing otherwise), "he will not be permitted, in case of a loss, to recover from the carrier, at the most, any amount beyond that value."[4]

Limitation as to time of liability.

§ 585 *a*. An agreement by an express company, that the company will not be liable for packages delivered to it unless the claim is made ninety days after the delivery of the package to the company, was sustained in 1874, by the supreme court of the United States, in a case where the

[1] Folger, J., Magnin *v.* Dinsmore, 62 N. Y. 35–44. See, also, Richards *v.* Westcott, 7 Bosw. 6. To the same effect are English and other rulings. Batson *v.* Donovan, 4 B. & Ald. 21; Brooke *v.* Pickwick, 4 Bing. 220; Crouch *v.* R. R. 14 C. B. 255; Scaife *v.* Farrant, L. R. 10 Exch. 358. See Story on Bail. § 557; Ang. on Com. Car §§ 220, 260; Little *v.* R. R. 66 Me. 239; Orange Co. *v.* Brown, 9 Wend. 85; Pardee *v.* Drew, 25 Wend. 459; Am. Ex. Co. *v.* Perkins, 42 Ill. 458; Chicago, &c. R. R. *v.* Shea, 66 Ill. 471; Mich. Cent. R. R. *v.* Carrow, 73 Ill. 348.

[2] Southern Ex. Co. *v.* Armstead, 50 Ala. 351. See Levy *v.* Ex. Co. 4 So. Car. 234.

[3] Infra, § 606; 2 Redf. on R. R. 161; Harris *v.* R. R. L. R. 1 Q. B. D. 515; Harrison *v.* R. R. 2 B. & S. 122; Great W. R. R. Co. *v.* Glenister, 29 L. T. N. S. 422; Squire *v.* R. R. 98 Mass. 239; Steers *v.* Steamship Co. 57 N. Y. 1; 11 Alb. L. J. 160; Farnham *v.* R. R. 55 Penn. St. 53; Gleason *v.* Transp. Co. 32 Wis. 85.

[4] Angell on Carriers (5th ed.), § 259; citing Harris *v.* Parkwood, 3 Taunt. 264; Hollister *v.* Nowlen, 19 Wend. 234; Cole *v.* Goodwin, 19 Wend. 251; Coxe *v.* Heisley, 19 Penn. St. 243; Chicago R. R. *v.* Thompson, 19 Ill. 78. See Steers *v.* Steams. Co. 57 N. Y. 1.

time required for the transportation of the package was a day.[1]

Agreements by which the carrier is relieved from his liability as insurer valid.

§ 586. That portion of a carrier's liability which is special to the English common law, and which consists of his liability for a damage not produced by his own or his servant's negligence, he may be relieved from by special agreement with the owner of the goods.[2]

Notice brought home to owner sufficient.

§ 587. It may be stated generally that while the carrier cannot by general notice, not proved to be known to the owner, restrict liability,[3] he may do so by notice brought home to and accepted by the owner or his agent. But "assent is not necessarily to be inferred from the mere fact that knowledge of such notice on the part of the owner or consignee of goods is shown. The evidence must go further, and be sufficient to show that the terms on which the carrier proposed to carry the goods were adopted as the contract between the parties, according to which the service of the carrier was to be rendered." [4]

So far as concerns proof of notice, we may suggest the following propositions: —

(1) A person executing a contract cannot relieve himself from liability by showing, unless on proof of fraud or coercion, that he was ignorant of its contents. If it were otherwise, a party, by declining to inform himself of what a contract contains, might reap its benefits and yet reject its burdens.[5] And

[1] Express Co. *v.* Caldwell, 21 Wall. 264; acc. Lee *v.* R. R. 5 H. & N. 867. See, however, South. Ex. Co. *v.* Caperton, 44 Ala. 101.

[2] For English cases, see infra, §§ 590, 591; and see New Jersey Nav. Co. *v.* Merchants' Bk. 6 How. (U. S.) 344; York Co. *v.* R. R. 3 Wall. 107; Camp *v.* St. Co. 43 Conn. 233; Hoadley *v.* Trans. Co. 115 Mass. 304; Manhattan Oil Co. *v.* R. R. 54 N. Y. 197; Railroad *v.* Man. Co. 16 Wall. 318; Westcott *v.* Fargo, 63 Barb. 353; McCann *v.* B. & O. R. R. 20 Md. 202; Michigan S. R. R. *v.* Heaton, 37 Ind. 448; Adams Ex. Co. *v.* Fendrick, 38 Ind. 150; McMillan *v.* R. R. 16 Mich. 109; Mobile, &c. R. R. *v.* Weinar, 49 Miss. 725; and cases hereafter cited.

[3] Ibid.; Judson *v.* W. R. R. Co. 6 Allen, 486; Fillebrown *v.* G. T. R. R. 55 Me. 462; Limburger *v.* Westcott, 49 Barb. 283. Gleason *v.* Trans. Co. 32 Wis. 86.

[4] Bigelow, C. J., in Buckland *v.* Express Co. 97 Mass. 127; approved in Fillebrown *v.* G. T. R. R. 55 Me. 468. See Balt. & O. R. R. *v.* Brady, 32 Md. 333; Adams Ex. *v.* Stettaners, 61 Ill. 184; South. Ex. Co. *v.* Armstead, 50 Ala. 350.

[5] Whart. on Ev. § 1243.

this rule has been applied to cases of contracts (not otherwise against the policy of the law), relieving carriers from liability.[1]

(2) This, however, does not make it my duty to inform myself of provisions inserted in an informal contract in such a way as to elude ordinary attention. I am required to exercise the sagacity of a good business man; and I am chargeable only with negligence when I omit to exercise such sagacity. That which a good business man would not ordinarily perceive, I am not chargeable with negligence in not perceiving. Besides, to impute to me a knowledge of conditions inserted, not in the body of an instrument, where I would be likely to see them, but in places where they would not be likely to attract my attention, would make a maxim which was designed to prevent fraud an engine of fraud, by enabling one party to surreptitiously work into a contract conditions of which the other had not the usual means of knowledge.

(3) Yet a condition, otherwise lawful, inserted in the body of a receipt, ticket, or bill of lading, binds the party claiming under it,[2] while it is otherwise when the condition is printed on the back of the ticket or bill of lading in such a way as not to be likely to attract attention. The question in such case is one of fact. Was the condition exhibited in such a way as to make its non-notice negligent?[3] And notice, it has been held, is not

[1] Austin *v.* R. R. 16 Q. B. 600; Carr *v.* R. R. 7 Exch. 767; Macmanus *v.* R. R. 4 H. & N. 327; Behrens *v.* R. R. 6 H. & N. 366; Peninsula R. R. *v.* Shand, 3 Moo. P. C. N. S. 272; Railroad *v.* Man. Co. 16 Wall. 130; Squire *v.* R. R. 98 Mass. 239; Grace *v.* Adams, 100 Mass. 505; Blossom *v.* Dodd, 43 N. Y. 264; Belger *v.* Dinsmore, 51 N. Y. 166; Snyder *v.* Ex. Co. 63 Mo. 76, and cases hereafter cited; Bk. of Ky. *v.* Adams Ex. 93 U. S. (1 Otto) 174; McMillan *v.* R. R. 16 Mich. 80; Mulligan *v.* Ill. Cent. R. Co. 36 Iowa, 181. See discussion of the question in opinion of Cooley, J., in McMillan *v.* R. R. 16 Mich. 80, and cases there cited; and also Kallman *v.* U. S. Ex. Co. 3 Kans. 205; Dorr *v.* New Jersey Steam Nav. Co. 11 N. Y. 491; Hopkins *v.* Westcott et al. 7 Am. Law Reg. N. S. 533.

In Illinois, on the other hand, it is a question of fact whether a party accepting a bill of lading knew of its conditions and assented thereto. Merchants' Union Ex. Co. *v.* Joseph Schier, 55 Ill. 140.

[2] Evansville, &c. R. R. *v.* Androscoggin Mills, 22 Wall. 594. See Angell on Carriers, 5th ed. § 250.

[3] Elmore *v.* Sands, 54 N. Y. 512. See Blossom *v.* Dodd, 43 N. Y. 264; Rawson *v.* R. R. 48 N. Y. 212; Nevins *v.* St. Co. 4 Bosw. 225; Wilson *v.* R. R. 21 Gratt. 654.

to be presumed when the condition is in comparatively small type;[1] or when, being on the back of the ticket, it is referred to by the words "Look on the back," printed in small type on the front.[2]

[1] Verner *v.* Sweitzer, 32 Penn. St. 208.

[2] Malone *v.* R. R. 2 Gray, 388.

In England the rulings on the point stated in the text are in much confusion. It has, however, been held by the House of Lords that a carrier is not relieved from liability for the loss of luggage (the loss being caused by the negligence of the carrier's servants) by a notice, printed on the back of the passenger's ticket, exonerating the carrier from liability for loss, injury, or delay to the passenger or his luggage, however caused, there being no proof that the passenger had assented to the conditions of the notice. Henderson *v.* Stevenson, L. R. 2 Sc. & Div. App. 470; 32 L. T. N. S. 709; 12 Alb. L. J. 136. In this result Lords Cairns, Chelmsford, Hatherly, and O'Hagan, concurred. "The question," said Lord Cairns, "resolves itself simply into this: Is the mere fact of handing a ticket of this kind to an intending passenger, at the time that he pays his fare, sufficient to hold him so affected by everything which is printed upon the back of it that, even without seeing or knowing what is printed there, he is held to have contracted upon the terms indicated upon the back of the ticket? I asked, with some anxiety, what was the authority for the proposition that a member of the public was to be supposed to have contracted under those circumstances in that way; and I have listened with great attention to all the authorities that have been cited. A great number of them are cases where there was no question at all arising as to what the nature of the contract was. They were cases in which it was assumed, either by the admission of both sides, or by the pleadings, that terms similar to those which I have read in the present case formed part of the contract. Those cases, therefore, have no relation whatever to the present. There were a considerable number of other cases in which, for the conveyance of animals, or of goods, a ticket or paper had been issued actually signed by the owner of the animals or goods. With regard to those cases there might indeed be a question what was the construction of the contract, or how far the contract was valid. But there could be no question whatever that the contract, such as it was, was assented to, and was entered into by the person who received the ticket. Of all that were cited, there really was one case (Stewart *v.* London & North Western Railway Company, 33 L. J. 199, Exch.; 10 L. T. N. S. 302) which could be said to approach the present: that was a case that was tried in the passage court of Liverpool, with regard to a ticket issued upon the occasion of an excursion train. And even with regard to that case, when it is examined, it is not an authority at all to decide the present case. There a ticket had been issued to the excursionist which had upon the face of it 'Ticket as per bill.' Therefore, upon that part of the ticket which the excursionist must have seen, he was referred to some bill or other upon the subject of the ticket. It was in evidence, moreover, by the admission of the excursionist himself, that he had seen and had read in the office a large

§ 588. (4) The burden of proof is on the party setting up the condition to show either that the shipper of the goods took

bill on the subject of the arrangements with regard to the excursion, and that in that large bill he had seen a reference to some smaller bill or bills, but he had not referred to the smaller bills which were so mentioned. In that state of things, although the jury found, and probably found rightly, that the excursionist was not aware of the contents of the smaller bills, the court above, having leave to draw inferences of fact, came to the conclusion that, under the circumstances, he must be taken to have submitted himself to all the terms contained in the smaller bills, and to have been content to do that without reading in detail what those terms were. I express no opinion upon that decision beyond saying that it does not in any way govern or cover the present case. The present case is one in which there was no reference whatever upon the face of the ticket to anything other than that which was written on the face. Upon that which was given to the passenger, and which he read, and of which he was aware, there was a contract self-contained and complete, without reference to anything *dehors*. Those who were satisfied to hand to the passenger such a contract complete upon the face of it, and to receive his money upon its being so handed to him, must be taken, as it seems to me, to have made that contract, and that contract only, with the passenger; and the passenger on his part, receiving the ticket in that form, and without knowing of anything beyond, must be taken to have made a contract according to that which was expressed and shown to him in that way. It seems to me that it would be extremely dangerous, not merely with regard to contracts of this description, but with regard to all contracts, if it were to be held that a document complete upon the face of it can be exhibited as between two contracting parties, and, without any knowledge of anything beside, from the mere circumstance that upon the back of that document there is something else printed which has not actually been brought to, and has not come to, the notice of one of the contracting parties, that contracting party is to be held to have assented to that which he has not seen, of which he knows nothing, and which is not in any way ostensibly connected with that which is printed or written upon the face of the contract presented to him. . . . . The question in this case does not depend upon any technicality of law, or upon any careful examination of decided authorities. It appears to me to be a question simply of common sense. Can it be held that any person, unless he is in default, unless something is said to him referring him to some place where he will find terms applicable to the contract he is entering into, has entered into a contract containing terms which *de facto* he does not know, and as to which he has received no notice, that he ought to inform himself upon them? It appears to me impossible that that can be held. The interlocutor of the lord ordinary, affirmed as it was in all respects by the second division of the court of session, appears to me to have been entirely correct; and I, therefore, move your lordships that this appeal be dismissed with costs."

"The company," said Lord Chelmsford, "was established for the conveyance of passengers, passengers' luggage, live-stock, and goods. Their liability by law to a passenger is to

notice of it, or that he ought to have taken notice of it.[1] It has been said that the carrier must show by "the most satis-

carry and convey him with reasonable care and diligence, which implies the absence on the part of the company of any carelessness and negligence. Of course, any person may enter into an express contract with them to dispense with this obligation, and to take the whole risk of the voyage on himself. And this contract may be established by a notice excluding liability for the want of care, or negligence, or even the wilful misconduct of the company's servants, if assented to by the passenger. But by a mere notice, without such assent, they can have no right to discharge themselves from performing what is the very essence of their duty, which is to carry safely and securely, unless prevented by unavoidable accidents. I think that such an exclusion of liability cannot be established without very clear evidence of the notice having been brought to the knowledge of the passenger, and of his having expressly assented to it. The mere delivery of a ticket with the conditions indorsed upon it is very far, in my opinion, from conclusively binding the passenger. The lord chief justice, in the case of Zunz *v.* The South Eastern Railway Company, L. Rep. 4 Q. B. 539; 20 L. T. Rep. N. S. 873, which has been referred to, thought himself bound by the authorities to hold that when a man takes a ticket with conditions printed on it, he must be presumed to know the contents of it, and must be bound by them. I was extremely anxious to be referred to the authorities which influenced his judgment; but although numerous authorities were cited, none of them go the length of establishing that a presumption of assent is sufficient. Assent is a question of evidence, and the assent must be given before the completion of the contract. The company undertake to convey passengers in their vessels for a certain sum. The moment the money for the passage is paid and accepted, their obligation to carry and convey arises. It does not require the exchange of a ticket for the passage-money, the ticket being only a voucher that the money is paid; or if a ticket is necessary to bind the company, the moment it is delivered the contract is completed, before the passenger has had an opportunity of reading the ticket, much less the indorsement."

"The respondent's loss by the default of the appellants," said Lord O'Hagan, "is plain and undisputed. The appellants rely upon a contract relieving them from liability, but the respondent says that he never entered into such a contract; that the terms of it were never in fact made known to him; and that his assent to them was neither asked nor given. The question is one of evidence. Did the respondent enter into such a contract? I am of opinion that he did not, and I have reached that conclusion substantially for the reasons which have been stated, and which it is not needful to repeat. Proof of the respondent's knowledge and assent might have been given in various ways. In certain circumstances, denial of them might not be permissible; in others, a jury or a court might be satisfied of their existence from ante-

[1] Brown *v.* R. R. 11 Cush. 97; Adams *v.* Buckland, 97 Mass. 124; Gott *v.* Dinsmore, 111 Mass. 45; Moses *v.* R. R. 24 N. H. 71; Moses *v.* R. R. 32 N. H. 523; Jones *v.* Voorhees, 10 Ohio, 145.

factory evidence" that the terms of the exception were "comprehended or assented to by hand or deed."[1] But while the

cedent dealings, notoriety of custom, publication of notices, verbal communications, and so forth; but I agree with the lord chancellor that mere receipt of a ticket under such circumstances, and with such an indorsement as we have before us, is not shown by the authorities cited at the bar to furnish, *per se*, sufficient evidence of such assent or knowledge. We have positive and uncontradicted testimony that they did not exist; and in declining to discard that testimony on the strength of a false presumption, your lordships will act in the spirit of the legislation which would have pronounced the contract we are asked to enforce void, if the case had come within the statute. Of course, as it does not, we must deal with the facts as we find them; but it is satisfactory that we are enabled to decide in harmony with the policy of parliament which has relaxed the stringency of judicial decisions in the interest of the public, and limited the power of companies to escape the proper consequences of their own misconduct or neglect. We were asked in the course of the argument what more the appellants could have done to furnish notice of the terms on which they proposed to contract; an answer was supplied by some of the cases cited, in which the signature of the passenger or consignor demonstrated conclusively his conscious and intelligent assent to the bargain by which it was sought to bind him. When a company desires to impose special and most stringent terms upon its customers, in exoneration of its own liability, there is nothing unreasonable in requiring that these terms shall be distinctly declared and deliberately accepted, and that the acceptance of them shall be unequivocally shown by the signature of the contractor. So the legislature have pronounced in cases of canals and railways, scarcely distinguishable in substance and principle from that before us; and if the effect of your lordships' affirmation of the interlocutor of the lord ordinary be to compel some precaution of this kind, it will be manifestly advantageous in promoting the harmonious action of the law and in protecting the ignorant and the unwary."

This decision, it should be remembered, is at common law, not being subject to the statutes in relation to conditions imposed by carriers on railroads and canals. Infra, § 591.

Next in order came Harris *v.* R. R. L. R. 1 Q. B. D. 515; 34 L. T. N. S. 647; which was before the queen's bench division of the high court of justice. In this case the plaintiff, a passenger by the defendants' railway, by her agent delivered certain luggage to the defendants to keep for her, for which the agent paid 4*d.* and received a ticket. On one side of the ticket was a filled-up list of the articles of luggage, with a memorandum that it was left "subject to the conditions on the other side." These conditions, of which the agent neither read nor knew, provided, *inter alia*, that the defendants would not be liable for the loss of packages above

[1] Boskowitz *v.* R. R. Sup. Ct. Ill. 1877, Central Law Journal, 1877, p. 60, and note thereto; and see article in same journal, p. 134; and see, also, South. Ex. Co. *v.* Moore, 39 Miss. 822; Levering *v.* Ex. Co. 42 Mo. 88; Adams Ex. Co. *v.* Stettaners, 61 Ill. 184.

burden is on the carrier to prove that the shipper had notice, yet it is enough, to make out the case, if it can be shown that the

the value of £5, unless the value should be declared, and an increased price paid, and that the defendants would not be liable, under any circumstances, "for loss or injury to articles except left in the cloak-room." The articles were above the value of £5, and not declared, and the articles were not placed in the cloak-room, but in the vestibule, from which they were stolen. The court held (one judge dissenting), that the defendants were not liable for the loss, and unanimously held that the plaintiff was bound by the conditions of the ticket.

In this case, Blackburn, J. (34 L. T. Rep. N. S. 651), said: "In the present case the ticket has on the face of it a plain and unequivocal reference to the conditions printed on the back of it, and any person who read that reference could without difficulty look at the back and see what the conditions were; and that being so, the question comes to be, whether the plaintiff is not precluded from setting up that Mr. Harris, who acted for her in taking that ticket, never looked at the face of the ticket, or bestowed a thought on what the conditions were. In other words, the question is, whether, by depositing the goods and taking this ticket, he did not so act as to assert to the defendants that he had looked at and read the ticket, and ascertained its terms, or was content to be bound by it without ascertaining them, and so induced them to enter into the contract with him in the belief that he had assented to its terms. I think he has so acted."

About the same time was reported, in the common pleas division, Parker *v.* R. R. L. R. 1 C. P. D. 618; 25 W. R. 97; 24 L. T. N. S. 656. In this case the plaintiff left his bag in the cloak-room at a railway station, and received a ticket which he supposed to be merely a voucher to identify the bag, or a receipt for the two-pence he had paid, and he never read or was aware of the special condition indorsed upon the back of it, and referred to on the front by the words "See back." It was held by the court of common pleas that there was no legal obligation upon him to make himself acquainted with the special condition, and, therefore, as he never assented to it, it was no part of the contract. It was also ruled that the judge was right in leaving it as a question for the jury, whether the plaintiff was, under the circumstances, bound, in the exercise of reasonable and proper caution, to make himself acquainted with the special condition.

The authorities cited were Henderson *v.* Stevenson, L. R. 2 Sc. & D. 470; Van Toll *v.* South Eastern Railway Co. 10 W. R. 578; 12 C. B. N. S. 75; Stewart *v.* London & North Western Railway Co. 12 W. R. 689; 3 H. & C. 135; Zunz *v.* South Eastern Railway Co. 17 W. R. 1096; L. R. 4 Q. B. 539; Lewis *v.* McKee, 17 W. R. 325; L. R. 4 Exch. 58; York, Newcastle & Berwick Railway Co. *v.* Crisp, 2 W. R. 428; 14 C. B. N. S. 527; Kerr *v.* Willan, 6 M. & S. 150; Rowley *v.* Horne, 3 Bing. 2.

This judgment, however, was reversed by the court of appeal on April 25, 1877, Lords Justices Bramwell, Mellish, and Bagallay, concurring in the reversal, and holding that the plaintiff was bound by the condition, and that there was no case against the company. *S.C.* L. R. 2 C. P. D. 416.

On the topic in the text see articles from London Law Journal, and Solicitors' Journal, republished in Central

contract was put to the shipper in such a way that he could not, without negligence, avoid taking notice of its conditions.[1]

It must, however, be kept in mind, that where a verbal agreement of carriage is completed, after which a bill of lading with restrictions is delivered to the shipper, the restrictions, unless assented to as part of a new contract, entered on with due consideration, do not affect the shipper.[2] It has also been held, that to restrict the liability of a railroad company as a common carrier for the loss of the baggage of a passenger, there must be proof of actual notice to the passenger of such restriction, before the cars are started; and an indorsement on the ticket given to the passenger is not enough, unless it is shown that he knew its purport before the cars started.[3]

Agreements relieving carrier from liability for negligence are invalid.

§ 589. As a general principle, accepted as such by our American courts with but few exceptions, we may hold that agreements relieving the carrier from liability for negligence are void as against public policy.[4]

Law Journal of St. Louis, July 16, 1875, and May 12, 1876.

In R. R. *v.* Man. Co. 16 Wall. 318, Davis, J., said: "These considerations against the relaxation of the common law responsibility by public advertisements apply with equal force to notices having the same object attached to receipts given by carriers on taking the property of those who employ them into their possession for transportation. Both are attempts to obtain, by indirection, exemption from burdens imposed in the interests of trade upon this particular business."

[1] See cases cited supra; and see also, York Comp. *v.* R. R. 3 Wall. 107; Bank of Ky. *v.* Ex. Co. 93 U. S. 188; Grace *v.* Adams, 100 Mass. 505; Steers *v.* Steamship Co. 57 N. Y. 1.

[2] Bostwick *v.* R. R. 45 N. Y. 712; Gaines *v.* Trans. Co. 28 Ohio St. See a learned article in Cent. L. J. for 1877, p. 134.

[3] Wilson *v.* R. R. 21 Gratt. 654.

[4] New Jer. St. Nav. Co. *v.* Merch. Bk. 6 Howard, 344; Express Co. *v.* Kountze, 8 Wallace, 342; York Co. *v.* Cent. R. R. 3 Wall. 107; Railroad *v.* Lockwood, 17 Wall. 357; Sager *v.* P. I. & P. R. R. 31 Me. 228; Hall *v.* Cheney, 36 N. H. 26; Farm. & Mec. Bk. *v.* Champ. Trans. Co. 23 Vt. 205; Mann *v.* Birchard, 40 Vt. 326; School Dist. *v.* R. R. 102 Mass. 552; Com. *v.* R. R. 108 Mass. 7; Camp *v.* St. Co. 43 Conn. 333; Bingham *v.* Rogers, 6 W. & S. 495; Goldey *v.* Penn. R. R. 30 Penn. St. 242; Cam. & A. R. R. *v.* Baldauff, 16 Penn. St. 67; Penn. R. R. *v.* McCloskey, 23 Penn. St. 526; Powell *v.* Penn. R. R. 32 Penn. St. 414; Penn. R. R. *v.* Butler, 57 Penn. St. 335; Hays *v.* Kennedy, 3 Grant, 331; *S. C.* 41 Penn. St. 378; Lackawanna R. R. *v.* Cheneworth, 52 Penn. St. 382; Wolf *v.* West. U. Tel. Co. 62 Penn. St. 83; Lanc. Co. Nat. Bk. *v.* Smith, 62 Penn. St. 47; Empire Trans. Co. *v.* Oil Co. 63 Penn. St. 14; Colton *v.* C. & P. R. R. 67 Penn. St. 211; Del. & Ches. St. T. C. *v.*

And this rule holds good as to passengers travelling with drovers' passes.[1]

Starrs, 69 Penn. St. 36; Am. Exp. *v.* Second Nat. Bk. 69 Penn. St. 394; Flinn *v.* R. R. 1 Houst. 472; Va. & Tenn. R. R. *v.* Sayers, 26 Gratt. 328; Graham *v.* Davis, 4 Ohio St. 65; Jones *v.* Voorhees, 10 Ohio, 145; Cleveland R. R. *v.* Curran, 19 Ohio St. 1; Cincin. R. R. *v.* Pontious, 19 Ohio St. 221; Union Ex. Co. *v.* Graham, 26 Ohio St. 598; Indianap. &c. R. R. *v.* Allen, 31 Ind. 394; Ohio, &c. R. R. *v.* Selby, 47 Ind. 471; Rose *v.* R. R. 39 Iowa, 246; Jacobus *v.* R. R. 20 Minn. 125; Pacific R. R. *v.* Reynolds, 8 Kans. 641; Swindler *v.* Hilliard, 2 Richs. 286; Smith *v.* R. R. 64 N. C. 135; Berry *v.* Cooper, 28 Ga. 543; Steele *v.* Townsend, 37 Ala. 247; Southern Ex. Co. *v.* Armstead, 50 Ala. 350; South Ala. R. R. *v.* Henlein, 52 Ala. 606; South. Ex. Co. *v.* Moon, 39 Miss. 822; Mobile, &c. R. R. *v.* Weiner, 49 Miss. 725; Read *v.* R. R. 60 Mo. 199; Snider *v.* Exp. Co. 62 Mo. 376; Orndorff *v.* Ex. Co. 3 Bush, 194.

[1] See infra, § 641 *a*; Railroad *v.* Lockwood, 17 Wall. 357; Penn. R. R. *v.* Henderson, 51 Penn. St. 315; Cleveland, &c. R. R. *v.* Curran, 19 Ohio St. 1; Ohio, &c. R. R. *v.* Selby, 47 Ind. 472; Jacobus *v.* R. R. 20 Minn. 125.

In New York, the early cases indicated a tendency to hold the carrier to his strict duties. Cole *v.* Goodwin, 19 Wend. 257; Gould *v.* Hill, 2 Hill, 623. See Smith *v.* R. R. 24 N. Y. 222. Subsequently, however (to adopt the summary of Bradley, J., in Railroad *v.* Lockwood), came Bissell *v.* R. R. 29 Barb. 602, décided in September, 1859, "which differed from the preceding, in that the ticket expressly stipulated that the railroad company should not be liable under any circumstances, 'whether of negligence by their agents or otherwise,' for injury to the person or stock of the passenger. The latter was killed by the express train running into the stock train; and the jury found that his death was caused by the gross negligence of the agents and servants of the defendants. The supreme court held that gross negligence (whether of servants or principals) cannot be excused by contract in reference to the carriage of passeugers for hire, and that such a contract is against the policy of the law, and void. In December, 1862, this judgment was reversed by the court of appeals, four judges against three. 25 N. Y. 442. Judge Smith, who concurred in the judgment below, having in the mean time changed his views as to the materiality of the fact that the negligence stipulated against was that of the servants of the company, and not of the company itself. The majority now held that the ticket was a free ticket, as it purported to be, and, therefore, that the case was governed by Wells *v.* The Central Railroad Co.; but whether so or not, the contract was founded on a valid consideration, and the passenger was bound to it, even to the assumption of the risk arising from the gross negligence of the company's servants. Elaborate opinions were read by Justice Selden in favor, and by Justice Denio against, the conclusions reached by the court. The former considered that no rule of public policy forbids such contracts, because the public is amply protected by the right of every one to decline any special contract, on paying the regular fare prescribed by law, — that is the highest amount which the law allows the company to charge. In other words, unless a man chooses to pay the highest amount which the company by its charter is

§ 590. In England the earlier cases hold that such agreements are valid only as relieving the carrier from insurance against

authorized to charge, he must submit to their terms, however onerous. Justice Denio, with much force of argument, combated this view, and insisted upon the impolicy and immorality of contracts stipulating immunity for negligence, either of servants or principals, where the lives and safety of passengers are concerned. The late case of Poucher *v.* N. Y. Cent. R. R. Co. 49 N. Y. 263, is in all essential respects a similar case to this, and a similar result was reached."

"These are the authorities which we are asked to follow. Cases may also be found in some of the other state courts, which, by dicta or decision, either favor or follow more or less closely the decisions in New York. A reference to the principal of these is all that is necessary here: Ashmore *v.* Penn. R. R. Co. 4 Dutch. 180; Kinney *v.* Cent. R. Co. 3 Vroom, 407; Hale *v.* N. J. St. Nav. Co. 15 Conn. 539; Peck *v.* Weeks, 34 Conn. 145; Lawrence *v.* N. Y. R. Co. 36 Conn. 63; Kimball *v.* Rutland R. Co. 26 Vt. 247; Mann *v.* Birchard, 40 Vt. 332; Adams Exp. Co. *v.* Haynes, 42 Ill. 89; Ibid. 458; Ill. Cent. R. R. Co. *v.* Adams Exp. Co. Ibid. 474; Hawkins *v.* Great West. R. Co. 17 Mich. 57; *S. C.* 18 Mich. 427; Balt. & O. R. Co. *v.* Brady, 32 Md. 333; 25 Md. 328; Levering *v.* Union Transportation Co. 42 Mo. 88.

"A review of the cases decided by the courts of New York, shows that though they have carried the power of the common carrier to make special contracts to the extent of enabling him to exonerate himself from the effects of even gross negligence, yet that this effect has never been given to a contract general in its terms. So that if we only felt bound by those precedents, we could, perhaps, find no authority for reversing the judgment in this case. But on a question of general commercial law, the federal courts administering justice in New York have equal and coördinate jurisdiction with the courts of that state. And in deciding a case which involves a question of such importance to the whole country, a question on which the courts of New York have expressed such diverse views, and have so recently and with such slight preponderancy of judicial suffrage come to the conclusion that they have, we should not feel satisfied without being able to place our decision upon grounds satisfactory to ourselves, and resting upon what we consider sound principles of law." It was afterwards ruled, that a common carrier may stipulate for exemption from liability for losses occurring through his negligence, but that his contract will not be construed to contain such an exemption, unless it be so expressly agreed. Magnin *v.* Dinsmore, 56 N. Y. 168.

In Louisiana it is held (substantially following the New York doctrine) that a carrier can protect himself, by contract, from liability for ordinary negligence. Higgins *v.* R. R. 1 La. Law J. 82. See Newman *v.* Smoker, 25 La. An. 303.

In Illinois, it is said by the supreme court, in 1877 (Arnold *v.* Ill. Cent. R. R., opinion filed January 31, 1877), that "the doctrine is settled in this court that railroad companies may, by contract, exempt themselves from liability on account of the negligence of their servants, other than that which is gross or wilful. I. C. R. R. Co. *v.* Read, 37 Ill. 484; I. C. R. R. Co. *v.* Morrison, 19 Ibid. 136; W. Tr. Co. *v.* Newhall, 24 Ibid. 466; I. C. R. R. *v.* Adams, 42 Ibid. 474; Adams Express Co. *v.*

casus or accidents occurring without his fault,[1] but according to Blackburn J., the cases decided "between 1832 and 1854 estab-

Haynes, Ibid. 89. So, also, it has been held, the law imposes no obligation on railroad companies to carry passengers on freight trains, nor freight on passenger trains. It only requires them to carry both, leaving it to them to regulate the manner in which it shall be done. I. C. R. R. Co. *v.* Nelson, 59 Ill. 112; I. C. R. R. Co. *v.* Johnson, 67 Ibid. 314."

As, however, according to the views heretofore expressed, a railroad company is always liable for lack of the diligence and care belonging to good specialists in their department, and is liable for no other negligence; it is difficult to see what "gross negligence," in the sense used by the court, is. When we remember the tremendous power of steam, the lack of due diligence by a railroad officer is always negligence of the highest class.

The true line of distinction in this relation is thus happily expressed by Bradley, J.:—

"Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness. It was for the reason that the limitations of liability first introduced by common carriers into their notices and bills of lading were just and reasonable, that the courts sustained them. It was just and reasonable that they should not be responsible for losses happening by sheer accident, or dangers of navigation that no human skill or vigilance could guard against; it was just and reasonable that they should not be chargeable for money or other valuable articles liable to be stolen or damaged, unless apprised of their character or value; it was just and reasonable that they should not be responsible for articles liable to rapid decay, or for live animals liable to get unruly from fright, and to injure themselves in that state, when such articles or live animals became injured without their fault or negligence. And when any of these just and reasonable excuses were incorporated into notices or special contracts assented to by their customers, the law might well give effect to them without the violation of any important principle, although modifying the strict rules of responsibility imposed by the common law. The improved state of society, and the better administration of the laws, had diminished the opportunities of collusion and bad faith on the part of the carrier, and rendered less imperative the application of the iron rule that he must be responsible at all events. Hence the exemptions referred to were deemed reasonable and proper to be allowed. But the proposition to allow a public carrier to abandon altogether his obligations to the public and stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law."

[1] Batson *v.* Donovan, 4 B. & A. 21. See Duff *v.* Budd, 3 Brod. & B. 177; Beck *v.* Evans, 16 East, 244; Smith *v.* Horne, 8 Taunt. 144; Bodenham *v.* Bennett, 4 Price, 31; Wyld *v.* Pickford, 8 M. & W. 443. Such, at least, was the law which, as stated by Blackburn, J., obtained until 1832. Peek *v.* R. R. 10 H. L. Cas. 473.

lished that this was not the law, and that a carrier might, by a special notice, make a contract limiting his responsibility, even in the cases here mentioned, of gross negligence, misconduct, or fraud on the part of his servants; and it seems to me, the reason why the legislature intervened in the Railway and Canal Traffic Act in 1854 was because it thought that the companies took advantage of those decisions to subvert (in Story's language) the salutary policy of the common law."[1]

§ 591. The Railway and Canal Traffic Act (17 & 18 Vict. ch. 31, § 7), just mentioned, requires the courts to determine the question of the reasonableness of exemptions in contracts by carriers; and it is held that under this act a stipulation relieving a carrier of goods from liability for negligence is unreasonable, and will be treated as inoperative.[2] But at the same time, it is held that a *passenger* may agree that he shall be carried at his own risk; and if so, the carrier is not liable even for gross negligence.[3] And it was expressly ruled in 1873, a few months before the decision by the supreme court of the United States that has just been cited at length, that a drover who agreed that he was to be carried at his own risk could not recover damages from the company for injuries produced by their negligence.[4]

§ 592. In order to group the cases bearing on the question of agreements to relieve from negligence we have been obliged, at this point, to discuss agreements concerning passengers as well as agreements concerning goods. The authorities in reference to passenger carriage will be examined more fully in a succeeding section.[5] It may be here noticed, in respect to the question whether a drover, by agreeing with a railroad to travel on a free pass, at his own risk, can recover from the company for damage received by him through their negligence, that there is a direct conflict between the court of queen's bench and the supreme court of the United

Conflict of opinion as to validity of such agreements.

[1] Peek *v.* R. R. *ut supra.*

[2] Aldridge *v.* R. R. 15 C. B. N. S. 582; Beal *v.* R. R. 3 H. & C. 337; Peek *v.* R. R. 10 H. L. Cas. 473.

[3] Carr *v.* R. R. 7 Exch. 707; Austin *v.* R. R. 10 C. B. 454; McCawley *v.* R. R. L. R. 8 Q. B. 57.

[4] McCawley *v.* R. R. L. R. 8 Q. B. 59; and see Gallin *v.* R. R. L. R. 10 Q. B. 212, to same effect.

As to construction of special agreements under English statute, see Robinson *v.* R. R. 35 L. J. C. P. 123; D'Arc *v.* R. R. L. R. 9 C. P. 325.

[5] Infra, § 641 *a.*

States. On this conflict the following observations may be ventured: (1) Whether the passenger is "free" or not is immaterial, on the reasoning of the supreme court of the United States.[1] That reasoning rests on the assumption that railroads are public agencies, bound, on public reasons, to show due diligence to the carriage of passengers as well as of goods. If this be the case, this diligence is a public duty, the fidelity in the performance of which is not to be graduated by the amount of pay received. (2) Supposing it to be true that railroads are public agencies, bound, on public reasons, to show due diligence in the carriage of passengers as well as of goods, then the conclusion cannot be disputed that this diligence cannot be dispensed with by agreement between road and passengers. *Jus publicum*, says Papinius, *privatorum pactis mutari non potest;*[2] and this no doubt is true in all cases where the attempt is to evade by private agreement a law designed for the protection of the public. (3) At the same time it must be remembered that there are two cases where a passenger (*e. g.* a drover, as in the cases before us) is precluded, even admitting the principle above stated to be correct, from recovering damages from a railroad for injuries accruing to himself through negligence. The first is where the negligence is the joint act of the carrier and the passenger, or is the passenger's exclusive act, as in case of a drover, who, undertaking to feed his stock on a journey, neglects so to do. The second is where the passenger makes himself a servant of the railroad, and is aware before the injury of the risks which lead to it.[3]

Burden of proof under special agreement.

§ 593. *When a limitation of the carrier's common law liabilities is effected by a valid agreement, the carrier loses the character of an insurer, but continues to be charged with the duties of a common carrier as in other respects.*— It is said by a learned member of the supreme court of Michigan, that "when a limited responsibility is legally contracted for, the bailee is not a common carrier in the full common law sense, but a private carrier or a bailee of another class, or a common carrier *sub modo* only."[4] The tendency of the Pennsylvania cases,

[1] See supra, § 438.

[2] L. 38. D. de pact. 2. 14.

[3] Infra, § 641 *a*.

[4] Graves, J., Lake Shore R. R. *v.* Perkins, 25 Mich. 335, citing Dorr *v.* N. J. Steam Nav. Co. 11 N. Y. (1

as elsewhere noticed, is to take, when the occasion demands (*e. g.* with contracts for the conveyance of cattle, a contract foreign to the English common law doctrine of common carriage), the first of the above alternatives, holding that a special agreement by a carrier to transport a particular class of goods in a particular way, giving to them a care entirely distinct from the usual care of a common carrier, constitutes a special form of bailment, which would fall under the title of mandates for pay.[1] There can be no question that as to the particular duties with which the carrier thus charges himself, he becomes a mandatary, subject, as is elsewhere shown, to the general liabilities as to diligence which adhere to mandataries. Under such circumstances, the burden, in a suit for negligence in discharging such peculiar duties, would be on the plaintiff. At the same time, as to that portion of the carrier's duties under such a contract which belong to him as a common carrier, such duties continue as at common law, and must be construed and applied as such by the courts. In conformity with these views it has been held in Ohio that in a suit against the carrier, on such common law duties, the burden is on the defendant to prove *casus* or *vis major*.[2]

§ 594. While a carrier is bound to have adequate carriages or vessels suitable for the kind of carriage he undertakes, it

Kern.) 485; N. J. Steam Nav. Co. *v.* Merchants' Bank, 6 How. (U. S.) 344; York Co. *v.* R. R. 3 Wall. 107; Farnham *v.* R. R. 55 Penn. St. 53.

[1] See infra, § 614.

[2] See Davidson *v.* Graham, 2 Ohio St. 131; Graham *v.* Davis, 4 Ohio St. 362; Wilson *v.* Hamilton, 4 Ohio St. 722; Welsh *v.* R. R. 10 Ohio St. 75; Cleveland R. R. *v.* Curran, 19 Ohio St. 1; R. R. *v.* Pontius, 19 Ohio St. 221; Knowlton *v.* R. R. 19 Ohio St. 260; Union Ex. Co. *v.* Graham, 26 Ohio St. 595.

"The Pennsylvania and Ohio decisions differ mainly in this: that the former give to a special contract (when the same is admissible) the effect of converting the common carrier into a special bailee for hire, whose duties are governed by his contract, and against whom, if negligence is charged, it must be proved by the party injured; whilst the latter hold that the character of the carrier is not changed by the contract, but that he is a common carrier still, with enlarged exemptions from responsibility, within which the burden of proof is on him to show that an injury occurs. The effect of this difference is to shift the burden of proof from one party to the other. It is unnecessary to adjudicate that point in this case, as the judge on the trial charged the jury, as requested by the defendants, that the burden of proof was on the plaintiff." Bradley, J., R. R. *v.* Lockwood, *ut supra;* and see supra, § 422.

is possible for the consignor, by selecting a particular carriage or vessel, after full knowledge of its defects, to so far assume the risk of the venture as to relieve the carrier from liability for damages accruing through the defects thus assumed by the consignor.[1] But this is to be taken with two qualifications. In the first place, the defect must be a matter as to which the consignor must be as competent to judge of as the carrier. Defects which the carrier knows, or ought to know, to be very serious, the consignor, who is not required to be an expert in the business of a carrier, may be unable properly to estimate.[2] Secondly, the existence of such defects, and the knowledge of them by the consignor, do not diminish the duty of the carrier to remedy them if within his power.[3]

Owner or consignor of goods selecting his own carriage or vessel.

§ 595. It is elsewhere noticed that the transport in carriages of live-stock to a distant terminus requires special qualifications and care, distinct from, if not incompatible with, those exercised by a carrier of passengers according to the definition both of Roman and English common law. The common carrier of passengers, according to both jurisprudences, must provide roadworthy carriages and servants capable of driving such carriages; and he is liable for all injuries caused by negligence, either in the structure of his carriages, the condition of his road so far as it is controlled by himself, or the conduct of his servants in the management of carriage and road. But the transporter of live-stock by rail has duties which, in order to enable them to reach their destination, are of a character different either from those just described, or from those of a carrier of goods. The cattle must when on transit be fed, watered, and nursed. Now does the duty of a common carrier, under such circumstances, include such feeding and nursing? So far as concerns *passengers*, it has been urged, with much force, that the duty of a common carrier does not oblige him to take care of a sick passenger, but that such passenger should provide himself with a nurse as his own special servant.[4] No one would maintain,

Special agreements as to transport of live-stock.

[1] Harris *v.* R. R. 20 N. Y. 232. Infra, § 641 *a*.

[2] Powell *v.* R. R. 32 Penn. St. 414.

[3] East Tennessee R. R. *v.* Whittle, 27 Ga. 535; Hannibal R. R. *v.* Swift, 12 Wall. 262; Chouteaux *v.* Leech, 18 Penn. St. 224.

[4] New Orleans, &c. R. R. *v.* Statham, 42 Miss. 607.

supposing a sick passenger thus provides himself with a nurse, that the railroad would be liable for the nurse's negligence. Is a common carrier, as such, required to nurse cattle on the road? No doubt he can undertake to do this by special contract, but is not such a contract severable from his common law duties as a common carrier, and does it not[1] make him a mandatary, subject to the law of negligence as applicable to mandates? And if this duty of nursing is assumed by the owner of the cattle, by special agreement with the carrier, is the carrier liable for the owner's negligence when executing this particular duty? This is an interesting question which, as thus detached, does not appear to have received distinctive judicial consideration. Undoubtedly we frequently meet with strong general statements to the effect that a carrier cannot exonerate himself by special agreement from damage happening to cattle sent over his road.[2] But these expressions we may not unnaturally regard as limited to damages arising from negligent management of the road, and not as extending to collateral duties, such as the nursing and tending of cattle when on transit.[3] And if it be correct, as is hereafter argued, that live-stock are not "goods," so as to make the carrier an insurer,[4] then the carrier in such case is a special bailee, whose duties are determinable by usage, or by special contract, subject to the condition that such usage or contract must be reasonable, and conformable to the policy of the law.

It is at all events clear that, on principles elsewhere stated, if the owner attends, and contributes to or shares in the negligence, he cannot recover from the carrier for injuries which such negligence causes.[5]

[1] See supra, § 594; infra, § 615.

[2] Kimball *v.* R. R. 26 Vt. 247; Smith *v.* R. R. 12 Allen, 531; Squire *v.* R. R. 98 Mass. 239; Evans *v.* R. R. 111 Mass. 142; Welch *v.* R. R. 41 Conn. 333; Wilson *v.* Hamilton, 4 Ohio St. 722; Kansas R. R. *v.* Reynolds, 8 Kans. 634; Stone *v.* Nichols, 9 Kans. 248. See supra, § 503; infra, §§ 615, 616; and compare Rexford *v.* Smith, 52 N. H. 355, for review of cases. See, particularly, Filebrown *v.* R. R. 55 Me. 462, and other cases cited by Judge Bradley, in N. Y. C. R. R. *v.* Lockwood, quoted § 589; and infra, § 615.

[3] See Cragin *v.* R. R. 51 N. Y. 61; Mich. South. R. R. *v.* McDonough, 21 Mich. 165.

[4] Infra, §§ 615, 616.

[5] Squire *v.* R. R. 98 Mass. 239. See Bissell *v.* R. R. 25 N. Y. 442; Rixford *v.* Smith, 52 N. H. 355; Lee *v.* R. R. 72 N. C. 236. Supra, §§ 300, 563.

§ 596. It is no defence, in case of loss while the live-stock is on board a vessel, for the carriers to show a custom to the effect that they took no risk in case of losses of this kind. To make the defence good that such a custom prevailed, it must be shown that the shipper had full knowledge of the custom at the time of shipment, and that he delivered the stock on board with reference to the custom.[1]

Mere usage without proof of notice no agreement.

§ 597. When the owner has an opportunity of examining the cars, and is cognizant of the way in which they are packed, and then agrees that he will take the risk of over-packing, he cannot recover from the road damages caused by such overpacking.[2] So, where the agreement was that certain hogs should be taken care of by the owner, and that the company should not be liable for loss of hogs by jumping from the cars, except it should occur by reason of a collision of trains, or when cars were thrown from the track, and when the hogs were shipped in cars belonging to another company, and selected by the plaintiff, he refusing to use the cars of the defendants; it was ruled that if the hogs escaped from these cars by reason of any defect in them, or of the door fastenings, the defendants would not be responsible if they did not know the fact when the plaintiff selected them.[3]

Special agreement valid by which owner takes particular risk.

§ 598. A contract, by which the owner or consignee "assumes all loss by fire," will not be so construed as to exonerate the carrier from a loss to which his negligence in any sense contributed.[4] Thus where goods, having been shipped upon the defendants' railway under a bill of lading containing a clause releasing it from liability "for damage or loss to any article from or by fire or explosion of any kind," were destroyed by fire, kindled by sparks from the locomotive hauling them: it was ruled by the New York court of appeals that such clause did not exempt the defendant from liability for loss by fire occasioned by the omission to apply to the locomotive any apparatus known and actually in use which would prevent the emission of sparks; though it was added, that the

Excepted perils induced by carriers' negligence.

[1] Pitre *v.* Offutt, 21 La. An. 679.

[2] Squire *v.* R. R. 98 Mass. 245; and see Rixford *v.* Smith, 52 N. H. 355.

[3] R. R. Co. *v.* Hall, 58 Ill. 409.

[4] Condict *v.* R. R. 54 N. Y. 500; Empire Trans. Co. *v.* Wamsutta Oil Co. 63 Penn. St. 14.

charge of the judge, that if the jury should find "that a locomotive could be so constructed as to prevent the emission of sparks, and thereby secure combustible matter from ignition, and the defendant neglected so to construct this locomotive, they should find for plaintiff because there was a duty upon the defendant to use every precaution and adopt all contrivances known to science to protect the goods intrusted to it for transportation," was error, and not in accordance with the correct rule.[1] It has, however, been ruled in Massachusetts, that a common carrier who negligently delays to forward goods is not liable for an injury to the goods by a peril excepted in the contract of carriage, happening without his fault, while the goods are in his custody at the place where they were delivered to him, although the goods would not have been exposed to the peril but for such delay.[2]

IX. BAGGAGE.

Baggage to be held as "goods."

§ 599. The baggage of a traveller is to be regarded as goods received by the common carrier under the ordinary terms of common carriage.[3] But whether the common carrier is the *insurer* of baggage has been doubted in England;[4] though the affirmative is expressly declared by the

[1] Steinweg *v.* R. R. 43 N. Y. 123; Condict *v.* R. R. 54 N. Y. 500; Mob. & Ohio R. R. *v.* Weinar, 49 Miss. 725. See §§ 52, 635.

[2] Hoadley *v.* N. Trans. Co. 115 Mass. 304.

In this case, Colt, J., said: "The defendant insists that the negligence alleged cannot be treated in law as the proximate cause of the loss. In actions of this description the injury complained of must be shown to be the direct consequences of the defendant's negligence. This is the only practical rule which can be adopted by courts in the administration of justice. . . . . Applying these rules to the case at bar it is plain that the destruction of the goods by fire in the calamity which happened could not reasonably be anticipated as a consequence of the wrongful detention of them. The delay did not destroy the property, and there was no connection between the fire and the detention." See, however, supra, §§ 123, 559.

[3] Robinson *v.* Dunmore, 2 B. & P. 416; Clarke *v.* Gray, 6 East, 564; Brooke *v.* Pickwick, 4 Bing. 218; Richards *v.* R. R. 7 C. B. 839; Butcher *v.* R. R. 16 C. B. 13; Bennett *v.* Dutton, 10 N. H. 481; Powell *v.* Myers, 26 Wend. 591; Hawkins *v.* Hoffman, 6 Hill, 586; Dexter *v.* R. R. 42 N. Y. 326.

[4] Stewart *v.* R. R. 3 H. & C. 139; Munster *v.* R. R. 4 C. B. N. S. 676; Talley *v.* R. R. Law Rep. 6 C. P 44. See Ross *v.* Hill, 2 C. B. 877. In Cohen *v.* R. R. L. R. (2 Exch. Div.; see *S. C.* L. R. 1 Exch. D. 217; 1 App. Cas. 253) Stewart *v.* R. R. was overruled, and the point in the text settled in the affirmative.

supreme court of the United States.[1] And it is now settled in England that luggage, though carried by a company without extra charge, falls under the head of goods carried by a railway, under the Railway Act of 1854.[2]

Carrier liable for goods carried by passenger.

§ 600. The carrier is liable for baggage the traveller takes into the same car with him as baggage, though unchecked or unreceipted for by the company.[3] "If a man travel in a stage coach," says Chambre, J.,[4] "and take his portmanteau with him, though he has his eye upon the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost;" and this view has been extended to railroads.[5] But as to articles which are not placed in the baggage car or van, but which are kept in the carriage in which the passenger travels, "so that he and not the company's servants has *de facto* the entire control of them whilst the carriage is moving, the amount of care and diligence reasonably necessary for their safe conveyance is considerably modified by the circumstance of their being" under the passenger's personal care. "To such a state of things, the rule that binds common carriers absolutely to insure the safe delivery of the goods, except against the act of God or the queen's enemies, whatever may be the negligence of the passenger himself, has never, that we have been aware of, applied."[6] Hence when it was shown that the plaintiff, instead of placing his portmanteau in the van, took it with him into a passenger car, and then negligently changed cars, leaving his portmanteau unprotected, it was held that the company was not liable to the plaintiff for damage accruing to him through the robbery of the portmanteau after it was thus deserted;[7] nor is the company liable as an insurer, for articles carried on the traveller's person,[8] nor for over-

[1] Hannibal R. R. *v.* Swift, 12 Wallace, 262.

[2] Cohen *v.* R. R. supra.

[3] Le Conteur *v.* R. R. L. R. 1 Q. B. 54; 6 B. & S. 961; Richards *v.* R. R. 7 C. B. 39; Hannibal R. R. *v.* Swift, 12 Wall. 262; Cohen *v.* Frost, 2 Duer, 335.

[4] Robinson *v.* Dunmore, 2 B. & P. 419.

[5] Richards *v.* R. R. 7 C. B. 839; Butcher *v.* R. R. 16 C. B. 13; Le Conteur *v.* R. R. L. R. 1 Q. B. 54. See infra, § 708.

[6] Willes, J., in Talley *v.* R. R. L. R. 6 C. P. 51.

[7] Talley *v.* R. R. 6 C. P. 44. Infra, § 708.

[8] First Nat. Bk. *v.* R. R. 20 Ohio St. 259. In this case Scott, J., said:

coats, canes, and umbrellas, such as he usually has under his exclusive care.[1]

§ 601. But the carrier's liability is not relieved by the owner placing his baggage in a special car supervised by himself. If the car belongs to the company, and they permit it to be used to carry baggage, this makes them liable;[2] and a railroad company has been held, in New York, liable as common carrier in a case where it only agreed with the plaintiff to furnish the motive power to draw his cars laden with his property, he to load and unload the cars and to furnish brakemen.[3]

And so when passenger supervises baggage.

§ 601 *a*. The carrier, however, is not liable when the baggage is deposited in a place not designated by him for reception.[4] Thus in a Wisconsin case, the plaintiff, a passenger on a steamboat, having been refused a key to a state-room engaged by him, the reason being that they did not give keys, placed his valise in the *unlocked* room, calling the attention of two or three cabin or saloon boys to the fact, asking their opinion whether it would be safe, and being told by them that it was. When he returned to his room, after an absence of three-quarters of an hour, the valise was gone. There was a porter or checkman on the boat, whose duty it was to receive and check baggage, which plaintiff knew. No evidence was offered of any custom of travellers to deposit their baggage in state-rooms, nor of any specific direction or assent on the part of the carrier; nor was there any finding by the jury that the carrier was guilty of negligence in not providing the state-room door with a suitable lock and key, according to the custom of such carriers. It was ruled that there was no delivery of the valise to the defendant, and they were not liable for its loss.[5]

But not where baggage is deposited in a place not permitted.

"We do not call in question the right of a passenger to carry about his person, for the mere purposes of transportation, large sums of money, or small parcels of great value, without communicating that fact to the carrier, or paying anything for their transportation. But he can only do so at his own risk, in so far as the acts of third persons, or even ordinary negligence on the part of the carrier or his servants is concerned."

[1] Richards *v.* R. R. *ut supra;* Steamboat Palace *v.* Vanderpool, 16 B. Mon. 302; Tower *v.* R. R. 7 Hill (N. Y.), 47. See infra, § 708.

[2] Hannibal R. R. *v.* Swift, 12 Wall. 262.

[3] Mallory *v.* R. R. 39 Barb. 488.

[4] Agrell *v.* R. R. 34 L. T. R. N. S. 134, n.

[5] Gleason *v.* Goodrich Trans. Co. 32 Wis. 86.

Yet although a steamship company may not be liable as insurer for the loss of goods kept by a passenger in his state-room, it is liable if such goods are stolen from the lack of such ordinary diligence on its part as is usual with prudent carriers under similar circumstances.[1]

Agreement that carrier shall not be liable for negligence invalid.

§ 602. The rule in this country, as we have already seen,[2] is, that agreements by which carriers seek to exonerate themselves from liability for negligence are invalid as against the policy of the law. This rule applies to the baggage of passengers travelling even with free tickets.[3] But where a valid condition is inserted in a ticket or receipt for baggage, the same rules of exemption apply as obtain in ordinary receipts for freight.[4]

Burden of proof.

§ 603. In accordance with the principle already stated,[5] proof of loss of baggage is *primâ facie* evidence of negligence.[6]

Liability when baggage is checked through connecting roads.

§ 604. The general rule, as we have already seen, is, that the receiving company engaging to carry goods over auxiliary roads is liable for loss resulting from negligence at any point in the route.[7] But when baggage is checked to a distant terminus, to be carried by a series of distinct carriers acting in concert, a ticket being sold for the whole route, the New York rule is, that each company is liable for negligence in carrying the baggage, when there is no evidence where the loss occurred.[8] It has been ruled in the same state, that a railroad company is not liable for a passenger's baggage lost by a connecting steamboat line, even though the company has given a check for the baggage to the terminus of the steamboat line, unless the company has some interest in, or con-

[1] American Steamship Co. *v.* Bryan, 1 Sup. Ct. Penn., Feb. 1877, 3 Weekly Notes, 528. See, also, Cohen *v.* Frost, 2 Duer, 335. See supra, § 554 *a*.

[2] Supra, § 586.

[3] Mobile, &c. R. R. *v.* Hopkins, 41 Ala. 486; Marshall *v.* R. R. 11 C. B. 655; Hall *v.* Cheney, 36 N. H. 26. See Phil. & Read. R. R. *v.* Derby, 14 How. U. S. 483.

[4] Steers *v.* Steamship Co. 57 N. Y. 1. As to the limitations in this relation, see supra, § 585 *et seq.* And see Cohen *v.* R. R. L. R. 2 Ex. D. (C. A.) 253.

[5] See supra, § 422.

[6] Van Horn *v.* Kermit, 4 E. D. Smith, 453; Hart *v.* R. R. 8 N. Y. 137; Kent *v.* R. R. L. R. 10 Q. B. 1.

[7] Supra, § 579; Burnell *v.* R. R. 45 N. Y. 184, noticed supra, § 582.

[8] Hart *v.* R. R. 8 N. Y. 37; Le Sage *v.* R. R. 1 Daly, 306; 2 Redf. on R. R. 42. Supra, §§ 535, 577.

trol over, the carriage of passengers by such boat line. And it has been said that proof that the railroad company checked the baggage to the terminus of the boat line, although there be evidence that they did so for their own convenience, without proof that the passenger paid them for his passage by the boat, is not sufficient to prove joint liability.[1] In Massachusetts it has been said that the mere failure by a railroad company to deliver at B., on its road, baggage of a passenger who delivered it to a connecting railroad at N., is not evidence of negligence on the part of the latter company which sold to the passenger at N. the tickets to transport him over both roads to B., and checked his luggage accordingly.[2]

§ 605. It is plain that an auxiliary or intermediate company, by whom the baggage is lost, is independently liable for the loss.[3] Whether the receiving company is liable for the negligence of the auxiliary company depends upon whether the receiving company contracted to carry the baggage through the whole route, or whether the auxiliary company was the partner of the receiving company. If either of the latter conditions affirmatively exists, then the receiving company is liable for the auxiliary company's negligence.[4]

§ 606. For merchandise taken under guise of baggage, the carrier, not being notified of its true character, is not liable, if the understanding or usage is that he restricts his liability to the personal effects of the traveller.[5]

Scope of term "baggage."

[1] Green *v.* R. R. Co. 4 Daly, 553. Supra, §§ 535, 582.

[2] Stimson *v.* R. R. 98 Mass. 82. See, however, Cary *v.* R. R. 29 Barb. 35; and see supra, § 582. The mere delivery of coupon tickets, and of checks on the auxiliary road, does not make the receiving road liable for negligence. Supra, § 582.

[3] Supra, § 579; Hart *v.* R. R. 8 N. Y. 37.

[4] Supra, § 582.

[5] Belfast, &c. R. R. *v.* Keys, 9 H. of Lords, 556; Cahill *v.* R. R. 13 C. B. N. S. 818; Great N. R. R. *v.* Shephard, 8 Exch. 30; Hudston *v.* R. R. L. R. 4 Q. B. 366; Harris *v.* R. R. L. R. 1 Q. B. D. 515; Smith *v.* R. R. 44 N. H. 325; Collins *v.* R. R. 10 Cush. 506; Squire *v.* R. R. 98 Mass. 239; Pardee *v.* Drew, 25 Wend. 459; Hawkins *v.* Hoffman, 6 Hill, 586; Dibble *v.* Brown, 12 Ga. 217; Mich. Cent. R. R. *v.* Carrow, 73 Ill. 348; Bruty *v.* R. R. 31 Up. Can. 66.

A railroad company is not liable to either owner or agent, on its ordinary contract of transportation of a passenger, for losing a valise delivered into its charge as his personal luggage, but which contained only samples of merchandise, and, with its contents, was owned by a trader whose travelling agent he was, to sell such

But if the carrier knowingly undertakes to transport merchandise, in trunks or in boxes, as baggage, he is liable, since he is bound by his own contract thus intelligently made.[1] And though not liable as an insurer, he may be liable as an ordinary bailee.

§ 607. "Baggage," which term includes clothes and such other conveniences as it is usual for travellers to carry from place to place when travelling,[2] has been held to cover materials to be worked into clothes for the traveller and his family, though not articles carried by him for others.[3] The term, also, has been held to include the bedding of an emigrant packed with his clothes in his trunk ;[4] an opera-glass in a trunk ;[5] manuscripts,[6]

goods by sample; nor in tort, for the loss, without proof of gross negligence. Stimson *v.* R. R. 98 Mass. 83. See supra, § 585. That "samples" are not luggage, see Solicitors' Journal, Feb. 21, 1874, p. 301.

[1] Great Northern R. R. *v.* Shepherd, 8 Exch. 30; Brooke *v.* Pickwick, 4 Bing. 218; Butler *v.* R. R. 3 E. D. Smith, 571.

[2] "Baggage," used by our courts as convertible with "luggage," is defined by Worcester as the "clothes or other conveniences which a traveller carries with him on a journey." Of the definitions given in Angell on Carriers, § 115, and Story on Bailments, § 499, Lush, J., in Hudston *v.* R. R. 38 L. T. 43, Q. B.; L. R. 4 Q. B. 366, says: "These definitions are quite good enough for the occasions upon which they were given, but none of them seem to be perfect. It would be very difficult, perhaps impossible, to frame a definition which would be suitable in any possible exigency; but I think that the interpretation put upon the rule by the company is not wide enough, for they contend that 'personal luggage' applies only to luggage which is carried by the passenger for his own use, and is personal to himself. But I do certainly think that any one using the words 'personal luggage' would mean more than is included by this description. . . . . We can only say that the article must be one which is ordinarily carried by passengers as luggage, and that this article," a child's spring-horse, weighing seventy-eight pounds, "does not come within this description."

See, also, Erle, C. J., in Phelps *v.* R. R. 19 C. B. N. S. 321. In Macrow *v.* R. R. 40 L. J. 300, Q. B.; *S. C.* L. R. 6 Q. B. 612, Cockburn, C. J., said that "luggage" includes "not only all articles of apparel, whether for use or ornament, but also the gun-case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character." And see 6 Robinson's Practice, 1012; Dexter *v.* R. R. 42 N. Y. 326.

[3] Dexter *v.* R. R. 42 N. Y. 326; Wilson *v.* R. R. 56 Me. 60. See Angell on Carriers, 5th ed. § 115.

[4] Ouimit *v.* Henshaw, 35 Vt. 605; though see Macrow *v.* R. R. L. R. 6 Q. B. 612; Conolly *v.* Warren, 106 Mass. 146, as to bedding not intended for the journey.

[5] Toledo & Wabash R. R. *v.* Hammond, 33 Ind. 379.

[6] Hopkins *v.* Westcott, 6 Blatch.

when carried for use or instruction; surgical instruments carried by a surgeon;[1] tools carried by a carpenter;[2] fire-arms for personal use;[3] and jewelry personally used by a lady and placed with her wardrobe.[4] But ladies' clothes have been held not to be part of a gentleman's baggage.[5]

Money or bullion.

§ 608. A carrier's liability for negligence in respect to money or bullion is entitled to specific consideration, from the fact that a higher grade of diligence, according to the rules we have recapitulated, is required in carrying money or bullion than in carrying wearing apparel. This is not because in such cases we recognize the theory of a *diligentia diligentis simi*, with its antithesis of *culpa levissima;* for this theory is both unauthorized and absurd.[6] But, taking the true standard of good business vigilance, — *diligentia diligentis patrisfamilias*, — it is clear that the care which a good business man would bestow on a package of bullion is far greater than that which he would bestow upon a package of wool; and that consequently that which would not be *culpa levis*, or special negligence, in the carriage of a package of wool, would be *culpa levis*, or special negligence, in the carriage of a package of bullion. For, independently of other reasons, the package of bullion would be likely to be tracked and rifled by thieves, which would not be likely with the package of wool. Hence in carrying baggage the carrier cannot be held liable for negligence in respect to bullion, money, or plate, concealed in such baggage (beyond the amount necessary for the traveller's current expenses), unless he had such notice as would enable him to give to the parcel the particular care it required.[7] And even the exception above stated, allow-

C. C. 64; Gleason *v.* Tr. Co. 32 Wis. 85. Otherwise as to title deeds of a client's property carried by a lawyer on his way to court. Phelps *v.* R. R. 19 C. B. N. S. 321.

[1] Hannibal R. R. *v.* Swift, 12 Wall. 262.

[2] Porter *v.* Hildebrand, 14 Penn. St. 129.

[3] Woods *v.* Devins, 13 Ill. 746; Davis *v.* R. R. 22 Ill. 278.

[4] Brooke *v.* Pickwick, 4 Bing. 218; Pudor *v.* R. R. 26 Me. 458; McCormick *v.* R. R. 4 E. D. Smith, 181; Jones *v.* Vorhees, 10 Ohio, 145; Miss. R. R. *v.* Kennedy, 41 Miss. 671.

[5] Chicago, &c. R. R. *v.* Boyce, 73 Ill. 511.

[6] See supra, § 57.

[7] Doyle *v.* Kiser, 6 Porter, 242; Jordan *v.* R. R. 5 Cush. 69; Bell *v.* Drew, 4 E. D. Smith, 59; Phelps *v.* R. R. 19 C. B. N. S. 321; Bomar *v.* Maxwell, 9 Humph. 621; Orange Co. Bk. *v.* Brown, 9 Wend. 85; Weed *v.* R. R. 19 Wend. 534; Davis *v.* Mich.

ing the passenger to carry in his baggage a small sum for current expenses,[1] has in some cases been disapproved.[2]

When carrier's liability merges in that of warehouseman.

§ 609. After the baggage has arrived at its terminus, for which it is checked, and the passenger neglects to call for it, the company's liability as common carrier ceases. Its liability, however, as bailee for the goods, continues: first as a bailee for hire, requiring it to exercise the *diligentia diligentis*, or diligence of a good business man charged with duties such as those in question; and afterwards, when the baggage remains unclaimed for such a time as to make the bailment one practically gratuitous, as a bailee without hire, or depositary, bound to lesser diligence.[3] As to the time which must elapse in order to convert the common carrier into a warehouseman without hire, no fixed rule can be laid down. It is the practice in companies to check baggage and sell tickets for a distant terminus, with the right on the part of the passenger to lie over at intermediate stations.[4] When such a right is conceded, the railroad company cannot complain if, on a long route, the traveller is several days behind his baggage. Yet is the carrier liable as *carrier*, *i. e.* as insurer, for the baggage thus held by him, waiting the arrival of the passenger? We must recollect that charging the carrier as insurer is peculiar to our own common law; that this exceptional and highly onerous liability is not only rejected by all modern European codes as inconsistent with the public interests, but is deplored by many eminent English and American jurists; and that the tendency of the courts is to strictly limit it within its present bounds. We must recollect also, that after this peculiar liability ceases, a liability begins which is coextensive with the liability of carriers by the German and French law, *i. e.* the liability

R. R. 22 Ill. 278. See Jones *v.* Preston, 1 Tex. L. J. 66.

[1] Weed *v.* R. R. 19 Wend. 534.

[2] Chicago, &c. R. R. *v.* Thompson, 19 Ill. 578 (which is, however, apparently overruled by Illinois Cent. R. R. *v.* Copeland, 24 Ill. 332); Hickox *v.* R. R. 31 Conn. 281.

[3] See supra, § 571; Van Horn *v.* Kermit, 4 E. D. Smith, 453; Jones *v.* N. & N. Y. T. Co. 50 Barb. 193; Roth *v.* R. R. 34 N. Y. 548; Rock Isl. &c. R. R. *v.* Fairclough, 52 Ill. 106; Mote *v.* R. R. 27 Iowa, 22; Louisville, C. & L. R. R. *v.* Mahan, 8 Bush, 184. See Samuels *v.* McDonald, 11 Abb. (N. Y.) Pr. N. S. 360; *S. C.* 42 How. Pr. 344.

[4] Infra, § 611.

of a good business man exercising his specialty. Hence it is no particular hardship to the traveller, if, as a counterpoise to his omitting to call for his trunk immediately on his arrival, the company ceases to be the insurer of the trunk, and becomes its bailee for hire, liable for special negligence, indeed, but not liable for accidents, such as fire communicated without negligence on its part. Indeed, the very idea of a warehouse, with the exposure of such a building, situated in a great city, to conflagration, contrasted with the comparative non-exposure to the same danger of carriages traversing an open country, suggests a reason why, when baggage or goods reach their destination, and remain uncalled for, this special liability for fire should cease.[1] How long a period should be allowed to elapse before the insuring quality in the carrier's duty should be viewed as gone, is of course to be determined by local usage, and will fluctuate with each particular case. In New York and Kentucky it has been held that leaving a trunk over night at a station, where it is destroyed by fire, works this effect.[2] Yet, after all, the question, whether the traveller has had time to call for his baggage, is one of fact, as to which the jury alone, under the limitations above expressed, can determine.[3]

But it must be again remembered that the carrier, by being relieved of his duty as an insurer, becomes bound to the duty of a warehouseman, and should exercise the same vigilance as a good warehouseman would do under similar circumstances, providing a proper wareroom for their safe-keeping.[4] And it must also be remembered that, as has been said, there must come a limit when the strict duty even of a warehouseman, as to baggage uncalled for, ceases, and the bailee becomes liable only as a depositary, or bailee without hire.[5]

§ 610. The question has lately been agitated whether the lia-

[1] See supra, § 569.

[2] Louisville, &c. R. R. *v.* Mahan, 8 Bush, 184; Roth *v.* R. R. 34 N. Y. 548.

[3] Supra, § 571. See Van Horn *v.* Kermit, 4 E. D. Smith, 453; Ouimit *v.* Henshaw, 35 Vt. 602; Jefferson R. R. Co. *v.* Cleveland, 2 Bush, 473; Louisville, &c. R. R. *v.* Mahan, 8 Bush, 184; and supra, § 570.

Sickness on part of the passenger, detaining him on the road, will not operate to continue the insuring liability of the carrier. Chicago, &c. R. R. *v.* Boyce, 73 Ill. 511.

[4] Bartholomew *v.* R. R. 53 Ill. 227; Mote *v.* R. R. 27 Iowa, 26; Whitney *v.* R. R. 27 Wis. 327. Supra, § 572.

[5] Minor *v.* R. R. 19 Wis. 40.

bility of an insurer is to be imputed to the proprietor of a "palace" or "sleeping car," who has leased from a railroad the privilege of attaching one of his cars to a passenger train, and who receives, for special accommodations given by him, special pay, in addition to that paid as fare on the road. It has been urged that such a proprietor is, if not a common carrier, at least an innkeeper, and therefore an insurer of the property of his guests. But it has been ruled in several cases that such a proprietor is not either a common carrier or an innkeeper, but is a special bailee, who is not an insurer, but is charged with the duty of exercising in his business a degree of care and diligence proportioned to risks to which those engaging places in his cars are exposed. He is liable, therefore, for any loss, by theft or otherwise, of the property of his guests, when he could have averted such loss by the exercise of such care and diligence as good business men, under the circumstances, are accustomed to apply.[1]

Proprietors of sleeping cars not insurers.

§ 611. It is no defence that the passenger does not accompany his baggage.[2] In fact, the practice which has been already noticed, of checking baggage to a distant terminus, with liberty to the passenger to lie over at intermediate points, concedes to the passenger this right of separation.[3] But if the passenger merely drop his baggage in a car, boat, or station, without checking it, or taking for it a receipt, and then proceed himself by a subsequent boat or train, the obligation of common carriage cannot be regarded as having been undertaken. No common carrier can be expected to forward goods or baggage without specific directions.[4]

Owner may travel separately from but cannot abandon his baggage.

§ 612. A railway company is liable for the negligence of its porters in delivering baggage to the traveller's cab at the place of destination, it appearing to be the usual course for the company's servants to assist gratuitously in removing passengers' baggage from the train to au-

When carrier liable for negligence of its porter.

[1] See supra, § 46; Welch *v.* Pullman Car Co. 16 Abbott (U. S.), 352; Palmeter *v.* Wagner, 11 Alb. L. J. 149; Pullman Car Co. *v.* Smith, 73 Ill. 360; 15 Am. Law Reg. N. S. 91; Cent. L. J. July 20, 1877; Pfaelzer *v.* Car Co. 4 Weekly Notes, 240; *S. C.* 2 Weekly Notes, 324.

[2] Logan *v.* R. R. 11 Rob. (La.) 24.

[3] Wilson *v.* R. R. 21 Gratt. 654; Mote *v.* R. R. 27 Iowa, 26.

[4] Wright *v.* Caldwell, 3 Mich. 51.

thorized cabs in attendance, of which the cab which the plaintiff engaged was one.[1] And the company is liable for the negligence of one of its porters or agents in losing or injuring a trunk delivered to him by a passenger at the station.[2] It is otherwise,

See Collins *v.* R. R. 10 Cush. 506; and see supra, § 600.

[1] Richards *v.* R. R. 7 C. B. 839; Butcher *v.* R. R. 16 C. B. 13. See supra, § 577; Jordan *v.* R. R. 5 Cush. 69.

In Kent *v.* R. R. L. R. 10 Q. B. 1, the plaintiff purchased a ticket of defendant company from A. to C. On the ticket was the condition that "The company does not hold itself responsible for any delay, detention, or loss or injury arising off its lines." The journey from A. to C. is on the defendant line to B., and thence by another line. Plaintiff delivered his baggage to defendant at A., and, when the train arrived at B., a porter took the baggage from the train and put it on a truck, and, after about twenty minutes, wheeled the truck across to the platform of the succeeding line. The plaintiff saw the baggage on the platform, and this was the last seen of it. It was held that, assuming the plaintiff to be bound by the condition, the meaning of the phrase "off the company's lines," must be taken to be —not "off the lines of the railway" merely, but — "out of the custody of the company." The plaintiff's baggage was shown to have been delivered to defendant, and it lay on them to show that they delivered it to the succeeding line, which they did not show, and the plaintiff was entitled to recover against the defendant for the loss. See Midland R. R. *v.* Bromley, 18 C. B. 372, where a porter took the baggage to the auxiliary road, and this was held a sufficient delivery.

[2] 2 Redf. on R. R. 51; Camd. &c. R. R. *v.* Belknap, 21 Wend. 354; Hickox *v.* R. R. 31 Conn. 281; Lovell *v.* R. R. 34 L. T. R. N. S. 127. In this case the plaintiff, supposing that there was a train to B. at 2.50, arrived at the station about that time with her luggage. There was no train until 3.15; the porter put the luggage into a truck and told plaintiff he would label it while she got her ticket. The ticket office was open a minute or two afterward, and a ticket obtained; but on plaintiff returning to look after her luggage, part of it was missing. There was a printed notice posted in the station that the company would not be liable for luggage left in the station, and that their servants were forbidden to take charge of it. *Held*, that the porter received the luggage in the ordinary course of his duty, and that plaintiff could recover of the company for the loss. It was also held, that the printed notice must be construed to relate to luggage deposited in stations, and not to the reception of luggage by a porter while a passenger procures his ticket. There is no reference in the opinion to the fact that the contract of carriage had not been entered into by the purchase of a ticket, before the luggage was delivered to the company's servant. See, also, Leach *v.* R. R. 34 L. T. Rep. N. S. 134; and compare, to same effect, Fisher *v.* Geddes, 15 La. An. 14.

"Common carriers of passengers sometimes assume to incur no responsibility for baggage unless delivered to their agents within a certain period before the departure of the passenger. But we apprehend that in such cases, if their servants, at the proper place for receiving such baggage, accept the

however, when the trunk is not left in the exclusive possession of the porter.[1]

Owner's claim based on carrier's duty.

§ 613. The plaintiff's right to recover for lost baggage is not exclusively based on a contract, but may be maintained wherever it is shown that the bailee accepted the confidence, and undertook its discharge.[2] Thus a servant, whose ticket was paid for by his master, may sue in his own name the carrier for lost baggage;[3] and a person whose ticket was paid for by friends has the same right.[4] Indeed, in view of the fact that the carrier who undertakes a bailment can recover the value of his services in a suit against the bailee, a passenger, even on a free ticket, has a right to recover against the carrier for injury caused to baggage by the carrier's negligence.[5] It should be at the same time remembered that the carrier is not an *insurer* of baggage he carries gratuitously, though if he undertakes the bailment he must discharge it with the care usual to good business men under the circumstances.[6]

Notices restrictive of liability.

§ 614. The general subject of such notices has been already discussed.[7] It should be observed that the general sense of the authorities is that a carrier of passengers may establish any *reasonable* regulation which he may deem necessary for the safety of their baggage, and is not liable where a passenger, knowing of such regulation, loses his baggage through his own neglect or refusal to comply with it.[8]

X. LIVE-STOCK.

§ 615. By the English common law, as we have already had

same, to be carried with the passenger, within any reasonable time, as the same day, or the night following, or the next morning, they must be regarded as having accepted it as common carriers, and their responsibility as such attaches." 2 Redf. on Law of Railways, 51.

[1] Agrell *v.* R. R. 34 L. T. N. S. 134, n.

[2] See supra, § 549; infra, § 622.

[3] Hall *v.* Cheney, 36 N. H. 26; Marshall *v.* R. R. 11 C. B. 655; 7 Eng. Law & E. 519. See supra, § 437.

[4] Van Horn *v.* Kermit, 4 E. D. Smith, 453.

[5] See Hall *v.* Cheney, 36 N. H. 26; Hannibal *v.* Swift, 12 Wall. 262. See supra, § 437.

[6] See Flint *v.* R. R. Sup. Ct. Mich. 1877; 5 Cent. L. J. 285. In Cohen *v.* R. R. L. R. 2 Exch. Div. App. Cas. 255; supra, § 599, it was intimated that luggage (up to the weight specified for payment) is taken gratuitously.

[7] Supra, §§ 585–590.

[8] Gleason *v.* Goodrich Transp. Co. 32 Wis. 85. Supra, § 585.

frequent occasion to observe, a common carrier insures to deliver goods which he undertakes to carry, unless prevented by *vis major*, or such extraordinary casualties as are called the acts of God. It has also been observed that this doctrine is peculiar to the English law, no such unqualified duty being laid on the carrier either by the Roman law, or by any modern European code; and that in our own practice, so inconvenient has the doctrine been, in mixing up two departments of business, that the courts have permitted it to be qualified by two important exceptions. In the first place, it has been held that by notice, certainly by contract, the carrier can relieve himself from this onerous obligation of insurance. In the second place, it is held that this obligation does not apply to passengers, being restricted to goods. The questions now immediately before us are whether live-stock can be called "goods," in reference to the duty in question; and secondly, whether the duty of the person who undertakes to transport live-stock from point to point by carriage is that of a common carrier by the English common law.

Live-stock not "goods."

If the question were the construction of a statute which simply determines the question of property, there could be no doubt that live domestic animals might be viewed as "goods." But the question before us is not pointed at live-stock simply in this narrow relation; for we have now to inquire whether live-stock are to be treated as goods, so far as concerns their capacity for being carried in car or boat from point to point. And here an important difference between these two classes of property arrests us at once. The cask of oil, or the barrel of potatoes, has in it no power of voluntary motion, and no qualities of disturbance or perishability, save those which may be determined by an inspection of the article itself. Live animals, on the other hand, have the power of voluntary motion, and have in them qualities of disturbance and perishability which cannot be determined until they are tried by this particular mode of conveyance. The quietest ox may be possessed by a frenzy of passion when placed in a freight car, with the engine screaming ahead of him, the boards shaking underneath him, and the train rumbling and jerking behind. Even strength and endurance, in stiffening the brute system to a more continuous and vehement resistance to the mo-

tion of the cars, may prove a greater hindrance to safe travel than the supple weakness which yields helplessly to the jar. There are features, therefore, of live-stock, which take them out of the category of "goods." There are undoubtedly perishable goods, such as fruit, but the perishability of such articles is patent, and hence distinguishable in a most material relation from the perishability of cattle.[1]

Carriers of live-stock not "common carriers."

§ 616. Some portions of the duties of persons conveying live-stock are undoubtedly those of the common carrier. In both cases a carriage suitable to the particular service must be provided, and servants put in charge who are capable of faithfully running boat or train. But in the conveyance of live-stock an important duty arises which has no counterpart in the ordinary service of a common carrier. The common carrier sees that the goods committed to him are safely packed in a suitable carriage, and then his specific charge over them is confined to the propulsion of the carriage containing them. The transporter of cattle, on the other hand, is required to watch them either personally or through the owner, who is for this purpose the servant of the transporter, and to feed and refresh them when they are on the road. In England this question does not present itself prominently, for the reason that in England journeys of this kind last but a few hours. In this country, however, such journeys may last a week, and the stock will perish unless they are attended with peculiar care. They must be constantly inspected, lest by the strong, in particular cases crowding on the weak, the weak be destroyed. They must be not merely fed and watered, but they must from time to time be washed, and the cars cleansed and sprinkled. Duties of this kind are the duties of the drover, and not of the common carrier, and require the exercise of skill, experience, and diligence, which a

[1] See supra, § 565; South Ala. R. R. v. Henlein, 52 Ala. 614, where this passage is approved; and see, also, German v. R. R. 38 Iowa, 127.

Hence, while agreeing to the correctness of the decision in Blower v. R. R. L. R. 7 C. P. 662, I cannot adopt that portion of the argument of Willes, J., which is based on the assumption that the two kinds of perishability just noticed have the same incidents. More reasonable is the conclusion in Nugent v. Smith, L. R. 1 C. P. D. 423, cited supra, §§ 553, 565; and see, as conclusive of the English common law view, cases cited in note to § 616.

drover alone, from his peculiar training, fraught as it is with a knowledge of the habits of animals, through continuous care of and dwelling with them, can be expected to possess.[1] We have no more right to charge the common carrier with the liabilities of the drover, than we have to charge the drover with the liabilities of the common carrier. Undoubtedly we must hold the carrier who undertakes to transport live animals chargeable with the same duties, as to adequacy of road, carriage, and motive power, as we do the carrier who undertakes to transport human beings; and undoubtedly, also, we must charge him specially (if he undertakes this) with the duty of tenderly watching and caring for the dumb creatures who are thus placed under his charge. But we cannot, if we thus create a new form of mandate for him, hold him for insurance as we would hold the ordinary carrier of goods in bale or package. We must treat him as a mandatary, who, on the law heretofore expressed, is bound to perform the business accepted by him with the diligence with which it would be conducted by a good, competent, and faithful business man, who, experienced in this particular work, undertakes its discharge.[2]

[1] See Maynard *v.* Buck, 100 Mass. 40; Cayzer *v.* Taylor, 10 Gray, 274; Sullivan *v.* Scripture, 3 Allen, 564; Shrewsbury *v.* Smith, 12 Cush. 177.

[2] White *v.* Winnisimmit Co. 7 Cush. 155; Squire *v.* R. R. 98 Mass. 239; Evans *v.* R. R. 111 Mass. 142; Clarke *v.* R. R. 14 N. Y. 570; Penn *v.* R. R. 49 N. Y. 207; Farnham *v.* R. R. 55 Penn. St. 53; Colton *v.* R. R. 67 Penn. St. 211; Mich. South. R. R. *v.* McDonough, 21 Mich. 166; Lake Shore R. R. *v.* Perkins, 25 Mich. 329. See Angell on Carriers, § 214; 2 Redf. on R. R. § 168.

As sustaining the positions of the text, the reader is referred to an able opinion of Christiancy, J., in Mich. South. R. R. Co. *v.* McDonough, 21 Mich. 189. See, also, remarks of Parke, B., in Carr *v.* R. R. 7 Exch. 712, 713; Denio, J., in Clarke *v.* R. R. 14 N. Y. 573.

The following valuable criticism on the English cases is from the opinion of Judge Christiancy, above cited: —

"In McManus *v.* R. R. 2 H. & N. 702, the court say: 'We are able to decide the case without referring to the second point made by the defendants, viz.: the alleged distinction between the liability of carriers as to the conveyance of horses and live-stock, and ordinary goods; but should the question ever arise, we think the observation which fell from Baron Parke, in Carr *v.* R. R., is entitled to much consideration.' . In the same case, on appeal in the exchequer chamber, 4 H. & N. 346, Earle, J., speaking of the condition of the contract in that case, says: 'This condition is imposed in respect of horses. And I find neither authority nor principle for holding that defendants were

§ 617. From this view the following conclusions result: (*a*) *A carrier of live-stock is not an insurer, but his duties, when*

bound to receive living animals, as common carriers.'

"In Palmer *v.* R. R. 4 M. & W. 758, Parke, B., interrupting counsel, asks: 'Does the rule as to negligence apply to live animals, as horses? Of course, if they are stolen, it would; but is it so when they are delivered, although hurt or damaged? If misdelivered, the carriers would be liable; but they would not be liable for a mere accident to an animal, supposing the carriage to be safe and good and properly conducted.' This case was decided in 1839, when the question was comparatively a new one. And it is quite manifest that Baron Parke, in the above remarks, had reference to the question as one of common law merely; and when he comes to decide the case (on pp. 767, 768), holding that if the company choose to carry (horses), and do not take care to accept them with a limited responsibility, then, by accepting them, they must be held to have accepted as common carriers, it is equally manifest that the decision is rested wholly upon the statute which he cites, expressly enumerating '*cattle*' with 'other goods, wares, and merchandise, articles, matters, and things,' which the company were authorized to carry, placing all apparently upon the same ground. The conclusion from the statute would seem to have been quite as broad, at least, as the premises would warrant. But it had the statute, such as it was, to rest upon. It may, however, well be doubted, whether the decision would have been the same if the question had arisen for the first time after the decision in Oxlade *v.* R. R. 5 C. B. N. S. 680, to be hereafter noticed, and that of Pardington *v.* South Wales Co. 38 Eng. Law & Eq. 432, decided in November, 1856. In the latter case the question arose upon the reasonableness of a notice given by the company to a shipper of cattle under 17 & 18 Vict. c. 31, § 7 (Railway Traffic Act of 1854), which expressly held the company liable for the loss of, or injury done to, 'any horses, cattle, or other animals,' or to any goods, &c., unless the conditions, fixed by the notices, &c., should be held by the court to be just and reasonable. Martin, B. (interrupting counsel), says: 'The common law liability of common carriers does not apply to cattle at all. In former days they were not carried. They might, therefore, but for the statutes, make what conditions they pleased.' Pollock, C. B., also says: 'Why should they not say, If you insist upon our carrying your cattle, we will carry them; but it must be upon the terms that we shall not be responsible for any injury which may happen to them? They hold themselves out as carriers of horses and cattle, *sub modo*.' The drovers went with the cattle, as in the present case; and Martin, B., in giving his judgment, says: "I doubt the liability of the company at all, even if there had been no stipulation on their part; for the fault, if any, was the fault of those who went by the train with the cattle.' All the judges held the notice reasonable.

"It will be noticed that in England, by the statute cited, railroad companies are common carriers of cattle, horses, &c., and bound to carry as such, if insisted upon by the shipper, except as they may limit their liability by notices or contracts which the court hold reasonable. And that the statute cited in Palmer *v.* Grand Junction Co. 4 M. & W. 758, was

not prescribed in writing, are those of a special agent to transport the cattle to their place of destination, he supplying suitable and safe carriage and motive power. "While common carriers," says Allen, J., in a leading case in New York, "are insurers of inanimate property against all loss and damage except such as is inevitable, or caused by public enemies, they are not insurers of animals against injuries arising from their nature and propensities, and which could not be prevented by foresight, vigilance, and care.[1] . . . . The liability of the defendant is, however, to

there held to have the effect to make them common carriers of such property, if they accepted it without conditions. (In that case, however, there was no evidence of their having held themselves out as doing such business *only* on special terms.) But this case has been frequently cited in this country, as if it had been made upon common law reasons only, and applied to cases where there were no such statutes as that upon which it was clearly rested by the court. Thus (without enumerating other instances), in Kimball *v.* Rutland Co. 26 Vt. 247, the court, after very correctly holding that the company, by publicly offering to take cattle at one price with the common law liability, and at another and less rate when the owner assumed the risk, thereby held themselves out and became common carriers of cattle, proceed to cite this case of Palmer *v.* Grand Junc. Co. as proving the proposition, that 'the fact that the company have undertaken such transportation for *hire*, and for such persons *as choose to employ them*, establishes their relation as common carriers.' The remark was correct enough, if applied to the facts of the case before them; but the language is much broader than is warranted by the case cited.

"Upon sound principle, and upon the English authorities above cited, I think it clear the transportation of cattle by railroad does not come within the reasons of the law applicable to common carriers, so far as relates to the care of the property and responsibility for its loss or injury."

It is clear that the carrier is not liable for injuries to cattle caused by their own restlessness. Smith *v.* R. R. 12 Allen, 531; Kendall *v.* R. R. L. R. 7 Exch. 373.

To the same effect is Lake Shore R. R. *v.* Perkins, 25 Mich. 341. As rejecting the doctrine of the text, and holding that a company which undertakes to carry live-stock is a common carrier, see Kimball *v.* R. R. 26 Vt. 247; Wilson *v.* Hamilton, 4 Ohio St. 722; Kansas R. R. *v.* Nichols, 9 Kans. 235; Atchison R. R. *v.* Washburn, 5 Neb. 117; and cases cited supra, § 595.

As to transport of live pigeons, and the duties of the carrier in such case, see Am. Ex. Co. *v.* Phillips, 29 Mich. 516.

[1] Clarke *v.* R. R. 14 N. Y. 570; Mich. South. &c. R. R. *v.* McDonough, 21 Mich. 165; Angell on Carriers, § 214 *a*.

The fact that the owner knows a cattle car to be defective does not relieve the carrier. Pratt *v.* R. R. 102 Mass. 557.

That an agreement to relieve the carrier from the consequences of negligence is void, see supra, § 595.

be determined by the agreement of the parties. The railroad company, by reason of the written contract, occupied the position of a private carrier for hire, and is only liable for the performance of the duty undertaken according to its terms, or for some wrongful act, either wilful or negligent. The agreement furnishes the extent of the liability, unless a loss has occurred from the wilfulness or negligence of the carrier." [1]

§ 618. (*b*) *By special agreement the owner or his agent may be placed in charge of the cattle, and the duty of feeding and caring for them transferred to him by the carrier.*[2] No doubt this is an apparent departure from the rule heretofore expressed, that by no special agreement can the carrier be relieved from liability for his neglect. But it may be justly argued that the duty of the carrier, regarding him in the light in which he is placed in the preceding sections, is better performed when he transfers the care of the cattle to their owner or driver than when he undertakes such care himself. The carrier cannot be expected to understand the management of cattle so well as one trained to the work; and the interests, if not sympathies, of the master will lead him to a tenderer consideration of the wants of his creatures than the carrier would be likely to give. Yet there are some duties which the carrier cannot devolve on others. So far as concerns the running of the train and the providing of adequate carriages, he is bound to bestow on the animals committed to his charge the same grade of diligence as it is required that he should render to the human beings on his trains; and what would be negligence, so far as concerns want of safety of carriage or management, in the latter case, would be considered negligence in the former. In addition to this, there are other duties from which it stands to reason the carrier cannot by such special agreement rid himself. He alone can stop the cars at places necessary for refreshment, and he must be held liable for the consequences

[1] Farnham *v.* R. R. 55 Penn. St. 53; Colton *v.* R. R. 67 Ibid. 211; New Jersey St. Nav. Co. *v.* Merchants' Bank, 6 How. (U. S.) 344; Angell on Carriers, §§ 225, 226; Dorr *v.* N. J. St. Nav. Co. 11 N. Y. 485.

When the owner of stock undertakes to load and unload his stock, and take charge of them, distinct acts of negligence must be proved on behalf of the carrier in order to impose liability on the latter. Clark *v.* R. R. 64 Mo. 440.

[2] As to such agreements generally, see supra, § 595.

of negligence should he fail so to do. And the same result follows if he fails to take those measures for cleaning the cars, which he alone has power to carry out.[1]

Duty assumed to be diligently discharged.

§ 619. In any view, if the carrier undertakes the special duty of caring for live-stock, he is bound to exercise this office not as an insurer, but as a special mandatary or agent, required to show the due diligence usual among persons skilled and experienced in this department of industry, as is elsewhere explained.[2] It is true that he is not liable for any injuries caused by the inherent viciousness of the animal carried.[3] Nor, when he assumes in any way the management of such animal, can he excuse himself on the ground of special contract exempting him from the consequences of restiveness, if the restiveness was in any way provoked by himself. Thus a clause in a contract for the transport of a cow by railroad, that the carrier will not be responsible for "damage caused by the kicking, plunging, or restiveness of the animal," does not release the defendants from the consequences of negligence in the management of the cow, although it appear that the injury to her was caused by her restiveness when imprudently let out by a servant of the defendants.[4]

§ 620. It has just been said that the carrier is liable for negligence in respect to any of the duties which can only be performed by himself. A carrier, for instance, is liable, if he negligently overcrowd his cars with stock;[5] and where live hogs are shipped in railroad cars, and by reason of their crowded condition become heated, which disease can only be allayed and their lives saved by throwing water upon them while in the cars, and where this fact is made known to the conductor of the train, it being customary for the company to apply water in such cases, and

[1] See cases above cited, and Gill *v.* R. R. L. R. 8 Q. B. 186; Phillips *v.* Clark, 2 C. B. N. S. 156; Squire *v.* R. R. 98 Mass. 239; Poucher *v.* R. R. 49 N. Y. 263; Ill. Cent. R. R. *v.* Adams, 42 Ill. 474; Indianap. R. R. *v.* Hall, 58 Ill. 409; Lee *v.* R. R. 72 N. C. 236; South Ala. R. R. *v.* Henlein, 52 Ala. 606.

[2] See Pitre *v.* Offutt, 21 La. An. 679.

[3] Clarke *v.* R. R. 14 N. Y. 570; Hall *v.* Renfro, 3 Metc. (Ky.) 51; Conger *v.* R. R. 6 Duer, 375. See, as to contributory negligence in this respect, supra, § 565; infra, § 621.

[4] Gill *v.* R. R. L. R. 8 Q. B. 186; Phillips *v.* Clark, 2 C. B. N. S. 156; and other cases cited supra, § 565.

[5] Ritz *v.* R. R. 3 Phil. R. R. 82.

having the necessary conveniences for applying the water, the company, in case of neglect in this respect by its servants, is liable for the consequent injury.[1] It is said, however, that the carrier is not chargeable with a want of proper diligence for allowing cattle to stand in the car from ten o'clock P. M. to nine A. M., after the passing of the regular cattle train, which neglected to take the car load.[2]

§ 621. How far the carrier may be made liable for negligences of the owner in matters which the carrier assumes is illustrated by two interesting English decisions. A greyhound was delivered to a canal company, with a string round his neck; and the company gave for him an ordinary carrier's receipt. The dog was fastened by this string to a box, but slipped his head through the noose. It was held that the carrier ought to have secured him or locked him up, as the string was evidently not meant nor fit to be a permanent fastening.[3] But where another greyhound, delivered by its owner to the servants of a railway company, who were not common carriers of dogs, to be carried, and the fare demanded was paid; at the time of delivery the greyhound had on a leathern collar with a strap attached to it; in the course of the journey, it being necessary to remove the greyhound from one train to another which had not then come up, it was fastened by means of the strap and collar to an iron spout on the open platform of one of the company's stations, and, while so fastened, it slipped its head from the collar, and ran upon the line and was killed: it was ruled that the fastening the greyhound by the means furnished by the owner himself, which at the time appeared to be sufficient, was no evidence of negligence on the part of the company.[4] So it has been held that the carrier is not liable for damage to horses caused by neglect of the owner in arranging their halters.[5] Where an animal is injured at sea, partly by the violence of a storm, and partly by its own struggling, it is clear that the carrier is not liable, without proof of negligence on his part aggravating the perils.[6] And it is plain that

[1] Ill. Cent. R. R. *v.* Adams, 42 Ill. 474.

[2] Ill. Cent. R. R. *v.* Waters, 41 Ill. 73.

[3] Stuart *v.* Crawley, 2 Stark. 323.

[4] Richardson *v.* R. R. L. R. 7 C. P. 75.

[5] Evans *v.* R. R. 111 Mass. 142; and see Roderick *v.* R. R. 7 W. Va. 54; Miltemore *v.* R. R. 37 Wisc. 196.

[6] Nugent *v.* Smith, L. R. 1 C. P. D. 423. Supra, § 553.

a carrier is not bound for injuries to an animal attributable exclusively to its own viciousness or restlessness.[1]

XI. GRATUITOUS PARCELS.

Company liable as special bailee for gratuitous parcels.

§ 622. A custom prevails generally on our railroads and other lines of common carriage, for baggage-masters, conductors, and other officers to carry parcels from point to point gratuitously, as a favor to customers of the road, the officers taking this trouble receiving from time to time presents from those thus obliged, but the pay being purely voluntary. The same custom exists among steamboats and other vessels undertaking the carriage of goods by water. Cases of this kind may be presented in two distinct phases. The first is when this custom is part of the carrier's ordinary business, and is known to the management of the road, as it necessarily is on our great railway lines. The second is when this special mode of carrying parcels is by agreement done at the owner's own risk, and with the knowledge on both sides that the officer taking the parcel does so out of the range of his prescribed duties. In the latter case the company is not liable unless for such negligence as is the basis of suit under the maxim, *Sic utere tuo ut non alienum laedas*.[2] In the former case, interesting questions arise. Is the company a common carrier as to the parcels thus carried by its subalterns? and is it to be treated as insuring the same, according to the law applicable to common carriers? These questions must be answered in the negative. To enable goods (not baggage) to be forwarded as freight, custom, if not contract, requires that certain formalities should be pursued, which formalities are not here attempted. What liability, then, if we must reject that of the common carrier at common law, does the company assume as to parcels which it thus permits its officers to carry? It has been said that its liability is simply for gross negligence: *e. g.* that of a depositary or other gratuitous bailee.[3] But this conclusion rests on two assumptions, neither of which can be

[1] Supra, § 565.

[2] Cincinnati & Lou. Mail Line Co. *v.* Boal, 15 Ind. 345.

[3] Haynie *v.* Waring, 29 Ala. 263. See King *v.* Lenox, 19 Johns. 235; Sewall *v.* Allen, 2 Wend. 327, reversed by Sewall *v.* Allen, 6 Wend. 251; Choteau *v.* Steamboat St. Anthony, 16 Mo. 216. See supra, § 547.

sustained. The first is that this particular contract is gratuitous, whereas, (1) these conveniences are given to persons who are *customers* of the road; and (2) if the salary or income of the officers carrying such parcels is increased by these gratuities, and the company secures the service of these officers at a cheaper rate than it could do otherwise, then the carriage is not strictly gratuitous, though there be no such fixed pay as is necessary to constitute the agreement of common carriage. The second mistake is that in mandates, supposing them to be gratuitous, the diligence required is only the ordinary diligence of seeing what everybody sees, and that consequently the only negligence for which the mandatary is responsible is gross negligence, or *culpa lata*. But this, as has been seen, is not the law. Mandate means special confidence imposed and accepted; and whenever this takes place, and a service is done in pursuance of such service, then the mandatary can recover compensation from the mandator, and is bound to the mandator to apply to the mandate that special diligence which every good business man is bound to exhibit in every transaction which in his particular department he undertakes.[1] At the same time, the carrier in such cases, we must repeat, having his duties modified by usage or special agreement, is not a common carrier in the sense of being an insurer.

[1] See on this point discussion in 2 Redfield on Rail. § 169, and cases there cited; Farmers' & Mech. Bk. *v.* Champ. Trans. Co. 23 Vt. 186; Maynard *v.* R. R. 19 N. H. 122; Cincin. & Lou. Mail Line *v.* Boal, 15 Ind. 345; Pierce *v.* R. R. 23 Wis. 387. Supra, §§ 438, 549, 613.

CHAPTER VI.

PASSENGER CARRIERS.

Who are passenger carriers, § 625.
Passenger carriers not insurers, § 626.
But bound to diligence of good apeçialist in their department, § 627.
Carriage must be adequate to the work, § 628.
Suitable seats must be provided, § 628 *a*.
Carrier not liable for defects of carriage caused by *casus*, § 630.
Nor for latent defects, § 631.
No defence that maker of carriage was competent, § 633.
Track of road must be kept in safe running order, § 634.
All practicable improvements in transportation must be adopted, § 635.
Diligence to be that which a good carrier of the particular grade is accustomed to exact, § 636.
But must rise in proportion to the risk, § 637.
Same rule applies to steamboats, § 638.
And to horse railways, § 639.
Diligence to be proportioned to capacity, § 640.
"Free" passengers: liability to, § 641.
Agreements that they should take all risks, § 641 *a*.
Trespassers and visitors, § 642.
Exception where free passenger acts as employee, § 643.
No defence that road is under government control, § 644.
Nor that train was an "excursion" train, § 645.
Removal of improper person from car, § 646.
Liable to passenger for neglect of duty in this respect, § 646 *a*.
Liable for misconduct of servant to passenger, § 646 *b*.
Stopping at spot where there is no platform, § 647.
Carrying passenger beyond station, § 647 *a*.
Disabling passenger to dismount, § 647 *b*.
Suddenly and without notice starting train, § 648.
Conductor must notify of danger, § 649.
Conductor must notify of approach of station, § 650.
Conductor must notify when train is about to start, § 651.
Bell-rope must be accessible, § 651 *a*.
Must be secure access to and egress from cars, § 652.
Platforms must be adequate, § 653.
And must have safe access and egress, § 654.
And so of access to road by level crossing, § 655.
And so of stairway and passages in boat, § 656.
And so of modes of disembarking passengers to and from boat, § 657.
Injury to passengers from cattle on track, § 659.
Passengers leaning out of carriage windows, § 660.
Burden of proof, § 661.
Liability to passenger for failure in punctuality, § 662.
Auxiliary lines, § 663.
[For contributory negligence of passenger, see §§ 353–381.]

§ 625. A COMMON CARRIER of passengers, to recur to a definition already given, is one who transports such passengers as choose to employ him from place to place for reward.[1] A person driving his own carriage, therefore,

Passenger carriers are those who carry all

[1] See supra, § 545.

who choose to employ them.

who gives a seat in it to another, does not subject himself to the liabilities of common carriers.[1]

Are not insurers.

§ 626. The element of insurance, which by the English common law exists in contracts by a common carrier to carry goods, does not apply, according to the same law, to the carriage of passengers.[2]

But bound to diligence of specialist.

§ 627. But while a common carrier of passengers is not an insurer, he is bound to the diligence which a good specialist in his particular line of business is accustomed to exert.[3] His care and diligence must be in proportion to the risk of the machinery he employs and of the work he undertakes.[4]

Carriage must be adequate to the work.

§ 628. The carrier must have carriages adequate to the work to which they are subjected, and he is liable for any damage caused by failure of his duty in this respect.[5]

Suitable seats must be provided.

§ 628 *a*. Suitable seats, also, must be prepared for passengers, such accommodations to be graded by the character and business of the road. To put passengers into unsuitable places, whereby they incur damage, may be negli-

[1] Moffatt *v.* Bateman, L. R. 3 P. C. 115.

[2] Aston *v.* Heaven, 2 Esp. 533; Knight *v.* R. R. 56 Me. 234; Munroe *v.* Leach, 7 Metc. 274; Feital *v.* R. R. 109 Mass. 398; Meier *v.* R. R. 64 Pa. St. 225; Frink *v.* Potter, 17 Ill. 406; McPadden *v.* R. R. 44 N. Y. 478; and cases hereafter cited.

[3] Supra, § 48; Sharp *v.* Grey, 9 Bing. 457; Christie *v.* Griggs, 2 Camp. 79; Skinner *v.* R. R. 5 Exch. 787; Burns *v.* R. R. 13 Ir. C. L. Rep. 543; Stokes *v.* R. R. 2 F. & F. 691; Ford *v.* R. R. 2 F. & F. 730; Stokes *v.* Saltonstall, 13 Peters, 181; Railroad *v.* Pollard, 23 Wall. 341; Meier *v.* R. R. 64 Pa. St. 225; Pendleton St. R. R. *v.* Shires, 18 Ohio St. 255. See infra, §§ 636, 637.

[4] Knight *v.* R. R. 56 Me. 234; Caldwell *v.* Steamboat Co. 47 N. Y. 282; Meier *v.* R. R. 64 Pa. St. 225; Heasle *v.* R. R. 62 Ill. 501; Brunswick R. R. *v.* Gale, 56 Ga. 322; and cases cited infra, § 637.

As to reciprocal duties of carrier and passenger, see Contributory Negligence, supra, § 353. The authorities on this point are collected in an excellent opinion of Bellows, J., in Taylor *v.* Grand Trunk R. R. 48 N. H. 313.

[5] Curtis *v.* Drinkwater, 2 B. & Ad. 169; Crofts *v.* Waterhouse, 3 Bing. 319; Bremmer *v.* Williams, 1 C. & P. 414; Taylor *v.* Day, 16 Vt. 566; Derwort *v.* Loomer, 21 Conn. 245; Fuller *v.* Naugatuck R. R. 21 Conn. 557; Hollister *v.* Nowlen, 19 Wend. 611; Stokes *v.* Saltonstall, 13 Pet. U. S. 181; McPadden *v.* N. Y. Cent. R. R. 44 N. Y. 478; *S. C.* 47 Barb. 247, qualifying Alden *v.* N. Y. Cent. R. R. 26 N. Y. 102; Hegeman *v.* West. R. R. 16 Barb. 353; 13 N. Y. 9.

gence.[1] If the carrier overcrowd the carriage, and injury result, he is liable for the damage.[2]

§ 629. The carrier must also see that his carriages are kept in due repair.[3] But the mode of diligence varies with each particular case, although its standard is the same with all.[4] It must be the diligence of a good business man in his specialty, which, as has already been seen, is equiva-

Carriage must be kept road-worthy.

[1] Pittsburg, &c. R. R. *v.* Caldwell, 74 Penn. St. 421; Crissey *v.* R. R. 75 Penn. St. 83. See Whipple *v.* R. R. 2 Weekly Notes, 559; 33 Leg. Int. 140.

[2] Jackson *v.* R. R. L. R. 10 C. P. 49; *S. C.* aff. on App. L. R. 2 C. P. D. 125.

"If the overcrowding," remarks the London Law Times of February 24, 1877, when criticising this case, "was caused by a sudden and unexpected rush of passengers which the company could not be expected to provide against, and there were a sufficient staff of servants to regulate such traffic as could fairly be expected, and these servants did their best to prevent overcrowding, probably no reasonable jury would find a verdict against the company. On the other hand, if the occasion were one on which it must be known that there would be a crowd (as would be the case on a bank holiday, or on Christmas Day), and there were only one or two servants on the platform, and no measures were taken to prevent overcrowding, the jury might not unreasonably come to the conclusion that there was negligence on the part of the company in carrying on their business, which brought about the accident. Surely all these questions are questions of fact for the jury; or as Keating, J., said, in Hogan *v.* R. R. 28 L. T. R. N. S. 271, 'if railway companies collect crowds for their own interest, it is for the jury to say what precautions they ought to take, and how far they have taken them.'"

[3] Ibid.; Curtiss *v.* R. R. 20 Barb. 282; 18 N. Y. 534.

[4] In Meier *v.* R. R. 64 Pa. St. 225, the question in the text is thus discussed by Agnew, J.: . . . . "The language of Judge Gibson, taken from N. Jersey Railroad Co. *v.* Kennard, 9 Harris, 204, that a carrier of either goods or passengers is bound to provide a carriage or vehicle perfect in all its parts, in default of which he becomes responsible for any loss or injury that may be suffered, has no relation to the question now before us. The case he was considering was that of a car made without guards at the windows to prevent the arms of passengers being thrust out, to their injury, which he considered a defect in the construction of the car, making the carrier liable for negligence. The car was not perfect in its parts, as he thought. The car was imperfect in construction, and therefore not adapted to the end to be attained, to wit, security. It may not be amiss to say that this opinion of the chief justice as to window guards, was not sustained by the court in banc, and has since been overruled in Pittsburg & Connellsville Railroad Co. *v.* McCleary, 6 P. F. Smith, 294. The doctrine we are now asked to sustain is, that though the car is perfect in all its parts, if imperfect from some latent and undiscoverable defect, which the utmost skill and care could neither perceive nor provide against, the railway company must still be held responsible for injury to passengers on

lent to the *diligentia diligentis patrisfamilias*. And as the specialty varies so must vary the mode of diligence required. The diligence of a stage-coach maker is very different from the diligence of the maker of locomotives and cars. The diligence to be exerted by the stage-coach maker must be such as a good stage-coach maker is accustomed to exert, the diligence to be exerted by the maker of locomotives and cars must be such as a good manufacturer in his particular line is accustomed to exert. But the railroad company, as we will have occasion further to see, does not warrant the security of the carriage. It is liable for failure to apply the degree of care, skill, and diligence, which good business men of the class are accustomed, under similar circumstances to apply. But perfect skill and care are not required; nor is the company compelled to exert an excessiveness of caution which would defeat the object for which the road was built.[1]

§ 630. In accordance with the views heretofore expressed,[2]

the ground of an absolute liability for every defect. The plaintiff in error in effect contends that the defendants were warrantors against every accident; but even in the case referred to, Judge Gibson denied this rule. He said of the carrier, he is bound to guard him (the passenger) from every danger which extreme vigilance can prevent. This expresses the true measure of responsibility. He answered a point in these words,—'That the company is responsible only for defects discoverable by a careful man, after a careful examination and exercise of sound judgment,'—thus: 'This is true, but were there such an examination and exercise of judgment? The defective construction of the car must have been obvious to the dullest perception,' &c. The same rule was laid down in Laing *v.* Colder, 8 Barr, 482. Judge Bell says, it is long since settled that the common law responsibilities of carriers of goods for hire do not, as a whole, extend to carriers of passengers. The latter are not insurers against all accidents. But though (he says) in legal contemplation they *do not warrant the absolute safety of* their passengers, they are bound to the exercise of the utmost degree of diligence and care. The slightest neglect against which human prudence and foresight may guard, and by which hurt or loss is occasioned, will render them liable in damages. The same doctrine will be found in substance in Railroad Co. *v.* Aspell, 11 Harris, 149, and Sullivan *v.* The Philadelphia & Reading Railroad Co. 6 Casey, 234, and in other cases. In all the Pennsylvania cases, it will be found that negligence is the ground of liability on the part of a carrier of passengers. Absolute liability requires absolute perfection in machinery in all respects, which is impossible."

[1] See Readhead *v.* R. R. L. R. 2 Q. B. 412; *S. C.* L. R. 4 Q. B. 381; Stokes *v.* R. R. 2 F. & F. 691; Murray *v.* R. R. 27 L. T. N. S. 762; Mich. Cent. R. R. *v.* Coleman, 28 Mich. 440.

[2] Supra, § 586.

the carrier is not liable for defects which could not have been averted except by the exercise of an excess of diligence incompatible with the performance of the duties of a common carrier. Thus, he will not be held liable for damages to a passenger caused by the breaking of a rail through extreme cold, when, in point of fact, to make rails of such a character as uniformly to withstand such extreme cold, would involve a degree of caution and expense which, if carried into every department, would make railway transportation impracticable.[1]

Carrier not bound for breakage caused by *casus.*

§ 631. Nor is the carrier liable, so far as concerns passenger carriage, for damages incurred through latent defects which could not have been discovered by examination by any usual and practicable tests.[2]

Nor for latent defects.

[1] McPadden *v.* R. R. 44 N. Y. 478; *S. C.* 47 Barb. 247, qualifying Alden *v.* R. R. 26 N. Y. 102; Heazle *v.* R. R. 76 Ill. 501. See, however, Frink *v.* Potter, 17 Ill. 406; and see Caldwell *v.* N. J. Steamboat Co. 47 N. Y. 282.

[2] Grote *v.* R. R. 2 Exch. 251; Readhead *v.* R. R. Law Rep. 2 Q. B. 412; aff. in Exch. Ch. Law Rep. 4 Q. B. 379; Hegeman *v.* R. R. 13 N. Y. 9; Toledo, &c. R. R. *v.* Conroy, 61 Ill. 162. See Meier *v.* R. R. 64 Penn. St. 225; and see also Angell on Carriers, 5th ed. § 538, where the correct view is given in the note, as distinguished from the text.

In Richardson *v.* R. R. L. R. 10 C. P. 486; 33 L. T. N. S. 248, the plaintiff was injured through the breaking of an axle on a truck not belonging to the defendants, but passing over their line and attached to a train of theirs, and paying toll to them, as provided for in the Railway Clauses Consolidation Act. It is the practice to examine all foreign trucks at the place where they first come on to the defendants' railway. Such examination is not minute enough to insure the discovery of a crack in the axle, which, existing in this case at the time when the examination was made, afterward caused the fracture and the consequent accident to the train in which the plaintiff was a passenger. The truck in question, when examined by the defendants' servants, was found to be defective in another respect, and was put into the owners' hands for repair. The latter remedied this, and observed another patent defect, which, however, was not a source of danger, and could not be rectified without the truck being unloaded; they, however, told the defendants that they wished to overhaul it thoroughly. The defendants' chief examiner, agreeing in the opinion that the patent defect was in no way dangerous, and seeing that the first defect had been remedied, gave orders for the truck to be allowed to proceed to its destination, marking it "Stop at Peterborough for repairs when empty." Before arriving at its destination the truck broke down, as described. The jury found that the defect in the axle might have been discovered upon a fit and careful examination of it, but that it was not the duty of the defendants to examine it so minutely as to enable them to see the crack; it was, however, their

§ 632. But where the defect is one which usual and practicable tests would have discovered, liability is imposed. Thus in an English case, where the plaintiff, a passenger in a railway carriage, got up from his seat and put his hand on the bar which passed across the window of the carriage, with the intention of looking out to see the lights of the next station; and the pressure caused the door to fly open, and the plaintiff fell out and was injured, but there was no further evidence as to the door or its fastenings; it was held, in 1873, both by the queen's bench and the exchequer chamber, that there was evidence to sustain a verdict against the carrier.[1]

No defence that maker of carriage was competent.

§ 633. If a carriage be defective from being negligently made, and an injury thereby occurs, it is no defence that the carriage was made by a competent manufacturer. The carrier is liable for the negligence of his servants, whether in making or running his carriage.[2] And the rule is declared to be that although the defect was latent, and could not be discovered by the most vigilant external examination, yet, if it could be ascertained by a known test, applied by the defendant, the latter is liable.[3]

Track of railroad must be kept in safe running order.

§ 634. It is the duty of the company to keep the track of the road in as good order as is consistent with the nature of the strain to which it is subjected and with the means of the company.[4] Perfection in this respect is not required, for this would involve engineering expenses

duty to require from the owners of the truck some distinct assurance that it had been thoroughly examined and repaired. It was ruled by the court of common pleas that upon these findings the plaintiff was entitled to a verdict; for that, although it might not have been the duty of the defendants themselves to cause the truck to be properly examined and repaired upon its arrival at Peterborough junction, it was somebody's duty to do it, and the defendants were guilty of negligence in not satisfying themselves that a proper examination had taken place before they allowed the truck to proceed. But this ruling was reversed by the court of appeals, on the ground that the evidence presented no negligence which imposed liability on the defendants. Richardson *v.* R. R. L. R. 1 C. P. D. 342.

[1] Gee *v.* R. R. L. R. 8 Q. B. 161. See supra, §§ 363, 364.

[2] Sharp *v.* Grey, 9 Bing. 459, per Alderson, B.; Readhead *v.* R. R. L. R. 2 Q. B. 412; 4 Q. B. 379; Francis *v.* Cockrell, L. R. 5 Q. B. 184; aff. in Exch. Ch. L. R. 5 Q. B. 501.

[3] Warren *v.* R. R. 8 Allen, 227; Hegeman *v.* R. R. 16 Barb. 353.

[4] Oakland R. R. *v.* Fielding, 48 Penn. St. 320; O'Donnell *v.* R. R. 59 Penn. St. 239; *S. C.* 50 Penn. St. 490.

which prevent the track from being laid at all. What is required is the care, diligence, and skill usual with good engineers when doing work similar to that in question.[1] The limits of liability in this relation are well expressed in an English case, where a train was injured in consequence of a railroad embankment being washed away by a freshet. The bed of the railroad was, at the particular spot, an embankment of loose sand, peculiarly liable to be disintegrated by water. The embankment certainly was not strong enough to withstand all possible freshets, for it did not withstand the freshet which caused the damage under investigation. But it was shown that the embankment had not previously been washed away, and that the freshet to which it succumbed at the time of the accident was higher than any recorded prior freshet. An express train, passing over the road just after the damage thus sustained, was thrown from the track, and the plaintiff thereby injured. The jury found a verdict for the plaintiff, which was set aside by the court on the ground that there was no inculpatory negligence on the part of the company if the road was able to stand ordinary as distinguished from extraordinary tests.[2] But while this is correct, so far as it is to be understood as expressing the position that the diligence required of a railroad is the practical diligence of a capable and faithful railroad management, and not the speculative diligence of an imaginary perfect railroad management, yet there is much good sense in the following criticism of Judge Redfield: "But it certainly deserves consideration whether there is not rashness in driving an express train at the usual rate of speed under such circumstances."[3] This, of course, depends upon whether, by proper diligence, the company could have known of the shock the road had received. If so, it was negligence to send over it an express train without special investigation. As with carriages so with road; it is no defence that the defendants employed a competent engineer, if the road, or its bridges or culverts, be

[1] See Tyrrel *v.* R. R. 111 Mass. 546; Mobile, &c. R. R. *v.* Ashcraft, 48 Ala. 15.

[2] Withers *v.* R. R. 3 H. & N. 969; 27 L. J. Exch. 417; 1 F. & F. 165. That a road must be in good running order, see Rockwell *v.* R. R. 64 Barb. 438; Read *v.* Spalding, 5 Bosw. 395; *S. C.* 30 N. Y. 630; Michaels *v.* R. R. 30 N. Y. 564; Morrison *v.* Davis, 20 Penn. St. 171; and cases cited supra, §§ 630, 631.

[3] 2 Redf. on R. R. § 192; S. P. Hardy *v.* R. R. 74 N. C. 734.

negligently made or kept.[1] Nor is it necessary that the company should have had notice of the defects in a bridge, if it was their duty to have become acquainted with such defects.[2]

To leave a switch out of place is *per se* negligence.[3]

Breakage of a rail by extraordinary frost is, as has been seen, a defence.[4]

All practicable improvements must be adopted.

§ 635. Yet, it must be again remembered, that the test is that of the *good* not of the *perfect* business man; and this, as has already been shown, because, among other reasons, no perfect business man exists.[5] A good business man, to apply this test, will adopt all improvements which, when tested by experience, seem likely to add to the security of those intrusted to his care, provided that such improvements can be applied without, by their cumbrousness or expense, impeding the transportation which such persons desire. But a good business man will not seize upon all inventions, though they ultimately prove to be improvements, which have not been tested by experience.[6] The engineer, to take up the question concretely, must apply the diligence of a good engineer; the brakesman that of a good brakesman; the conductor that of a good conductor; the manufacturer, who is *pro tanto* the owner's agent, that of a good manufacturer of his class; the repairer that of a good repairer.[7] Neither is required to be perfect.[8]

[1] Grote *v.* R. R. 2 Exch. 254.

[2] Toledo, &c. R. R. *v.* Conroy, 68 Ill. 560.

[3] State *v.* O'Brien, 3 Vroom, 169; R. *v.* Pargeter, 3 Cox C. C. 191. Infra, § 802.

[4] Supra, § 630.

[5] Supra, § 65.

[6] Supra, §§ 52, 212, 213; infra, § 872. Jackson *v.* R. R. L. R. 2 C. P. D. 25; Caldwell *v.* N. J. Steamboat Co. 47 N. Y. 282; Balt. & O. R. R. *v.* State, 29 Md. 252; Unger *v.* R. R. infra, § 639; Taylor *v.* R. R. 48 N. H. 304; Steinweg *v.* R. R. 43 N. Y. 123; Toledo R. R. *v.* Conroy, 68 Ill. 560.

[7] See Fletcher *v.* R. R. 1 Allen, 9; Briggs *v.* Taylor, 28 Vt. 180; Parker *v.* R. R. 34 Iowa, 400.

[8] Important suggestions, in relation to the topic in the text, will be found in a work published in 1877, under the following title: A Practical Manual for Engineers in Charge of Locomotive Engines. By Michael Reynolds, Locomotive Inspector, London, Brighton, and South Coast Railway. With Illustrations. Crosby, Lockwood, & Co., Stationers' Hall Court.

From this we extract the following:—

"During the time that an engine is under steam with a train, everything seen, heard, felt, and smelt, is capable of affording a lesson. On the

§ 636. It is true that we sometimes find great confusion in the expression of the degree of diligence to be exacted from the carrier of passengers. The authority of Sir William Jones, based, as has been shown, on unauthorized glosses of the scholastic jurists, backed as it is by Judge Story's

Diligence to be that of good specialist.

engine foot-plate the eye is trained to distinguish different colors at considerable distances. The ear learns to detect the slightest variation in the 'beats' and knocks about the machinery; it learns to distinguish between the knock of an axle-box and the knock of a journal. The human frame learns to distinguish the shocks, oscillations, &c., which are due to a defective road from those which are due to a defective engine. The olfactory nerves become from experience very sensitive, so as to detect the heat of friction before any mischief is done. It is whilst an engine is in steam and going at good speed that the rocks, coral-reefs, and sand-banks on railways can be seen and learned; and the value of, and rank acquired by, an engineman, are proportionate to the pains that he takes to find them out, and to mark their dangerous positions upon his chart. Just by so much as there is of this inquiring spirit within a man will he achieve success. . . . . It is a habit with some firemen to arrive late on duty. They never think of coming on duty an hour or so before their booked time, even for the sake of having an excellent fire to begin the day's work with. Such individuals will of course in time be made drivers, but they never do anything sufficiently good to induce their firemen to push them on to the best running engines or express trains. . . . . It is well known that some drivers have pulled out of a station without their trains, and have not found their mistake until they have overshot the next station platform a tender's length, and actually then whistled for the guard to put on his brake. Others have lost eight carriages out of twelve, and observed no difference in the working of the engines.

"A goods train, having two engines attached, was proceeding south at midnight, and, after it had passed a fast express train, a thought struck the driver of the express that, for two engines, it was a *very short* goods train. He stepped over to the fireman's side of the foot-plate for the purpose of seeing whether there were any tail lights to the last vehicle, but, owing to a curve in the line, he could not ascertain that point. He, however, shut off steam, and gave instructions to his mate to have his brake in readiness, 'for,' said he, 'it strikes me very forcibly, mate, all the train is not there.' When they had run about two miles, and were thinking of getting up the speed again, a red light was seen ahead, surging violently from right to left. They pulled up at once to it, when a goods guard informed them, as he held his bull's-eye light into their faces, that a wagon-axle had broken in *his* train, and had caused twelve trucks to leave the rails, and that they were across the down-road right in the way of the express. The guard got up on the step of the engine, when they pulled gently down to the scene of the accident, when a sight presented itself which told them that something else besides being able to drive an engine was required to make a man a good railway man."

reluctant though influential approval, continues occasionally to draw from judges the statement that the law contemplates a third kind of diligence, the *diligentia diligentissimi*, or the utmost diligence, with its antithesis of *culpa levissima;* but when this is done, it is generally with qualifications that show that the *culpa levissima* in question is simply the *culpa levis* of the business Roman jurists; *i. e.* that negligence which a man who specially undertakes a particular business shows either in the inadequate preparation for or the inadequate management of such business. Of this we have an illustration in a Massachusetts case, where the damage arose from the breaking of the axle-tree of a coach through a flaw not visible from the outside. It was assumed by the court that the defendant had been at great pains and expense in procuring a coach that was entirely roadworthy. The court began by asserting that carriers of passengers are bound to use the *utmost care and diligence* in the providing of safe, sufficient, and suitable coaches, harnesses, horses, and coachmen, *in order to prevent those injuries which human care and foresight can guard against;* and if accident happens through defect in the coach, which might have been discovered and remedied upon the most thorough and careful examination of the coach, the owner is liable. But then comes the qualification: "But if the injury arose from some invisible defect *which no ordinary test will disclose*, like that in the present case, the carrier is not liable."[1] The *culpa levissima*, therefore, of the theorist subsides into *culpa levis* when applied to practical life. The tests by which this *culpa* is to be defined are, therefore, those which a good specialist skilled in his particular department is accustomed to apply.[2] The same observations are applicable to the terms, "extreme care," and "utmost degree of diligence and care," as used by eminent Pennsylvania judges in this connection. By the court from which these expressions emanate, they are declared to be equivalent to a responsibility for such defects

[1] Ingalls *v.* Bills, 9 Metc. 1. See, also, Edwards *v.* Lord, 49 Me. 279.

[2] See, further, to this effect, Bowen *v.* R. R. 18 N. Y. 408; Curtis *v.* R. R. 18 N. Y. 534; Cleveland *v.* St. Co. 5 Hun, 523; *S. C.* N. Y. Ct. of Appeals, 1877; Meier *v.* R. R. 64 Penn. St. 225, cited supra, § 629; Heazle *v.* R. R. 76 Ill. 501; Tuller *v.* Talbot, 23 Ill. 357; Mich. Cent. R. R. *v.* Coleman, 28 Mich. 446. See supra, § 627; infra, § 872.

only "as are discoverable by a careful man, after a careful examination and exercise of a sound judgment." [1]

Is in proportion to risks.

§ 637. Yet it must not be forgotten that the diligence to be applied, from the very nature of the definition just given, rises in proportion to the risks incurred.[2] The diligence and skill required to push a scow is far lower than that to navigate a steamship, but in each case the standard is the same, — the diligence and skill which a good business man in the specialty is accustomed to use under similar circumstances, keeping in view his own means and opportunities, and the dangers of the service.

Same rule applies to steamboats.

§ 638. The structure of steamboats must be such as to enable them, in proportion to the risks to which they will be exposed, to apply the improvements of mechanical art for the safe transit of passengers. Nor does the fact that a carrier by steamboat has fully complied with the act of Congress, as to the safeguards to be used for the protection of passengers, clear him from liability, or remove a presumption of

[1] Meier *v.* R. R. 64 Penn. St. 225, as quoted supra, § 629.

In Indian. R. R. *v.* Horst, 93 U. S. (3 Otto) 391, while we find the court adhering to the expression that the "greatest possible care and diligence," and "the highest degree of carefulness and diligence," are exacted, these terms are explained as follows: "The standard of duty should be according to the consequences that may ensue from carelessness. The rule of law has its foundation deep in public policy. It is approved by experience and sanctioned by the plainest principles of reason and justice. It is of great importance that courts of justice should not relax it. The terms in question do not mean all the care and diligence the human mind can conceive of, nor such as will render the transportation free from any possible peril, nor such as would drive the carrier from his business. It does not, for instance, require, with respect to either passenger or freight trains, steel rails and iron or granite cross-ties, because such ties are less liable to decay, and hence safer than those of wood; nor upon freight trains air brakes, bell pulls, and a brakesman upon every car; but it does emphatically require every thing necessary to the security of the passenger upon either, and reasonably consistent with the business of the carrier, and the means of conveyance employed. The language used cannot mislead. It well expresses the rigorous requirement of the law, and ought not to be departed from. The rule is beneficial to both parties. It tends to give protection to the traveller, and warns the carrier against the consequences of delinquency. A lower degree of vigilance than that required would have averted the catastrophe from which this litigation has arisen. Dunn *v.* R. R. 58 Me. 157; Tuller *v.* Talbot, 23 Ill. 357; Pittsburg, &c. R. R. Co. *v.* Thompson, 56 Ibid. 138."

[2] See supra, §§ 48, 50; infra, § 627.

negligence established by the evidence. His liability is not in any manner restricted or limited by that act, but a failure to comply with its provisions would, of itself, subject him to a charge of negligence.[1] In the management of steamboats when on the water, the same degree of prudence and skill (*mutatis mutandis*) is required as is required in the management of steamcars on the land.[2]

And so as to horse railways.

§ 639. The same test — the diligence of a good business man in the particular specialty when acting under similar circumstances — is on the same reasoning applicable to horse railroads.[3] Hence, in the attachment of horses to its cars a horse railway company is not bound to use the best method human skill and ingenuity have devised to prevent accidents. If it uses the method in general use, and which has been found usually adequate and safe, its duty in this respect is discharged.[4] So care proportioned to the danger must be exercised

[1] Caldwell *v.* St. Nav. Co. 47 N. Y. 282; and see Carroll *v.* R. R. N. Y. Ct. of App. 1876.

[2] See Sherlock *v.* Alling, 44 Ind. 184, where it was held that where two boats were owned by the same persons, running on the same line of passenger steamers, and an injury was sustained, through a collision, by a passenger in one boat, the company was liable, though the blame was solely chargeable to the boat colliding with that in which the party injured was carried.

On the general topic of the liabilities of carriers by water, my space will not permit me to enlarge. I beg to refer, in this connection, to the eighth chapter of the fifth edition of Angell on Carriers (1877), where the duties of steamboat carriers are satisfactorily examined. As to negligence in respect to passage-ways to boats, see infra, § 656.

[3] Infra, § 820 *l.* See Geddes *v.* R. R. 103 Mass. 391; Feital *v.* R. R. 109 Mass. 398; Chicago, &c. R. R. *v.* Young, 62 Ill. 238; Johnson *v.* R. R. 10 Bush. 231.

[4] Unger *v.* R. R. 51 N. Y. 497. In this case the question is thus discussed by Earl, C.: . . . . "The degree of care which a person owing diligence must exercise depends upon the hazards and dangers which he may expect to encounter, and upon the consequences which may be expected to flow from his negligence. Railroad companies, whose cars are drawn by steam, at a high rate of speed, are held to the greatest skill, care, and diligence in the manufacture of their cars and engines, and in the management of their roads, because of the great danger from their hazardous mode of conveyance to human life in case of any negligence. But the same degree of care and skill is not required from carriers of passengers by stage-coaches (Hegeman *v.* Western Railroad Corporation, 13 N. Y. 9); and for the same reason is not required from the carriers of passengers upon street cars drawn by horses. The degree of care required in any case must have reference to the subject matter, and must be such only as a man of or-

to secure passengers from injury.[1] And the car must be brought to a full stop to enable the passengers to dismount.[2] Contributory negligence, in its relation to horse-cars, has been already considered.[3]

Diligence to be proportioned to capacity of carrier.

§ 640. It has just been observed that the diligence of the carrier is to be proportioned to the risk of the service and the capacity of the carrier. The test of risk has been already discussed. It must not, however, be forgotten, that we have also to apply the test of the capacity of the carrier. If I employ a carrier of small means and machinery knowing what his capacity is, I must take him as I find him. The distinction in this respect may be illustrated by the well-known rule as elsewhere detailed, which is applied to physicians. A physician, when called upon to manage a case, is not required to apply the skill and care which could be applied by the perfect ideal physician, for the reason that from the limitation of the human intellect no perfect ideal physician exists in practice, and from the limitation of human endurance no perfect ideal physician, even if he existed, could watch a patient unintermittingly. But a physician, when called upon to manage a case, is bound to exercise the skill and vigilance which good and faithful physicians, under the circumstances in which he is placed, would exercise. If called upon in a country town, remote from the great centres of scientific activity, to attend to an exceptional case which requires immediate action, he is not liable if he does not employ those mechanisms which only a residence in such a centre of scientific activity would enable him to procure. On the other

dinary prudence and capacity may be expected to exercise in the same circumstances. In some cases this rule will require the highest degree of care, and in others much less. . . . .

"I hold, therefore, that the defendant was not required to adopt an unusual and perhaps untried method of attaching its horses to the cars. It discharged its duty in that respect to pedestrians, who had the right to use the streets in common with it, if it attached them in the way which was in general use, and which had been found reasonably adequate and safe." . . . .

[1] Chicago R. R. *v.* Hughes, 69 Ill. 170.

[2] Infra, § 647 *b*. Poulin *v.* R. R. 61 N. Y. 621; Crissey *v.* R. R. 75 Penn. St. 83; though see Murphey *v.* R. R. 118 Mass. 228, where it is said that whether it is negligence not to stop a horse-car to put a person off is a question of fact.

[3] Supra, § 365.

hand, a physician living in such a centre is liable for negligence if, when called upon in such a case, he does not use such mechanism, supposing its application to be advisable.[1] So it is with railroads. A railroad doing a small local business in a sparsely populated territory, and running only a few slow trains where the chances of collision are slight, is not required to apply those delicate and complicated checks and guards which are not only very expensive, but involve new and critical risks peculiar to themselves. It would not, for instance, be negligence in such a road to omit the construction of an auxiliary telegraph, by which each station-master, and through him each engineer, can be advised of the position of all other trains at that time traversing the same section of the track. But a great trunk road, over which at any given moment are dashing, within a range of a few miles, several express trains, which cannot wait at a given station until all other due trains have arrived, may be bound to employ such a telegraph. The same observations are applicable to double tracks. When a double track is not required by the business of the road, it is not negligence to have but a single track; but the business of a road may become so heavy and complex as to make the omission of a double track negligence. So, while a company will not be compelled to have its beds laid with ties of iron or stone, and will be permitted to lay them with wood, yet these ties, when made of wood, must be preserved sound and roadworthy.[2] The same distinction, to take up a case elsewhere independently discussed, applies to fencing. To omit fencing is negligence when required by law, or when essential to the ordinary safe transport of passengers; it is not negligence when it is not required by law, and when it is not necessary, from the sparseness of population, to the ordinary safe transport of passengers. Diligence in all these cases is not the speculative perfection of the ideal road; it is the practical adequacy of the actual road for the particular duty which it undertakes.[3]

[1] Infra, §§ 730–7; supra, § 439.

[2] Pittsburg, &c. R. R. *v.* Thompson, 56 Ill. 138.

[3] Ford *v.* R. R. 2 F. & F. 730; Great W. R. R. *v.* Fawcett, 1 Moore, P. C. N. S. 101; Le Barron *v.* E. B. Ferry, 11 Allen, 312; Steinweg *v.* R. R. 43 N. Y. 123; Pittsburg R. R. *v.* Thompson, 56 Ill. 138; Toledo, &c. R. R. *v.* Corn, 71 Ill. 493. Supra, §§ 25, 212, 213.

§ 641. It has been already shown, in the discussion of mandates, that when there is special confidence between bailor and bailee, the idea that the gratuitous bailee is liable only for "gross" negligence is exploded as inconsistent both with reason and authority.[1] But in addition to this, it may be questioned whether there are really any litigated cases of passengers, not employees, who are truly gratuitous.[2] Railroads are not accustomed to give passes for nothing.[3] The consideration may be the interchange of courtesies with officers of other roads; or it may be the expectation of administrative favors; or it may be the attracting of custom, as is the case with tickets given to newspaper reporters, to persons having the option of sending masses of freight, to drovers,[4] and in a less but still perceptible degree, to lecturers, clergymen, and others who circulate among large sections of the community. Or, the giving away of a certain number of free tickets may be among the perquisites of the officers of the road, who pay for them by their services. But however this may be, it is clear that where a company undertakes to transport a passenger, it is bound to exercise the same degree of diligence, whether that passenger pays or does not pay money for his ticket. Undoubtedly when the idea of *culpa levissima* was afloat, it was a relief to say that in cases at least of free passengers this impossible degree of diligence was not to be exacted. But whenever it has come to the question whether a railroad, in transporting a free passenger, is bound to exercise towards such passenger the diligence which a good and competent business man should under such circumstances exercise (which is all that is required as to pay passengers), then the answer is emphatically in the affirmative. Thus, in a celebrated case before the supreme court of the United States, where the plaintiff was invited, being the president of another road, to ride as free passenger on the Philadelphia and Reading Railroad, and while so riding was injured by a collision caused by the negligence of the employees of the latter road, it was held that the plaintiff was

Free passengers.

[1] See supra, §§ 355, 485, 501.

[2] See supra, § 355.

[3] Cleveland, &c. R. R. *v.* Curran, 19 Ohio N. S. 1.

[4] A drover with a free pass is a passenger for hire. N. Y. Cent. R. R. *v.* Lockwood, 17 Wall. 357; Ohio, &c. R. R. *v.* Selby, 47 Ind. 471; Indian. R. R. *v.* Horst, 93 U. S. (3 Otto) 291. Supra, § 355.

entitled to recover. The reasoning of the court goes to the root of the question, and is in full harmony with the Roman law of mandates as heretofore discussed. Whether the service is gratuitous is treated as immaterial; it is enough if confidence is tendered on the one side and accepted on the other. "The confidence induced," says Judge Grier, "by undertaking any service for another, is a sufficient legal consideration to create a duty in the performance of it." [1]

But a free passenger is not entitled to anything more than a *safe* seat. He cannot claim a first class, or even a second class car. So a passenger taking a second class car cannot sue the company because it does not provide for him the conveniences given to those who take a first class passage. But so far as concerns safety for life or limb, the free passenger and the third or second class passenger are entitled to the same protection as the first class passenger.[2]

It is elsewhere noticed that when such passenger is an employee, knowing the risks of travel, he cannot recover from the carrier on account of such risks.[3]

A mail or express agent transported by a railroad company under a contract to carry such agents gratuitously is entitled to the same protection as a pay passenger.[4]

§ 641 *a.* We have already seen [5] that an agreement that a carrier shall not be liable for negligence is void as against the pol-

[1] Phil. & Read. R. R. *v.* Derby, 14 How. U. S. 983; Todd *v.* R. R. 3 Allen, 18. See, also, Nolton *v.* R. R. 15 N. Y. 444; Perkins *v.* R. R. 24 N. Y. 196; Gillenwater *v.* R. R. 5 Ind. 540; Great N. R. R. *v.* Harrison, 12 C. B. 576; Jacobus *v.* R. R. 20 Minn. 125, and cases cited at large, supra, § 355.

Where a railroad company carries passengers in a caboose car, on a freight train, it is liable to them for any injury which by proper care and prudence it could have avoided. Indiana R. R. *v.* Horst, supra; I. B. & W. R. R. *v.* Beever, 41 Ind. 493.

"Life and limb are as valuable, and there is the same right to safety in the caboose as in the palace-car. The same formidable power gives the traction in both cases. The rule is uniformly applied to passenger trains. The same considerations apply to freight-trains. The same dangers are common to both. Such care and diligence are as effectual and as important upon the latter as upon the former, and not more difficult to exercise." Swayne, J., Indiana R. R. *v.* Horst, supra.

[2] Supra, §§ 355–501. See, however, criticism on above in Flint *v.* R. R. Sup. Ct. Mich. 1877; 5 Cent. L. J. 255.

[3] Supra, §§ 200–2; infra, § 605.

[4] Blair *v.* R. R. 66 N. Y. 313; Hammond *v.* R. R. 6 Richards. 130.

[5] See supra, §§ 589, 592.

icy of the law. There is no reason why this principle should not apply to cases of free as well as of paid carriage. If "confidence," as has been just stated, is a sufficient consideration, then no passage voluntarily tendered and accepted is gratuitous. But, independently of this, it is against public policy that a person using the high and dangerous agency of steam should, in any case on which human life depends, act with a diligence less than a good and capable expert should employ in wielding such an agency. If diligence be proportioned to remuneration, steam service would be graded in diligence according to the degree of pay: first class diligence for first class cars; second class diligence for second class cars; minimum diligence to those who pay but little, or do not pay at all. But the law knows no such gradations; when the work is undertaken, then so far as safety is concerned, the same precautions must be taken for all who are permitted to take passage.[1]

Agreement that free passenger should take risk of all injury.

§ 642. *Trespassers and visitors.* — The duties of carriers to trespassers and visitors have been elsewhere discussed.[2]

An interesting question has arisen as to whether parties visiting a train as escorts are so far entitled to notice of the departure of the train as to make the company liable for injuries accruing to them from failure to give such notice. There can be little doubt that trespassers, crowding a railway car for mere curiosity, are not within the purview of transportation in such a sense that the company should contemplate them as persons for whom it should specially provide.[3] It is otherwise, however, with those attending as escorts to passengers sick or dependent. It should be in the contemplation of a company

Escorts.

[1] R. R. *v.* Lockwood, 17 Wall. 357; Dunn *v.* R. R. 58 Me. 187; Edgerton *v.* R. R. 39 N. Y. 227; Penn. R. R. *v.* Henderson, 51 Penn. St. 315; Cleveland, &c. R. R. *v.* Curran, 19 Ohio St. 1; Penn. R. R. *v.* Woodworth, 26 Ohio St. 585; Ohio, &c. R. R. *v.* Selby, 47 Ind. 471; Jacobus *v.* R. R. 20 Minn. 125; Mobile, &c. R. R. *v.* Hopkins, 41 Ala. 488; Ohio, &c. R. R. *v.* Muhling, 30 Ill. 9; Ill. Cent. R. R. *v.* Read, 37 Ill. 484. On the other hand, such contracts have been sustained in Kinney *v.* R. R. 34 N. J. 513; 3 Vroom, 407, and other cases cited supra, § 589. But in any view such contracts, in order to relieve, must be clear and unmistakable. Blair *v.* R. R. 76 N. Y. 313.

[2] Supra, §§ 349–354.

[3] See Rounds *v.* R. R. 64 N. Y. 129; Sutton *v.* R. R. 66 N. Y. 243; Pittsburg, &c. R. R. *v.* Bingham, 29 Ohio St. 364. As to trespassers on platforms, see infra, §§ 653, 654.

that such persons should be attended by their friends; and such friends it is one of the duties of the company to protect by giving them not merely access to and egress from the cars, but such usual timely notice as will enable them to leave the car when starting.[1]

Where passenger acts as employee.

§ 643. Yet, in obedience to the familiar principle that an employee cannot recover from his employer for risks of which he was previously advised,[2] cases may occur when a passenger, by taking upon himself the duties of an employee, may put himself in such a relation to the road that it will not be liable to him for injuries he received from defects as to which he was advised, and whose risks he agreed to assume. This has been held in New York to be the case where a drover took a free ticket, under an agreement that "persons riding free *to take charge of their own stock* do so at their own risk of personal injury from whatever cause."[3] And whatever view we may take of the immediate point here taken, or of the discussion of it elsewhere noticed,[4] we must concur in the conclusion, as given under another title, that on the general principles of contributory negligence, the drover who participates with the carrier in the mismanagement of the stock cannot recover from the carrier damages for losses thus incurred.[5]

As a matter of fact, we may hold that employees, paying no fare, but riding on the road by virtue of their employment, are

[1] Gautret *v.* Egerton, L. R. 2 C. P. 371; Holmes *v.* R. R. L. R. 4 Exch. 254; Gillis *v.* R. R. 59 Penn. St. 143, per Sharswood, J.; Doss *v.* R. R. 59 Mo. 27. See supra, §§ 349–52; and see Lucas *v.* R. R. 6 Gray, 64, where it was held that in such cases the burden is on the escort to prove negligence on part of carrier, and to disprove contributory negligence on his own part. Watkins *v.* R. R. 37 L. T. N. S. 194.

In Watkins *v.* R. R. 37 L. T. 194, where a lady was injured when attending her daughter to the cars, Denman, J., said: "The female plaintiff, though in a certain sense a licensee, was a person going with her daughter to see her safe into a proper carriage, and reasonably so going without a ticket by implied permission and acquiescence of the company, and therefore a person to whom the company were under an obligation to be guilty of no negligence as regards the passage by which she would necessarily go across the line; and that, negligence having been found by the jury, the question raised in Bolch *v.* Smith did not arise." See supra, § 351, for opinion of court.

[2] See supra, § 209.

[3] Bissell *v.* R. R. 25 N. Y. 442.

[4] See supra, §§ 355, 589, 641, and cases there cited.

[5] See supra, §§ 495–97.

not passengers, though they may not on the particular trains be affording any service to the company.[1]

§ 644. The carrier, we must remember, cannot set up as a defence that the road is under government control. This is largely the case in Germany, where it is held that whatever may be the authority of the state over the road, the carrier who undertakes to transport on it passengers is liable for *culpa levis*, or for such negligence as exists in the lack of the diligence which a good and competent business man should under the circumstances show. Such is undoubtedly the law in the United States.[2]

Government control no defence.

§ 645. Nor does it make any difference that the contract for passage was one for an excursion party in an excursion train hired in gross. Such a case is within the scope of the reasoning heretofore noticed as applying to free tickets. No matter what may be the carrier's engagements, he must exercise as a carrier the skill and diligence of a competent and faithful business man when undertaking the particular class of work.[3]

Excursion trains.

§ 646. It is within the power of the company to remove a mischievous or troublesome passenger from the cars,[4] though the company is liable to the party offending for negligence in putting him out;[5] as well as for executing the duty at an improper time. Yet the removal of a passenger, for alleged misconduct, from the ladies' car to another, by the officers of the train, while the train is moving at the rate of twenty miles an hour, is not negligent or wrongful *per se*, but a question to be left to the jury under all the facts of the case.[6] So, too, the question whether unnecessary force was used,

Removal of improper person from car.

[1] Gilshannon *v.* Stony Brook, 10 Cush. 228; Seaver *v.* R. R. 14 Gray, 466; Russell *v.* R. R. 17 N. Y. 134; Higgins *v.* R. R. 36 Mo. 418; Un. Pac. R. R. *v.* Nichols, 8 Kans. 505; Kansas R. R. *v.* Salmon, 11 Kans. 83.

[2] Peters *v.* Rylands, 20 Penn. St. 497.

[3] Skinner *v.* R. R. 5 Exch. 787; Cleveland, &c. R. R. *v.* Terry, 6 Ohio N. S. 570.

[4] Hanson *v.* R. R. 62 Me. 84; Jerome *v.* Smith, 48 Vt. 230; Putnam *v.* R. R. 55 N. Y. 108; Townsend *v.* R. R. 56 N. Y. 295; Pittsburg, &c. R. R. *v.* Hinds, 53 Penn. St. 512; Pittsburg, &c. R. R. *v.* Pillow, 76 Penn. St. 510; St. Louis, &c. R. R. *v.* Myrtle, 51 Ind. 566; Chic. R. R. *v.* Griffin, 68 Ill. 499; Marquette *v.* R. R. 33 Iowa, 563. See Angell on Carriers, 5th ed. § 609.

[5] Col. &c. R. R. *v.* Powell, 40 Ind. 37. Infra, § 646 *b*.

[6] Marquette *v.* R. R. 33 Iowa, 563.

or used in an unreasonable manner, is a question of fact for the jury.[1]

Carrier liable to passenger if he neglect his duty in this respect.

§ 646 *a*. We have already seen that whoever by contract assumes a duty to another person is liable to such other person for damages arising from a negligent performance of this duty.[2] One of the duties assumed by a carrier of passengers is that his conveyance should be reasonably comfortable and safe, so far as concerns the number and character of the persons taken on board. Hence overcrowding has been held to be negligence.[3]

For the same reason the carrier who neglects to remove improper persons from the carriage is liable to a passenger for any damage the latter receives from such persons.[4] Hence the carrier is liable to one passenger for injuries sustained by him through the violence of another passenger whom it was the duty of the carrier to have subdued or removed.[5]

Liable for servant's improper conduct.

§ 646 *b*. *That the carrier is liable for the misconduct of his servant* has been already noticed.[6] It is sufficient here to repeat that a railroad company is liable for all oppressive or indecent acts of its servants, when in the range of their office, to passengers.[7]

[1] Murphy *v.* R. R. 118 Mass. 228; Healey *v.* R. R. 28 Ohio St. 418. But ordinarily the car should be fully stopped before such a passenger is put out. Lovet *v.* R. R. 4 Allen, 557; Sanford *v.* R. R. 23 N. Y. 343. See infra, § 646 *b*.

As to damages in such cases, see Bayley *v.* R. R. L. R. 7. C. P. 415; Ramsden *v.* R. R. 104 Mass. 117; Townsend *v.* R. R. 56 N. Y. 295. See §§ 170, 846 *a*. When the attack is wanton and malicious, punitive damages can be given. Holmes *v.* Wakefield, 12 Allen, 580; Jeffersonville, &c. R. R. *v.* Rogers, 38 Ind. 116.

[2] Supra, § 435.

[3] Jackson *v.* R. R. L. R. 10 C. P. 49; *S. C.* L. R. 2 C. P. D. 125.

[4] Flint *v.* R. R. 34 Conn. 554; Putnam *v.* R. R. 55 N. Y. 108; Pittsburg R. R. *v.* Pillow, 76 Penn. St. 510. "I take it to be part of the duty of a railway company," said Cockburn, C. J., in Jackson *v.* R. R. 36 L. T. N. S. 485; L. R. 2 C. P. D. 125, "which invites persons to resort to its station, and to travel by its trains, *inter alia*, to provide two things: first, sufficient carriage accommodation to meet the ordinary requirements of the traffic; secondly, a sufficient staff to maintain order and to prevent irregularity and confusion, and to protect passengers from annoyance, inconvenience, or injury from travellers, who set not only the regulations of the company, but also decency and order, at defiance."

[5] New Orleans, &c. R. R. *v.* Burke, 53 Miss. 200; Cent. L. J. 1877, p. 539.

[6] Supra, §§ 169–178.

[7] Bayley *v.* R. R. L. R. 7 C. P. 415; Goddard *v.* R. R. 57 Me. 202; Han-

§ 647. Stopping a train at an unusual place, and thus inducing a passenger to alight at such a place, where there is no platform, makes a *primâ facie* case of negligence.[1] Nor does it alter the case that where a train overshoots the platform, warning is given not to alight, if such warning is not heard by the passengers.[2] At the same time, if the passenger, when he knows that he can be safe by waiting a moment, or by alighting from an end of the car where there is a platform, steps off where there is no platform, and is injured, he cannot recover from the company.[3]

Stopping at spot where there is no platform.

§ 647 *a*. *Carrying a passenger beyond a station* to which he is ticketed subjects the carrier to liability to the passenger for dam-

son *v.* R. R. 62 Me. 84; Weed *v.* R. R. 17 N. Y. 362; Pittsburg R. R. *v.* Hinds, 53 Penn. St. 512; Van Kirk *v.* R. R. 76 Penn. St. 67; Chic. &c. R. R. *v.* Dickson, 63 Ill. 151; Craker *v.* R. R. 36 Wis. 657; Bass *v.* R. R. 36 Wis. 450; and see, fully, supra, § 178, and cases cited at close of § 646.

In Jackson *v.* R. R. L. R. 2 C. P. D. (C. A.) 125, "the plaintiff was a passenger by the defendants' railway, and at one station, though all the seats in the carriage in which the plaintiff was were filled, three more persons got in and stood up. There was no evidence that the defendants' servants were aware of this, but the plaintiff remonstrated with the persons who had so got in. At the next station, the door of the carriage was opened by persons who tried to get in, and the plaintiff rose and held up his hand to prevent them. After the train had started, a porter pushed away the persons who were trying to get in, and slammed the door, which caught and injured the hand of the plaintiff, who had been thrown forward by the motion of the train. Held, by Cockburn, C. J., and Amphlett, J. A. (Kelly, C. B., and Bramwell, J. A., dissenting), affirming the decision of the court of common pleas, that there was evidence from which the jury might infer negligence on the part of the defendants so as to entitle the plaintiff to recover damages."

In Isaacs *v.* R. R. 47 N. Y. 122, it was held that a horse railroad company was not liable for an assault by a conductor, in pushing a passenger off a car; the reason being that the conductor is not bound to assist passengers on or off the cars. But his case confounds the duty of a carrier to passengers with the carrier's duty to strangers. A carrier is bound to give his passengers opportunity to dismount, and he is liable for an imperfect discharge of this duty.

[1] Robson *v.* R. R. L. R. 2 Q. B. D. 85; Curtis *v.* R. R. 29 Barb. 285; Memphis, &c. R. R. *v.* Whitfield, 44 Miss. 466. See supra, §§ 371, 375.

Overshooting "the platform a little" not *per se* negligence. Honyman, J., in Weller *v.* R. R. L. R. 9 C. P. 134, quoting Blackburn, J., in Lewis *v.* R. R. L. R. 9 Q. B. 66. Supra, §§ 375–79. But see Rose *v.* R. R. L. R. 2 Exch. D. 248; Robson *v.* R. R. L. R. 2 Q. B. D. 85. Infra, § 647 *b*.

[2] Rose *v.* R. R. L. R. 2 Exch. D. 248. See supra, §§ 374, 375.

[3] See supra, §§ 370, 375; Owen *v.* R. R. 36 L. J. N. S. 850.

ages sustained by the latter in consequence of having been carried beyond his proper destination.[1]

Enabling passenger to dismount.

§ 647 *b*. We have seen that it is the duty of the carrier to stop a horse-car when required, in order to enable a passenger conveniently to dismount.[2] The same rule is *a fortiori* applicable to steam-cars.[3]

Suddenly starting train.

§ 648. *Suddenly and without notice* starting a train, when passengers are getting on and off, is negligence.[4] Thus in a Massachusetts case,[5] the evidence was that the driver stopped the carriage to receive the plaintiff as a passenger; that the carriage was crowded and all the seats in it were occupied; and that, immediately after she had got in, and when she was standing within the door, she was thrown out by its violent jerk at starting. It was held by the supreme court, that there was evidence in favor of the plaintiff to go to the jury.

Conductor must notify of danger.

§ 649. When a danger approaches, it is the duty of the officers of the road to notify the passengers so that they can take steps to avoid it; and failure to give such notice is negligence.[6] So, also, if there is a dangerous place

[1] Chic. R. R. *v.* Fisher, 66 Ill. 152; Mobile, &c. R. R. *v.* McArthur, 43 Miss. 180.

[2] See supra, § 639.

[3] Jeffersonville, &c. R. R. *v.* Parmalee, 51 Ind. 43; Central R. R. *v.* Vanhorn, 38 N. J. L. 133. See Robson *v.* R. R. supra, § 393.

Where a passenger by a railway is invited to alight at a spot where there is no platform, so that the usual means of descent are absent, the duty of the railway company, not to expose the passenger to undue danger, requires them to provide some reasonably fit and safe substitute; and, in the case of a female passenger, a jury may reasonably find that the company fails in this duty where the only means of alighting provided are the usual iron step and footboard, with no attendants to assist the passenger in alighting. Robson *v.* R. R. L. R. 10 Q. B. 271. Supra, § 373; and see, also, Weller *v.* R. R. L. R. 9 C. P. 126.

That a railroad company must make proper arrangements to enable a passenger to alight, see Fairmount R. R. *v.* Stutler, 54 Penn. St. 575; Crissey *v.* R. R. 75 Penn. St. 83.

[4] Keating *v.* R. R. 49 N. Y. (4 Sick.) 673; Santer *v.* R. R. 66 N. Y. 51; Burrows *v.* R. R. 3 N. Y. Sup. Ct. 44; Jeff. &c. R. R. *v.* Hendricks, 41 Ind. 48. But see Barton *v.* R. R. 1 N. Y. Sup. Ct. 297; 56 N. Y. 660; Probst *v.* R. R. 1 N. Y. Sup. Ct. 10. Supra, §§ 371–77.

The same rule applies to street cars. Geddes *v.* R. R. infra; Dale *v.* R. R. 3 N. Y. Sup. Ct. 686; 1 Hun, 146. See Curtis *v.* R. R. 27 Wis. 158.

[5] Geddes *v.* R. R. 103 Mass. 391.

[6] McLean *v.* Burbank, 11 Minn.

at the landing, it is the duty of the conductor to warn those about stepping out. He is not obliged specially to attend infirm passengers,[1] but he must give notice to all if any danger in alighting is probable. Of any violent expected jars he must give notice;[2] but not of the ordinary jarring caused by the setting of the brakes, though thereby a passenger standing on a platform is injured.[3]

§ 650. So must a conductor notify the passengers of an approaching station; and if any one of them is injured from the want of such notice, the company is liable.[4] The liabilities attaching to his neglect in this respect have been already discussed.[5] But the conductor need not personally notify passengers not to stand on the platform (unless some sudden and peculiar danger be imminent) if there be a

Must notify of approach of station.

277; Derwort *v.* Loomer, 21 Conn. 245.

[1] New O. & G. N. R. R. *v.* Statham, 42 Miss. 607.

[2] Indian. R. R. *v.* Horst, 93 U. S. (3 Otto) 271.

[3] Rockford R. R. *v.* Coultas, 67 Ill. 398.

[4] Southern R. R. *v.* Kendrick, 40 Miss. 374.

[5] Supra, § 379. The inference a passenger is entitled to draw from the conductor calling out the name of a station has been already largely discussed, and the leading English cases bearing on the question have been cited. See supra, § 379. It is scarcely necessary here to repeat that the inference is one of fact, which varies with each particular case. If, to take an extreme case on the one side, a conductor, when the train is travelling at full speed, calls out the name of an approaching station, a passenger jumping from the cars at such an announcement is guilty of such negligence as to bar his recovery. If, on the other hand, a train overshoots the platform, and comes to what appears to be a final stand-still, and the conductor calls out the name of the station, and a passenger alights and is hurt, then, on this bare state of facts, the company is liable for the injury received by the passenger. Between these two extremes we may conceive of an almost numberless series of cases, each with its own *differentia*, as to each of which distinct inferences may be drawn by the jury. In addition to the cases already mentioned may be cited that of Nicholls *v.* R. R. 7 Irish L. R. 40; 21 W. R. 387; reported in part in an article republished in the Albany L. J. of Aug. 1, 1874, p. 72. In this case (as in Lewis *v.* R. R. L. R. 9 Q. B. 70, cited supra, § 379), the train had passed beyond the platform when the conductor called out the name of the station. The plaintiff was acquainted with the locality, but nevertheless alighted and was injured. It was held that the defendant was liable for the plaintiff's injury, on the grounds that the defendant's conduct was such as to lead the plaintiff to believe the train had come to a final rest, and that the plaintiff took ordinary care in alighting.

printed notice posted in the cars warning the passengers not to stand on the platform.[1]

Must signalize when train is about to start.

§ 651. When passengers have alighted at a way-station, it is the duty of the officers of the train to notify them by signals when the train is about to start; but if they go out of hearing of such signals, the road is not liable. Thus where a through train turns out upon a side-track, at an intermediate station, and there stops to await the crossing of another train out of time, and a through passenger, not destined to that station, leaves the car, and is on the platform, or near the track when his train is about to start, or the coming train has signalled its approach, the company, through its officers, should give reasonable notice for such passenger to return to the car, by using proper diligence and care; and if there be an established signal, by the blowing of the whistle for passengers to resume their places in the cars, that signal should also be given. But if the passenger go out of sight, and out of the reach of the usual notice for all passengers to repair on board, the officers of the road are not required to go after him.[2] Nor are conductors of night-trains required to be on the lookout for passengers to get aboard from both sides of the train; and hence they are not at fault for not discovering a passenger attempting to get on from the wrong side.[3]

Car must have bell-rope.

§ 651 *a*. Ropes by which accidents may be signalled from car to conductor being usually adopted by railway companies, a company is liable, in case of the absence of such ropes, for an injury which might have been prevented had they been at hand. It is otherwise, however, as to an injury which could not have been so prevented.[4]

Access to and from carriage must be safe.

§ 652. The duty of carriage includes giving secure access to and egress from the conveyance, as will be more fully seen under another head.[5] It may, however, be here distinctively noticed that a common carrier, in offering to take passengers, must give such passengers free in-

[1] Higgins *v.* R. R. 2 Bosw. 132. See supra, § 364.

[2] State *v.* R. R. 58 Me. 176.

[3] Mich. C. R. R. Co. *v.* Coleman, 28 Mich. 441.

[4] Mobile R. R. *v.* Ashcraft, 48 Ala. 16; *S. C.* 49 Ala. 305. As to limitations of English statute, see Blamires *v.* R. R. L. R. 8 Exch. 283.

[5] Infra, § 821.

gress and egress, and is liable for any damage which may occur to such passengers from his negligence in not securing them from risk when passing to and fro on a depot, or walking on a railway platform.[1] The same duty applies to all persons having business with the company.[2] His duty, however, is not to warrant safety, but to exercise such reasonable care as a good business man, under similar circumstances, would exercise.[3]

Platforms must be adequate.

§ 653. Even as a matter of contract, the duty of a common carrier protects passengers not only when they are in the cars, but when they are standing on the platforms provided for the convenience of passengers at stations where the train stops for refreshments or for transfer.[4] Such platforms must be large enough to enable passengers to move freely without danger of collision.[5] It has, however, been properly held that where a railroad company has a platform and other facilities for entering and leaving the cars with safety on the depot side of their track, the failure to have the opposite side likewise prepared as a place for entering and leaving the cars cannot be regarded as negligence.[6] And while a railroad company is required, as will hereafter be more fully illustrated,[7]

[1] Burgess *v.* R. R. 6 C. B. N. S. 923; Longmore *v.* R. R. 19 C. B. N. S. 183; Nicholson *v.* R. R. 3 H. & C. 534; Robson *v.* R. R. L. R. 2 Q. B. D. (C. A.) 85; Foy *v.* R. R. 18 C. B. N. S. 225; Watkins *v.* R. R. 37 L. J. N. S. 194; Knight *v.* R. R. 56 Me. 234; Murch *v.* R. R. 29 N. H. 2; McElroy *v.* R. R. 4 Cush. 400; Warren *v.* Fitchburg R. R. 8 Allen, 227; Penn. R. R. *v.* Henderson, 51 Penn. St. 315. Infra, §§ 821, 822.

[2] Toledo, &c. R. R. *v.* Grush, 67 Ill. 262; Ill. Cent. R. R. *v.* Hammer, 72 Ill. 686.

[3] That this is the limit of the company's liability is illustrated by a curious English case, where it appeared that the plaintiff was bitten by a stray dog at a railway station, while waiting for a train. It was proved that at 9 P. M. the dog flew at and tore the dress of another person on the platform; that at 10.30 he attacked a cat in the signal box near the station, when the porter there kicked him out, and saw no more of him; and that he made his appearance again at 10.40 on the platform, where he bit the plaintiff. It was held by the common pleas, that there was no evidence to warrant a jury in finding that the company had been guilty of any negligence in keeping the station safe for passengers. Smith *v.* R. R. L. R. 2 C. P. 4. See infra, §§ 821, 822.

[4] Infra, § 821; supra, § 360; Jeffersonville, &c. R. R. *v.* Riley, 39 Ind. 569. As to visitors, see supra, § 642.

[5] Chicago, &c. R. R. *v.* Wilson, 63 Ill. 167.

[6] Mich. Cent. R. R. Co. *v.* Coleman, 28 Mich. 441.

[7] Infra, §§ 821, 822.

to discharge its duties to passengers by making its approaches safe for their use, it is under no such duty to persons who are mere visitors, entering from curiosity or for purposes of personal comfort, without any business with the company.[1]

Must have proper approaches.

§ 654. The platform must not only be safe, but must have proper approaches. Thus in an action against a railroad company to recover for injuries alleged to have been occasioned by defective steps in the end of a platform, beyond which the train had been backed during a stop for supper, and which the plaintiff was descending to enter the car, evidence that the passenger room was filled with tobacco smoke, crowded, and offensive, was held admissible as a part of the transaction, and as tending to show that plaintiff was justified in leaving the room and seeking the cars before the train had returned in front thereof. It was also held that evidence tending to show that passengers to and from another railroad usually passed over these steps was admissible, to show that plaintiff, when injured, was not endeavoring to enter the cars by a dangerous and unfrequented place.[2] As the general rule, it is the duty of a railroad company to give safe access to and egress from their platforms.[3] At night the depot should be lighted, or other proper means taken, so as to enable passengers safely to reach the place of entrance or exit.[4]

[1] Supra, §§ 350, 642; infra, §§ 824, 825; Harris *v.* Stevens, 31 Vt. 90; Sweeny *v.* R. R. 10 Allen, 372; Nicholson *v.* R. R. 41 N. Y. 525; Gillis *v.* R. R. 59 Penn. St. 129; Pittsburg, &c. R. R. *v.* Bingham, 29 Ohio St. 364. As to escorts of passengers, see supra, § 642.

[2] McDonald *v.* R. R. 29 Iowa, 170; *S. C.* 26 Iowa, 124; Chic. &c. R. R. *v.* Wilson, 63 Ill. 167. As to defective access to urinary, see Toomey *v.* R. R. 3 C. B. N. S. 146. As to defective stairway to station, see Crafter *v.* R. R. L. R. 1 C. P. 300. As to defects in foot-bridge leading to station, see Watkins *v.* R. R. 37 L. J. N. S. 193.

[3] Brainerd *v.* R. R. 48 Vt. 107.

[4] Patten *v.* R. R. 32 Wis. 524; *S. C.* 36 Wis. 413. Infra, § 821. See Allender *v.* R. R. 43 Iowa, 276.

In a recent (1874) English case, a wife having arrived at a station, proceeded to cross the rails, to a platform on the opposite side, by a path which the railway company had always allowed the passengers to use for that purpose. While in the act of crossing, she was knocked down and killed by a train, which had been suddenly and without any warning driven backwards along the line of rails which she was so crossing. In an action by her husband against the company, held, that there was evidence of negligence on the part of the company. Rogers *v.* R. R. 26 L. T. N. S. 879; 21 W. R. 21. See Cornman *v.* R. R. 4 H. & N. 781.

Intermediate crossing must be safe.

§ 655. Where there is a level crossing on the way to the cars, it must be so arranged that the passengers will have a safe passage over the crossing.[1]

So of stairways and passages to boats.

§ 656. What has been said as to the mode of access to railway trains applies, *mutatis mutandis*, to steamers and other vessels.[2] The use of a defective stairway, if inferior to those employed in good and safe vessels of the same class, may be negligence. But it is otherwise if the stairway was of the character generally employed, and had been used by great multitudes of persons safely.[3]

So of disembarking passengers from boat.

§ 657. In a late English case,[4] the evidence was that A. agreed to carry B. from M. to L.; the mode of transit provided was that B. should come on to a hulk lying in the harbor at M., and wait till a steamer came and took him to L. On the hulk, close to a ladder down which B. had to pass to reach the steamer, was a large hatchway, which was negligently left unguarded and improperly lighted, and B. fell through it and was injured. The hulk belonged to a third party, and A. had only acquired a right to the use of it for the purpose of embarking passengers on his steamer. In an action by B. against A. for the injury he sustained, it was held by the English common pleas that A. was answerable for all injury occurring through the means of transit being improper, whether it arose from the negligence of his own servants or of other parties who helped to provide the means of transit. It was also held (Brett, J., doubting), that A., having invited B. on to the hulk, was bound to protect him from concealed dangers, and was liable for injury he sustained through the condition of the hatchway, even though it was under the care of others and not his own servants.[5]

So as to wharf.

§ 658. The same rule applies to a wharf through which travellers pass on way from cars to boat.[6]

[1] Nicholson *v.* R. R. 3 H. & C. 534; 34 L. J. Ex. 84.

[2] Smith *v.* London Docks Co. L. R. 3 C. P. 326; Parker *v.* R. R. 109 Mass. 449; Cleveland *v.* St. Co. N. Y. Ct. of App. 1877. See Dougan *v.* C. T. Co. 56 N. Y. 1.

[3] Crocheron *v.* Ferry Co. 56 N. Y. 656, reversing *S. C.* 1 N. Y. Sup. Ct. 446.

[4] John *v.* Bacon, L. R. 5 C. P. 437. Infra, § 823.

[5] See, as to mode of egress from steamboat, Joy *v.* Winnisimmet Co. 114 Mass. 63.

[6] Knight *v.* R. R. 56 Me. 234; Cohen *v.* Hum, 1 McCord (S. C.) 439.

§ 659. Is it the duty of a railway company to keep the railway, at its own risk, clear from cattle? Of course, in traversing uninhabited wastes, this, as is seen in another connection, is not to be expected; but in a state where there is a duty to fence (whether this duty be statutory or imposed by the nature of things), the railway company is responsible to passengers for any damage to them occurring through its neglect in fencing.[1]

Track to be free from cattle.

§ 660. *Passengers leaning out of carriage windows, pressing against doors or windows, standing on platform of cars, passing from car to car when in motion, getting on or off a train negligently.*—These topics, belonging more properly to the subject of contributory negligence, will be hereafter discussed under that head.[2]

Contributory negligence.

§ 661. It has been frequently ruled, that an accident being proved, in a suit by passenger against carrier for injuries sustained by the passenger, the burden is thrown on the defendant to show that he exercised due care.[3] But this depends upon the nature of the case the plaintiff makes out. If such case indicates *vis major*, for instance, the plaintiff must go beyond this, and show that the *vis major* could have been avoided or overcome. It is only when the injury occurred from the abuse of agencies within the defendant's power that he can be inferred, from the mere fact of the injury, to have acted negligently.[4] Hence when the plaintiff declares in tort, he must usually prove the tort.[5]

Burden of proof.

[1] Sullivan *v.* R. R. 30 Penn. St. 234.

[2] Supra, § 360 *et seq.*

[3] Carpue *v.* R. R. 5 Q. B. 747; Briggs *v.* Taylor, 28 Vt. 180; Hegeman *v.* R. R. 16 Barb. 353; 13 N. Y. 9; Holbrook *v.* R. R. 16 Barb. 113 (but see *S. C.* 12 N. Y. 534); Sullivan *v.* R. R. 30 Penn. St. 234; Meier *v.* R. R. 64 Penn. St. 225; Laing *v.* Colder, 8 Penn. St. 479; Pitts. & Con. R. R. *v.* Pillow, 76 Penn. 510; Galena, &c. R. R. *v.* Yarwood, 15 Ill. 468; Pittsburg, &c. R. R. *v.* Thompson, 56 Ill. 138; Zemp *v.* Wilmington, 9 Rich. (Law) 84; Yeomans *v.* S. N. Co. 44 Cal. 71; Stokes *v.* Saltonstall, 13 Pet. (U. S.) 181; *contra*, Caldwell *v.* N. Jersey Steamboat Co. 47 N. Y. 282; Curtis *v.* R. R. 18 N. Y. 534, which throw the burden of negligence on plaintiff. See supra, § 422; and see Angell on Carriers, 5th ed. § 569.

[4] Daniel *v.* R. R. L. R. 3 C. P. 216, 591; *S. C.* L. R. 5 H. L. 45; Le Barron *v.* Ferry Co. 11 Allen, 312. See Curtis *v.* R. R. 18 N. Y. 543.

[5] Supra, § 421.

§ 662. As a general rule, a railroad is liable for damage accruing to a passenger from a negligent failure on its part to keep the time it promises.[1] But to entitle the plaintiff to recover, there must be proof of negligence. Neither time-table nor advertisement is a warranty of punctuality, though with the ticket they are admissible to show a contract between the passenger and the carrier to use due diligence in transport on the given terms. And as a rule the passenger can only recover from the company such outlays by him, consequent upon his disappointment, as a prudent business man would be under the circumstances justified in making.[2] Where,

Want of punctuality.

Running cars off track is *primâ facie* evidence of negligence in a horse railway. Feital *v.* R. R. 109 Mass. 398; Le Barron *v.* R. R. 11 Allen, 312; Carpue *v.* R. R. 5 Q. B. 747. See Bird *v.* R. R. 28 L. J. Exch. 3. See, also, Walker *v.* R. R. 63 Barb. 260.

So a collision between trains of the same company is *primâ facie* evidence of negligence. Skinner *v.* R. R. 5 Exch. 787. Where a stage-coach, which is overloaded, breaks down, the excess in the number of the passengers has been held to be evidence that the accident arose from overloading. Israel *v.* Clark, 4 Esp. 259.

[1] Phillips *v.* Clark, 5 W. R. 582; Hamlin *v.* R. R. 1 H. & N. 408; Peninsular St. Co. *v.* Shand, 3 Moo. P. C. 272; Memphis, &c. R. R. *v.* Green, 52 Miss. 779.

[2] Le Blanche *v.* R. R. 24 W. R. 808; 34 L. T. N. S. 25; Beeke *v.* R. R. London Law J. Oct. 22, 1874; 10 Alb. L. J. 327. See, also, remarks of Crompton, J. (Provost *v.* R. R. 13 L. T. N. S. 21), that the words, "every exertion will be used to insure punctuality, but the departure or arrival of trains at the time stated will not be guaranteed," meant that "the company will use proper care and not be negligent."

In Le Blanche *v.* R. R., it must be remembered, there was a statement, that "every attention will be paid to insure punctuality," and also a negative condition, that "the company will not be responsible for loss or injury arising from unpunctuality;" and it was held that the court will imply an affirmative contract to insure punctuality, so far as preventible causes are concerned, and will limit the negative condition to cases of inevitable accident. As to this, the court of appeal, by three voices to two, affirmed the unanimous judgment of the common pleas division. 24 W. R. 396. See review of this case in Solicitors' Journal, reprinted in Cent. L. J. for 1876 (vol. iii. No. 33), p. 532; and in Albany L. J. for 1876, p. 74.

The authorities bearing on the topic in the text are fully and faithfully discussed by Smith, J., in Gordon *v.* R. R. 52 N. H. 596. And see, as sustaining the text, Sears *v.* R. R. 14 Allen, 433; Strohn *v.* R. R. 23 Wis. 126; Thompson *v.* R. R. 50 Miss. 316.

In Gordon *v.* R. R. *ut supra*, it was held that the publication of a time-table, in common form, imposes upon a railroad company the obligation to use due care and skill to have the trains arrive and depart at the precise moments indicated in the table; but it

however, there is an absolute contract to forward goods within a specific time, the carrier is bound by the contract.[1] The carrier is also liable for falsely representing that a train would start at a time at which he knew it would not start.[2]

Auxiliary lines.

§ 663. For the purposes of convenience, the authorities bearing on the relations of auxiliary carriers, both of passengers and of goods, have been massed in prior sections, to which reference is now made.[3]

does not import an absolute and unconditional engagement for such arrival and departure, and does not make the company liable for want of punctuality which is not attributable to their negligence.

[1] Denning *v.* R. R. 48 N. H. 455.

[2] Denton *v.* R. R. 5 E. & B. 860.

[3] See supra, § 577 *et seq.*; and as to passenger carriers, supra, §§ 584, 585.

CHAPTER VII.

CUSTODIA, § 665.

§ 665. In certain cases where one person has the goods of another in charge, the Roman law exacts what is called *custodia*, or absolute responsibility of custody. In such case the custodiary is liable for every injury of the thing held by him, as well as for theft; though he is relieved when the damage is through *casus* or superior force. The cases in which *custodia* is exacted are those: (1) of the warehouseman, who undertakes for pay safely to keep;[1] (2) of the shipper, innkeeper, or stable-keeper, who receives the goods of a traveller as a traveller;[2] (3) of the operative, who undertakes the *conductio operis* or *operarum*, in other words, when he receives goods from his employer to work upon;[3] (4) of the vendor, who sells goods by measure, until the goods are set apart by measure;[4] (5) of the commodatary, when he pays nothing, and in any way forces himself into the trust;[5] (6) of the volunteer agent, or *negotiorum gestor*, when he has intruded in the trust.[6] Nature of.

§ 666. It must be however kept in mind that the better opinion is that the custodian is presumed to be liable in all cases of damage or loss, and that the burden is on him to show that the injury came from *casus* or from superior force. Baron, an eminent contemporaneous jurist, rejects this view, Diligence exacted in.

[1] L. 1. C. de loc. 4. 65; L. 19. D. Comm. 13. 16; L. 40; L. 41. D. loc. 19. 2.

[2] L. 3. § 1; L. 4. pr. L. 5. D. nautae, 4. 9; L. 14. § 17. D. de furt. 47. 2.

[3] L. 5. pr. D. nautae, 4. 9; L. 12. pr. L. 14. § 17; L. 48. § 4. D. de furt. 47. 2; L. 13. § 5; L. 25. § 7; L. 62. D. loc. 19. 2.

[4] L. 1. § 1; L. 2. § 1; L. 3. D. de per. &c. Comm. 18. 6.

[5] L. 18. pr. L. 5. §§ 2–6. 9. 13. 15. D. Comm. 13. 6; and other passages cited by Baron, § 237.

[6] L. 5. 3. § 3. D. de furt. 47. 2; and other passages cited by Baron, § 237.

holding that the utmost care to be exacted from a custodian is the *diligentia diligentis patrisfamilias*, or the diligence which an honest and capable business man in the particular department would show in the particular transaction.[1]

[1] Baron, Pandekten, 1873, § 237.

CHAPTER VIII.

COMMODATUM.

Characteristics of, § 667.

Liability of commodatary for negligence, § 668.

§ 667. *Commodatum* or loan is a contract by which one party, the *commodans*, passes to another, the *commodatary*, for the latter's gratuitous use, a thing to be subsequently returned to the commodans. *Property* in the thing loaned the commodans need not have. It is enough if he has an interest therein. The thing is to be returned in specie at a given time, at the close of the contract, or when its use by the commodatary is over, or when it is needed by the commodans. But the commodans cannot capriciously require the return of the article; and it is in this respect that commodatum differs from precarium.[1]

Commodatum a contract of borrowing.

§ 668. The commodatary, from the facts, that the contract is solely for his benefit and that it is gratuitous, is liable for *culpa levis* (special negligence) as well as for *culpa lata* (gross negligence). In other words, he is held bound to bestow on the thing loaned to him the care which a good business man, versed in the use of such particular thing, would, under the particular circumstances, exhibit.[2]

Duties and liabilities of commodatary or borrower.

A borrower is bound to special diligence and is liable for slight neglect.[3] At the same time he is not bound, as has just been stated, to *diligentia diligentissimi;* in other words, it is sufficient if he brings to bear the diligence which a good business man of his class is accustomed to exert in a similar case. Thus in a

[1] Holtz. in loco.

[2] Vangerow, § 629; Baron, § 275.

[3] Green *v.* Hollingsworth, 5 Dana (Ky.), 173; Kennedy *v.* Ashcraft, 4 Bush, 530; Scranton *v.* Baxter, 4 Sandf. (N. Y.) 5; Ross *v.* Clark, 27 Mo. 549; Chiles *v.* Garrison, 32 Mo. 475; Laborde *v.* Ingraham, 1 Nott & McCord, 419; Howard *v.* Babcock, 21 Ill. 259; Bennett *v.* O'Brien, 37 Ill. 250; Wood *v.* McClure, 7 Ind. 155; and see, further, Clark *v.* Jack, 7 Watts, 375; McMahan *v.* Sloan, 12 Penn. St. 229. Infra, § 717.

North Carolina case,[1] where a horse, loaned by plaintiff to defendant, was carried to defendant's house and placed in the common horse lot, so used for many years, though it was somewhat slanting, and the horse, being nearly blind, and the weather being wet, slipped and fell upon a stump, breaking its thigh, it was held that these facts did not import such negligence as to render the defendant liable for the loss of the property.[2]

[1] Fortune *v.* Harris, 6 Jones (N. C.), 532.

[2] Pearson, C. J.: "It is not necessary for us to inquire whether, if one borrows a horse, and it is injured so that it cannot be returned in as good condition as when received, the *onus* of proving how the injury occurred is upon the bailor or bailee; for, admitting that, as the bailment was for the benefit of the bailee alone, she was liable for slight neglect; and, admitting also that the *onus* of exculpation, by disproving any degree of neglect on her part, was on the defendant, we concur with his honor, that, upon the state of the facts assumed, she was not guilty of even slight neglect, as the damage was the effect of a mere accident." See, to the same general effect, Wilcox *v.* Hogan, 5 Ind. 546; Wood *v.* McClure, 7 Ind. 155; Howard *v.* Babcock, 21 Ill. 259; Bennett *v.* O'Brien, 37 Ill. 250; Laborde *v.* Ingraham, 1 Nott & McC. 419.

CHAPTER IX.

PIGNUS OR PAWN.

Characteristics of, § 670.
Liability of bailee for theft, § 671.
Degree of diligence exacted in, § 672.

§ 670. A PAWN or *pignus*, so far as concerns the present inquiry, is where goods are hypothecated by a debtor to a creditor as security for the debt. The holder of the pawn is bound, it is clear from the very nature of the transaction, to exercise the diligence of a good business man when in his particular circumstances; for, says Ulpian, *Non solum dolus malus verum culpa quoque debeatur.*[1] *Culpa* is here used for *culpa omnis*, embracing necessarily *culpa levis*, or the lack of the diligence of a good business man in his specialty.[2] So, in another passage, Ulpian speaks of *instruere pignoratos servos;* and goes on to declare *negligere enim creditorem dolus et culpa, quam praestat, non patitur.*[3] *Culpa*, but not *vis major*, we are expressly told, is to be charged.[4] Pignus, indeed, is declared to be governed by the same law in this respect as commodatum.[5] Characteristics of.

§ 671. Lord Coke's opinion,[6] that "if goods be delivered to one as a gage or pledge, and they be stolen, he shall be discharged, because he hath a property in them; and therefore he ought to keep them no otherwise than his his own," is peremptorily rejected by Sir W. Jones,[7] who maintains that a bailee cannot be considered as using ordinary diligence, who suffers the goods to be taken by stealth out of his custody. This position, however, is elaborately controverted by Judge Story, and the question correctly stated to be whether the Liability of bailee for theft.

[1] L. 9. § 5. de reb. auct. jud.
[2] See supra, § 32.
[3] L. 25 D. de pign. act.
[4] See other passages cited supra, § 69.
[5] L. 13. § 1; L. 14. D. de pign. act.
[6] 1 Inst. 89 *a;* 4 Rep. 83 *b.*
[7] Jones on Bailm. 75.

theft was induced by any negligence on part of the bailee. If so, — if the bailee kept the pledge less carefully than a good business man would under the circumstances be accustomed to do, — then is the bailee liable.[1]

Degree of diligence exacted in.

§ 672. The bailee in *pignus*, as has been seen, is required to exert the *diligentia* of a *bonus et diligens paterfamilias*; in other words, the diligence that a good business man of the particular class would exert under the circumstances.[2] Thus the officer who seizes cattle in satisfaction for debt or taxes is liable to the owner if they suffer from want of food;[3] and a banker who receives on deposit certain collaterals, as security for money loaned, is required to apply to the bailment the care usual among good business men when discharging, under similar circumstances, similar trusts.[4]

[1] Story on Bailments, § 335, citing Vere *v.* Smith, 1 Ventr. 121; 2 Kent Comm. Lect. 40.

[2] Faulkner *v.* Hill, 104 Mass. 98; Fisher *v.* Brown, 104 Mass. 250; Thayer *v.* Dwight, 104 Mass. 255; Strong *v.* Nat. Bank, 45 N. Y. 718; Worthington *v.* Toomey, 34 Md. 182; Commercial Bank *v.* Martin, 1 La. An. 348; Pickersgill *v.* Brown, 7 La. An. 298; Ainsworth *v.* Bowen, 9 Wis. 348.

[3] L. 2. § 20. vi. bon. rapt. 47. 8; St. Losky *v.* Davidson, 6 Cal. 643.

[4] Scott *v.* Crews, 2 Rich. (N. S.) 522. See supra, § 469.

CHAPTER X.

INNKEEPERS AND LIVERY STABLE-KEEPERS.

Innkeeper liable for losses, except by *vis major* or *casus*, § 675.
Liable for thefts as well as negligence of servants, § 676.
But not for burglaries or robberies accompanied by *vis major*, § 677.
Nor for inevitable accident, § 678.
Who are innkeepers, § 679.
Not "restaurants," or "saloons," nor "palace cars," § 680.
Nor lodging-house keepers, § 681.
Nor boarding-house keepers, § 682.
Who are guests, § 683.
For what goods liability exists, § 684.
Liability extends to horses, § 685.
How long liability continues, § 687.
Innkeeper's absence at time no defence, § 688.
Limitation of liability by notice or statute, § 689.
Not liable when loss is attributable to guest's negligence, § 690.
Burden of proof, § 692.
Livery stable-keepers not innkeepers, but liable for diligence of good business men in their specialty, § 693.

§ 675. THE liabilities of the innkeeper by the Roman law have been already noticed.[1] In our own law there has been some fluctuation of opinion in this relation; but as a general rule it may be held that an innkeeper is at common law liable for all losses of property sustained by his guests, when such property was in his house, and when the loss is not imputable either to *vis major* or *casus*.[2]

Liable for all losses, except by *vis major* or *casus*.

§ 676. That an innkeeper is liable for the thefts as well as the negligences of servant, is established by a series of decisions in both England and the United States.[3]

Liable for servant's thefts.

§ 677. He is not liable, however, for burglaries and robberies

[1] Supra, §§ 454, 665.

[2] Infra, § 678; Morgan *v.* Ravey, 6 H. & N. 265; Day *v.* Bather, 2 H. & C. 14; Cashill *v.* Wright, 6 El. & Bl. 891; Oppenheim *v.* Hotel Co. L. R. 6 C. P. 515; Norcross *v.* Norcross, 53 Me. 163; Shaw *v.* Berry, 31 Me. 478; Sibley *v.* Aldrich, 33 N. H. 553; Hulett *v.* Swift, 33 N. Y. 571; Wilkins *v.* Earle, 44 N. Y. 172.

[3] See cases cited in succeeding section, and Morgan *v.* Ravey, 6 H. & N. 265; Houser *v.* Tully, 62 Pa. St. 92; Rockwell *v.* Proctor, 39 Ga. 105; Wade *v.* Thayer, 40 Cal. 578.

accompanied by *vis major*.[1] Thus, although a common carrier is liable for all losses occasioned by an armed mob (not being public enemies), an innkeeper is not (as it should seem) liable for such a loss.[2]

But not for violent robberies.

But unless accompanied by violence liability is not relieved.[3]

§ 678. So far as an accident is to be regarded as the act of God, in the sense which has already been considered,[4] it exonerates the innkeeper.[5] Hence, following the analogy of common carriers, an innkeeper, according to the weight of authority, is liable for all losses of his guests' property through fire, unless such fire was caused by lightning.[6]

Nor for inevitable accident.

[1] Jones on Baliments, 96; Burgess *v.* Clements, 4 M. & S. 306; Lane *v.* Cotton, 12 Mod. 489; McDaniels *v.* Robinson, 26 Vt. 317.

[2] Morse *v.* Slue, 1 Vent. 190, 238; Rich *v.* Kneeland, Cro. Jac. 330; *S. P.* Hob. 17; Lane *v.* Cotton, 12 Mod. 480; Jones on Bailm. 100.

[3] See Mateer *v.* Brown, 1 Cal. 22.

[4] Supra, §§ 114, 553.

[5] Burgess *v.* Clements, 4 Maule & Selw. 306; Calye's case, 8 Co. 32; Dawson *v.* Chamney, 5 Q. B. 164; McDaniels *v.* Robinson, 26 Vt. 337. In Richmond *v.* Smith, 8 B. & C. 9, Bayley, J. said: "It appears to me that the innkeeper's liability very closely resembles that of a carrier. He is *primâ facie* liable for any loss not occasioned by the act of God or the king's enemies; although he may be exonerated where the guest chooses to have his goods under his own care." This, however, was subsequently qualified in Dawson *v.* Chamney, 5 Q. B. 164, by Lord Denman, who said: "The doubt expressed by Bayley, J., in Richmond *v.* Smith, applies to another branch of the doctrine, namely, the exception from the rule which arises where the guest chooses to take the chattels entirely under his own care." "In truth, however," comments Judge Story (Bailments, § 494), "Mr. Justice Bayley's dictum was not so qualified. He treated the responsibility of the innkeeper as like that of a carrier, to be for all losses not occasioned by the act of God or the king's enemies, adding another exception, that where the party took his goods into his own custody. And the opinion of Bayley, J., is not without the support of several American courts. Norcross *v.* Norcross, 53 Me. 163; Gill *v.* Libbey, 26 N. Y. 70. See cases cited under next section, and Thickstun *v.* Howard, 8 Blackf. 535; Pinkerton *v.* Woodward, 33 Cal. 557; Sibley *v.* Aldrich, 33 N. H. 553." See comments of Pollock, C. B., infra, § 686. As to meaning of inevitable accident, see supra, § 553.

[6] Hulett *v.* Swift, 33 N. Y. 571; Mateer *v.* Brown, 1 Cal. 221; Shaw *v.* Berry, 31 Me. 478; Mason *v.* Thompson, 9 Pick. 280; Manning *v.* Wells, 9 Humph. 746. And see Norcross *v.* Norcross, 53 Me. 163; Houser *v.* Tully, 62 Penn. St. 93. See, *contra*, holding the innkeeper liable only for fires produced by his or his servants' negligence: Merritt *v.* Claghorn, 23 Vt. 177; McDaniels *v.* Robinson, 26 Vt. 316; Read *v.* Amidon, 41 Vt. 15; Cutler *v.* Bonney, 30 Mich. 359; Howth *v.* Franklin, 20 Tex. 798. And see Laird *v.* Eichold, 10 Ind. 212; John-

§ 679. To impose this special and exceptional liability, it is necessary that there should be the assumption by the party charged of the business of receiving "all travellers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a condition in which they are fit to be received."[1] Hence it is not necessary that the house in question should have stables, so as to accommodate horses;[2] nor that it should have a sign or license.[3] But the landlord must hold himself out as ready to receive all persons who apply as guests.[4]

Who are innkeepers.

It has been held in England that the salaried manager of an hotel belonging to a company is not an innkeeper, so as to be by law responsible for the goods and property of the guests.[5]

§ 680. Houses merely for the sale of refreshments, not professing to furnish beds and lodging for the night, are not inns.[6] But a hotel does not cease to be an inn because its guests take their meals at a restaurant, provided by itself, and not at a joint table.[7] A palace or sleeping car, however, it is settled, is not an inn.[8]

"Restaurants," "saloons," "palace cars."

§ 681. The special liabilities of an innkeeper do not attach to a

son *v.* Richardson, 17 Ill. 302; Kisten *v.* Hildebrand, 9 B. Monr. 72.

In Story on Bailments, § 472, while it is intimated that an innkeeper is not liable for loss for non-negligent fire, this view is qualified by the following statement: "In a still more recent case it has been laid down in Massachusetts (Mason *v.* Thompson, 9 Pick. 280, 284), that innkeepers as well as common carriers are regarded as insurers of the property committed to their care, and are bound to make restitution for any injury or loss not caused by the act of God, or the common enemy, or the neglect or fault of the owner of the property." To this Judge Bennett adds in parenthesis: "And this seems to be the doctrine of the modern English, and the better considered of the American, cases." See, also, article in Alb. L. J. 1876, p. 128, and 2 Story on Cont. § 909.

[1] Best, J., Thompson *v.* Lacy, 3 B. & A. 283; Parker *v.* Flint, 12 Mod. 255; Walling *v.* Potter, 35 Conn. 183; State *v.* Matthews, 2 Dev. & B. 424.

[2] Thompson *v.* Lacy, *ut supra.*

[3] Thompson *v.* Lacy, 3 B. & A. 283; Smith *v.* Scott, 9 Bing. 14.

[4] See Lyon *v.* Smith, Morris, 184.

[5] Dixon *v.* Birch, L. R. 8 Exch. 135; 28 L. T. N. S. 360.

[6] Doe *v.* Laming, 4 Camp. 77; R. *v.* Rymer, L. R. 2 Q. B. D. (C. C. R.) 136; People *v.* Jones, 54 Barb. 311; Com. *v.* Cuncannon, 3 Brewst. 344; St. Louis *v.* Siegrist, 46 Mo. 593. See supra, § 454.

[7] Krohn *v.* Sweeny, 2 Daly, 200; Cromwell *v.* Stephens, 2 Daly, 15.

[8] Supra, § 610.

lodging-house keeper in respect to the goods of his lodgers; and, accordingly, he is not responsible for a theft of them by a stranger, who came in to view the rooms, which were about to be vacated by the plaintiff; although the plaintiff was then absent, and the stranger was allowed to look at the rooms by the defendant himself.[1] But a guest, by making with his landlord special arrangements as to time or price, does not lose his character and privileges as a guest.[2]

Lodging-house keepers.

§ 682. The duty of boarding-house keepers in this respect was much discussed in England, in a case[3] where on the trial it appeared that the plaintiff had been received as a guest in the defendant's boarding-house, at a weekly payment, upon the terms of being provided with board and lodging and attendance. The plaintiff being about to leave the house, sent one of the defendant's servants to purchase some biscuits, and he left the front door ajar; and whilst he was absent on the errand a thief entered the house and stole a box of the plaintiff's from the hall. The judge directed the jury that the defendant was not bound to take more care of the house and the things in it than a prndent owner would take, and that she was not liable if there were no negligence on her part in hiring and keeping her servant; and he left it to the jury to say whether, supposing the loss to have been occasioned by the negligence of the servant in leaving the door ajar, there was any negligence on the part of the defendant in hiring or keeping the servant. It was held by the court of queen's bench, that at least it was the duty of the defendant to take such care of her house and the things of her guests in it as every prudent householder would take; and by Lord Campbell, C. J., and Coleridge, J., that she was bound not merely to be careful in the choice of her servants, but absolutely to supply the plaintiff with certain things, and to take due and reasonable care of his goods; and if

Boarding-house keepers.

[1] Holder *v.* Soulby, 8 C. B. N. S. 254; aliter, by Roman law, supra, § 454. See Walling *v.* Porter, 35 Conn. 183; Wintermute *v.* Clark, 5 Sandf. 242; Pinkerton *v.* Woodward, 33 Cal. 557; Manning *v.* Wells, 9 Humph. 746.

[2] Allen *v.* Smith, 12 C. B. N. S. 638; Norcross *v.* Norcross, 53 Me. 163; Berkshire Co. *v.* Proctor, 7 Cush. 417; Hall *v.* Pike, 100 Mass. 495; Shoecraft *v.* Bailey, 25 Iowa, 553; Jalie *v.* Cardinal, 35 Wis. 119; Pinkerton *v.* Woodward, 33 Cal. 557.

[3] Dansey *v.* Richardson, 3 E. & B. 165; 25 Eng. L. & E. 76.

there had been a want of such care as regarded the plaintiff's box, it was immaterial whether the negligent act was that of the defendant or her servant, though every care had been taken by the defendant in employing such servant; and, consequently that the direction of the learned judge was not correct; but by Wightman, J., and Erle, J., that the duty of the defendant did not require that she should do more than take all requisite care to employ and keep none but trustworthy servants; and that if that had been done, the defendant was not liable for the single act of negligence on the part of the servant in leaving the door open; and therefore that the direction at the trial was right.

In any view, transient guests at an inn, not *permanent* boarders at a boarding-house, are the persons whom this high duty charged on innkeepers is meant to protect,[1] though, as has just been seen,[2] an innkeeper's liability is not divested by a special contract with a guest as to the duration of the latter's stay.

Who are guests.

§ 683. It may be questioned whether a person depositing valuables with an innkeeper is a guest, or simply a casual visitor desiring to avail himself of the innkeeper's protection of a temporary deposit. In such case the question of relationship is for the jury. Thus in a Pennsylvania case,[3] the evidence was that T. went to H.'s inn, purchased liquor, &c., and gave money for safe keeping to one in the bar-room, as to whom there was evidence that he was bar-keeper, and the money was lost. The court properly instructed the jury that if T. was a guest and gave his money to the bar-keeper, or to one who, if not in fact bar-keeper, was acting in a capacity from which an authority to receive the money on the credit of the house might be inferred, T. could recover, if the money was intrusted on the credit of the inn; but if T. was not a guest, or intrusted the money on the individual credit of the bar-keeper, he could not recover. But a person visiting an inn even casually is deemed a guest, if his object is to be received and entertained personally.[4] Where such person is not a guest, he is a

[1] Peet *v.* McGraw, 25 Wend. 653; Ingallsbee *v.* Wood, 33 N. Y. 577; Walling *v.* Potter, 35 Conn. 183; Jalie *v.* Cardinal, 35 Wisc. 119.

[2] Supra, § 681.

[3] Houser *v.* Tully, 62 Penn. St. 92.

[4] McDaniels *v.* Robinson, 26 Vt. 316; Read *v.* Amidon, 41 Vt. 15; Berkshire Co. *v.* Proctor, 7 Cush. 417; Ingallsbee *v.* Wood, 33 N. Y. 577.

gratuitous depositor, and can recover only on proof of such negligence on part of the bailee as is inconsistent with the care and prudence shown by good business men accepting such deposits.[1]

Liability is only for travelling effects.

§ 684. The high liability of the innkeeper, as an insurer, is only to be extended to articles which are the ordinary accompaniments of a traveller.[2] An innkeeper is under no obligation to receive, as innkeeper, other articles (*e. g.* a piano), and he is only to be regarded as to such articles as a depositary for hire.[3]

Liability for horses received.

§ 685. Where an innkeeper undertakes the charge of horses, there is much difference of opinion as to whether he is their insurer.[4] In a New York case, heard before the commissioners of appeal in 1874, the evidence was that the plaintiffs, being the owners of a stallion, agreed with defendant, an innkeeper, that he should be at his inn for a certain number of days in each week, during a certain season, in charge of one of the plaintiffs. The plaintiffs were to have the choice of one of two stalls in the wagon-house of the inn for his accommodation. The price of oats and meals was fixed at a lower rate than customary, but there was no agreement as to the price for lodging, hay, or use of stall. Pursuant to this agreement, one of the plaintiffs took the horse to the defendant's inn, and lodged and took his meals there on the days agreed upon, kept the horse in a stall provided, under his own lock and key, and took care of him, fed and groomed him, and the wagon, harness, &c., of plaintiffs were kept in the wagon-house. It was ruled that the relation of innkeeper and guest did not exist between the plaintiffs and the defendant, in this respect, so far as to make the defendant liable to the plaintiffs for loss, by accidental fire in the wagon-house, of the horse, while there in pursuance of such agreement.[5] The exception, it should be observed, was put on the ground that the insuring relations of a landlord to a guest did not cover property which the latter brought to the inn for

[1] Wiser *v.* Chesley, 53 Mo. 549.

[2] See, as to meaning of baggage, supra, § 607; and see Wilkins *v.* Earle, 44 N. Y. 172; Pinkerton *v.* Woodward, 33 Cal. 557; Treiber *v.* Barrows, 27 Md. 130; Simon *v.* Miller, 7 La. An. 360.

[3] Broadwood *v.* Granara, 10 Exch. 417.

[4] See Hill *v.* Owen, 5 Blackf. 323.

[5] Mowers *v.* Fethers, 61 N. Y. 34, reversing *S. C.* 6 Lansing, 112. See Washburn *v.* Jones, 14 Barb. 193. See, also, Hulett *v.* Swift, 33 N. Y. 571.

the purpose of carrying on a trade. "It seems to be apparent," says Reynolds, C., "from the nature of the duties and the obligations of the keeper of a common or public inn, that he is not, in his capacity of innkeeper, bound to receive or furnish accommodations for persons desirous of exposing their commodities for sale, or bound to permit his establishment to be made a depot for the propagation of horses."

§ 686. At one time an innkeeper was supposed, in England, not to be liable for the destruction of horses by accidental fire,[1] but subsequently the higher degree of liability was maintained.[2] Thus Pollock, C. B., says: "It is true the expression in the forms in tort is that the loss was 'propter defectum;' but we think the cases show that there is a defect in the innkeeper, wherever there is a loss not arising from the plaintiff's negligence, the act of God, or the queen's enemies. The only case that points the other way is Dawson *v.* Chamney, 5 Q. B. 164. According to the report, however, of that case in 7 Jurist, 1037, 'there was no evidence of the manner in which the horse received the injury.' This may be the explanation of that case; for though damage happening to the horse from what occurred in the stable might be evidence of 'defectus' or neglect, still if it was not shown how the damage arose, it was not even shown that it arose from what occurred in the stable. This would reconcile that case to the general current of authorities." [3]

How long liability continues.

§ 687. It is an interesting question, how long, when a guest leaves his baggage with an innkeeper, the innkeeper is liable, as innkeeper, for such. Judging from the analogy obtaining as to common carriers,[4] we would conclude that the exceptional and onerous insurance liability of the innkeeper would not continue after the guest has permanently left the inn, allowing, of course, for a few hours which may be necessary for porters to effect a removal. At the same time the following observations of a learned Georgia judge [5] are not without weight: "We think in such case that the innkeeper with

[1] Dawson *v.* Chamney, 5 Q. B. 164; and see, as holding that an innkeeper is not liable for injury from non-negligent fire, Merritt *v.* Claghorn, 23 Vt. 177; Cutler *v.* Bonney, 30 Mich. 259.

[2] See supra, § 678.

[3] Morgan *v.* Ravey, 6 H. & N. 277.

[4] See supra, §§ 569–75.

[5] Brown, C. J., Adams *v.* Clem, 41 Ga. 67.

whom the baggage of his guest is left with his consent, though he gets no additional compensation for taking care of it, is still liable for it as innkeeper, for a reasonable time, to be estimated according to the circumstances of the case, after which he would be only a bailee without hire, and liable as such." The innkeeper, in any view, remains liable during the guest's *temporary* absence, the guest continuing to pay board, retaining his room, and expecting at any moment to return.[1]

Innkeeper's absence is no defence.

§ 688. In case of a loss at an inn, the innkeeper is liable, although sick or absent.[2]

Limitation of liability by notice or statute.

§ 689. At common law where an innkeeper, for the purpose of securing the safety of the goods of his guests, makes a reasonable and proper rule or requirement, to be observed by them, as a condition of his liability, and the goods of a guest having knowledge of the rule are lost from the inn solely by reason of neglect to comply therewith, the innkeeper is not liable for the loss thus occasioned by the negligence of the guest.[3] Such agreement, however, cannot operate to relieve the innkeeper from the consequences of his own negligence.[4]

The mere posting in the room of a guest a notice limiting the liability of the innkeeper for losses by theft, unless certain directions are observed, does not operate as notice to the guest of its contents without proof that the guest read it, or his attention was called to its contents.[5]

Statutes are in force in England, and in several of the United States (as New York, New Jersey, and other states), which prescribe that when the landlord provides a safe for valuables, and posts a notice to this effect in his rooms, if the guest declines so to deposit valuables the landlord shall not be liable for their loss. These statutes have been held to apply to all money, jewels, and ornaments of the guest.[6] When the guest has time and oppor-

[1] See York *v.* Grindstone, 1 Salk. 388; Bather *v.* Day, 32 L. J. Exch. 171; Day *v.* Bather, 2 H. & C. 14; McDonald *v.* Edgerton, 27 Vt. 171; Hays *v.* Turner, 23 Iowa, 214.

[2] Houser *v.* Tully, 62 Penn. St. 92.

[3] Purvis *v.* Coleman, 21 N. Y. 111; Fuller *v.* Coats, 18 Ohio St. 343; Houser *v.* Tully, 62 Penn. St. 92. See Coykendall *v.* Eaton, 42 How. (N. Y.) Pr. 378.

[4] Supra, §§ 586–9.

[5] Bodwell *v.* Bragg, 29 Iowa, 232. See supra, § 587.

[6] Hyatt *v.* Taylor, 51 Barb. 632; 42 N. Y. 258; Rosenplaenter *v.* Roessle,

tunity to make the deposit, but neglects so to do, this releases the landlord.[1] It is otherwise, however, when he has no such opportunity: *e. g.* when the theft occurs when he has packed up, and is about leaving.[2] The notice must be printed and posted as the statute directs,[3] and must contain either the statute itself, or its material parts, when so required by the statute.[4] Whether as to risks which are within the statute, and as to which the landlord ceases to be insurer, he is liable, depends upon whether he was negligent, which is a question of fact for the jury.[5] Where the innkeeper's special liability as such ceases, he becomes liable as an ordinary bailee.[6]

§ 690. The innkeeper may be exonerated by showing that the guest has taken upon himself exclusively the custody of his own goods,[7] or has by his own neglect exposed them to the peril.[8] Hence where a guest at an inn takes his goods from his room into his personal custody, and puts them into a place in the inn not designated by the innkeeper, and without his knowledge, and such place is one unusual, and manifestly hazardous and improper therefor, and they are thereby lost, the innkeeper is not liable for the loss.[9] Nor can liability attach where a guest at an inn, instead of confiding his goods to the innkeeper, of choice commits them exclusively to the custody of another person, who is living at the inn.[10]

Not liable when loss is attributable to personal negligence of guest.

54 N. Y. 262; overruling Gile *v.* Libby, 36 Barb. 70.

[1] Rosenplaenter *v.* Roessle, 54 N. Y. 262.

[2] Bendetson *v.* French, 46 N. Y. 266.

[3] Porter *v.* Gilky, 57 Mo. 235; as to gratuitous deposits with innkeepers, see Wiser *v.* Chesley, 53 Mo. 547.

[4] Spice *v.* Bacon, 36 L. T. N. S. 896; L. R. 2 Exch. D. (C. A.) 384.

[5] Faucett *v.* Nichols, 64 N. Y. 377.

[6] Ibid.; Hawley *v.* Smith, 25 Wend. 642; Grinnell *v.* Cook, 3 Hill, 485; Hays *v.* Turner, 23 Iowa, 214; Wiser *v.* Chesley, 53 Mo. 549; Adams *v.* Clem, 41 Ga. 67.

[7] Morgan *v.* Ravey, 6 H. & N. 265; Armistead *v.* Wilde, 17 Q. B. 261; Fuller *v.* Coats, 18 Ohio St. 343.

[8] Story on Bailm. § 483; Calye's case, 8 Co. 32; 2 Kent Comm. Lect. 40, pp. 592, 593, 594 (4th ed.); Com. Dig. Action on the Case for Negligence, B, 1, 2; Armistead *v.* Wilde, 17 Q. B. 261; Spice *v.* Bacon, L. R. 2 Exch. D. (C. A.) 384; Read *v.* Amidon, 41 Vt. 15; Fuller *v.* Coats, 18 Ohio St. 343; Fowler *v.* Dorlon, 24 Barb. 384; Seymour *v.* Cook, 53 Barb. 452; Houser *v.* Tully, 62 Penn. St. 92; Cashill *v.* Wright, 6 E. & B. 890.

Whether the guest has taken exclusive possession of the goods is for the jury. Jalie *v.* Cardinal, 35 Wis. 119.

[9] Fuller *v.* Coats, 18 Ohio St. 343. See Purvis *v.* Coleman, 21 N. Y. 111.

[10] Houser *v.* Tully, 62 Penn. St. 92; Sneider *v.* Geiss, 1 Yeates, 34.

The liability of the innkeeper has been held to cease where a traveller had some boxes of jewelry, and desired a room to himself for the purpose of opening and showing it to customers; and he had the room assigned to him, and the key delivered to him, with directions about locking the door; and he used the room accordingly, and unpacked his jewelry; and he afterwards went away, and left the room for some hours, with the key in the lock on the outside of the door, and some of his boxes of jewelry were stolen.[1] And a refusal by a guest to put his valuables in a place of safety designated by the landlord may relieve the landlord.[2]

§ 691. It has also been held that a guest who exhibits valuables in the presence of strangers, and then leaves them in his room, without locking the door, or in other unguarded places, is guilty of such negligence as precludes him recovering from the innkeeper in case of theft.[3] The mere leaving of a chamber door unlocked, however, is not negligence that relieves the innkeeper, even though the latter had given the lodger a key;[4] but it is otherwise where the lodger uses the particular room as a warehouse;[5] and where there are other circumstances combining to show negligence in the lodger. "The fact of the guest having the means of securing himself, and choosing not to use them, is one which with the other circumstances of the case should be left to the jury."[6] And that the guest not merely left his door unlocked, but left his watch and other valuables on top of a chest of drawers in his room, when he had an opportunity of depositing them in a fire-proof at the office of the hotel, are facts sufficient to sustain a verdict of contributory negligence.[7]

§ 692. The loss of the goods of a guest while at an inn will

[1] Burgess *v.* Clements, 4 M. & S. 306; *S. C.* 1 Stark. 251, n.

[2] Jones *v.* Jackson, 29 L. T. N. S. 399.

[3] Armistead *v.* Wilde, 17 Q. B. 261; Cashill *v.* Wright, 6 E. & B. 891.

[4] Calye's case, 8 Co. Rep. 32 (a), 33 (a); Morgan *v.* Ravey, 6 H. & N. 265; Mitchell *v.* Woods, 16 L. T. N. S. 676. See Burgess *v.* Clements, 4 M. & S. 306.

[5] Farnworth *v.* Packwood, 1 Stark. 249; Burgess *v.* Clements, 4 M. & S. 306.

[6] Montagu Smith, J., in Oppenheim *v.* White Lion Hotel Co. L. R. 6 C. P. 522.

[7] Spice *v.* Bacon, by Cairns, Ch., Cockburn, C. J., Bramwell, L. J., 36 L. T. N. S. 896; L. R. 2 Exch. Div. (C. A.) 384, overruling decision of Kelly, C. B.

be *primâ facie* evidence of negligence on the part of the inn-keeper or of his domestics,[1] and this presumption can be defeated only on proof of *vis major* or *casus*.[2] Burden of proof.

The question of contributory negligence is for the jury.[3]

§ 693. A livery stable exclusively for horses is not an "inn;" and hence the keeper of such a stable is not liable for any loss which is not imputable to his negligence. He is bound, however, to exert in his calling the diligence which good business men in this specialty are accustomed to exert.[4] This obligation involves, among other things, a duty to take reasonable care that any building used for the purpose is in a proper state, so that the thing deposited may be reasonably safe in it; but no warranty or obligation is to be implied by law on his part that the building is absolutely safe.[5] It is the duty of a livery stable-keeper, it should be added, in letting a horse, to provide one suitable for the purpose.[6] Livery stable-keepers.

[1] Bennett *v.* Mellor, 5 T. R. 276; Dawson *v.* Chamney, 5 Q. B. 164; McDaniels *v.* Robinson, 26 Vt. 316; Read *v.* Amidon, 41 Vt. 15; Laird *v.* Eichold, 10 Ind. 212; which cases, qualifying the rule of absolute liability, hold that the presumption of negligence can be rebutted. Hill *v.* Owen, 5 Blackf. 323. See Metcalf *v.* Hess, 14 Ill. 129; Johnson *v.* Richardson, 17 Ill. 302; Merritt *v.* Cleghorn, 23 Vt. 177; Keston *v.* Hildebrand, 9 B. Mon. 72; Howth *v.* Franklin, 20 Tex. 798. Supra, § 422.

[2] Supra, §§ 675–8.

[3] Cashill *v.* Wright, 6 E. & B. 891. Supra, § 423.

[4] See supra, §§ 48, 492; Berry *v.* Marix, 16 La. An. 248; Swann *v.* Brown, 6 Jones (N. C.), 150; cases of negligence to horses. As to pasturers of horses, see infra, § 723.

[5] Searle *v.* Laverick, L. R. 9 Q. B. 122.

[6] Supra, § 200; infra, §§ 712–715.

CHAPTER XI.

EXPRESSMEN.

Are common carriers, § 697.
Cannot exonerate themselves by agreement from negligence, § 698.
But may limit their special liability to their own route, § 699.
Must deliver at address or personally, § 700.
Consignor may recover from railroads, § 701.

Express companies are common carriers.

§ 697. EXPRESSMEN, though using exclusively the carriages of other carriers, are nevertheless themselves common carriers, and subject to the liabilities of such.[1] And this rule applies to local expressmen, whose duty it is to carry passenger trunks to and from depots.[2] When acting as warehousemen, they are under the usual liabilities of warehousemen.[3]

Agreements relieving from negligence are void.

§ 698. Expressmen, in accordance with the limitations already expressed, cannot exonerate themselves by contract from injuries done by their negligence or the negligence of those whom they employ.[4] As their em-

[1] Lowell Wire Fence Co. *v.* Sargent, 8 Allen, 189; Buckland *v.* Adams Ex. Co. 97 Mass. 124; Sweet *v.* Barney, 23 N. Y. 335; Russel *v.* Livingston, 19 Barb. 346; *S. C.* 16 N. Y. 515; Belger *v.* Dinsmore, 51 N. Y. 166; Verner *v.* Sweitzer, 32 Penn. St. 208; Am. Un. Ex. Co. *v.* Robinson, 72 Penn. St. (22 P. F. Smith) 274; Ketchum *v.* Am. Un. Ex. Co. 52 Mo. 390; Christenson *v.* Am. Ex. Co. 15 Minn. 270; Baldwin *v.* Am. Ex. Co. 23 Ill. 197; Gulliver *v.* Adams Ex. Co. 38 Ill. 503; South. Ex. Co. *v.* Caperton, 44 Ala. 101; South. Ex. Co. *v.* Newby, 36 Ga. 65; U. S. Ex. Co. *v.* Backman, 28 Ohio St. 144.

In Pitlock *v.* Wells, 109 Mass. 452, the court went a questionable distance in denying that an expressman in New York, doing business with California, was a common carrier when he undertook to take a package specially from New York to Boston.

[2] Henshaw *v.* Rowland, 54 N. Y. 242; Richards *v.* Westcott, 2 Bosw. 589; 7 Bos. 6; Verner *v.* Sweitzer, 32 Penn. St. 208.

[3] Am. Ex. Co. *v.* Baldwin, 26 Ill. 504.

[4] Ibid. See supra, § 585 *et seq.*; Ketchum *v.* Am. Un. Ex. Co. 52 Mo. 390; Balt. &c. R. R. *v.* Rathbone, 1 W. Va. 87; Am. Ex. Co. *v.* Sands, 55 Penn. St. 140; Adams Ex. Co. *v.* Stettaners, 61 Ill. 185; South. Ex. Co. *v.* Armstead, 50 Ala. 350. Supra, § 598.

ployees in this sense are to be viewed the railroad and other companies who carry for them.[1]

But may limit as to route and value.

§ 699. An express company, however, may decline to be liable, except as a forwarder, beyond its own route, and in such case its special liability as insurer is confined by this limitation.[2] Thus in a Pennsylvania case an express company received a package of money from a bank at Titusville to be transmitted to Lancaster. In their printed receipt, they undertook to "forward to the nearest place of destination reached by this company." By conditions printed with the receipt, they were not to be liable "except as forwarders only, ... or for any default or negligence of any person or corporation to whom" the package should be delivered, "at any place of the established route run by this company," and such person, &c., was to be taken to be the agent of the consignor. To reach Lancaster the package was carried by three other express companies. The consignee at Lancaster refused to receive it, and directed it to be returned to Titusville, to which place it was carried by the same routes. On its arrival there it was found that part of the money had been abstracted. It was held by the supreme court that at most the company were liable as carriers only to the end of their own route, and afterwards were forwarders, responsible only for reasonable care and diligence in selecting proper carriers.[3] An express company can also ordinarily by agreement limit its liability as insurer to a specific amount, if such limitation be reasonable, and is known to

[1] Bank of Ky. *v.* Adams Ex. Co. 93 U. S. (3 Otto) 174; Hooper *v.* Wells, 27 Cal. 11; Christenson *v.* Ex. Co. 15 Minn. 270; South. Ex. Co. *v.* Armstead, 50 Ala. 350.

In Bank of Ky. *v.* Adams Ex. the proof was that the defendant, an express company, upon receiving some packages of money for transportation, gave back to the sender a "bill of lading," which contained a clause exempting the company from liability for loss occasioned "by the dangers of railroad transportation, or ocean or river navigation, or by fire or steam." This was ruled not to exempt the company from liability for loss caused by the negligence of employees of a railroad company over whose line it transported the money. And see, to same effect, Machu *v.* R. R. 2 Exch. 415.

[2] See supra, §§ 581, 585 *et seq.*; infra, § 703; Read *v.* R. R. 60 Mo. 199; Snider *v.* R. R. 63 Mo. 376.

[3] Am. Ex. Co. *v.* Bank of Titusville, 69 Penn. St. 394. As to forwarding merchants, see infra, § 703.

That such limitations enure to the benefit of subsequent carriers, see supra, §§ 583, 585; Levy *v.* Ex. Co. 4 S. Car. 234.

the parties to be such, though it cannot by agreement protect itself from liability for negligence.[1]

Must deliver at address or personally.

§ 700. The duty of an express company, when the address of the consignee is placed on the parcel, or when such address is, by the ordinary diligence of a good business man ascertainable (as where the name of the consignee is given, and the town in which he dwells, in which his residence is generally known, or when his address can be obtained by reference to a directory), is to deliver at the consignee's place of business or residence at such address, if not personally. Hence, on failure to do so, the expressman is liable, unless it should appear that he exercised the diligence which a good business man in this particular department would do under the circumstances.[2] He is also liable for the conversion if he lose the

[1] Supra, § 585 *et seq.*; Grace *v.* Adams, 100 Mass. 502; though see Am. Ex. Co. *v.* Schier, 55 Ill. 140; 2 Redf. Am. R. R. Cas. 223–27; and see U. S. Ex. Co. *v.* Backman, 28 Ohio St. 144, where it was ruled that an express company is liable for the value of the goods lost through its negligence, notwithstanding the bill of lading provides that the carrier shall not be liable beyond an amount named therein, when it is understood by the parties that the sum so agreed on is less than the value of the goods. Such an agreement, it was argued, can at most cover a loss arising from some cause other than the negligence or default of the carrier or his servants, and the rule of damages is the same, although less is charged and paid for the transportation than when the exempting clause is omitted.

Where "the plaintiff, or his agent for forwarding the goods, is aware that the carrier makes a distinction in the price of transportation, whether he assumes the full responsibility of insuring a safe delivery, or only that of a limited character, and that these two degrees of responsibility are defined upon the bill of lading, the consignor having the option between them, it is, unquestionably, his duty to state which alternative he will adopt, and if he fills up the bill or allows it to be filled, upon the lower scale of responsibility, he must be considered as having elected to send his goods upon the terms therein specified, and if he failed to read, or become acquainted with those terms, it was his own fault, and he cannot complain if the court assume that he did know the terms of the contract." Judge Redfield, note to Bank of Ky. *v.* Adams Ex. Am. Law Reg. 1876, p. 40.

An agreement made by an express company that the company should not be held liable for any loss or damage to a package whatever, delivered to it, unless claim should be made therefor within ninety days from its delivery to the company, is an agreement which the company can rightfully make when the time required for transit is brief in comparison with the time required for reclamation. Ex. Co. *v.* Caldwell, 21 Wall. 264.

[2] Haslam *v.* Adams Ex. Co. 6 Bosw. 235; Am. Un. Ex. Co. *v.* Robinson, 72 Penn. St. (22 P. F. Smith) 274. See Stephenson *v.* Hart, 4 Bing.

goods by delivery to a wrong person or a wrong place, or if they are destroyed before delivery, unless he can prove that the destruction is by inevitable accident or the act of God. But if the consignee cannot be found, then the expressman is released from his common law liability as insurer, and is only liable for the *diligentia diligentis*, *i. e.* for the diligence a good business man would under such circumstances show.[1] Even where an expressman has no agent at a distant point at which he agrees to deliver a parcel, he is liable for negligence in non-delivery at such point.[2] It should be remembered that so far as concerns delivery personally to the consignee, the duties of the express company are regulated by contract or by custom, such delivery not being the common law duty of a common carrier. As, however, a carrier is only liable as insurer in respect to his common law duties, the expressman is not to be held liable as insurer so far as concerns delivery to the consignees. If he can show that he safely carried the goods, and that he used all practicable diligence to discover the consignee, but failed, this, on the principles above stated, should excuse him at common law.[3] Of course, the express company may by contract bind itself to deliver to an individual specifically.[4]

The custom exists in our great cities for travellers expecting to take passage from a railroad depot to send their trunks in advance by an expressman to such depot. An expressman under the circumstances discharges his duty by leaving a trunk so given to him at the baggage office of the depot where travellers are accustomed to check their trunks.[5]

§ 701. Persons sending goods by express companies may re-

476; Golden *v.* Manning, 2 Wm. Bl. 916; 3 Wil. 429; Tooker *v.* Gormer, 2 Hilt. 71; Hersfield *v.* Adams, 19 Barb. 577; Finn *v.* R. R. 102 Mass. 283; Baldwin *v.* Am. Ex. Co. 23 Ill. 197; *S. C.* 26 Ibid. 504; *S. C.* 2 Redf. Am. R. R. Cas. 72; Marshall *v.* Am. Ex. Co. 7 Wis. 1; Adams Ex. Co. *v.* Haynes, 42 Ill. 89; Adams Ex. Co. *v.* Stettaners, 61 Ill. 184; Am. Ex. Co. *v.* Hockett, 30 Ind. 250. Supra, § 569.

[1] Adams Ex. Co. *v.* Darnell, 31 Ind. 20.

[2] South. Ex. Co. *v.* Armstead, 50 Ala. 350.

[3] See, as holding to a higher liability, Place *v.* Un. Ex. Co. 2 Hilt. 19; Redf. on Carriers, c. 5, 47.

[4] As to effect of such contracts, see supra, § 517.

[5] Henshaw *v.* Rowland, 54 N. Y. 242. See Verner *v.* Sweitzer, 32 Penn. St. 208.

cover against the railroad company, or other common carrier em-
Consignors may recover from railroad.
ployed by such express company, for negligence in the carriage. The express company is to be regarded as the agent of the owner, who is entitled to sue in his own name on the contract made between the express company and the principal carriers, and to proceed against the latter for negligence, to the same extent as could the express company were it suing the principal carriers.[1] Thus where the owner of specie employed an expressman to transport it for him, and the expressman employed a transportation company to carry the specie, under a contract providing that the carriers were not to be held in any way responsible for loss or damage, it was ruled by the supreme court of the United States that the company was liable directly to the owner for loss occasioned by the company's negligence; it being held that even though the owner should be held entitled only to recover on the contract made with the com-

[1] New Jersey Steam. Nav. Co. *v.* Merchants' Bank, 6 Howard, 344; Langworthy *v.* R. R. 2 E. D. Smith, 195. See Southern Express Co. *v.* Newby, 36 Ga. 635; Buckland *v.* Express Company, 97 Mass. 124. In this connection, however, we have to consider the following remarks by Strong, J., in Bk. of Ky. *v.* Adams Ex. Co. 93 U. S. (3 Otto) 174: "Express companies frequently carry over long routes, at great distances from the places of destination of the property carried, and from the residence of its owners. If in the course of transportation a loss occurs through the want of care of managers of public conveyances which they employ, the carriers or their servants are at hand. They are best acquainted with the facts. To them those managers of the public conveyances are responsible, and they can obtain redress much more conveniently than distant owners of the property can. Indeed, in many cases, suits by absent owners would be attended with serious difficulties. Besides, express companies make their own bargains with the companies they employ, while they keep the property in their own charge, usually attended by a messenger. It was so in the present case. The defendants had an arrangement with the railroad company, under which the packages of money, inclosed in an iron safe, were put into an apartment of a car set apart for the use of the express company. Yet the safe containing the packages continued in the custody of the messenger. Therefore, as between the defendants and the railroad company, it may be doubted whether the relation was that of a common carrier to his consignor, because the company had not the packages in charge. The department in the car was the defendants' for the time being. And if the defendants retained the custody of the packages carried, instead of trusting them to the company, the latter did not insure the carriage. Miles *v.* Cattle, 6 Bing. 743; Tower *v.* The Utica & Syracuse Railroad Co. 7 Hill (N. Y.) 47; Redfield on Railways, § 74."

pany by the expressman, yet that this contract could not be so construed as to relieve the company from liability for negligence, such limitations being against the policy of the law.[1] The same liability is maintained in England, though there the limitation of responsibility is allowed a wider range.[2]

[1] New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 Howard, 344. As to agreements modifying carriers' responsibility, see supra, § 517.

[2] Baxendale *v.* R. R. Co. 5 C. B. N. S. 336; Garton *v.* R. R. 1 B. & S. 112; Branley *v.* R. R. 12 C. B. N. S. 63.

CHAPTER XII.

FORWARDING MERCHANTS.

§ 703. FORWARDING merchants, or forwarders, are a class of business men who store and forward goods by other agencies, they receiving a commission from the owner for their trouble in storing, and in selecting such carrying agencies. Forwarders, therefore, are distinguished from expressmen by not being impressed with the special and extraordinary insurance liabilities of common carriers. Hence forwarders are liable only as ordinary bailees for hire, who need only satisfy the jury by the best evidence in their power of their due care and fidelity, and that the loss was not from default of themselves or their servants.[1] Hence it is, that a person who receives goods in his own store, standing upon his own wharf, for the purpose of forwarding them, is deemed but a mere forwarding warehouseman, and responsible only for the diligence shown by good agents of this class, even although he holds himself out to the public as ready and willing to take goods for persons generally, on storage, and to forward them to their destination.[2] Therefore, if in such a case his store is broken open, and the goods stored are stolen therefrom by thieves, without any default on his part, or any want of appropriate care, he will not be responsible for the loss.[3]

[1] Forward *v.* Pittard, 1 Term R. 27; Hyde *v.* Trent Navigation Company, 5 Term R. 389; Streeter *v.* Horlock, 1 Bing. 34 ; American Express Co. *v.* Bank of Titusville, 69 Penn. St. 394; supra, § 699; Forsythe *v.* Walker, 9 Barr, 148 ; Platt *v.* Hibbard, 7 Cowen, 497; Brown *v.* Dennison, 2 Wend. 593; Bush *v.* Miller, 13 Barbour, 488; Maybin *v.* R. R. 8 Rich. 240; Hooper *v.* Wells, 27 Cal. 11. See Quiggin *v.* Duff, 1 Mees. & Wels. 174; Powers *v.* Mitchell, 3 Hill, 545; Thompson *v.* Given, 46 Miss. 524; Archer *v.* Sinclair, 49 Miss. 343; Story on Bail. § 502. Supra, §§ 571, 572.

[2] Platt *v.* Hibbard, 7 Cowen, 497; Roberts *v.* Turner, 12 Johns. 232; Brown *v.* Dennison, 2 Wend. 593.

[3] Platt *v.* Hibbard, 7 Cowen, 497; Campbell on Negligence, § 482.

CHAPTER XIII.

FERRYMEN.

When common carriers of goods, § 706.
Diligence required from, § 707.
When passenger relieves ferryman from liability, § 708.

§ 706. A FERRYMAN, who undertakes to carry goods from point to point for hire, is a common carrier;[1] though if not undertaking to carry goods, his liability in this respect is denied.[2]

Are common carriers.

§ 707. When a common carrier of goods, the ferryman is subject to the liabilities of common carriers of goods, as already stated. When not a common carrier, he is bound to the diligence such as is exercised by good and diligent persons in his calling. Hence in New York, where it is held that a ferryman is not technically a common carrier, unless he makes it his business to carry goods systematically for hire, it is said by Allen, J.:[3] "A ferryman does not undertake absolutely for the safety of the goods carried with and under the control of the owner; but he does undertake for their safety as against the defects and insufficiencies of his boats, and other appliances for the performance of the services, and for the neglect or want of skill of himself and his servants. At the same time the owner of the property, retaining the custody of it, is bound to use ordinary care and diligence to prevent loss or injury. The duties and obligations of a defendant, a ferry company, were defined by the judge to the jury in the very words of Judge Dewey,

Diligence required of.

[1] Babcock *v.* Herbert, 3 Alab. 392; Smith *v.* Seward, 3 Barr, 342; Willoughby *v.* Horridge, 12 C. B. 742; Slimmer *v.* Merry, 23 Iowa, 90; Fisher *v.* Clisbee, 12 Ill. 344; Powell *v.* Mills, 37 Miss. 691; Wilson *v.* Hamilton, 4 Ohio St. 722.

[2] White *v.* Winnisimmet Co. 7 Cush. 155; Wells *v.* St. Nav. Co. 2 Comst. 208; Alexander *v.* Greene, 3 Hill (N. Y.), 19; Wyckoff *v.* Queen's County Ferry Co. 52 N. Y. (7 Sickles) 32.

[3] Wyckoff *v.* Queen's County Ferry Co. 52 N. Y. 32.

in White *v.* Winnisimmet Co. 7 Cush. 155. When the only possession and custody by the ferryman of a horse and carriage is, as in this case, that which necessarily results from the traveller's driving his horse and wagon on board the boat, and paying the usual ferriage, the ferryman is not chargeable with the full liabilities of a common carrier. The duties and liabilities of the ferryman to persons thus using the ferry is thus stated by Judge Dewey: It is the duty of a ferry company 'to have all suitable and requisite accommodations for the entering upon, the safe transportation while on board, and the departure from the boat of all horses and vehicles, passing over such ferry.' . . . . 'They are also required to be provided with all proper and suitable guards and barriers on the boat for the security of the property thus carried, and to prevent damage from such casualties as it would naturally be exposed to, though there was ordinary care on the part of the traveller.'"[1] In other words, the ferryman, when not liable absolutely as a common carrier, is liable for the lack of such diligence as is usual among good specialists of his class, such diligence to be proportioned to the dangers of the service.

When passenger relieves ferryman from liability.

§ 708. Should a passenger take his baggage, or other property in his charge, under his exclusive care, in such a way as to discharge the ferryman from giving personal attention, then, for any damage occurring through the passenger's negligence, the ferryman is not liable.[2] It

[1] The same principle was adjudged in Clark *v.* Union Ferry Co. 35 N. Y. 485; and the defendant was held liable for the loss of a horse occasioned by the insufficiency of the chain used as a guard or barrier at the rear of the boat. See, also, Willoughby *v.* Horridge, 12 C. B. 742; Walker *v.* Jackson, 10 M. & W. 161; Cohen *v.* Hum, 1 McCord (S. C.), 439.

In Hazeman *v.* Hoboken Land & Imp. Co. 50 New York, 53, it was ruled that it is the duty of a ferry company not only to carry its passengers safely, but not to injure them by any act of carelessness or negligence. *S. C.* 2 Daly, 130. See, also, Ferris *v.* Union Ferry Co. 36 N. Y. 313.

In an action against a ferryman, on his contract for the transportation of animals which fell off the ferry-boat and were drowned, through his alleged carelessness in not furnishing the boat with a barrier where they fell, evidence is inadmissible that just such a boat had been used to transport animals over the ferry daily for thirty years, and no accident had ever occurred before. Lewis *v.* Smith, 107 Mass. 534.

[2] White *v.* Winnisimmet Co. 7 Cush. 155; Wilson *v.* Hamilton, 4 Ohio N. S. 722. See supra, § 600.

is otherwise, however, when the care given by the passenger is merely supplementary to that to be exercised by the ferryman.[1] In such case the passenger is regarded as the agent of the ferryman, and not as his substitute; and the ferryman is liable for any damage not accruing from the direct negligence or misconduct of the passenger.[2]

[1] Powell *v.* Mills, 37 Miss. 691.

[2] Fisher *v.* Clisbee, 12 Ill. 344.

CHAPTER XIV.

LOCATIO (HIRING).

Definition, § 710.
Classification, § 711.
Hiring of a thing, § 712.
Duties of latter, § 712.
Duties of hirer, § 713.
Hirer liable for his subaltern's negligence, § 714.
Hiring horses, § 715.
Burden as to negligence, § 718.
Hiring of service, § 719.
Negligence by employer of service, § 720.
Negligence of servant or employee, § 721.
Hiring by job. *Locatio conductio operis*, § 724.
Negligence by employee in such case, § 725.
Negligence of employer, § 726.
When employee is at liberty to substitute other stuff for that given, he is liable for all kinds of loss, § 727.
Hiring of seats in public theatres or buildings for spectacles; hiring of storage in warehouses, § 728.
Wharfingers, § 729.

§ 710. HIRING: *Locatio conductio*, in the Roman law; Miethe, in the German law; is a consensual contract which arises when one person (the *locator*) agrees for a settled price to give to another (the *conductor*) the use of a particular thing, or a particular amount of labor.[1]

Definition.

§ 711. Hiring, therefore, falls into two heads: the hiring of a thing, *locatio conductio rei;* and the hiring of labor, *locatio conductio operarum.* Under the latter head falls, as a subdivision, the hiring of a job, or labor necessary to complete a particular work; *locatio conductio operis.*

Classification.

§ 712. *Hiring of a thing. Locatio conductio rei. — Duties of the letter*, negligence in respect to which makes him liable, in case damage ensue to the hirer, are: 1. Delivery of the thing to the hirer, unless prevented by necessity.[2]

Letter's duty.

2. Due care and diligence (*e. g.* in letting horses) in providing a thing suitable for the purpose required.[3]

[1] Dig. t. xix. 2. locati conducti; Cod. t. iv. 65. de locato et conducto; Vangerow, § 638; Baron, § 292.

[2] L. 7–9. § 1; L. 15. § 8; L. 35. pr. D. h. t. 19. 2; Baron, § 294. See supra, § 181; infra, § 791.

[3] Fowler *v.* Locke, L. R. 7 C. P. 272; Horne *v.* Meakin, 115 Mass. 326. Supra, §§ 200, 693.

It has also been ruled in Massachusetts that when an accident is caused in part by the fault of a horse unsuitable for the purpose for which it is let, and in part by a defect in the high-

§ 713. The hirer must (independently of the question of rent, which does not belong to this treatise) keep and redeliver the thing hired in good condition; and he is liable for negligence in this respect, if such negligence be productive of damage to the owner.[1] As has been already seen,[2] the hirer is liable in such case for *culpa levis* (special negligence or lack of diligence due from a person presumed to be acquainted with what is necessary to preserve the thing hired) as well as for *culpa lata* (gross negligence). In other words, he is liable not merely for the lack of that general diligence which notices what every one notices (*quod omnes intelligunt*), but for the lack of the special diligence which a person ought to have and exercise who undertakes to do any work requiring special qualifications. He is only relieved from liability on account of damage to the thing leased if he can show that he is chargeable with no such negligence.[3] But he is in no sense an insurer, nor is he liable for *culpa levissima*, or that apocryphal phase of infinitesimal negligence which stands in antithesis to the *diligentia diligentissimi*, or intense diligence, which, as has been already shown,[4] the law does not, as a continuous service, exact. The Roman law is clear to this point. The hirer is not liable for damages induced by extraordinary catastrophes, unless it should be proved that these could have been averted by such diligence on his part as is usually shown by persons undertaking to lease property of the same character as that under his charge. Hence he is not ordinarily liable for damages produced by inundation, by

Hirer's duty.

way, the stable-keeper who let the horse will be liable for the damage to the parties injured. Horne *v.* Meakin, 115 Mass. 326.

[1] See Batson *v.* Donovan, 4 B. & A. 21; Sullivan *v.* Scripture, 3 Allen 564; Eastman *v.* Sanborn, 3 Allen, 594; Conway Bk. *v.* Am. Ex. Co. 8 Allen, 512. Infra, § 723.

[2] Ante, § 69.

[3] Brown *v.* Waterman, 10 Cushing, 117; Lucas *v.* Trumbull, 15 Gray, 306; Cayzer *v.* Taylor, 10 Gray, 274; Maynard *v.* Buck, 100 Mass. 40; Sullivan *v.* Scripture, 3 Allen, 564; Vaughan *v.* Webster, 5 Harr. (Del.) 256; Mayor *v.* Howard, 6 Ga. 213; Jackson *v.* Robinson, 18 B. Monr. 1; Swigert *v.* Graham, 7 B. Monr. 661; Lockwood v. Bull, 1 Cowen, 322; Milton *v.* Salisbury, 13 Johns. R. 211; Davy *v.* Chamberlain, 4 Esp. 229; and cases cited infra, § 723. Using the thing hired for a different and more perilous purpose than that agreed upon is itself negligence. Wheelock *v.* Wheelwright, 5 Mass. 104; Homer *v.* Thwing, 3 Pick. 492; Rotch *v.* Hawes, 12 Pick. 136; Schenck *v.* Strong, 4 N. J. L. (1 South.) 87; Lewis *v.* McAfee, 32 Ga. 465.

[4] Ante, §§ 63–5.

fire, by riot, or by the act of a public enemy.[1] Nor is he liable for thefts by his servants, unless there is some negligence on his part facilitating such theft.[2] But if the theft be attributable to his want of care, he is liable.[3]

Hirer liable for his subaltern's negligence.

§ 714. The hirer is liable for the default and negligence of servants, domestics, and children, and of all acting under him.[4] If, therefore, a hired horse is ridden by the servant of the hirer so immoderately that he is injured or killed thereby, the hirer is personally responsible.[5] The same rule applies where the servant of the hirer carelessly and improperly leaves open the stable-door of the hirer, and the hired horse is stolen by thieves.[6] And where the injury is done by sub-agents, employed by the hirer, the same responsibility for the negligent acts of the former, about the thing bailed, is incurred by the latter.[7] But where horses are hired for a journey, and the owner sends his driver, the hirer is not liable for the driver's overdriving unless the hirer directed the same.[8]

[1] See L. 15. §§ 2–4. D. h. t. 19. 2; Menetone *v.* Athawes, 3 Burr. 1592; Longman *v.* Galini, Abbott on Shipp. P. 4, ch. 6, p. 389, note *d*, 7th ed.; 1 Bell Comm. pp. 453, 455, 458, 5th ed.; 1 Bell Comm. § 394, 4th ed.; Reeves *v.* The Ship Constitution, Gilp. 579; McEvers *v.* Steamboat Sangamon, 22 Mo. 187.

[2] See Finucane *v.* Small, 1 Esp. 315; Brind *v.* Dale, 8 Carr. & Payne, 207; *S. C.* 2 Mood. & Rob. 80; Butt *v.* Great Western Railway Co. 7 Eng. Law & Eq. 448; 11 C. B. 140; Great Western Railway Co. *v.* Rimell, 27 Law Journ. C. P. 201; 6 C. B. N. S. 917 (Am. ed.); 18 C. B. 575.

[3] See Dansey *v.* Richardson, 25 Eng. Law & Eq. 90; 3 El. & Bl. 722; Broadwater *v.* Blot, Holt N. P. 547; Jones on Bailm. 91, 92; Bryan *v.* Fowler, 70 N. C. 596; Mansfield *v.* Cole, 61 Ill. 191.

[4] Sinclair *v.* Pearson, 7 N. H. 219. See, as to servants, supra, §§ 156, 178.

[5] Jones on Bailm. 89; 1 Black. Comm. 430, 431; Story on Bailm. § 400.

[6] Jones on Bailm. 89; Salem Bank *v.* Gloucester Bank, 17 Mass. 1. See Dansey *v.* Richardson, 25 Eng. Law & Eq. 90; 3 Ell. & Bl. 722.

[7] Story on Agency, §§ 308, 311, 452, 457; Randenson *v.* Murray, 3 Nev. & Per. 239; *S. C.* 8 Adolph. & Ellis, 109; Bush *v.* Steinman, 1 Bos. & Pull. 409; Laugher *v.* Pointer, 5 Barn. & Cress. 547, 553, 554; Milligan *v.* Wedge, 12 Adolph. & Ellis, 737; Quarman *v.* Burnett, 6 Mees. & Welsby, 499; and cases cited supra, § 157.

[8] Hughes *v.* Boyer, 9 Watts, 556.

In Chase *v.* Boody, 55 N. H. 574, C. bailed to B. a horse for hire, to drive from D. to S. Upon arriving at S., B. put up the horse in a proper place, and, having properly cared for it, left it, but returned within a reasonable time, intending to water and feed it again. In his absence, a boy sixteen years old, belonging on the premises,

§ 715. We have noticed in the preceding section the liability of the hirer of horses for his subaltern's negligence. The duties of the hirer may be further illustrated as follows: Where a horse falls sick during a journey, the hirer ought to call in a farrier, if one can be obtained within a reasonable time or distance; and if he secures such aid, he is not responsible for any mistakes of the farrier in the treatment of the horse. But if, instead of procuring the aid of a farrier, when he reasonably may, he himself prescribes unskilfully for the horse, and thus causes his death, he will be responsible for the damages, although he act *bonâ fide*.[1] Again: If a hired horse refuses its feed from fatigue, the hirer is bound to abstain from using the horse; and if he pursues his journey with the horse, he is liable to the owner of the horse for all the injury occasioned thereby.[2] In general, any neglect on the hirer's part in the application to the horse of such care as is usual with good and careful hostlers or owners of horses makes the hirer liable to the owner for the consequences.[3]

Care required of hirer of horses.

§ 716. In a German case reported by Mommsen, a student

had turned out the horse to water, and it had jumped over a pair of bars and lamed itself. It was held that B. was not responsible to C. in damages, although B. had some reason to apprehend that the boy might attempt to water the horse, it not appearing, however, that the boy was incompetent.

[1] Dean *v.* Keate, 3 Camp. 4.

[2] Bray *v.* Mayne, 1 Gow, 1; Thompson *v.* Harlow, 31 Geo. 348. See Eastman *v.* Sanborn, 3 Allen, 595; Edwards *v.* Carr, 13 Gray, 234.

[3] Handford *v.* Palmer, 2 Br. & B. 359; *S. C.* 5 Moore, 74; Chase *v.* Boody, 55 N. H. 574; Edwards *v.* Carr, 13 Gray, 239; Mooers *v.* Larry, 15 Gray, 451; Eastman *v.* Sanborn, 3 Allen, 504; Strong *v.* Connell, 115 Mass. 575; Perham *v.* Coney, 117 Mass. 102; Milton *v.* Salisbury, 13 Johns. 211; Ruggles *v.* Fay, 31 Mich. 141; Graves *v.* Moses, 13 Minn. 335; Thompson *v.* Harlow, 31 Ga. 348; Rowland *v.* Jones, 73 N. C. 52; Murphy *v.* Kauffman, 20 La. An. 559. See Maxwell *v.* Houston, 67 N. C. 305, as to what constitutes a hiring of this class. In Chamberlain *v.* Cobb, 32 Iowa, 161, it was held that only "ordinary care" need be paid to a horse which the hirer took to work, paying for the use of the horse by its keep.

In an action to recover for an injury sustained by a horse owned by plaintiff, through the alleged negligence of the defendant, who was employed by plaintiff, in taking the horse on slippery ground, the presiding judge gave general instructions not excepted to as to what constituted due care. The plaintiff then requested the court to rule "that if the ground was slippery, or the horse's shoes so smooth that they slipped with no load, common prudence required

hired from a livery stable a one-horse wagon to drive to a specified place. When arrived at a tavern in the place of destination, he gave the horse to the hostler, who fastened the horse so negligently in the stall that it was suffocated and died. What is the student's liability? Undoubtedly, had he driven negligently, it would have been *culpa levis;* either because he did not know how to drive, in which case he is liable for negligence in undertaking to do that for which he is incompetent, or because though competent he did not apply his competency. But the charge was not negligence in *driving*. The livery-stable man could not rightfully have expected from the student more than that, when arriving at the tavern, he would put the horse under the charge of a proper attendant, with the proper orders. So argues Mommsen, on the ground that the student could not be reasonably expected to know about fastening a horse; and that he is liable for ignorance only of what he could be reasonably expected to know. But this conclusion cannot be accepted for two reasons: First, if I hire a horse, I must see that he is safely kept as well as safely driven, and if I take the horse under my care, the owner of the horse has as much right to presume that I know how to tie him as that I know how to drive him. Secondly, even supposing the first point fail, the maxim *respondeat superior* here comes in. The hostler who puts up my horse under my directions is my servant; and I am as much liable for his negligence as for my own.

In an interesting case in New York,[1] where the hirer of a horse stopped at an inn, and ordered the horse to be put into the barn and fed, and owing to the neglect of the hostler to put the bits in the horse's mouth, on bringing him up, the horse was unmanageable, and ran away, damaging himself, the buggy, and harness; the hirer was held liable to the owner for the damages occasioned by the negligence of the hostler.

of the defendant greater care in the use of the horse than if its shoes had been sharp, or the ground not slippery." This instruction the court declined to give, saying that the jury were to consider all the circumstances, and these among others. It was ruled that the plaintiff had no ground of exception. Strong *v.* Connell, 115 Mass. 575.

Although a contract for the hire of a horse on Sunday is void, the hirer will be held liable in an action of tort for misusing the horse. Gregg *v.* Wyman, 4 Cush. 322; Stewart *v.* Davis, 31 Ark. 518.

[1] Hall *v.* Warner, 60 Barb. 198.

§ 717. The *borrower* of a horse, without pay, is bound to even greater caution. He can only use the horse for the particular purpose agreed on, and must scrupulously avoid any risks to which the animal might be exposed.[1]

The duties of the *owner* of a horse, who lets it out, are noticed in a prior section.[2]

§ 718. The question of burden of proof, in this relation, has been already discussed.[3] In cases of theft, it may be here noticed that Judge Story dissents from Pothier and Sir William Jones, who hold that a loss by theft is *primâ facie* evidence of negligence,[4] and he argues that no such rule exists in the English law, however it may exist in the Roman or French law.[5] He adds, that if there be such a rule, it is but a bare presumption, and capable of being rebutted by proof that the theft was by no negligence of the hirer.[6]

Burden as to negligence.

§ 719. *Hiring of service* (*locatio conductio operarum; Dienstmiethe*) is a contract peculiarly applicable to engagements of manual labor for fixed wages, distinctively called in the Roman law *operae locari solitae*, *illiberales*. Here we strike at the true distinction between the Mandate and the Hiring, or *locatio conductio operarum*. This distinction is not, as has been supposed,[7] that hiring is for pay, while mandate is gratuitous, for the mandatary could and constantly did recover remuneration for his services by a *cognitio extraordinaria*, or a special equitable suit; but that in hiring the pay is fixed wages, suitable to cases where only manual labor is given, and recoverable by ordinary suit at law, while in mandate the compensation is an *honorarium salarium philantropium*,[8] suitable to the discretionary powers the agent is expected to exercise for his principal, and recoverable, not by suit for a specific sum, but by a

Hiring of service.

[1] Howard *v.* Babcock, 21 Ill. 259; Bennett *v.* O'Brien, 37 Ill. 250; Wilcox *v.* Hogan, 5 Ind. 546. See § 668.

[2] § 712.

[3] Supra, § 422; and see Collins *v.* Bennett, 46 N. Y. 490; Harrington *v.* Snyder, 3 Barbour, 380; Logan *v.* Mathews, 6 Penn. St. 417.

[4] Jones on Bailm. 43, 44, 76, 78, 98, 110; Pothier, Prêt à Usage, n. 53; Pothier, Contrat de Louage, n. 429; Pothier, Pand. lib. 19, tit. 2, n. 28; Vere *v.* Smith, 1 Vent. 121.

[5] Pothier, Contrat de Louage, n. 429; Pothier, Pand. lib. 19, tit. 2, n. 28.

[6] Jones on Bailments, 96, 98; Coggs *v.* Bernard, 2 Lord Raymond, 909, 918.

[7] Duncan *v.* Blundell, 3 Stark. 6.

[8] See Story on Bailments, § 435.

suit in the nature of *quantum meruit*, through the special equitable remedy afforded by the *cognitio extraordinaria*. In other words, the distinction between the *locatio conductio operarum*, or hiring, and mandate, is, so far as concerns compensation, about the same as that between wages, in our own popular use, and fees, or salary. The first is a mere contract for labor without discretion; the second, a contract for labor with discretion and intelligence. The first does not involve, the second, as is elsewhere shown, does involve, a confidential relation between the parties.

Negligence by the employer (*conductor operarum*) in contracts for manual labor.

§ 720. Hence we understand the rulings of the Roman jurists and their successors,[1] that the employer, by the nature of his contract (*conductor omnia secundum legem conductionis facere debet*),[2] is bound to the servant to supply the latter with proper materials for work, and to surround him with such guards as will enable the work to be safely performed by the servant.[3] If, through the employer's negligence in this respect, the servant is injured, the master is liable to the servant to make good the damage. This arises from the nature of the contract of hiring. The master says to the servant go, and he goeth, and come, and he cometh. There is no discretion reserved to the servant, except that ordinary discretion which sees what everybody sees. He is a mere laborer, selling only his labor, and the master or employer is bound to exercise that special discretion as to selection of material and application of protective agencies which the laborer is cut off from exercising. Hence the employer is liable not only for *culpa lata*, or gross negligence, which consists in not seeing what every one sees, but for *culpa levis*, or special negligence, which consists, in this relation, in not providing each particular industry with the materials and guards by which such industry can be safely conducted. He is not, of course, liable for lacking that intense diligence (*the antithesis of culpa levissima*), which, as it has been shown, the law does not and cannot exact.[4] But he is liable for *culpa levis*, or special negligence, or the lack of that special diligence which prudent business men

[1] See Vangerow, §§ 645, 650; Baron, § 608; Demangeat, ii. 318, 444.

[2] Inst. § 5. de locat. et conduct.

[3] So in our own law, supra, §§ 208, 209.

[4] See supra, § 57.

in his particular department show. Yet at the same time in dangerous industries, laborers who undertake the work with their eyes open cannot recover for injuries sustained by them from dangers of which they had notice.[1]

§ 721. In ordinary cases of hiring manual labor, the laborer or servant is responsible not only for gross negligence, *i. e.* neglecting to see that which persons not specialists see, but for special negligence, *i. e.* for neglecting to see that which a laborer in his particular kind of labor should see.[2] He is liable for negligence not merely in doing the work carelessly, but in entering on the work without due skill. Thus, if I employ a person claiming to be a proper mechanic or artisan to erect a stove in a shop, and lay a tube under the floor for the purpose of carrying off the smoke, and the plan should fail, he is liable to me for want of skill as well as for want of diligence.[3] "Of course," as Judge Story adds,[4] "this doctrine is subject to the exception, that the undertaker is permitted to act upon his own judgment; for if his employer chooses to supersede the judgment of the undertaker, and requires his own to be followed, he must not only bear the loss, but pay the full compensation."[5]

Negligence of servant or employee; *locator operarum.* Negligence in doing his work.

§ 722. Skill, of course, cannot be insisted on in cases where the employer, at the time of the employment, knew there was no skill.[6] Thus if a person who has a disorder in his eyes should employ a farrier to cure the disease, and he should lose his sight by using the remedies prescribed in such cases for horses, he would have no legal ground of complaint.[7] So, to take a case from Sir W. Jones, if a person will knowingly employ a common mat-maker to weave or embroider a fine carpet, he must impute the bad workmanship to his own folly.[8] But ordinarily, where skill as well as care is required in performing the undertaking, there, if the party purports to have skill in the business, and he

[1] Supra, §§ 201–6.

[2] See supra, § 30. Gamber *v.* Wolaver, 1 Watts & S. 69; McConihe *v.* R. R. 20 N. Y. 495.

[3] Duncan *v.* Blundell, 3 Stark. 6; Farnsworth *v.* Garrard, 1 Camp. 39; Moneypenny *v.* Hartland, 1 Carr. & Payne, 352; 2 Carr. & Payne, 378.

[4] Bailments, § 378.

[5] Duncan *v.* Blundell, 3 Stark. 6.

[6] See Story on Bailments, § 435.

[7] Jones on Bailm. 99, 100; Beauchamp *v.* Powley, 1 Mood. & Rob. 38.

[8] Jones on Bailm. 99, 109.

undertakes it for hire, he is bound, not only to ordinary care and diligence in securing and preserving the thing, but also to the exercise of due and ordinary skill in the employment of his art or business about it; or, in other words, he undertakes to perform it in a workmanlike manner.[1] Where a person is employed in a work of skill, the employer buys both his labor and his judgment. He ought not to undertake the work unless he be skilful; and he should know whether he is skilful or not.[2]

Return of article.

§ 723. Suppose, however, the laborer or operative has given to him a particular article to work at, *e. g.* cloth to be made into a coat, or gold to be made into a ring; what phase of diligence is he to exert in the keeping of such article? The natural answer is, such special diligence as a person qualified to do such work should in such case exert. But on this point the Roman jurists apply a more stringent rule. By the Roman law bailees of a certain class are held liable for *custodia;* that is to say, they are, like common carriers by Anglo-American law, insurers of articles committed to their care, and are liable not merely for injuries but for theft, unless they can prove that the loss occurred through accident, *casus*, or a superior force.[3] And as subjected to such liability is specifically enumerated the laborer or operative to whom a particular article is given to be worked on or manufactured. He stands in this respect in the same position as the innkeeper who has received goods from a guest.[4] But the duties of an insurer our law does not in such cases impose,[5] and hence the operative is not liable if the article is accidentally, without negligence on his part, destroyed by fire.[6]

[1] Supra, § 713; Story on Bailments, § 431; Jones on Bailments, 91; 1 Bell Comm. 459; Farnsworth *v.* Garrand, 1 Camp. 39; Beauchamp *v.* Powley, 1 M. & R. 38; Rodgers *v.* Grothe, 58 Penn. St. 414; Foster *v.* Taylor, 2 Brev. 348; Spangler *v.* Eicholtz, 25 Ill. 297; Hilyard *v.* Crabtree, 11 Texas, 264; Kuehn *v.* Wilson, 13 Wis. 104. Thus, one who is mending a boat is liable for damages if he expose her to injury from ice by launching her at an unsuitable time. Smith *v.* Meegan, 22 Mo. 150.

[2] Duncan *v.* Blundell, 3 Stark. 6; Moneypenny *v.* Hartland, 1 Carr. & Payne, 352; *S. C.* 2 Carr. & Payne, 378.

[3] L. 25. § 7. D. loc. 19. 2; L. 41. D. loc. 19. 2; Vangerow, § 105; Baron, § 237.

[4] Ibid.

[5] Menetone *v.* Athawes, 3 Burr. 1592; Seymour *v.* Brown, 19 Johns. R. 44; Slaughter *v.* Green, 1 Rand. (Va.) 3; Waller *v.* Parker, 5 Coldw. (Tenn.) 476.

[6] Russell *v.* Koehler, 66 Ill. 459;

At the same time, if the operative, by his negligence, retains the goods until they are destroyed by fire, he is liable.[1] And generally, where the thing given to the operative to be worked upon is damaged or lost by his negligence, he is liable to the employer for the article itself, or its value.[2] Thus, where a watch was deposited with a watchmaker for repairs, and it was left in his shop in a less secure repository than that in which he kept his own, and it was stolen by his servant, the watchmaker was held liable for the value of the watch.[3]

Agisters of horses. Pasturers. — When a horse is given to an agister or pasturer to be pastured, the agister is liable for *culpa levis*, or lack of diligence of a good agister or pasturer.[4] He is not liable for theft or for *casus*, unless it be induced by his negligence, in which case liability attaches to him.[5]

Livery stables, so far as concerns the duties imposed on those who keep them, have been already noticed.[6]

§ 724. The jobbing of a work, or *locatio conductio operis* (in German *Verdingung eines Werkes*), exists where one person agrees with another to undertake, for a fixed price (in the Roman law for a fixed sum of money), to perform a particular work. *Locatio conductio operis*, by the Roman law, is very comprehensive. It includes the building of a house, the transport of person or goods by land or sea, the instruction of another in any manual industry, the cutting and setting of a jewel, the cleaning and mending of garments, the painting of a picture, the sculpturing of a statue.[7] It is essential, however, in the Roman law, to constitute this particular service, that the employer should give some part of the material to the employee

Hiring by job.

Henderson *v.* Bessent, 68 N. C. 223; Bryan *v.* Fowler, 70 N. C. 596. Supra, § 713, and cases there cited.

[1] Francis *v.* Castlemann, 4 Bibb, 282; Pattison *v.* Wallace, 1 Stewart (Ala.), 48. But see supra, § 559.

[2] Story on Bailments, § 431; Jones on Bailm. 91; Kuehn *v.* Wilson, 13 Wis. 104; Bryan *v.* Fowler, 70 N. C. 596; Mansfield *v.* Cole, 61 Ill. 191; Batson *v.* Donavan, 4 B. & A. 21.

[3] Clarke *v.* Earnshaw, 1 Gow, 30; Halyerd *v.* Dechelman, 29 Mo. 459.

[4] Mansfield *v.* Cole, 61 Ill. 191; Umlauf *v.* Bassett, 38 Ill. 96.

[5] Dansey *v.* Richardson, 3 E. & B. 722; Broadwater *v.* Blot, Holt N. P. 547; Morgan *v.* Crocker, 3 N. Y. Supreme Ct. 301; Rey *v.* Toney, 24 Mo. 600.

[6] Supra, § 693.

[7] The authorities for these specific enumerations will be found in Vangerow, § 645; Baron, § 297; Rey *v.* Toney, 24 Mo. 600.

to work upon; if the employee gives both material and labor (*e. g.* in house-building gives land and building stuff entire), the transaction is not a *locatio conductio operis*, but a sale.[1]

Negligence by the employee or jobber, in *locatio cond. operis.*

§ 725. The employee in this contract is liable, according to the principles already sufficiently expounded, not merely for gross negligence, *i. e.* negligence in failing to see that which any person would ordinarily see, but for that special negligence which fails to see that which a specialist competent to undertake the particular contract ought to see. Hence, as has been already noticed,[2] he is liable for the negligence of his subalterns, for in this respect applies the maxim *respondeat superior*.[3]

The master or owner of a tow-boat, undertaking to tow vessels for a lumping price, from point to point, is a bailee falling under the general head now under discussion, and is required to apply the diligence and care usual among good specialists of this class.[4]

[1] L. 2. § 1. D. h. t. 19. 2, and other authorities cited by Baron, § 297.

[2] Supra, § 714.

[3] L. 25. § 7; L. 13. § 5; L. 62. D. h. t. 19–2.

[4] Supra, § 546; The Merrimac, 2 Sawyer, 586; The Steamer America, 6 Benedict, 122. See Hays *v.* Miller, 77 Penn. St. 238.

Deady, J.: "This is a bailment which is beneficial to both parties, and the bailee is responsible for ordinary skill and diligence. Ed. on Bail. 371; Story on Bail. 457. But he is not a common carrier, and may contract for a more restricted liability than the law imposes upon him. Alexander *v.* Greene, 3 Hill, 19; The Steamer Webb, 14 Wall. 414. Counsel for respondent insists that this hiring did not amount to a bailment of any kind, and, in support of this proposition, cites a dictum of Bronson, J., in Wells *v.* The S. N. Co. 2 Comst. 208, to that effect. It was decided in that case that the proprietor of a tow-boat was not a common carrier, as to the boat towed, but the dictum that such proprietor was not a bailee, and that the transaction was not a bailment, is in direct opposition to the language of all the authorities, as well as that of the learned judge elsewhere in the same opinion, and in Alexander *v.* Greene, supra.

"The master of the tug being a bailee for hire, and as such responsible for ordinary skill and diligence in the performance of his contract, what was his duty in the premises? Impliedly he undertook to furnish a tug, properly equipped and of sufficient capacity and power, to take the scow to the cape, and for the exercise of ordinary skill and prudence in selecting the proper time to make the voyage, with reference to the craft to be towed, and the wind and tide or other ordinary peculiarities of the navigation, and in the conduct of the enterprise in the case of any unlooked for or extraordinary emergency." The Merrimac, 2 Sawyer, 592.

§ 726. The employer who puts certain goods in the hands of another on a special contract, not of day labor, but that the work should be completed by the employee for a given price, is liable, according to the Roman law, for negligence, should the materials be such as to injure the employee in their use, provided the defect is attributable to the negligence of the employer. Of course the diligence the employer is required to give in the selection of the materials is the special diligence of a business man acting prudently in his particular department; and hence he is liable for *culpa levis*, or special negligence, as well as for *culpa lata*, or gross negligence.[1] The adjudications to the same effect in the Anglo-American courts are very numerous and have been already considered.[2]

Negligence of employer in *loc. cond. operis.*

§ 727. Should the contract be that the employee should be at liberty to prepare the article either out of the particular stuff given to him, or out of some other similar stuff, then, according to the Roman law, he becomes possessor of the stuff given to him, and bears all the risk of its loss.[3]

When employee can substitute another stuff for that given.

727 *a*. A lessor of real estate, whose duty is to make repairs, is liable to his tenant for the lack of such care and diligence as a good business man under such circumstances is accustomed to exercise.[4] But it is not required that everything in the building leased should be of the best order and quality. The thing leased should be in a condition suitable to the circumstances and price; and any peculiar defect of which the lessor has notice he is bound to state to the lessee. If he conceal important facts, this may yield an inference of fraud; if he does not know what he ought to know, and what he ought to communicate, this may be negligence. If he permit the thing leased to be a nuisance, then he is liable for the nuisance. But beyond this his obligation does not go.[5] That a lessor's specific

Liability of lessor to lessee of real estate.

[1] See Vangerow, § 645; Fowler *v.* Lock, L. R. 7 C. P. 272.

[2] See supra, §§ 206–223.

[3] L. 31. D. h. t. 19. 2; L. 34. pr. D. de auro. 34. 2.

[4] Taylor L. & T. § 390; Priest *v.* Nichols, 116 Mass. 401; Peck *v.* Ingersoll, 3 Seld. 528; McHenry *v.* Marr, 39 Md. 510.

[5] Hart *v.* Windsor, 12 M. & W. 68; Robbins *v.* Jones, 15 C. B. N. S. 221; Leavitt *v.* Fletcher, 10 Allen, 119; Clevcs *v.* Willoughby, 7 Hill, 83; Jaffe *v.* Harteau, 56 N. Y. 398; Hazlett *v.* Powell, 30 Penn. St. 293; Lampater

undertaking to make repairs was gratuitous is no defence.[1] But when there is no duty there is no liability.[2]

Hiring of seats in public theatres or

§ 728. It has been held in England, in a case hereafter more fully discussed,[3] that he who lets to another a seat in a building erected for the purpose of witnessing a public exhibition impliedly warrants not only that there has

v. Wallbaum, 45 Ill. 444. See supra, § 321; infra, §§ 791, 792.

[1] Gill *v.* Middleton, 105 Mass. 470.

[2] Infra, §§ 791, 792.

In Jaffe *v.* Harteau, 56 N. Y. 400, Grover, J., said: —

"The question, then, is, whether a lessor of buildings, in the absence of fraud, or any agreement to that effect, is liable to the tenant or others lawfully upon the premises, by his authority, for their condition, or that they are tenantable and may be safely and conveniently used for the purpose for which they were apparently intended. This question must be regarded as settled by authority.

"In the following cases it was held that no such liability existed: Cleves *v.* Willoughby, 7 Hill, 83; O'Brien *v.* Capwell, 59 Barb. 497; Hart *v.* Windsor, 12 M. & W. 68; Keates *v.* Cadogan, 10 C. B. 591; Robbins *v.* Jones, 15 C. B. N. S. 221; Leavitt *v.* Fletcher, 10 Allen (Mass.), 119. Godley *v.* Hagerty, 20 Penn. 387, cited by the counsel for the appellant, as sustaining a contrary doctrine, was disposed of upon the peculiar facts of the case. It has not been understood by the courts of that state as holding the doctrine contended for by counsel. See Hazlett *v.* Powell, 30 Penn. 293. In the former, some importance was attached to the fact that the building was erected by the defendant. This may have been regarded as proper in that case, as tending to show him guilty of fraud. But nothing of the kind is imputed to the defendant in the present case. The cases cited by the counsel for the appellant, holding that one who erects a nuisance upon his premises, and afterwards parts with the possession of the *locus in quo*, is still liable for injuries caused by the nuisance, have no application to this case. There is no reason for holding the lessor, in the absence of any agreement or fraud, liable to the tenant for the present or future condition of the premises, that would not be equally applicable to a similar liability sought to be imposed by a grantee in fee upon his grantor. See infra, § 858.

[3] See infra, § 775; Francis *v.* Cockerell, L. R. 5 Q. B. 184, 503; but see this case criticised in Searle *v.* Laverick, L. R. 9 Q. B. 122.

See Kendall *v.* Boston, 118 Mass. 234, where the defendant, for the purpose of a concert, hired a public hall and employed a person to decorate it. Among the decorations was a bust, placed on the outside of a balcony. The plaintiff sat in a seat on the floor of the hall, immediately under the bust. The audience were requested, by the programme, to rise at a certain part of the concert, and, when they did so, the bust fell from its place and injured the plaintiff. The plaintiff offered no evidence as to the manner in which the bust was secured. The question was made to turn upon the issue whether there was proof of negligence, and it was decided that no such proof was exhibited in the fact that the bust fell. This case, therefore, negatives the idea of warranty.

been due care by himself and his servants, but that there has been due care on the part of the contractors employed by him to erect the building; and although in such case we abandon the supposition of a warranty, there can be no question that he who lets seats for a public entertainment is bound, on the principle *Sic utere tuo ut non alienum laedas*, to see that these seats are fit for use.[1] So far as concerns the letting of storage in a warehouse, the law has been more accurately expressed in a case in the supreme court of Pennsylvania, where it was held, that where the owner of a warehouse or place hired for storage has taken proper care in its erection, he is not liable for occult defects, of which he had no means of knowledge.[2] Hence there is no liability if the building were reasonably safe.[3]

buildings for spectacles: hiring of storage in warehouses.

§ 729. A wharfinger is not an insurer of the goods which may be temporarily in his charge, but is required to bestow on them the same care and to apply to them the same skill as are usual with good business men of his particular class.[4] In this view his liabilities are analogous to those of a warehouseman.[5] When, however, he undertakes to transport goods from place to place, he becomes a common carrier, and hence, at common law, an insurer of the goods committed to his charge.[6]

Wharfinger.

[1] Latham *v.* Roach, 72 Ill. 179.

[2] Walden *v.* Finch, 70 Penn. St. 461; and see infra, §§ 775, 791; supra, § 693.

[3] Moulton *v.* Phillips, 10 R. I. 218. See supra, § 573.

[4] Ross *v.* Johnson, 5 Burr. 2827; Carnes *v.* Nichols, 10 Gray, 369; Cowles *v.* Pointer, 26 Miss. 256; Thompson *v.* Gwin, 46 Miss. 524; Archer *v.* Sinclair, 49 Miss. 343.

[5] Sidaways *v.* Todd, 2 Stark. 400.

[6] See Maving *v.* Todd, 1 Stark. 72; and see Story on Bailm. § 451.

CHAPTER XV.

PHYSICIANS.

General statement of liability, § 730.
If undertaking case, liable for due diligence, § 731.
Incompetent volunteer, excluding expert, liable for *culpa levis*, § 732.
Physician to be competent according to school he professes, § 733.
Test of "average capacity" inadequate, § 734.
Not liable for *culpa levissima*, § 735.
Not liable if there be no injury, § 736.
Not liable if patient was the direct cause of the injury, § 737.
Causal relation, § 738.

General statement of liability.

§ 730. THE liability of a physician is to be determined by the same rules as have heretofore been stated in reference to business experts in general. He is bound, in every case which he undertakes, to exhibit the diligence of a good specialist in his particular calling; in other words, to express this concretely, he is obliged in each case to apply such diligence as good physicians, called under similar circumstances, are accustomed to apply. At the same time it must be remembered that when he professes to be an expert in a specialty, and is employed as such, he must possess the education and skill,[1] and must show the diligence of an expert in such specialty. The simple question is, did he, in the particular department he undertook to fill, exhibit such diligence as good physicians in such department (be it general or special) are accustomed to exhibit? These several qualifications of liability will now be examined.

May decline case, but bound

§ 731. No question can exist as to the legal right of a physician, unless he be an officer of the government charged with specific duties which he thereby violates, to decline

[1] Supra, § 50; Rich *v.* Pierpoint, 3 F. & F. 35; Ruddock *v.* Lowe, 4 F. & F. 519; Hancke *v.* Hooper, 7 C. & P. 84; Lanphier *v.* Phipos, 8 C. & P. 479; Wilmot *v.* Howard, 39 Vt. 447; Patten *v.* Wiggin, 51 Me. 594; Howard *v.* Grover, 28 Me. 97; Bellinger *v.* Craigue, 31 Barb. 534; Carpenter *v.* Blake, 60 Barb. 488; Fowler *v.* Sergeant, 1 Grant, 355; Long *v.* Morrison, 14 Ind. 595; Wood *v.* Clapp, 4 Sneed, 65; 2 Whart. & St. Med. J. § 1090.

A person not authorized by statute to practise medicine may be sued for malpractice. Musser *v.* Chase, 29 Ohio St. 577.

to take charge of a particular case. When in charge, however, he is liable for any negligence, whether of omission or of commission, which may produce injury to his patient. *Voluntatis est suscipere mandatum, necessitas est consummare.*[1]

to diligence if he accept.

§ 732. No doubt an inexperienced volunteer, who acts (he being known to make no claims to be an expert) when no expert could be obtained, is liable only for *culpa lata*, or gross negligence.[2] But if by forcing himself into the case he excludes a competent physician, he is liable for *culpa levis*, or the lack of the diligence of a specialist.[3]

Incompetent person excluding expert is liable for his incompetency.

§ 733. A physician must be competent according to the school he professes. He is a specialist, but a specialist only in the kind of practice which he claims to adopt.[4] Thus, a botanic physician, employed as such, is gauged according to the botanic system,[5] and a homeopathic physician by the homeopathic system.[6]

Physician to be tested by his school.

§ 734. The average skill of a profession, taking in good and bad, young and old, as a mass, is difficult to reach; and if we count into the aggregate the young who have had no practice, and the old who have retired from practice, the average would give a standard lower than that which should be required. Nor is this all. Even supposing such a standard could be reached and should be adequate, it is too inflexible to be indiscriminately applied. In a city, there are many means of professional culture which are inaccessible in the country. In a city hospitals can be readily walked, and new books and appliances promptly purchased, and libraries easily visited; and in a city, also, exists that intercourse with prominent professional men which leads not only to the promotion of keenness and culture, but to the free interchange of new modes of treatment. In the

Test of "average capacity" inadequate.

[1] It has been said that, when the service is gratuitous, then the physician is only liable for gross negligence, — *culpa lata*. Ritchey *v.* West, 23 Ill. 385. This, not merely for humane considerations, but for the reasons stated in prior sections (supra, §§ 437, 640), I cannot accept. See, also, R. *v.* Macleod, 12 Cox C. C. 534.

[2] See supra, §§ 26–48.

[3] Supra, § 534; Hood *v.* Grimes, 13 B. Mon. 188; Ruddock *v.* Lowe, 4 F. & F. 519.

[4] See Musser *v.* Chase, 29 Ohio St. 577.

[5] Bowman *v.* Woods, 1 Greene (Iowa), 441.

[6] Corsi *v.* Maretzek, 4 E. D. Smith, 1.

country such opportunities do not exist. What is due diligence, therefore, in the city, is not due diligence in the country; and what is due diligence in the country is not due diligence in a city. Hence the question of diligence in each particular case is to be determined, not by inquiring what would be the average diligence of the profession, but what would be the diligence of an honest, intelligent, and responsible expert in the position in which the defendant was placed.[1]

That we cannot take the average diligence of others as a standard is illustrated by several distinct lines of adjudication. Thus in an action for negligence in omitting to put up adequate guards around an excavation on a highway, it is no defence that the guards were such as builders usually put up; it must be shown that the guards were such as would be thought sufficient by a builder of ordinary care and prudence, in view of the particular excavation.[2] So in other cases of engineering heretofore noticed,[3] where it is ruled that no "average" practice will excuse a failure to adopt improvements which experience has shown to be practicable and efficacious.[4]

Physician not liable for *culpa levissima.*

§ 735. That there is no such distinct grade of *culpa* as *culpa levissima* has been already abundantly shown,[5] and of the absurdity in applying such a test no more striking illustrations can be found than in medical practice. There is scarcely a case in which a physician is called in which he may not be charged with *culpa levissima*, and if *culpa levissima* makes him liable, then his liability becomes almost coextensive with his practice. According to the well known axiom, *imperitia* is to be imputed as *negligentia;* but who, in a science so vast, so complicated in its connections, so uncertain in its boundaries, so fluctuating in its standards, so manifold in its schools, can divest himself of the charge of *imperitia levissima?*[6] Is there not some recess of information to which he has not penetrated, some remedy which he has not tested, some particular possible line of practice with which he has not familiarized himself? So, also, with regard to the mechanism of his practice. Is there not some instrument, if the case be one in which

[1] See Fowler *v.* Sergeant, 1 Grant, 355.

[2] Koester *v.* City of Ottumwa, 34 Iowa, 41.

[3] Supra, §§ 52, 635.

[4] Steinweg *v.* R. R. 43 N. Y. 123.

[5] Supra, § 65.

[6] See Bogle *v.* Winslow, 5 Phil. 136.

instruments are required, which might aid his patients, but which he has not procured? Is there not some new mode of nursing by which pain could be mitigated and recovery hastened, but which he has not applied? And then, once more, with regard to his personal attendance. It is possible for a physician never to leave a particular patient; and in such case, if he leave the patient, and mischief thereby ensue, he is guilty of *culpa levissima*. It is no use to say in reply that if he gives all his time to one patient he can give no time at all to other patients. Undoubtedly by thus utterly neglecting his other patients he would be guilty of *culpa lata* towards them; but unless he was thus guilty of *culpa lata* to them, he would be guilty of *culpa levissima* to the patient whom he thus temporarily left. In other words, he must be guilty of *culpa levissima* to each of his patients if he is a physician in general practice; yet, unless he be a physician claiming to practice, he cannot, on the grounds heretofore specified, be chargeable even with *culpa levis*. The only relief from this absurdity is by rejecting the doctrine of *culpa levissima*, and holding the physician specially liable, as is the mandatary and agent, only for *culpa levis; i. e.* the lack of that diligence which would be exhibited by good physicians of the school and specialty with which he connects himself, when practising in a case similar to that under investigation.[1] He must familiarize himself with the literature of his profession, but this must be according to the opportunities of his place.[2] He must be attentive to his patient,

[1] See cases cited supra, § 730; Simonds *v.* Henry, 39 Me. 135; Leighton *v.* Sargeant, 7 Foster, 460; Landon *v.* Humphrey, 9 Conn. 209; Carpenter *v.* Blake, 60 Barb. 488; Hathorn *v.* Richmond, 48 Vt. 557; McCandless *v.* McWha, 22 Penn. St. 261; Tefft *v.* Wilcox, 6 Kans. 46; Ritchey *v.* West, 23 Ill. 385; McNevins *v.* Lowe, 40 Ill. 210; Heath *v.* Glison, 3 Oregon, 64; Hancke *v.* Hooper, 7 C. & P. 81; R. *v.* Macleod, 12 Cox C. C. 534.

[2] Carpenter *v.* Blake, *ut supra*.

In McCandless *v.* McWha, 22 Penn. St. 261, although there is much said by Judge Lewis inconsistent with this view, the law, as stated by Woodward, J., and Black, C. J., is, that a physician is liable only for such skill and diligence as are ordinarily exercised in his profession. "Extraordinary skill, such as belongs only to a few men of rare genius and endowments," is not required, "but that degree which ordinarily characterizes the profession." In Iowa, in 1872, it was held error to charge the jury that a physician is bound to exercise "such reasonable skill and diligence as are ordinarily exercised in the profession by thoroughly educated surgeons, having regard to the improvements and advanced state of the profession at

whose case he undertakes, in proportion to the exigencies of the case; he cannot leave the patient at a critical juncture, without giving the patient opportunity to obtain other competent attendance;[1] and he must give to the patient continued attention so long as this is requisite;[2] but he is not required to give to any one patient, as we have seen, an undue proportion of his services.

No recovery can be had where there is no injury.

§ 736. It must be remembered that the implied liability of a physician or surgeon, retained to treat a case professionally, extends no further, in the absence of a special agreement, than that he will indemnify his patient against any injurious *consequences* resulting from his want of the proper degree of skill, care, or diligence in the execution of his employment. And in an action against the surgeon for malpractice, the plaintiff, if he shows no *injury* resulting from negligence, or want of due skill in the defendant, will not be entitled to recover even nominal damages.[3]

Not liable if patient was direct cause of the injury.

§ 737. If the patient, by refusing to adopt the remedies of the physician, frustrates the latter's endeavors, or if he aggravates the case by his misconduct, he cannot charge to the physician the consequences due distinctively to himself.[4] At the same time we must remember, to adopt the language of Chapman, C. J., that "a physician may be called to prescribe for cases which originated in the carelessness of the patient; and though such carelessness would remotely contribute to the injury sued for, it would not relieve the physician from liability for his distinct negligence, and the separate injury occasioned thereby. The patient may also, while he is under treatment, injure himself by his own carelessness; yet he may recover of the physician if he carelessly or unskilfully treats

the time;" and it was held by a majority of the supreme court, that a physician or surgeon was bound only to exercise ordinary skill and diligence, the average of that possessed by the profession as a body, and not by the thoroughly educated only. Smothers *v.* Hanks, 34 Iowa, 287, Beck, C. J., dissenting.

But the true rule is, not what the *average* of a profession would do, but what an intelligent, responsible, and respectable member of the profession would under the circumstances do.

[1] Barbour *v.* Martin, 62 Me. 536.

[2] Barbour *v.* Martin, 62 Me. 536; Ballou *v.* Prescott, 64 Me. 305.

[3] Craig *v.* Chambers, 17 Ohio St. 253.

[4] McCandless *v.* McWha, 22 Penn. St. 261; *S. C.* 25 Penn. St. 95; Geiselman *v.* Scott, 25 Ohio St. 86; Almond *v.* Nugent, 34 Iowa, 300; Scudder *v.* Crossan, 43 Ind. 343. Supra, § 300 *et seq.*

him afterwards, and thus does him a distinct injury."[1] It must also be kept in mind that we cannot hold that any prior negligence on the plaintiff's part, in reference to his ailments, will defeat his recovery; for if this were the law there could be no recovery in suits against physicians for negligence, for there are no ailments in which the patient, owing to the imperfection of human nature, cannot be charged with more or less negligence. There must be such a substantial disregard of the physician's instructions, or such recklessness as would defeat the effect of the physician's treatment.[2] And this disregard must not have been induced by any prior negligences of the physician.[3]

§ 738. To make the physician liable, it is scarcely necessary to add, his negligence must stand in immediate causal relation to the injury.[4] Causal connection.

[1] Chapman, C. J., Hibbard *v.* Thompson, 109 Mass. 288. Supra, § 343. See Robison *v.* Gary, 28 Ohio St. 241.

[2] See Scudder *v.* Crossan, *ut supra.*

[3] Geiselman *v.* Scott, 25 Ohio St. 86; Robison *v.* Gary, 28 Ohio St. 241.

[4] Supra, § 73 *et seq.*; Braunberger *v.* Cleis, 13 Am. L. Reg. 587. When an injury, without a surgical operation, would cause death, and after the surgical operation, the surgeon being experienced and skilful, death ensues, through the negligence of the surgeon, this does not relieve the party originally causing the injury from liability. Sauter *v.* R. R. 66 N. Y. 50, and cases cited in Whart. on Homicide, § 385.

CHAPTER XVI.

SOCIETAS (PARTNERSHIP).

Definition, § 740. | Liability of partners for neglect, § 741.

§ 740. *Societas*, in the Roman law, is a consensual contract in which two or more persons agree to pursue a common purpose with common means.[1]

Definition.

§ 741. A partner, as has been already seen, is liable to his associates for neglect of duty on the test of *diligentia quam suis*;[2] in other words, he is bound to bestow on the partnership affairs the same diligence that he is accustomed to bestow on his own.[3] The reasons for this are: (1) that it would be, in a joint transaction, where the parties are interdependent, illogical to apply the test of a good business man, since a good business man would do what the partnership requires, which involves a *petitio principii*; and (2) because the ground on which a partner selects his associates is the very *diligentia quam suis* which is here invoked.

Liability of partners for neglect.

At the same time when the partnership assigns certain goods to a partner at a valuation, then he is liable to his partners for the same in *custodia* in its narrow sense.[4] By our own law the same doctrine is vigilantly applied. Good faith, in its highest and purest sense, is required between partners; and even in matters of honor, negligence imposes liability.[5]

[1] Vangerow, §§ 651, 655; Baron, § 300; Demangeat, ii. 323.

[2] See supra, §§ 54–6, 69.

[3] The passages sustaining this are, L. 52. § 2. 3; L. 72. D. h. t. 17. 2, and others cited by Baron, § 301.

[4] L. 52. § 3. D. 3. 25.

[5] Blisset *v.* Daniel, 10 Hare, 522; Stone *v.* Marsh, P. & M. 304; 6 B. & C. 551; 8 D. & R. 71; Keating *v.* Marsh, 2 Cl. & F. 250.

CHAPTER XVII.

LAWYERS.

Degree of diligence to be exacted, § 744.
Not bound to *diligentia diligentissimi*, § 745.
Perfect knowledge and skill impracticable, § 746.
Test is not *diligentia quam suis*, § 748.
True test is the diligence which a good lawyer, under similar circumstances, is accustomed to apply, § 749.
Specialist must show skill in specialty, § 751.
Burden on plaintiff to show negligence, § 752.
Lawyer liable for acts of agent, § 753.
Only liable when confidence is imposed, § 754.
But liable when services were gratuitous, § 755.

§ 744. WHAT is the degree of diligence to be exacted from a lawyer? For upon this depends the determination of the issue of negligence. If he is liable for *levissima culpa*, or the slightest negligence, this is because he is bound to *diligentia diligentissimi*, or the diligence of the most diligent. So, if he is liable for negligence in case he bestows on his client's affairs less care than he bestows on his own, this is because he is bound to *diligentia quam suis*, or to that phase of diligence which requires an agent to show the same attention to his principal's business as he shows to his own. In order, therefore, to dispose of these preliminary questions, we now proceed to show that to the relation of lawyer and client neither of these two phases of diligence applies.

Degree of diligence to be exacted.

§ 745. *Diligentia diligentissimi*, with its antithesis of *culpa levissima*, have been already fully discussed, and it has been shown that the idea was unknown to the practical jurists of imperial Rome; was a mere fiction of the scholastic jurists of the Middle Ages, who, from lack of actual business to deal with, created distinctions which are merely speculative and unreal; and is inconsistent with any jurisprudence based on actual life. But as in respect to the relation of lawyer and client the theory of *culpa levissima* has been sometimes strenuously urged, it may properly here receive a few words of special consideration in its present immediate bearings.

Not liable for *culpa levissima*.

§ 746. *Perfect professional knowledge and skill are incompatible with the comprehensiveness of the profession.* — From the peculiar combination of faculties required to make a perfect lawyer, we cannot expect to see a lawyer who is perfect. It may be said that at the English bar, and to some extent at the bar of our great American cities, the profession is so subdivided that no man is expected to be an expert in more than a particular branch. But apart from the fact that this subdivision only exists exceptionally so far as concerns the United States, no man can undertake the management of a particular suit as counsel without advising its conduct in all its stages. He must be, or understand how to be, a calm and accurate judge of the probabilities of success so as to enable him to determine the preliminary question of suing or settling; he must understand the preparation, collection, and marshalling of evidence; he must be acquainted with pleading and practice so as to bring the suit in a proper technical shape before the court; he must possess the power of lucid, exact, and persuasive statement, so as to make an effective opening speech; he must have the rare gift of examining his own witnesses judiciously, and the still rarer of cross-examining with skill and penetration those of his opponent; he must have *nisi prius* law, in all its numberless ramifications, not merely in his head but on his tongue, so as to bring it out on immediate notice to meet each of the varying emergencies of his case; he must have the capacity to instantaneously perceive what part of the testimony he objects to is inadmissible, and what is not, and what is the proper form in which his objection is to be couched, lest from his clumsiness in this respect he lose the opportunity of correcting in error an unfavorable but unjust ruling of the judge at *nisi prius*, and he must exercise the same prompt sagacity in the statement of the objects for which his own evidence is offered; he must adopt such a tone as at least will not force either court or jury into unnecessary antagonism to himself, and hence to his client; he must possess the tact, the experience, and the argumentative power necessary to a successful summing up; and above all he must be recognized as governed by that high honor the want of which diminishes more or less appreciably a lawyer's power. Nor is this all. A case does not terminate with the verdict. A new tribunal is to be addressed, invoking the use of a class of

faculties distinct from those which are successful at *nisi prius*. Slow, not quick thought, is here required; not only the capacity to recall a decision, settling a point suddenly presented, but the capacity to revolve the "conflicting analogies" (of which law, according to Bentham, is the science) which bear on a particular case, so as to rise to those higher principles which form part of the atmosphere of pure jurisprudence. Then we must remember that this capacity is not required only in one particular line. The perfect lawyer is not merely perfect in the English common law. He must be perfect in admiralty and in equity; he must be perfect in the canon law, on which our law of marriage and of wills so largely rests; and in the Roman law, without understanding which so much of the true meaning of our law is lost. Yet who can combine these various qualifications in perfection? Who, to take up a single line of them, has been even perfect master of such as are necessary to constitute a complete *nisi prius* lawyer? Can we recall such either in England or the United States? We can recall, indeed, men eminent for their calm judiciousness in the preparation of a case. We can recall men eminent for their sagacity in cross-examination. We can recall men distinguished for their tact in so offering or checking evidence that defeat, if it occurred at *nisi prius*, could often be retrieved in error. We can recall men who, one for one kind of power, another for another kind of power, were very effective in addressing juries. But we hear of no man who was equally great in each of these departments; or if we do, we find on examination that his greatness was that of respectability — the *diligentia diligentis* — not that of preëminence, the *diligentia diligentissimi*. And even if in some rare case an ideal hero is produced to us by forensic history as having attained preëminence in each department of *nisi prius* practice, we find, independently of the absurdity of making so exceptional a character the standard by which the average lawyer is to be tried, that the more extraordinary were the gifts, the more conspicuous were the collateral deficiencies which the splendor of these gifts disclosed. Cicero's timidity caused him sometimes to withhold unpopular truths, which a less eloquent but more courageous advocate would have stated at least with force enough to save himself from discredit and his client from discomfiture. Erskine faltered in his loftiest flights when his van-

ity was wounded.[1] Scarlett, a consummate forensic tactician, sometimes signally failed in the department in which he was most skilful: that of cross-examination.[2] And of Brougham, the most versatile forensic genius of his day, Lord Melbourne once said in the House of Lords, with a truth which could not be gainsaid: "You have just listened to a splendid effort of eloquence; you must judge how great must be the defects as to judgment and temper which have made it impossible for this, and will make it impossible for any other administration, to avail itself of the services of a man whose oratorical powers are so superb." So far as concerns skill, therefore, whether in the mastery of the learning of the profession, or in the mastery of self, if we should require perfection, we would have to exclude the great lawyers of the past, and any possible lawyer of the future.[3]

[1] "He had, says Dr. Croly, a morbid sensibility to the circumstances of the moment, which sometimes strangely enfeebled his presence of mind; any appearance of slight in his audience, a cough, a rude laugh, or a whisper, has been known to dishearten him visibly. Aware of this infirmity, an attorney wise in his generation has been known to plant a man of drowsy appearance directly opposite the place where Erskine was accustomed to address the jury. . . . . A pause of effect would be broken upon by a dreadful yawn, and a splendid peroration by a titter in the second row, and the cry of silence from the ushers by the too plain indication of a snore. Erskine could not withstand the torture, but sat down abruptly." Townsend's Judges, ii. 457. Erskine's quailing during his first speech in the House of Commons is narrated at large by the same writer. Ibid. 446.

[2] See Quarterly Review, July, 1877, in reviewing Lord Abinger's life.

[3] This question has been heretofore generally discussed at §§ 52, 414, 635. As sustaining the text, we may notice an opinion of Lord Campbell, in a case before the House of Lords: "In an action such as this," he says, "by the client against the professional adviser, to recover damages arising from the misconduct of the professional adviser, I apprehend there is no distinction whatever between the law of Scotland and the law of England. The law must be the same in all countries where law has been considered as a science. The professional adviser has never been supposed to guarantee the soundness of his advice. I am sure I should have been sorry, when I had the honor to practise at the bar of England, if barristers had been liable to such a responsibility. Though I was tolerably cautious in giving opinions, I have no doubt that I have repeatedly given erroneous opinions; and I think it was Mr. Justice Heath who said that it was a very difficult thing for a gentleman at the bar to be called upon to give his opinion, because it was calling on him to conjecture what twelve other persons would say upon some points that had never before been determined. Well, then, this may happen in all grades of the profession of the law. Against the barrister in England, and the advocate in Scotland, luckily, no action

§ 747. *The uncertainty of future litigation also precludes perfect sureness of opinion.* — The contingencies even of a single suit are so many and often so unexpected, that perfect judgment in dealing with all of them is out of the range of ordinary calculation. "He wins at last," so a great strategist once said, "who makes the fewest mistakes." If a single inflection from perfect judiciousness and in the management of a case be negligence which gives the client a cause of action against his counsel in case of defeat, then in every case the ultimate party to pay would be the lawyer, for no lawyer can conduct a case with perfect judiciousness. We must hence, applying the reasoning already more generally developed, conclude that the standard of diligence with lawyers is not the *diligentia diligentissimi;* and that consequently a lawyer, when sued by his client for negligence, cannot be made

can be maintained. But against the attorney, the professional adviser, or the procurator, an action may be maintained. But it is only if he has been guilty of gross negligence, because it would be monstrous to say that he is responsible for even falling into what must be considered a mistake. You can only expect from him that he will be honest and diligent; and if there is no fault to be found either with his integrity or diligence, that is all for which he is answerable. It would be utterly impossible that you could ever have a class of men who would give a guarantee binding themselves, in giving legal advice and conducting suits at law, to be always in the right." Purves *v.* Landell, 12 Clark & Finnelly, 91. See, also, Baikie *v.* Chandless, 3 Camp. 17; Pitt *v.* Yalden, 4 Burr. 2066; Montriou *v.* Jefferys, 2 Car. & P. 113; Laidler *v.* Elliott, 3 B. & Cr. 738; Elkington *v.* Holland, 9 M. & W. 661; Chapman *v.* Van Toll, 8 Ell. & Bl. 407; Bulmer *v.* Gilman, 4 Man. & Gr. 108.

"God forbid," says Abbott, C. J., in Montriou *v.* Jefferys, "that it should be imagined that an attorney or a counsel, or even a judge, is bound to know all the law; or that an attorney is to lose his fair recompense on account of an error, being such as a cautious man might fall into." "This," says Mr. Campbell, in his work on Negligence, § 47, "is really all that is meant in this class of cases, where, with an affectation of learning borrowed from the Pandects, the expressions *culpa lata*, *crassa negligentia*, have been used. The expression, *considerable* negligence, which is used in some of these cases, is much preferable, and may well be employed to indicate culpable default as contrasted with that occasional failure in diligence or knowledge which the inherent difficulty of the subject renders almost inevitable."

No doubt the application to any specialist, acting as such, of the term *culpa lata*, is wrong, if *professional* ignorance is what is intended to be imputed. Such a *culpa* is *culpa levis*, — the negligence of failing in *professional* knowledge. Supra, § 414.

liable for *culpa levissima*, or negligence in falling below the standard of ideal perfection.

Test is not *diligentia quam suis.*

§ 748. Nor is a lawyer bound to *diligentia quam suis*, or to exhibit the same diligence in his client's affairs as he does in his own. Already have we shown that the *diligentia quam suis* is a standard only applicable in certain exceptional cases of partnership and trusteeship; and that in any sense it is simply a subordinate phase of the *diligentia diligentis patrisfamilias*, or diligence of a good business man. That such a standard (that of the *diligentia quam suis*) is, as a general rule, inapplicable, is nowhere so effectively illustrated as in the class of cases immediately before us. In a suit against a lawyer for negligence, can the plaintiff make the defendant's management of his own affairs the standard? What lawyer of eminence ever conducted his own lawsuits?[1] Or, in such a suit, could the defendant set up as a defence that he was as negligent in his own business as he was in his client's? If so, lawyers with the largest and most successful practice would often be exempt from all liability for negligence in their client's affairs on the ground of their notorious negligence in their own. Thus, to give a single illustration: no lawyer was more accurate, no judge of keener or ex acter perception, than the late Lord Westbury; yet his will,

[1] It is stated of Scarlett (afterwards Lord Abinger), that when he was party to a contested election suit before the House of Commons, he greatly embarrassed his counsel by suggestions, which, as one of them afterwards said, he would have at once overruled if made to him when acting as counsel in the case of another.

"I was Follett's senior," says Lord Chelmsford, in the Quarterly Review, July, 1877, "and conducted most of the case; but whether he or I suggested that we could not conduct it if Scarlett remained in the room, I am unable to say: only I know we both agreed that he must be requested to absent himself, on the ground of his presence embarrassing our free action. A curious instance occurred, whilst he was watching us, of the difficulty which the ablest and acutest counsel has to conduct his own case with his accustomed skill. I had been cross-examining one of the witnesses, and when he left the box, Scarlett said to me, 'You omitted the most important question.' 'What was that?' I said, rather nervously, at having exposed myself to the censure. 'Why,' said Scarlett, 'to ask him whether I did not publicly state there must be no bribery.' Now, if I had been his junior and had put such a question without his authority, I should most likely have received a severe rap on the knuckles. 'Don't you think, Sir James,' I said, 'that it was better to leave the idea of bribery out of mind? Might it not be thought the trick of an old electioneerer?' He acquiesced."

prepared by himself, is couched in terms so vague that it has several times already gone to the courts for judicial construction, and at last is declared by the master of the rolls to contain at least one provision whose meaning no rational system of interpretation can solve.[1]

[1] "By a deed of settlement, made in pursuance of an agreement contained in a memorandum drawn on a sheet of paper by the testator before the marriage of his eldest son, the present Lord Westbury, the testator settled on his daughter-in-law an annuity of £400 a year for his and her joint lives, and covenanted that he would, by his will, direct his executors to invest in such securities in such manner and with such power of variation or transposition as he should thereby direct, the sum of £10,000, the trustees under the settlement to hold the same upon certain trusts.

"Afterward, by his will, the testator gave all his property to trustees, directing them to pay certain annuities to various members of his family during the period of five years from his death, and to accumulate and invest the residue of the income of his estate during that period, and at the expiration of it to pay 'to my son Richard's wife and children the sum of £10,000, upon the trusts and for the purposes of the settlement made on Richard's marriage.'

"The question now was whether this was a sufficient performance of the covenant, or whether the trustees of the settlement were entitled to be admitted as creditors of the estate to the amount of £10,000.

"The master of the rolls, Sir George Jessel (Bethell *v.* Abraham, L. R. 3 C. D. 590, n.), in pronouncing for the latter alternative, observed that this was the third time he had been called on to construe a passage in the late Lord Westbury's will. Two more difficult documents to construe than this will and this settlement he had never seen. He would have been glad to decline to construe either of them, on the ground that they could not be construed, but for a decision of the late Lord Westbury himself, which precluded the court from taking that course." Pall Mall Gazette, April, 1874.

From the same paper we take the following: "The fact that the wills of two lord chancellors within as many years should have occasioned grave difficulty is not a little remarkable. Lord Westbury's will, carefully prepared by himself, was said to be exceedingly hard to construe by the master of the rolls. In the case of Lord St. Leonards the difficulty is still more grave. His will, written 'in his own handwriting, on five or six sheets of old quarto white letter-paper,' has been lost, and the advertisement declares that it has been 'lost since August, 1873.' Unless the document is forthcoming, the presumption of law may possibly be in such a case that the testator destroyed this will *animo revocandi*, and serious results to his family may be the consequence." See Sugden *v.* St. Leonards, L. R. 1 P. D. 154; 34 L. T. N. S. 369. "Lord Chief Justice Saunders appears to have made a speculative devise, upon the validity of which his executors — Maynard, Holt, and Pollexfen, all great lawyers — were divided in opinion. The wills of Lord Chief Justice Holt and Mr. Sergeant Maynard were the subject of chancery proceedings. So was the will of Chief Baron Thom-

§ 749. *The true test is, such diligence as good lawyers are, under similar circumstances, accustomed to apply.* — We have already shown that this is the general law in all cases of mandate and agency, irrespective of the question of money consideration. To apply this rule specifically to the relation of lawyer and client, the following observations are to be made: —

Competent knowledge of law must be brought to the service. — Not *perfect* knowledge of the law, for this can be predicated of no one; but such average knowledge as is usual in the particular locality for the management of the particular suit. Is the process the ordinary collection of a debt? The lawyer undertaking to collect such a claim must be familiar with and apply the practice by which such collection can be enforced.[1] Is it the trial of a case before a jury? Then there must be familiarity with *nisi prius* law and practice. Is it the argument of a case before a court of law? Then it must be such acquaintance with the settled law and the mode of presenting it as is usual with respectable counsel when undertaking such arguments.[2] Is it the conduct of a suit in equity? Then acquaintance with equity law and pleading is in like manner requisite. The standard to be reached in each of these cases is not, as has been seen, that of the ideal great lawyer; nor is it that of the lawyer in question, when trying cases either for others or for himself. But it is the standard which is presented by the custom of good and diligent lawyers at the particular bar in managing

Competent knowledge must be possessed.

son. Mr. Sergeant Hill's will was 'so singularly confused that, but for the respect due to the very learned sergeant, it might, not unreasonably, have been held void for uncertainty.' The will of Sir Samuel Romilly was inartificially drawn. The will of Mr. Bradley, the celebrated conveyancer, was set aside by Lord Thurlow for uncertainty; 'and a late learned master in chancery directed the proceeds of his estate to be invested in consols in his own name.'"

Lord Kenyon when at the bar gave more opinions as counsel than any of his contemporaries; yet Lord Kenyon, when investing on his own behalf, "frequently," says his biographer (Kenyon's Life of Lord Kenyon, London, 1873, p. 394), "bought with very indifferent titles," trusting to luck and time to bring them right.

[1] Gleason *v.* Clark, 9 Cow. 57. See Varnum *v.* Martin, 15 Pick. 440; Walker *v.* Goodman, 21 Ala. N. S. 647; Evans *v.* Watrous, 2 Porter, 205; Grayson *v.* Wilkinson, 5 Sm. & M. 268.

[2] Supra, §§ 438, 503; Donaldson *v.* Haldane, 7 C. & F. 762; Gambert *v.* Hart, 44 Cal. 542.

a case such as that under investigation. For this purpose there must be a familiarity with the adjudicated local law as well as the statute law bearing on the particular point; and there must be a knowledge of the legal machinery necessary for the application of this law. To undertake the management of a case without such knowledge is negligence, which makes the lawyer liable for any loss which his client may thereby incur. But he is not liable for the consequences of his ignorance of foreign or of remotely applicable jurisprudences, even though these jurisprudences might be powerfully used in his argument; nor is he liable for deficiency in that capacity in penetrating to subtle though effective analogies, or in that energy of close and vehement argumentation, or in that magnetism in manner, by which consummate advocates may be distinguished. He is required to possess ordinary, not extraordinary preparation and power. He is not liable for error of judgment as to an open and doubtful point of law.[1] But if he undertakes to conduct a case without ordinary preparation and power, this is negligence, whose consequences, if injurious to his client, he must personally bear.[2]

§ 750. *The business undertaken must be managed with the diligence and skill usual with good lawyers versed in the particular practice at the particular bar.* — We have no right to apply a metropolitan standard to a purely rural bar. An admiralty case, for instance, may arise in one of the Lake Superior villages which no doubt could be conducted with greater skill in New York by those practising almost exclusively in admiralty, than it could be by lawyers unfamiliar with practice in this particular specialty. A criminal trial, we might also say, would be managed with greater dexter-

Diligence must be proportioned to opportunities.

[1] Morrill *v.* Graham, 27 Tex. 646.

[2] Godefroy *v.* Dalton, 6 Bing. 468; Hart *v.* Frame, 6 Cl. & Fin. 210; Allen *v.* Clark, 1 N. R. 358 (Q. B.); Parker *v.* Rolls, 14 C. B. 691; Bakie *v.* Chandless, 3 Camp. 17; Purvess *v.* Landell, 12 C. & F. 91; Wilson *v.* Russ, 20 Me. 421; Holmes *v.* Peck, 1 R. I. 242; Bowman *v.* Tallman, 27 How. (N. Y.) Pr. 212; Lynch *v.* Com. 16 S. & R. 368; Watson *v.* Muirhead, 57 Penn. St. 161; Gallaher *v.* Thompson, Wright (Ohio), 466; Walpole *v.* Carlisle, 32 Ind. 415; Nisbet *v.* Lawson, 1 Ga. 275; Cox *v.* Sullivan, 7 Ga. 144; O'Barr *v.* Alexander, 37 Ga. 195; Goodman *v.* Walker, 30 Ala. N. S. 482; Stubbs *v.* Beene, 37 Ala. 627; Spiller *v.* Davidson, 4 La. An. 171; Hastings *v.* Halleck, 13 Cal. 203; Gambert *v.* Hart, 44 Cal. 542; and cases hereafter cited in notes to § 751.

ity and argued with greater eloquence by one of those eminent counsel who in the bar of a great city have been singled out for this particular practice, than it could be by a particular lawyer who is chosen by the defendant or assigned by the court out of a bar which is comparatively small. But such standards as these are not to be applied. The client, we must assume, in litigating his case before a particular court, is confined to the bar practising in that court; and even as to this test he cannot set up, when suing his lawyer for negligence, the possible case of what some particularly brilliant or shrewd member of that bar might have done; but he must confine himself to showing that the defendant neglected to do that which would have been done under similar circumstances by lawyers of respectable parts and skill.[1]

§ 751. *A specialist is required to exhibit skill in his specialty.* It must not, however, be forgotten, that a lawyer who holds out to specially practise in a particular department must possess the skill and exhibit the diligence proper for those practising in such a department. This, *mutatis mutandis*, follows from the doctrine of *diligentia diligentis*, which we have already discussed. Just as a person claiming to be an ordinary practising lawyer must possess the skill and exhibit the diligence of lawyers in ordinary; so a person claiming to be an admiralty or equity lawyer, while not required to be an expert out of the department thus specified, must, in it, exercise due skill and diligence.[2]

Specialist must be skilled in specialty.

[1] See supra, § 30; Wilson *v.* Russ, 20 Me. 421; Goodman *v.* Walker, 30 Ala. N. S. 482; Pennington *v.* Yell, 6 Eng. 212, and cases hereafter cited.

[2] See supra, §§ 33, 45, 46.

As to the English rule, that while attorneys are liable, counsel are not so liable, see Green's Story on Agency, § 27.

In my work on Agency, I have discussed the liability of lawyers for negligence with a fulness which the limits of the present work do not permit me to attempt. I must, therefore, instead of giving a condensation which would be unsatisfactory, make the following references: —

Attorney required to show skill as specialist. Whart. on Agency, § 596.

Attorney liable for negligence as to titles. Ibid. § 597.

Attorney liable for blunders in process. Ibid. § 598.

Attorney liable for defective preparation for trial. Ibid. § 599.

Attorney liable for negligence of subalterns. Ibid. § 604.

As to liability in equity of solicitor for loss occasioned by his neglect, see Chapman *v.* Chapman, L. R. 9 Eq.

§ 752. Special negligence being alleged in such a suit, when an action is brought by a client against his attorney or solicitor for negligence, he must state and prove the negligent act, or at least state and prove circumstances

Burden of suit is on plaintiff.

276; Low *v.* Turner, reported in Solicitors' Journal for April, 1875, p. 469, which see. And see British Invest. Soc. *v.* ———, 32 L. T. N. S. 251.

"The following," says Mr. Campbell, in his Treatise on Negligence (§ 45), when enumerating acts of attorneys which are deemed negligent, "have been held to amount to breaches of this obligation. Misdescription in the particulars of sale prepared for a sale under the authority of the court of chancery. Taylor *v.* Gorman, 4 Ir. Eq. Rep. 550. Vendor's solicitor causing abortive expenses to be incurred by his client executing a conveyance, while the title deeds were (as he knew) in the hands of an adverse party. Potts *v.* Dutton, 8 Beav. 493. Allowing client to enter into unusual covenant without explaining 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. Ireson *v.* Pearman, 3 Barn. & Cress. 799. Solicitor of intending mortgagee omitting to make the proper searches. Cooper *v.* Stephenson, 21 L. J. N. S. Q. B. 292; Graham (Court of Session), Mar. 4, 1831, 9 Sh. 543; or to give the proper notices to secure priority of title. Watts *v.* Porter, 3 Ell. & Bl. 743; Lillie (Court of Session), 13 Dec. 1816, F. C."

(As American authorities on the last point, see Clark *v.* Marshall, 34 Mo. 429; Gilman *v.* Hovey, 26 Mo. 280; Gore *v.* Brazier, 3 Mass. 543; Sprague *v.* Baker, 17 Mass. 586; Miller *v.* Wilson, 24 Penn. St. 114; Watson *v.* Muirhead, 57 Penn. St. 161. See, particularly, Whart. on Agency, § 597, and cases there cited.)

The same author cites, to show liability attaching to "neglect or ignorance of rules of the court, Cox *v.* Leech, 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. 111; Stokes *v.* Trumper, 2 K. & J. 232. Omitting to see to attendance of witnesses, Reeves *v.* Rigby, 4 Barn. & Alder. 202; neglecting to retain counsel, Rex *v.* Tew, Sayer, 50; to deliver the brief, De Roufigny *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 Exch. 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. & Ad. 350; 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."

An attorney is bound to diligence in issuing such executions as are necessary to secure a debt he is employed to collect. Phillips *v.* Bridge, 11

from which negligence is implied by necessary legal inference.[1] But when negligence has been proved in consequence of which judgment has gone against the client, it is not incumbent on the client to show that but for the negligence he could have succeeded in the action. It is for the solicitor to defend himself if he can by showing that the client has not been hurt by his negligence.[2]

Liable for acts of agents.

§ 753. The attorney or solicitor is equally responsible whether the breach of duty has arisen through his own default or through the default of his agent,[3] of his partner,[4] or

Mass. 246; Dearborn *v.* Dearborn, 15 Mass. 316; Crooker *v.* Hutchinson, 2 D. Chip. (Vt.) 117. See Whart. on Agency, § 598.

As to negligence in compromising, see Whart. on Agency, § 590 *et seq.*

Unreasonable delay in bringing suit imposes liability on an attorney. McDowell *v.* Potter, 8 Barr, 189; Rhines *v.* Evans, 66 Penn. St. 192; Walpole *v.* Carlisle, 32 Ind. 415. And see Hopping *v.* Quin, 12 Wend. 517; Smedes *v.* Elmendorf, 3 Johns. 185; Stevens *v.* Walker, 55 Ill. 151; Fitch *v.* Scott, 4 Miss. (3 How.) 314.

A lawyer from whose office papers are burglariously stolen, he having shown the care usual under the circumstances, is not liable for the loss. Hill *v.* Barney, 18 N. H. 607.

[1] Purves *v.* Landell, 12 Cl. & F. 91. Supra, § 422.

[2] Godefroy *v.* Jay, 7 Bing. 415. But see Harter *v.* Morris, 18 Ohio St. 492, where it is intimated that plaintiff must prove injury.

Law and fact. — It is said in California, that in actions against attorneys for negligence or want of skill in the management of suits, when the facts are ascertained, the question of negligence or want of skill is a question of law for the court; and it has been ruled to be a want of ordinary care and skill in an attorney to submit a motion for a new trial before the statement in support of it is certified. Gambert *v.* Hart, 44 Cal. 542. As a rule, however, it is for the jury, under direction of the court. Rhines *v.* Evans, 66 Penn. St. 192; Pennington *v.* Yell, 6 Eng. 212; Hunter *v.* Caldwell, 10 Q. B. 69; Reece *v.* Righy, 4 B. & Ald. 202. Supra, § 420.

[3] Supra, § 532; Am. Ex. Co. *v.* Haire, 21 Ind. 4; Whitney *v.* Ex. Co. 104 Mass. 152; Collins *v.* Griffin, Barnes, 37. See Simmons *v.* Rose, 31 Beav. 11; Corporation of Ruthin *v.* Adams, 7 Sim. 345; Bradstreet *v.* Everson, 72 Pa. St. 124. In this case Bradstreet had a "commercial agency" at Pittsburg, to which Everson delivered acceptances payable in Memphis, and took a receipt for them "for collection." Bradstreet sent them to an agent in Memphis, who collected

[4] Norton *v.* Cooper, 3 Sm. & Giff. 375, 384; Warner *v.* Griswold, 8 Wend. 665; Livingston *v.* Cox, 6 Pa. St. 360; Mardis *v.* Shackleford, 4 Ala. 493; Morgan *v.* Roberts, 38 Ill. 65; Smyth *v.* Harvie, 31 Ill. 62; Dwight *v.* Simon, 4 La. An. 490; Poole *v.* Gist, 4 McCord, 259.

of his clerk.[1] But this does not imply liability on his part for associate or ancillary counsel, or agents who exercise a discretion independent of his own, provided he be not chargeable with *culpa in eligendo*.[2]

§ 754. A lawyer is not usually liable for negligence to a person who does not employ him professionally.[3] If, however, he appears for another without authority, he is liable to such person for injuries received by this intrusion.[4]

Only liable when confidence is imposed.

§ 755. It has been said that unless a fee be paid no action can be maintained against a lawyer for negligence.[5] But this is an error. Wherever confidence is bestowed and accepted, there is a sufficient consideration to sustain such a suit,[6] and when a lawyer undertakes to conduct a suit gratuitously, he cannot set up want of consideration to an action for negligence.[7]

Liability attaches even when services are gratuitous.

the money and kept it. The court held that Bradstreet was liable. After citing and commenting upon Cox *v.* Livingstone, 2 W. & S. 103; Kraus *v.* Dorrance, 10 Barr, 462; and Rhines *v.* Evans, 66 Pa. St. 192, the court said: "These cases show the understanding of the bench and bar of this state upon a receipt of claims for collection. It imports an undertaking by the attorney himself to collect, and not merely that he receives it for transmission to another for collection, for whose negligence he is not responsible. He is therefore liable, by the very terms of his receipt, for the negligence of the distant attorney, who is his agent, and he cannot shift responsibility from himself upon his client." The same view is taken in the following cases: Morgan *v.* Tener, 3 Weekly Notes, 398; Lewis *v.* Peck, 10 Ala. 142; Pollard *v.* Rowland, 2 Blackf. (Ind.) 22; Cummins *v.* McLean, 2 Pike (Ark.), 402; Wilkinson *v.* Griswold, 12 Smedes & Mar. 669.

When an attorney at law puts a claim committed to him in the hands of one of his clerks, through whose negligence it is lost, it is no defence to a suit against the attorney, that the clerk was a competent lawyer. Walker *v.* Stevens, 79 Ill. 193.

[1] Floyd *v.* Nangle, 3 Atk. 568; Power *v.* Kent, 1 Cowen, 211; Birkbeck *v.* Stafford, 14 Abb. (N. S.) Pr. 285; 23 How. Pr. 236. See Campbell, *ut supra*, § 50.

[2] See Watson *v.* Muirhead, 57 Penn. St. 247; Godefroy *v.* Dalton, 6 Bing. 468; Whart. on Agency, § 601; Porter *v.* Peckham, 44 Cal. 204.

[3] Supra, §§ 439–441; Fish *v.* Kelly, 17 C. B. N. S. 194.

[4] Bradt *v.* Walton, 8 Johns. 298; O'Hara *v.* Brophy, 24 How. Pr. 379.

[5] Cavilland *v.* Yale, 3 Cal. 188.

[6] Supra, § 436.

[7] Stephens *v.* White, 2 Wash. (Va.) 203.

CHAPTER XVIII.

TELEGRAPH COMPANIES.

Liability of company to sender of message, § 756.
To sendee of message, § 757.
To receiver of message, § 758.
Of connecting lines, § 759.
Effect of notice restricting liability, § 760.
Notice only affects contracting company, § 761.
Cannot exonerate negligence, § 762.
Limitation as to repeated messages, § 763.
Contributory negligence, § 764.
Burden of proof, § 766.
Damages, § 767.

§ 756. THE liability of a telegraph company to the sender of a message is based upon contract, the company being bound to the diligence of good specialists in the particular department. *Perfect* accuracy and promptitude are not exacted;[1] but the accuracy and promptitude displayed must be such as good specialists in this department of business are accustomed to exhibit, and must be in proportion to the critical character of the work.[2]

Company liable to sender for negligence as specialist.

It is true that if we should hold a telegraph company to be a common carrier of goods, it would be liable as insurer; but (1) it has been already seen that the doctrine of insurance in this relation is peculiar to Anglo-American law, and is so exceptionally onerous that the courts have refused to extend it to any carriers except of goods;[3] and (2) the idea that telegraph companies are common carriers at all is incompatible with the current of adjudications on this particular topic.[4]

[1] See supra, §§ 45–48.

[2] Ellis *v.* Am. Tel. Co. 13 Allen, 226; Breese *v.* U. S. Tel. Co. 45 Barb. 174; 48 N. Y. 132; Leonard *v.* N. Y. & Alb. Tel. Co. 41 N. Y. 544; De Rutte *v.* N. Y. &c. Tel. Co. 1 Daly, 547; Elwood *v.* W. U. Tel. Co. 45 N. Y. 549; La Grange *v.* S. W. Tel. Co. 25 La. An. 383; New York, &c. Tel. Co. *v.* Dryburg, 35 Penn. St. 298; West. U. Tel. Co. *v.* Buchanan, 35 Ind. 430; West. Un. Tel. Co. *v.* Meek, 49 Ind. 53; Wash. & N. O. Tel. Co. *v.* Hobson, 15 Gratt. 122.

[3] See supra, §§ 586, 626.

[4] Dickson *v.* Tel. Co. (C. P. D. 1877) 35 L. T. R. N. S. 842; L. R. 2 C. B. D. 62; *S. C.* on appeal, 37 L. T. R. N. S. 370; Ellis *v.* Tel. Co. 13 Allen, 226; Breese *v.* U. S. Tel. Co.

§ 757. Suppose a message given to the company to deliver to A., A. being in this respect a stranger to the company, is lost; can A. maintain a suit for its non-delivery? On the reasoning already expressed, we must answer this question in the negative.[1] It is true that if by statute it is made a duty of the company to faithfully deliver messages to the sendee, then the sendee may sue for failure in this respect.[2] And so, also, without such a statute, it is easy to conceive of cases in which the sendee of a message may occupy such a position to the company as to give him a title to sue. If the company by special contract has agreed to deliver messages to him; if, on the faith of its general announcements, he has put himself in such a position to it that he suffers loss from its negligence; then he may sustain suit. But if there be no such confidence, or if the message be not in reply to one sent by the sendee, he cannot maintain a suit against the company for mere non-delivery of a message addressed to him.[3]

When liable to sendee.

§ 758. A *receiver* of a telegraphic message occupies a different position, and may recover from the company damages for losses he has sustained from its negligent errors in its messages delivered to him. It is true this point has been disputed in England;[4] but it has been in this country maintained, and with justice: since a telegraphic company, wielding a power for good or evil only transcended by railway corporations, is eminently within the scope of the rule *Sic utere tuo ut non alienum laedas*. If it undertakes to exercise so tremendous a franchise, it must do so in a way which may not injure others.[5] It should be remembered, also, as was noticed

Liability to receiver for erroneous transmission.

48 N. Y. 132; New York, &c. Tel. Co. *v.* Dryburgh, 35 Penn. 298; Smithson *v.* Tel. Co. 29 Md. 162; Dorgan *v.* Tel. Co. 1 Am. L. T. (1874) 406; See article in West. Jurist, May, 1875, and in American Law Register for Feb. 1875. Baldwin *v.* Tel. Co. 1 Lansing, 125; Wash. &c. Tel. Co. *v.* Hobson, 15 Gratt. 122; (*contra*, Parks *v.* Tel. Co. 13 Cal. 422). See Am. Law Rev. for April, 1874, p. 457.

[1] See supra, §§ 439–41.

[2] Supra, § 443; West. Un. Tel. Co. *v.* Fenton, 52 Ind. 1. See West. Un. Tel. Co. *v.* Meek, 49 Ind. 53.

[3] See Scott & Jarnagin, Telegraphs, § 95; Parks *v.* Tel. Co. 13 Cal. 422; True *v.* Inter. Tel. Co. 60 Me. 9.

[4] Playford *v.* Tel. Co. L. R. 4 Q. B. 706; Dickson *v.* Tel. Co. 35 L. T. R. N. S. 842; L. R. 2 C. B. D. 62; *S. C.* on app. 37 L. T. R. N. S. 370.

[5] See West. Un. Tel. Co. *v.* Carew, 15 Mich. 525; N. Y. & Wash. Tel. Co. *v.* Dryburg, 35 Penn. St. 298; La

in the last section, that where a statute makes it the duty of a telegraph company to transmit messages correctly, then any person injured by the negligence of the company in this respect may sue the company for neglect.

Liability of connecting lines.

§ 759. The liability of connecting lines must be viewed in relation distinctively to the receiver and to the sender. A delivering company (one at the end of several connecting lines) sends an erroneous message, causing the receiver to incur loss. The company, in such case, can defend itself by showing that it exercised due diligence, and that the negligence was in a prior line, supposing there is no partnership between the lines.[1] As concerns the sender of a message, it may be generally said that when the operator of a telegraph company contracts to send a telegram over his own line and the lines of other connecting companies, he, being so authorized by the other companies, becomes the agent of each company assuming to forward the message, and they are thereupon severally liable (no partnership relation being proved), upon the agreement as made by him.[2] It has been however held, in an action against one of two connecting companies, that neither, without proof of agency, is liable for the negligence of the other.[3] But the primary com-

Grange *v.* S. W. Tel. Co. 25 La. An. 383; Bowen *v.* Lake Erie Tel. Co. 1 Am. L. Reg. 685; De Rutte *v.* N. Y., Albany, &c. Tel. Co. 1 Daly, 547; Rose *v.* U. S. Tel. Co. 3 Abb. Pr. N. S. 408; 6 Rob. (N. Y.) 305; Elwood *v.* West. Un. Tel. Co. 45 N. Y. 549; Ellis *v.* Am. Tel. Co. 13 Allen, 226; Beaupre *v.* Pac. & At. Tel. Co. 21 Minn. 155.

Sometimes this liability is placed on the ground of agency. "The defendants hold themselves out to the public as being ready to transmit for hire messages for individuals, and to deliver faithfully for others such messages as are intrusted to them. They make themselves the agents of both the sender and receiver, and their failure in their assumed duties creates an obligation in favor of the one who may be thereby injured. *It may, and often does, occur, that the party to whom the message is addressed is the only one whose interests are involved, and who is to pay the fee.* In such case he is the one in reality with whom the contract is made." Howell, J., La Grange *v.* S. W. Tel. Co. 25 La. An. 383.

But this position is open to doubt, and is contested in Bigelow's Cases on Torts, 623, and in Dickson *v.* Tel. Co. *ut supra.*

[1] La Grange *v.* S. W. Tel. Co. 25 La. An. 383; Stevenson *v.* Tel. Co. 16 Up. Can. R. 530. See De Rutte *v.* Tel. Co. 1 Daly, 547.

[2] Leonard *v.* Tel. Co. 41 N. Y. 544.

[3] Baldwin *v* U. S. Tel. Co. 45 N. Y. 744, reversing, *S. C.* 54 Barb. 505; 1 Lans. 125. See supra, § 577.

pany is, in such case, liable for the negligence of the auxiliary companies, whenever they act in the matter as its agents.[1]

Effect of notices restricting liability.

§ 760. A notice printed on the paper signed by the sender has been held sufficient to restrict the liability of the company.[2] At the same time it is essential that such notice should be brought home to the sender,[3] and the restriction must be reasonable.[4] In England it should be remembered that the statute provides that the action of the parties should be "subject to such reasonable regulations as may be from time to time made or entered into by the company."

§ 761. In a Massachusetts case,[5] a telegraph company received a message addressed to a place on the line of another company, collected pay for its transmission the whole distance, forwarded it to the terminus of its own line, and delivered it there to the other company, which forwarded it thence to the place to which it was addressed. The paper on which it was written by the sender was headed with the name of the first company, beneath which were printed, "Terms and conditions on which this and all messages are received by this company for transmission," limiting to a small sum the liability of "the company" for error or delay in the transmission or delivery of any message, and pro-

[1] De Rutte *v.* Tel. Co. 1 Daly, 547. See Collins *v.* R. R. 7 H. L. Cas. 194. Supra, § 577 *et seq.*

[2] MacAndrew *v.* Tel. Co. 17 C. B. 3; Wolf *v.* W. Tel. Co. 62 Penn. St. 83; Wann *v.* Tel. Co. 37 Mo. 472; Camp *v.* Tel. Co. 1 Met. (Ky.) 164. Supra, § 587.

[3] Baldwin *v.* U. S. Tel. Co., *ut supra.* See the subject of constructive notices, discussed supra, § 587.

In Wolf *v.* W. U. Tel. Co. 62 Penn. St. 83, one of the conditions of a telegraph company, printed in their blank form, was that they would not be liable for damages if the claim was not presented in sixty days from sending the message. It was held that the condition was binding on one sending a message on the printed form. The condition was in very small type, but the heading directing to it was in conspicuous type. It was held that this was not obscure and deceptive. Ibid., citing Inland Ins. Co. *v.* Stauffer, 33 Penn. St. 397; Trask *v.* Ins. Co. 29 Penn. St. 198; *S. P.* West. Tel. Co. *v.* Buchanan, 35 Ind. 429.

[4] A condition (incorporated in the margin of a blank message) that the company shall not be liable for mistakes beyond the amount received by the company for sending the message, is unreasonable and invalid. True *v.* Int. Tel. Co. 60 Me. 9.

See Hibbard *v.* Tel. Co. 33 Wis. 558; Candee *v.* Tel. Co. 34 Wis. 471, where it was held that a stipulation, that the company "shall not be liable for errors or delay in the transmission or delivery, or non-delivery of such messages," was invalid.

[5] Squire *v.* W. U. Tel. Co. 98 Mass. 232. See supra, § 583.

viding that "no liability is assumed for any error or neglect by any other company over whose lines this message may be sent to reach its destination;" subject to which conditions the message was directed to be sent. The sender brought suit against the *second* company for negligence in delivering the message at the place to which it was addressed. It was ruled by the supreme court that the limitation of the liability of "the company" for error or delay in delivering any message applied to the contract with the first company only for the service to be rendered on their line alone. It would be otherwise, however, if the contract were made with the receiving company as representing a series of auxiliary companies.[1]

Agreements relieving from consequences of negligence invalid.

§ 762. The principle, that an agreement relieving a party from the consequences of negligence is invalid, which has been fully discussed in its relation to carriers,[2] applies with equal force to telegraphic companies.[3]

[1] Supra, § 583; and see supra, § 759.

[2] See supra, § 589.

[3] Wann *v.* W. U. Tel. Co. 37 Mo. 14. See U. S. Tel. Co. *v.* Gildersleve, 29 Md. 232; Birney *v.* N. Y. & W. Tel. Co. 18 Md. 341; Sweatland *v.* Tel. Co. 27 Iowa, 433; West. Un. Tel. Co. *v.* Fontaine, S. C. Ga. Feb. 27, 1877; West. Un. Tel. Co. *v.* Graham, 1 Col. 230; MacAndrew *v.* Elect. Tel. Co. 17 C. B. 3. See cases collected in 2 Am. Law Rev. 615, 632; 4 Am. Law Reg. N. S. 192.

It has been held in Maine that a rule adopted by a telegraph company, that it will receive and send messages by night at half its usual rates, "on condition that the company shall not be liable for errors or delay in the transmission or delivery, or for the non-delivery of such messages, from whatever cause occurring, and shall only be bound in such case to return the amount paid by the sender," is against public policy; and is, therefore, void, even when assented to by the sender. And it was further argued that the exception was void also because its terms were repugnant, assuming to impose an obligation, and, by the same act, to release from all obligation. Bartlett *v.* Tel. Co. 62 Me. 209.

In True *v.* Tel. Co. 60 Me. 9, the blank on which the dispatch was written bore on its margin a notice stating that the amount of damages to be recovered in case the message was not properly sent should be the price paid for transmitting the message, which was forty-eight cents. The court said: "The consideration is sufficient. It is entered into by parties competent to contract. There is no statute prohibiting. It is a contract for the liquidation of damages to be paid in case of a violated contract. Whether the damages agreed upon be large or small, it is a matter for the contracting parties, and for them alone. If they are satisfied with large or small damages, it matters not to any one else." But see, *contra*, Hibbard *v.* Tel. Co. 33 Wis. 558.

Agreement that liability shall be restricted to repeated messages.

§ 763. When telegraphy was first put in practice, the inexperience of operators, the imperfection of instruments, and the uncertainty, as it then appeared, of the new agency which was invoked, produced a feeling that telegrams were to be regarded as exposed to so many aberrations that until they were proved by a duplicate from the receiving office, their accuracy could not be relied on. I cannot sue my printer for negligence in minor details, so the position at first taken in this respect may be illustrated, if I do not require from him a proof. For a gross and patent blunder he is in any case suable; but for the negligences which would escape a proof-reader on the first inspection he is not open to suit, if the custom among printers is, as I know, only to bestow a final and minute examination on revises, which are proofs having intermediately the benefit of the author's corrections. Of course everything depends upon usage, as understood by author and printer. If it is understood that the printer gives the final corrections, then he is liable for failure to give such corrections. If it is understood that the author is to correct the proofs, then, if when opportunity has been given him to make such correction, he fails to do so, he cannot recover for errors of the press such as would not be likely to strike the eye of the printer on reading the first proof. A similar view was taken on the first introduction of telegraphy. For any absurd and preposterous blunder, such as an operator ought to discover at first sight, the company would be liable. But for what might be called latent errors there seemed at first no security unless the message was sent back from the receiving office, and then revised, or *proved*, by the sender. Hence the companies put into their blank forms which were used by the sender, a condition that they would not be liable for errors in a message unless it should be repeated, and for repeating they charged half price. By several courts this condition has been sustained.[1]

[1] MacAndrew *v.* Tel. Co. 17 C. B. 3; Ellis *v.* Tel. Co. 13 Allen, 226; Breese *v.* Tel. Co. 48 N. Y. 132; *S. C.* 45 Barb. 275; New York, &c. Tel. Co. *v.* Dryburgh, 35 Penn. St. 298; Passmore *v.* Tel. Co. 78 Penn. St. 238; West. Un. Tel. Co. *v.* Carew, 15 Mich. 525; Camp *v.* Tel. Co. 1 Metc. (Ky.) 165; Wann *v.* Tel. Co. 37 Mo. 372. See True *v.* Tel. Co. 60 Me. 9; Baldwin *v.* Tel. Co. *ut supra*.

In Redpath *v.* Tel. Co. 112 Mass. 71, it was intimated by Chapman, C. J., that liability would not be relieved

On the other hand, it has recently been argued with great effect that in the present condition of telegraphy it is as easy to telegraph from a fair copy as to write from a fair copy; that when a blunder is made in telegraphing from a fair copy, the company, in view of the vast public importance of accuracy in telegrams, should not be permitted to set up an agreement by the sender releasing it from negligence; and that this is eminently the case when the company occupies the position of a public officer required by statute to perform a particular duty. A public officer, it is argued, would not be permitted to protect himself from liability for negligence by an agreement with parties calling on him for official duty; a telegraphic company should not be allowed to set up conditions virtually amounting to such a protection.[1] And unless it should be proved, (1) that a custom of repeating exists as well known as a custom of proof-reading, and (2) that an opportunity of hearing the repeated message was given the sender, it is a hard measure to impose upon him a condition, of which he had no actual notice, attached to a paper of which no copy was given him, and which, from the exigency of the case, he was obliged to sign rapidly. Apart from this view, a condition which relieves from negligence *in toto* is held void, and this is a condition which relieves from negligence *in toto*, and which, if operative at all, is operative in relieving the companies, in the vast majority of cases, from all liability for negligence. At the same time, the effect of such a stipulation may be to throw the burden of proof of negligence on the plaintiff.[2] We may therefore hold that such stipulations when brought home to the sender, though not barring his recovery, may impose on him, before he can recover, the duty of proving some degree of negligence in the company.[3]

by such an agreement in cases of "fraud or gross negligence."

[1] U. S. Tel. Co. *v.* Gildersleve, 29 Md. 332; Tyler *v.* Tel. Co. 60 Ill. 421; West. Un. Tel. Co. *v.* Meek, 49 Ind. 53; Manville *v.* Tel. Co. 37 Iowa, 214.

[2] Ellis *v.* Tel. Co. 13 Allen, 226; Birney *v.* Tel. Co. 18 Md. 341; Sweatland *v.* Tel. Co. 27 Iowa, 432; Breese *v.* Tel. Co. 48 N. Y. 132.

[3] As giving the reasoning by which is sustained the conclusion controverted in the text, I cite at large from Passmore *v.* Tel. Co. 78 Penn. St. 238. In this case the plaintiff gave the following message at Parkersburg, W. Va., to the telegraphic operator of the defendant company, to be transmitted to E., at Philadelphia: "I hold the Tibbs tract for you," &c. The message as received by E. read, "I sold,"

§ 764. But whatever we may say on the last topic, the *receiver* of a message stands in the attitude of a person who is injured by another in defiance of the maxim, *sic utere tuo ut non alienum laedas*. It is true that if the receiver have notice of the qualification as to repeating, and takes

Such restriction invalid as to receiver.

&c. The printed blanks of the defendant, *with which the plaintiff was known to be familiar* (though there was no evidence that he had used one for the above message), stipulated that the company should not be responsible for any error in the transmission of an unrepeated message, and provided an extra charge for such repetition. In an action for damages for the loss of a contract occasioned by the above mistake, the court entered judgment for the defendant, holding that the above regulation was not so far contrary to the public good as to justify a court in pronouncing it invalid. It was held by the supreme court that in this there was no error.

In this case, Hare, President J., in an opinion affirmed by the supreme court, said: "The fundamental truth of the plaintiff's contention is, therefore, undeniable; but like most truths, it is limited by other and collateral principles. A railway, telegraph, or other company charged with a duty which concerns the public interest, cannot screen themselves from liability for negligence, but they may prescribe rules calculated to insure safety, and diminish the loss in the event of accident, and declare that if these are not observed, the injured party shall be considered as in default, and precluded by the doctrine of contributory negligence. The rule must, however, be such as that reason, which is said to be the life of the law, can approve; or at the least, such as it need not condemn. By no device can a body corporate avoid liability for fraud, for wilful wrong, or for the gross negligence which, if it does not intend to occasion injury, is reckless of consequences, and transcends the bounds of right, with full knowledge that mischief may ensue. Nor, as I am inclined to think, will any stipulation against liability be valid, which has the pecuniary interest of the corporation its sole object, and takes a safeguard from the public without giving anything in return. But a rule, which, in marking out a path plain and easily accessible, as that in which the company guarantees that every one shall be secure, declares that if any man prefers to walk outside of it, they will accompany him, will do their best to secure and protect him, but will not be insurers, will not consent to be responsible for accidents arising from fortuitous and unexpected causes, or even from a want of care and watchfulness on the part of their agents, may be a reasonable rule, and as such upheld by the courts. Applying this test to the case in hand, does the evidence disclose any sufficient ground for overruling a defence which is *primâ facie* valid? The burden of proof is on the plaintiff. It is for him to show in what respect a regulation, which he tacitly accepted, is so far hostile to the interest of the community, or of that portion of it which uses telegraphy as a means of communication, that the law should not suffer it to stand. Unless this is so clear as to be legally indisputable, the judiciary should obviously refrain from interfering with the contract as framed by the parties, and refer the subject to the legislature, who can at any time regulate the whole by statute."

the message subject to such qualification, then he may be bound thereby. But if the case be simply that of the company negligently making a false statement to him, whereby he suffers injury, then he cannot be affected by any arrangement between the sender and the company.[1]

Contributory negligence.

§ 765. When the sender employs a special operator, not the servant of the company, he takes the sole responsibility of the accuracy of the message transmitted.[2] And whenever the mistake is imputable to the negligence of the plaintiff, this bars recovery.[3]

Burden of proof.

§ 766. As has been seen, when the sender sues on the breach of contract, the burden is on the defendant to prove that he complied with his contract.[4] When the *receiver* sues, charging the company with negligently bringing him a false message, the burden is on the plaintiff, though it will be enough to shift this burden to show that the message received was not that sent.[5] But where, in an action for breach of contract to send a telegram, the defence is negligence of the plaintiff, the *onus* is on the defendant to allege and prove it.[6]

Damages.

§ 767. As a general rule, we may hold that a telegraph company is liable for all damages, which in regular and natural sequence, according to the limitations heretofore given, result from its negligence.[7]

[1] New York, &c. Tel. Co. *v.* Dryburgh, 35 Penn. St. 298. See La Grange *v.* S. W. Tel. Co. 25 La. An. 383; West. Un. Tel. Co. *v.* Fenton, 52 Ind. 1.

If, however, we accept the rule adopted in Passmore *v.* Tel. Co., above cited, that a man, aware of the restriction in question, is bound by it, though he sign no contract, and do not use the blank on which the restriction is printed, this might bind the receiver.

[2] Dunning *v.* Roberts, 35 Barb. 463.

[3] Dorgan *v.* Tel. Co. 1 Am. Law Times R. Sept. 1874, p. 407.

[4] See supra, § 422.

[5] Supra, § 421; Rittenhouse *v.* Ind. Un. Tel. Co. 44 N. Y. 263; *S. C.* 1 Daly, 474; West. Un. Tel. *v.* Carew, 15 Mich. 525; Birney *v.* Tel. Co. 18 Md. 341.

[6] Baldwin *v.* U. S. Tel. Co. 1 Lans. 125; 45 N. Y. 744.

[7] Supra, § 97 *et seq.*; Field on Damages, tit. Telegraph, § 4 *et seq.*; Hadley *v.* Baxendale, 9 Exch. 341; Leonard *v.* Tel. Co. 42 N. Y. 544; Baldwin *v.* Tel. Co. 45 N. Y. 744; Bryant *v.* Tel. Co. 1 Daly, 575; N. Y. &c. Tel. Co. *v.* Dryburgh, 35 Penn. St. 298; U. S. Tel. Co. *v.* Wenger, 55 Penn. St. 262; Smithson *v.* Tel. Co. 29 Md. 162; Wash. &c. Tel. Co. *v.* Hobson, 15 Gratt. 125. See West. Tel. Co. *v.* Graham, 1 Col. 230; and see an able discussion of this question in Am. Law Reg. for Feb. 1875.

See, also, Sanders *v.* Stuart, L. R. 1 C. P. D. 326, where the evidence was that the defendant's business was to collect telegraphic messages for transmission to America and other places. The plaintiffs intrusted to defendant a message in cipher, which was unintelligible to the defendant, for transmission to America. The defendant negligently omitted to send the message. The plaintiffs subsequently lost a sum of money which they would have earned for commission upon an order to which the message related. The court held that plaintiffs could not recover the sum of money which they had failed to earn, but only nominal damages. See Baldwin *v.* Tel. Co. 45 N. Y. 750.

It has been held, where a company contracted, without any limitation as to liability, to transmit a message accepting an offer to sell certain goods at a certain place for a certain price, and, by their negligence in delivering it, the sender failed to complete the purchase, that he could recover from them, in damages, the difference between the price which by the message he agreed to pay, and the price which he would have been compelled to pay at the same place, in order, with use of due diligence, to have purchased goods there of the same kind, quantity, and quality. Squire *v.* Tel. Co. 98 Mass. 232.

The plaintiffs' message, instructing their brokers to "buy five Hudson," was transmitted and delivered by the defendant "buy five hundred." Learning of the error, the plaintiffs telegraphed again to their brokers; but, owing to the delay so occasioned, the plaintiffs lost, by the advance in the price of the stock so ordered, $1,375. It was held by the court of appeals in New York, that this sum was the measure of their damages, for which the defendant was liable; and it was intimated, that the action could have been maintained, if no purchase had been made, on proof of the rise in value of the stock. Rittenhouse *v.* Tel. Co. 44 N. Y. 263.

CHAPTER XIX.

VENDORS.

Vendor liable for concealed defects, § 774.
Implied contract that thing sold is fit for use, § 775.
Accident as a defence to non-performance, § 776.

Vendor liable for concealed and dangerous defects.

§ 774. THE relations of vendor and vendee form a distinct topic of jurisprudence, of which it is possible here to touch upon only two features. The first is the liability of the vendor to the vendee for concealed defects. And as to these the law is plain, that though for ordinary defects the innocent vendor is not liable,[1] yet whenever the vendor has or ought to have notice of defects calculated to do serious harm, and neglects to notify them to the vendee, he is liable to the vendee for damages produced by such neglect.[2] But he is not liable for mischief done to third parties through defects disclosed posterior to the sale. Thus it has been held in New York,[3] that the manufacturer and vendor of a steam-boiler is only liable to the purchaser for defective materials, or for any want of care and skill in its construction calculated subsequently to do harm; and if after delivery to and acceptance by the pur-

[1] Longmeid *v.* Holliday, 6 Exch. 761. Supra, §§ 180, 440.

[2] Brown *v.* Edgington, 2 M. & G. 279; George *v.* Skivington, L. R. 5 Exch. 1; Wellington *v.* Downer Oil Co. 104 Mass. 64; Elkins *v.* McKean, 79 Penn. St. 493, where Agnew, C. J., said: "Certainly one who knowingly makes and puts on the market, for domestic and other use, such a death-dealing fluid, cannot claim exemption from liability for his terrible wrong, because he has sent it through many hands. The length of its passage may create a doubt of its identity, or that it was sent on its mission of destruction with a full purpose and knowledge of its dangerous qualities; but the facts being established, he cannot escape the consequences of his crime against society." And see, also, infra, § 853; Loop *v.* Litchfield, 42 N. Y. 351; and cases cited supra, § 440; infra, §§ 854–930; and also Benjamin on Sales, §§ 541–43.

[3] Losee *v.* Clute, 51 N. Y. 494, cited supra, § 439; infra, § 858. See King *v.* R. R. 66 N. Y. 181.

chaser, and while in use by him, an explosion occurs in consequence of such defective construction, to the injury of a third person, the latter has no cause of action, because of such injury, against the manufacturer. At the same time, as we have already seen,[1] a contractor is liable to third parties when he retains control of the thing contracted for, or when the contractee is agent for the party injured.

Implied contract that thing sold should be fit for use.

§ 775. Whenever A. orders B., a specialist, to furnish him with an article in B.'s specialty (whatever the branch may be), there is an implied warranty that B. exercises in the matter the skill of a good specialist in the department.[2] Should B. fail in the exercise of such diligence, he is liable to A. orf any damage sustained by the latter. In a case decided in England in 1870,[3] this doctrine was pushed to its furthest limit; it being held that where a man causes a building to be erected for viewing a public exhibition, and admits persons on payment of money, the contract between him and the persons admitted is analogous to the contract between a carrier and his passengers; and there is implied in such contract a warranty, not only of due care on the part of himself and his servants, but also of due care on the part of any independent contractor, who may have been employed by him to construct the means of conveyance or support. It was ruled, therefore, that where the defendant, acting on behalf of himself and others interested in certain races, entered into a contract with E., who was a competent person to be so employed, to erect and let to them a stand for the purpose of viewing the races; and the defendant, on behalf of himself and his colleagues, received 5*s*. (to be appropriated to the race fund) from every person admitted, of whom the plaintiff was one; and the stand had been negligently and im-

[1] Supra, § 440.

[2] Shepherd *v.* Pybus, 3 M. & G. 868; Macfarlane *v.* Taylor, L. R. 1 Sc. App. C. 245; Ollivant *v.* Bayley, 5 Q. B. 288; Clark *v.* Detroit Locomotive Works, 32 Mich. 348; Benjamin on Sales, §§ 542, 543.

[3] Francis *v.* Cockrell, L. R. 5 Q. B. 184. See supra, § 728.

In Wilson *v.* Finch Hatton, L. R. 2 Excb. D. 336, it was held that, in the letting of a furnished house, there is an implied warranty that the premises are fit for occupation; and in Randall *v.* Newsom, 46 L. J. Rep. 259; 36 L. T. N. S. 84, that, in every sale of goods, there is an implied warranty that the article sold shall answer the description in the contract, and that this warranty is absolute, and extends to latent as well as to discoverable defects.

properly constructed (but not to the knowledge of the defendant), and in consequence fell and injured the plaintiff, — that the plaintiff could maintain an action against the defendant for the damages sustained, although the defendant was free from all personal negligence, and had employed a competent person to erect the stand.[1]

[1] The case was affirmed in the exchequer chamber (Francis *v.* Cockrell, L. R. 5 Q. B. 503; see supra, § 728; and see the limitations of this case given in Searle *v.* Laverick, L. R. 9 Q. B. 122; Collis *v.* Selden, L. R. 3 C. P. 495; supra, § 439), Kelly, C. B., saying: —

"But then the second and more important question arises, what was the implied contract, with respect to the sufficiency of the stand for the purpose to which it was to be applied? I do not hesitate to say that I am clearly of opinion, as a general proposition of law, that when one man engages with another to supply him with a particular article or thing, to be applied to a certain use and purpose, in consideration of a pecuniary payment, he enters into an implied contract that the article or thing shall be reasonably fit for the purpose for which it is to be used and to which it is to be applied. That I hold to be a general proposition of law, applicable to all contracts of this nature and character. It is, indeed, subject to a qualification or exception, to which I will hereafter advert, as determined by the case of Readhead *v.* R. R. L. R. 2 Q. B. 412; L. R. 4 Q. B. 379, but that *qualification extends only to the case of some defect which is unseen and unknown and undiscoverable*, — not only unknown to the contracting party, but undiscoverable by the exercise of any reasonable skill and diligence, or by any ordinary and reasonable means of inquiry and examination. Let us see how the case stands upon the authorities. It was insisted that there was no such warranty, — that there was no such contract. When we look to the judgment delivered in this case in the court of queen's bench, it appears to have proceeded upon this principle, though the principle is laid down in somewhat different terms from those in which I have expressed it. It appears that the ground of the decision in the court below was, that the defendant had contracted against any defect in the construction of the stand, occasioned by reason of his own negligence or of the negligence of the persons who had erected the stand. Though entirely adopting that as the ground of the decision in the court of queen's bench, I should rather express myself differently, and say, that what the defendant in a case like this contracted for was, that the stand upon which he supplied a seat to the plaintiff for the pecuniary consideration of 5*s.* should be reasonably fit for the purpose for which it was supplied to him, without any other exception or qualification than that which was held to apply to such a contract in the case of Readhead *v.* R. R. L. R. 2 Q. B. 412; L. R. 4 Q. B. 379; that is, that the defendant did not contract against any unseen and unknown defect which there was no means of discovering or ascertaining under ordinary and reasonable modes of inquiry or examination. Now that there is an implied contract that an article supplied for hire and reward, or for a pecuniary consideration, shall be reasonably fit for the purpose for

§ 776. It may be generally stated that when there is an absolute contract to deliver goods of a certain class, the vendor must pay damages in case the goods cannot be delivered, though the occasion of non-delivery is inevitable accident.[1] On the other hand, where the contract is to deliver a specific thing, and this thing perishes by *casus*, or is in any way (not involving the vendor's negligence) non-existent at the time of performance, this excuses performance.[2]

Accident as a defence to non-performance.

which it is to be supplied, was, if not decided, assumed and affirmed as established law by the case of Readhead *v.* R. R., both in the court of queen's bench and in the court of exchequer chamber. But the authority does not rest there. Whether it be a case of a carriage or of a bridge, or, as in the present case, of a stand in which seats are contracted for to witness some public spectacle, the rule of law and the rule of reason and good sense appear to me to be the same. Take the ordinary case of a carriage. If a man engaged, in consideration of, say a guinea, to supply a carriage, such as an omnibus, to hold six persons, to proceed on an excursion to the Crystal Palace, and a guinea is paid, and the carriage is sent, is it possible to conceive that he does not contract, not only that that carriage shall contain seats for six persons, but that it shall be reasonably fit for the purpose? I cannot understand upon what imaginable ground it is to be supposed that there is not such an implied undertaking in every contract of this description."

Were it not for the qualification contained in the lines in italics, this extension of the laws of warranty would be open to serious objections. It is opposed to those sound doctrines of law which require the diligence of a good specialist from all operatives, but not a perfection which is unattainable (see supra, § 65); and it is in conflict with the almost universal opinion of the courts that the exceptional and onerous doctrine of insurance, as applied to common carriers of goods, is not to be pressed beyond the cases by which it is expressly determined. See supra, §§ 555, 586, 635, 728. Far more judicious is Keating, J., in the presentation of the reasons that led him to concur in affirming the decision of the queen's bench. "I should prefer, however," he said (Francis *v.* Cockrell, L. R. 5 Q. B. 513; and see Moulton *v.* Phillips, 10 R. I. 218), "to state the defendant's liability or his undertaking to be that due care, that is, reasonable care, had been exercised in the erection of that stand, which he so let out for the use of the public. It is found upon the case that reasonable care was not exercised, but that negligence occurred in its erection, for which it appears to me the defendant is liable." To the same effect is the subsequent argument of Montague Smith, J. See, also, supra, §§ 727 *a*, 728; Walden *v.* Finch, 70 Penn. St. 461. See, also, Gray *v.* Cox, 4 B. & C. 108.

[1] Kearon *v.* Pearson, 7 H. & N. 386.

[2] See Taylor *v.* Caldwell, 3 B. & S. 82; Howell *v.* Coupland, 30 L. T. Rep. N. S. 677; Alb. Law J. Sept. 3, 1874, p. 158.

CHAPTER XX.

DROVERS.

§ 778. A DROVER is bound to use the same care in regard to the cattle that he undertakes to drive for hire that good and faithful drovers are accustomed to exercise when engaged in their particular trade.[1]

[1] Maynard *v.* Buck, 100 Mass. 40; Cayzer *v.* Taylor, 10 Gray, 274; Shaw *v.* R. R. 8 Gray, 45; Shrewsbury *v.* Smith, 12 Cush. 177; Sullivan *v.* Scripture, 3 Allen, 564. See supra, §§ 182, 589, 595.

BOOK III.

NEGLIGENCE IN DUTIES NOT BASED ON CONTRACT.

CHAPTER I.

GENERAL PRINCIPLES AND ILLUSTRATIONS.

Roman law: Aquilian statute, § 780.
Expressions of principle in Digest, § 781.
Abuse of legal rights, § 782.
Damage from negligent management of real estate, § 783.
Distinction between contractual and non-contractual duties, § 784.
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In Anglo-American law doctrine expressed by maxim, *Sic utere tuo ut non alienum laedas*, § 786.
Distinction between use and abuse of rights illustrated by application of water in such a way as to flood a mine, § 787.
All jointly concerned liable, § 788.
Negligence may consist in omitting to control, § 789.
No liability except for probable consequences, § 790.
Special illustration of doctrine, § 791.
Landlord overloading upper floor, § 791.
Landlord negligently repairing, § 792.
Train on railroad negligently cutting hose leading to a fire, § 793.

§ 780. THE Roman law in this respect rests on the principle that the necessity of society requires that all citizens should be educated to exercise care and consideration in dealing with the persons and property of others. Whoever directly injures another's person or property by the neglect of such care is *in culpa*, and is bound to make good the injury caused by his neglect. This general responsibility is recognized by the Aquilian law, enacted about three centuries before Christ, which is the basis of Roman jurisprudence in this relation. *Culpa* of this class consists mainly in commission, *in faciendo*. Thus an omission by a stranger to perform an act of charity is not *culpa;* it is *culpa*, however, to inadvertently place obstacles on a road over which another falls and is hurt; to kin-

Roman law: Aquilian statute.

dle a fire by which another's property may be burned; to dig a trench which causes another's wall to fall.[1]

Expressions of rule in Digest.

§ 781. In the Digest the principle is repeatedly given as follows: *Nemo cum damno alterius locupletior fieri debet.*[2] In other words, no one can use his property to damage another *for his own benefit.* The Roman maxim, however, to adopt the summary of Wening-Ingenheim,[3] is limited to cases where the act complained of is unlawful. But unlawfulness, in this sense, includes direct and indirect violation of law: the first is called *contra legem facere;* the second, *in fraudem legis facere.* In the latter sense, whatever prejudices another's rights is forbidden as *damnum indirectum.*[4]

By the same principle lawful acts become unlawful when they are so performed as to injure other persons (whether this injury be intentional or unintentional), from want of proper care.[5] So also acts are in this sense unlawful (that is to say, when productive of damage to others they are the subject of action) when they are *contra bonos mores*, as to which the *turpe* and the *injustum* equally operate.[6] Hence we may conclude that the Romans regarded all tortious acts undertaken without legal right as unlawful.[7]

The following exceptions, however, are recognized: 1. When a man does everything in his power to avoid doing the mischief, or when it is of a character utterly out of the range of expectation, then the liability ceases and the event is to be regarded as a casualty.[8] 2. If the injury is due to the fault of the party injured, the liability of the party injuring is extinguished. *Quod quis ex sua culpa damnum sentit, non intelligitur sentire.*[9] But

[1] See, fully, supra, § 9, for details of Aquilian law.

[2] L. 14. D. de condict. indeb. (12. 6); L. 6. § 2. de jure dotium (23. 3); L. 206. D. de R. J. (50. 17); Wening-Ingenheim, § 23.

[3] Schadensersatze, § 23.

[4] L. 24. § ult. de damno infect. (39. 2); L. 26. eodem; Wening-Ingenheim, Schadensersatze, § 31.

[5] L. 27. § 9; L. 31. ad L. Aquil. (9. 2.)

[6] L. 15. D. de condic. institution. (28. 7); L. 26. 61. de verb. obl. (45. 1.)

[7] L. 1. § 12; L. 2. § 9. D. de aqua et aquae pluv. (39. 3); Wening-Ingenheim, § 31.

[8] *Casum sentit dominus.* L. 1; L. 52. § 4. D. ad Leg. Aquil. (9. 2); L. 7. ad Leg. Corn. de Sicar. (48. 8); L. 9. § 4; L. 10. ad leg. Aq. L. 23. in fine de Reg. jur. (50. 17); L. 15. § 6. D. loc. cond. (19. 2.)

[9] Supra, § 300.

if the fault of the injuring party is gross, while that of the party injured is slight, then the contributory negligence of the latter does not bar the action. *Dolus* (and gross negligence is to be in this sense regarded as *dolus*) *culpa est pejor*.[1] 3. Liability cannot be attached to the bare exercise of a legal right, if the party injuring confine himself strictly to such exercise, and if the hurt done could not have been avoided except by abandoning the right. *Qui jure suo utitur nemini injuriam facit*, or, *neminem laedit*.[2]

§ 782. No jurisprudence is more determined than the Roman in maintaining the immunity of the individual in the exercise of his rights. *Qui jure suo utitur*, to recur to the maxim just quoted, *nemini facit injuriam*. But this maxim is not to be so construed as to imply that the possessor of a right can exercise it regardless of the effect it produces upon the rights of others. "Expedit reipublicae ne suâ re quis male utatur."[3] I can undoubtedly, in exercise of my rightful liberty, do generally with my property, within its own orbit, what I will; but if I so wield it as to impinge upon the rights of others, then I am liable for the damage so produced. The same jurists who assert the maxim are careful to attach to it this limitation. Thus, I may dig pits at my pleasure on my land; but I will nevertheless be liable if any person having a right or even permission to enter the land falls into one of these pits and is hurt.[4] So I can drive out strange cattle from my close, but for any hurt to them which I arbitrarily inflict I am liable. "Q. Mucius scribit: equa cum in alieno pasceretur in cogendo quod praegnans erat, ejecit. Quaerebatur, dominus ejus possetne cum eo qui coegissit lege Aquilia agere, quia equam in ejiciendo ruperat. Si percussisset aut consulto vehementius egisset, visum est agere posse."[5] I may certainly drive a trespassing animal from my field. I cannot, however, even to expedite matters, rightfully proceed to "percutere." The owner of the land is

Abuse of legal rights.

[1] L. 3. § 3. D. de eo, per quem, f. e. (2. 10); L. 203 de R. J. 50. 17.; L. 4; L. 5. proem. ad L. A. (9. 2.)

[2] L. 151. de R. J. (50. 17); L. 26, de damn. inf. (39. 2); L. 24. D. eodem; L. 25. eod.; L. 1. § 3. sq. de per. et commod. rei vend. (18. 6); L. 36. de dolo malo (4. 3); and other citations given by Wening-Ingenheim, § 33.

[3] L. 1. 8. 2.

[4] L. 28. D. 9. 2.

[5] L. 39. pr. D. ad Leg. Aquil.

under even greater restrictions as to the exercise of this right. He must, as the context of the passage last cited shows, "sic illud expellere . . . . quomodo si suum deprehendisset . . . . vel abigere sine damno, vel admonere dominum, ut suum recipiat."[1] The *publicani*, to take another illustration adduced by Bar, had a lien on cattle impounded by them for taxes, and if they exercised their rights in this respect so as to reserve the rights of property of the owner, no liability attached to them. If, however, they let the impounded beast perish for want of food, they were liable for the loss. "Si publicanus pecus meum abduxerit, dum putat contra legem vectigalis aliquid a me factum, quamvis erraverit, agi tamen cum eo vi bonorum raptorum non posse: sane (si) dolo caret, si tamen ideo inclusit, ne pascatur et ut fame periret, etiam utili lege Aquilia."[2] So also with regard to my neighbor's roof (protectum) which projects from his portico over my land. It is on my land; yet I cannot cut it away, in the exercise of my general right over my land, lest in so doing I injure my neighbor's portico; but I must resort to process of law to abate it if it is offensive. If, however, a stream of water is unlawfully turned on my land by my neighbor, I am permitted, by my own act, to divert the stream so as to keep it out. The distinction, says Ulpian, is, that in the one case, *in suo protexit;* in the other, *ille in alieno fecit.*[3] The overhanging roof is not such an obvious and intrusive violation of my rights as is the turning of a stream upon my land; and for me to tear away the projecting roof involves a more permanent and irremediable harm to my neighbor than does the sending back to him his own stream. It is my right, undoubtedly, to repel a trespass; but I cannot so repel as seriously to injure my aggressor.

Maxims as to negligent abuse of real estate.

§ 783. In addition to the points noticed in the last section, it may be here observed that a person who is damaged by the negligent or tortious management by another of the latter's real estate is entitled to obtain from the latter the *cautio damni infecti;* that is, an express promise that the injury sustained will be made good.[4] The Di-

[1] Bar, Causalzusammenhange, p. 126; Hasse, p. 147.

[2] L. 2. § 20. 47. 8.

[3] L. 29. § 1. D. ad Leg. Aq. See Bower *v.* Peate, L. R. 1 Q. B. D. 321.

[4] Baron's Pandekten, Leipzig, 1872, § 315.

gest designates several negligences or failures of duty for which the owner of real estate is thus held liable. Among these, under the general head of *vitiam aediam, operis*, is noticed the defective construction or management of roofs and porches, of ovens, of fountains and streams, of aqueducts and water, and of piles of manure. It is not necessary to create a right for remuneration that the property injured should immediately adjoin that on which the nuisance is created.[1] The *cautio damni infecti* is extended to cases of nuisances or obstructions either on public roads, rivers, and parks, or on the land of strangers.[2]

Non-contractual as distinguished from contractual negligence.

§ 784. It is maintained by some of the scholastic jurists that negligence in performance of duties not defined by contract (regarding mainly as such those imposed by the Aquilian law) is less culpable than negligence in performance of duties defined by contract. The principal ground of distinction is the notion, shown elsewhere to be unfounded, that *culpa* in the performance of a contract is *culpa in non faciendo*, while the Aquilian *culpa* is *culpa in faciendo*.[3] Other subtle differences were foreshadowed, tending to show that the Aquilian *culpa* presented psychological characteristics distinct from those of the non-Aquilian *culpa*. But the practical jurists of the *Corpus Juris* view *culpa* as they do *dolus*, in the concrete, treating it, not as involving particular dispositions, but as exhibiting itself in particular acts. *Culpa* is indeed spoken of as convertible with *magna negligentia*,[4] but these terms, with *segnitia*, *desidia*, *imperitia*, are applied to non-contractual *culpa* as well as to contractual. The very test used as to contractual negligence, that of the *diligentia* of the *diligens*, is applied to non-contractual negligence. It is of negligence of the latter class that Scaevola expressly says, when commenting on the Aquilian law,[5] Culpam autem esse cum quod a diligente provideri poterit non esset provisum.

Levissima culpa not chargeable in Aquilian torts.

§ 785. Some confusion has been produced by the saying of Ulpian: In lege Aquilia et levissima culpa venit;[6] and those who maintain the idea of three grades of *culpa*, when compelled to admit that this decision cannot

[1] See Digest, 39. 2: de damno infecto et de suggrundis et protectionibus.

[2] Baron's Pandekten, *ut supra*.

[3] See supra, § 79.

[4] L. 226. de V. S. (50. 16.)

[5] L. 31. h. t.

[6] L. 44. pr. h. t.

be applied to *culpa* in performance of contracts, have taken refuge in *culpa* outside of contracts, maintaining that here, at least, *culpa levissima* is imputable. But the context shows that Ulpian intended to establish no such triple grade. What he meant is, that care must be applied in proportion to the dangerousness of the agency used. This, however, is the *diligentia* of a *diligens paterfamilias;* a *diligentia*, failure as to which is *culpa levis*, and not *culpa levissima*. For, as has already been fully shown, by the *diligentia* of a *diligens* or *bonus paterfamilias*, we are to understand the diligence which a conscientious man, versed in a particular business, is accustomed to show when attending to such business. *Culpa levis*, therefore, which is the withdrawal of the diligence of a *diligens paterfamilias*, may, in this as well as in other cases, be properly rendered as *negligence in performance* of *a specialty*. Nor does it make any difference that this specialty is not one the performance of which is described and required by contract. If I own a house, this is a specialty which requires that the house should be so kept as not to be a nuisance to others. If I run a locomotive, this is also a specialty which requires that I should keep this locomotive from exploding or colliding so as to hurt travellers.[1] It is to this very kind of conscientious diligence, single in principle, but multiform in application, that the *diligentia* of the *diligens paterfamilias* peculiarly applies. Pernice, a recent and able expositor on this topic,[2] shows conclusively that this principle applies fully to *culpa* in acts not limited by contract; in other words, to *culpa* under the Roman Aquilian law, and to negligence in our own law, based on the maxim, *Sic utere tuo ut alienum non laedas.* Answering the objection, that the good "father of a family" would not expose himself if at sea to wind and wave, he argues that though this might apply to the "Hausvater" of a little German town, the term "paterfamilias" in the Roman system presents an entirely distinct idea. That idea is *responsibility.* What would a responsible man, occupying the position in question, do? This is what must be done by the person who undertakes the management of agencies by which the persons or property of others may be hurt. From such a person are required

[1] See supra, §§ 33–45.

[2] Pernice, Sachbeschädegungen, Weimar, 1867, p. 65.

the diligence and caution usual to good specialists of his class. The law cannot require more, and it does not require less.[1]

§ 786. The maxim, *Sic utere tuo ut non alienum laedas*, just cited, which is of mediaeval rather than classical origin, has been constantly accepted, with qualifications such as those which have been just stated, as expressing the doctrine, that a party who by the negligent use of his own rights inflicts an injury on another's rights is liable to the latter for the damage. On this doctrine hang most of the decisions adjudicated in the following sections;[2] and the maxim applies to every suit in which one person seeks redress from another for a neglect of duty not based on contract. Thus, to quote from Mr. Broom's admirable exposition, "It has been held, that an action lies against a party for so negligently constructing a hay-rick on the extremity of his land, that in consequence of its spontaneous ignition his neighbor's house was burnt down.[3] So the owners of a canal, taking tolls for the navigation, are, by the common law, bound to use reasonable care in making the navigation secure, and will be responsible for the breach of such duty, upon a similar principle to that which makes a shopkeeper, who *invites*[4] the public to his shop, liable for neglect in leaving a trap-door open without any protection, by which his customers suffer injury.[5] The trustees of docks will likewise be

In our own law the rule is expressed by the maxim, *Sic utere tuo ut non alienum laedas.*

[1] Supra, § 65. See this question noticed by Ames, J., in Gill *v.* Middleton, 105 Mass. 477.

[2] See, also, Schwartz *v.* Gilmore, 45 Ill. 455; Ill. Cent. R. R. *v.* Middlesworth, 46 Ill. 494; Ill. Cent. R. R. *v.* Phillips, 49 Ill. 234; City of Springfield *v.* Le Claire, 49 Ill. 476; McGill *v.* Compton, 66 Ill. 327; Potter *v.* Bunnell, 20 Ohio St. 150; Fehr *v.* Sch. Nav. Co. 69 Penn. St. 161; Homan *v.* Stanley, 66 Penn. St. 464; Phil. &c. R. R. *v.* Constable, 39 Md. 149; Garlick *v.* Dorsey, 48 Ala. 220.

[3] Broom's Legal Maxims, p. 383; Vaughan *v.* Menlove, 3 Bing. N. C. 468; Tuberville *v.* Stampe, Ld. Raym. 264; *S. C.* 1 Salk. 13; Jones *v.* Festiniog R. C., L. R. 3 Q. B. 733. As to liability for fire caused by negligence, see, further, Filliter *v.* Phippard, 11 Q. B. 347, per Tindal, C. J.; Ross *v.* Hill, 2 C. B. 899; Smith *v.* Frampton, Ld. Raym. 62; Visc. Canterbury *v.* A. G. 1 Phill. 306; Smith *v.* R. R. L. R. 5 C. P. 98.

[4] See Nicholson *v.* R. R. 3 H. & C. 534; Holmes *v.* R. R. L. R. 4 Exch. 254; Lunt *v.* R. R. L. R. 1 Q. B. 277, 286.

[5] Parnaby *v.* Lancaster Canal Co. 11 Ad. & El. 223, 243; Birkett *v.* R. R. H. & N. 730; Chapman *v.* Rothwell, E., B. & E. 168; Bayley *v.* Wolverhampton Works Co. 6 H. & N. 241; and cases cited infra.

answerable for their negligence and breach of duty causing damage."[1] So whoever negligently causes another's land to be flooded is liable for the damage.[2]

Distinction between use and abuse of rights illustrated by the application of water in such a way as to flood a mine.

§ 787. An interesting illustration of the principle just stated is to be found in an English case, where the owner of a coal mine on the higher level worked out the whole of his coal, leaving no barrier between his mine and the mine on the lower level, so that the water percolating through the upper mine flowed into the lower mine, and obstructed the owner of it in getting his coal. It was held that the owner of the lower mine had no cause of complaint. The defendant, the owner of the upper mine, had a right to remove all his coal. The damage sustained by the plaintiff was occasioned by the natural flow or percolation of water from the upper strata. There was no obligation on the defendant to protect the plaintiff against this. It was his business to erect or leave a sufficient barrier to keep out the water, or to adopt proper means for so conducting the water that it should not impede him in its workings. The water was only left by the defendant to flow in its natural course.[3] On the other hand, if the owner of one mine introduces into it by *artificial means* water which floods an adjacent mine, this is an injury for which redress will be given.[4] Of this last case it is said by Lord Cairns that "the owner of the upper mine did not merely suffer the water to flow through his mine without leaving a barrier between it and the mine below, but in order to work his own mine beneficially he pumped up quantities of water in addition to that which would have naturally reached it, and so occasioned him damage. Though this was done without negligence, and in the due working of his own mine, yet he was held to be responsible for the damage thus occasioned. It was in consequence of his act, whether skilfully or unskilfully performed, that the plaintiff

[1] Mersey Docks Trustees *v.* Gibbs; Same *v.* Penhallow, L. R. 1 H. L. 93.

[2] Robinson *v.* Coal Co. 50 Cal. 460. See Jones *v.* R. R. L. R. 3 Q. B. 736; and cases cited infra, §§ 787, 934. See, however, Parks *v.* Newburyport, 10 Gray, 28; Flagg *v.* Worcester, 7 Allen, 19; Gannon *v.* Hargadon, 10 Allen, 106.

[3] Smith *v.* Kenrick, 7 C. B. 564, as stated and approved by Lord Cranworth, in Rylands *v.* Fletcher, L. R. 3 H. of L. 341. See infra, § 934.

[4] Baird *v.* Williamson, 13 C. B. N. S. 376.

had been damaged, and he was therefore held liable for the consequences. *The damage in the former case may be treated as having arisen from the act of God, in the latter from the act of the defendant.*" [1] And where the injury is traceable to the act of God, the defendant is not liable.[2]

The point was further discussed in a celebrated case,[3] where it appeared that A. was the lessee of certain mines, and B. was the owner of a mill standing on land adjoining that under which the mines were worked. B. desired to construct a reservoir, and employed competent persons, an engineer and a contractor, to build it. A. had worked his mines up to a spot where there were certain old passages of disused mines; these passages were connected with vertical shafts which communicated with the land above, and which had also been out of use for years, and were apparently filled with marl and the earth of the surrounding land. No care was taken by the engineer or the contractor to block up these shafts, and shortly after water had been introduced into the reservoir it broke through some of the shafts, flowed through the old passages, and flooded A.'s mine. It was held in the house of lords that A. was entitled to recover damages from B. in respect of this injury.[4]

[1] Lord Cairns, in Rylands *v.* Fletcher, L. R. 3 H. L. 341; Smith *v.* Canal Co. 2 Allen, 355; Wilson *v.* New Bedford, 108 Mass. 261.

[2] Nichols *v.* Marsland, L. R. 10 Exch. 255; *S. C.* aff. L. R. 2 Exch. D. (C. A.) 1; and see 11 Alb. L. J. 255. Infra, § 938; and as to causal connection, supra, § 148.

[3] Rylands *v.* Fletcher, L. R. 3 H. of L. 330.

[4] "We think," said Blackburn, J., in his judgment in the court of exchequer chamber, where he states the opinion of that court, "that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor who has brought

Subsequently, however, it was held that this rule was not to be stretched so far as to impose liability for such floodings when the owner of the upper mine exercised ordinary proper and usual diligence in working the mine.[1] Following this line it was decided by the judicial committee of the privy council in 1874,[2] that the principle that a man who accumulates anything on his land which, in escaping, may damage his neighbor, is liable for the damage, does not apply to water stored in the Indian tanks, in accordance with immemorial custom, and which are part of the tenure of land. And in December, 1876, it was ruled by the house of lords that where mineral workings have caused a subsidence of the surface, and a consequent descent of surface water, exclusively by gravitation and percolation, to a lower field, this does not sustain a claim for damages.[3]

On the other hand, it was decided by the common pleas division of the English high court of justice, in 1877,[4] that an occupier of land can recover against an adjoining occupier for damages caused by noxious substances coming on to his premises, in a way in which he is not bound to receive them, from any artificial structure on the adjoining premises, although the adjoining occupier is ignorant of the facts which cause the injury, and is no negligence.[5]

something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his own peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the thing so brought be beast, or water, or filth, or stenches."

[1] Smith *v.* Fletcher, L. R. 9 Exch. 64, reversing same case in court of exchequer.

[2] Madras R. R. *v.* Zemindar, 30 L. T. N. S. 771; Alh. L. J. Sept. 5, 1874, 150; and see, as to *casus*, supra, § 148; Carstairs *v.* Taylor, L. R. 6 Exch. 217. Supra, § 114.

[3] Wilson *v.* Waddell, L. R. 2 App. Cas. (1876), 95.

[4] Humphreys *v.* Cousins, 36 L. T. Rep. N. S. 180.

[5] To same effect, see Raydure *v.* Knight, 2 Weekly Notes, 713; infra, § 852; Shipley *v.* Fifty Associates, 106 Mass. 194.

Rylands *v.* Fletcher is approved in Wilson *v.* New Bedford, 108 Mass. 261, and Cahill *v.* Eastman, 18 Minn. 324. See McCafferty *v.* R. R. 61 N. Y. 178; cited supra, § 188, where Dwight, C.,

§ 788. If two or more persons are jointly concerned in a particular act infringing the maxim before us, they may be sued jointly.[1] So far has this been carried, that it has been held in Massachusetts that one who superintends, although gratuitously and not under any contract, work done on land of another, and through whose negligence, as well as that of such other, damage is done to a third person by the work, is liable therefor in an action by such third person against him and such other jointly.[2] But where a principal's liability is based, not upon any participation on his part in the negligence, but solely on his agent's personal nonfeasance, then, though the two are severally, they are not jointly, liable.[3]

All concerned in the negligence jointly liable.

§ 789. Negligence of the class before us consists not simply in *originating* the mischief, for this may be a lawful act, but in not controlling it when put in operation.[4] Thus he who starts a fire lawfully on his own property is responsible for his negligence in not controlling it;[5] he who leaves a dangerous pit on his land adjoining a high-

Negligence consists in omitting to control as well as in originating.

in a minority opinion, argues that Rylands *v.* Fletcher is to be extended so as to make a principal liable for a nuisance exclusively caused by the negligence of a contractor, and not incidental to the contract. The majority of the court held to the contrary view. On the other hand, Rylands *v.* Fletcher is unfavorably criticised in Swett *v.* Cutts, 50 N. H. 439; Brown *v.* Collins, 53 N. H. 442; Losee *v.* Buchanan, 51 N. Y. 476; and its principle is doubted in Hoyt *v.* Hudson, 27 Wis. 656. See notice in Alb. L. J. for April 10, 1875; and a comprehensive criticism in Bigelow on Torts, 492 *et seq.*, where the fluctuations of the New York courts are particularly noticed. As to right of neighbors to be protected from negligent construction of reservoirs, see Monson Manuf. Co. *v.* Fuller, 15 Pick. 334; Fuller *v.* Chicopee Manuf. Co. 16 Gray, 46; Wilson *v.* New Bedford, 108 Mass. 261; Pixley *v.* Clark, 35 N. Y. 520. In Hudson *v.* Tabor, L. R. 1 Q. B. D. 225; 34 L. T. 249, it was held that the owner of a sea-wall is not bound to repair it for the benefit of his neighbor.

[1] See Klauder *v.* McGrath, 35 Penn. St. 128; Keene *v.* Whistler, 2 Sawyer, 348; and cases cited supra, § 395. And as to joinder of principal and agent in tort, see Whart. on Agency, §§ 474–478, 546.

[2] Hawkesworth *v.* Thompson, 98 Mass. 77. See Phelps *v.* Wait, 30 N. Y. 78; Michael *v.* Alestree, 3 Lev. 172; Pfau *v.* Williamson, 63 Ill. 16.

[3] Parsons *v.* Winchell, 5 Cush. 592; Campbell *v.* Portland Sugar Co. 72 Me. 566.

[4] See fully, supra, § 79; and see Pickard *v.* Smith, 10 C. B. N. S. 470; Bower *v.* Peate, L. R. 1 Q. B. D. 321.

[5] See infra, § 866.

way is responsible for damages arising from his neglecting to fence such pit off from the highway;[1] he who negligently permits a waste pipe to overflow is liable for injury to a tenant from the overflow;[2] he who consents to blasting operations on his own land for damages thereby produced to the land of another;[3] he who erects a dam through which water percolates for damage accruing from the percolation of the water.[4]

No liability except for probable consequence.

§ 790. It would be absurd, however, to take the maxim before us in its literal sense, and to interpret it, as is sometimes done,[5] as meaning that I am to be made liable to another for any injury that I may sustain for anything that I may do. "It is almost impossible," so writes a learned commentator on this topic,[6] "to conceive of a lawful action that may not by possibility cause injury to another. One man establishes a store which takes away from the profits of a store already established; he erects a mill, in consequence of which the value of another in the vicinity is sensibly diminished; he collects his debt, and the debtor's business is broken up to the prejudice of others who were customers; he assists in starting a new town, which draws away the business from an older one; or he gives to the public a park on one side of a city, which changes relative values to the prejudice of the opposite side; — in all these cases the injury may be very perceptible and easily traced to the cause which produced it, but there is manifestly no ground for the suggestion that an action at law should redress it." That the line separating the two classes of cases is difficult of apprehension is exhibited by the extreme delicacy of the distinctions given in prior sections, and by the fact that acts which are held to impose liabilities in one jurisdiction are declared to impose no such liabilities in another. We may, however, generally state that the torts now before us, following in this respect the Aquilian torts of the Roman law, consist of such abuses of *corporeal* rights as, in probable and

[1] Barnes *v.* Ward, 9 C. B. 392; Hadley *v.* Taylor, L. R. 1 C. P. 53.

[2] Priest *v.* Nichols, 116 Mass. 401.

[3] Harris *v.* James, 45 L. J. Q. B. 545.

[4] Pixley *v.* Clark, 35 N. Y. 520; Arimond *v.* Canal Co. 35 Wis. 45.

[5] Phil. &c. R. R. *v.* Constable, 39 Md. 149; Garlick *v.* Dorsey, 48 Ala. 220.

[6] Judge Cooley, in "Incidental Injuries," in Southern Law Review for 1876.

ordinary sequence, produce injuries to others. I may, by erecting a building, cut off the prospect or the air of another, but the rights in such case are incorporeal. I may so negligently use my influence in political or social life as to injure another, but such rights, also, are incorporeal. So, to take up another line of distinction: I may use an ordinary corporeal right, *e. g.* the right to use water or fire, so as to injure another; yet, if this use be not turned into an abuse, I may not be liable. The distinction is this: when I exercise a corporeal right in such a way as that its probable and regular consequences are to injure another, then I am liable to such other person for the consequences, but otherwise not. I may in a calm day build a fire in my fields to burn stubble, — to repeat an illustration elsewhere given,[1] — and I am not liable, if the fire spreads, for the injury caused by its subsequent extension through a sudden and unusual storm of wind. But if when the wind is blowing a gale I fire my stubble, then I am liable for the conflagration, for such conflagration probably and ordinarily follows such a fire. Again; while a land-owner is not permitted to collect water the natural and probable effect of which is to injure his neighbor, he is permitted to retain surface or rain water, which, if he permitted it to flow on, might irrigate his neighbor's land.[2]

Special illustrations of doctrine.

§ 791. In subsequent chapters will be given certain leading groups of cases (*e. g.* collisions on roads, abuse of dangerous agencies, neglect in fencing, neglect in restraining mischievous animals), in which the doctrine before us finds its chief application. At this point will be noticed as illustrations a few cases not falling within the groups just mentioned.

Person overloading floor of upper room so as to injure tenant in lower room.

If a person overloads the floor of an upper room so that the floor breaks and crushes the goods of another man in the floor beneath, the latter is entitled to redress. If the floor is weak, the occupier must take good care that he does not put upon such weak floor more than it can well bear; and if it will not bear anything,

[1] Supra, §§ 12, 20, 160; infra, §§ 865–867.

[2] Broadbent *v.* Ramsbotham, 11 Exch. 602; Luther *v.* Winnisimmet Co. 9 Cush. 171; Curtis *v.* Ayrault, 47 N. Y. 73; Livingston *v.* McDonald, 21 Iowa, 160; Bigelow's Cases on Torts, 496–503.

he ought not to put anything upon it to the prejudice of another. Thus where the defendant, who was the lessee and occupier of a warehouse, underlet a cellar beneath the warehouse to the plaintiff, and the defendant so overloaded the floor of the warehouse with merchandise that the floor gave way and crushed the plaintiff's wine in the cellar; it was held that the defendant was responsible for the injury, and that it was no answer to the quest on to say that the floor was ruinous and that the defendant was not bound to repair it; "for he who takes a ruinous house ought to mind well what weight he puts into it, at his peril; that it be not so much that another shall take any damage by it. But if the floor had fallen of itself without any weight put upon it, or by the default only of the posts in the cellar which support it, with which the defendant had nothing to do, then the defendant shall be excused." [1]

Landlord neglecting to use proper skill in making repairs.

§ 792. A landlord who undertakes to repair a building in his tenant's hands, and who neglects to use due skill in making repairs on the demised premises, and thereby causes a personal injury to the tenant, is liable to the tenant therefor, although his undertaking to make the repairs was gratuitous and by the tenant's solicitation.[2] It is otherwise, however, if there is no duty imposed on the landlord.[3] A lessor's duty, in this respect, has been already discussed.[4] Even without an undertaking, a landlord is liable for any carelessness on his part which injures the tenant's goods. Thus if goods of a tenant of part of a building are injured by water escaping from a waste pipe, through the negligence of the landlord, who occupies the rest of the building, and who has charge of the waste pipe and engine, the tenant may maintain an action therefor against the landlord.[5] It has been even held that a landlord, who has notice of a prior leak in a waste pipe, which he has placed in a building, is liable to a tenant for a subsequent leak in the same waste pipe caused by the negligence of a co-tenant; [6] though this may be doubted, so far as it assumes liability of a landlord for a tenant's negligence.[7]

[1] Edwards *v.* Halinder, Poph. 46. See supra, § 728.

[2] Gill *v.* Middleton, 105 Mass. 477; and see McHenry *v.* Marr, 39 Md. 510.

[3] Supra, § 729.

[4] Supra, §§ 727 *a*, 728.

[5] Priest *v.* Nichols, 116 Mass. 401.

[6] Marshall *v.* Cohen, 44 Ga. 489.

[7] See Doupe *v.* Gerrin, 45 N. Y.

§ 793. Water is conducted to a house on fire in such a way that by the ordinary laws of nature the fire would be thereby extinguished. The hose by which the water is conducted is laid over a railroad track, and a train passing by negligently cuts the hose. The train in so doing makes the company liable for the damages caused by the non-extinguishing of the fire.[1]

Cutting off water by which fire would otherwise be extinguished.

119; Ross *v.* Fedden, L. R. 7 Q. B. 661. See Fisher *v.* Thirkell, and notes thereto, Bigelow on Torts, 627.

[1] Supra, 98 *a*; Metallic Comp. Cast. Co. *v.* R. R. 109 Mass. 277; 1 Am. L. T. N. S. 135.

In Mott *v.* R. R. 1 Robertson (N. Y.), 585, it was held that a railroad company was not liable for cutting the hose leading to a fire when there was no notice or warning to the train.

In Hyde Park *v.* Gay, 120 Mass. 589, the proof was that on Sunday morning, before daylight, the fire department of the town of Hyde Park, for the purpose of extinguishing a fire, ran hose across a railroad track, which hose was cut in two by a train, owned by defendant. It was shown that there were no signals given to warn approaching trains. The court held that the persons in charge of the hose had a right, in the absence of positive information, to expect that no train would be run on that day, and that a request to charge that danger signals should have been made in either direction was rightly refused. It held, also, that if the running of the train on Sunday, in violation of law, was the direct cause of the injury, the action could be maintained without showing further proof of negligence on the part of defendant. As to Sunday laws, see supra, §§ 331, 381; infra, § 812.

CHAPTER II.

COLLISION OF RAILWAY TRAINS WITH TRAVELLERS.

Railroad bound to provide adequate guards or flagmen at crossings, § 798.
Compliance with statutory requisitions not a defence if negligence be proved, § 799.
Omission to keep tracks in good order, § 800.
Interposition of objects in such a way as to prevent traveller from seeing train, § 801.
Omission to replace switch, § 802.
To slacken speed, § 803.
To give signals, § 804.
To place sign-boards, § 807.
To shut gate, § 808.
To have lights at crossings, § 808 *a*.
Omission to have adequate brakes, § 809.
To have time-tables, § 810.
Moving cars by surprise, § 811.
Running on Lord's day, § 812.
Burden of proof, § 813.
Moving cars irregularly, supra, § 390.
Negligence of persons carrying plaintiff, supra, § 395.
Giving negligent invitation to cross, supra, § 387.
Frightening horses by whistle, see infra, § 836.
Horse-cars, distinctive law of, infra, § 820 *k*.
Contributory negligence, § 382 *et seq*.

§ 798. It is elsewhere shown that the diligence of a railroad company must be in proportion to its responsibilities and opportunities.[1] This doctrine is readily applied to the topic immediately before us. A railroad crossing a wilderness can dispense, there being no intervening highway, with flagmen or guards. A railroad intersecting on level a populous thoroughfare is bound to take all practicable measures, in the way of gates, signs, and flagmen, to prevent collision with travellers.[2] Perfect vigilance, however, is not required, for per-

Precautions at crossings.

[1] Supra, §§ 47, 48; infra, § 806.

[2] See supra, §§ 47, 48, and cases cited in following sections of this chapter. As special illustrations may be here noticed, Ill. Cent. R. R. *v.* Baches, 55 Ill. 379; Chic. &c. R. R. *v.* Payne, 59 Ill. 534; Rothe *v.* R. R. 21 Wis. 256; Duffy *v.* R. R. 32 Wis. 269.

In an English case, determined in 1876 the evidence was, that where a public footway crossed a railway on a level, the plaintiff, while crossing on the footway in the evening, after dark, was knocked down and injured by a train of the defendants on the crossing. He stated in evidence at the trial that he did not see the train until it was close upon him; that he saw no lights on the train, and heard no whistling. He stated, also, that he did not hear any caution or warning given to him by any servant of the

fect vigilance would result in perfect inaction,[1] but simply prudence, such as good business men in the same specialty are accustomed to exercise, such prudence to be proportioned to the risk.[2]

Flagmen.

§ 798 *a*. Unless, therefore, required by custom or statute, or by the peculiar exigencies of a much frequented level crossing, it is not negligence, *per se*, to omit to station a flagman at a crossing.[3] But the better opinion is, that it is the duty of a railway company to place a flagman at all crossings in thickly populated centres, where there is a flow of travellers and a frequent passage of trains.[4] And where by ordinance or statute a railroad company is required to have a flagman at a particular crossing, to omit such a precaution is *primâ facie* negligence.[5] A railroad company, by establishing a custom to this effect, may make itself liable for negligence in permitting a flagman to be absent at the time of collision.[6] Nor can the company, in a case where a flagman is required, set up the custom of other roads as an excuse. Thus, in an action against

company. The driver and fireman of the engine were called in behalf of the company, and stated that there were lamps on the engine and train, which were lighted in due course on the night in question, at the commencement of the journey, and which, if lighted, could be seen for a considerable distance by any one standing at the crossing. A porter in the defendants' employ also stated that he had seen the plaintiff at the crossing on the night in question, and had called to him not to cross. The judge at the trial ruled that there was evidence to go to the jury of negligence on the part of the defendants which caused the injury to the plaintiff. Held, on a bill of exceptions, by Bramwell, B., Mellor, J., Pollock and Amphlett, BB. (Cockburn, C. J., and Cleasby, B., dissenting), that there was no evidence of negligence to go to the jury. Ellis *v.* R. R. L. R. 9 C. P. (Exch. Ch.) 554.

[1] Supra, §§ 59–62.

[2] Supra, §§ 636, 637; Chic. &c. R. R. *v.* Stumps, 53 Ill. 367.

[3] Com. *v.* R. R. 101 Mass. 201; Ernst *v.* R. R. 39 N. Y. 61; Warner *v.* R. R. 45 Barb. 239; 45 N. Y. 465; 52 N. Y. 437; Delaware, &c. R. R *v.* Toffey, 38 N. J. L. 525. See R. *v.* Smith, 11 Cox C. C. 210.

[4] Bilbee *v.* R. R. 18 C. B. N. S. 584; Stubley *v.* R. R. L. R. 1 Exch. 13; Cliff *v.* R. R. L. R. 5 Q. B. 258; Richardson *v.* R. R. 45 N. Y. 846; New Jersey R. R. *v.* West, 3 Vroom, 91; Penn. R. R. *v.* Matthews, 36 N. J. 531; Rothe *v.* R. R. 21 Wis. 256; St. Louis R. R. *v.* Dunn, 78 Ill. 197. See Beisiegel *v.* R. R. 40 N. Y. 9.

In New York, evidence of the absence of a flagman is always admissible; Ibid.; Weber *v.* R. R. 58 N. Y. 451; and is one of the circumstances from which negligence can be inferred. McGrath *v.* R. R. 63 N. Y. 528, 529.

[5] McGrath *v.* R. R. 63 N. Y. 522.

[6] Ibid. See *S. C.* 59 N. Y. 468; 1 N. Y. Sup. Ct. 243; 3 N. Y. Sup. Ct. 776; and see Lane *v.* Atlantic Works, 111 Mass. 136; Kissenger *v.* R. R. 56 N. Y. 538.

a railroad corporation for running a train over the plaintiff at a crossing where there was a single track and no flagman, a witness, called as an expert by the defendants, cannot be asked what is the custom of railroads in maintaining a flagman at crossings similar to the one in question, or at crossings where there is one track.[1]

Compliance with statute not by itself a defence.

§ 799. The fact that a railroad complies with certain statutory prescriptions, intended to prevent collisions, does not relieve it from the necessity of adopting other precautions which ordinary prudence would suggest. If negligence in other respects be proved, compliance with statutory requisitions is no defence.[2]

Omission to keep track in good order.

§ 800. A railroad company is liable for damages resulting from its neglect to keep in order its track laid through a public street or road.[3] Nor is notice necessary. "The presumption of knowledge arises from the existence of the defects themselves."[4] And this duty applies to a road over which the company has a right of way. "A railroad company, when using the track and easement of another similar corporation for the purpose of running their own engine and cars, with their own employees, must be held to observe such precautions for the safety of the public at a crossing as shall be fully equivalent to those which are required in the exercise of reasonable care and prudence at the hands of the corporation

[1] Bailey *v.* R. R. 107 Mass. 496.

[2] See supra, §§ 384–88; Webb *v.* R. R. 57 Me. 117; Bradley *v.* R. R. 2 Cush. 539; Richardson *v.* R. R. 45 N. Y. 846; Ill. Cent. R. R. *v.* Baches, 55 Ill. 379. See remarks of Allen, J., in Weber *v.* R. R. 58 N. Y. 456; and also supra, § 388 *a*.

"It has been adjudged that compliance with all statute requirements does not exempt a railroad corporation from liability to an action by a party injured by its omission to take all other reasonable precautions. Bradley *v.* R. R. 2 Cush. 539; Linfield *v.* R. R. 10 Cush. 569; Shaw *v.* R. R. 8 Gray, 73. The question whether the defendants had omitted any such precautions was, therefore, a question for the jury." Gray, J., Com. *v.* R. R. 101 Mass. 201.

[3] Oliver *v.* R. R. L. R. 9 Q. B. 409; G. W. R. R. *v.* Braid, 1 Moore P. C. N. S. 101; Worster *v.* R. R. 50 N. Y. 203; Fash *v.* R. R. 1 Daly, 148; Mazetti *v.* R. R. 3 E. D. Smith, 98; Cumberland R. R. *v.* Hughes, 11 Penn. St. 141; Virginia Cent. R. R. *v.* Sanger, 15 Gratt. 230; Meyers *v.* R. R. 59 Mo. 223; Smith *v.* R. R. 61 Mo. 588.

[4] Church, C. J., in Worster *v.* R. R. 50 N. Y. 203; Grote *v.* R. R. 2 Exch. 251; Barton *v.* City of Syracuse, 36 N. Y. 54; Griffin *v.* Mayor, 9 N. Y. 456.

whose road they are using."[1] The track must be made suitable for the crossing not only of persons but of teams.[2] At the same time, we have again to remark that what is required is not perfection, but such care and diligence as are at once conducive to the safety of travellers, and compatible with the conditions of the company.[3]

§ 801. Where a railroad is arbitrarily and unnecessarily laid across a public highway, in such manner and place that those travelling the highway can neither see nor distinctly hear approaching trains until too late to avoid collision with them;[4] or when intermediate objects are retained by the company so as to shut off the view, the company, in the absence of causal negligence of those injured, is liable for a collision so induced.[5]

Interposition of objects preventing traveller from seeing train.

§ 802. It being the duty of the company to have a switchman at all places where a switch is to be adjusted, the omission to adjust a switch is *per se* negligence.[6]

Omission to replace switch.

§ 803. A slackening of speed, on approaching a crossing where persons are constantly passing, is the duty of those running a train,[7] though this duty varies in proportion to the amount of travel over the crossing,[8] and

Omission to slacken speed.

[1] Barrows, J., Webb *v.* R. R. 57 Me. 136.

[2] Infra, § 819; Ill. &c. R. R. *v.* Stables, 62 Ill. 313; Duffy *v.* R. R. 32 Wis. 269; Roberts *v.* R. R. 35 Wis. 679.

[3] See supra, §§ 634, 635.

[4] Duffy *v.* R. R. 32 Wis. 269.

[5] Supra, § 386; Mackay *v.* R. R. 35 N. Y. 75; Richardson *v.* R. R. 45 N. Y. 846; Indian. R. R. *v.* Smith, 78 Ill. 112; Dimick *v.* R. R. 80 Ill. 338; Roberts *v.* R. R. 35 Wis, 680.

In Cordell *v.* R. R. N. Y. Ct. of App. 1877, the evidence was that at the time of the collision, which was on a private crossing, there was a quantity of stumps and other material which the railroad company had piled on its own land, which prevented one coming toward the track at the crossing from seeing approaching trains. It was ruled (reversing the decision of the court below), that it was not negligence for the company to so pile the stumps and material on its own land as to obstruct the view of trains. *S. C.* 6 Hun, 461; 64 N. Y. 535.

[6] R. *v.* Pargeter, 3 Cox C. C. 191; Caswell *v.* R. R. 98 Mass. 194; Piper *v.* R. R. 56 N. Y. 630; State *v.* O'Brien, 3 Vroom, 169; B. & O. R. R. *v.* Worthington, 21 Md. 275.

As to duty of company in respect to switches, see Piper *v.* R. R. 56 N. Y. 630.

[7] Lafayette R. R. *v.* Adams, 26 Ind. 76; Pittsburg R. R. *v.* Knutson, 69 Ill. 103; Reeves *v.* R. R. 30 Penn. St. 454; Phil. & Read. R. R. *v.* Long, 75 Penn. St. 257; Penn. R. R. *v.* Lewis, 79 Penn. St. 33; Wilds *v.* R. R. 29 N. Y. 315. See Toledo R. R. *v.* Jones, 76 Ill. 311.

[8] Toledo R. R. *v.* Miller, 76 Ill.

is qualified by statutory prescription.[1] So, as has been already said, if the engineer sees a person apparently helpless before him, it is his duty to slacken speed;[2] but otherwise when he sees a person apparently intelligent and capable of moving off the track.[3] And, generally, when a train crosses a public street, its officers are bound to take every reasonable precaution for public safety.[4]

A local ordinance, prohibiting the degree of speed at which the train was run, can be put in evidence as part of the proof of negligence.[5]

Omission to give signals.

§ 804. Omission to give signals, by sounding a bell or whistle, has been held not necessarily negligence;[6] and it is easy to conceive of a case in which such an omission would not amount to negligence. The engine may be passing an open country, in which it is plain no one approaching can avoid seeing the train. Such omission, unaccompanied with other proof, though in cases where the collision is on a public crossing, does not necessarily constitute even a *primâ facie* case.[7]

278; Pacific R. R. *v.* Houts, 12 Kans. 328.

[1] See infra, § 896 *a;* Zeigler *v.* R. R. 5 S. C. 221.

[2] Supra, § 389 *a;* Balt. City R. R. *v.* McDonnell, 41 Md. 534; Penn. R. R. *v.* Lewis, 79 Penn. St. 33; Chic. &c. R. R. *v.* Lee, 68 Ill. 576.

In East Tenn. R. R. *v.* St. John, 5 Sneed, 524, it was held negligence to run over a sleeping boy. See Nashville, &c. R. R. *v.* Smith, 6 Heisk. 174, cited supra, § 388 *a.*

[3] Supra, § 389, and cases there cited; and see, also, Telfer *v.* R. R. 30 N. J. 188; Lake Shore R. R. *v.* Miller, 25 Mich. 277; Chic. &c. R. R. *v.* Austin, 69 Ill. 426, Herring *v.* R. R. 10 Ired. 402; Jones *v.* R. R. 67 N. C. 125.

[4] Chic. &c. R. R. *v.* Stumps, 69 Ill. 409. In Rockford, &c. R. R. *v.* Byam, 80 Ill. 528; and Maher *v.* R. R. 64 Mo. 267, it is said that no reasonable speed is *per se* unlawful.

[5] Jetter *v.* R. R. 2 Abb. Ct. of App. 458; Beisiegel *v.* R. R. 14 Abb. N. S. 29; Massoth *v.* R. R. 64 N. Y. 524; Balt. & O. R. R. *v.* State, 29 Md. 252; Rock Island, &c. R. R. *v.* Reidy, 66 Ill. 44; and cases cited infra, § 896 *a.*

[6] Supra, §§ 384–86; R. *v.* Pargeter, 3 Cox C. C. 191; R. *v.* Gray, 4 F. & F. 1098; Cook *v.* R. R. 5 Lans. 401; Havens *v.* R. R. 41 N. Y. 296; Bradley *v.* R. R. 3 N. Y. Sup. Ct. 288; Galena, &c. R. R. *v.* Dill, 22 Ill. 265; Ill. Cent. R. R. *v.* Phelps, 29 Ill. 447; Chic. &c. R. R. *v.* Notzki, 66 Ill. 455; Chic. R. R. *v.* Bell, 70 Ill. 100; Toledo R. R. *v.* Jones, 76 Ill. 311; Toledo R. R. *v.* Wabash, 76 Ill. 395. See Schwartz *v.* R. R. 4 Rob. 347; Leav. R. R. *v.* Rice, 10 Kans. 426; and cases cited supra, §§ 384–86.

[7] Chic. &c. R. R. *v.* Lee, 68 Ill. 576. See Cleveland R. R. *v.* Elliott, 28 Ohio St. 340; Chic. &c. R. R. *v.* Lee, 60 Ill. 501; Chic. &c. R. R. *v.* Notzki, 66 Ill. 455; Rockford, &c. R. R. *v.* Linn, 67 Ill. 109; Chic. &c. R. R. *v.* Van Patten, 64 Ill. 510; Chic. &c. R. R. *v.* Elmore, 67 Ill. 176; Bellefon-

Even where a statute is in force requiring the use of a bell or steam-whistle or other signal at a crossing, while the omission to comply may, under the statute, create a *primâ facie* case against the company, it is a good defence that the plaintiff saw the train, and recklessly exposed himself to the collision. When, however, the injury results from the omission of the signal, then the railroad is liable.[1] But when crossing a thoroughfare, where the train is in any way hid, or when passing close to houses in a village or city, there not only should its speed be slackened, but notice be given by bell in the more crowded neighborhoods, by steam-whistle in the country.[2] So, if the obstructions at the crossing were such as to make it impossible for a person approaching it to see the train, and impossible or very difficult to hear it, in such and similar cases (apart from statutes), "it would be the clear duty of a railroad company to ring the bell or sound the whistle, so as to warn persons of the approach of the train; and an omission so to do, even in the absence of any statute requiring it, would be negligence, if so found by the jury, rendering the company liable for any injury resulting therefrom."[3] In

taine R. R. *v.* Hunter, 33 Ind. 335; R. R. *v.* Hamilton, 44 Ind. 76.

[1] See supra, §§ 130, 384; Wakefield *v.* R. R. 37 Vt. 330; Flint *v.* R. R. 110 Mass. 222; Elkins *v.* R. R. 115 Mass. 190; Steves *v.* R. R. 18 N. Y. 422; Ernst *v.* R. R. 35 N. Y. 9; Renwick *v.* R. R. 36 N. Y. 132; Havens *v.* R. R. 41 N. Y. 296; Wilcox *v.* R. R. 39 N. Y. 358; Eaton *v.* R. R. 51 N. Y. 544; Galena R. R. *v.* Loomis, 13 Ill. 548; Ohio R. R. *v.* Eaves, 42 Ill. 288; St. Louis R. R. *v.* Manly, 58 Ill. 300; Indianap. &c. R. R. *v.* Blackman, 63 Ill. 117; Peoria, &c. R. R. *v.* Siltman, 67 Ill. 72; Ill. Cent. R. R. *v.* Benton, 69 Ill. 174; Indianap. R. R. *v.* Dunn, 78 Ill. 197; Chic. &c. R. R. *v.* Garvey, 58 Ill. 83; Penn. R. R. *v.* Krick, 47 Ind. 369; Gates *v.* R. R. 39 Iowa, 45; Reynolds *v.* Hindman, 32 Iowa, 146; Artz *v.* R. R. 34 Iowa, 153; Spencer *v.* R. R. 29 Iowa, 55; Paducah, &c. R. R. *v.* Hoehl, 11 Bush, 41; though see St. Louis, J. & C. *v.* Terhune, 50 Ill. 151; Chic. &c. R. R. *v.* Adler, 56 Ill. 344; and see, fully, supra, §§ 384–86.

It should be remembered at the same time that the use of the steam-whistle, unless in cases of danger, is open to strong objections, and was deprecated by the Massachusetts railroad commissioners in 1874. See Boston Daily Advertiser, July 24, 1874. See infra, § 837.

[2] See cases cited supra, § 386; and Elkins *v.* R. R. 115 Mass. 190; Artz *v.* R. R. 34 Iowa, 160; Maginnis *v.* R. R. 52 N. Y. 215; Phil. R. R. *v.* Hagan, 47 Penn. St. 244; C., B. & Q. R. R. *v.* Payne, cited supra, § 798; Cleveland R. R. *v.* Elliott, 28 Ohio St. 330.

[3] Cole, J., in Artz *v.* R. R. 34 Iowa, 158, citing Brown *v.* R. R. 32 N. Y. 597; Beisiegel *v.* R R. 34 N. Y. 622; Ernst *v.* R. R. 35 N. Y. 9. See Ill.

fine, wherever the engine approaches a crossing where, from the nature of the ground, there is not a free view of the track from the highway until the intersection is at hand, then it is the duty of the engineer, on approaching the crossing, to give all practicable signals of alarm, and an omission to do so makes the company liable for the consequences.[1] How far it is the duty of a traveller in all cases to look out, is discussed in prior sections.[2]

We must again call attention to the important distinction between persons walking on a track which belongs exclusively to the company, and persons crossing a frequented public road at a level crossing. As to the former, the company is only obliged to signalize when they are in sight, since in the ordinary course of things they are not to be expected on the track. As to the latter, however, signals are to be given, and this in proportion to the probability of persons coming unexpectedly on the train.[3]

Head lights must be used, when necessary to safety of train and of travellers, however much they may endanger cattle.[4] And an omission to use head lights may make the company liable for running over a person whom the engineer might have seen had there been a head light.[5]

Signals must be significant.

§ 805. It is not enough to ring bell or sound whistle if these do not indicate the danger.[6] Thus in a New York case,[7] it was held that the ringing a bell, or the sounding a whistle upon a locomotive attached to a long

Cent. R. R. *v.* Hoffman, 67 Ill. 287. Supra, §§ 384–86.

In New York it is held that, unless in cases to which the statutory duty applies, the question of negligent omission to give signals is for the jury. Cordell *v.* R. R. 64 N. Y. 535.

[1] Indianapolis, &c. R. R. *v.* Stables, 62 Ill. 313; and see North East. R. R. *v.* Wanless, L. R. 7 H. L. 12.

[2] See supra, § 385 *et seq.*

[3] See supra, § 388 *a*; Sutton *v.* R. R. 66 N. Y. 243.

[4] Bellefontaine R. R. *v.* Schruyhart, 10 Ohio St. 116. See Johnson *v.* R. R. 20 N. Y. 65.

[5] Nashville, &c. R. R. *v.* Smith, 6 Heisk. 174.

A statute providing that "every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead," &c., is not to be construed as requiring, for the exoneration of the company, that somebody on the locomotive must throughout the whole trip have been literally always upon the lookout. It is sufficient if the precaution was being observed when the accident happened. Memphis, &c. R. R. *v.* Dean, 5 Sneed, 291; Louisville & N. R. R. *v.* Stone, 7 Heisk. 468.

[6] Roberts *v.* R. R. 35 Wis. 680.

[7] Eaton *v.* R. R. 51 N. Y. 544.

freight train, which is standing with its rear end partially across a street in a city, is not such notice to passengers upon the street of an intended backward movement of the train as will absolve the railroad company from the charge of negligence.

§ 806. On an issue as to the ringing the bell or sounding the whistle on the engine, affirmative evidence as to that fact is entitled to more weight than negative evidence in relation to it.[1]

Affirmative proof outweighs negative.

§ 807. The omission of a railroad company to have a sign-board at a highway crossing to warn persons approaching, as provided by the Iowa statute, does not render the company absolutely liable for injuries to persons or property while attempting to cross the track at such point. Evidence of such omission merely establishes the negligence of the company; and if it appears that the plaintiff's negligence contributed to the injury he cannot recover.[2] At common law, the question whether want of a sign-board constitutes negligence depends upon the character of the crossing.[3] In any view, evidence that there was no sign-board at the crossing at the time of the accident is admissible on the issue of due care on the part of the plaintiff.[4]

Omission to place sign-boards.

§ 808. Where a statute requires gates to be kept at a crossing, and a person is injured through non-compliance of the company with the statute, the company is liable for the negligence.[5] Under the statute of 8 & 9 Victoria to this effect, the road is only a highway when the gates are opened by one of the company's servants; and if, there being no servant there, though after waiting a reasonable time, a passenger opens the gates and attempts to pass through with his horse and carriage and damage ensue to him, the company will not be liable.[6] And as the company, by shutting the gate, can entirely preclude a collision, it is properly held (separating in this case from the rulings as to merely cautionary signals), that the leaving a gate

Omission to close gates.

[1] Stitt *v.* Huidekopers, 17 Wall. 584; Seibert *v.* R. R. 49 Barb. 583; Chic. &c. R. R. *v.* Stitt, 19 Ill. 499; Chic. Bur. & Q. R. R. *v.* Stumps, 55 Ill. 367; Whart. on Ev. § 415.

[2] Dodge *v.* R. R. 34 Iowa, 276; Payne *v.* R. R. 39 Iowa, 523.

[3] Elkins *v.* R. R. 115 Mass. 190.

[4] Elkins *v.* R. R. 115 Mass. 190.

[5] Williams *v.* R. R. L. R. 9 Exch. 157.

[6] See Wyatt *v.* R. R. 6 Best & S. 709; 34 L. J. Q. B. 204.

open, when an act of the legislature requires it to be closed on the approach of a train, is such negligence as makes the company responsible for damages.[1]

Lights at crossings.

§ 808 *a*. Where there is an established level crossing, it is the duty of the company to place lights at night at such crossing;[2] but this does not apply where there is no footpath.[3]

Omission to have adequate brakes.

§ 809. Railroad companies are bound to supply their trains with adequate brakes, and if a person is injured on or crossing a track, and the injury could have been avoided by the use of brakes, the omission to have them, or to use them, would be such negligence as would render them liable to the person injured. If they are obliged to have some brake, the public safety requires that it should be the best in use. They cannot use an old brake which will stop a train in less than 1,000 feet when running ten miles per hour, when other companies use brakes that will stop a train in 500 feet, running at the same rate of speed.[4] And the faithful use of the brakes is required.[5]

Omission to have time-tables.

§ 810. A railway company, by omitting to keep to its time-tables, may make itself liable to its employees for injuries they thereby receive through collision.[6] But the omission to provide regulations for the movement of trains engaged in and about the freight and engine-houses and depots of the company is not negligence, such a mode of regulation being impracticable.[7] At the same time it is practicable to prescribe in what manner engineers and conductors shall give notice of the approach of an engine, with or without cars, when trains are being made up, or moving about freight-houses, depots, or engine-houses; and if proper precautions are not taken for the protection of life and limb from injury by such engines and

[1] Stapley *v.* R. R. Law Rep. 1 Exch. 21; Wanless *v.* R. R. Law Rep. 6 Q. B. 481; L. R. 7 H. L. 12.

[2] Nicholson *v.* R. R. 3 H. & C. 534; Maginnis *v.* R. R. 52 N. Y. 215; Chic. & A. R. R. *v.* Garvy, 58 Ill. 83. See Bellefontaine R. R. *v.* Schruyhart, 10 Ohio 10 St. 116.

[3] Paddock *v.* R. R. 16 Law Times N. S. 639.

[4] Costello *v.* R. R. 65 Barb. 92.

[5] Ill. Cent. R. R. *v.* Baches, 56 Ill. 379.

[6] Matteson *v.* R. R. 62 Barb. 364, cited supra, § 798. See Memphis, &c. R. R. *v.* Green, 52 Miss. 779.

[7] See Phil. &c. R. R. R. *v.* Spearen, 47 Penn. St. 300.

trains, a person injured, who is not an employee of the company, is entitled to recover damages for any injury thereby sustained.[1]

Moving cars by surprise.

§ 811. Even as to trespassers, as we have already seen, if a dangerous agency is let loose in a place where such persons are likely to be, it is no defence that they are trespassers.[2] Hence it has been correctly held in Pennsylvania, that where the agents of a railroad company detached a car and permitted it to run loose, without a brakeman, round a curve on a piece of ground belonging to the company, to a place where persons were accustomed to congregate, whereby a boy standing on the track was injured, the company was liable for the injury.[3]

Running on Lord's day.

§ 812. When a statute prohibits the running of cars on the Lord's day, persons likely to use the road have a right to suppose that it will not be traversed by cars; and in case of injury on that day by the running of the cars, the burden, it has been ruled, is on the defendants to excuse themselves.[4]

Burden of proof.

§ 813. As has been already seen, the burden in suits against a railroad company for injuries received by a traveller in a collision is on the plaintiff.[5]

[1] Haskin *v.* Cent. R. R. 65 Barb. 129; 56 N. Y. 608.

[2] Supra, §§ 344, 345, 364, 390.

[3] Kay *v.* R. R. 65 Penn. St. 269. See Kissenger *v.* R. R. 56 N. Y. 538.

[4] Hyde Park *v.* Gay, 120 Mass. 589. See §§ 331, 381 *a*, 406, 995.

[5] Supra, § 421. See Daniels *v.* Clegg, 28 Mich. 33.

CHAPTER III.

INJURIES CAUSED TO TRAVELLERS AND VISITORS BY OWNERS OF LAND OR HOUSES.

I. Obstructions and defects in highways, § 815.
Persons placing defect on highway liable, § 815.
Making excavation on and under highway, § 816.
Necessary obstruction of highway in building, loading, &c., § 816 *a*.
Owner out of possession not liable for tenant's negligence, § 817.
No defence that negligence was by contractor, § 818.
Railroad changing course of highway, § 819.
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Care to be such as careful drivers are accustomed to use, § 820 *a*.
Speed to be proportioned to danger, § 820 *b*.
Suddenly whipping or spurring horse close to traveller, negligence, § 820 c.
So of driving rapidly in a crowd, § 820 *d*.
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And for defective carriage, § 820 *g*.
And for driving on wrong side of road, § 820 *h*.
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II. Obstructions and defects in platforms and approaches of railway companies, § 821.
Company must have its platform and approaches safe, § 821.
III. Obstructions and defects in approaches to steps, § 822.
IV. Obstructions and defects in private inclosures, § 824.
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V. Obstructions and defects in houses, § 825.
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When liability to trespasser exists, § 832.
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Liability exists in such case, § 835.
Distinction between necessary and unnecessary instruments of alarm, § 836.
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VII. Things falling on and injuring travellers, § 839.
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VIII. Nuisances on watercourses, § 846.
Obstructing navigable streams, § 846.
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IX. Negligent interference with riparian owner, § 849.

I. OBSTRUCTIONS AND DEFECTS ON HIGHWAYS.

§ 815. THE duty of the public authorities in making and repairing public roads will be hereafter considered. Under the present head we will be limited to the consideration of the obstruction or endangering of highways through the negligence of individuals. And it is a general axiom that an individual who negligently causes a defect on a highway by which travellers are injured is liable for the injury.[1] It has been held, however, that an individual

Person placing obstruction on highway liable.

[1] Barnes *v.* Ward, 9 C. B. 392; Bush *v.* Steinman, 1 B. & P. 404; Robbins *v.* Jones, 15 C. B. N. S. 221; Com. *v.* King, 13 Metc. 115; Congreve *v.* Smith, 18 N. Y. 79; Hart *v.* Albany, 9 Wend. 571; Heacock *v.* Sherman, 14 Wend. 58; Wright *v.* Saunders, 65 Barb. 214; Thomas *v.* Hook, 4 Phil. 119; Pryor *v.* Valer, 9 Phil. 95; Balt. *v.* Marriott, 9 Md. 160; Linsley *v.* Bushnell, 15 Conn. 225. See this topic fully examined in Whart. Crim. Law, 7th ed. § 2414 *et seq.*

Persons putting obstructions on a public road are not discharged from liability by the fact that the municipal or state authorities are also liable for damage from such nuisance. Tobin *v.* R. R. 59 Me. 183.

Even where a bridge is placed by a private person over a highway, with the consent of the road builders, the person erecting the bridge is liable for injuries sustained by a traveller from defects caused by its decay. Thus, where the defendant, with the consent of a turnpike company, crossed their road with a railroad for his individual use, and raised the bed of the turnpike passing over it with a bridge, it being his duty to keep the bridge in repair; and the original railing of the bridge having decayed, the plaintiff fell over it on a dark night, and was hurt, it was held that the defendant was liable. Hays *v.* Gallagher, 72 Penn. (22 P. F. Smith) 136.

See, also, Phœnix *v.* Phœnixville Iron Co. 45 Penn. St. 135; Perley *v.* Chandler, 6 Mass. 454; Dygert *v.* Schenck, 23 Wend. 446.

Cellar doors and flap-doors are often lawfully connected with a public street; and in this case the duty of the owner is limited to covering and guarding the entrances in such a way as good mechanics are accustomed to adopt for such purposes. Fisher *v.* Thirkell, infra; Daniels *v.* Potter, 4 C. & P. 262; Proctor *v.* Harris, 4 C. & P. 337.

Proof of the fact that the defendant dug a ditch across a public sidewalk, and allowed it to remain open in the night-time, with no provision for warning or protecting travellers, establishes negligence, as matter of law, and a refusal to submit this question to the jury is no error. Evidence of permission from the proper city au-

owner of a house and lot is not liable for an injury to a person produced by an accumulation of ice on a public sidewalk in front of the lot, though the owner was required by a municipal ordinance to keep the sidewalk free from ice.[1]

That a person leaving a defect on his own grounds, close to a highway, may become liable to a traveller who, in the ordinary aberrations of travelling, strikes the defect, has been already seen.[2]

Diligence exacted from person making excavation by or under highway.

§ 816. It has undoubtedly been held that a person excavating, though with legal title, under a highway, is bound, no matter what may be his care, for the injuries thereby caused to a traveller on the highway.[3] But this is at variance with the principle that no one in exercising a lawful calling is liable for anything more than the diligence of a good business man in such calling;[4] and is inconsistent with more recent and better considered cases, which hold that if such work is done with the care good business men are accustomed to exercise in such kind of work this is an exoneration.[5] But clearly when the hole is illegal, those concerned in making and continuing the nuisance, as well as the owner himself, are liable for injuries thereby produced, irrespective of negligence.[6] And when there is a license to excavate (as in lay-

thorities to open such ditch furnishes no defence, where the action is based upon negligence instead of a trespass. Sexton *v.* Lett, 44 N. Y. 430. In this case it was said by Earl, C.: . . . . "It is a well settled rule that a person who interferes with a sidewalk in a city, and leaves it in a dangerous condition, is liable for injuries caused thereby, whether he knew it to be dangerous or not, and irrespective of any permission from the public authorities to do the work from which the injury arises. Creed *v.* Hartmann, 29 N. Y. 591; Congreve *v.* Smith, 18 N. Y. 79; Congreve *v.* Morgan, 18 N. Y. 84."

[1] Kirby *v.* Boylston Market Ass. 14 Gray, 249; Flynn *v.* Canton Co. 40 Md. 312; Chambers *v.* Ohio Trust Co. 1 Disney, 327; Van Dyke *v.* Cincinnati, 1 Disney, 532; and see Brown *v.* R. R. 22 N. Y. 191; Heeney *v.* Sprague, S. C. Rh. I. 1877, Alb. L. J. 1877, p. 512.

[2] Supra, § 349.

[3] Congreve *v.* Morgan, 5 Duer, 495; *S. C.* 18 N. Y. 79; Irvin *v.* Fowler, 5 Robertson, 482; Homan *v.* Stanley, 66 Pa. St. 464; Atlanta R. R. *v.* Wood, 48 Ga. 565. See infra, § 885.

[4] Supra, §§ 30–54.

[5] Ellis *v.* Gas Co. 2 E. & B. 767; Clark *v.* Fry, 8 Ohio St. 358; Fisher *v.* Thirkell, 21 Mich. 1.

[6] Supra, § 349; infra, § 861; Homan *v.* Stanley, 66 Penn. St. 464. So where a statute requires the top of the shaft of a mine to be fenced in a designated manner, a neglect in this respect leading to injury to an employee, imposes liability on the mine-

ing gas-pipes or sewers), the party so excavating is bound to exercise the diligence of competent mechanics in replacing the road in a state safe for travel.[1]

How far excavations near a highway may impose liability has been already noticed.[2]

§ 816 *a*. Circumstances may exist when in building, unloading, and other operations essential to business in a city, obstructions are temporarily placed on a highway. The mere fact of such obstructions being so temporarily placed is not of itself negligence, unless a statute or municipal ordinance be thereby violated, or unless the obstruction be unnecessarily prolonged or inadequately guarded.[3] Obstruction of highway in building, loading, &c.

§ 817. An owner being out of possession and not bound to repair, is not liable for injuries to a third party received in consequence of his neglect to repair.[4] But where a Owner out of possession not

owner. Bartlett Co. *v.* Roach, 68 Ill. 174.

[1] Drew *v.* New River Co. 6 C. & P. 754; Jones *v.* Bird, 5 B. & Ald. 837; McCamus *v.* C. G. Co. 40 Barb. 380; Hays *v.* Gallagher, 72 Penn. St. 136.

[2] Supra, § 349.

[3] Haight *v.* Keokuk, 4 Iowa, 199; Vanderpool *v.* Husson, 28 Barb. 186; Jackson *v.* Schmidt, 14 La. An. 806. See R. *v.* Russell, 6 East, 427; Passmore's case, 1 S. & R. 217.

As to contributory negligence in such a case, see Murphy *v.* Brooks, 109 Mass. 202.

[4] Taylor's Land. & Ten. 975; Payne *v.* Rogers, 2 H. Bl. 350; Lowell *v.* Spaulding, 4 Cush. 277; Chauntler *v.* Robinson, 4 Exch. 163; Rich *v.* Basterfield, 4 M., G. & S. 783; Russell *v.* Shenton, 3 Ad. & E. N. S. 449; Bishop *v.* Bedford Charity, 1 E. & E. 697; Nelson *v.* Brewery Co. L. R. 2 C. P. D. 311; Clancy *v.* Byrne, 56 N. Y. 129; Fisher *v.* Thirkell, 21 Mich. 1. See Bigelow's Cases on Torts, 627, 653.

See Palmer *v.* Lincoln, 4 Neb. 156; Marshall *v.* Cohen, 44 Ga. 489; Tennery *v.* Drinkhouse, 2 Weekly Notes, 209.

Same rule applies to coal mines. Offerman *v.* Starr, 2 Penn. St. 394.

In Pretty *v.* Bickmore, L. R. 8 C. P. 401, it was held that when the duty of keeping leased premises in repair is cast by the lease on the tenant, the landlord is not liable for damage accruing to third parties by failure to repair, even though the defect arose before the lease. See, also, Leonard *v.* Storer, 115 Mass. 86; Taylor *v.* N. Y. 4 E. D. Smith, 559; Godley *v.* Hagerty, 20 Penn. St. 387; Gwathney *v.* R. R. 12 Ohio St. 92; Kahn *v.* Love, 3 Oregon, 206; and comments in Swords *v.* Edgar, 59 N. Y. 39; and see Killion *v.* Power, 51 Penn. St. 429.

Hence, where A. was injured by the giving way of a grating in a public footway, which was used for a coal-shoot, and for letting light into the lower part of premises adjoining, which premises were at the time of the accident under lease to B. who covenanted to repair and keep in repair all except the roofs, main walls, and

liable for tenant's negligence.

nuisance existed when the property was leased to the tenant, the landlord may be held liable.[1] The tenant is liable for the nuisance thus retained by him, even though the nuisance was on the premises when leased to him.[2] And both landlord and tenant, under the circumstances, are jointly and severally liable for the continuation of the nuisance, supposing the nuisance to be on the property when leased, or to be put there with the landlord's connivance.[3]

While the landlord continues in possession he is liable for the tenant's negligence.[4]

main timbers; and at the time of the demise the grating was unsafe; but there was no evidence that C., the landlady, had any knowledge of its unsafe state; and the jury found that no blame was attributable to her for not knowing it; it was held, upon the authority of Pretty *v.* Bickmore, L. R. 8 C. P. 401, that no action was maintainable against C. Gwinnell *v.* Eamer, L. R. 10 C. P. 658.

In Nelson *v.* Brewery Co. L. R. 2 C. P. D. 311; Cent. L. J. Oct. 5, 1877, Lopes, J., said: "We think there are only two ways in which landlords or owners can be made liable, in the case of an injury to a stranger by the defective repair of premises let to a tenant, the occupier, and the occupier alone being *primâ facie* liable: first, in the case of a contract by the landlord to do repairs, where the tenant can sue him for not repairing; secondly, in the case of a misfeasance by the landlord, as for instance where he lets premises in a ruinous condition. In either of these cases we think an action would lie against the owner. See Payne *v.* Rogers, 2 H. Bl. 349; Todd *v.* Flight, 9 W. R. 145, 9 C. B. N. S. 377; Russell *v.* Shenton, 3 Q. B. 449; Pretty *v.* Bickmore, 21 W. R. 733; L. R. 8 C. P. 401."

[1] Rich *v.* Basterfield, above cited; Todd *v.* Flight, 9 C. B. N. S. 377; Anderson *v.* Dickie, 26 How. Pr. 105; Davenport *v.* Ruckman, 37 N. Y. 568; Swords *v.* Edgar, 59 N. Y. 28; R. *v.* Pedly, 1 A. & E. 826.

[2] Coupland *v.* Hardingham, 3 Camp. 398. See Davenport *v.* Ruckman, 37 N. Y. 568.

[3] R. *v.* Stoughton, 2 Saund. 158, note; R. *v.* Kenison, 3 M. & S. 526; R. *v.* Pedley, 1 A. & E. 826; Stapple *v.* Spring, 10 Mass. 74; Vedder *v.* Vedder, 1 Den. 257; Waggoner *v.* Jermaine, 3 Denio, 306; Brown *v.* R. R. 12 N. Y. 486.

In Harris *v.* James, 45 L. J. Q. B. 545, the evidence was that an owner of land demised a field to a tenant for the purpose of its being worked as a lime quarry, and consented to that being carried out in the ordinary way by means of blasting, and also to the erection of lime-kilns upon it in which to burn lime. The occupier of adjoining lands brought an action against both landlord and tenant for the injury to his land caused by the smoke of the kilns, and by the stones thrown upon it by the blasting. On demurrer by the landlord it was held that the action was maintainable, because the injury was the natural and necessary consequence of the use of the land contemplated in the demise.

[4] Taylor *v.* New York, 4 E. D. Smith, 559.

§ 818. The rule is now firmly established, that where the owner of lands undertakes to do a work which, in the ordinary mode of doing it, is a nuisance, he is liable for any injuries which may result from it to third persons, though the work is done by a contractor exercising an independent employment and employing his own servants. But when the work is not in itself necessarily a nuisance, and the injury results from the negligence of such contractor or his servants in the execution of it, the contractor alone is liable, unless the owner is in default in employing an unskilful or improper person as the contractor.[1] It has

No defence that work was done by a contractor when the natural effect is a nuisance.

[1] Supra, §§ 181, 182, 187. Depue, J., in Cuff *v.* R. R. 35 N. J. 17, citing Elvin *v.* Sheffield Gas Consumers' Co. 2 E. & B. 767; Peachy *v.* Rowland, 13 C. B. 182; Toole *v.* R. R. 6 H. & N. 488; Steel *v.* R. R. 16 C. B. 550; Rapson *v.* Cubit, 9 M. & W. 710; Reedie *v.* R. R. 4 Exch. 244; Knight *v.* Fox, 5 Exch. 721; Milligan *v.* Wedge, 12 A. & E. 737; Overton *v.* Freeman, 11 C. B. 867; Packard *v.* Smith, 10 C. B. N. S. 470–480; Butler *v.* Hunter, 7 H. & N. 826; Allen *v.* Hayward, 7 Q. B. 960; Chicago City *v.* Robbins, 2 Black. 418; Storrs *v.* Utica, 17 N. Y. 104; Scammon *v.* Chicago, 25 Ill. 424; McCafferty *v.* R. R. 61 N. Y. 178; King *v.* R. R. 66 N. Y. 181; Allen *v.* Willard, 57 Penn. St. 374; McGuire *v.* Grant, 1 Dutcher, 356. See supra, §§ 186, 440, 535.

An owner about to build, contracted with one to dig the cellar, who employed his own assistants, horses, and carts; with another to do the masonry, the owner finding the stone, lime, &c.; with a third to put up the superstructure. The excavation not being sufficiently guarded, the plaintiff fell in and was injured. Held, that the owner and not the contractor was liable. Homan *v.* Stanley, 66 Penn. St. 464.

"In Bush *v.* Steinman, 1 B. & P. 404, it was held that the owner of lands was liable for all injuries resulting from the negligence of employees engaged in executing work upon the land, though the work was done by a contractor who had contracted to do the work, and who employed the servant through whose negligence the injury happened. In that case, the action was against the owner of lands for causing a quantity of lime to be placed on the highway, by means of which the plaintiff and his wife, in driving along the highway, were overturned and much injured. The defendant, having purchased a house by the roadside, contracted with a surveyor to put it in repair for a stipulated sum. A carpenter, having a contract under the surveyor to do the whole business, employed a bricklayer under him, and he again contracted for a quantity of lime with a limeburner, by whose servant the lime in question was laid in the road. The defendant was held liable. After a recognition as authority, Bush *v.* Steinman was overruled. At first its authority was restricted to liability for negligence in relation to real estate, making a distinction in this respect between the owners of real and personal property; finally, this distinction was abandoned, and the au-

been even held that a railroad company, which commits the entire work of excavation to contractors, is not liable for damage caused to third parties by the blasting of stone by the contractor's servants.[1]

Railroad changing the course of a highway is liable for injuries caused by its negligence.

§ 819. Where a railroad company is authorized by its charter to divert the location of a highway, when this is necessary in the construction of its road, the right must be exercised with due regard to the public safety; and the company will be liable for injuries sustained by travellers on the highway, by reason of its negligence in not erecting proper barriers to guard them from driving into cuts or excavations made in the highway by the company, where such travellers are not in fault themselves.[2] And the same liability attaches where a railroad is licensed to lay its track along, over, or under a public road. The company must make the track of the public road, at the crossing, safe and fit for travel.[3]

Negligent driving on public road.

§ 820. In respect to driving, it is only practicable at present briefly to state the following conclusions.

§ 820 *a. The care to be exercised is that which careful drivers are accustomed to use.*[4] — Hence a driver who fails to exercise such care and thereby injures another is liable.[5] It is

thority of Bush *v.* Steinman was completely denied, and no case which was once esteemed as authority has been more completely overthrown. Quarman *v.* Burnett, 6 M. & W. 499; Hobbitt *v.* R. R. 4 Exch. 254; Painter *v.* Pittsburg, 46 Penn. 213; Blake *v.* Ferris, 5 N. Y. 48; Pack *v.* The City of New York, 8 N. Y. 222; Hilliard *v.* Richardson, 3 Gray, 349. The cases on this subject are collected in the American note to Holliday *v.* St. Leonards, 11 C. B. N. S. 209; and in a note to the case of Painter *v.* Pittsburg, in 3 Am. Law Reg. N. S. 358; 1 Redfield on Railways, § 129; Shearman & Redfield on Negligence, § 79." Depue, J., Cuff *v.* Newark, *ut supra.*

As to contractor's liability to third parties, see supra, § 439.

[1] McCafferty *v.* R. R. 61 N. Y. 178. See supra, § 181–2.

[2] Supra, § 800; Oliver *v.* R. R. L. R. 9 Q. B. 409; Potter *v.* Bunnell, 20 Ohio St. 150; Atlanta R. R. *v.* Wood, 48 Ga. 565.

[3] R. *v.* U. K. Elec. Tel. Co. 9 Cox C. C. 174; Veazie *v.* R. R. 49 Me. 119; Hughes *v.* R. R. 2 R. I. 493; Com. *v.* R. R. 2 Gray, 54; Com. *v.* R. R. 101 Mass. 201; Gahagan *v.* R. R. 1 Allen, 187; State *v.* R. R. 1 Dutch. 437; Com. *v.* R. R. 27 Penn. St. 339; Ill. R. R. *v.* Stables, 62 Ill. 313; Duffy *v.* R. R. 32 Wis. 269; Roberts *v.* R. R. 35 Wis. 679.

[4] Supra, §§ 31–46.

[5] See Pitts *v.* Gaince, 1 Salk. 10; Hall *v.* Pickard, 3 Camp. 184; Barnes *v.* Hurd, 11 Mass. 57; Hall *v.* Ripley, 119 Mass. 135; Garlick *v.* Dorsey, 48

otherwise when he exercises the care usual with prudent drivers under the circumstances.[1] But in an action for an injury caused by the alleged unskilful driving of a person, evidence of similar negligent acts on his part at other times is not admissible.[2]

§ 820 *b*. To drive rapidly on an open country highway, where the danger of collision is slight, is not negligence.[3] On the other hand, rapid driving in a thronged street invokes a peculiar degree of caution,[4] and *a fortiori*, proof of driving in a public street in a city, at the rate of a mile in three minutes and ten seconds, when the law limits driving to a mile in eleven minutes, is amply sufficient to charge the driver with the consequences that follow from such driving.[5] So, also, it is the duty of persons who are driving over a crossing for foot-passengers to drive slowly, cautiously, and carefully.[6]

Speed is to be proportioned to danger.

§ 820 *c*. Liability, also, may be imposed by suddenly whipping or spurring a restive horse close to a traveller, by which the traveller is injured.[7]

Suddenly whipping or spurring horse.

Ala. 220. The burden is on plaintiff to prove negligence. Ibid.

[1] Strouse *v*. Whittlesey, 41 Conn. 559; Unger *v*. R. R. 51 N. Y. 497; Schienfeldt *v*. Norris, 115 Mass. 17; Bennett *v*. Ford, 47 Ind. 264.

[2] Maguire *v*. R. R. 115 Mass. 239.

In a late interesting English case, the evidence was that the defendant's horses, while being driven by his servant in the public highway, ran away, and became so unmanageable that the servant could not stop them, but could, to some extent, guide them. The defendant, who sat beside his servant, was requested by him not to interfere with the driving, and complied. While unsuccessfully trying to turn a corner safely, the servant guided them so that, without his intending it, they knocked down and injured the plaintiff, who was in the highway. The plaintiff having sued the defendant for negligence and in trespass, the jury found that there was no negligence in any one. Held, that, even assuming the defendant to be as much responsible as his servant, no action was maintainable; for since the servant had done his best under the circumstances, the act of alleged trespass in giving the horses the direction towards the plaintiff was not a wrongful act. Holmes *v*. Mather, L. R. 10 Exch. 261. It was, however, left undecided, whether, if an action would have lain against the servant, it would also have lain against the defendant.

[3] Supra, § 48; Davies *v*. Mann, 10 M. & W. 546; Sykes *v*. Lawlor, 49 Cal. 236.

[4] Williams *v*. Richards, 3 C. & K. 81; Garmon *v*. Bangor, 38 Maine, 443.

[5] Moody *v*. Osgood, 60 Barb. 644. See Jetter *v*. R. R. 2 Keyes, 154; 2 Abb. Ct. of App. 458.

[6] Williams *v*. Richards, 3 Car. & Kir. 82; Cotton *v*. Wood, 8 Com. B. N. S. 571; Garmon *v*. Bangor, 38 Me. 443.

[7] North *v*. Smith, 10 C. B. N. S. 572; Center *v*. Finney, 17 Barb. 94; 2 Seld. Notes, 45.

Driving through crowd.

§ 820 *d*. *Driving rapidly through a crowd* is negligence in proportion to the apparent incapacity of the persons so driven into to avoid the collision.[1]

Leaving horse unattended.

§ 820 *e*. To leave a horse unattended exposes the person so negligent to the natural consequences of an unattended horse, moving inadvertently, being meddled with, or taking fright.[2] So it has been held negligence to lead two skittish horses attached to a buggy by means only of a halter fastened round the neck of the near horse.[3]

Driver not liable for *casus*.

§ 820 *f*. *A driver is not liable for latent viciousness or defects of horse which he did not know, and which it was not his duty to be acquainted with.* — This resul tsfrom principles which are hereafter more fully noticed.[4] To those driving horses the doctrine has been more than once applied.[5]

But liable for defective carriage.

§ 820 *g*. If a collision is caused by a defective carriage, this is negligence in the owner, when the defect was known or ought to have been known by him; otherwise not.[6]

Driving on wrong side of road when negligence.

§ 820 *h*. Of course when a road is free from other travellers, a driver may take his own course.[7] He is not, according to the English rule, bound to keep on the regular side of the road; but if he does not do so, he should use more care and keep a better lookout to avoid concussion than would be necessary if he were on the proper side.[8] In this country statutes exist in several states requiring travellers to take the right of the centre of the road when passing others; and even where there are no such statutes, the custom to

[1] See supra, §§ 310, 389 *a*; Edsall *v*. Vandemark, 39 Barb. 589.

[2] See supra, §§ 100, 102–107, 108; infra, § 838; Welling *v*. Judge, 40 Barb. 193; Park *v*. O'Brien, 23 Conn. 339.

[3] Pickens *v*. Diecker, 21 Ohio St. 212.

[4] See infra, §§ 920–923.

[5] Hammack *v*. White, 11 C. B. N. S. 588; Sullivan *v*. Scripture, 3 Allen, 564.

[6] Welsh *v*. Lawrence, 2 Chit. 262. See supra, §§ 628, 809.

[7] Aston *v*. Heaven, 2 Espinasse, 533; Foster *v*. Goddard, 40 Maine, 64.

[8] Pluckwell *v*. Wilson, 5 C. & P. 375; Boss *v*. Litton, Ibid. 407. See Turley *v*. Thomas, 8 C. & P. 103; Wayde *v*. Carr, 2 D. & R. 255. As to contributory negligence, see Daniels *v*. Clegg, 28 Mich. 33.

this effect is so universal that a collision produced by violating it is regarded as negligent.[1] Yet the fact that a driver is on the wrong side of the road will not excuse another for negligently driving into him.[2] And while the rule is strictly applied to persons driving in the dark,[3] it is relaxed in favor of a heavy wagon when meeting one much lighter and more capable of moving on one side;[4] in favor of a person turning into the road from a cross-road,[5] and *a fortiori* in favor of a horse-car, which cannot move at all off its track.[6] Nor does it apply to one driver seeking to pass another on the same road. The former, being behind, must pick out the safest way of passing, which he takes at his peril.[7] When there is a statute requiring persons from behind to pass on the left, the fact that the plaintiff was attempting to pass another vehicle to the right, in violation of the statute, does not throw on the plaintiff the burden of proving that this course was necessary.[8] That he is on wrong side of the road does not bar recovery.[9]

§ 820 *i*. As will be hereafter seen, noise and violence on the road, startling horses, is on general principles negligence.[10] Hence a noisy and violent driver, causing another's horse to take fright, is liable for the consequences.[11]

Noise and violence in driving.

§ 820 *k*. The rule as to steam-cars has been already noticed.[12] Horse-cars are less likely to inflict damage, but even as to these, from their noiselessness and their heavy mo-

Horse-cars.

[1] Kennard *v.* Burton, 25 Maine, 39; Brooks *v.* Hart, 14 N. H. 307; Earing *v.* Lansing, 7 Wend. 185; Kennedy *v.* Way, Bright. R. 186.

[2] See supra, §§ 346, 388, 400; Davies *v.* Mann, 10 M. & W. 546; Spofford *v.* Harlow, 3 Allen, 176.

[3] Cruden *v.* Fentham, 2 Espinasse, 685.

[4] See Grier *v.* Sampson, 27 Penn. St. 183.

[5] Lovejoy *v.* Dolan, 10 Cushing, 495.

[6] Hegan *v.* R. R. 15 N. Y. 380. See Suydam *v.* R. R. 41 Barb. 375; Willbrand *v.* R. R. 3 Bosw. 314.

[7] Burnham *v.* Butler, 31 N. Y. 480; Avegno *v.* Hart, 25 La. An. 235; Bolton *v.* Colder, 1 Watts, 360; Chicago R. R. *v.* Hughes, 69 Ill. 170.

[8] Smith *v.* Conway, 121 Mass. 216.

[9] Ibid.; Wrinn *v.* Jones, 111 Mass. 360; Tuttle *v.* Lawrence, 119 Mass. 276; Spofford *v.* Harlow, 3 Allen, 176.

[10] See infra, § 835 *b*.

[11] Burnham *v.* Butler, 31 N. Y. 480; Howe *v.* Young, 16 Indiana, 312; Welsh *v.* Lawrence, 2 Chit. 262.

[12] Supra, § 798 *et seq.*

mentum, the rule applies that bells should be used (except when forbidden on Sundays by local ordinance), and that at night they should display lights.[1] Care is exacted from the driver of such car in proportion to the danger with which the travel is attended.[2] Such cars, it should be remembered, have precedence on the railway track, and it is the duty of a team ahead of an approaching car to move out of the way.[3]

The care required from the driver of a horse-car is in several respects to be distinguished from that required from the driver of a locomotive engine. "The cars of a horse railway have not the same right to the use of the track over which they travel, do not run at the same speed, are not attended with the same danger, and are not so difficult to check quickly and suddenly, as those of an ordinary railway corporation. A person lawfully travelling upon the highway is not therefore bound to exercise the same degree of watchfulness and attention to avoid the one as to keep himself out of the way of the other."[4] To this it may be added that a horse railway company is not required to take the precautions at crossings, in the way of guards and gates, that are exacted from a steam railway company.

Horse railway companies, like all other railway companies, are liable for the damages produced by defective condition of their track.[5]

Sleighs.

§ 820 *l*. For *sleighs* the usage is to require bells, but the mere want of bells by a colliding sleigh is not negligence, without proof that the collision was thereby caused.[6]

Drunken driver.

§ 820 *m*. For a master to employ a drunken driver is negligence in the master, whenever the knowledge of the driver's habits is imputable to him.[7]

§ 820 *n*. *Contributory negligence*, in this relation, has been already specially discussed.[8]

[1] Johnson *v*. R. R. 20 N. Y. 65; Shea *v*. R. R. 44 Cal. 414.

[2] Supra, §§ 48, 639; Com. *v*. R. R. 107 Mass. 236; Mangam *v*. R. R. 38 N. Y. 455.

[3] Chicago, &c. R. R. *v*. Bert, 69 Ill. 388.

[4] Gray, C. J., Lynam *v*. R. R. 114 Mass. 88; Shea *v*. R. R. 44 Cal. 414.

[5] Worster *v*. R. R. 50 N. Y. 203.

[6] Parker *v*. Adams, 12 Metc. 415. See Kennard *v*. Burton, 25 Me. 39; Burnham *v*. Butler, 31 N. Y. 480.

[7] Cleghorn *v*. R. R. 56 N. Y. 44; Chapman *v*. R. R. 55 N. Y. 579; Chic. & A. R. R. *v*. Sullivan, 63 Ill. 293; Sawyer *v*. Sauer, 10 Kans. 466; Frink *v*. Coe, 4 Greene (Iowa), 555.

[8] See supra, § 395; and see, also, Park *v*. O'Brien, 23 Conn. 339; Well-

II. OBSTRUCTIONS AND DEFECTS ON PLATFORMS AND APPROACHES OF RAILROAD COMPANIES.

§ 821. In prior sections we have had occasion to define the relations of railway companies to persons, whether customers, visitors, or trespassers, passing over their platforms and approaches.[1] Such approaches must be kept in safe condition for the use of persons having business with the company, as well as for its particular customers.[2] It has been even said, that "they" (railroad corporations) "are bound to keep in a safe condition all portions of their platforms and approaches thereto, to which the public do or would naturally resort, and all portions of their station grounds reasonably near the platform, where passengers, or those who have purchased tickets with a view to take passage on their cars, would naturally or ordinarily be likely to go."[3]

Duty of railroad companies as to platforms and approaches.

ing *v.* Judge, 40 Barb. 193; Barker *v.* Savage, 45 N. Y. 191; Belton *v.* Baxter, 54 N. Y. 245, where it is held that a traveller crossing a travelled road is bound to look out for carriages. And see, also, *S. C.* 58 N. Y. 411.

In Metcalf *v.* Baker, 11 Abb. N. S. 431, it was held not to bar plaintiff that his driver was guilty of negligence. See, also, Daniels *v.* Clegg, 28 Mich. 33. It should be remembered that a pedestrian is bound not to cross a crowded street without looking up and down for carriages. Barker *v.* Savage, 45 N. Y. 191; Belton *v.* Baxter, 54 N. Y. 245; 58 N. Y. 411.

[1] Supra, §§ 346, 652, 653.

[2] Cases cited supra, § 652; Corman *v.* R. R. 4 H. & N. 781; Martin *v.* R. R. 16 C. B. 179 (a case of bad lighting); Longmore *v.* R. R. 19 C. B. N. S. 183; Davis *v.* R. R. 2 F. & F. 588; Sawyer *v.* R. R. 27 Vt. 370; Murch *v.* R. R. 9 Foster, 9; Frost *v.* R. R. 10 Allen, 387; Chic. &c. R. R. *v.* Wilson, 63 Ill. 167; Chicago, &c. R. R. *v.* Coss, 73 Ill. 394; McDonald *v.* R. R. 26 Iowa, 124; Knight *v.* R. R. 56 Me. 234; Tobin *v.* R. R. 59 Me. 183; Liscomb *v.* R. R. 6 Lansing, 75; Memphis, &c. R. R. *v.* Whitfield, 44 Miss. 406; Hicks *v.* R. R. 64 Mo. 467.

[3] Dillon, C. J., in McDonald *v.* R. R. 26 Iowa, 124; approved in *S. C.* 29 Iowa, 170; and Jeffersonville, &c. R. R. *v.* Riley, 39 Ind. 586.

In Watkins *v.* R. R. 37 L. T. N. S. 193 (1877) a railway porter was standing, in broad daylight, upon a plank thrown across from parapet to parapet of a footbridge connecting the two platforms of a station, cleaning a lamp, when the plaintiff, accompanying her daughter to a train, in crossing the bridge, struck her head against the plank and was injured. On a motion for a new trial, after verdict for plaintiff, it was held, by Denman, J., that the plaintiff was not a mere licensee; but that there was no evidence of negligence on the part of the railway company; and by Lopes, J., the question whether there was or was not negligence on the part of the defendants should have been left to

So far as concerns persons having business with the company, this is indubitably true. So far as concerns persons, however, who may visit the platforms or grounds of the company from curiosity, or for personal convenience, without any business with the company, or reasonable duty calling them to its premises, the company is liable only for such defects as are in the nature of traps.

§ 822. For what is required of the company is not the warranty of the safety of everybody from everything, but such diligence as a good business man is in such matters accustomed to use.[1] Railway platforms are not made for the use of the public, and if persons not invited, and having no business with the company, crowd on such platforms, and an injury occurs to one of them in consequence of a defect in the platform, he has no redress.[2]

the jury. And see, particularly, supra, §§ 652, 653; infra, § 828.

[1] Sweeny *v.* R. R. 10 Allen, 368; Toomey *v.* R. R. 3 C. B. N. S. 146; Foy *v.* R. R. 18 C. B. N. S. 225; Crafter *v.* R. R. L. R. 1 C. P. 300; Cornman *v.* R. R. 4 H. & N. 781. See supra, §§ 346, 634, 635, 652.

[2] Gillis *v.* R. R. 59 Penn. St. 129. And see, fully, supra, §§ 346, 653, where this question is fully considered.

"It is doubtless true that a railroad company, by erecting station-houses and opening them to the public, impliedly licenses all persons to enter. But it is equally true that such license is revocable at the pleasure of the company as to all persons who are not there on business connected with the road, or with its servants or agents. Commonwealth *v.* Powers, 7 Met. 596; Nicholson *v.* R. R. supra, 532. In Harris *v.* Stevens, 31 Vt. 90, it is said: 'The right to enter (a depot) and remain exists only by virtue of and as incident to the right to go upon the train, and it is to be extended so far only as is reasonably necessary to secure to the traveller the full and perfect exercise and enjoyment of his right to be carried upon the cars.' An implied license to enter a depot creates no additional duty upon the part of the company as respects the safety of the building entered. Its only effect is to make that lawful which, without it, would be unlawful. Wood *v.* Leadbitter, 13 M. & W. 838. It is a waiver or relinquishment of the right to treat him who has entered as a trespasser.

"In Sweeny *v.* R. R. 10 Allen, 372, the court say: 'A licensee, who enters on premises by permission only, without any enticement, allurement, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes at his own risk, and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own conveniences or pleasure, and who are not expressly invited to enter, or induced to come upon them by the purpose for which

III. OBSTRUCTIONS AND DEFECTS ON APPROACHES TO SHIPS.

§ 823. The same duty, it has been seen,[1] applies to the giving safe access to ships. The principle has been applied to dock companies in a case [2] where the evidence was that the defendants, a dock company, provided gangways from the shore to the ships lying in their dock, the gangways being made of materials belonging to the defendants and managed by their servants. The plaintiff went on board a ship in the dock at the invitation of one of the ship's officers, and, while he was on board, the defendants' servants, for the purposes of the business of the dock, moved the gangway, so that it was, to their knowledge, insecure. The plaintiff, in ignorance of its insecurity, returned along it to the shore, the gangway gave way, and he was injured. It was ruled that there was a duty on the defendants toward the plaintiff to keep the gangway reasonably safe, and that he was entitled to recover damages from them for the injuries he received.[3]

Shipping and dock companies must give safe access to ships.

IV. OBSTRUCTIONS AND DEFECTS IN INCLOSURES BELONGING TO A PRIVATE PERSON.

§ 824. The law in this respect has been already noticed. As against ordinary trespassers who pass over land, the erection of spring-guns makes the owner liable for any damage thereby produced;[4] and so as to the erection by him of any dangerous engine which, in the natural

Traps dangerous to trespassers create liability.

the premises are appropriated or occupied.' The inducement here spoken of must be equivalent to an invitation to enter. Carlton *v.* Franconia Iron & Steel Co. 99 Mass. 216. Mere permission is neither inducement, allurement, nor enticement." Pittsburg, &c. R. R. *v.* Bingham, 29 Ohio St. 364.

[1] Supra, §§ 655–657.

[2] Smith *v.* London & Saint Katharine Docks Company, L. R. 3 C. P. 326. See, also, Campbell *v.* Portland Sugar Co. 62 Me. 552; Swords *v.* Edgar, 59 N. Y. 28. See supra, § 349.

[3] Defendants leased a pier to another party, the lessee agreeing to keep the same in repair. At the time of leasing there was a defect in the pier, in consequence of which plaintiff's intestate received the injury whereof he died. The accident happened after the lessees had taken possession. Held, that defendants were liable for such injury. Fish *v.* Dodge, 4 Denio, 311. See Moody *v.* Mayor of New York, 43 Barb. 282; Davenport *v.* Ruckman, 37 N. Y. 568; Swords *v.* Edgar, 1 N. Y. Sup. Ct. add. 23; *S. C.* 59 N. Y. 28; Campbell *v.* Portland Sugar Co. 62 Me. 552.

[4] Supra, § 345–7.

order of things, would be meddled with by loiterers in the neighborhood.[1]

But not ordinary imperfection of private grounds.

§ 824 *a*. But for the ordinary imperfections (*e. g.* unguarded excavations or ditches)[2] of his private grounds, the owner of the land is not liable.[3] At the same time it must be kept in mind that he is bound to keep his premises in such order that visitors, whom he invites, when acting prudently, will not be injured; and if dangerous places exist by which they, exercising such prudence, might be hurt, his duty is to give notice of the danger.[4] If he do not, and damage ensues, he is liable for the damage;[5] and *a fortiori* when the danger is in the nature of a trap.[6] And if he is aware that persons are in the habit of passing over his grounds, trespassers though they may be, he is liable if he leaves in their way dangerous excavations or instruments by which they are injured.[7] To persons with whom he enters on business relations he contracts to use due diligence to make the place suitable for the purposes of the proposed business.[8]

[1] Supra, § 350; infra, § 860; Railroad *v.* Stout, 17 Wall. 659.

[2] Supra, § 349 *et seq.*; infra, § 885; Hardcastle *v.* R. R. 4 H. & N. 67; Hounsell *v.* Smyth, 7 C. B. N. S. 731; Gautret *v.* Egerton, L. R. 2 C. P. 371.

[3] Supra, § 349; Gautret *v.* Egerton, L. R. 2 C. P. 371; Kohn *v.* Lovett, 44 Ga. 251; Louisville R. R. *v.* Murphy, 9 Bush, 522. Supra, § 351.

[4] Infra, § 885; Holmes *v.* R. R. L. R. 4 Exch. 254; Watkins *v.* R. R. 37 L. T. N. S. 193, and cases cited supra, § 821; Carleton *v.* Franco Iron Works, 99 Mass. 216; Sweeny *v.* R. R. 10 Allen, 368; Hydraulic Works *v.* Orr, 83 Penn. St. 332. Though see Southcote *v.* Stanley, 1 H. & N. 143, and cases commented on supra, § 349.

[5] Groucott *v.* Williams, 4 B. & S. 149; Curby *v.* Hill, 4 C. B. N. S. 556; Indemauer *v.* Dames, L. R. 1 C. P. 274; *S. C.* L. R. 1 C. P. 311.

[6] White *v.* France, cited supra, § 350.

[7] Supra, §§ 349, 350; infra, §§ 826, 860. When the owner of land expressly or by implication invites a person to come upon the land, he cannot permit anything in the nature of a snare to exist thereon, which results in injury to the person who avails himself of the invitation, and who, at the time, is exercising ordinary care, without being answerable for the consequences. If, however, he gives but a bare license or a permission to cross his premises, the licensee takes the risk of accidents in using the premises in the condition in which they are. Beck *v.* Carter, N. Y. Ct. of App. decided Jan. 30, 1877. Reported below, 6 Hun, 604. Hydraulic Works *v.* Orr, 83 Penn. St. 332; 2 Am. L. T. 173. Though see Hounsell *v.* Smyth, 7 C. B. N. S. 731.

[8] Supra, § 351.

V. OBSTRUCTIONS AND DEFECTS IN HOUSES.

Defects ordinarily incident to houses.

§ 825. Defects in a house, such as are incident to the ordinary wear of housekeeping, but which are the cause of injury to a lawful visitor, attach no liability to the owner or occupier of the house, so far as concerns such visitors or guests.[1] For the question when such liability is mooted in reference to such a visitor is, whether the proprietor exercised in his house the care which good housekeepers are accustomed to exercise.[2] What is such care? Certainly, when we recollect the great varieties of habit and taste in this respect, all that we can ask is that the house, to those visiting it, should be free from those obvious defects of which an occupant, not an expert in mechanics, would be cognizant. Those latent defects which are incident to the ordinary wear and tear of houses, or which spring from the bad faith or negligence of builders, and of which the owner has no notice, are among those casualties which no man can avoid without the exercise of that extraordinary care and vigilance which the law does not impose.[3]

[1] Supra, § 353.

[2] See supra, §§ 350, 351.

[3] See supra, § 65.

Oo this principle we can sustain a leading English case, Southcote *v.* Stanley, 1 Hur. & N. 247; 25 L. J. Exch. 329, where the declaration alleged that the plaintiff was lawfully in the defendant's house as a visitor by his invitation, and that for the purpose of leaving the house the plaintiff, with the defendant's permission and knowledge, opened a glass door of the defendant, which it was necessary to open, and that by the carelessness, negligence, and default of the defendant, the door was in an insecure and dangerous condition and unfit to be opened, by reason whereof, and of the carelessness, negligence, default, and improper conduct of the defendant, a piece of glass fell from the door upon the plaintiff and injured him. Upon a demurrer to the declaration, it was held that it disclosed no cause of action. In giving his judgment, Bramwell, B., says: "I agree with Mr. Gray, that a person lawfully in a house has a right to expect that there is no pitfall, as it were, in his way. If a man says to another, 'Come through my garden to supper,' and there is a steel-trap in the path, which causes personal injury, I am inclined to think that an action would lie, because the leading another into danger would be an act of commission. The present case is not even so strong as the negligence of a servant in permitting a guest to sleep in a damp bed, and that would be merely an act of omission. The declaration is certainly drawn in a way to create a difficulty. It alleges the act to have been caused by the 'carelessness, negligence, default, and improper conduct of the defendant.' That is only saying, 'If you, the defendant, had looked at the door, you would have found it to be in an insecure state,'

§ 826. It is otherwise, however, with gross defects, in the nature of traps, in a house. As to these, it is negligence in the owner to invite, or even permit visitors, who are not warned of such defects, to expose themselves. "If a person allows a dangerous place to exist in premises occupied by him, he will be responsible for injury caused thereby to any other person entering upon the premises by his invitation or procurement, express or implied, and not notified of the danger, if the person injured is in the use of due care." [1] Hence a person injured, without neglect on his part, by a defect or obstruction in a way or passage over which he has been induced to pass, for a lawful purpose, by an invitation express or implied, can recover damages for the injury sustained, against the individual so inviting and being in fault, for the defect.[2] It is on this principle, assuming in each case that the defect is one of which the occupier of the house ought to be cognizant, and the natural consequence of which is to produce injury to visitors, that the following cases can be sustained.

Gross defects known to owner.

§ 827. A custom-house officer, visiting a store upon his lawful business, was injured by the fall of sugar-bags from a loft over a door on the defendant's premises. No explanation was given of the cause of the occurrence. The fact was, however, held evidence of negligence, as such a passage-way should be guarded from casualties that could be prevented by due care.[3]

§ 828. On the premises of the defendant, within one foot of the sidewalk of a public street, was a descending roll-way leading to the basement of the defendant's block of stores. The entrance to the south store, occupied by the defendant's tenant as a drug store, was up four narrow steps immediately south of the roll-way. In front of the stores north of the roll-way was a continuous platform, extending from the north end of the block

and the defendant is not liable for that act of omission. The only difficulty I felt was as to the allegation of 'improper conduct;' but, although obscure, I think it does not amount to anything more, and that the declaration does not disclose any cause of action." See Lamparter *v.* Wallbaum, 45 Ill. 444.

[1] Hoar, J., Coombs *v.* New Bed. Cord. Co. 102 Mass. 572. See supra, § 350.

[2] Supra, §§ 350, 821; Barrett *v.* Black, 56 Me. 498; Tobin *v.* R. R. 59 Me. 183; Carleton *v.* Franconia Co. 99 Mass. 216.

[3] Scott *v.* Dock Co. 3 H. & C. 596.

to the roll-way. The roll-way was unprovided with railing or other safeguard, except a buttress on either side thereof rising nine inches above the level of the platform. The plaintiff went upon the north end of the platform in the evening, and while passing along in the exercise of ordinary care for the purpose of entering the drug store on legitimate business, fell into the roll-way and was injured. It was ruled that the place was unsafe and the defendant liable.[1]

§ 829. When the visit is part of a business transaction, then the owner is liable if he do not make the place visited suitable for the business.[2] A declaration averred that the defendant was in occupation of an office and passage leading thereto from the street, used by him for the reception of customers and others on business; that the passage was the ordinary means of ingress and egress between the office and street; that the defendant negligently permitted a trap-door in the passage to remain open without being properly guarded and lighted, and that the deceased, having been to the office as a customer, was lawfully passing out by the passage, and through the said negligence of the defendant fell through the hole of the trap-door and was killed. Upon demurrer, it was held that a good cause of action was disclosed on the facts stated.[3]

§ 830. A gas-fitter, having contracted to fix certain gas apparatus to the defendant's premises, sent his workman, the plaintiff, after the apparatus had been fixed and by appointment with the defendant, to see that it acted properly. The plaintiff, having for this purpose gone upon the defendant's premises, fell through an unfenced shaft in the floor, and was injured. It was proved that the premises were constructed in a manner usual in the defendant's business, that of a sugar refiner, but that the shaft could, when not in use, have been fenced without injury to the business. It was held, that the plaintiff was entitled to recover damages from the defendant for the injury which he had sustained.[4]

[1] Stratton *v.* Staples, 59 Me. 94. See infra, § 883.

[2] Supra, § 351.

[3] Chapman *v.* Rothwell, Ell., Bla. & Ell. 168. See, also, Shoebottom *v.* Egerton, 18 L. T. R. N. S. 364, 889. See supra, § 351.

[4] Indermaur *v.* Dames, L. R. 2 C. P. 311. In Hydraulic Works *v.* Orr, 83 Penn. St. 332, the defendant had

§ 831. But that the occupier or owner of a house is not liable for *culpa levissima*, is one of the fundamental propositions of the law in this respect.[1] A householder for instance, may by putting guards about an elevator make it impossible for a person to be injured by it, just as he might prevent persons from tripping on his stairway by stationing about it watchmen. But he is bound to no such extreme vigilance.[2]

Municipal corporations so liable.

§ 831 *a*. A municipal corporation is, to the same extent, liable for injuries caused by defects negligently permitted by it in a public building erected by it.[3]

Liability to trespassers.

§ 832. A defendant, as we have elsewhere seen, is liable to trespassers, if, not heeding the fact of the likelihood of their passing through his premises, he places in their way dangerous instruments by which, in the natural course of things, they will be severely injured.[4]

Contributory negligence.

§ 833. That the plaintiff had notice, or was bound to have taken notice, of the defects, is, as we have already seen, a defence.[5] In addition to the illustrations already given, the following may be here introduced: The plaintiff, who was a carman, having been sent by his employer to the defendants for some goods, was directed by their servant to go to the counting-house. In proceeding along a dark passage of the defendants, in the direction pointed out, the plaintiff fell down a staircase, and was injured. It was held, that the defendants were not guilty of any negligence, for if the passage was so dark that the plaintiff could not see his way, he ought not to have proceeded; and if, on the other hand, there was sufficient light, he ought to have avoided the danger. In his judgment, Pollock, C. B., said: "The learned judge, my brother Bramwell, directed a nonsuit, and I think the nonsuit

an inclined plane or platform resting on hinges attached to his factory, which raised and lowered into a private cartway opening into the highway by a gate, which was often left open. When not in use the platform was raised and rested against the wall, not fastened or secured, so that a slight pull or jar would cause it to fall. It fell and injured a child who had strayed through the open gate into the private way. The court sustained a verdict against defendant. See 2 Am. Law T. 173.

[1] See supra, § 57.

[2] Murray *v.* McLean, 57 Ill. 378.

[3] Chicago *v* Joney, 60 Ill. 383; Chicago *v.* Dermody, 61 Ill. 431. Supra, § 250.

[4] See supra, §§ 345, 350, 824.

[5] See supra, § 300 *et seq.*

was perfectly right. I am not aware what question could have been left to the jury. It certainly was not the duty of the owners of the premises to have the passage lighted. It is, generally speaking, the duty of every person to take care of his own safety, so as not to go along a dark passage without the assistance of some light to tell him where he is going, and what the danger is that he is to expect. There was no contract, and no public or private duty on the part of the owners of the premises, that they should be in any other or different condition to that in which they were. It, therefore, seems to us that the nonsuit was perfectly correct." [1]

Landlord's liability to third persons.

A landlord's liability to third persons, for defects in the leased premises, has been already generally noticed.[2] In the present connection it may be sufficient to say that while the landlord is liable to the tenant's visitors for any radical defects in the house which were existing at the time of the lease,[3] he is not liable to such visitors for such defects as are superficial, and capable of remedy, even though such defects were in the house at the time of the lease.[4]

VI. OBJECTS ON HIGHWAYS CALCULATED TO FRIGHTEN HORSES.

Liability of persons placing objects on a highway calculated to frighten horses.

§ 835. We have already, when treating of causal connection, noticed that it is one of the natural incidents of the employment of horses on a highway that they should be frightened by extraordinary sights and sounds.[5] Those who negligently and unnecessarily, therefore, place on a highway instruments likely to cause such alarm, are liable for the consequences, if damage of this kind result.[6] Nor can the owner of land erect on it, so as to impinge

[1] Wilkinson *v.* Fairrie, 1 Hur. & C. 633; 32 L. J. Exch. 73.

[2] See supra, § 817.

[3] Godley *v.* Hagerty, 20 Penn. St. 387. Supra, § 817.

[4] Robbins *v.* Jones, 15 C. B. N. S. 221.

[5] See supra, § 107; infra, §§ 898, 983.

[6] Hill *v.* New Riv. Co. 9 B. & S. 303; Judd *v.* Fargo, 107 Mass. 265; Jones *v.* R. R. 107 Mass. 261, where it was held that a railroad corporation is liable for injuries sustained by a traveller driving a horse upon a highway with due care, through a fright of the horse occasioned by a derrick which the corporation maintained projecting over the highway, so as naturally to frighten passing animals, although it was maintained for the purpose of loading and unloading

upon a highway, implements, flags, or banners, thus calculated to frighten horses;[1] nor can he, without liability, keep dogs whose practice is to fly out and frighten horses on the road.[2]

The liability of towns for mischief thus produced is hereafter noticed.[3]

Distinction between necessary and unnecessary instruments of alarm.

§ 836. Yet it must be remembered that there are some instruments of alarm, *e. g.* steam-whistles on locomotives, which are essential to important industries, and which are tacitly if not expressly licensed by the state. The use of these is not *per se* negligence, though animals be thereby frightened and injury ensue.[4] It is otherwise when the use is not necessary to the industry. Thus it has been correctly held[5] that the proprietors of factories are not entitled to use steam-whistles on their factories, so located, of such a character, and placed in such a manner, as to frighten horses of ordinary gentleness when passing upon the highway adjoining their land; and they are responsible for an injury caused by an unnecessary, alarming, or frightening use of them, provided such injury is not imputable to some special trick or viciousness of the horse.[6] It is conceded, however, that the law is otherwise as to whistles upon railroad engines.[7] At the same

freight on the cars. See Atchison, &c. R. R. *v.* Loree, 4 Neb. 446.

So as to frightening a horse by reckless driving of another horse. Rowe *v.* Young, 16 Ind. 312. Supra, § 820 *i.*

As to causal connection, when horses take fright at noises produced mediately by defendant's negligence, see supra, §§ 103–5; and also Lake *v.* Milliken, 62 Me. 240.

[1] People *v.* Cunningham, 3 Denio, 524; R. *v.* Jones, 3 Camp. 230; Jones *v.* R. R. 107 Mass. 261; Congreve *v.* Smith, 18 N. Y. 79; Congreve *v.* Morgan, 18 N. Y. 84; Morton *v.* Moore, 15 Gray, 573. As to liability of town, see infra, § 983. As to liability of railroads for frightening horses, see infra, § 898.

[2] Mann *v.* Wieand, 4 Weekly Notes, 6. See, also, McDonald *v.* Snelling, cited supra, § 103.

[3] Infra, § 983.

[4] See infra, § 898; Hall *v.* Brown, 54 N. H. 495; Chic. &c. R. R. *v.* Dunn, 61 Ill. 385.

A carriage propelled by steam on a highway, though calculated to frighten horses, does not necessarily expose its owner to liability for damages incurred by a horse taking fright. If the carriage is on the road for a useful and lawful purpose, negligence on the part of those using it must be proved. Macomber *v.* Nichols, 34 Mich. 212.

[5] Knight *v.* Goodyear's Glove Man. Co. 38 Conn. 438; Chic. B. & Q. R. R. *v.* Dunn, 61 Ill. 385.

[6] Parker *v.* Union Co. 42 Conn. 399.

[7] Phil. R. R. *v.* Stinger, 78 Penn. St. 219. Supra, § 804.

time, where the whistle is negligently and wantonly sounded, so that horses lawfully in the vicinity are caused to run off and injury is inflicted, it is correctly held that the company is liable.[1] So liability attaches for frightening horses by the negligent discharge of a gun,[2] or the beating of a drum near a highway.[3] But it has been held that where a railroad crosses a highway on a bridge, the company is not liable for damages produced by horses travelling underneath the bridge taking fright at the customary noise of the cars passing above;[4] and where at a level crossing a horse became frightened when about five rods from the crossing, by the approach of two cars about ten rods therefrom, when the cars were coming on a down grade by the force of gravitation, at the rate of eight or ten miles an hour, no signal being given of their approach, it was ruled that these facts would not warrant the jury in returning a verdict for the plaintiff.[5] But where the engineer of a train having given no notice of its approach, blew his whistle under a bridge while a traveller was passing over it, by means whereof his horse took fright, ran off and injured him, it was held that the omission to give notice by whistling, or other signal, of the approach of the train to the bridge, as well as the blowing of the whistle while the engine was *under* the bridge, there being no apparent necessity therefor, was properly left to the jury as evidence of negligence.[6] Generally, whether alarming a horse and causing an accident by a rapidly moving train, or sounding a whistle, will make the company liable for damages, depends upon whether it was from want of proper care in those in charge of the train; what would be due care in running a train through a sparsely settled rural district might be negligence in approaching a large city.[7]

§ 837. As has been already intimated, we must consider, when

[1] Infra, § 898; Sneesby *v.* R. R. L. R. 9 Q. B. 263; *S. C.* L. R. 1 Q. B. D. 42; Manchester R. R. *v.* Fullarton, 14 C. B. N. S. 54; Gilman *v.* R. R. 60 Me. 235; Penn. R. R. *v.* Barnett, 59 Penn. St. 259; Toledo, &c. R. R. *v.* Harmon, 47 Ill. 298; Hill *v.* R. R. 55 Me. 438; Culp *v.* R. R. 17 Kans. 475; and see infra, § 898.

[2] Cole *v.* Fisher, 11 Mass. 137.

[3] Loubz *v.* Hafner, 1 Dev. (Law) 185.

[4] Favor *v.* R. R. 114 Mass. 350.

[5] Flint *v.* R. R. 110 Mass. 222.

[6] Penn. R. R. *v.* Barnett, 59 Penn. St. 259.

[7] Ind. &c. R. R. *v.* McBrown, 46 Ind. 229; Phil. R. R. *v.* Stinger, 78 Penn. St. 219.

amount of we take up the question of the natural and ordinary only in consequences of an act of this character, the and the travel on a highway. If two or three horses the course of a morning are accustomed to pass, nuisance only lasts during a morning, then it is not to be expected that of these two or three one should take fright at anything but a very extraordinary object on the road. It is otherwise when a large number of horses of all kinds, are accustomed to pass. Hence in an action in Massachusetts[1] against the proprietor of a farm adjoining a highway, for damage sustained by a person travelling on the highway with due care, through his horses taking fright at a sled with some tubs on it, which the defendant had left on the highway, near one of his out-buildings, into which he intended to remove the contents of the tubs, the question whether the sled and tubs were a nuisance which rendered the defendant liable was held to depend upon whether they had remained on the highway for an unreasonable time; and upon that issue it is competent for the defendant to prove that the highway was little frequented, particularly at the time of year when the accident occurred; but not that the state of things in the out-building was such as to render it convenient for him to leave the sled and tubs on the highway, nor that his neighbors were accustomed to do so under similar circumstances; and it was held that the use made of highways by others under such circumstances does not determine his liability.

Frequency of travel on a road as affecting issue.

§ 838. Contributory negligence, in cases of fright by steam-whistles, is determinable both by the nature of the horse driven, and by the character of the noise. A railway company is entitled to use a steam-whistle; and to drive a horse, known to scare at the whistle, near a locomotive, is contributory negligence.[2] It is otherwise, however, as we have seen, in respect to stationary whistles on factories.[3]

Contributory negligence.

[1] Judd *v.* Fargo, 107 Mass. 264, citing O'Linda *v.* Lothrop, 21 Pick. 192.

[2] Phil. &c. R. R. *v.* Stinger, 78 Penn. St. 219.

[3] Supra, § 836. "The owners of animals which have not become accustomed to whistles are bound to submit to the necessities of the case, and if they drive them where *locomotive* whistles are liable to be blown, they take the risk upon themselves, and if any injury results they can have no redress. But the rule should be and is different in respect to whistles used upon factories. Their use is not necessary at all,

That where a horse is negligently left unattended the plaintiff cannot recover results from principles heretofore announced.[1] Thus it has been rightly held in Illinois,[2] in an action against a telegraph company for the loss of the plaintiff's horse and wagon, occasioned by the alleged negligence of the defendant's servants, while engaged in repairing a telegraph line on one of the streets in the city of Chicago, in so handling a broken wire as to strike the horse, thereby frightening him and causing him to run, resulting in his death, that as it appeared that the driver had left the horse, attached to a wagon, standing loose in the street, the negligence of the driver, in failing to secure the horse properly, or have him under his control, was a bar to recovery.[3] Yet it is possible to conceive of a case in which a horse is so gentle and accustomed to cars that it may not be negligence to leave him unattended near a railroad track.[4]

Leaving horse unattended.

VII. THINGS WHICH MAY FALL UPON AND INJURE TRAVELLERS.

§ 839. It is negligence to permit things to remain near a highway in such a way that in the natural course of events they may fall and injure persons lawfully passing.[5] Of this principle the following illustrations may be given.

Things falling on highway.

but if used there is no necessity for constructing them in such a way, and using them in such a manner, as to alarm or frighten any person or animal." Butler, C. J., in Knight *v.* Goodyear's Co. 38 Conn. 441.

[1] Supra, §§ 102, 300, 820 *e*; infra, § 898; Southworth *v.* R. R. 105 Mass. 342.

[2] Western Union Telegraph Company *v.* Quinn, 56 Ill. 319.

[3] In Lynch *v.* Nurdin, 1 Q. B. 29, a case already noticed (supra, § 113; infra, § 860), the defendant had negligently left his horse and cart unattended in the street, and plaintiff, a child seven years old, having got upon the cart in play, another child incautiously led the horse on, whereby plaintiff was thrown down and hurt; and, in answer to the argument, that plaintiff could not recover, having, by his own act, contributed to the accident, it was observed that the plaintiff, although acting without prudence or thought, had shown these qualities in as great a degree as he could be expected to possess them, and that his misconduct, at all events, bore no proportion to that of the defendant.

[4] Supra, § 394.

[5] "The owner of a building under his control and in his occupation is bound, as between himself and the public, to keep it in such proper and safe condition that travellers on the highway shall not suffer injury. . . . . And he is liable for the consequences of having neglected to do so, whether the unsafe condition was

§ 840. It is negligence for a party, in hanging a sign on a windy day in a city, upon a thronged thoroughfare, to use for the purpose a swinging stage that has no rim, or any other preventive against the sliding off of tools, which may occasion injury to passers on the street.[1] And even though the sign be not negligently placed, yet if it be put up in violation of a city ordinance, the party owning it is liable for damage accruing from its fall.[2]

§ 841. The plaintiff, on going to the doorway of a house in which the defendant had offices, was pushed out of the way by a servant of the defendant, who was watching a packing-case which belonged to the defendant and was leaning against the wall of the house. The plaintiff fell and the packing-case fell on his foot, and injured him. There was no evidence as to who placed the packing-case against the wall, or what caused its fall. The court (Martin B., *dissentiente*) held that there was a *primâ facie* case against the defendant to go to the jury, the fall of the packing-case being some evidence that it had been improperly placed against the wall.[3]

§ 842. As the plaintiff was passing along a highway under a railway bridge of the defendants, which was a girder bridge resting on a perpendicular brick wall, with pilasters, a brick fell from the top of one of the piers, on which one of the girders rested, and injured the plaintiff. A train had passed just previously. On examination afterwards, other bricks were found to have fallen out. The bridge had been built and in use three years. The jury having found a verdict for the plaintiff, a rule was obtained, pursuant to leave, to enter a nonsuit, on the ground that there was no evidence to submit to the jury. It was held by the exchequer chamber, affirming the judgment of the court of

caused by himself or another." Endicott, J., Gray *v.* Gaslight Co. 114 Mass. 149. See 1 Wash. R. Prop. 4th ed. 539; and see particularly Pearson *v.* Cox, cited supra, § 189.

[1] Hunt *v.* Hoyt, 20 Ill. 544. Where the defendant became occupier of premises from which a large lamp was suspended over the highway, and the lamp before he became occupier had become worn out, the defendant having notice of this fact, it was held by the queen's bench division, in 1876, that he was liable to a person passing for injury by the falling of the lamp. Tarry *v.* Ashton, L. R. 1 Q. B. D. 314. As to liability of town, see infra, § 982.

[2] Salisbury *v.* Herschenroder, 106 Mass. 458.

[3] Briggs *v.* Oliver, 4 Hur. & C. 403; 35 L. J. Exch. 163.

queen's bench, that the defendants were bound to use due care in keeping the bridge in proper repair, so as not to injure persons passing along the highway, and that there was evidence from which the jury might infer negligence.[1]

§ 843. When the natural consequence of the structure of a building is that ice, snow, or water, falling from it, injures adjacent property, or travellers passing the street on which the building stands, then the owner of the premises is liable for the injury. With regard to the fall of water this point has been long settled. He who fixes to his house a spout or cornice which gathers the water that falls upon his roof, and throws it upon his neighbor's land, is liable therefor.[2] So no man has a right so to construct his roof as to discharge upon his neighbor's land water which would not naturally fall there.[3] "In such a case," says Gray J.,[4] "the maxim, *Sic utere tuo ut alienum non laedas*, would be applicable. It is not at all a question of reasonable care and diligence in the management of his roof, and it would be of no avail to the party to show that the building was of the usual construction, and that the inconvenience complained of was one which, with such a roof as his, nothing could prevent or guard against." [5]

Ice, snow, or water falling from roof.

[1] Kearney *v.* R. R. L. R. 6 Q. B. 759; affirming *S. C.* Law Rep. 5 Q. B. 411.

[2] Reynolds *v.* Clarke, 2 Ld. Raym. 1399; *S. C.* 1 Stra. 634; Fay *v.* Prentice, 1 C. B. 828; Bellows *v.* Sackett, 15 Barb. 96; Martin *v.* Simpson, 6 Allen, 102. As to liability of town, see infra, § 982.

[3] Washburn on Easements, 390; Reynolds *v.* Clarke, 2 Ld. Raym. 1399; Tucker *v.* Newman, 11 A. & E. 40; Thomas *v.* Kenyon, 1 Daly, 132; Martin *v.* Simpson, 6 Allen, 102.

[4] Shipley *v.* Fifty Associates, 106 Mass. 194. See comments on this case in Garland *v.* Towne, 58 N. H. 58–9.

[5] "If one constructs his building so as to cast the water therefrom upon the land of another, he is liable therefor, not only to the occupant, but to the reversioner; but if he puts proper eave-troughs or gutters upon his building for leading off the water upon his own grounds, and keeps them in proper order, and is guilty of no negligence in this regard, an adjoining proprietor can have no legal complaint against him for injuries resulting from extraordinary or accidental circumstances for which no one is in fault, but such injuries must be left to be borne by those on whom they fall." Cooley, J., in Southern Law Rev. 1876, citing Baten's case, 9 Coke, 53 *b*; Jackson *v.* Pesked, 1 M. & S. 234; Tucker *v.* Newman, 11 A. & El. 40; Fay *v.* Prentice, 1 M., G. & S. 828; Underwood *v.* Waldron, 33 Mich. 232. Compare Bellows *v.* Sackett, 15 Barb. 99; Hoare *v.* Dickinson, Ld. Raym. 1568

The same liability attaches to persons controlling roofs so constructed that ice and snow, from the overhanging character of the roofs,[1] fall from them on travellers in the street below.[2] And the owner of the building is liable, without other proof of negligence than that of the overhanging character of the roof, and the consequent tendency of ice and snow to slip from it, to a person injured by such a fall upon him while travelling on the highway with due care; and it is immaterial that all the rooms in the building are occupied by tenants, if the owner retains control of the roof.[3] It is otherwise, however, when the roof does not directly overhang the street.[4]

Mere falling not enough; must be something to indicate negligence.

§ 844. The mere fact that something on a roof falls is not evidence of negligence on the part of the owner of the house. Snow, for instance, or tiles, may be dislodged by sudden gales of wind; and the mere fact, therefore, of snow or tiles falling to the earth would not be sufficient ground to sustain a suit against the owner of the house. If, however, there is anything to show that the thing fell, as in the cases just cited, through the defective structure of the roof, or through a want of care in repairing the roof, or in permitting it to fall into decay, or through negligence of the owner or his servants in handling the thing that falls, then the owner becomes responsible.[5] Thus, as has been seen, the falling of a bag of sugar from a crane fixed over a doorway was held to be a *primâ facie* case of negligence, on the ground that the accident was one which, in the ordinary state of things, would not happen in the use of machinery.[6] On the other hand, mere proof that a plank and a roll of zinc fell through a hole in the defendants' roof on the plaintiff, and that at the same time a man was seen on the roof, was held not *primâ facie* evidence of negligence on part of the defendant. There was no proof of negligence on the part of this man, nor that he was a servant of the defendants; and hence, said Cockburn, C. J., in order to

[1] Garland *v.* Towne, 55 N. H. 55. See Leonard *v.* Storer, 115 Mass. 86, as to non-liability of master for tenant's negligence in this respect.

[2] Shipley *v.* Fifty Associates, 101 Mass. 251, citing Dygert *v.* Schenck, 23 Wend. 447.

[3] Shipley *v.* Fifty Associates, 106 Mass. 194.

[4] Garland *v.* Towne, 55 N. H. 55.

[5] Bryne *v.* Boadle, 2 H. & C. 722.

[6] Scott *v.* London Dock Co. 3 H. & C. 596.

charge the defendants with negligence, it is necessary to show that the defendants either "knew, or had the means of knowing, or were bound to take steps to know, the state in which the roof was." [1]

§ 845. The principle is the same if the injuring thing be dropped through the negligence of a servant. Hence a person whose servant carelessly throws a keg out of a window, so that it injures one passing a passage-way below, is liable for such injury, even if his title in the way is such as not to render him responsible for any defect therein, and though he may at any time revoke the permission by which the person injured is passing over it.[2]

Same rule when thing is dropped on street by servant.

VIII. NUISANCES ON WATERCOURSES.

§ 846. Any obstacle to travel on a navigable stream is a nuisance, which is abatable by indictment; and injuries arising from which may be redressed by suit instituted by the party injured.[3]

Obstacles to navigable streams.

[1] Welfare *v.* R. R. L. R. 4 Q. B. 693.

[2] Corrigan *v.* Union Sug. Ref. 98 Mass. 577.

. . . . "The material question is, whether the keg fell upon the plaintiff's head by reason of the negligence of the defendants' servants. If it did, then, whether this was a public or a private way, and whether the plaintiff was passing over it in the exercise of a public right, or upon an express or implied invitation or inducement of the defendants or by their mere permission, he was rightfully there, and may maintain this action. Even if he was there under a permission which they might at any time revoke, and under circumstances which did not make them responsible for any defect in the existing condition of the way, they were still liable for any negligent act of themselves or their servants, which increased the danger of passing and in fact injured him." Gray, J., citing Gallagher *v.* Humphrey, 6 Law Times N. S. 684; Sullivan *v.* Waters, 14 Irish C. L. 474; Indermaur *v.* Dames, Law Rep. 1 C. P. 274; Byrne *v.* Boadle, 2 H. & C. 722; Stewart *v.* Harvard College, 12 Allen, 67.

In Stewart *v.* Alcorn, 2 Weekly Notes, 401, A., standing on a bridge or iron grating in front of the premises of S. & Co., which was in and formed part of the street, was injured by the fall of a hale of goods from a truck which was being taken across the bridge by S. & Co.'s servant. It was held, that A. was not improperly using the bridge, and could maintain an action against S. & Co. for the injury.

[3] See Whart. Cr. L. § 2419; West River Bridge Co. *v.* Dix, 6 How. U. S. 545; Lansing *v.* Smith, 8 Cow. 146; Monong. Bridge Co. *v.* Kirk, 46 Penn. St. 112; Phil. *v.* Gilmartin, 71 Penn. St. 140. Supra, § 254. As to flooding, see infra, § 934.

On this subject the following cases will be of interest: —

When the river is a public highway,

§ 847. The care and diligence to be used in constructing a dam must be proportioned to the risk encountered. It is not enough if the dam be strong enough to resist ordinary floods.[1] This it may be able to do, yet if it is not strong enough to resist freshets such as those which are in the range of ordinary probability, — *e. g.* occurring in one season out of ten, — those maintaining it are responsible for damages to third parties caused by its giving way.[2] The test is not

Diligence required in constructing dam.

and the obstruction is a public nuisance, the plaintiffs can only recover for such damage as is peculiar to themselves. Powers *v.* Irish, 23 Mich. 429.

A telegraphic wire, though licensed by government, is *primâ facie* a nuisance, when it blocks navigation and impedes vessels. Blanchard *v.* Tel. Co. 60 N. Y. 510; *S. C.* 3 N. Y. Supreme Ct. 775.

But unless a wire laid across a river blocks or imperils navigation, it is not a nuisance. The Vancouver, 2 Sawyer, 381.

A riparian owner has a right to enjoy his lands, in all proper ways; the other party has an absolute right, as one of the public, to navigate the stream; neither can justly deprive the other of his rights and their incidents.

Keeping a boom fastened too long to a bank would be an obstruction; what was a reasonable time for removal of boom is a question for the jury. Weise *v.* Smith, 3 Oregon, 445.

An owner is not bound to raise or remove the hulk of a worthless wreck, sunk in navigable waters, nor is he liable for injuries to other navigators. Winpenny *v.* Philadelphia, 65 Penn. St. 136; Brown *v.* Mallet, 5 C. B. 599; R. *v.* Watts, 2 Esp. 675.

If instead of abandoning a sunken vessel the owner retains such possession and control of it as it is susceptible of, he is bound to exercise a reasonable degree of diligence in removing it. Ibid.; Hancock *v.* R. R. 10 C. B. 348; Taylor *v.* Atlantic Ins. Co. 37 N. Y. 275.

If he attempts to remove the wreck and fails, the inadequacy of the means will not be proof of negligence. Ibid. In Winpenny *v.* Philadelphia, supra, it was said by Agnew, J. . . . . "The principle is stated in the 3d vol. Whart. Cr. Law. sec. 2406 (6th ed.), where it is said: 'But if a ship or other vessel sink by accident in a river, although it obstructs the navigation, yet the owner is not indictable as for a nuisance for not removing it.' For this he cites the leading cases of Rex *v.* Watts, 2 Espinasse Rep. 675; and also R. *v.* Russell, 9 D. & R. 566; *S. C.* 6 B. & C. 566; R. *v.* Ward, 4 Ad. & El. 384; R. *v.* Tindall, 6 Ad. & El. 143; and R. *v.* Morris, 1 B. & Ad. 441."

Until abandonment, however, the owner is bound "to use due care to prevent injury to other vessels." Morton, J., Boston & Hingham Co. *v.* Munson, 117 Mass. 34; citing White *v.* Crisp, 10 Exch. 312; Brown *v.* Mallet, 5 C. B. 599; and he is liable for damage to others by the sinking of his vessel, if that sinking was caused by his negligence. Ibid.

[1] See Angell on Watercourses, § 336.

[2] Livingston *v.* Adams, 8 Cow. 175; Pixley *v.* Clark, 32 Barb. 268; 35 N. Y.

whether the particular freshet might have been reasonably anticipated at the particular time when it occurred, but whether judging from the past, and from the natural causes at work on the stream, there is a contingency that within the time the dam is expected to last freshets likely to require extraordinary powers of resistance may occur. If so, it is negligence not to give the dam such extraordinary powers of resistance. And the same rule applies where a dam is so constructed as to produce dangerous or offensive accumulations of ice or mud.[1] Whether negligence in constructing a lower dam is a defence in a suit for negligence in constructing an upper dam has been already discussed.[2]

§ 847 *a*. The law as to the wasting or pollution of watercourses can only be fully discussed in an independent treatise. It may be here generally noticed that a negligent waste of water, even in pursuance of a license, makes the waster liable to those injured.[3] A person entitled to the use of the water cannot, by waste, or by polluting the stream, interfere with the use of other riparian owners,[4] or of parties entitled to the use of the stream.[5]

Wasting or polluting watercourses.

IX. NEGLIGENT INTERFERENCE WITH RIPARIAN OWNER.

§ 848. By the Roman law the public have a right to use the banks of a river, for right of way, as much as the river itself.[6]

520; Pollett *v.* Long, 56 N. Y. 200; Mayor *v.* Bailey, 2 Denio, 433; Everett *v.* Hydraulic Ram Co. 23 Cal. 225; Gray *v.* Harris, 107 Mass. 492; Lapham *v.* Curtis, 5 Verm. 371. See Shrewsbury *v.* Smith, 12 Cush. 177.

[1] Sch. Nav. Co. *v.* M'Donough, 33 Penn. St. 73; Bell *v.* McClintock, 9 Watts, 119.

[2] Supra, § 148.

[3] Philadelphia *v.* Gilmartin, 71 Penn. St. 140; supra, § 254; Pratt *v.* Lamson, 2 Allen, 275; Blood *v.* R. R. 2 Gray, 137; Parker *v.* Griswold, 17 Conn. 299; Bellinger *v.* R. R. 23 N. Y. 42; Crooker *v.* Bragg, 10 Wend. 260.

[4] Mason *v.* Hill, 5 B. & A. 1; Whittier *v.* Cocheco Man. Co. 9 N. H. 454; Embrey *v.* Owen, 6 Exch. 353; and other cases cited in the 3d edition of Professor Washburn's work on Easements, ch. iii. § 1. As to liability for negligence in polluting stream, see Norton *v.* Scholefield, 9 M. & W. 665; Call *v.* Buttrick, 4 Cush. 345; Woodward *v.* Aborn, 35 Me. 271; Howell *v.* McCoy, 3 Rawle, 256; Gladfelter *v.* Walker, 40 Md. 1; and cases cited in Washburn on Easements, 3d ed. 292–309.

[5] Holker *v.* Porritt, L. R. 10 Exch. 59.

[6] L. 2. tit. 1. D. de us. et. proprietate rip.

By the common law this right does not exist.[1] The owners of log rafts are liable to the riparian owner for damages accruing to the latter from the former's negligence in managing their rafts.[2] On the other hand, those navigating the stream have a right to protection, as has just been seen, from any interference from the riparian owner.

[1] Ball *v.* Herbert, 3 T. R. 253; Hooper *v.* Hobson, 57 Me. 276; Weise *v.* Smith, 3 Oregon, 445, cited in note to § 846.

[2] Hooper *v.* Hobson, 57 Me. 276.

CHAPTER IV.

DANGEROUS AGENCIES.

Possessor of dangerous agency bound to guard it, § 851.
Owner of land liable for dangerous material, which may pass naturally from his soil to a neighbor's, § 852.
Negligence in giving dangerous instruments to persons ignorant and incapable of reason, § 853.
Persons forwarding explosive compounds through carrier, § 854.
Explosion of steam-engine, § 857.
Owner of dangerous machinery liable when left with ignorant person, § 859.
And so when it is left in a place where it is probable that it may be meddled with, § 860.
Blasting rocks near highway, § 861.
[As to fire-works, sea § 881.]

§ 851. WHEREVER a thing, dangerous unless particularly guarded, is left unguarded, the party so leaving it is responsible for damages to another thereby produced.[1] At common law a person using dangerous instruments or mechanisms does so at his peril, and is responsible for any damages not caused by extraordinary natural occurrences, or by the interposition of strangers.[2] But if the dangerous material is left at a particular place without the owner's fault, and if there is no special duty imposed on him to remove or guard it, he is not responsible for negligence on account of damages resulting from its continuance in the place where it was thus left.[3] How far trespassers can sue in such cases has been already discussed.[4]

Possessor of dangerous agency bound to guard it.

[1] Supra, §§ 786–90. Dixon *v.* Bell, 5 M. & S. 198; Gilbertson *v.* Richardson, 5 C. B. 502; Bird *v.* Holbrook, 4 Bing. 628; Jordin *v.* Crump, 8 M. & W. 782; Wootten *v.* Dawkins, 2 C. B. N. S. 412; Ellis *v.* Sheffield Gas. Co. 2 E. & B. 767; Stratton *v.* Staples, 59 Me. 94; Ackert *v.* Lansing, 59 N. Y. 646; Lobenstein *v.* McGraw, 11 Kans. 645. "The law of England, in its care for human life, requires consummate caution in the person who deals with dangerous weapons." Per Earle, C. J., Potter *v.* Faulkner, 1 B. & S. 805.

[2] Fletcher *v.* Rylands, Law Rep. 1 Exch. 265, 279; aff. L. R. 3 H. of L. 330.

[3] See Brown *v.* Mallet, 5 C. B. 599; King *v.* N. Y. 66 N. Y. 181.

[4] Supra, § 346–9.

§ 852. The owner of land, on which dangerous or mischievous material is stored, is bound to prevent such material from, in the ordinary course of events, passing to and injuring a neighbor.[1] But he is not responsible for other than the natural and ordinary consequences of such possession on his part; and the case against him must exclude the hypothesis of injury caused by the mischievous interposition of a stranger.[2]

Owner of land liable for dangerous matter which may pass naturally from his soil to another's.

§ 853. It has been already shown that a person is primarily liable for mischief by means of a dangerous instrument given by him to an agent incapable of reason, or ignorant of the nature of the thing,[3] though the injury be directly wrought by the latter. As illustrating this position may be cited a leading English case,[4] where the defendant, being possessed of a loaded gun, sent a young girl to fetch it, with directions to take the priming out, which was accordingly done; and an injury accruing to the plaintiff's son in consequence of the girl's presenting the gun at him and drawing the trigger, when the gun went off, it was held that the defendant was liable to damages in an action on the case. So a person who sells gunpowder to a boy eight years of age, who has no knowledge or experience in its use, and who subsequently injures himself by an explosion, has been held liable for the injury;[5] and so of a retailer of burning fluids, who sells a dangerous and explosive fluid, without giving notice of its character, to a person ignorant of such character.[6] So, on the ground of the

When dangerous instrument is given to person ignorant or incapable of reason.

[1] See this question discussed at large, supra, § 787. Rylands *v.* Fletcher, L. R. 3 H. L. 330. See Pixley *v.* Clark, 35 N. Y. 520, and cases cited in Washburn on Easements (3d ed.), pp. 382–3, 603.

[2] Wilson *v.* Newberry, L. R. 7 Q. B. 31. See supra, §§ 134, 787–9.

[3] Supra, §§ 88, 92, 95.

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

[5] Carter *v.* Towne, 98 Mass. 567. In this case a declaration that the defendant, knowing that the plaintiff, a child eight years old, had neither experience in nor knowledge of the use of gunpowder, and was an unfit person to be intrusted with it, sold and delivered gunpowder to him, and that he, in ignorance of its effects, and using that care of which he was capable, exploded it and was burned thereby, was held to set forth a good cause of action, and to which the fact that the defendant was a duly licensed seller of gunpowder is no defence.

[6] Supra, § 774; Wellington *v.* Downer Ker. Oil. Co. 104 Mass. 64. That the causal relation in such case is not broken by a series of innocent vendees, see Elkins *v.* McKean, 79 Penn. St. 493. Supra, § 145. See, also, supra, §§ 90, 146.

master's liability for the servant's acts, an apothecary is liable for the negligence in this respect of his clerk.[1] And where an inexperienced agent was left in charge of a train of cars, for the purpose of loading the cars with oil, and through his ignorance or unskilful management a collision occurred between one of the cars and the locomotive, resulting in a fire which burned plaintiff's house, the railroad company was held responsible for his acts.[2]

Persons forwarding explosive compounds through carrier.

§ 854. A person shipping an explosive compound without notice is liable for consequences, although these result from the opening of the package by a warehouseman ignorant of its contents, who was led to open the package from the fact of its leaking.[3]

§ 855. Where the defendant caused a carboy containing nitric acid to be delivered to the plaintiff, who was one of the servants of a carrier, in order that it might be carried by such carrier for the defendant, and the defendant did not take reasonable care to make the plaintiff aware that the acid was dangerous, but only informed him that it was an acid, and the plaintiff was burnt and injured by reason of the carboy bursting, when, in ignorance of its dangerous character, he was carrying it on his back from the carrier's cart, it was held that the defendant was liable in an action for damages for such injury.[4]

It has been held in Massachusetts, that in a suit under the statutes of 1869, c. 152, to recover for injuries caused by the explosion of illuminating oil, which had been sold by the defendant, and did not conform to the standard fixed by the statute, it is no defence either that the defendant was ignorant that it did not so conform, or that an authorized inspector had certified that it did; and if the person injured was using such care as would have been proper had the oil conformed to that standard, the jury will be warranted in finding that she was in the exercise of due care. Hourigan *v.* Nowell, 110 Mass. 470.

[1] Hanford *v.* Payne, 11 Bush, 380.

[2] Oil Creek, &c. Co. *v.* Keighron, 74 Penn. St. 320. See supra, §§ 90, 136, 563, 774.

[3] Barney *v.* Burstenbinder, 7 Lansing, 210; *S. C.* 64 Barb. 212. See Pierce *v.* Windsor, 2 Sprague, 35; Jeffrey *v.* Bigelow, 13 Wend. 518; Thomas *v.* Winchester, 2 Seld. 397; Boston & A. R. R. *v.* Shanly, 107 Mass. 568; Williams *v.* E. Ind. Co. 3 East, 192; Brass *v.* Maitland, 6 El. & B. 470; Farrant *v.* Barnes, 11 C. B. N. S. 553. As to selling poison without notice, see Norton *v.* Sewall, 106 Mass. 143. Supra, § 90; infra, § 859.

[4] Farrant *v.* Barnes, 11 Com. B. 553; 31 L. J. C. P. 137.

In his judgment, Erle, C. J., says:

§ 856. One "who has in his possession a dangerous article that he desires to send to another may send it by a common carrier if he will take it; but it is his duty to give him notice of its character, so that he may either refuse to take it, or be enabled, if he takes it, to make suitable provisions against the danger."[1] Under such circumstances the carrier, unconscious of the character of the package, is not liable for damage caused by its explosion.[2]

Explosion of steam-engines; liability for.

§ 857. No doubt a steam-engine is a powerful agent, and it is essential to keep in mind the cautions of a leading judgment of the supreme court of the United States, on a suit for damages occasioned by the bursting of a boiler.[3] "That the proper management of the boilers and machinery of a steamboat requires skill must be admitted. Indeed, by the act of Congress of August 30, 1852, great and unusual

"I am of opinion that it was the duty of the defendant, knowing the dangerous nature of the acid which was in the carboy, to take reasonable care that its dangerous nature should be communicated to all those who were about to carry it. Now it is found by the jury that he did not do so. The accident occurred, perhaps, from the explosive character of the article; but be this as it may, it seems to me that the plaintiff was employed by the defendant to carry it, and so comes within the distinction pointed out in Levy *v.* Langridge, 4 Mee. & Wel. 337; 7 L. J. Exch. N. S. 387, as the principle of that case. I rely, however, on the case of Brass *v.* Maitland, 6 Ell. & Bla. 470; 26 L. J. Q. B. 49 (see supra, § 563), as establishing the principle which governs the present case. There it was held by Lord Campbell, 'that while the owners of a general ship undertake that they will receive goods and safely carry them and deliver them at the destined port, the shippers undertake that they will not deliver, to be carried on the voyage, packages of goods of a dangerous nature, which those employed on behalf of the shippers may not on inspection be reasonably expected to know to be of a dangerous nature, without expressly giving notice that they are of a dangerous nature.' So Willes, J., says: 'I apprehend that a person, who gives a carrier goods of a dangerous character to carry, which require more caution in their carriage than ordinary merchandise, as without such caution they would be likely to injure the carrier and his servants, is bound in law to give notice of the dangerous character of such goods to the carrier, and that if he does not do so he is liable for the consequence of such omission.'"

[1] Chapman, C. J., Bost. & A. R. R. *v.* Shanly, 107 Mass. 576, citing Williams *v.* East I. Co. 3 East, 192; Brass *v.* Maitland, 6 E. & B. 470; Farrant *v.* Barnes, 11 C. B. N. S. 553.

[2] Parrot *v.* Wells, 15 Wall, 524. See Pierce *v.* Winsor, 2 Cliff. 18.

[3] Steamboat New World *v.* King, 16 How. U. S. 469.

precautions are taken to exclude from this employment all persons who do not possess it. That an omission to exercise this skill vigilantly and faithfully endangers, to a frightful extent, the lives and limbs of great numbers of human beings, the awful destruction of life in our country by explosions of steam-boilers but too painfully proves. We do not hesitate, therefore, to declare that negligence in the care or management of such boilers, for which skill is necessary, the probable consequence of which negligence is injury and loss of the most disastrous kind, is to be deemed culpable negligence, rendering the owners and the boat liable for damages, even in case of a gratuitous carriage of a passenger. Indeed, as to explosion of boilers and flues, or other dangerous escape of steam on board steamboats, Congress, in clear terms, excluded all such cases from the operation of a rule requiring gross negligence to be proved to lay the foundation of an action for damages to person or property." At the same time, it must also be kept in mind that steam-engines are now among the necessary agents of business life, and that while diligence in their management is required in proportion to their danger,[1] yet in no case is the user to be treated as the insurer of the instrument used.[2]

§ 858. It has been held, it is true, in Illinois,[3] in an action against a company for injuries alleged to have been sustained by the plaintiff, while in the depot of the defendants, from the explosion of the boiler of one of defendants' engines, that the mere fact that the boiler exploded is *primâ facie* evidence of negligence, and that the burden of disproving the negligence is thrown upon the company; and this rule has more recently by the same court been adhered to, upon a review of the question, and is applied in a case where the party injured did not hold any relation of trust and confidence towards the company, such as exists between a passenger and the carrier.[4] But in a Pennsylvania case,[5] where a man drove a horse to defendant's steam grist-mill to get some grist which he had had ground, and while lawfully

[1] See supra, § 48.

[2] Loop *v.* Litchfield, 42 N. Y. 351. See supra, §§ 630, 637–8, 774–5; King *v.* N. Y. 66 N. Y. 181.

[3] Illinois Central Railroad Company *v.* Phillips, 49 Ill. 234.

[4] Ill. Cent. R. R. *v.* Phillips, 55 Ill. 194.

[5] Spencer *v.* Campbell, 9 Watts & S. 32.

there the steam-boiler exploded and killed his horse, and the action was brought for the value of the horse, it was held that, to entitle the plaintiff to recover, he was bound to show the want of ordinary care, skill, and diligence. And it is held in New York that where one places a steam-boiler upon his premises and operates the same with care and skill, so that it is no nuisance, in the absence of proof of fault or negligence upon his part, he is not liable for damages to his neighbor occasioned by the explosion of the boiler.[1] It is also said that if the explosion was caused by a defect in the manufacture of the boiler, he is not liable in the absence of proof that such defect was known to him or was discoverable upon examination, or by the application of known tests.[2] At the same time, as has been remarked by a learned commentator,[3] the question in such case depends not a little on the relations of the steam-engine to the neighborhood in which it is placed. If my neighbor builds next to my workshop, knowing that in it I am running a steam-engine, he cannot complain of me if my engine, without any negligence of mine, should explode. On the other hand, he has just cause of complaint if I have erected a dangerous engine in my dwelling-house, he being in possession before the engine was put up.[4]

Dangerous machinery, when left with an ignorant person or child, creates liability.

§ 859. "If the owners of dangerous machinery, by their foreman, employ a young person about it quite inexperienced in its use, either without proper directions as to its use, or with directions which are improper and which are likely to lead to danger, of which the young person is not aware, and of which they are aware; as it is their duty to take reasonable care to avert such danger, they are responsible for any injury which may ensue from the use of such materials." [5]

[1] Losee *v.* Buchanan, 51 N. Y. 476. See Marshall *v.* Welwood, 38 N. J. L. 339. Supra, § 775.

[2] Earl, C., Losee *v.* Buchanan, *ut supra.*

[3] Bigelow's Cases on Torts, 500.

[4] See, also, Jaffe *v.* Harteau, 56 N. Y. 398, quoted supra, § 727 *a*. Losee *v.* Buchanan, on the explanation above given, may be made to harmonize with Fletcher *v.* Rylands, though the authority of the latter case is rejected by Earl, C., in Losee *v.* Buchanan. See supra, § 787.

[5] Cockburn, C. J., in Grizzle *v.* Frost, 3 F. & F. 622, adopted by Gray, J., in Coombs *v.* New Bedf. Cordage Co. 102 Mass. 599. See Hackett *v.* Middlesex Man. Co. 101 Mass. 101. Supra, §§ 90, 853.

§ 860. The same conclusion follows where dangerous machinery is left in an exposed position where it is probable, in the ordinary course of things, that it will be meddled with by children.[1] And the same principle has been recently affirmed by the supreme court of the United States in a case in which it was held that a railroad company was liable for damages sustained by a boy when playing with a turn-table left by the company unguarded and unlocked on its own grounds; it being shown that the boys of the neighborhood were in the habit of resorting to the place for play, and that this was known by the company.[2] An analogous illustration of the same rule may be found in a Massachusetts case decided in 1872, where it was held that a person leaving a mass of iron negligently placed in a truck in a highway is liable for injury thereby caused to children who were playing or idling at that particular point, assuming that the meddling of children at that point was conduct which the defendant should have expected and provided against.[3] It is scarcely necessary to add, that the fact that the negligent act sued for is a violation of a local ordinance or statute is evidence for the plaintiff in such an issue.[4]

And so where it is likely to be meddled with by children.

§ 861. To blast rocks, near a highway or dwelling-houses, without taking every proper precaution to prevent injury, exposes the party blasting to a suit for damages for the mischief ensuing. In such case the plaintiff need not do more than prove the unlawful act of blasting. The burden is on the defendant to exculpate himself by showing due care.[5]

Blasting rocks near highway.

[1] See supra, §§ 108, 109, 145, 315, 344, 350, 826; and see Lynch *v.* Nurdin, 1 Q. B. 29, 35. Supra, §§ 113, 838, with which compare Mangan *v.* Atterton, L. R. 1 Exch. 239; Lygo *v.* Newbold, 9 Exch. 302; Great Northern R. C. *v.* Harrison, 10 Exch. 376; Austin *v.* Great Western R. C. L. R. 2 Q. B. 442; Caswell *v.* Worth, 5 E. & B. 849; Hydraulic Works *v.* Orr, 83 Penn. St. 332; Keffe *v.* R. R. 21 Minn. 207.

[2] Railroad Company *v.* Stout, 17 Wall. 659.

[3] Lane *v.* Atlantic Works, 111 Mass. 136.

[4] Ibid.

[5] Hay *v.* Cohoes Co. 2 Comst. 159; Tremain *v.* Cohoes Co. 2 Comst. 163; Wright *v.* Compton, 53 Ind. 342. Supra, §§ 92, 110–13; infra, § 881.

CHAPTER V.

FIRE.

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What are unlawful fires, § 867 *a*.
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Otherwise with chartered company, when due diligence is used, § 869.
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Intervening negligence of third party, § 879.
Distinctive local statutes, § 880.
III. Fireworks, § 881.
IV. Fire-arms, § 882.
V. Smoke injuring houses. § 882 *a*.

I. FOR DOMESTIC OR FARMING PURPOSES.

Building fire which by natural law spreads.

§ 865. A MAN lights a fire on his own hearth, and indulges, at the same time, a wish that a sudden eddy of wind may lodge a spark on his neighbor's roof; yet if the spark really is thus carried, and the neighbor's house catches fire, the builder of the fire, supposing it is prudently made and cared for, is not responsible for the damage.[1] Supposing, however, he negligently sets fire to his own chimney, in such a way as, in the ordinary sequence of events, to set fire to his neighbor's, then the case is otherwise, for he is responsible for all the natural consequences of his negligence. Or suppose the fire be made in a field. If in a sequestered spot, and on a quiet day,

[1] Cleland *v.* Thornton, 43 Cal. 437; Gagg *v.* Vetter, 41 Ind. 228. Supra, § 80.

then there is no inculpatory negligence; otherwise on a windy day, when buildings are so near as to make ignition probable.[1] To this effect is a famous passage in the Digest: —

"Si quis in stipulam suam vel spinam comburendae ejus causa ignem immiserit et ulterius evagatus et progressus ignis alienam segetem vel vineam laeserit, requiramus, num imperitia vel negligentia id accidit; nam *si die ventoso id fecit, culpae reus est;* nam et qui occasionem praestat, damnum fecisse videtur."[2]

So it has been held both in England and this country, that kindling a fire in the open air in such a way that under ordinary circumstances the fire may spread to another's property makes the party kindling such fire *primâ facie* liable for the consequences, though he may meet this by proving that the fire was blown away from him by a sudden gale of wind, it being prudently kindled in a calm.[3]

§ 866. *Negligently leaving a fire*, necessarily made, makes the person so negligent liable for damages incurred to others from such negligence.[4] No doubt that "every person has a right to kindle a fire on his own land for the purposes of husbandry, if he does it at a proper time, and in a suitable manner, and uses reasonable care and diligence to prevent its spreading and doing injury to the property of others." But though the time be suitable and the manner prudent, "yet if he is guilty of negligence in taking care of it, and it spreads and injures the property of another in consequence of such negligence, he is liable in damages for the injury done. The gist of the action is negligence, and if that exists in either of these particulars, and injury is done in consequence thereof, the liability attaches; and it is immaterial whether the proof establishes gross negligence, or only a want of ordinary care, on the part of the defendant."[5]

[1] Whart. Crim. L. § 751; supra, § 97.

[2] L. 30. § 3. D. ad. Leg. Aquil. Supra, §§ 12, 116.

[3] Tubervill *v.* Stamp, 1 Salk. 13; Filliter *v.* Phippard, 11 Q. B. 347; Higgins *v.* Dewey, 107 Mass. 494; Perley *v.* East. R. R. Co. 98 Mass. 414; Calkins *v.* Barger, 44 Barb. 424; Hanlon *v.* Ingram, 3 Iowa, 81; Miller *v.* Martin, 16 Mo. 508. See, also, Collins *v.* Groseclose, 40 Ind. 414; Gagg *v.* Vetter, 41 Ind. 228, and cases cited supra, § 197; Averitt *v.* Murrell, 4 Jones N. C. 323; Fahn *v.* Reichart, 8 Wis. 255.

[4] Cleland *v.* Thornton, 43 Cal. 437. See supra, §§ 97, 789.

[5] Hewey *v.* Nourse, 54 Me. 256. See Bachelder *v.* Heagan, 18 Me. 32; Barnard *v.* Poor, 21 Pick. 378; Tourtellot *v.* Rosebrook, 11 Met. 460.

It is not necessary, however, that the watch should be constant. It does not inculpate the defendant that he left for a short time, when there was no prospect of the wind rising.[1]

When a fire is necessary in order to clear the land, it is proper to give notice to those whose property may be thereby affected, and it is negligent to omit such notice. But if after notice the plaintiff could have prevented his property from being burned, but failed to do so, he has no ground of complaint.[2]

When fire is lawful, burden on plaintiff to prove negligence; but otherwise with unlawful fires.

§ 867. The burden of negligence, in suits for damage from lawful fires, is on the plaintiff.[3] "Fire, like water or steam," to quote from a judgment of Earl, C.,[4] "is likely to produce mischief if it escapes and goes beyond control; and yet it has never been held in this country that one building a fire upon his own premises can be made liable if it escapes upon his neighbor's premises and does him damage, without proof of negligence." [5] But the rule is otherwise when the fire is unlawful, in which case the burden is on the defendant, after proof of the unlawfulness, to defend himself by proving *casus*.[6] Eminently is this the case with fire started on prairies, or other wild lands, where the devastation is likely to be so terrible.[7]

§ 867 *a*. As unlawful fires are to be regarded, as will presently be seen, the fires of steam-engines, dashing without charter, in all

[1] Calkins *v.* Barger, 44 Barb. 424. Where the plaintiff was possessed of farm buildings and stacks of corn, standing in a close in his occupation, and nearly adjoining another close in the occupation of the defendant, and the defendant placed a stack of hay on his close, which heated and smoked and gave out a strong smell indicating that the hay-stack was in danger of taking fire, and the defendant knowing its dangerous condition nevertheless kept it in his close, although he could have removed it, and it ignited and burst into flame and set fire to the adjoining farm buildings of the plaintiff, — it was held that the defendant was liable. Vaughan *v.* Menlove, 3 Bing. N. C. 468.

[2] Bachelder *v.* Heagan, 18 Me. 32; Hewey *v.* Nourse, 54 Me. 256; Tourtellot *v.* Rosebrook, 1 Met. 460; Bennett *v.* Scott, 18 Barb. 348.

[3] See supra, § 421; Sturgess *v.* Robbins, 62 Me. 289.

[4] Losee *v.* Buchanan, 51 N. Y. 476.

[5] Clark *v.* Foot, 8 J. R. 422; Stewart *v.* Hawley, 22 Barb. 619; Calkins *v.* Barger, 44 Ibid. 424; Lansing *v.* Stone, 37 Ibid. 15; Barnard *v.* Poor, 21 Pick. 378; Tourtellot *v.* Rosebrook, 11 Metcalf, 460; Bachelder *v.* Heagan, 18 Maine, 32. See Sturgess *v.* Robbins, 62 Me. 289; Hanlon *v.* Ingram, 3 Iowa, 81.

[6] Infra, § 868.

[7] See Finley *v.* Langston, 12 Mo. 120.

states of the wind, through a narrow strip of land bordered by a territory which from time to time presents peculiarly combustible material. Setting fire to trees and underbrush on another's land is, being a trespass, in itself unlawful. So, in the prairie states, where the danger from fire is so great, statutes exist prohibiting the kindling of fires on the land even by the owner himself, except under strict limitations and in peculiar seasons.[1]

Negligent fires spreading through intervening negligence.

§ 867 *b*. If a fire, being negligently started, is extended by the plaintiff's negligence, the plaintiff has no redress, the causal connection between the defendant's negligence and the plaintiff's damage being broken.[2] The same conclusion, as has been already shown, is reached, when the fire is spread by the intervening causal negligence of a third party.[3]

Effect of statute of Anne.

§ 867 *c*. The statute 6 Anne, ch. 3, sec. 6 (enacted in 1707), which declares that "no action shall be maintained against any person in whose house or chamber any fire shall accidentally begin," with the construction which makes it include fires caused by negligence of strangers, has been accepted in some parts of the United States as part of the common law.[4] But this statute, even as amended by that of 14 George 3, ch. 78, is not construed to apply to the defendant's negligence, either in this country[5] or in England.[6]

II. FIRES IN STEAM-ENGINES.

§ 868. Emitting sparks from a locomotive engine traversing a railway track belonging to an unchartered company, whereby fire is communicated to adjacent property, is a negligent act which makes the company liable for the damage. In the nature of things a locomotive engine, rapidly traversing a narrow strip

[1] See Burton *v.* McClelland, 2 Scam. 434; Johnson *v.* Barber, 5 Gil. 426; Armstrong *v.* Cooley, 5 Gil. 509.

[2] See supra, §§ 130, 149, 300; and Great W. R. R. *v.* Haworth, 39 Ill. 346. See Ross *v.* R. R. 6 Allen, 87; Ill. Cent. R. R. *v.* McClelland, 42 Ill. 355; Chapman *v.* R. R. 37 Me. 92; Smith *v.* R. R. L. R. 5 C. P. 98; Bryan *v.* Fowler, 70 N. C. 596.

[3] Supra, § 145–149; infra, § 879.

[4] See Spaulding *v.* C. & N. R. R. Co. 30 Wis. 110; though see, *dubitante*, Webb *v.* R. R. 49 N. Y. 420.

[5] Scott *v.* Hale, 16 Me. 326; Webb *v.* R. R. 49 N. Y. 420; Maull *v.* Wilson, 2 Harring. 443.

[6] Vaughan *v.* Menlove, 3 Bing. N. C. 468; 4 Scott, 244; Filliter *v.* Phippard, 11 Q. B. 947.

Negligence in unchartered company to emit sparks.

of land, many miles in length, in periods of drought as well as of rain, in wind-storms as well as in calm, with combustible materials from time to time on either side, will in the course of time set fire to such materials if it emit sparks; and to emit sparks by such an engine, according to the rules heretofore expressed,[1] is negligence for which, where there is damage done, suit lies. It is one of the sequences of material laws that fire should in this way be communicated, and he who on a windy day emits sparks from a locomotive (putting the charter out of the question) is as negligent as he who on a windy day builds a bonfire on his own land.[2] And as the latter is liable for damage in case he sets fire to his neighbor's field, so is the former.[3]

Otherwise when company is chartered.

§ 869. When, however, a railroad company is chartered with a right to propel its trains by steam-engines, then the company is liable only in case, in using its engines, it fails in the diligence good specialists in this department are accustomed to exercise. The legislature says: "This is an essential industry; you are authorized to engage in it; and as it is necessary that your engines should be driven by fire and steam, you are authorized to use fire and steam in your engines." Such being the case, the mere fact of a company emitting sparks from its engines is not negligence, unless it is proved that the sparks were negligently emitted.[4] "When the legislature has

[1] Supra, § 73 *et seq.*, 867 *a*.

[2] See supra, § 865.

[3] See Jones *v.* R. R. Law Rep. 3 Q. B. 733. In this case (that of an unchartered company) it was proved by the defendants that all reasonable precautions had been taken to prevent the emission of sparks. They were, nevertheless, held liable, on the ground that the locomotive was a dangerous engine to be brought and used by the defendants upon their premises, and that they must bear the consequences in case of damage to others.

[4] Supra, § 271; Flynn *v.* R. R. 40 Cal. 14; Burroughs *v.* R. R. 15 Conn. 124; Sheldon *v.* R. R. 14 N. Y. 218; Rood *v.* R. R. 18 Barb. 80; Hinds *v.* Barton, 25 N. Y. 544; Phil. &c. R. R. *v.* Yeiser, 8 Penn. St. (8 Barr) 366; Frank. T. P. *v.* R. R. 54 Penn. St. 345; Jefferis *v.* B. R. R. 3 Houston, 447; Balt. & O. R. R. *v.* Woodruff, 4 Md. 242; 2 Am. R. R. Ca. 30; Vaughan *v.* R. R. 5 H. & N. 679 (recognizing R. *v.* Pease, 4 B. & Ad. 30); cited and explained in Jones *v.* R. R. L. R. 3 Q. B. 737; and approved in Hammersmith, &c. R. C. *v.* Brand, L. R. 4 H. L. 171, 201–2; Cracknell *v.* Mayor & Corporation of Thetford, L. R. 4 C. P. 629. *Secus*, if the company were guilty of negligence. Smith *v.* London & South Western R. C. L. R. 5 C. P. 98; *S. C.* L. R. 6 C. P. (Exch. Ch.) 14.

sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence, that if damage results from the use of such thing, independently of negligence, the party using it is not responsible." [1]

§ 870. Undoubtedly there are cases (some under local statutes) to the effect that when the plaintiff shows that his property caught fire from the defendant's engine the burden is on the defendant to disprove negligence.[2] This is unquestionably sound law as to unchartered companies.[3] When, however, a company is chartered, and thereby lawfully uses fire in its engines, the true doctrine is, that it rests on a plaintiff suing it for fire communicated from its engines to show negligence in the company.[4]

In latter case burden is on plaintiff.

In any view, the burden is on the plaintiff to show that the fire in question was communicated from the defendant's engines.[5]

§ 871. A slight inference of negligence, however, raised by the plaintiff's case is sufficient to throw the burden of disproving negligence on the defendant. It is a mistake, as has been elsewhere shown, to suppose that negligence can be only proved by positive affirmatory evidence. In

Negligence when to be inferred.

[1] Cockburn, C. J., Vaughan *v.* R. R. 5 H. & N. 685.

[2] Hull *v.* R. R. 14 Cal. 387; Ill. Cent. R. R. *v.* Mills, 42 Ill. 407; Chic. & N. W. R. R. *v.* McCahill, 56 Ill. 28 (under statute); Chicago, &c. R. R. *v.* Clampit, 63 Ill. 95; Toledo, &c. R. R. *v.* Larmon, 67 Ill. 68; Ellis *v.* Portsmouth R. R. 2 Ired. L. 9, 138; Spaulding *v.* R. R. 30 Wis. 110; Galpin *v.* W. R. R. 19 Wis. 608; Burke *v.* R. R. 7 Heisk. 451; Atchison R. R. *v.* Stanford, 12 Kans. 354; Clemens *v.* R. R. 53 Mo. 366. See Piggot *v.* R. R. 3 Man., Gr. & S. 229; Aldridge *v.* R. R. 3 Man. & G. 515; Gibson *v.* R. R. 1 F. & F. 23.

[3] See supra, §§ 867, 867 *a*; Jones *v.* R. R. L. R. 3 Q. B. 733.

[4] See supra, § 421; Aldridge *v.* R. R. 3 M. & G. 515; Phil. & Read. R. R. *v.* Yeiser, 8 Penn. St. (8 Barr) 366; Hugett *v.* R. R. 23 Penn. St. 373; Phil. & Read. R. R. *v.* Yerger, 73 Penn. St. 121; Morris & E. R. R. *v.* State, 36 N. J. 553; Burroughs *v.* R. R. 15 Conn. 124; Herring *v.* R. R. 10 Ired. 402; Sheldon *v.* R. R. 29 N. Y. 226; Field *v.* R. R. 32 N. Y. 339; McCready *v.* R. R. 2 Strobh. L. 356; Macon, &c. R. R. *v.* McConnell, 27 Ga. 481; Smith *v.* R. R. 37 Mo. 287; Gandy *v.* R. R. 30 Iowa, 420; Garrett *v.* R. R. 36 Iowa, 131; McCummons *v.* R. R. 33 Iowa, 187; Indianapolis, &c. R. R. *v.* Paramore, 31 Ind. 143; Kans. P. R. R. *v.* Butts, 7 Kans. 308. See 4 West. Jur. 333; 5 Am. Law Rev. 208.

[5] Sheldon *v.* R. R. 29 Barb. 226; Smith *v.* R. R. 37 Mo. 287.

cases of this class, from the nature of things, it is not necessary for the plaintiff to do more than show such circumstances as lead to the inference of negligence.[1] There may be no direct proof of negligence; yet the way in which an injury is done may be such that negligence is the most probable hypothesis by which it can be explained, and when this is so, the defendant must disprove negligence by showing that he exercised due care.[2]

Degree of diligence required.

§ 872. It has sometimes been said that a company is bound to use the most perfect possible contrivances to prevent the escape of sparks.[3] But this is an error. If a railroad is required to have perfect mechanism at its command, no railroad can be operated, because no railroad can have perfect mechanism.[4] The best that can be done is, by careful trial of all approved mechanisms, and careful study of all improvements that may be proposed, to get the best apparatus that can, under the circumstances, be obtained.[5] A more perfect contrivance than that employed may be possible, and may be even patented; yet, until it has been accepted in general use a company cannot be charged with negligence in not adopting it. It is unnecessary to give for this position the reason that if the test be a perfect apparatus we lose ourselves in the maze of purely speculative mechanics. It is enough for us to fall back on the essential principle that lies at the base of this branch of the law, that the diligence to be exacted from a specialist is the diligence which good specialists in his department are accustomed to show. Indeed, if we force him to go beyond this limit, and require him to experiment, when working his engine, with conjectural improvements such as good specialists are not accustomed to apply, disasters much more terrible would be occasioned than those which, under the present rule, occur. Initiatory experiments

[1] Whart. on Ev. § 42; Garrett *v.* R. R. 36 Iowa, 121.

[2] Kendall *v.* Boston, 118 Mass. 234; Field *v.* R. R. 32 N. Y. 339; Gagg *v.* Vetter, 41 Ind. 228; Garrett *v.* R. R. 36 Iowa, 121; Hull *v.* R. R. 14 Cal. 387; Piggott *v.* R. R. 3 C. B. 229.

[3] Indiana R. R. *v.* Paramore, 31 Ind. 143; St. Louis, A. & T. R. R. *v.* Gilham, 39 Ill. 455; Ill. Cent. R. R. *v.* McClelland, 42 Ill. 355; Ill. Cent. R. R. Co. *v.* Mills, 42 Ill. 407; Chicago & Alt. R. R. *v.* Quaintance, 58 Ill. 389; Ill. Cent. R. R. *v.* Shanefelt, 47 Ill. 497.

[4] See supra, §§ 52, 65, 631, and particularly § 635.

[5] See supra, § 635; Crist *v.* R. R. 58 N. Y. 638.

should be confined to trial processes, not to the running of ordinary business trains.[1] At the same time we must remember that the best practicable machinery must be used, and every reasonable precaution, such as is usual among good engineers, should be taken in running the engine.[2]

[1] See 1 Redfield on R. R. p. 454; Jefferis *v.* R. R. 3 Houston, 447; Smith *v.* R. R. 10 R. I. 22; Burroughs *v.* R. R. 15 Conn. 124; 2 Am. R. R. C. 30; Frankford T. C. *v.* R. R. 54 Penn. St. 345; Phil. &c. R. R. *v.* Yeager, 73 Penn. St. 125; Toledo, &c. R. R. *v.* Larmon, 67 Ill. 68.

See Spaulding *v.* R. R. 30 Wis. 110.

In the summing up of the judge to the jury, in the case of Freemantle *v.* London, &c. Railway Co. 10 C. B. N. S. 89, he said: "The question is, whether, notwithstanding the evidence of impossibility which has been adduced by all that numerous company of witnesses, do you, nevertheless, think that the plaintiffs have established the fact that the fire could not be accounted for upon any other supposition than that it must have come from the engine? If you do, then I must repeat that all this evidence that is so powerful on the first question is cogent against the defendants upon the second; because it then goes to show that the fire was occasioned by an engine which was so perfect in its quality that nothing could have caused the emission of sparks except negligence, either in the condition of the engine or in the way in which it was worked by the driver; and, therefore, the evidence then becomes cogent the other way." . . . .

This, however, is hard measure; putting the company in the attitude of insuring the perfection of their apparatus, in face of the fact that there is no machinery, no matter how perfect, but is liable to *casus*, and that *casus*, when proved, is a defence. See supra, § 114–6.

A peculiar degree of care, however, should be used in passing through a village or city with wooden buildings bordering the track. Fero *v.* R. R. 22 N. Y. 209.

A judicious view was taken in Mich. Cent. R. R. *v.* Anderson, 20 Mich. 244, where it was held that the care which a railroad company must exercise in the running of trains so as not to injure property situated near their track, is not contingent upon such circumstances as the force and direction of the wind, the dryness of the weather, or the combustible character of property liable to be affected. The company not being in fault as to the quality or character of their equipments, the special risks incident to proximity to railroad trains must be borne by those who establish themselves in such localities.

The single issue is, whether the "persons conducting the engine were negligent or the engine was insufficient." Vories, J., Coale *v.* R. R. 60 Mo. 233; aff. in Lester *v.* R. R. 60 Mo. 265; *S. P.* Burke *v.* R. R. 7 Heisk. 452.

[2] Toledo, &c. R. R. *v.* Wand, 48 Ind. 476; Pittsburg R. R. *v.* Nelson, 51 Ind. 150; Hoyt *v.* Jeffers, 30 Mich. 182; Kenney *v.* R. R. 63 Mo. 99; Erie R. R. *v.* Decker, 78 Penn. St. 293; Burke *v.* R. R. 7 Heisk. 452.

A railroad company is not obliged to keep men stationed along the line of its road either to guard against or to extinguish fires which may happen. Balt. & Ohio R. R. Co. *v.* Shipley, 39 Md. 251.

§ 873. For a railroad company to leave light combustible material, consisting either of dried grass or light wood, along its line, in such a situation as readily to ignite from sparks, is such negligence as will justify a jury in holding it responsible for damage sustained by a fire communicated from such combustible material to a neighboring field.[1] Ordinarily, however, the question is for the jury, and the court will not hold the mere leaving of dry grass on the track to be negligence at law.[2]

Leaving inflammable material on the track.

It has also been held that evidence as to the usage of the defendant, in regard to the construction and condition of its engines, is inadmissible; the defendant must prove that its engines were properly constructed and in good condition; but such proof is not to be restricted to their condition on the day of the fire. Ibid. See Whart. on Evidence, § 44 *et seq.*

[1] Supra, § 98; Flynn *v.* R. R. 40 Cal. 14; Henry *v.* R. R. 50 Cal. 176; Hearne *v.* R. R. 50 Cal. 482; Bass *v.* R. R. Co. 28 Ill. 16. As to when the leaving of dry grass and weeds is negligence, see Ill. Cent. R. R. Co. *v.* Mills, 42 Ill. 407; Ohio & M. R. R. *v.* Shanefelt, 47 Ill. 497; Ill. Cent. R. R. *v.* Frazier, 64 Ill. 28; Rockford, &c. R. R. *v.* Rogers, 62 Ill. 346; Ill. Cent. R. R. *v.* Nunn, 51 Ill. 78; Toledo, &c. R. R. *v.* Wand, 48 Ind. 476; Pittsburg, &c. R. R. *v.* Nelson, 51 Ind. 150; Troxler *v.* R. R. 74 N. C. 377.

In an English case already cited (Smith *v.* R. R. L. R. 6 C. P. 14, supra § 98), the evidence was that workmen employed by the defendants, a railway company, after cutting the grass and trimming the hedges bordering the railway, placed the trimmings in heaps between the hedge and the line, and allowed them to remain there fourteen days, during very hot weather, which had continued for some weeks. A fire broke out between the hedge and the rails, and burnt some of the heaps of trimmings and the hedge, and spread to a stubble field beyond, and was thence carried by a high wind across the stubble field and over a road, and burnt the plaintiff's cottage, which was situated about two hundred yards from the place where the fire broke out. There was evidence that an engine belonging to the defendants had passed the spot shortly before the fire was seen, but no evidence that the engine had emitted any sparks, nor any further evidence that the fire had originated from the engine, nor was there any evidence that the fire began in the heaps of trimmings and not on the parched ground around them. It was held, first, that it being a matter of common knowledge that engines do emit sparks, there was evidence for the jury that the fire originated in sparks from the engine that had just passed; secondly, that there was evidence for the jury that the defendants were negligent in leaving the dry trimmings, and that the trimmings either originated or increased the fire, and caused it to spread to the stubble field; and, thirdly, that if the defendants were negligent they were liable for the injury, that resulted from their conduct, to the plaintiff, although they could not have reasonably anticipated that such injury would be caused by it.

[2] Ill. Cent. R. R. *v.* Mills, 42 Ill. 407; Hearne *v.* R. R. 50 Cal. 482.

§ 874. The omission of spark-catchers is *per se* negligence, wherever such as extinguishers would be operative in preventing such an emission of sparks as would be likely to endanger surrounding interests.[1]

Omission of spark-catcher.

§ 875. Negligently dropping coals of fire on track and setting fire to ties is also negligence, which, on the fire communicating to an adjacent field, makes the company liable.[2]

Setting fire to ties.

§ 876. It has been held negligence on the part of a railway engineer to use wood in a coal-burning engine, while running it over the road, for the reason that the meshes in the wire netting, used to prevent the escape of fire sparks, are made much larger when coal only is used for fuel, and the sparks from wood are much more dangerous because they retain the fire for a much greater length of time. To use wood, therefore, in such an engine, in a dry time, with a high wind prevailing, would be negligence.[3]

Burning wood in a coal-burning engine.

§ 877. Where the plaintiff or his family or servants was in a position to have prevented damage from the fire, and made no efforts to do so, the plaintiff cannot recover from the company whose engines caused the fire.[4] And so when he neglected to remove or to protect goods for whose loss he afterwards claimed damages.[5]

Contributory negligence.

§ 878. It has been ruled in Illinois that land-owners contiguous to railroads are as much bound in law to keep their lands free from dry grass and weeds as the railroad company is on its right of way; and that unless it appears that the negligence of the company is greater

Leaving combustible matter near the track.

[1] Anderson *v.* C. F. Steamboat, 64 N. C. 399; Hoyt *v.* Jeffers, 30 Mich. 181. In Kellogg *v.* R. R. Central L. J. for June 4, 1874, it was left to the jury by Miller, J., to determine whether neglecting to use a "spark-arrester" on a steam ferry-boat was negligence; and they naturally held that it was. With regard to railway locomotives, such an omission, in a populous country, must be held as negligence, as a matter of law. Affirmed in Sup. Ct. U. S. 94 U. S. (4 Otto) 469. See supra, § 154. And see Teall *v.* Barton, 40 Barb. 137.

[2] Field *v.* R. R. 32 N. Y. 339; Webb *v.* R. R. 3 Lansing, 453; S. P. & S. C. 49 N. Y. 420. See supra, § 151.

[3] Chic. & Alt. R. R. *v.* Quaintance, 58 Ill. 389.

[4] Ill. Cent. R. R. Co. *v.* McClelland, 42 Ill. 355.

[5] Ward *v.* R. R. 29 Wis. 144. Supra, § 866, note 4.

than that of the land-owner, the latter cannot recover for injuries by fire thus arising.[1]

It is said, however, that where the adjoining land, to which fire has been so communicated, is woodland, that fact should be considered by the court in the instructions as abating the degree of diligence required of the land-owner, on account of the greater difficulty of keeping such land clear of inflammable matter.[2]

Certain it is, that if a party wantonly permits combustible matter to accumulate about his house, by which means a spark from a locomotive is kindled into a flame, he has no case.[3] But such an ordinary accumulation of dry leaves or other combustible materials as is among the usual incidents of farming life cannot be regarded as contributory negligence. A railway company is bound to anticipate such ordinary accumulations, and to guard against them.[4] So it has been held that a person who, after the construction of a railroad, builds in an exposed position with respect thereto is not necessarily on that account precluded from recovering for the destruction of his premises through the want of proper caution on the part of the company.[5] It has also been ruled that where a barn, close to the track of a railroad, was negligently burned by sparks from a locomotive, it was not proof of contributory negligence that the owner suffered the roof to be in such condition that it was more liable to take fire than if it had a secure and safe roof.[6]

Proof of prior firings from the same engine can be received to afford an inference of defective construction.[7]

[1] Ohio & M. R. R. Co. *v.* Shanefelt, 47 Ill. 497; Ill. Cent. R. R. Co. *v.* Frazier, Ibid. 505; Ill. Cent. R. R. Co. *v.* Munn, 51 Ill. 78. See Smith *v.* R. R. 37 Mo. 288.

[2] Chicago, &c. R. R. *v.* Simonson, 54 Ill. 504; and see, as still further qualifying the text, Kans. Pac. R. R. *v.* Butts, 7 Kans. 308; Spaulding *v.* R. R. 30 Wis. 110. Compare remarks of Cole, Ch. J., in Kesee *v.* R. R. 30 Iowa, 83.

[3] Toledo R. R. *v.* Maxfield, 72 Ill. 82; Kansas R. R. *v.* Brady, 17 Kans. 380; Coates *v.* R. R. 61 Mo. 37. See Fitch *v.* R. R. 45 Mo. 422; Kesee *v.* R. R. 30 Iowa, 82; though see Phil. &c. R. R. *v.* Hendrickson, 80 Penn. St. 182.

[4] Salmon *v.* R. R. 38 N. J. L. 5. See Garrett *v.* R. R. 36 Iowa, 121; Kellogg *v.* R. R. 26 Iowa, 223; Erd *v.* R. R. 41 Wis. 65.

[5] Grand Trunk R. R. *v.* Richardson, 91 U. S. 454; Burke *v.* R. R. 7 Heisk. 451; R. R. *v.* Chase, 11 Kans. 47. See, also, Phil. R. R. *v.* Hendrickson, 80 Penn. St. 182.

[6] Phil. &c. R. R. *v.* Hendrickson, 80 Penn. St. 182.

[7] Whart. on Ev. § 42, where the distinctions on this question are discussed.

§ 879. Suppose that there are intermediate objects between the object for whose burning damages are claimed and the object first ignited; and suppose that the fire, if there had been due diligence, could have been extinguished when passing through one of those intermediate objects, is the original author of the fire liable? This interesting and difficult point has been already discussed in sections in which the doctrine of causal connection in this respect is examined.[1]

Intervening negligence of third party.

§ 880. By statutes in force in several of the states, railroad companies are made liable for all fires communicated by engines, independently of the question of negligence; and they are authorized to insure such risks. Under these statutes the companies are held only to be liable for the burning of such articles as could be insured, thus excluding mere movable and transitory chattels,[2] but including remote as well as proximate damage.[3]

Local statutes imposing liability on company.

III. FIREWORKS.

§ 881. The explosion of fireworks on all public occasions, when sanctioned by law or custom, is subject, so far as concerns participants, to the considerations heretofore noticed as applying to public games.[4] But when such fireworks are exploded in grounds not set apart for the purpose, their explosion is unlawful, and makes the parties concerned liable for injuries sustained by others not participants.[5]

IV. FIRE-ARMS.

§ 882. The same reasoning applies to the use of fire-arms.[6] A

The case of Ohio & Miss. R. R. Co. *v.* Shanefelt, supra, holding that land-owners contiguous to railroads are as much bound in law to keep their lands free from an accumulation of dry grass and weeds as railroad companies are, applies, on reasoning already given (supra, § 148), to cases where a fire is ignited on the company's right of way, and is communicated by negligent third parties.

[1] See supra, §§ 148–9.

[2] Chapman *v.* R. R. 37 Me. 92. See Ingersoll *v.* R. R. 8 Allen, 438; Hart *v.* R. R. 13 Metc. 99. See, for statutes, Shear. & Red. on Neg. § 334.

[3] See Hooksett *v.* R. R. 38 N. H. 242; Hart *v.* R. R. 13 Metc. 99; Ingersoll *v.* R. R. 8 Allen, 438; and cases cited supra, § 150 *et seq.*

[4] Supra, § 401.

[5] Conklin *v.* Thompson, 29 Barb. 218; Scott *v.* Shepherd, 2 W. Bl. 892. Supra, § 95.

[6] See, also, supra, §§ 92, 108, 853.

hunter shooting in a wilderness is not bound to the caution required of a person shooting in a populous neighborhood,[1] or of a military officer who, when training his men, negligently shoots a spectator;[2] though in the latter case it must be remembered that as the use of fire-arms is lawful, and as the men take upon them all the risks incident to their employment, and as persons knowingly visiting such spectacles take the same risk, the burden on the plaintiff is to prove negligence.[3] But when the firing is unlawful, or when, being lawful, it is negligent, then it brings liability for the consequences, including injuries caused by fright.[4] And as loaded fire-arms are dangerous weapons, it is negligence to place them in the hands of persons incompetent to use them.[5]

V. SMOKE FROM FIRE.

§ 882 *a*. He who negligently injures another by smoke is in like manner liable to suit.[6] In a late case in Illinois, it was averred in the declaration substantially that the plaintiff owned and occupied as a residence certain property fronting on Walnut Street in the town of Fairbury; that the defendant constructed along, upon, and over said street its railroad, and ran daily its locomotives and trains thereon; that smoke and cinders were thrown from the locomotives over the plaintiff's property. On demurrer it was held that the declaration disclosed a good cause of action.[7]

[1] Supra, §§ 47–8; Bizzell *v.* Booker, 16 Ark. 308.

[2] Castle *v.* Duryea, 42 Barb. 480; 2 Keyes, 169.

[3] See R. *v.* Hutchinson, 9 Cox C. C. 555; and Comments on 3 Russ. Cr. & M. 660.

[4] Supra, § 836. See Haack *v.* Fearing, 5 Roberts. 528.

[5] Supra, §§ 92, 853. Wood on Nuisances, § 429 *et seq*. As to construction of Michigan statute concerning careless use of fire-arms, see People *v.* Chappell, 27 Mich. 486.

[6] See Smith *v.* R. R. 37 L. T. N. S. 224; Sampson *v.* Smith, 8 Sim. 272.

[7] Stone *v.* R. R. S. C. Ill. 1875.

CHAPTER VI.

DEFECTIVE FENCING; COLLISION OF CATTLE WITH LOCOMOTIVE ENGINE.

I. General duty to fence, § 883.
Neglect to repair fences by which cattle escape, § 883.
Fence left open by defendants whereby plaintiff's cattle escapes, § 884.
Neglect by defendant to fence dangerous places, § 885.
II. Fencing by railroads, § 886.
At common law not bound to fence, § 886.
By local statutes this duty is imposed, § 887.
Necessary exceptions to statutes, § 887 *a*.
Limitations as to persons benefited, § 887 *b*.
Degree of diligence required in fencing, § 888.
Cattle-guards, § 889.
III. Collision of engine with cattle, § 891.
Company liable when neglecting statutory duty to fence, § 892.
Even when cattle are trespassers, company liable if collision could have prudently been avoided, § 893.
Omission to use bell or whistle, § 896.
Travelling with undue speed, § 896 *a*.
Company not liable in case of accident, § 897.
When injury caused only by fright, company not liable, § 898.
Burden of proof on plaintiff, § 899.
Contributory negligence, § 900.
When road is run by several companies, § 901.

I. GENERAL DUTY TO FENCE.

§ 883. THE English common law requiring the owner of cattle to fence them in is in force in Maine,[1] New Hampshire,[2] Massachusetts,[3] Vermont,[4] New York,[5] New Jersey,[6] Pennsylvania,[7] Delaware,[8] Maryland,[9] Kentucky,[10]

Common law duty to fence.

[1] Little *v.* Lathrop, 5 Greenleaf, 356; Estes *v.* R. R. 63 Me. 509; Lord *v.* Wormwood, 29 Me. 282.

[2] Avery *v.* Maxwell, 4 N. H. 36. See, as to usage modifying this, Wheeler *v.* Rowell, 7 N. H. 515.

[3] In Lyons *v.* Merrick, 105 Mass. 71, the mule of the defendant escaped

[4] Holden *v.* Shattuck, 34 Vt. 336.

[5] Munger *v.* R. R. 4 N. Y. 349; Bowman *v.* R. R. 37 Barb. 516. See, as to recent statute prohibiting cattle from running at large, Cowles *v.* Balzer, 47 Barb. 562; Bowyer *v.* Burlow, 3 N. Y. Sup. Ct. 884.

[6] Price *v.* R. R. 2 Vroom, 229; Chambers *v.* Matthews, 3 Harrison, 368; Coxe *v.* Robbins, 4 Halst. 384.

[7] N. Y. & Erie R. R. *v.* Skinner, 19 Penn. St. 301, where it was strongly declared that the owner of straying cattle is liable for the damage they do; but this is much qualified in N. P. R. R. *v.* Rehman, 49 Penn. St. 101.

[8] Vandergrift *v.* R. R. 2 Houston, 297.

[9] Keech *v.* R. R. 17 Md. 32.

[10] Louisville & F. R. R. *v.* Ballard, 2 Metc. (Ky.) 177.

Minnesota,[1] Indiana,[2] and Michigan.[3] No such liability is regarded as in force by common law in Ohio,[4] Iowa,[5] Illinois,[6] California,[7] North Carolina,[8] South Carolina,[9] Georgia,[10] Mississippi,[11] Missouri,[12] and Texas.[13] In those states where the

from his field through an insufficient fence into the field of A., thence into the field of B., and thence into the field of the plaintiff, and injured the plaintiff's mare. Held, that the defendant was liable for the injuries, although, as between him and A., the latter was bound to keep the fence between their fields in repair; although the fence between the plaintiff's field and B.'s was insufficient; and although the defendant did not know that the beast was vicious. As to general duty, see Eames *v.* R. R. 98 Mass. 560; Thayer *v.* Arnold, 4 Metc. 589; McDonnell *v.* R. R. 115 Mass. 564.

In Lee *v.* Riley, 18 C. B. N. S. 722; 34 L. J. C. P. 212, it appeared that through the defect of a gate, which the defendant was bound to repair, his horse got out of his farm into an occupation-road, and strayed into the plaintiff's field, where it kicked the plaintiff's horse; and it was held, that the defendant was liable for the trespass by his horse, and that it was not necessary, for the maintenance of the action, to prove that defendant's horse was vicious, and that the defendant was aware of it; also, that the damage the plaintiff had sustained by the injury to his horse was not too remote, but was sufficiently the consequence of the defendant's neglect to be recoverable. See Ellis *v.* Loftus Iron Co. L. R. 10 C. P. 10, 31 L. T. N. S. 483.

[1] Locke *v.* R. R. 15 Minn. 350.

[2] Williams *v.* R. R. 5 Ind. 111; Indian. R. R. *v.* Harter, 38 Ind. 557; Brady *v.* Ball, 14 Ind. 317. Infra, § 923. Though see under statute, M. S. & N. R. R. *v.* Fisher, 27 Ind. 96.

[3] Johnson *v.* Wing, 3 Mich. 163; Williams *v.* R. R. 2 Mich. 259.

[4] C. C. & C. R. R. *v.* Elliott, 4 Ohio St. 474. It is, however, held that if the owner of cattle permit them to stray, he cannot require those running trains to modify their speed in view of the abstract contingency that cattle may turn up on the road. At the same time, when cattle appear, those running the train must avoid damaging them, if this can be prudently done. C. O. R. R. *v.* Lawrence, 13 Ohio St. N. S. 66.

[5] Alger *v.* R. R. 10 Iowa, 268; Herold *v.* Meyers, 20 Iowa, 378; Smith *v.* R. R. 34 Iowa, 506.

[6] Stoner *v.* Shugart, 45 Ill. 76. Though see Bass *v.* R. R. 28 Ill. 9; C. B. & Q. R. R. *v.* Cauffman, 38 Ill. 425. As to construction of Illinois statute, see Ohio, &c. R. R. *v.* Jones, 63 Ill. 472. In Illinois it is "the settled law that individuals may permit their stock to run on the commons and on the highways of the country, and that in doing so they are guilty of no wrong." Rockford, &c. R. R. *v.* Rafferty, 73 Ill. 59; aff. Chic. &c. R. R. *v.* Cauffman, 38 Ill. 425.

[7] Waters *v.* Moss, 12 Cal. 535; Comerford *v.* Dupuy, 17 Cal. 308.

[8] Laws *v.* R. R. 7 Jones, 468.

[9] Murray *v.* R. R. 10 Rich. 227.

[10] Macon & W. R. R. *v.* Baber, 42 Ga. 305.

[11] Vicksburg & J. R. R. *v.* Patton, 31 Miss. 156. See Dickson *v.* Parker, 3 How. (Miss.) 219; N. O. R. R. *v.* Field, 46 Miss. 573.

[12] Gorman *v.* R. R. 26 Mo. 441. See H. & St. J. R. *v.* Kenney, 41 Mo. 271; Crafton *v.* R. R. 55 Mo. 580.

[13] Walker *v.* Herron, 22 Tex. 55.

English common law is in this respect not in force, and where there is no local statute requiring fencing in of cattle, it is not negligence in the owner of cattle to permit them to stray at large.[1] Hence cattle thus straying upon uninclosed land are not trespassers; and it is not contributory negligence in their owners if it should appear that when trespassing they were negligently run down.[2] At the same time if they are injured by any defect or dangerous agencies which are the usual, lawful, and necessary incidents of the place on which they stray, their owner has no redress.[3] But it must not be forgotten that cattle let loose on a railroad track are likely to do much harm; and hence so to let them loose may impose on their owner liability for the consequences, even where there is no law requiring cattle to be inclosed.[4]

Straying cattle are trespassers.

Where the English common law is in force, all cattle straying even on uninclosed land are trespassers, and the owner is liable for any damage they may commit.[5] How far such straying constitutes contributory negligence, so as to defeat an action for negligent injury to the cattle, has been already discussed.[6] In any view, the owner of land is not bound at common law to fence out cattle, and if they stray on such land it is at their own risk.[7] He may drive them off, provided he does

[1] C. C. & C. R. R. *v.* Elliott, 4 Ohio St. 474; Herold *v.* Meyers, 20 Iowa, 378; Stoner *v.* Shugart, 45 Ill. 76; Macon & W. R. R. *v.* Baber, 42 Ga. 305; Laws *v.* R. R. 7 Jones (N. C. L.), 468.

[2] Supra, §§ 345, 396.

[3] Supra, §§ 350, 353, 837, 838. See Walker *v.* Herron, 22 Tex. 55; Cowles *v.* Balzer, 47 Barb. 562; Woodward *v.* Purdy, 20 Ala. N.S. 379.

[4] Cent. O. R. R. *v.* Lawrence, 13 Ohio St. N. S. 66; N. Y. & E. R. R. *v.* Skinner, 19 Penn. St. 301; Mobile, &c. R. R. *v.* Hudson, 50 Miss. 572. See supra, § 851; infra, § 908.

[5] Lee *v.* Riley, 18 C. B. N. S. 722; Powell *v.* Salisbury, 2 Young & J. 391; Little *v.* Lathrop, 5 Greenl. 35; Avery *v.* Maxwell, 4 N. H. 36; Thayer *v.* Arnold, 4 Met. 589; Rust *v.* Low, 6 Mass. 90; Munger *v.* R. R. 4 N. Y. 349; Wells *v.* Howell, 19 Johns. 385; Coxe *v.* Robbins, 4 Halst. 384; Vandergrift *v.* R. R. 2 Houston, 297; Williams *v.* R. R. 5 Ind. 111; Brady *v.* Ball, 14 Ind. 317; Johnson *v.* Wing, 3 Mich. 163. Infra, § 908.

[6] Supra, §§ 345, 396.

[7] Lord *v.* Wormwood, 29 Me. 282; Chambers *v.* Matthews, 3 Harr. (N. J.) 368; Holden *v.* Shattuck, 34 Vt. 336; Bush *v.* Brainerd, 1 Cow. 78; Knight *v.* Abert, 6 Penn. St. 472; Phil. &c. R. R. *v.* Wilt, 4 Whart. 143; N. Y. & Erie R. R. *v.* Skinner, 19 Penn. St. 301; Hilton *v.* Ankisson, 27 L. T. N. S. 519; Deane *v.* Clayton, 7 Taunt. 489; Ilott *v.* Wilkes, 3 B. & Al. 304; Buxton *v.* R. R. L. R. 3 Q. B. 549; Bird *v.* Holbrook, 4 Bing. 628; and cases cited supra, § 396.

not do so negligently or with unnecessary force, so as to injure them; and he is not liable for any injury they may subsequently receive.[1] In some jurisdictions, however, statutes are in force providing that the owner of unfenced land can have no redress for injuries committed by straying cattle. In such cases, no suit can be maintained by him for such injuries against the owner of such cattle.[2] And if he, in any way (though unintentionally), tempt such animals on his land, he is liable for the damage they there receive from any peculiar peril.[3]

Leaving open fence.

§ 884. An action, on the principle above stated, lies when by the defendant's negligence the plaintiff's fence is left open and his crops destroyed.[4] But the injury must be a natural and ordinary consequence of the negligence.[5] So, also, if caused by the negligent act of a third person, the causal connection is broken, and the defendant's liability is detached.[6]

Duty to fence dangerous places.

§ 885. The duty of parties to fence in dangerous places has been already incidentally noticed.[7] It is sufficient here to say that while a person opening near a public way a dangerous hole or ditch is bound to fence it in,[8] yet the dangerous place must be sufficiently near the public way to make it probable that persons travelling the public way might be hurt.[9] Thus in an English case,[10] it appeared that the defendants were possessed of a canal and the land between it and a sluice; an ancient foot-path passed through the land close to the sluice; there was a towing-path nine feet wide by the side of the canal, and an intervening space of twelve feet of grass between the towing-path and the foot-path. By the permission of the defendants the intervening space had been lately used for carting, and ruts having been caused, the whole space between the canal and the sluice had been covered with cinders, and thus all dis-

[1] Palmer *v.* Silverthorn, 32 Penn. St. 65. As to Roman law, see supra, § 782.

[2] Studwell *v.* Ritch, 14 Conn. 292; Wright *v.* Wright, 21 Conn. 329. See Phelps *v.* Cousins, 29 Ohio St. 364.

[3] Crafton *v.* R. R. 55 Mo. 580.

[4] Loker *v.* Damon, 17 Pick. 284.

[5] Saxton *v.* Bacon, 31 Vt. 540.

[6] See Saxton *v.* Bacon, 31 Vt. 540; Crain *v.* Petrie, 6 Hill (N. Y.), 522; Vicars *v.* Wilcocks, 8 East, 1. See supra, § 136.

[7] See supra, §§ 824–32; and infra, § 931.

[8] Supra, § 824 *a*.

[9] See supra, §§ 815, 824 *a*.

[10] Binks *v.* R. R. 3 B. & S. 244; 32 L. J. Q. B. 26, relying on Hardcastle *v.* R. R. 2 H. & N. 67. See, also, Barnes *v.* Ward, 9 C. B. 392. Supra, § 825.

tinction between the path and the rest of the land had been obliterated. A person using the path at night missed his way, and fell into the canal and was drowned; and it was held that the canal was not so near the foot-path as to be adjoining to it, so as to throw upon the defendants the duty of fencing the canal off, and that the other facts did not render the defendants liable for the accident.[1]

II. FENCING BY RAILROADS.

§ 886. At common law, a railway company is not bound to maintain fences sufficient to keep cattle off its line;[2] but is bound to use every reasonable care to prevent them from straying on the line.[3] When on the track, however, lawfully or unlawfully, if they are negligently run down the company is liable.[4]

At common law no such duty.

§ 887. By statutes, however, adopted in many jurisdictions, the duty of fencing is imposed on railroads, the object being to prevent collisions with cattle straying on the road; and hence, when in consequence of defective

By local statutes such duty is imposed.

[1] See Bolch *v.* Smith, 7 H. & N. 736. Supra, §§ 824 *a*, 825.

[2] Supra, §§ 397, 833; R. R. *v.* Skinner, 19 Penn. St. 301; Lord *v.* Wormwood, 29 Me. 282; Perkins *v.* R. R. 29 Me. 307; Tonawanda R. R. *v.* Munger, 4 N. Y. 349; Toledo R. R. *v.* Wickery, 44 Ill. 76; Price *v.* R. R. 2 Vroom, 229; Chic. &c. R. R. *v.* Patchin, 16 Ill. 198; Ill. Cent. R. R. *v.* Reedy, 17 Ill. 581; Knight *v.* R. R. 15 La. An. 105; Williams *v.* R. R. 2 Mich. 259; N. E. R. R. *v.* Sineath, 8 Rich. L. 185; and cases cited supra, § 883.

[3] Buxton *v.* R. R. L. R. 3 Q. B. 549.

"Where there exist no statutory regulations defining the duties of railway companies in respect to fencing, they are under no obligations to make or maintain fences between their road and the adjoining lands. They come within the common law rule, and, at common law, the owner of land is not obliged to fence against the cattle of his neighbor. The owner of cattle is bound to keep them within his own lines, and if he suffers them to go at large, and they stray upon the premises of his neighbor, they are clearly trespassers, and he is liable for whatever damage they may commit; and, as a general rule, he cannot recover for injuries received by them while thus wrongfully on his neighbor's premises." Gilpin, C. J., in Vandergrift *v.* R. R. 2 Houston, 297. See Macon & West. R. R. *v.* Baber, 42 Ga. 305.

[4] See supra, §§ 396–8; infra, § 893; Munger *v.* R. R. 4 N. Y. 349; N. P. R. R. *v.* Rehman, 49 Penn. 301; Ill. Cent. R. R. *v.* Phelps, 29 Ill. 447; Gilman R. R. *v.* Spencer, 76 Ill. 192; Galpin *v.* R. R. 19 Wis. 604; Brown *v.* R. R. 33 Mo. 309.

fencing, cattle, in such jurisdictions, stray on the road and are injured, the company is liable for the damage, without proof of any negligence in the company in running down the cattle.[1]

[1] See supra, § 398; infra, § 891.

The statutes vary so much in character that any general classification would be futile. The following cases, however, may be of comparative use: —

In Vermont it is settled law that the obligation upon railroad companies to build a fence along their roads only extends to the owner or rightful occupier of the adjoining fields, and not to mere trespassers therein. Bemis *v.* R. R. 42 Vt. 375.

The "suitable" fences which a railroad corporation is required by the Mass. Gen. Sts. c. 63, § 43 (St. 1846, c. 271), to erect and maintain on both sides of the railroad, need not of necessity be such fences as are required to be maintained by owners of adjoining improved lands, and described in the Gen. Sts. c. 25, § 1, as "legal and sufficient." Eames *v.* R. R. 98 Mass. 561.

In Maryland, non-fencing is only *primâ facie* evidence of negligence. Keech *v.* R. R. 17 Md. 32. And so in Georgia. Macon R. R. *v.* Davis, 13 Ga. 68. And California, infra, § 899.

In Ohio, in an action by the owner against a railroad company, to recover damages resulting from an injury to his cow, "by reason of the want or insufficiency of fences," &c., as provided by the first section of the Act of March 25, 1859 (S. & C. 331), entitled "An act for inclosing railroads by fences and cattle-guards," it appearing in the petition that the injury complained of was done subsequent to the taking effect of the Act of April 18, 1865 (S. & S. 7), entitled. "An act to restrain from running at large certain animals therein named," it is sufficient answer to allege, "That the plaintiff did not live along the line of its said road, nor was his said cow grazing in any inclosed field adjacent thereto. That said plaintiff knowingly, wilfully, and unlawfully permitted his said cow to run at large on the highways and uninclosed lands adjacent to defendant's said railroad, whereby said cow went upon said road and was accidentally killed." P., Ft. W. & C. R. R. Co. *v.* Methven, 21 Ohio St. 586. See, further, under Ohio St., Gill *v.* R. R. 27 Ohio St. 240; Sandusky, &c. R. R. *v.* Sloan, 27 Ohio St. 339. See supra, § 398.

Under the Indiana statute the allowing, by the company, of an insecure gate in a fence, imposes liability on the company. Cleveland, &c. R. R. *v.* Swift, 42 Ind. 119.

A railroad company is not required by the Indiana statute to fence its road, where such fencing would result in cutting itself off from the use of its own land, or leased property, or buildings, or wood-sheds, although the buildings or sheds may not be in present use; and if cattle are killed at such a point by the cars of the company, it is not liable, unless there is proof of negligence or want of care or skill on the part of the persons operating the train. Jeffers., Med. & I. R. R. *v.* Beatty, 36 Ind. 15.

See, also, Toledo R. R. *v.* Daniels, 21 Ind. 256; Ill. Cent. R. R. *v.* Swearingen, 33 Ill. 289, to the effect that the road leading to a machine shop and other appurtenances need not be fenced. So, also, as to station. In. & S. R. R. *v.* Christy, 43 Ind. 143. And as to points of intersection with

§ 887 *a*. Of special exceptions, several have been noticed in the note to the preceding section. As a general exception, it may be mentioned that when a railroad crosses a city, though it is required, as has been seen, to take

Necessary exceptions to statute.

public roads, see Jefferson R. R. *v.* Huber, 42 Ind. 173.

In cities, where the duty is not imposed on the company to fence, it is contributory negligence for the owner of cattle to permit them to run at large, though this does not excuse the company for wilfully or recklessly running them down. Jeffersonville R. R. *v.* Underhill, 48 Ind. 389; Cincinnati, &c. R. R. *v.* Street, 50 Ind. 225.

So as to the grounds of a saw-mill abutting on the road. Pittsburg, &c. R. R. *v.* Bowyer, 45 Ind. 496.

In the same state it is necessary for the complaint, in charging negligence to the company, to aver that there was no negligence on the part of the plaintiff, though such an averment is not necessary when the defendant's negligence is in not fencing. But in the latter case it must be averred that the road was not securely fenced. It is not enough to charge that the road was not fenced "according to law." Jeffersonville, &c. R. R. *v.* Underhill, 40 Ind. 229; Jeffersonville, &c. R. R. *v.* Vancant, 40 Ind. 233; Indianapolis, &c. R. R. *v.* Robinson, 35 Ind. 380.

"The Indiana statute makes no exceptions as to the place where the stock shall be killed, as to liability, if the road is not securely fenced; but this court has interpolated exceptions, such as the crossings of highways, streets, and alleys, in towns and cities, and at mills, where the public has a right and a necessity to go undisturbed; but this court has not made, and ought not to make, under the statute, an exception of large blocks of ground, merely because they are situated in a city. There is no reason why such lands not in a city must be fenced, which does not apply with equal if not greater force when they are within the limits of a city." Pettit, J., in Toledo, &c. R. R. *v.* Howell, 38 Ind. 448, citing Bellefontaine R. R. *v.* Reed, 33 Ind. 476; Indianapolis, &c. R. R. *v.* Parker, 29 Ind. 471; Toledo, &c. R. R. *v.* Cary, 37 Ind. 172. See, generally, Cincin. &c. R. R. *v.* Ridge, 54 Ind. 39; Koutz *v.* R. R. 54 Ind. 515.

The fencing of a railroad contemplated by the Indiana statute of March 4, 1863, providing compensation to the owners of animals killed or injured by the cars, &c., of a railroad company, includes the putting in of proper cattle-guards to prevent animals from passing from streets and highways upon the railroad track on each side of said streets and highways. Pitts., C. & S. R. R. *v.* Ehrhart, 36 Ind. 119.

The Illinois railroad companies are required to fence the tracks of their roads, within six months after opening, with sufficient fences to turn stock, and after erecting them, to keep them in repair; they are required to put in gates at farm crossings, which are a part of the fence, and the duty to keep their fences in repair includes the duty of keeping these gates safe and securely closed, so as to afford equal protection from stock getting upon their roads at such places as at other points. Chic. &c. R. R. *v.* Harris, 54 Ill. 528. See Rockford, &c. R. R. *v.* Spillers, 67 Ill. 167; Rockford, &c. R. R. *v.* Connell, 67 Ill. 216; Toledo, &c. R. R. *v.* Crane, 68 Ill. 355; To

every reasonable precaution to prevent collision, it is a necessity of business that it should be relieved from the duty of putting up fences.[1] But where this does not interfere with the necessary current of business, cattle-guards should be put up.[2]

Limitations to persons to be benefited.

§ 887 *b*. In England and in several of our own states, the protection of the statutes is limited to the occupiers of land adjoining the road. In such cases the company is not bound to fence out cattle straying on a highway which runs alongside of the road in parallel lines.[3] Contributory negligence, in this relation, has been already discussed.[4]

Degree of diligence in fencing.

§ 888. The degree of diligence to be exercised in fencing is not that of perfect vigilance and accuracy, but such as good business men, in this particular branch of industry, are accustomed to exercise.[5] Thus it has been ruled,

ledo, &c. R. R. *v.* Pence, 68 Ill. 524; Peoria R. R. *v.* Burton, 80 Ill. 72.

The Iowa statute, requiring railroads to fence, makes the railroad neglecting to fence liable only for damages to cattle "running at large," and not to those driven by their owner and within his control. Hinman *v.* R. R. 28 Iowa, 491; Smith *v.* R. R. 34 Iowa, 96.

The Iowa statute does not compel railroads to fence their depot grounds. Davis *v.* R. R. 26 Iowa, 549; Durand *v.* R. R. 26 Iowa, 559; Smith *v.* R. R. 34 Iowa, 506; Flattes *v.* R. R. 35 Iowa, 191; Latty *v.* R. R. 38 Iowa, 259. As to Missouri, see Crafton *v.* R. R. 55 Mo. 580.

Under the Iowa statute, to attach liability to a railroad for injury to cattle from its failure to repair its fences, it must have knowledge, either actual or implied, that the fence is out of repair, and a reasonable time to put it in good condition. Aylesworth *v.* R. R. 30 Iowa, 459.

[1] See Halloran *v.* R. R. 2 E. D. Smith, 257; Bowman *v.* R. R. 37 Barb. 516; Ill. Cent. R. R. *v.* Goodwin, 30 Ill. 117; Great W. R. R. *v.* Morthland, 30 Ill. 451; Galena, &c. R. R. *v.* Griffin, 31 Ill. 303; Ohio & M. R. R. *v.* Rowland, 50 Ind. 349; Gerren *v.* R. R. 60 Mo. 405.

[2] Perkins *v.* R. R. 29 Me. 307; Brace *v.* R. R. 27 N. Y. 269; Great W. R. R. *v.* Morthland, 30 Ill. 451; Toledo R. R. *v.* Howells, supra; Tol., W. & N. R. R. *v.* Owen, 43 Ind. 405.

[3] Jackson *v.* R. R. 25 Vt. 150; Eames *v.* R. R. 98 Mass. 560; Ricketts *v.* R. R. 12 C. B. 160; Manchester R. R. *v.* Wallis, 14 C. B. 213; Ellis *v.* R. R. 2 H. & N. 424.

[4] Supra, § 398.

[5] See supra, §§ 48–65, 635; Bessant *v.* R. R. 8 C. B. N. S. 368; Polar *v.* R. R. 16 N. Y. 476; Lemmon *v.* R. R. 32 Iowa, 151; Perry *v.* R. R. 36 Iowa, 102; Chic. R. R. *v.* Utley, 38 Ill. 410; Rockford, &c. R. R. *v.* Connell, 67 Ill. 26; Chicago, &c. R. R. *v.* McMorrow, 67 Ill. 218; Chic. &c. R. R. *v.* Umphenour, 69 Ill. 198; Indiana. R. R. *v.* Marshall, 27 Ind. 300; Enright *v.* R. R. 33 Cal. 230.

A railroad corporation omitted to fence the line of its road in front of a culvert under the road-bed; and did not construct any barrier to prevent

that while railroad companies will be held to a high degree of diligence in keeping their fences in good repair, they are not bound to do impossible things, nor are they required to keep a constant patrol, night and day.[1] If, where a railroad is inclosed by a sufficient fence, a breach occurs therein by reason of the unlawful act of a stranger, and through such breach stock get upon the track and are injured; in the absence of negligence on its part, the company will not be liable, unless the accident happened after the lapse of a sufficient time for the company, in the exercise of reasonable diligence, to have discovered and repaired the breach before the injury occurred. It has been also ruled in the same state, that while these companies are not required to keep such a guard on their roads as would see a breach at the instant it occurs, and repair it at the time, still the law requires them to keep such a force as may discover breaches and openings in their fences, and close them in a reasonable time. And to neglect doing so, for a week or more, is a neglect of duty that will ordinarily render them liable for an injury ensuing therefrom. In an action, therefore, against a railroad company, to recover for injuries to two horses, inflicted by a train on defendants' road, where it appeared the horses passed upon the track through an open gate at a farm crossing, the company, having permitted the gate to remain open for a week previous to the accident, was regarded as guilty of such negligence as rendered them liable.[2]

In a case in Indiana, where a portion of the fence of a railroad was burned, and one week thereafter cattle entered upon the track through the opening so caused, and were injured by a passing train, it was ruled that the delay in repairing the fence was

cattle from entering the culvert, although it was practicable to maintain such a barrier without interfering with the flow of the water. The depth of the water was usually enough to prevent the escape of cattle from the land of the adjoining proprietor at the unprotected place; but on a day when the water was low, a cow which he was pasturing there passed through the culvert, and over land of another person on the other side of it, and then entered the road at a place which was also defective for want of a suitable fence, and was there injured by a passing train. The court held that the railroad corporation was liable for the injury. Keliher *v.* R. R. 107 Mass. 411.

[1] Chic. &c. R. R. *v.* Barrie, 55 Ill. 226.

[2] Chic. &c. R. R. *v.* Harris, 54 Ill. 528.

unreasonably long, and that the railroad company was liable for the injury to the cattle.[1]

Cattle-guards.

§ 889. A cattle-guard must be so constructed as to leave no aperture on either side through which cattle can pass.[2] Hence if a horse takes fright, runs away, and gets upon a railroad at a point where the company is bound to fence, and is killed upon the track, the fact that the fence or cattle-guard was insufficient at that point will alone render the company liable. But if the horse breaks a fence, or leaps a cattle-guard, which would be sufficient under all ordinary circumstances to turn stock, then it will not devolve on the company to prove an absence of negligence in running the train, and the company will only be liable upon proof that it was guilty of carelessness or wilful injury.[3]

Diligence in maintaining fences.

§ 890. The duty to *make* involves the duty to *maintain;* and hence the company becomes liable if it permits, as has already been incidentally seen, a broken fence to remain unrepaired after notice of the breach could reasonably have been received by the company.[4] But where an employee went over the road at four P. M. Saturday, and found the fence in repair, and the next Monday morning he passed over the road and found the fence recently broken and stock injured, it was held that the company showed due diligence, and was not liable for the injury to the stock.[5]

III. COLLISION OF STEAM-ENGINE WITH CATTLE.

§ 891. This topic is so intimately blended with others that have been already discussed, that at this place it is best considered by presenting in connection with it a few general propositions, with references to the sections where the propositions have been already examined.

[1] Cleveland, &c. R. R. Co. *v.* Brown, 45 Ind. 90.

[2] Jeffersonville, &c. R. R. *v.* Morgan, 38 Ind. 170; Ind. &c. R. R. *v.* Bonnell, 42 Ind. 539. See supra, §§ 397, 398.

[3] Chic. &c. R. R. *v.* Utley, 38 Ill. 410.

[4] McDowell *v.* R. R. 37 Barb. 195; Murray *v.* R. R. 4 Keyes, 274; Bartlett *v.* R. R. 20 Iowa, 188; Indian. R. R. *v.* Snelling, 16 Ind. 435; Brown *v.* R. R. 21 Wis. 39.

[5] Ill. Cent. R. R. Co. *v.* Swearingen, 47 Ill. 206.

§ 892. *When cattle, not being trespassers, wander on a railroad through a fence which it was the duty of the company to maintain, then the company is primâ facie liable for injuries sustained by them through collision.* — This principle is established by a series of cases already cited,[1] and will be more fully discussed when we consider the question of burden of proof.[2] But the plaintiff in such a suit cannot close after proving the injury to his cattle. He must prove, in addition, that the defendant omitted to fence.[3]

Non-fencing imposes *primâ facie* liability.

§ 893. If cattle trespass on a railroad through the negligence of their owner, the company is liable for a collision if it could have been prudently avoided.[4]

Company liable for running down trespassing cattle.

§ 894. The diligence to be exercised by an engineer in avoiding cattle on the road is to be such as would be exercised under such circumstances by good engineers, having in view the safety of their trains.[5] An engineer, seeing cattle ahead of him on a road, is not bound to reverse his engine, unless it appear that he can do so without danger to his train, or detriment to the interests of the company.[6] Nor are the company bound to break up their tim appointments for the purpose of thus avoiding cattle.[7]

Diligence required of company.

[1] See supra, §§ 397, 398, 883–88; and see, also, Wilder *v.* R. R. 65 Me. 332; McCoy *v.* R. R. 40 Cal. 532; Bay City *v.* Austin, 21 Mich. 390; Brady *v.* R. R. 3 N. Y. Sup. Ct. R. 537; Child *v.* Hearn, L. R. 9 Exch. 176.

[2] See infra, § 899.

[3] Pittsburg R. R. *v.* Hackney, 53 Ind. 488; Owens *v.* R. R. 58 Mo. 386. Infra, § 899. But see Maynard *v.* R. R. 115 Mass. 458, where it was held, that if a horse, while trespassing upon the track of a railroad corporation, is killed by a locomotive engine, the corporation is not liable unless the injury was caused by the wanton and reckless misconduct of its agents; and it is not enough to show that they carelessly ran over the horse, and did not use reasonable care to avoid him. See, also, McDonnell *v.* R. R. 115 Mass. 564. Supra, §§ 397, 398.

[4] Supra, §§ 397, 398.

Where the hogs of the plaintiff were attracted to the warehouse of the defendant by the drippings of molasses from defendant's cars, and were killed by the trains suddenly starting or approaching, without the usual alarm, this was held such negligence as entitled the plaintiff to damages. Page *v.* R. R. 71 N. C. 222.

[5] Supra, § 345; Bemis *v.* R. R. 42 Vt. 375; Chic. &c. R. R. *v.* Rice, 71 Ill. 567; Toledo R. R. *v.* McGinnis, 71 Ill. 346; Toledo R. R. *v.* Barlow, 71 Ill. 640.

[6] Parker *v.* R. R. 34 Iowa, 399; Sandham *v.* R. R. 38 Iowa, 88; Proctor *v.* R. R. 72 N. C. 579; Owens *v.* R. R. 58 Mo. 386; Lexington, &c. R. R. *v.* Ballard, 2 Met. (Ky.) 177.

[7] 1 Redf. on R. R. 498; Keech *v.* R. R. 17 Md. 32; Fisher *v.* Farm. Loan

§ 895. When the engineer, however, has notice in time enough, without serious inconvenience to the company, to avoid running down the cattle, his neglect so to do imposes liability upon company[1]. For wilful acts of an engineer, in running down the stock, a company is held not to be liable.[2]

Omission to use bell or whistle.

§ 896. Engineers are required to use the ordinary means, by bell and whistle, to repel animals from the railway track, and in some jurisdictions this is required by statute.[3] It must be remembered, however, that even when there is a statute, the company will not be liable, in an action for damages, unless the injury is traceable to the omission;[4] and when there is a *primâ facie* case of negligence, coupled with this omission, the defendants can show that the injury was not due to such omission,[5] or that the animal dashed on the road so suddenly as to give no time for notice.[6] When such means fail, then the question whether the engineer should stop the train, or check its speed, if in his power, depends upon what the safety of the passengers and train require, and upon whether the running time of the train can be kept up, notwithstanding

Co. 21 Wis. 73. See fully, supra, § 397, and cases cited infra, §§ 896, 897.

[1] Chic. &c. R. R. *v.* Barrie, 55 Ill. 226; Toledo, &c. R. R. *v.* Milligan, 52 Ind. 505; Paris, &c. R. R. *v.* Mullins, 66 Ill. 526; Chic. &c. R. R. *v.* Henderson, 66 Ill. 494.

[2] De Camp *v.* R. R. 12 Iowa, 348; Cooke *v.* R. R. 30 Iowa, 202.

[3] Bemis *v.* R. R. 42 Vt. 375; Trout *v.* R. R. 23 Gratt. 619; Jones *v.* R. R. 67 N. C. 128, cited supra, § 803; Rockford R. R. *v.* Linn, 67 Ill. 109; Edson *v.* R. R. 40 Iowa, 47; Pacific R. R. *v.* Houts, 12 Kans. 328. See, on this topic, supra, §§ 384, 804.

[4] Steves *v.* R. R. 18 N. Y. 422; Indianap. &c. R. R. *v.* Blackman, 63 Ill. 117; Quincy, &c. R. R. *v.* Welthoener, 72 Ill. 60; Flattes *v.* R. R. 35 Iowa, 191. See Stoneman *v.* R. R. 58 Mo. 503; Searles *v.* R. R. 35 Iowa, 490. Otherwise under Tennessee statute. Nash. &c. R. R. *v.* Thomas, 5 Heisk. 262.

[5] Great West. R. R. *v.* Geddis, 33 Ill. 304; Ill. Cent. R. R. *v.* Phelps, 29 Ill. 447; Springfield, &c. R. R. *v.* Andrews, 68 Ill. 56; Ill. Cent. R. R. *v.* Gillis, 68 Ill. 317; Searles *v.* R. R. 35 Iowa, 490; Edson *v.* R. R. 40 Iowa, 47; Memph. R. R. *v.* Bibb, 37 Ala. 699; Stoneman *v.* R. R. 58 Mo. 503; Howenstein *v.* R. R. 55 Mo. 33. To omit, when practicable, to use breaks, is negligence. Toledo R. R. *v.* Barlow, 71 Ill. 640. See Aycock *v.* R. R. 6 Jones (N. C.) L. 231. Supra, § 804.

It has, however, been held, that where the only proof of negligence is the killing of the stock at a public crossing, and the failure of the officers of the train to use either bell or whistle, the plaintiff cannot recover. Owens *v.* R. R. 58 Mo. 386; Holman *v.* R. R. 62 Mo. 562.

[6] Chic. &c. R. R. *v.* Bradfield, 63 Ill. 220.

the stoppage.[1] And the burden is on the plaintiff to prove negligence in cases where the law does not require fencing.[2]

It should be remembered, that on the statutory question affirmative proof that signals were given overweighs negative proof that they were not heard.[3]

§ 896 *a*. Where a train is rushed through a village or city at a velocity prohibited by law, causing thereby injury to property, this constitutes a *primâ facie* case against the company.[4] And it has been held, that the running of trains through a city at a prohibited speed is negligence *per se*,[5] though there is strong authority for holding that it is admissible for the defendants to prove that the injury was not due to the illegal speed of the defendants' train, but to other circumstances.[6] And the last view is in accordance with rulings, already cited, that the fact that a party is at the time breaking the law does not make him liable for damages attributable to *casus*, or to the negligence or wilfulness of the injured party.[7] The distinction, however, is of little moment in the present case, since, where a collision occurs with a train going at illegal speed, it would be next to impossible to prove that the illegal speed had nothing to do with the collision. In any view, it is admissible to put the ordinance in evidence, in connection with proof of excessive speed, as a fact from which negligence may be inferred.[8] But unless there be a statutory limitation, the law, it may be added, attaches negligence *a priori* to no condition or rate of speed.[9]

Travelling with undue speed.

§ 897. In accordance with principles already discussed,[10] if an

[1] Ibid. Supra, § 464.

[2] Infra, § 899.

[3] Supra, § 804; Whart. on Ev. § 415.

[4] Toledo, &c. R. R. *v.* Deacon, 63 Ill. 91. See supra, § 803.

[5] Dodge *v.* R. R. 34 Iowa, 276; Correll *v.* R. R. 38 Iowa, 120; though see Latty *v.* R. R. 38 Iowa, 250.

[6] Brown *v.* R. R. 32 N. Y. 597; though see Jetter *v.* R. R. 2 Keyes, 154; 2 Abb. Ct. of App. 458.

[7] Supra, §§ 331, 881 *a*, 896.

[8] Massoth *v.* R. R. 64 N. Y. 521; Balt. & O. R. R. *v.* State, 29 Md. 252. Supra, § 803.

[9] Plaster *v.* R. R. 35 Iowa, 449; McKonkey *v.* R. R. 40 Iowa, 205; but see Pacific R. R. *v.* Houts, 12 Kans. 328, and Reeves *v.* R. R. 30 Penn. St. 454, where it was held that a person driving cattle across a level crossing is not bound to expect a train coming with a velocity of twenty-five miles an hour.

[10] Supra, §§ 114, 553.

animal is suddenly driven on the track by sudden fright, or other circumstance, and there is no fault on the part of the engineer, the company is not responsible.[1] So it has been ruled[2] that a railroad company is not responsible for the value of a mule which passed through a gap in the fence near the railway, jumped on the track, only about fifty yards ahead of the locomotive, and was killed by an inevitable collision, there being no proof of negligence, unskilfulness, defective machinery, or recklessness. Had the mule, it was said, been on the railroad track far enough ahead to enable the engineer, by proper means, to stop the locomotive before it reached the animal, or to have enabled him to retard the train's progress until the mule could have been driven out of all danger of collision, it was his duty to see and save the mule, and, for failing to do so, the railroad company would have been responsible for its value. And so the company is not liable for breaches in its fence produced by causes beyond its control.[3]

Company not liable in cases of accident.

§ 898. A railroad company is not liable, under the fencing statutes, for an injury to an animal, where a train caused the animal to take fright, and the injury was the result of the fright, there being no negligence in the company. And hence the company has been held not liable, where a colt frightened by a train, without negligence on the company's part, ran from an adjoining field upon the railroad track, which was not properly fenced, and there broke its leg between the bars of a cow-pit.[4] And this is in accordance with the law as expressed in other relations.[5] A railroad company in exercise of its chartered privileges must sound whistles and do many other things calculated to frighten horses. If unchartered, it would be liable for damage thus produced; if chartered, its charter is a defence for its acts done in necessary

Not sufficient if the injury was caused by fright, there being no collision.

[1] Ill. Cent. R. R. *v.* Wren, 43 Ill. 77; Chicago, &c. R. R. *v.* Bradfield, 63 Ill. 220; Rockford, &c. R. R. *v.* Linn, 67 Ill. 109; Brothers *v.* R. R. 5 S. C. 55.

[2] Lou. & Nash. Railroad Co. *v.* Wainscott, 3 Bush, 149.

[3] Ind. R. R. *v.* Wright, 13 Ind. 213; Ind. R. R. *v.* Oestel, 20 Ind. 231; Toledo & W. R. R. *v.* Daniels, 21 Ind. 256.

[4] Ohio & Miss. R. R. *v.* Cole, 41 Ind. 331. See Ind. R. R. *v.* McBrown, 46 Ind. 229; Peru & I. R. R. *v.* Hasket, 10 Ind. 409. To same effect is Burton *v.* R. R. 4 Harring. 252.

[5] See supra, § 836.

exercise of its privileges. But if the fright be produced by the company's negligence, then it is liable for all the consequences. Thus, when those driving a train wantonly cause cattle to take alarm, so that they become uncontrollable, the company is liable for the injury done the cattle by the fright.[1]

Burden of negligence is on plaintiff, as in other cases of collision.

§ 899. It is necessary, in cases where the plaintiff does not rely on a breach of the fencing statutes, for him to prove negligence on the part of the defendant; it is not enough to prove the collision alone.[2] When there is a duty to fence, then it is enough to show a failure in fencing, in order to make out a *primâ facie* case. But in places where it is not required to fence, the law is otherwise;[3] and where the evidence shows that a horse got upon a railroad track within the corporate limits of a city (where fencing is not required), and was driven by the train and finally killed at or beyond the city limits, and there is no evidence of negligence on the part of the company, the owner cannot recover if no negligence is inferrible.[4] But where a statute requires a railroad corporation to fence its road, the fact that animals stray upon it from an adjacent field, no intermediate fence having been put up, and that such animals are injured by a train on the road, establishes a *primâ facie* case of negligence against the corporation.[5] Nor

[1] See cases cited, supra, § 836; Sneesby *v.* R. R. L. R. 9 Q. B. 263; *S. C.* L. R. 1 Q. B. D. 42; relying on Lawrence *v.* Jenkins, L. R. 8 Q. B. 274. And see Gilman *v.* R. R. 60 Me. 235; Moshier *v.* R. R. 8 Barb. 427; Coy *v.* R. R. 23 Barb. 643.

[2] Supra, §§ 397, 398, 421; Chicago & Miss. R. R. *v.* Patchin, 16 Ill. 198; Ill. Cent. R. R. *v.* Reedy, 17 Ill. 580; Chic. & N. W. R. R. *v.* Barrie, 55 Ill. 226; Ill. Cent. R. R. *v.* Bull, 72 Ill. 537; Peoria, &c. R. R. *v.* Barton, 80 Ill. 72; Vandergrift *v.* R. R. 2 Houston, 297; Macon & West. R. R. *v.* Baber, 42 Ga. 305; Macon R. R. *v.* Vaughan, 48 Ga. 464; Mobile, &c. R. R. *v.* Hudson, 50 Miss. 572; Morris *v.* R. R. 58 Mo. 78; Swearingen *v.* R. R. 64 Mo. 73; Robertson *v.* R. R. 64 Mo. 412.

[3] Ibid.; Toledo, &c. R. R. *v.* Pence, 68 Ill. 524; Toledo R. R. *v.* Lavery, 71 Ill. 522; Toledo R. R. *v.* Delehanty, 71 Ill. 615, and cases cited in prior note; Plaster *v.* R. R. 35 Iowa, 449; Root *v.* R. R. 4 S. C. 61.

[4] Great Western R. R. Co. *v.* Morthland, 30 Ill. 451.

[5] McCoy *v.* R. R. 40 Cal. 532; Keech *v.* R. R. 17 Md. 32; Cecil *v.* R. R. 47 Mo. 246; Macon R. R. *v.* Davis, 13 Ga. 68. Supra, §§ 398, 892.

The plaintiff may close with such evidence, the burden being on defendant to prove *casus*. Great W. R. R. *v.* Helm, 27 Ill. 198; Suydam *v.* Moore, 8 Barb. 358; Waldron *v.* R. R. 8 Barb. 390; Horn *v.* R. R. 35 N. H. 169, 440. See, as to Missouri, Meyer *v.* R. R. 35 Mo. 352; Powell *v.*

does the putting of his cattle by the plaintiff in such unfenced field, he knowing that there was no fence separating it from the railroad, amount to such contributory negligence as bars the plaintiff's recovery.[1] But where a part only of a fence is defective, then the burden on the plaintiff is to show that the cattle entered through the defective part,[2] the company not being liable unless the cattle entered at the defective place.[3] On the other hand, when cattle come upon a railroad whose statutory duty it is to fence at a place where there is no fence, and wander along the road to a place where the road is not fenced, and cannot be fenced, and are there injured, the company is liable on the ground that it did not fence at the place where the cattle entered.[4] What has been said as to fencing applies where a statute prohibits running past a highway at over a certain speed.[5]

Contributory negligence.

§ 900. Contributory negligence in this relation has been already discussed.[6] It is important, however, to remember that whether there be or be not fencing statutes, it is negligence in the owner of cattle to permit them to stray in any place where they would be trespassers, and where they are likely to strike a locomotive engine;[7] though this will not excuse the company for recklessly running them down,[8] nor for not fencing in cases where the road intersects the plaintiff's land, on which he has a right to expect the company to fence.[9]

R. R. 35 Mo. 457, and cases cited § 892.

In North Carolina, all killing of cattle by railroad engines is *primâ facie* negligence. Pippen *v.* R. R. 75 N. C. 54.

[1] McCoy *v.* R. R. 40 Cal. 532; Flattes *v.* R. R. 35 Iowa, 191; Searles *v.* R. R. 35 Iowa, 490. But see supra, §§ 396, 892.

[2] See Morrison *v.* R. R. 32 Barb. 568; 56 N. Y. 302.

[3] Bennett *v.* R. R. 19 Wis. 145; Brooks *v.* R. R. 13 Barb. 594; Great W. R. R. *v.* Morthland, 30 Ill. 458; Sharrod *v.* R. R. 4 Exch. 580; Towns *v.* R. R. 21 N. H. (1 Foster) 363. See supra, § 398.

[4] Toledo, &c. R. R. *v.* Howell, 38 Ind. 447.

[5] Chicago, &c. R. R. *v.* Haggerty, 67 Ill. 113; Cleaveland *v.* R. R. 35 Iowa, 220; Flattes *v.* R. R. 35 Iowa, 191; Plaster *v.* R. R. 35 Iowa, 449.

[6] See supra. § 396.

[7] Supra, §§ 398, 883; Bellefontaine R. R. *v.* Bailey, 11 Ohio St. 333; C. O. R. R. *v.* Lawrence, 13 Ohio St. 66; Corwin *v.* R. R. 13 N. Y. 42; Shepard *v.* R. R. 35 N. Y. 641; T., P. & W. R. R. *v.* Head, 62 Ill. 233; Ind. R. R. *v.* Shimer, 17 Ind. 295; Jef. R. R. *v.* Adams, 43 Ind. 402; Pitzner *v.* Shinnick, 39 Wis. 129.

[8] Supra, § 397. See Georgia R. R. *v.* Neely, 56 Ga. 540.

[9] Supra, § 892.

§ 901. We have already noticed the conflict of opinion as to whether a company whose road is leased by another can defend itself from liability on the ground of such lease.[1] It is clear that the company running the offending train is itself liable for the collision, and for the neglect of the company whose road it leases.[2] So far as concerns the running down of cattle, each company has been held to be liable: the company owning the road, for its negligence in permitting its road to be an instrument of danger; and the company running the road, for its negligence in running trains over a road by which the required precautions are not taken.[3]

When road is run by several companies.

[1] See supra, § 584; Wyman *v.* R. R. 46 Maine, 162; Parker *v.* R. R. 16 Barb. 315.

[2] Ill. Cent. R. R. *v.* Kanouse, 39 Ill. 272. See Tracy *v.* R. R. 38 N. Y. 433.

[3] Toledo R. R. *v.* Rumbold, 40 Ill. 143. And so when the injury comes from non-fencing. Stephens *v.* R. R. 36 Iowa, 327. See supra, § 584.

CHAPTER VII.

NOXIOUS ANIMALS.

Roman law: Distinction between natural and non-natural harm, § 904.
Animals naturally noxious, § 905.
Wild animals, § 906.
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Care required in such cases, § 919.
When vicious animal is transferred to another, notice should be given of its viciousness, § 920.
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Character of notice required to make owner liable, § 922.
Knowledge of noxious propensity to be presumed, § 923.
Effect of general character of animal, § 924.
Who are liable. "Owners." § 925.
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§ 904. THE Roman law on this topic presents some distinctive features which lie at the basis of our own jurisprudence. When the owner of an animal is sued for injuries done by the animal, the first question is whether the animal, in doing the harm, acted against its nature (*contra naturam*) or in conformity with its nature (*secundum naturam*). In the first case (*contra naturam*), the injury is called *pauperies*, or *damnum sine injuria facientis datum, vel noxa;* and assumes that the animal was not provoked to the mischief, and was not led on by a stranger. If the animal is provoked by the person injured, then the latter, if himself responsible for the provocation, has no redress. If the animal is led on by the defendant, then the latter is in *culpa* (whether he be the animal's owner or not), and may be proceeded against by the *actio legis Aquiliae*.[1] But independently of this process, a distinct remedy, called the *actio de pauperie*, sometimes called *quadrupedaria*, is given against the owner as owner, to whom the harm done by the animal is imputed. To this process it is essential that the

Roman law: Distinction between natural and non-natural harm.

[1] Koch, Forderungen, iii. 1179; L. I. §§ 3-6. D. h. t.; Pr. Inst. h. t.

animal is tame, and the injury done by it *contra naturam;* and the action is inapplicable, therefore, to provoked animals and to wild beasts (*feris*). Originally only *quadrupedes* were the subjects of this action; but subsequently it was extended to other animals.[1] By the modern Roman law, in the shape it assumes in German legislation,[2] the *actio legis Aquiliae* is the sole remedy for injuries of this class; and to entitle the plaintiff to recovery, negligence on the part of the defendant must be shown, and this with the following qualifications: if the injury comes from a domestic animal, then the owner is only liable in case he is either negligently ignorant of the mischievous tendencies of the animal, or, being cognizant of such tendencies, does not properly restrain it. If, however, the animal is at the time of the injury under the care of a keeper or herdsman, then the owner is liable only in case of his negligent selection of such keeper or herdsman. If the animal, though of a domestic and innoxious character, is vicious, and the owner knows this, or ought to know it, then he is liable for any damages caused by neglect in restraining such animal.

§ 905. When the injury is done by an animal according to its natural instincts and habits (*secundum naturam sui generis*), the Roman law gave no remedy unless in some way this injury was induced by human negligence. But it was negligence in the owner of such animals to permit them to range at large; and the owner, by one of the prescriptions of the Twelve Tables, was liable for all the injuries produced by such freedom.[3] By the law as subsequently expanded, the owner was made personally liable for all injuries inflicted by the escaped animal.[4]

Animals naturally noxious.

[1] L. 1. § 2. 7–10; L. 4. D. h. t.

[2] Koch, Forderungen, iii. 1181.

[3] L. 14. § 3. D. xix. 5; Koch, Forderungen, iii. 1182. By the Prussian law, it is negligence to permit such animals to wander without a herdsman or keeper. Koch, Forderungen, iii. 1183.

[4] This appears from the reason given why it was not necessary to seize the animal (as in some modern jurisprudences), to meet damages: "Quoniam, si quid ex ea re damnum cepit, habet" (*i. e.* the party injured), "proprias actiones." L. 39. § 1. D. ad. Leg. Aquil. ix. 2. The animal, wherever it went, was subject to the claim for damages adhering to it as a lien: *noxa caput sequitur.* L. I. § 12. D. si quadr. (ix. 2.) Hence as the animal could, at any future time, be seized to make good this claim, there was no reason that it should be immediately impounded to meet damages. Curious ques-

§ 906. As by the Roman law there could be no property in wild animals, the possessor of such animals was held liable for their depredations only in case he negligently permitted them to escape his custody. No liability attached to him for them by reason of anything done by them after they obtained their liberty, if such liberty was obtained without their possessor's fault. But for injuries immediately consequent upon a negligent escape the Aediles provided a penal action for damages commensurate to the injury.[1] By the modern Prussian law, which forbids the keeping of a savage animal without license from the government, the keeping of such animal without license is *per se* negligence, which makes the delinquent responsible for all injuries which may thereby accrue to others.[2]

Wild animals.

§ 907. By the English common law, as obtaining in the United States, the owner of animals kept for use is liable for mischief done by them, when unrestrained, such mischief being in accordance with their nature; nor in such case is it necessary to prove knowledge on his part that their nature prompts them to mischief of this kind. We have already seen that a person who negligently puts animals in a position in which they are likely to do harm is, on principles heretofore fully discussed, liable for such harm;[3] and that he who uses a dangerous instrument is liable for the natural and probable mischievous consequences of the use of such instrument, in case he could by due circumspection have prevented such mischievous consequences.[4] The chief point as to which difficulty arises in the application of these principles is that which concerns the degree of knowledge the owner of the animal is presumed to possess of its mischievous tendencies. And as to this it is assumed by both the Roman law and our own, that when these tendencies are natural to the animals, they are to be regarded as general laws, knowledge of which is supposed to belong to all men.[5] On the same principle by which the tendency of

By our law when owner is liable for mischief done by his animals.

tions, however, as to priority of liens, must have arisen when an animal, on a general excursion through several fields, committed a series of depredations.

[1] L. 1. § 10. D. si quad. (ix. 1.) § 1. Inst. eod. (iv. 9); L. 4. D. eod.
[2] Koch, Forderungen, iii. 1190.
[3] See supra, § 100.
[4] See supra, § 851.
[5] See cases cited infra, §§ 917, 923.

heavy bodies to fall is regarded as a matter of common notoriety, so the tendency of animals to act according to their nature is regarded as a matter of common notoriety. Hence a person who negligently puts an animal in a position in which, following the laws of its nature, it does mischief, is as liable for the consequences as is a person who negligently puts a heavy body in such a position that it falls.[1] This principle may be applied as follows: —

Cattle.

§ 908. It is the nature of cattle when straying at large to ravage the land on which they stray; and hence it is a principle of ethics as well as of jurisprudence, that he who permits his cattle so to stray is liable for the damage they do.[2] By Plato this is announced as a primary principle of ethical jurisprudence: "*καὶ εαν ὑποζυγιον, ἢ ἵππος, ἢ τι τῶν ἀλλων δρεμματων σινηται τι τῶν πελας, κατα ταυτα ἐκτινειν την βλαβην.*"[3] By the Roman law the owner is vicariously liable for the harm done, *secundum naturam* by his domestic animals, in the same way as he is liable for the delicts of his slaves and of his children, within the scope of their representative relations.[4] That the English common law retains in some measure this doctrine is illustrated by the cases in which it is held that he who keeps animals which he knows are prone to mischief is liable for the harm done by them irrespective of the question of negligence.[5] Hence it is that the owner of cattle, by the English common law in force in several of our American states, is liable for any damage caused by his leaving them unfenced.[6] And though the difficulties which in newly opened settlements attend fencing have led to some tardiness in the adoption of the rule in our less populated states, the principle is one which it is a necessity of all advanced agricultural communities to maintain.[7] Hence in modern German and Swiss law, which does not impose fencing as a uniform necessity, the owner of cattle who permits them to stray without a herdsman is in like manner liable.

[1] See supra, §§ 73–100.

[2] See Fredrick *v.* White, 73 Ill. 590.

[3] De Legg. lib. ii. p. 170.

[4] Zimmern, Noxalklagen, § 92.

[5] Jackson *v.* Smithson, 15 M. & W. 563; May *v.* Burdett, 9 Q. B. 101.

[6] 3 Bl. Com. 211; Tewksbury *v.* Bucklin, 7 N. H. 518; McIntire *v.* Plaisted, 57 N. H. 606.

[7] See supra, § 883; see Stumps *v.* Kelley, 22 Ill. 140; Van Leuven *v.* Lyke, 1 N. Y. 515.

§ 909. When we come, however, to the exhibition of unusual viciousness, such as is not natural to cows as a class, then, in conformity with the principles just stated, the knowledge of this individual peculiarity of particular cows must be properly imputable to the owner, in order to make him liable for the mischief caused by such viciousness. But such knowledge is to be presumed if the cow in question has been in the habit of displaying such viciousness; and it is clear that negligently to drive a vicious cow makes the drover liable for the damage she may inflict.[1]

Bulls.

§ 910. We now approach ground more debatable. Is it the natural tendency of bulls, when running at large, not merely to damage crops but to attack persons? Certainly the number of the cases in which bulls make such attacks is sufficient reason, in view of the severe injuries thus inflicted, to require the owners of bulls to keep them restrained.[2] Yet the English law, departing in this respect from the Roman, seems to assume that in order to make the owner liable he should be in some way shown to be cognizant of the evil propensities of the particular bull. But where the defendant's bull, which was being driven along the public streets, ran at a man who had a red handkerchief round his neck and gored him, and the defendant after the accident was heard to say, that the red handkerchief caused the mischief, as a bull would run at anything red, it was held that this was some evidence to go to a jury, to show that the defendant knew that his bull was a dangerous animal.[3] And when of

[1] Hewes *v.* McNamara, 106 Mass. 281.

[2] See Smith *v.* Cook, L. R. 1 Q. B. D. 79. In this case defendant, a farmer, received from plaintiff a colt to pasture. He put the colt in a marsh with some heifers of his own. In the adjoining marsh, occupied by another farmer, was a bull, which was known by defendant to frequently cross into his marsh. The bull was, as far as known, a perfectly gentle animal. After the colt had been there a month, it was found dead, having apparently been gored by some animal. The plaintiff having sued the defendant, alleging that it was negligence to put the colt in a field with heifers, to which a bull could get access, and the jury having found for the plaintiff, the court refused to set aside the verdict, although no *scienter* was proved.

[3] Pollock, C. B., said: "As the circumstance of persons carrying red handkerchiefs is not uncommon, and it is reasonable to expect that in every public street persons so dressed may be met with, we think it was the duty of the defendant not to suffer such an animal to be driven in the public streets, possessing as he did the knowledge that if it met a person with a red garment it was likely to run at and injure him." Hudson *v.* Roberts,

another bull the characteristic was a habit of goring gray horses, it was held that although it was contributory negligence in a boy, knowing this peculiarity of the bull, to expose a gray horse to the bull, yet it was negligence in the defendant to let the bull wander where he might hit upon gray horses.[1]

§ 911. Rams seem to be viewed in the same light as bulls, a *scienter* being necessary to make the owner liable. When, however, the owner knows that the ram has a propensity to butt, he is bound to secure it so that it can do no harm.[2] The keeping an ass, unless known to be vicious, does not necessarily throw on the owner the burden of disproving negligence.[3]

Rams and Asses.

§ 912. Still more complicated are the questions arising in respect to liability for dogs. The first is, is it in the nature of dogs to worry sheep and other defenceless animals? The Roman law, following in this respect the doctrine of Plato, held, as we have seen, that it is the nature of dogs when unrestrained to do mischief, and that hence their owner is liable for the mischief they do when unrestrained. Whether because in the course of centuries the nature of the domestic dog has become essentially changed, or whether, as is more likely, the English judges were influenced by the desire not to impose too great a liability upon those who kept dogs for hunting or sporting purposes, the English common law at an early period assumed that to make the owner of dogs liable for their mischievous acts, he must be shown to have been aware of their particular tendency

Dogs.

6 Exch. 699; 20 L. J. Exch. 299. See Cockerham *v.* Nixon, 11 Ired. 269.

[1] Earhart *v.* Youngblood, 27 Penn. St. 331.

[2] Jackson *v.* Smithson, 15 M. & W. 563; Oakes *v.* Spaulding, 40 Vt. 347, where it was held that the owner of a ram, knowing of its propensity to butt persons, is bound so to secure it as to keep it under safe restraint.

A special statute in Vermont dispenses with proof of *scienter* as to rams, between August 1 and December 1. See Town *v.* Lamphire, 37 Vt. 52.

In Cargill *v.* Mervyn, decided in New Zealand (2 N. Z. Jur. Rep. 50), the plaintiff had a number of ewes, which he was fattening in his pasture for butchers, and carefully excluding ram sheep. The defendant's rams strayed upon the plaintiff's pasture and mixed with the ewes, causing a large number of them to get with lamb and to bear lambs, thus rendering them unsalable. In an action for the damage caused thereby, the court held that the plaintiff was entitled to recover.

[3] See Williams *v.* Dixon, 65 N. C. 416.

to such acts. "The domestic dog," says Mr. Campbell,[1] "has occasioned many legal disputes; and the presumption by the common law of England is that he is tame, and therefore the owner is not held responsible, unless the dog in question is by disposition ferocious, and reasonable ground be shown for presuming that this ferocious character is known to the owner. This is technically called proof of the '*scienter*,' from the terms anciently used in pleading. But this presumption was carried to an absurd extent, when the wolfish nature of the creature was deemed so completely extinguished that it was against his nature to worry sheep and cattle. And it did astonish the Scotch sheep-farmers when this doctrine was brought to their notice by the decision of a Scotch appeal by Lords Brougham and Cranworth,[2] who applied the rule to Scotland, so that, as Lord Cockburn observed, 'every dog became entitled to at least one worry.' The consequence was that an act (26 & 27 Vict. c. 100) was soon afterwards passed (for Scotland), declaring it unnecessary in an action against the owner of the dog to prove a previous propensity to injure sheep or cattle. An act to a similar purport was afterwards passed for England (28 & 29 Vict. c. 60)." Similar statutes have been passed in several of the United States; and in construing one of these statutes it has been ruled that the fact of knowledge in the owner of the vicious disposition of his dog, while not any longer essential to constitute the offence, is a proper subject to be taken into account and weighed by the jury in estimating the damages; it being held that recklessness of conduct or the want of due and reasonable care is an important element in estimating the damages in such a case, as it is in most cases of tort.[3]

Scienter must be established.

§ 913. So far, however, as concerns the worrying and biting of human beings, it seems by our own common law to be settled that the ferocious nature of the dog is so far extinguished by domestic life as to throw upon a party injured the burden of proving that the owner of the dog had knowledge of its tendency so to worry and bite.[4] When, how-

[1] Negligence, § 27.

[2] Flemming *v.* Orr, 2 Macq. 14.

[3] Swift *v.* Applebone, 23 Mich. 252.

[4] See Read *v.* Edwards, 17 C. B. N. S. 245; Thomas *v.* Morgan, 2 C., M. & R. 496; Marsh *v.* Jones, 21 Vt. 378; Brown *v.* Carpenter, 26 Vt. 638;

ever, such knowledge is established, or when, as it will presently be seen, the defendant is in a position in which it is his duty to have such knowledge, then liability accrues. "Whoever," says Lord Denman, C. J., "keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *primâ facie* liable in an action on the case at the suit of any person attacked or injured by the animal, without any averment of negligence or default in the securing or taking care of it. The *gist* of the action is the *keeping* the animal after knowledge of its mischievous propensities." [1]

Negligence must be proved.

§ 914. Keeping a ferocious dog for defence does not impute liability unless the dog be kept negligently.[2] In this respect the rule is to be distinguished from that laid down as to spring-guns. A spring-gun is an unnecessary and cruel engine; [3] a watch-dog, who will assail invaders, is sanctioned by usage and law, and may be maintained chained or inclosed for household protection.[4] Hence when the defendant, for the protection of his yard, kept a fierce dog, which was tied up all day and was let loose in the yard at night, and the defendant's foreman negligently went into the yard after dark, knowing that the dog was let loose at night, and was thrown down and bitten by the dog, it was held that he was not entitled to recover damages.[5] A man, however, has no right to put a ferocious dog in such a situation in the way of access to his house, that a person innocently coming there may be injured by it.[6]

The putting up of a notice, to beware of the dog, will not exempt the owner of the animal from liability to a person

Woolf *v.* Chalker, 31 Conn. 121; Vrooman *v.* Lawyer, 13 Johns. 339; Wheeler *v.* Brant, 23 Barb. 324; Fairchild *v.* Bentley, 30 Barb. 147; Buckley *v.* Leonard, 4 Denio, 500; Sherfey *v.* Bartley, 4 Sneed, 58; Durden *v.* Barnett, 7 Ala. 169; McCaskill *v.* Elliot, 5 Strobh. 196; Jackson *v.* Smithson, 15 M. & W. 563; Hudson *v.* Roberts, 6 Exch. 697.

[1] Judgt., May *v.* Burdett, 9 Q. B. 110, 111; Card *v.* Case, 5 C. B. 633; Hudson *v.* Roberts, 6 Exch. 697.

[2] Keightlinger *v.* Egan, 65 Ill. 235.

[3] See supra, § 347.

[4] See infra, § 924. Woolf *v.* Chalker, 31 Conn. 121; McIntyre *v.* Plaisted, 57 N. H. 606.

[5] Brock *v.* Copeland, 1 Esp. 302.

[6] Supra, § 860; Sarch *v.* Blackburn, 4 Car. & P. 300; Moo. & M. 505; Tindal, C. J., Curtis *v.* Mills, 5 Car. & P. 489; Charlwood *v.* Greig, 3 Car. & Kir. 48; Munn *v.* Reed, 4 Allen, 431; Laverone *v.* Mangianti, 41 Cal. 138.

injured, unless knowledge of the notice is brought home to the plaintiff.[1]

A ferocious dog, even when in his master's presence, must be safely restrained. "His being in the presence of his keeper affords no safe assurance that his known propensities will not prevail over the restraints of authority."[2]

Horses.

§ 915. Horses, when left unattended, are not only apt, as are cattle, to damage crops, but they are liable to take fright (independently of the question of careless driving), and then to do hurt by collision. Hence it is properly held that the owner of horses left without guard is liable for all the mischief they do, in pursuance of their natural habits, in consequence of their being thus left unguarded;[3] and it has even been held that if a horse and cart be left standing in the street without any person to watch them, and a person jostle against the horse and cause it to back against a shop window, the owner is liable for the damage, for he must take the risk of all the consequences that result from the horse being unattended, though an action would also lie against the person who struck the horse.[4]

It is not necessary that the mischief done by a horse should be from *viciousness*. If done from mere playfulness the master's liability is the same.[5]

Animals contagiously diseased.

§ 916. Where cattle, which were afflicted with a contagious disorder, trespassed upon an adjoining pasture and infected other cattle with the disease, it was held that the owner of the trespassing cattle was responsible for

[1] Sarch *v.* Blackburn, supra. See more fully, infra, §§ 922–4.

[2] Redfield, C. J., Brown *v.* Carpenter, 26 Vt. 638. See, also, Popplewell *v.* Pierce, 10 Cush. 509.

[3] Lynch *v.* Nurdin, 1 Q. B. 38. Supra, §§ 100–1, 113, 838; Overington *v.* Dunn, 1 Miles, 39; Hummell *v.* Wester, Bright. 133. In some states this liability is imposed by statute. Barnes *v.* Chapin, 4 Allen, 444; Goodman *v.* Gay, 15 Penn. St. 188. Criminal responsibility is on the same principles imposed. R. *v.* Dant, L. & C. 567; 10 Cox C. C. 102.

[4] Illidge *v.* Goodwin, 5 C. & P. 192. See supra, § 838, for cases where it is held contributory negligence to leave horses unattended on highways; and see McCahill *v.* Kipp, 2 E. D. Smith, 413. In Cox *v.* Burbridge, 13 C. B. N. S. 430, however, it was said that none but the public, or the owner of the fee, could complain of animals wandering on the highway.

[5] Dickson *v.* McCoy, 39 N. Y. 400.

the damage arising from the spread of the disorder as well as for the injury to the grass and herbage.[1]

§ 917. Animals *ferae naturae*, as a class, are known to be mischievous, and whoever undertakes to keep them is liable for the consequences, if damage ensue; the burden being on him to disprove negligence, it not being necessary that negligence should be averred.[2] In an English case,[3] the declaration stated that the defendant wrongfully kept a monkey, well knowing that it was of a mischievous and ferocious nature, and used and accustomed to attack and bite mankind, and that it was dangerous to allow it to be at large; and that the monkey, whilst the defendant kept the same as aforesaid, did attack, bite, and injure the female plaintiff, whereby, &c. It was objected, on the part of the defendant, that the declaration was bad, for not alleging negligence or some default of the defendant in not properly or securely keeping the animal; and it was said that, consistently with this declaration, the monkey might have been kept with due and proper caution, and the injury might have been entirely occasioned by the carelessness and want of caution of the plaintiff herself. Lord Denman, C. J., however, said: "The conclusion to be drawn from an examination of all the authorities appears to us to be this: that a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril, and that if it does mischief, negligence is presumed without express averment." When, however, the animal has escaped from its keeper and returned to wild life, as no ownership in it remains, there can be no further liability, as the Roman law above stated well determines, on the part of its late keeper.

Animals *ferae naturae*.

§ 918. Nor is the principle announced by Lord Kenyon in the case last cited to be confined to animals *ferae naturae*. Domestic animals, relapsing into their wild habits, are included in the same rule; the *gist* of the action in such

With noxious animals negligence need

[1] Anderson *v.* Buckton, 1 Strange, 192; Barnum *v.* Vandusen, 16 Conn. 200; Mullett *v.* Mason, Law Rep. 1 C. P. 559; Fultz *v.* Wycoff, 25 Ind. 321; Jeffrey *v.* Bigelow, 13 Wend. 518; Penten *v.* Murdock, 22 Law T. R. 371; Herrick *v.* Gary, Sup. Ct. Ill. 877.

[2] See Besozzi *v.* Harris, 1 F. & F. 92; Scribner *v.* Kelley, 38 Barb. 14; Kelly *v.* Tilton, 2 Abb. Ct. Ap. 495; Partlow *v.* Haggarty, 35 Ind. 178; Laverone *v.* Mangianti, 41 Cal. 138. Infra, § 923.

[3] May *v.* Burdett, 9 Q. B. 101.

not he averred when there is *scienter*.

cases not being the *negligent* keeping, but the keeping with the *knowledge* of the mischievous propensity.[1] At the same time, when the keeping of an animal is lawful, the defendant may set up either due diligence, *casus*, or the intervention of the negligence of others, as a defence.[2]

Care in such cases required.

§ 919. Here, again, must we invoke the old standard of the *bonus paterfamilias*, or good business man.[3] No one has a right to use instruments he knows to be dangerous to others without acquainting himself with their properties and guarding them in proportion to their risk.[4] In the Roman law is this doctrine expressly[5] and in our own implicitly applied to animals.[6]

Notice of viciousness when required from owner.

§ 920. When a vicious animal is transferred by one person to another, notice should have been given of its viciousness. This is in conformity with the principle heretofore stated, that he who confides to another a dangerous instrument is guilty of negligence if he does so without notice of its character.[7] But this only applies to viciousness directly calculated to produce injury. Where the evidence was that the defendant owned a mare, which had a habit of suddenly "pulling" back upon her halter when excited or restless, and that this habit was known to defendant, who left the mare at a hotel, kept by the plaintiff's employer, to be cared for, giving plaintiff no notice of the habit, and while the plaintiff was hitching the mare in the stable, and in doing so, had put her halter rope through a ring, she pulled suddenly back, drawing the rope through the ring, thereby severely injuring the plaintiff's finger, caught between the rope and ring, and torn to pieces; it was held, that defendant was not bound to notify plaintiff of the

[1] Jackson *v.* Smithson, supra; May *v.* Burdett, supra; Cox *v.* Burbidge, 13 Co. B. N. S. 430; 32 L. J. C. P. 89. See Stiles *v.* Cardiff Steam Nav. Co. 33 L. J. Q. B. 310; 4 N. R. 483; Decker *v.* Gammon, 44 Me. 522; Brown *v.* Carpenter, 26 Vt. 638; Popplewell *v.* Pierce, 10 Cush. 509; Scribner *v.* Kelly, 38 Barb. 14; Van Leuven *v.* Lyke, 1 N. Y. 515; McCaskill *v.* Elliot, 5 Strobh. 196; Pickering *v.* Orange, 2 Ill. 492; Dearth *v.* Baker, 22 Wis. 73; Wilkinson *v.* Parrott, 32 Cal. 102; Smith *v.* Causey, 22 Ala. 568.

[2] Supra, §§ 114, 130, 148.

[3] Supra, §§ 31–7.

[4] Supra, §§ 48–9.

[5] See Zimmern's valuable treatise on Noxalklagen, § 24 *et seq.*

[6] See cases cited supra, and Meredith *v.* Reed, 26 Ind. 334.

[7] Blakemore *v.* R. R. 8 E. & B. 1035. Supra, § 565.

habit of the mare to pull.[1] It was said, however, that it would be otherwise if the habit was flagrantly dangerous; *e. g.* kicking or biting.

Owner not liable for non-natural acts of animal.

§ 921. But no liability attaches for a non-natural and unlikely act of mischief done by an animal whose natural tendency is not to do such mischief.[2] Thus the owner of a horse is not liable for damages caused by a sudden fright of the horse, supposing there was no negligence on part of the driver, and the horse was one fit to be driven.[3] Nor according to the Roman law, and no doubt to our own, would the owner of a quiet house-dog be liable for injury done by him in a sudden attack of madness. And according to the Roman law, as just stated, the master is not liable when a wild animal escapes through *casus*.[4] So, the fact that a mare ordinarily gentle is in the habit of kicking other horses when in heat, it has been ruled in a case already cited, imposes no duty upon the owner to restrain her at other times, and his failure to do so would not be sufficient to make him responsible for her kicking another horse when she was not in heat.[5] So the owner of an elephant, lawfully in its place, has been held not to be liable for the fright its mere appearance occasioned to a passing horse.[6]

Character of notice required to make owner liable.

§ 922. It has already been seen that while the owner of an animal is liable without notice for its generic peculiarities, notice of some kind is necessary in order to make him liable for mischief done by it in accordance with tendencies as to which it differs radically from its race. In what way this notice is proved in respect to dogs is illustrated by several cases.

Notice to agents enough.

In an action for injury inflicted by the bite of a dog, in order to establish the *scienter*, it was proved that the wife of the defendant (who was a milkman) occasionally attended to his business, which was carried on upon

[1] Keshan *v.* Gates, 2 N. Y. Sup. Ct. 288.

[2] Park *v.* O'Brien, 23 Conn. 339. See Keightlinger *v.* Egan, 65 Ill. 235.

[3] Goodman *v.* Taylor, 5 C. & P. 410; Wakeman *v.* Robinson, 1 Bing. 213; 8 Moore, 63; Hammack *v.* White, 11 C. B. N. S. 588; Aston *v.* Heaven, 2 Esp. 533; Sullivan *v.* Scripture, 3 Allen, 564; Weldon *v.* R. R. 5 Bosw. 576; Ficken *v.* Jones, 28 Cal. 618. See supra, § 100.

[4] Supra, § 866.

[5] Tupper *v.* Clark, 43 Vt. 200.

[6] Scribner *v.* Kelley, 38 Barb. 14.

premises where he kept the dog, and that a person had gone there and made a formal complaint to the wife, for the purpose of its being communicated to her husband, of the dog having bitten such person's nephew. Upon this it was held that there was evidence of the husband's knowledge of the dog's propensity to bite.[1] In giving his judgment, Bovill, C. J., said: "I am not prepared to assent to the proposition, that notice to an ordinary servant, or even to a wife, would in all cases be sufficient to fix the defendant, in such an action as this, with knowledge of the mischievous propensity of the dog; but here it appears that the wife attended to the milk business, which was carried on upon the premises where the dog was kept, and that a formal complaint as to that dog was made to the wife when on the premises, and for the purpose of being communicated to the husband." Subsequently, however, it was held,[2] that if the owner of a dog permit it to run about his business premises and into the street near his shop during his absence, and his servants, ordinarily serving in his shop, are informed of the dog's ferocity, by persons who had been attacked by it on three occasions, the fact of the servants' knowledge is evidence sufficient to be left to the jury of the master's knowledge.

Prior acts of ferocity.

Kindred acts of ferocity or mischief of the animal are admissible when brought to the master's notice. In New Hampshire, Connecticut, and Pennsylvania, one instance of prior biting has been held enough to charge notice, the fact being told the master;[3] and in New York two instances.[4] It has been held, that in a suit for a bull hurting a horse, it was competent to show that the owner knew that the bull had previously attacked a man;[5] and so, as to a dog, that the dog had previously shown a ferocious temper, though without biting.[6]

[1] Gladman *v.* Johnson, 36 L. J. C. P. 153. See Thomas *v.* Morgan, 2 C., M. & R. 496.

[2] Applebee *v.* Percy, L. R. 9 C. P. 647; 30 L. T. N. S. 785. See, also, McKone *v.* Wood, 5 C. & P. 1; Baldwin *v.* Casilla, L. R. 7 Exch. 325. Supra, § 223.

[3] Arnold *v.* Norton, 25 Conn. 92; Kittredge *v.* Elliott, 16 N. H. 77; Mann *v.* Wieand, 4 Weekly Notes, 6; and so as to horses, Whittier *v.* Franklin, 46 N. H. 23.

[4] Buckley *v.* Leonard, 4 Denio, 500. See Loomis *v.* Terry, 17 Wend. 496.

[5] Cockerham *v.* Nixon, 11 Ired. (N. C.) 269.

[6] Infra, § 924; Worth *v.* Gilling, L. R. 2 C. P. 1. See supra, § 910.

But it has been ruled that the fact that the owner of a dog knew that it had bitten other dogs, and allowed it to run at large, is not of itself sufficient to make the owner liable to a man bitten by such dog.[1] It is not necessary, however, that the acts of noxiousness should be precisely similar.[2]

§ 923. It has been just stated that the keeper of wild animals is liable for any damage which they may cause during his possession of them, and that it is not necessary to prove that he knew of their evil propensities,[3] and that the owner of animals of all classes, tame or wild, is assumed to be cognizant of their generic noxious tendencies; but that the owner of domestic animals is not liable for such damages perpetrated by them as are not in accordance with their nature, unless he knows or ought to know their tendency to such noxiousness. Not infrequently do we meet with cases in which this doctrine is so expressed as to make it appear necessary to prove that notice was brought home to the defendant of some prior similar mischievous exploits of the animal.[4] Indeed, so common was this misapprehension of the law that, as has been seen, it has been thought necessary in England and some parts of the United States to pass statutes protecting the sheep-growing and other industries, by enacting that in actions against the owners of dogs for worrying, it is not necessary to prove a *scienter* on part of the owner.[5] But the true view is, that the

Knowledge of noxious propensity by owner may be presumed.

[1] Keightlinger *v.* Egan, 65 Ill. 235.

[2] Mann *v.* Wieand, 4 Weekly Notes, 6; *S. P.* McCaskill *v.* Elliot, 5 Strobh. 196. See, also, Jenkins *v.* Turner, 3 Salk. 13; Read *v.* Edwards, 17 C. B. 246.

[3] See May *v.* Burdett, 9 Q. B. 101 (a monkey); Besozzi *v.* Harris, 1 F. & F. 91 (a bear).

[4] Cox *v.* Burbridge, 13 C. B. N. S. 430, supra; Beck *v.* Dyson, 4 Camp. 198; Card *v.* Case, 5 C. B. 622; Applebee *v.* Percy, 30 L. T. N. S. 785; Woolf *v.* Chalker, 31 Conn. 121; Earl *v.* Van Alstine, 8 Barb. 630; Vrooman *v.* Lawyer, 13 Johns. 339; Fairchild *v.* Bentley, 30 Barb. 147; Stiles *v.* Nav. Co. 33 L. J. Q. B. 310, quoted Campb. on Neg. p. 103.

[5] So in Pennsylvania, as to horses and cattle, Goodman *v.* Gay, 15 Penn. St. 188; as to sheep, Campbell *v.* Brown, 19 Penn. St. 359; 1 Grant, 82. In Vermont, as to rams, Town *v.* Lamphire, 37 Vt. 52. In Massachusetts, as to animals straying on highway, Barnes *v.* Chapin, 4 Allen, 444; as to sheep, McCarthy *v.* Guild, 12 Metc. 291; Pressey *v.* Wirth, 3 Allen, 191. As to dogs, special statutes are enacted in Massachusetts and other states. See Shearm. & Redf. on Neg. §§ 205–8, for a valuable compilation of those statutes; and see Barrett

master is to be inferred (as an inference of fact variable with the circumstances of the case) to be cognizant of the characteristics, not only, as we have seen, of animals *ferae naturae* which are under his control, but of such domestic animals under his control as have relapsed into barbarism, or have habitually, and for such a time as to imply notice to the master, exhibited ferocious and dangerous traits. Whenever, in such case, it was the master's duty to take notice of such traits, then he is chargeable with negligence in not taking notice, and not preventing the mischief.[1] Such, indeed, is the rule as to negligence in other analogous branches of the law. A master is liable for his servant's negligence, not because he is proved to know that on one or two prior occasions that servant had been negligent, but because it is his business to be acquainted with the character of a servant whom he employs. A capitalist, who opens a mill with cheap and defective machinery, is held liable for the mischief this machinery does, not because this machinery has on prior occasions done injury to life or limb, but because it is his business, when he puts it in operation, to acquaint himself with its character, and his failure to do so is imputable to him as negligence.[2] If, however, instead of buying defective machinery, he should buy as motive power horses rejected in the market on account of their viciousness, he could not set up want of knowledge on his part of this viciousness as a defence; and the answer applies as effectively in one case as in the other. "You are bound to know the character of the instruments you employ, and your neglect to acquaint yourself with their character is itself a negligence for whose consequences the law holds you liable." Yet here we must again remember that the "knowledge" which is thus made obligatory on employers is not that perfect knowledge which is involved in the exploded theory of the *diligentia diligentissimi*.[3] The question is, not whether a particular animal may not on some single exceptional occasion be mischievous, for this does not

v. R. R. 3 Allen, 101. In New York, as to sheep, Osincup *v.* Nichols, 49 Barb. 146; Auchmuty *v.* Ham; 1 Denio, 495; Wiley *v.* Slater, 22 Barb. 506. In Wisconsin, as to sheep, Tenney *v.* Lenz, 16 Wis. 566; and as to dogs, Slinger *v.* Henneman, 38 Wis. 504.

[1] See Barnes *v.* Chapin, 4 Allen, 444; Goodman *v.* Gay, 15 Penn. St. 188.

[2] See supra, §§ 730–7; and see Campbell *v.* Brown, 19 Penn. St. 359.

[3] See supra, § 65.

prove a character for viciousness,[1] but whether the animal's nature and character are such that mischief is a likely and natural result of his being let loose.[2] If the nature of an animal is fierce, so that mischief naturally flows from it, it is not necessary to prove that his owner knows that he has been guilty of prior acts of mischief, to make the owner liable for his depredations. Indeed this is now expressly held in England. Thus, in a famous case already frequently cited,[3] where the defendant was held liable for mischief done by a horse which he left unattended on a highway, it was not even suggested that, to make the defendant liable, it was necessary to prove that the horse had to his knowledge on some prior occasion done mischief when left unattended. So it has been expressly held that it is not necessary, in order to sustain an action for damages for negligent keeping of a ferocious dog, to prove that the dog had bitten some one. It is enough to show that the animal was of a fierce and savage nature, and had evinced on former occasions an inclination to bite.[4] This brings us back to the principle already expressed, that a person whose duty it is to know a particular thing is liable for the consequences of his ignorance.[5] A man is bound to take notice of the agencies he uses, and if ignorance of their nature is a defence, then, as Pascal argues in a passage already quoted, the more reckless or stupid is the violator of law, the more complete his exemption

[1] See Tupper *v.* Clark, 43 Vt. 200, where it was held that the fact that a mare kicks when she is in heat does not prove her to be vicious. And see Decker *v.* Gammon, 44 Me. 322; Dickson *v.* McCoy, 39 N. Y. 400; Goodman *v.* Gay, 5 Penn. St. 188; Barnes *v.* Chapin, 4 Allen, 444; Conger *v.* R. R. 6 Duer, 375; and supra, §§ 237–8, for the parallel case of evidence of incompetency in employees.

"By a vicious propensity," says Grover, J. (Dickson *v.* McCoy, 39 N. Y. 400; see Keshan *v.* Gates, 2 N. Y. Sup. 288), "is included a propensity to do any act that might endanger the safety of the person or property of others in a given situation; not such only as would impair the utility of the animal for the purpose for which it is kept."

[2] See supra, § 73.

[3] Lynch *v.* Nurdin, 1 Q. B. 36. See supra, §§ 112, 860, 915.

[4] Worth *v.* Gilling, Law Rep. 2 C. P. 1; Judge *v.* Cox, 1 Stark. 285, qualifying Beck *v.* Dyson, 4 Campb. 198; Rider *v.* White, 65 N. Y. 54; Mann *v.* Wieand, 4 Weekly Notes, 6. See, however, Keightlinger *v.* Egan, 65 Ill. 235; Laverone *v.* Mangianti, 41 Cal. 138; Kertschacke *v.* Ludwig, 28 Wis. 430; McCaskill *v.* Elliot, 5 Strobh. 196.

[5] See supra, § 415; and see Conger *v.* R. R. 6 Duer, 375, cited supra, § 565; Van Leuven *v.* Lyke, 1 N. Y. 515.

from liability. I may choose, for instance, to carry a ferocious animal about with me, which I may be pleased to regard as harmless; but the law tells me that this, whether it be affectation or arrogance, is not permitted, and that if I undertake to indulge in such an eccentricity, my very non-acquaintance with the nature of the creature, instead of being a defence, is an act of negligence which makes me liable for any damage he may inflict. *Cui facile est scire, ei detrimento esse debet ignorantia sua.*[1]

Effect of general character of animal to charge master with notice.

§ 924. On the one side, when the suit against the master is for mischief done *contra naturam* by the animal, it is enough to put the master on his defence to show that the animal's general character is ferocious.[2] It is certainly notice enough that the animal has even once before[3] relapsed into savage habits, so as to impel him to offences kindred to that charged. If there be such proof, then, in case of a renewal of such savage tendencies, resulting in the attack under trial, it is clear that evidence of the intermediate good character of the animal is irrelevant. It is true that the practice in this respect is fluctuating. In an English case,[4] the dog in litigation was brought into court in order that it might be inspected by the jury so that they might judge of its disposition. In a case reported by Zimmern, in the valuable treatise already referred to,[5] Madame Leclerc is reported to have been sued before a Parisian court in 1750 as the owner of an ass by which the plaintiff was bitten; and the character of the ass being in issue, the defendant was allowed to put in evidence the certificate of the pastor and five of the most respectable

[1] See supra, §§ 15, 16.

An extraordinary ruling was lately made by the English court of common pleas; Ellis *v.* Loftus Iron Co. L. R. 10 C. P. 10; where the evidence was that the plaintiff's mare was injured by the defendants' stallion biting and kicking her through the wire fence separating the plaintiff's from the defendants' land. It was held, that, apart from any question of negligence on the defendants' part, the defendants were liable for the damage done to the mare, on the ground that there was a trespass to the plaintiff's land, for which they were responsible. But can a trespass on my neighbor's land be committed by an animal belonging to me which was all the time standing on my land?

[2] Worth *v.* Gilling, L. R. 2 C. P. 1; Rider *v.* White, 65 N. Y. 54; McCaskill *v.* Elliot, 5 Strobh. 196.

[3] See supra, § 921.

[4] Line *v.* Taylor, 3 F. & F. 731.

[5] Zimmern, *ut supra*, p. 31.

inhabitants of the place to the animal's innocency and goodness (Unschuld und Frömmigkeit); evidence which Zimmern tells us is, on the principles of the Roman law, clearly irrelevant. That evidence of good character, offered by the defence, is irrelevant, when there are prior instances of ferocity proved, has been ruled in New York, in a suit brought for damages sustained by the bite of a dog.[1] It was proved that the dog had previously bitten two persons; and the defendant then called witnesses to prove that it was quiet and inoffensive. But Jewett, J., on reviewing the admission of this evidence by the court at *nisi prius*, declared that the admission was erroneous, as the testimony "was immaterial. If the evidence proved that the dog bit the plaintiff, that the defendant was the owner, and knew or had notice that the dog was accustomed to bite others, he was responsible for the injury, however high the character of the dog for mildness stood among the neighbors." On the other hand, it is said that such evidence may be received when there is a conflict of testimony in regard to the act of aggression, in which case the general conduct and habits of the dog may be considered in determining the credit to be given to the witnesses.[2]

§ 925. On the one hand, all who derive profit or service from animals are liable for the damage they inflict in the ordinary range of their service, in the same way that the master is liable for the negligences of his servant,[3] and the engine-owner for defects in his machinery.[4] According to the Roman law, as already stated, a mere fiduciary possession of an animal, accompanied by its control, is sufficient to impose this liability; and the same rule is accepted by ourselves.[5] So he who permits an animal to reside on his premises becomes liable for the mischief it commits, under the limitations above stated;[6] but this, as has been correctly ruled in a case already referred to,[7] does not make the owner of premises liable for the

Who are "owners" liable for damages.

[1] Buckley *v.* Leonard, 4 Denio, 500.

[2] Mann *v.* Wieand, 4 Weekly Notes, 6.

[3] Supra, §§ 156, 457.

[4] See supra, §§ 851, 857, 860.

[5] See Barnum *v.* Vandusen, 16 Conn. 200; Hewes *v.* McNamara, 106 Mass. 281; Sheridan *v.* Bean, 8 Metc. 284; Marsh *v.* Jones, 21 Vt. 378; Fish *v.* Skut, 21 Barb. 333.

[6] See McKone *v.* Wood, 5 C. & P. 1; Frammell *v.* Little, 16 Ind. 251.

[7] Smith *v.* R. R. L. R. 2 C. P. 4.

depredations of a strange dog which he has not tolerated and has sought to drive off. On the other hand, when a drover undertakes the care of animals as an independent business, he may become exclusively liable for their trespasses resulting from his own particular negligence. In several states the keepers of dogs are made by statute liable in all cases for their trespasses,[2] and this liability is so extended as to make the owners of dogs who combine in mischief severally liable for the joint mischief.[3] At common law, no such joint liability can be imposed.[4]

Contributory negligence.

§ 926. The principles of contributory negligence, as already announced,[5] are of ready application to the topic immediately under consideration. We may, for instance, correctly assume that when a dangerous animal is put in such a position that even trespassers wandering through the premises are likely to be assailed by him without notice to them of the danger, the fact that the party assailed is a trespasser is no defence,[6] though notice may be inferred when the trespasser entered at night upon a close likely to be guarded by dogs.[7] Negligent driving, for instance, can be no defence to a suit for permitting ferocious dogs to jump out on a road and frighten horses.[8] We may be justified in concluding that if a dangerous animal is placed on a spot which children are apt to frequent, the fact that the children are trespassers cannot protect the owner from liability.[9] We may also, in analogy with the law laid down in other relations, hold, that where the defendant invites the plaintiff to cross the dog's path, no warning "to beware of the dog" will be an excuse.[10] It is clear, also, that the owner of land on which animals trespass may drive such animals into

[1] Supra, § 778; Hewes *v.* McNamara, 106 Mass. 281.

[2] See, as to Massachusetts, Barrett *v.* R. R. 3 Allen, 101.

[3] Kerr *v.* O'Connor, 63 Penn. St. 341.

[4] Partenheimer *v.* Van Order, 20 Barb. 479; Wilbur *v.* Hubbard, 35 Barb. 303.

[5] See supra, §§ 300, 403.

[6] See supra, § 345; Loomis *v.* Terry, 17 Wend. 496; Sherfey *v.* Bartley, 4 Sneed, 58; Woolf *v.* Chalker, 31 Conn. 121.

[7] Supra, § 914, and cases there cited; Koney *v.* Ward, 2 Daly, 295.

[8] Mann *v.* Wieand, 4 Weekly Notes, 6.

[9] Supra, §§ 345, 824, 851, 859, 860; Munn *v.* Reed, 4 Allen, 431; Logue *v.* Link, 4 E. D. Smith, 63; Meibus *v.* Dodge, 38 Wis. 300.

[10] See supra, § 379; Curtis *v.* Mills, 5 C. & P. 489.

the highway, provided he inflict on them no unnecessary harm,[1] and that he may also drive off animals who endanger his person or property.[2] But it certainly is contributory negligence for a trespasser to pry into an inclosure which in the natural order of things may be guarded by dogs;[3] and so it would also be regarded as contributory negligence for a person visiting a menagerie to put himself within the bounds in which a wild beast is permitted to range.[4] And it has been held that where the plaintiff wantonly irritates a dog by kicking it, and the dog bites him in repelling the aggression, and not from a mischievous propensity, the plaintiff cannot recover.[5]

[1] See supra, §§ 883–8.

[2] See supra, §§ 396–8.

[3] Supra, § 914; Brock *v.* Copeland, 1 Esp. 203; Sarch *v.* Blackburn, 4 C. & P. 297.

[4] See supra, § 401.

[5] Keightlinger *v.* Egan, 65 Ill. 236.

CHAPTER VIII.

SUPPORT TO LAND AND HOUSES.

Excavation of soil, so that adjoining land or building is damaged, § 929. | Damage through interference with contiguous wall, § 930.

Excavation of soil so that adjoining land or building is damaged.

§ 929. By both the Roman law[1] and our own, the owner of land, who excavates it in such a way as to damage the soil of an adjoining proprietor, is liable for the injury, though he confines himself to his own soil. "If every proprietor of land was at liberty to dig and mine at pleasure on his own soil, without considering what effect such excavations must produce upon the lands of his neighbors, it is obvious that the withdrawal of the natural support would, in many cases, cause the falling in of the land adjoining. . . . . The negation of this principle would be incompatible with the very security for property, as it is obvious that if the neighboring owners might excavate their soil on every side up to the boundary line to an indefinite depth, land thus deprived of support on all sides could not stand by its own coherence alone."[2] The support, however, which the owner of soil is thus bound to give to the soil of an adjacent owner, is only such support as is necessary for unincumbered land; the rule being that no one shall excavate his own soil so as to cause his neighbor's to loosen and fall. But this rule only requires that support should be kept for the soil of the adjacent neighbor, and for any division fence

[1] Supra, § 115.

[2] Gale on Easements, 335; Met. Works *v.* R. R. L. R. 3 C. P. 612; Farrand *v.* Marshall, 19 Barb. 380; Lasala *v.* Holbrook, 4 Paige, 169; Radcliff *v.* Brooklyn, 4 N. Y. 195; Howland *v.* Vincent, 10 Metc. 371; Gilmore *v.* Driscoll, 122 Mass. 199. See, also, People *v.* Canal Board, 2 Barb. Sup. Ct. 275; McGuire *v.* Grant, 1 Dutch. 356; Ryckman *v.* Gillis, 57 N. Y. 68; Foley *v.* Wyeth, 2 Allen, 131; Washburn on Easements, 542. See, as to interference with canals, Midland R. R. *v.* Chickley, L. R. 4 Eq. C. 20.

he may erect,[1] but not for buildings or improvements on it unless, it has been intimated, erected for twenty years; and even this limitation has been denied, and it has been questioned whether any prescription can give a right to a building to support from adjacent soil.[2] If the excavations would have caused a subsidence of the ground without a building erected on it, but the damage would then have been inappreciable, there will be no right of action, although a building has been considerably damaged.[3] Besides the exception arising from prescription, there is

[1] 2 Rol. Ab. 564; Palmer *v.* Fleschees, 1 Sid. 167; Thurston *v.* Hancock, 12 Mass. 220; Foley *v.* Wyeth, 2 Allen, 131; Gilmore *v.* Driscoll, 122 Mass. 199; Washburn on Easements, 545; Oneil *v.* Harkins, 8 Bush, 653.

[2] Gilmore *v.* Driscoll, 122 Mass. 199; Mitchell *v.* Rome, 49 Ga. 19; Napier *v.* Balwinkle, 5 Rich. (S. C.) 311; and see Chase *v.* Silverstone, 62 Me. 173.

In England the question of prescription is complicated by Lord Tenterden's Act (2 & 3 Will. 4, c. 76), though practically, both under that act and at common law, the easement, to give title, must have been enjoyed for twenty years under a claim of right, which requires knowledge on the part of the owner of the servient tenement of the claim. The "neighbor" who is thus required to continue support is the owner of the land needed to give immediate support. "The neighboring owner," says the master of the rolls, in a case determined in 1877 (Birmingham *v.* Allen, 37 L. T. N. S. 207, and affirmed by the judges of the court of appeal; see editorial comments in Law Times, Oct. 20, 1877), "for this purpose, must be the owner of that portion of land — it may be a wider or narrower strip of land — the existence of which, in its natural state, is necessary for the support of my land. That is my neighbor for that purpose; as long as that land remains in its natural state, and it supports my land, I have no right beyond it." . . . . "There might be land of so solid a character, consisting of solid stone, that a foot of it would be enough to support the land. There might be other land, so friable and of such an unsolid character, that you would want a quarter of a mile of it; but whatever it is, as long as you have got enough land on your boundary which, left untouched, will support your land, you have got your neighbor, and you have got your neighbor's land, to whose support you are entitled."

In Gilmore *v.* Driscoll, 122 Mass. 199, it was held, that unless there be proof of negligence, a party digging a pit by which his neighbor's land caves in, although he is liable for the injury to the land in its natural condition, is not liable for injuries produced thereby to buildings and shrubbery. The measure of damage in such case is the actual loss and injury to the soil. *S. P.* Beard *v.* Murphy, 37 Vt. 99; Shrieve *v.* Stokes, 8 B. Mon. 453; Charless *v.* Rankin, 22 Mo. 556. It was also held in Gilmore *v.* Driscoll, that the fact that the defendant was the licensee of the party owning the adjacent land (that on which the excavation was made), and not the owner, made no difference. See infra, § 939.

[3] Smith *v.* Thackerah, L. R. 1 C. P. 564; Hunt *v.* Peake, Johns. (Eng.) Ch. 705; Partridge *v.* Scott, 3 M. &

an exception recognized where a common owner originally held both parcels: that on which the plaintiff's house was built, and that which the defendant subsequently bought and excavated. In this case the defendant is charged with the duty of supporting not merely the soil, but the house of the plaintiff's parcel.[1] But wherever the owner of the soil has the right, so far as concerns adjoining buildings, so to excavate, he must exercise this right with the diligence good builders are in this respect accustomed to employ in similar circumstances,[2] and he is liable for any damage caused by the lack of such diligence.[3] But this does not preclude him, even supposing the adjoining houses may have acquired an easement by prescription, from draining his land, or from taking other steps necessary to its usefulness, when the land is in a large town.[4] And the first builder, if building so negligently as to make his building incapable of bearing such adjacent

W. 220; Humphries *v.* Brogden, 12 Q. B. 739; Dixon *v.* Wilkinson, 2 McArthur, 425; Thurston *v.* Hancock, 12 Mass. 226. See comments in Farrand *v.* Marshall, 19 Barb. 380; Richardson *v.* R. R. 25 Vt. 465; Washburn on Easements, 545. See Lasala *v.* Holbrook, 4 Paige, 169, where a church, which had been built for thirty-eight years, was injured by excavating an adjoining lot: the English limitation of twenty years was not sustained, and the chancellor refused to enjoin the persons excavating.

[1] Cox *v.* Matthews, 1 Vent. 237; Humphries *v.* Brogden, 12 Q. B. 739; Harris *v.* Ryding, 5 M. & W. 71; U. S. *v.* Appleton, 1 Sumn. 492; Eno *v.* Del Vecchio, 4 Duer, 53; McGuire *v.* Grant, 1 Dutch. 356.

[2] Supra, §§ 31–46; Charless *v.* Rankin, 22 Mo. 566; Shrieve *v.* Stokes, 8 B. Monr. 453.

[3] Jeffries *v.* Williams, 5 Exch. 792; Elliot *v.* R. R. 10 H. L. Ca. 336; Bradbee *v.* Hospital, 4 M. & G. 714; Humphries *v.* Brogden, 12 Q. B. 739; Dodd *v.* Holme, 1 A. & E. 493; Foley *v.* Wyeth, 2 Allen, 131; Richardson *v.* R. R. 25 Vt. 465; Panton *v.* Holland, 17 Johns. 92; Radcliff *v.* Brooklyn, 4 N. Y. 195; McGuire *v.* Grant, 1 Dutch. 356; Shrieve *v.* Stokes, 8 B. Monr. 453; Richart *v.* Scott, 7 Watts, 460.

"There are many cases in which an act may be perfectly lawful in itself, and will continue to be so, until damage has been done to the property or person of another; but from the moment such damage arises the act becomes unlawful, and an action is maintainable for the injury. This is the case where a man sinks mines and makes excavations in his own land, doing no damage in the first instance to his neighbor, but subsequently causing his neighbor's land or his house to slide down into the excavation. Bonomi *v.* Backhouse, Ell., Bl. & Ell. 662; Smith *v.* Thackerah, L. R. 1 C. P. 564; Add. on Torts, 9." Alvey, J., Balt. &c. R. R. *v.* Reaney, 42 Md. 117. See Charless *v.* Rankin, 22 Mo. 566 *Casus*, of course, excuses. Shrieve *v.* Stokes, 8 B. Monr. 453; Chadwick *v.* Trower, 6 Bing. (N. C.) 1.

[4] Popplewell *v.* Hodkinson, L. R. 4 Exch. 248; Chase *v.* Silverstone, 62 Me. 175.

excavations as are made with due care, cannot, on the ground of contributory negligence,[1] recover, even in cases of prescription, for damages resulting from such excavation.[2]

The occupier of the ground floor of a house is responsible for damages to occupiers of an upper floor occasioned by his negligence in so excavating the ground as to weaken the support of the upper floors.[3]

Damage through interference with contiguous wall.

§ 930. Independently of prescription, as just noticed, no man, therefore, has a right to require his neighbors to support his house. But while this is clear, it is also plain, in accordance with the law just stated as bearing on excavations, that the owner of a house which is being repaired or pulled down, who conducts the work so negligently that injury is produced thereby to the adjoining house, will be liable to make compensation in damages for the consequences of his want of caution.[4] The mere fact of juxtaposition, it is said, does not, in the absence of any right of easement, render it necessary for a person who pulls down his wall to give notice of his intention to the owner of an adjoining wall; nor is such person, if he be ignorant of the existence of the adjoining wall, bound to use extraordinary caution in pulling down his own.[5] Prescrip-

[1] See supra, §§ 130, 300.

[2] Richart *v.* Scott, 7 Watts, 460; Washburn on Easements, 551; Smith *v.* Hardesty, 31 Mo. 412.

[3] Humphries *v.* Brogden, 12 Q. B. 739.

[4] Supra, § 115; Walters *v.* Pfeil, M. & M. 362; Dodd *v.* Holme, 1 Ad. & E. 493; Bradbee *v.* Mayor, 5 Scott N. R. 120; Charless *v.* Rankin, 22 Mo. 566; Radcliff *v.* Brooklyn, 4 N. Y. 195; Eno *v.* Del Vecchio, 4 Duer, 53; 6 Duer, 17; Partridge *v.* Gilbert, 15 N. Y. 601, and other cases cited; Washburn on Easements, 563. See *S. P.* Dunlap *v.* Wallingford, 1 Pitts, 127; Richart *v.* Scott, 7 Watts, 460; Ward *v.* Cowperthwait, 16 Leg. Int. 85; Brown *v.* Werner, 40 Md. 15; Peyton *v.* Mayor, &c. of London, 9 B. & C. 725; Butler *v.* Hunter, 7 H. & N. 826, where the maxim *respondeat superior* applied to exonerate the defendant from liability. For Roman law, see supra, § 115.

See, further, as to right to support by an adjacent house, Solomon *v.* Vintners' Co. 4 H. & N. 585, where the cases are collected; and see Napier *v.* Bulwinkle, 5 Rich. S. C. 311; Wash. on Easements, 559.

[5] Chadwick *v.* Trower, 6 Bing. N. C. 1; reversing *S. C.* 3 Bing. N. C. 334, cited 5 Scott N. R. 119; Grocers' Co. *v.* Donne, 3 Bing. N. C. 34; Davis *v.* R. R. 2 Scott N. R. 74. See Shafer *v.* Wilson, 44 Md. 268, where it was said that notice to one's neighbor of an intention to make a contemplated improvement of property would seem to be a reasonable precaution in a populous city, where buildings are necessarily required to be contiguous to each other, and improvements made

tion, in any view, does not run to protect one who builds a weak house which derives its support from another's.[1] So it has been held that there is no "obligation towards a neighbor cast by law on the owner of a house, merely as such, to keep it repaired in a lasting and substantial manner; the only duty is to keep it in such a state that his neighbor may not be injured by its fall; the house may, therefore, be in a ruinous state, provided it be shored sufficiently, or the house may be demolished altogether."[2] Where, however, several houses belonging to the same owner are built together, so that each requires the support of the adjoining house, and the owner parts with one of these houses, the right to such support is not thereby lost.[3] And the *right* to pull down, it need scarcely be repeated, does not protect the defendant, any more than in the analogous case of excavation just noticed, from the consequence of damages produced by his negligent exercise of this right.[4]

by one proprietor, however skilfully conducted, may be attended with disastrous results to his neighbors, who ought to have the opportunity to take the steps necessary to protect themselves and property. It was further ruled, that although the plaintiff's house be in a bad condition, the defendant has no right to hasten its fall by making improvements on his own lot in a careless and negligent manner; but if the house was so weak that it could not stand the reasonable improvement of the defendant's property, conducted with skill and care, any loss sustained by the plaintiff would be *damnum absque injuria*.

[1] Solomon *v.* Vintners' Co. 4 H. & N. 585; Napier *v.* Bulwinkle, 5 Rich. 311; Wiltshire *v.* Sidford, 8 B. & C. 259.

[2] Judgm., Chauntler *v.* Robinson, 4 Exch. 170. As to the right of support for a sewer, see Metropolitan Board of Works *v.* R. R. L. R. 4 C. P. 192.

[3] Richards *v.* Rose, 9 Exch. 218. See Partridge *v.* Gilbert, 15 N. Y. 601; Webster *v.* Stevens, 5 Duer, 553.

[4] Massey *v.* Goyder, 4 C. & P. 161; Walters *v.* Pfeil, *ut supra;* Trower *v.* Chadwick, *ut supra;* Radcliff *v.* Brooklyn, 4 N. Y. 195. So in Roman law, supra, § 115.

CHAPTER IX.

WATERCOURSES.

Liability for negligent flooding, § 934.
Liability for diverting or diminishing surface stream, § 935.
Rule as to artificial streams, § 936.
Unusual freshet or stress of weather a defence, § 938.
Liability for diversion of subterranean waters, § 939.
Nuisances on navigable streams, supra, § 846.
Sewerage, supra, § 262.

§ 933. THE subject of easements and servitudes in reference to watercourses is too vast and complicated to be introduced in its elements into the present volume; and I feel less embarrassment at this omission from the fact that this whole department of law is thoroughly and ably discussed in Professor Washburn's work on Easements and Servitudes, the third edition of which introduces the authorities as late as 1873.[1] My object in the present chapter is to touch the subject only as far as it bears upon the Law of Negligence.

§ 934. Wherever there is negligence in the use of water power, there is liability for damage.[2] Hence, where a railway company so constructed an embankment as to serve the purpose of a dam to create a reservoir for the accommodation of the mill-owners below, whereby the company obtained some indirect advantage; it was held that the company was liable to proprietors on a lower grade of land for damages arising from a flood produced by the defective construction of the land.[3] So a railroad company is liable to parties for injury to

Liability for negligent flooding.

[1] See, also, an elaborate exposition of the later cases in Wood on Nuisances, § 307 *et seq.*

[2] See this as to flooding adjacent lands by back-water, supra, § 786.

If A. has a drain through the lands of B. and C., and C. stops up the inlet into his land from B.'s, and A. nevertheless, knowing this, pours water in the drain and damages B., A. is liable to B. Collins *v.* Middle Level Commissioners, L. R. 4 C. P. 279; Judgm., Harrison *v.* R. R. 3 H. & C. 238. See Ogburn *v.* Connor, 46 Cal. 346.

[3] Jones *v.* R. R. 27 Vt. 399; and see McCormick *v.* R. R. 57 Mo. 433.

their land produced by the imperfection of the sluices opened by the company for the passage of streams which the railroad intersects.[1] A municipal corporation, also, is liable for negligence in defective sluices, culverts, drains, sewers, and dams.[2] And where, by a drainage act, the commissioners were to construct a cut, with proper walls, gates, and sluices, to keep out the waters of a tidal river, and also a culvert under the cut to carry off the drainage from the lands on the east to the west of the cut, and to keep the same at all times open; but in consequence of the negligent construction of the gates and sluices, the waters of the river flowed into the cut, and, bursting its western bank, flooded the adjoining lands; upon which the plaintiff and other owners of lands on the east side of the cut closed the lower end of the culvert, which prevented the waters overflowing their lands to any considerable extent; but the occupiers of the lands on the west side, believing that the stoppage of the culvert would be injurious to their lands, reopened it, and so let the waters through on to the plaintiff's land to a much greater extent; it was held that the commissioners were responsible for the entire damage thus caused to the plaintiff's land.[3] A similar position is taken in the Roman law: "Si fistulae, per quas aquam ducas, aedibus meis applicatae damnum mihi dent, in factum actio mihi competit."[4] . . . . This, however, is subject to the qualification that "fistulae" were not constructed with the "diligentia" of a "bonus et diligens paterfamilias." If they were so constructed, there was no liability. The same view obtains in our own jurisprudence.

But here emerges the distinction between the ordinary and the extraordinary use of dangerous agencies; a distinction established by the Roman law as well as our own. If I build a fire for domestic purposes, and the fire spreads, the burden is on the party injured to prove that I was negligent. If I build a fire in such an extraordinary way as to make its spreading probable, — *e. g.* as in locomotive engines, sweeping through a wide tract of

[1] Whitcomb *v.* R. R. 25 Vt. 49; Mississippi Cent. R. R. *v.* Caruth, 51 Miss. 77.

[2] Supra, §§ 262, 846. Lacour *v.* N. Y. 3 Duer, 406; Smith *v.* Milwaukee, 18 Wis. 63; Kensington *v.* Wood, 10 Penn. St. 93; Merrifield *v.* Worcester, 110 Mass. 216.

[3] Collins *v.* Commis. L. R. 4 C. P. 279.

[4] L. 18. D. de serv. praed. urb. 8. 2. Supra, § 115.

country, — then, unless the act be licensed by the state, I must, in order to relieve myself from liability, prove that the spreading of the fire was due to *casus* or to the negligence of the plaintiff.[1] The same rule is applicable to water, concerning which we may hold as established the following propositions: —

1. If a land-owner collects surface or well water for domestic purposes, or for the ordinary purposes of irrigation or of mining, negligence in his mode of working must be proved against him in order to make him liable to parties injured by his act.[2]

2. If a land-owner, without license from the state,[3] erects, for extraordinary (as distinguished from the purposes of farming and irrigation) purposes, a reservoir on his land, which reservoir bursts, and inundates the land of others, or otherwise injures their property, he is *primâ facie* liable for the damage, and can only relieve himself by proving that the injury to the reservoir was caused by *casus* or *vis major*, or by the plaintiff.[4]

3. A land-owner may, if there be no negligence in the execution, turn the surface drainage of his land into a natural watercourse, even though this floods a lower proprietor. "For the sake of agriculture — *agri colendi causa* — a man may drain his ground which is too moist, and, discharging the water according to its natural channel, may cover up and conceal the drains through his lands; may use running streams to irrigate his fields, though he thereby diminishes, not unreasonably, the sup-

[1] See supra, §§ 865, 868.

[2] Smith *v.* Fletcher, L. R. 9 Exch. 64, cited supra, § 787; Madras R. R. *v.* Zemindar, 30 L. T. N. S. 771; Williams *v.* Gale, 3 Har. & J. 231; Kauffman *v.* Greisemer, 26 Penn. St. 407; Phinizy *v.* Augusta, 47 Ga. 260.

[3] That such license operates to change burden of proof, see Phinizy *v.* Augusta, 47 Ga. 260.

[4] Supra, § 787; Rylands *v.* Fletcher, L. R. 3 H. of L. 341; Wheatly *v.* Baugh, 25 Penn. St. 528; Martin *v.* Riddle, 26 Penn. St. 415; Tootle *v.* Clifton, 22 Ohio St. 247; Martin *v.* Jett, 12 La. 501; Laumier *v.* Francis, 23 Mo. 181; Hosher *v.* R. R. 60 Mo. 329; Munkers *v.* R. R. 60 Mo. 334; Gillham *v.* R. R. 49 Ill. 484; Livingston *v.* McDonald, 21 Iowa, 160; Ogburn *v.* Connor, 46 Cal. 346; Washburn on Easements (2d ed.), 427; Bigelow's Cases on Torts, 495–497.

In Massachusetts, Rylands *v.* Fletcher is approved in Shipley *v.* Fifty Associates, 106 Mass. 194, and in Wilson *v.* New Bedford, 108 Mass. 261; though it was intimated in Rockwood *v.* Wilson, 11 Cush. 221, that a defendant, causing a volume of water, collected in draining operations, to overflow on a neighbor's land, was only liable to the latter in case of negligence.

ply of his neighbor below; and may clear out impediments in the natural channel of his streams, though the flow of water upon his neighbor be thereby increased."[1] The same rule is applied to artificial drainage.[2]

4. Mere surface water may be detained by a land-owner, on whose land it begins its course, for the purpose of irrigation, or for domestic purposes, on his own premises, and he is not liable to his neighbor for damage to the latter from the non-flowage of the water over his lands.[3]

5. Nor does unqualified liability exist, even in England, as to the occupiers of distinct portions of the same house, in reference to the water-pipes or reservoirs. If there be no negligence, one tenant, in whose apartment a pipe bursts, or gutter overflows, is not responsible to another tenant for damages produced by such bursting or overflowing.[4]

Owner of land through which surface stream passes diverting or diminishing its volume.

§ 935. The owner of land through which a stream passes has a right to the advantage of the stream flowing in its natural course over his land, and to use the same as he pleases for any purposes of his own, provided that they be not inconsistent with a similar right in the owner of the land above or below; the law, however, being that the upper owner cannot diminish the quantity or injure the quality of the water, which would otherwise naturally descend.[5] Where, therefore, it is held in England, the

[1] Woodward, J., Kauffman *v.* Griesemer, 26 Penn. St. 414; and see, to same general effect, Waffle *v.* Porter, 61 Barb. 130; Williams *v.* Gale, 3 H. & Johns. 231; Miller *v.* Lauback, 47 Penn. St. 154.

[2] Flagg *v.* Worcester, 13 Gray, 601; Goodale *v.* Tuttle, 29 N. Y. 459.

[3] Broadbent *v.* Ramsbotham, 11 Exch. 602; Luther *v.* Winnisimmet Co. 9 Cush. 171; Gannon *v.* Hargadon, 10 Allen, 106; Cott *v.* Lewiston, 36 N. Y. 217; Curtiss *v.* Ayrault, 47 N. Y. 73; Thayer *v.* Brooks, 17 Ohio, 491; Livingston *v.* McDonald, 21 Iowa, 160.

[4] Ross *v.* Fedden, L. R. 7 Q. B. 661; Carstairs *v.* Taylor, L. R. 6 Exch. 217. See, also, Ortmayer *v.* Johnson, 45 Ill. 469.

[5] Mason *v.* Hill, 5 B. & Adol. 1; Wright *v.* Howard, 1 Sim. & Stu. 190; cited Judgm., Acton *v.* Blundell, 12 M. & W. 349; Judgm., Embrey *v.* Owen, 6 Exch. 368, 373; Chasemore *v.* Richards, 7 H. L. Cas. 349; Rawstron *v.* Taylor, 11 Exch. 369; Broadbent *v.* Ramsbotham, Ibid. 602; Holker *v.* Porritt, L. R. 10 Exch. 59. See, also, Laing *v.* Whaley, 3 H. & N. 675, 901; Hipkins *v.* Birmingham & Staffordshire Gas Light Co. 6 H. & N. 250; *S. C.* 5 Ibid. 74; Snow *v.* Parsons, 28 Vt. 459; Parks *v.* Newburyport, 10 Gray, 28; Emery *v.* Lowell,

owner of land applies the stream running through it to the use of a mill newly erected, or to any other purpose, he may, if the stream is diverted or obstructed by the proprietor of land above, recover against such proprietor for the consequential injury to the mill; and the same principle seems to apply where the obstruction or diversion has taken place prior to the erection of the mill, unless, indeed, the owner of land higher up the stream has acquired a right to any particular mode of using the water by prescription, that is, by user continued until the presumption of a grant has arisen.[1] But priority of occupation gives no priority of right to the use of the stream, beyond the actual extent of such occupancy.[2]

§ 936. On this subject we have the following authoritative remarks from an English judgment: "The flow of a natural stream creates natural rights and liabilities between all the riparian proprietors along the whole of its course. Subject to reasonable use by himself, each proprietor is bound to allow the water to flow on without altering the quantity or quality. These natural rights and liabilities may be altered by grant or by user of an easement to alter the stream, as by diverting, or fouling, or penning back, or the like.

Artificial streams, however, may be absorbed by owner.

104 Mass. 16; Judd *v.* Wells, 12 Met. 504; Newhall *v.* Ireson, 8 Cush. 595; Sackrider *v.* Beers, 10 Johns. 241; Van Hoesen *v.* Coventry, 10 Barb. 518; Thomas *v.* Brackney, 17 Barb. 654; Hartzall *v.* Sill, 12 Penn. St. 248; Washburn on Easements, 348. See Phil. *v.* Gilmartin, 71 Penn. St. 140; supra, §§ 127, 254, where it was held the city of Philadelphia was liable to persons navigating the river Schuylkill for a wasteful use of its water so as to impair such navigation. See, also, Woolman *v.* Garringer, 1 Montana, 535; Merrifield *v.* Worcester, 110 Mass. 216; Phinizy *v.* Augusta, 47 Ga. 260.

"The true watercourse is well defined. There must be a stream *usually* flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides, or banks, and usually discharge itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes. It does not include the water flowing in the hollows or ravines in land which is the mere surface water from rain or melting snow, and is discharged through them from a higher to a lower level, but which at other times are destitute of water. Such hollows or ravines are not, in legal contemplation, watercourses." Dixon, C. J., Hoyt *v.* Hudson, 27 Wis. 656, cited by Cooley, J., South. Law Rev. 1876.

[1] Judgm., Mason *v.* Hill, 5 B. & Ad. 25.

[2] See Washb. on Easements, 353.

If the stream flows at its source by the operation of nature, that is, if it is a natural stream, the rights and liabilities of the party owning the land at its source are the same as those of the proprietors in the course below. If the stream flows at its source by the operation of man, that is, if it is an artificial stream, the owner of the land at its source or the commencement of the flow is not subject to any rights or liabilities towards any other person, in respect of the water of that stream. The owner of such land may make himself liable to duties in respect of such water by grant or contract; but the party claiming a right to compel performance of those duties must give evidence of such right beyond the mere suffering by him of the servitude of receiving such water."[1] It has been also held that there is no duty on the owners of a canal analogous to that on the owners of a natural watercourse not to impede the flow of water down it.[2]

§ 937. A party who floods the land of another with an artificial stream is, as we have seen, as liable for this as he would be for any other kind of flooding.[3] But it is otherwise with regard to supplying a neighbor with such water. "If there is uninterrupted user of the land of the neighbor for receiving the flow as of right for twenty years, such user is evidence that the land from which the water is sent into the neighbor's land has become the dominant tenement, having a right to the easement of so sending the water, and that the neighbor's land has become subject to the easement of receiving that water. But such user of the easement of sending on the water of an artificial stream is of itself alone no evidence that the land from which the water is sent has become subject to the servitude of being bound to send on the water to the land of the neighbor below. The enjoyment of the easement is of itself no evidence that the party enjoying it has become subject to the servitude of being bound to exercise the easement for the benefit of the neighbor. . . . . A party by the mere exercise of a right to make an artificial drain into his neighbor's land, either from mine or surface, does not raise any

[1] Judgm., Gaved *v.* Martyn, 19 C. B. N. S. 759, 760, and cases there cited. See Nutall *v.* Bracewell, L. R. 2 Exch. 1.

[2] Nield *v.* R. R. L. R. 10 Exch. 4.

[3] So as to overflowing by canal. Schuylkill Nav. Co. *v.* McDonough, 33 Penn. St. 73; Fehr *v.* Sch. Nav. Co. 69 Penn. St. 161.

presumption that he is subject to any duty to continue his artificial drain by twenty years' user, although there may be additional circumstances by which that presumption could be raised or the right proved. Also, if it be proved that the stream was originally intended to have a permanent flow, or if the party by whom or on whose behalf the artificial stream was caused to flow is shown to have abandoned permanently, without intention to resume the works by which the flow was caused, and given up all right to and control over the stream, such stream may become subject to the laws relating to natural streams." [1]

Unusual freshet a defence.

§ 938. On principles heretofore announced,[2] it is a good defence that the flooding, whether this be in backing the water on an upper proprietor, or throwing it forwards on a lower, is caused by an extraordinary freshet or sudden breaking up of ice.[3] It is otherwise, however, as to such freshets as are periodical and calculable.[4]

Subterranean waters.

§ 939. It will be inferred from what is already stated,[5] that if a man digs a well in his own land, so close to the soil of his neighbor as to require the support of a rib of clay or of stone in his neighbor's land to retain the water in the well, no action will lie against the owner of the adjacent land for digging away such clay or stone, which is his own property, and thereby letting out the water; and it makes no difference as to the legal rights of the parties if the well stands some distance within the plaintiff's boundary, and the digging by the defendant, which occasions the water to flow from the well, is some distance within the defendant's boundary. Hence it properly follows that the owner of land through which subterranean waters flow has no right or interest (at all events in the absence of an uninterrupted user of the right for more than twenty

[1] Gaved *v.* Martyn, 19 C. B. N. S. 755–59, 760, quoted with approval in Broom's Legal Maxims, 575; and see Arkwright *v.* Gell, 5 M. & W. 203; Mason *v.* R. R. L. R. 6 Q. B. 578; Norton *v.* Volentine, 14 Vt. 239; Curtiss *v.* Ayrault, 47 N. Y. 73; Washb. on Easements, 386–411, where the subject of artificial watercourses is discussed.

[2] Supra, §§ 114–130, 787; Nichols *v.* Marsland, L. R. 10 Exch. 255; *S. C.* on app. L. R. 2 Exch. D. 1.

[3] McCoy *v.* Danley, 20 Penn. St. 85; Monong. Nav. Co. *v.* Coon, 6 Penn. St. 379. See Young *v.* Leedom, 67 Penn. St. 351; Stout *v.* Millbridge Co. 45 Me. 76; Cowles *v.* Kidder, 4 Fost. 364; and cases cited in Washb. on Easements, 346.

[4] Bell *v.* McClintock, 9 Watts, 119.

[5] Supra, § 929.

years, which is now questioned)[1] which will enable him to maintain an action against a land-owner, who, in conducting without negligence, and in a workmanlike manner, excavations in his own land, drains away the water from the land of the first mentioned owner, and causes his well or spring to dry.[2]

One land-owner may therefore dig a well which may drain adjacent wells without incurring any liability to the owner of the latter.[3] A party owning a clearly defined and well known underground stream, however, may have such a property in it as will protect him from its diversion by others.[4]

[1] The weight of opinion is now against prescription in such cases.

"We are aware that a contrary doctrine has been held by a few of the most learned courts in this country, and among them that of New Hampshire. In Bassett *v.* Salisbury Manuf. Co. 43 N. H. 569, and again in Swett *v.* Cutts, 50 N. H. 439, the subject was most elaborately and candidly discussed, and the cases reviewed. But we feel better satisfied with the reasoning in the cases from which we have made such liberal extracts, and the American cases which we have simply cited, than with the views expressed by the courts holding the other doctrine; and we see less difficulties in applying the rule of *cujus solum*, &c., than that of *sic utere*, &c., to cases of this character. "The tendency of all the authorities is against the acquisition of a prescriptive right in cases of this nature, and the plaintiff's counsel has abandoned that point." Virgin, J., Chase *v.* Silverstone, 62 Me. 182. See supra, § 929.

[2] Acton *v.* Blundell, 12 M. & W. 324; Chasemore *v.* Richards, 2 H. & N. 168; *S. C.* 7 H. L. Cas. 349; South Shields Water Works Co. *v.* Cookson, 15 L. J. Exch. 315; Chase *v.* Silverstone, 62 Me. 175. See Chatfield *v.* Wilson, 28 Vt. 49; Harwood *v.* Benton, 32 Vt. 737; Greenleaf *v.* Francis, 18 Pick. 117; Frazier *v.* Brown, 12 Ohio St. 364; Goodale *v.* Tuttle, 29 N. Y. 466; Bliss *v.* Greeley, 45 N, Y. 671; Haldeman *v.* Bruckhardt, 45 Penn. St. 521; Roath *v.* Driscoll, 20 Conn. 533; Brown *v.* Illus, 25 Conn. 583; Hoy *v.* Sterrett, 2 Watts, 327; Wheatly *v.* Baugh, 25 Penn. St. 528; Dexter *v.* Provid. Aqued. Co. 1 Story, 387; and see, for a full consideration of the law, Washb. on Easements, c. iii. § 7. See a learned article by Judge Cooley, in South. Law Rev. for 1876.

[3] Chasemore *v.* Richards, *ut supra*.

[4] Dickenson *v.* Canal Co. 7 Exch. 282, 300; Dudden *v.* Guardians, 1 H. & N. 627; Smith *v.* Adams, 6 Paige, 435; Wheatley *v.* Bough, 25 Penn. St. 528; Whetstone *v.* Bowser, 29 Penn. St. 59; Hanson *v.* McCue, 42 Cal. 303.

CHAPTER X.

COLLISIONS ON WATER.

Ships to be governed by maxim, *Sic utere tuo ut non alienum laedas*, § 943.
Rule when one is stationary and another moving, § 945.
Sailing vessels colliding with steamers, § 946.
Care to be proportioned to emergency, § 947.
Lookout is to be maintained, § 948.
Signals and lights, § 949.
Casus, "Act of God," "Inevitable accident," § 950.
Contributory negligence, § 952.

§ 943. A VESSEL traversing the sea is bound *mutatis mutandis*, to the same care in respect to the rights of another as is a passenger traversing a highway. The law of collisions at sea, however, is affected by so many distinctive technical considerations that it cannot be here adequately discussed. All that is now proposed is to present such general propositions in reference to collisions on water as are of interest in suits at common law.[1]

Ships to be governed by maxim, *Sic utere tuo ut non alienum laedas.*

§ 944. "There seems no doubt," said Maule, J., in a leading case,[2] "that it is the duty of a person using a navigable river, with a vessel of which he is possessed and has the control and management, to use reasonable skill and care to prevent mischief to other vessels; and that in case of a collision arising from his negligence he must sustain without compensation the damage occasioned to his own vessel, and is liable to pay compensation for that sustained by another navigated with due skill and care. And this liability is the same whether the vessel be in motion or stationary, floating or aground, under water or above it; in all these circumstances the vessel may continue to be in his possession and under his management and control; and supposing it to be so, and a collision with another vessel to occur from the

[1] See Abbott on Shipping; Angell on Carriers, 5th ed. ch. viii.

[2] Brown *v.* Mallet, 5 C. B. 599. See The Wenona, 19 Wall. 41; The Falcon, 19 Wall. 75; The Pennsylvania, 19 Wall. 125.

improper manner in which one of the two is managed, the owner of the vessel properly managed is entitled to recover damages from the owner of that which is improperly managed." At the same time it was in the same case ruled that where a vessel was sunk from unavoidable accident, the owner being wholly blameless, and there being no special circumstances throwing on him a continuing liability, he was not compellable to remove the obstruction to the navigation caused by the sunken vessel, nor even to take measures for diminishing the dangers arising from it.[1]

When one vessel is stationary and another moving.

§ 945. In cases of collision between a stationary and a moving vessel, the presumption of negligence is against the latter.[2] Thus in a Connecticut case,[3] the evidence was that a dredging machine was anchored outside of but close to the channel of a navigable river, with an outrigger extending three feet over the channel, but ample room was left for the passage of vessels in the channel. A steamer going up the river by daylight in fair weather ran against the outrigger and damaged the dredging machine. In a suit brought by the owner of the latter against the owners of the steamer the court below found the facts, but did not find the defendants guilty of negligence, unless the law would infer it from the facts, and found that the plaintiff was not guilty of want of care, unless to be inferred from the facts. It was ruled by the supreme court, first, that the degree of care which the defendants were bound to exercise was that of skilful navigators; secondly, that the burden of proof as to the exercise of such care was on the defendants, and as the fact was not found in their favor the law would presume their negligence; and thirdly, that the law could not upon the facts infer want of care on the part of the plaintiff.

It may happen, however, that a stationary body may be placed in such a position in the channel that collision cannot be avoided without great risk, and in such case the negligence is with those so placing the stationary body. A steamship coming into New York, in charge of a pilot, ran over a seine, in which had been inclosed a quantity of fish, which are caught for the manufacture

[1] *S. P.* Winpenny *v.* Phil. 65 Penn. St. 136. Cited more fully, supra, § 846.

[2] Culbertson *v.* Shaw, 18 How. 584; The Granite State, 3 Wall. 310; The Bridgeport, 7 Blatch. C. C. 361; The Julia M. Hallock, 1 Sprague, 539; Bill *v.* Smith, 39 Conn. 206.

[3] Bill *v.* Smith, 39 Conn. 206.

of fish-oil and guano. A libel in admiralty being filed against her to recover damages, it was ruled that, inasmuch as it appeared that the steamship was in a regular course of navigation, and that the seine was in such a part of the channel that if the steamship had deviated to go around it she would have been in danger of grounding, the seine was an obstruction to navigation. It was also held, that as the seine was put in the way while the ship was in sight, coming in, and as no negligence was shown on the part of the ship, the libel must be dismissed.[1]

Sailing vessel and steamer.

§ 946. When a sailing vessel and a steamer are proceeding in such directions as to involve collision, it is the duty of the steamer to keep out of the way of the sailing vessel, and of the sailing vessel to keep her course.[2] And the rule applies to a steamer transporting a train of cars across a river at a railway junction.[3]

Care to be proportioned to emergency.

§ 947. It has been already shown that diligence must be in proportion to duty; and that the care to be exercised in any given service is to rise so as to meet the dangers of such service.[4] To apply this principle to collisions at sea belongs to treatises on maritime law, of which it forms so important a branch. At present, all that can be done is to simply announce the principle with a single illustration. A steamer having a very large tow, and approaching a place where, from the number of vessels in the water and the force of counter currents, navigation with such a tow is apt to be dangerous, — a place, for example, like that near the Battery, New York, where the East River and the Hudson meet, — is bound to proceed with great care, and if within two or three miles of the place, though not nearer, she can divide her tow, she is bound to divide it.[5]

[1] The Steamship City of Baltimore, 5 Benedict, 474.

[2] St. John *v.* Paine, 10 How. U. S. 583; Jameson *v.* Drinkald, 12 Moore, 148; Handaysyde *v.* Wilson, 3 C. & P. 528; Mellon *v.* Smith, 2 E. D. Smith, 462; Bigley *v.* Williams, 80 Penn. St. 107; Mailler *v.* Propeller, 61 N. Y. 312; The U. S. Grant, 7 Ben. 195.

[3] Phil., W. & B. R. R. *v.* Kerr, 33 Md. 331.

[4] See supra, §§ 47–8.

[5] The Steamer Syracuse, 12 Wall. 167.

As to tugs, the law is thus expressed by the supreme court of the U. S. (Thompson *v.* Bliss, 1876): "The tug was not a common carrier, and the law of that relation has no application here. She was not an insurer. The highest possible degree of skill and care were not required of her. She was bound to bring to the per-

Lookout.

§ 948. Lookout is always imperative, and when a vessel is sailing in close proximity to other vessels the fact that her hands are engaged in reefing her mainsail is no sufficient excuse for failure to keep a lookout, or to take such precautions as are needful to avoid collisions.[1] It seems that where the captain of a steamer is acting at the same time as pilot and lookout the vessel has not a proper lookout, and the owners would be liable for any injury caused by such omission.[2]

Signals and lights.

§ 949. The same general considerations apply to the use of signals and lights, — a subject, however, governed by distinctive admiralty law, to which it is now practicable simply to refer. It may be noticed, however, that neglect to use the proper lights will not defeat a recovery if it appear that the colliding vessel was not misled by the neglect, and that the collision was in no way caused by such neglect.[3] And it is not negligence in those in charge of a vessel aground to omit to give signals to an approaching vessel as to which side is the proper course to take, even if such course is known to them. The customary signal from steam-vessels by blasts of the steam-whistle are to indicate the course which the vessel giving them intends herself to take, and are not, therefore, appropriate to be given by a steamer not in motion.[4]

Casus, 'Act of God," "Inevitable accident."

§ 950. The terms *casus*, and "Act of God," have been already discussed, and it has been shown that by the intervention of *casus* or *vis major* causal connection is broken.[5] So far as concerns the topic immediately before us, we may regard it as settled that inevitable accident is that which the party charged with the damage could not prevent

formance of the duty she assumed reasonable skill and care, and to exercise them in everything relating to the work until it was accomplished. The want of either in such cases is a gross fault, and the offender is liable to the extent of the full measure of the consequences. Brown *v.* Clegg, 63 Penn. St. 51; The Quickstep, 9 Wall. 665; Wooden *v.* Austin, 51 Barb. 9; Wells *v.* Steam Navigation, 8 N. Y. 375; Steamer New Philadelphia, 1 Black, 62; The Cayuga, 16 Wall. 177; James Gray *v.* John Frazier, 21 How. 184."

[1] Thorp *v.* Hammond, 12 Wall. 408.

[2] Bill *v.* Smith, 39 Conn, 206.

[3] Hoffman *v.* Union Ferry Co. 47 N. Y. 176; Whitehall Tr. Co. *v.* N. J. Steamb. Co. 51 N. Y. (6 Sick.) 369.

[4] Austin *v.* New Jersey Steamboat Co. 43 N. Y. 75.

[5] Supra, §§ 114–131.

by the exercise of care and maritime skill usual among good seamen.[1] It is consequently held, in accordance with views heretofore generally stated,[2] that where in a case of collision the defence of inevitable accident is raised, the *onus* of proof lies, in the first instance, on those who bring the suit against the vessel and seek to be indemnified for damage sustained; and does not attach to the vessel proceeded against until a *primâ facie* case of negligence and want of due seamanship is shown.[3] In a late important case before the English privy council, where this question arose, the evidence was that two sailing vessels approaching stern on in such a manner as that, under the sailing rules, each would be bound to port, being in a dense fog, only sighted each other at a distance of about two hundred yards, and the defendants' vessel, having been close hauled on the port tack, was then preparing to go about, and had eased off her head-sheets. Both vessels immediately ported, but came into collision. Only one minute elapsed between the time of sighting and the collision. The plaintiffs' petition alleged that the defendants' vessel neglected to port, and it was stated, in answer to a question by the judge of the admiralty court, that the head-sheets of the defendants' vessel were not again hauled aft. On this evidence, that vessel was held to blame by the admiralty court, on the ground that she had not executed all the proper manœuvres which she might have executed after sighting the other vessel. It was held by the privy council (reversing the decision of the admiralty court), that the collision was the result of an inevitable accident, the defendants' vessel having done all that could be effected by ordinary care, caution, and maritime skill, in the short space of time that elapsed, and that the plaintiffs, if they meant to rely upon the fact that the head-sheets had not been again hauled back, ought to have alleged that fact in their petition as the cause of the collision; the allegation of neglect to port not sufficiently indicating the nature of such omission.[4]

§ 951. But *casus* brought on by the plaintiff's negligence is, as has been already noticed,[5] no defence. Thus, to illustrate this by

[1] The Virgil, 2 W. Rob. 205; The Marpesia, L. R. 4 P. C. 212.

[2] Supra, §§ 421, 429.

[3] The Bolina, 3 Notes of Cases, 210; The Marpesia, *ut supra*.

[4] The Marpesia, L. R. 4 P. C. 212. See The London, Br. & L. 82.

[5] Supra, § 123.

a recent case, where a steamboat collided with a vessel aground in or near the channel of a navigable river, it will not relieve the colliding vessel from liability for the injury, that, from some hidden and unforeseen cause, her bow was suddenly sheered directly toward the injured vessel, when so near that, by the exercise of the utmost care and vigilance, the collision could not be avoided, when it appears that at the time the steamer's bow so sheered, her pilot, under an erroneous impression as to the true direction of the channel, was negligently steering her away from it and out of the accustomed course.[1]

Contributory negligence.

§ 952. Here, again, must we fall back, so far as concerns general principles, upon the law already declared on the subject of contributory negligence in the abstract,[2] referring, for contributory negligence in its relation to maritime collisions, to treatises on maritime law. It is enough here to say that in suits for negligent collisions at sea, the plaintiff whose negligence directly contributed to the result breaks the causal connection between the defendants' negligence and the disaster, and cannot, therefore, recover. Thus it has been ruled that if by want of proper lights upon a vessel those in charge of another vessel are deceived and a collision happens, this is such contributory negligence as will prevent the owner of the former from recovering for the injuries resulting; but if those in charge of the latter knew the true state of the facts, and with reasonable care could have avoided the injury, the absence of the proper lights is no defence. In such a case, however, it is ruled that the presumption of contributory negligence would arise in the absence of proof of facts to repel it; but if there is evidence tending to repel this presumption, the jury is the only proper tribunal to weigh and determine the proper effect of it.[3] It is to be observed, also, that the fact that the injured vessel "was not manned, or did not carry the lights, or take the course prescribed by law for vessels in the same situation, is to be considered as one of the

[1] Austin *v.* N. J. Steamboat Co. 43 N. Y. 75.

[2] See supra, § 300. In proceedings in admiralty, the damages may be apportioned according to the degree of fault. See City of Hartford, 7 Ben. 350; Maclachlan on Merchant Shipping, 2d ed. 287; Letter of Registrar of Adm. to Lord Selborne, cited Ibid.

[3] Silliman *v.* Lewis, 49 N. Y. 379.

circumstances to be taken into consideration in determining the liability of the parties, but not as of itself necessarily in all cases controlling or decisive." [1] It is otherwise when the want of a lookout, or non-compliance with any statutory prescription, is the direct cause of the disaster.[2]

[1] Allen, J., Blanchard *v.* N. J. St. Co. 59 N. Y. 296, citing Hoffman *v.* Ferry Co. 47 N. Y. 176; Whitehall *v.* St. Co. 51 N. Y. 369; The Farragut, 10 Wall. 334. Supra, §§ 229, 300.

[2] Thorp *v.* Hammond, 2 Wall. 408.

CHAPTER XI.

GAS COMPANIES.

Liability for negligent injury of consumers.

§ 953. THE duties and liabilities of gas companies can be easily inferred from the elementary principles of the law of negligence as hereinbefore stated. Gas is an important yet delicate agent both of industry and comfort, an agent which when rightfully used is of great value, but which when badly made or applied may produce discomfort and business disorder. The gas producer may therefore be regarded as an agent who, for reward, undertakes to render a service requiring the skill of a specialist. From him, therefore, are expected the possession and the application of such skill and the use of diligence proportioned to the delicacy and difficulty of his business.[1] Yet here we must not fall into the error of imposing on him speculative duties, such as the highest conceivable scientific perfection might impose. No doubt great improvements in this as well as all other manufactures are possible; but he who undertakes to supply gas for family and business use is not expected to experiment with such improvements, because, if for no other reason, the experimenting with improvements is the experimenting with risks. His duty is to exert, not a possible yet unusual degree of keenness and inventiveness in his work, but that degree of diligence which good specialists in his particular department are accustomed to apply.[2]

Injury to third parties from

§ 954. Were the duties of gas producers limited to their customers, this chapter would more properly have fallen into that portion of the present volume which treats of

[1] See supra, §§ 48, 145; and see Allen *v.* Gas Co. L. R. 1 Exch. D. 251.

[2] See supra, § 46. Hipkins *v.* Gas Co. 6 H. & N. 250; Lannen *v.* Gas Light Co. 46 Barb. 264; *S. C.* 44 N. Y. 459; Holly *v.* Gas Light Co. 8 Gray, 123; Mose *v.* Gas Co. 4 F. & F. 324. For cases as to causal connection, see supra, § 145.

negligence in the discharge of contracts. But it so happens that most of the cases on this topic relate to the defects in gas apparatus causing injury to third parties. We have, therefore, to appeal to non-contractual analogies for the solution of the question that now immediately presses on us; and here, also, the answer is plain. Whoever wields a dangerous agency must exercise the skill usual among specialists who employ such agency, and if he fail to do this he is liable to those who are damaged by his neglect.[1] A gas company is, therefore, bound to diligence of this class in the structure and repairing of its pipes, which must be kept free from leakage,[2] and in the structure and repairing of its tanks and other apparatus.[3] For these purposes the company is bound to keep on hand a body of operatives sufficient for the ordinary contingencies of damage, though, of course, it is not bound to that extreme cautiousness which would oppress business by a load of precautions, such as a reserve of extra hands, which only rare and improbable emergencies would require.[4] As a rule,[5] the company is liable for the negligence of such operatives in the scope of their employment.[6] Where notice of a defect to the company is either expressed or implied, it is its duty to repair the defect at once, and notice will be implied wherever the defect was caused by the company's negligence.[7]

imperfection of machinery.

§ 955. Of course if the managers place their apparatus, properly guarded, in its necessary location, they are not liable for the damage produced by the mischievous or negligent meddling of the party injured, or of third parties.[8] If, however, they are guilty of negligence, the ordinary

Interposition of other causes.

[1] Supra, § 851.

[2] Blenkiron *v.* Gas Co. 2 F. & F. 437; Burrows *v.* Gas Co. L. R. 5 Exch. 67; Emerson *v.* Gas Co. 3 Allen, 410; Hunt *v.* Gas Co. 1 Allen, 343; 3 Allen, 418; Mose *v.* Gas Co. 4 F. & F. 324.

[3] Hipkins *v.* Gas Co. 6 H. & N. 250.

[4] Supra, § 65; Holly *v.* Gas Co. 8 Gray, 123.

[5] See supra, §§ 156–185.

[6] Lannen *v.* Gas Co. 46 Barb. 264; *S. C.* 44 N. Y. 459.

[7] Hunt *v.* Gas Co. 1 Allen, 343; 3 Allen, 418; Holly *v.* Gas Co. 8 Gray, 123.

Whether a gas company, under special facts, can be made liable for injury caused by its neglect to turn off its gas during a fire by which a part of a city is devastated, see Hutchinson *v.* Gas Co. 122 Mass. 219.

[8] See supra, § 851; Hunt *v.* Gas Co. *ut supra;* Flint *v.* Gas Co. 9 Allen, 552.

Bartlett *v.* Gas Co. 117 Mass. 534,

and natural consequence of which is that, in the common run of things, some one will negligently interfere with their machinery, and thereby cause damage, then they are not exonerated from the consequences by the fact that this last negligent interference was the immediate cause of the disaster.[1]

was a suit brought by the owner of the reversionary interest in a house for damages caused by an alleged negligent explosion of gas. The defence was that the explosion was caused by the negligence of the plaintiff's tenant, and the court below held that no such negligence would defeat the plaintiff's recovery. Judgment based on this ruling was reversed by the supreme court. On a second trial (Bartlett *v.* Gas Light Co. 122 Mass. 209), the evidence was that the plaintiff's tenant in possession, smelling gas in the night, went with a lighted candle into the cellar, where the gas caught fire from the candle, and an explosion took place, causing the injury complained of. The judge trying the case charged the jury that if the tenant, on discovering the presence of gas, did not take reasonable precautions, or did not make reasonable efforts to notify the defendant, and if he recklessly brought the flame of the candle in contact with the fire, his want of care would prevent a recovery. The judge further substantially ruled, that the plaintiff was not barred if the explosion was caused by the bringing the candle by the tenant "merely accidentally, without recklessness or carelessness." A judgment for the plaintiff was sustained by the supreme court.

[1] See supra, §§ 108, 134, 145; Burrows *v.* Gas Co. L. R. 5 Exch. 67; Sherman *v.* Iron Co. 5 Allen, 213.

CHAPTER XII.

DUTY OF PUBLIC AUTHORITIES IN REPAIRING ROADS.

I. General grounds of liability, § 956.
Distinction between New England towns and municipal corporations, § 956.
Liability of New England towns, § 957.
Distinctive duty of cities, § 959.
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Not bound to repair latent defects except upon notice, § 962.
And so as to defects caused by *casus* or interference of third parties, § 963.
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No defence that the plaintiff could have taken another road, § 997.
Inevitable accident as a defence, § 998.
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Individual liability of officers, § 1000.
Proximate cause, § 1001.

I. GENERAL GROUNDS OF LIABILITY.

§ 956. THE question of the liability of towns and municipal corporations for negligence in making and repairing roads is

one which, for several reasons, it is impossible to discuss with systematic accuracy. We have a great mass of adjudications before us when we proceed to enter on this investigation, but when we scrutinize these adjudications we find that they fall into three distinct classes, two of which, at least, are liable to minute subdivision. Out of New England, the States of the American Union, with but few exceptions,[1] vest in special officers the duty of maintaining country roads; while as to cities it is held that when a city or other municipal corporation accepts a charter, investing it with the charge of the highways within its borders, it becomes liable, to an injured party, on common law principles, for negligence in the discharge of this duty,[2] and thus is specifically charged with the care of such highways, to a degree even greater than is the case with towns, viewing the latter in the New England sense.[3] As to municipal corporations, therefore, to which this common principle applies, it is possible to approach a uniform system. It is otherwise, however, when we come to the statutory liability imposed on supervisors of roads and county commissioners, for here the legislation of each state not only shifts from year to year, but is often special for particular counties.[4]

Distinction between New England towns and municipal corporations.

Municipal corporations made liable by acceptance of power.

[1] Wisconsin may be conspicuously noticed, having adopted the New England system.

[2] Henley *v.* Lyme, 5 Bing. 91; Mayor *v.* Henley, 3 B. & A. 77; Lyme Regis *v.* Henley, 2 Cl. & Fin. 331; Hutson *v.* New York, 5 Sandf. 289; Erie *v.* Schwingle, 22 Penn. St. 384; Storrs *v.* Utica, 17 N. Y. 104; Lloyd *v.* Mayor, 5 N. Y. 369; Conrad *v.* Ithaca, 16 Ibid. 159; Browning *v.* Springfield, 17 Ill. 145, and cases cited infra, § 959. No doubt an indictment lies against a municipal corporation for defective discharge of the duty imposed upon it by statute of keeping roads in good condition. It is held, however, that when there is no compensation or benefit for the duty received by the municipal corporation, it is not liable to a private action for omission or neglect to perform a corporate duty imposed by a general law on all towns and cities alike. Oliver *v.* Worcester, 102 Mass. 490; citing Providence *v.* Clapp, 17 How. 161–167; Riddle *v.* Prop. of Locks & Canals, 7 Mass. 169; Mower *v.* Leicester, 9 Mass. 247; Brady *v.* Lowell, 3 Cush. 121. Supra, § 190. See, also, remarks of Clifford, J., in Water Co. *v.* Ware, 16 Wall. 566.

[3] Dillon on Corp. §§ 10, 11; Barnes *v.* Dist. of Columbia, 91 U. S. (1 Otto) 540.

[4] In New York it is well settled that, in the case of a village or city where the trustees, or common council, are made commissioners of highways, the corporation is liable for its negligence in not keeping the streets and sidewalks, within its corporate limits, in a

§ 957. In New England a new factor, requiring independent treatment, is introduced by the town system, it being held by the New England courts that the towns have no common law duty imposed on them[1] to maintain highways, and the New England legislatures having passed statutes making this the duty of the towns, and subjecting them to a liability for damages arising from a defective discharge of this duty. Here, however, a fresh distracting agent arrests us, for while the statutes imposing this liability are, at first sight, alike, they exhibit shades of difference which are the constant source of judicial divergence. Without giving the distinctive features of these statutes it is impossible to show how far the decisions on them are exacted by local legislation, and how far they may be viewed as touching the question of the general liability of the road-makers for defects. Yet thus to analyze these statutes would require the labor and the space of an independent treatise.

Liability of New England towns.

§ 958. It is true that there are certain leading expressions in those statutes which will be forced upon our notice by the constant adjudications of which they have been the subjects. Thus,

condition safe for the use of passengers thereon. Mosey *v.* The City of Troy, 61 Barb. 580.

The negative, however, has been held in New Jersey. Sussex *v.* Strader, 3 Harr. (18 N. J.) 108; Cooley *v.* Essex, 27 N. J. 415; Livermore *v.* Camden, 29 N. J. 242; 2 Vroom (31 N. J.), 507; Pray *v.* Jersey City, 32 N. J. 394. In the latter case it was ruled that an action will not lie in behalf of an individual who has sustained special damage from the neglect of a public corporation to perform a public duty. Consequently the plaintiff's horse having, by accident, come in contact with an obstacle in one of the streets of Jersey City, which obstacle would not have existed but for the neglect of the corporate officers to fill in such street to the proper grade, it was held that a civil action would not lie against the city for the damages thus sustained. The case of Strader *v.* Freeholders of Sussex, 3 Harr. 108, reaffirmed. So in Michigan, Dermont *v.* Detroit, 4 Mich. 435; Detroit *v.* Blackeby, 21 Mich. 84, Cooley, J., dissenting. It was, however, agreed by Cooley, J., that "a municipal corporation is not liable to an individual damnified by the exercise, or the failure to exercise, a legislative authority; and the political divisions of the states, which have duties imposed on them by general law without their assent, are not liable to respond to individuals in damages for their neglect, unless expressly made so by statute."

In Iowa a county is liable at common law for a neglect to repair highways. Huston *v.* Iowa County, 43 Iowa, 456; affirming Wilson *v.* Jeff. Co. 13 Iowa, 181; Moreland *v.* Mitchell Co. 40 Iowa, 394.

[1] See supra, § 266.

for instance, in Massachusetts, the town is required to keep its roads "in repair," so that the same may be made "reasonably safe and convenient for travellers with their horses, teams, and carriages, at all seasons of the year," [1] and the test "safe and convenient" is introduced into the statutes of other states. In Connecticut, the repair the towns are required to make must be "good and sufficient." In Vermont, the town is liable for special damage to the traveller, "by means of the insufficiency or want of repairs" of the roads the town is required to keep; while New Hampshire declares that the liability of the town is to the traveller for damages happening "by reason of any obstructions, defect, insufficiency, or want of repair, which renders it (the road) unsuitable for the travel thereon." Prominent peculiarities such as these demand our consideration; but beyond this, so far as concerns the special interpretation of the statutes, we cannot in this treatise proceed.

§ 959. The task, in reference to cities and other municipal

[1] In Massachusetts, by a statute of 1877, ch. 234, it is provided as follows:

Section 1. Highways, townways, streets, causeways, and bridges shall be kept in repair at the expense of the town, city, or place in which they are situated when other provision is not made therefor, so that the same may be reasonably safe and convenient for travellers, with their horses, teams, and carriages at all seasons of the year.

Section 2. If a person receives or suffers bodily injury, or damage to his property, through a defect or want of repair, or of sufficient railing in or upon a highway, townway, causeway, or bridge, which might have been remedied, or which damage or injury might have been prevented by reasonable care and diligence on the part of the county, town, place, or persons by law obliged to repair the same, he may recover in the manner hereinafter provided, of the same county, town, place, or persons, the amount of damage sustained thereby, if such county, town, place, or persons had seasonable notice of the defect, or might have had notice thereof by the exercise of proper care and diligence on their part; but no such damage shall be recovered by a person whose carriage and load thereon exceed the weight of six tons.

Section 3. Any person injured in the manner set forth in the preceding section shall within thirty days thereafter give notice to the county, town, place, or persons by law obliged to keep said highway, townway, causeway, or bridge in repair, of the time, place, and cause of the said injury or damage; and if the said county, town, place, or persons do not pay the amount thereof, he may within two years after the date of said injury or damage bring an action of tort against said county, town, place, or persons in the superior court to recover the same: provided, however, that no person shall recover in any such action a greater sum for damages than four thousand dollars.

corporations, is far simpler. The law is that the city, undertaking the task of road repairing, is bound to due diligence in the task, and as to what due diligence is, the leading maxims of the law of negligence enable us to reach a satisfactory conclusion. But even as to municipal corporations, there are so many local variations in the powers and duties prescribed by charter, that we are sometimes baffled, at the moment when we think we are reaching a decision based on the common law, by finding that the court is directed in its opinion by statutory provisions which make the decision valuable simply as a matter of statutory exegesis. Under such circumstances, the best we can do is to group the adjudications before us under certain obvious titles, reserving to other investigators, undertaking distinct treatises, the task of connecting each decision with the local legislation from which it springs. At the same time, we must acknowledge as a settled and fundamental doctrine the rule already stated, that where a municipal corporation is charged, under the provisions of a charter granted at the request of its citizens, with the care of roads, and accepts the charge, it is liable to parties injured for negligence in the defective construction or repair of such roads.[1] The general characteristics of this liability have been already examined.

Distinctive duty of cities.

[1] Bill *v.* Norwich, 39 Conn. 222; Jones *v.* New Haven, 34 Conn. 1; Cusick *v.* Norwich, 40 Conn. 375; Bigelow *v.* Randolph, 14 Gray, 541; Eastman *v.* Meredith, 36 N. H. 284; Hutson *v.* New York, 9 N. Y. 163; Hines *v.* Lockport, 5 Lansing, 16; Haskell *v.* Penn Yan, 5 Lansing, 43; West *v.* Rockport, 16 N. Y. 161, note; Conrad *v.* Ithaca, 16 N. Y. 158; Storrs *v.* Utica, 17 N. Y. 104; Mills *v.* Brooklyn, 32 N. Y. 489; Lee *v.* Sandyhill, 40 N. Y. 442; Requa *v.* City of Rochester, 45 N. Y. (6 Hand) 129; Bush *v.* Trustees, 3 N. Y. Sup. Ct. 409; Deyoe *v.* Saratoga, 3 N. Y. Sup. Ct. 504; Todd *v.* Troy, 61 N. Y. 506; Pittsburg *v.* Grier, 22 Penn. St. 63; Erie *v.* Schwingle, 22 Penn. St. 388; Lower Macungie *v.* Merkhoffer, 71 Penn. St. 276; Allentown *v.* Kramer, 73 Penn. St. 406; Philadelphia *v.* Weller, 4 Brewst. 24; Newlin *v.* Davis, 77 Penn. St. 317; Hey *v.* Phila. 81 Penn. St. 44; Baltimore *v.* Holmes, 39 Md. 243; Stackhouse *v.* Lafayette, 26 Ind. 17; McCalla *v.* Multnomah County, 3 Oregon, 424; Browning *v.* Springfield, 17 Ill. 143; Bloomington *v.* Bay, 42 Ill. 503; Springfield *v.* Le Claire, 49 Ill. 476; Sterling *v.* Thomas, 60 Ill. 264; Rockford *v.* Hildebrand, 61 Ill. 155; Chicago *v.* Dermody, 61 Ill. 431; Jansen *v.* Atchison, 16 Kans. 358; Wegmann *v.* Jefferson, 61 Mo. 55; Meares *v.* Wilmington, 9 Ired. 73; Shartle *v.* Minneapolis, 17 Minn. 308; Smoot *v.* Wetumpka, 24 Ala. 112; Cook *v.* Milwaukee, 24 Wis. 270; Weightman *v.* Washington, 1 Black, 39; Supervisors *v.* U. S. 4 Wall. 435; Mayor *v.* Sheffield, 4 Wall.

II. LIMITS OF LIABILITY.

No suit lies for discretionary acts.

§ 960. When the repairing of a road is left to the discretion of the corporation, no action ordinarily lies for non-exercise of the power.[1] And there can be no question that when an officer of government is left with discretionary powers, he is not liable to an individual for damages

190; Thurston *v.* St. Joseph, 51 Mo. 510; Johnston *v.* Charleston, 3 Richard. N. S. 232.

That a city is liable for defects in its wharves, see Pittsburg *v.* Grier, 22 Penn. St. 54; Maxwell *v.* Phil. 7 Phil. 137.

The distinction noticed in the text is expounded in the following extract from the opinion of Hunt, J., in Barnes *v.* District of Columbia, 91 U. S. (1 Otto) 545: —

"And here a distinction is to be noted between the liability of a municipal corporation, made such by acceptance of a village or city charter, and the involuntary *quasi* corporations known as counties, towns, school districts, and especially the townships of New England. The liability of the former is greater than that of the latter, even when invested with corporate capacity and the power of taxation. 1 Dillon, §§ 10, 11, 13; 2d, § 761.

"The latter are auxiliaries of the state merely, and when corporations, are of the very lowest grade and invested with the smallest amount of power. Accordingly, in Conrad *v.* Ithaca, 16 N. Y. 158, the village was held to be liable for the negligence of their trustees; while in Weet *v.* Brockport, the town was said not to be liable for the same acts by their commissioners of highways. Ib. 163, 4, 9. See Brooke's Abr., Action on the Case; Russell *v.* Men of Devon, 2 T. R. 308, and cases there cited; 16 N. Y. supra.

"Whether this distinction is based upon sound principle or not, it is so well settled that it cannot be disturbed."

In England a common law liability, enforcible by indictment, rests on the parishes. See R. *v.* Ecclesfield, 1 B. & Al. 348; R. *v.* Eastrington, 5 A. & E. 765; R. *v.* Oxfordshire, 4 B. & C. 194. No liability arises against a vestry for a defective repairing, though the vestry is empowered by law to make the repairs. Parsons *v.* Vestry, &c. L. R. 3 C. P. 56. No action lies against a local board, under the public health acts, for damage done to an individual through their neglect in repairing a parish road placed by those acts under their management, the ground of the decision being that the duty of repairing was left to the discretion of the board. Gibson *v.* Mayor of Preston, L. R. 5 Q. B. 218; affirming Wilson *v.* The Mayor & Corporation of Halifax, L. R. 3 Exch. 114; 37 L. J. Exch. 44.

What has been said of highways applies to wharves. A city owning a wharf, which is a thoroughfare, is bound to keep it in repair. Pittsburg *v.* Grier, 22 Penn. St. 54; Maxwell *v.* Phil. 7 Phil. 137.

In Michigan a conclusion contrary to that of the text has been held by a majority of the supreme court. Detroit *v.* Blackeby, 21 Mich. 84; and so in New Jersey, in cases cited supra. § 956.

[1] See supra, § 260; Gibson *v.* Mayor, L. R. 5 Q. B. 218; Wilson *v.* Mayor, L. R. 3 Exch. 111.

arising from his honest refusal to act.[1] Even for a defective plan, a city is held not to be liable, when the defect arises from an error of judgment in the selection of one among several plans.[2] When, however, the work is undertaken, it must be done in a workmanlike and suitable manner.[3]

Liability not to extend beyond duty.

§ 961. To make the municipal authorities liable, the road must have been accepted, expressly or impliedly.[4] Where, also, the duty is limited, the liability is only to do what the duty prescribes.[5] Thus, where the statutory duty is simply to put a road in order, and this is done, the parties thus charged cease to be liable for subsequent mischief to the road arising from subsidence of the soil.[6] And where a town puts the entire building of a road in the hands of a contractor, it is relieved from liability for the contractor's negligence;[7] though not for defects or nuisances thereby produced.[8]

Not bound to repair latent defects except upon notice.

§ 962. To expect a municipal corporation to be cognizant of latent defects, when it has taken due care in the construction of a road, would exact from it a greater diligence than that required from common carriers, and would revive the extinct *culpa levissima* of the Schoolmen.[9] Hence, if a road be properly constructed, a municipal corporation is not liable for a latent defect of which it had no notice either actual or constructive.[10]

[1] See supra, §§ 285–6.

[2] Child *v.* Boston, 4 Allen, 41; Thayer *v.* Boston, 19 Pick. 511. In O'Connor *v.* Pittsburg, 18 Penn. St. 187, it was held that the city of Pittsburg was not liable for negligent alteration of the grade of a street, though it destroyed the value of St. Paul's Cathedral, for which the plaintiffs sued.

[3] Wheeler *v.* Worcester, 10 Allen, 604; Rochester White Lead Co. *v.* Rochester, 3 N. Y. 463; Clemence *v.* Auburn, 66 N. Y. 334; and cases hereinafter cited, infra, § 988.

[4] Page *v.* Wethersfield, 13 Vt. 424; Jones *v.* Andover, 9 Pick. 166; Haywood *v.* Charlestown, 43 N. H. 61; Rung *v.* Shoneberger, 2 Watts, 23.

[5] Gorham *v.* Trustees, 59 N. Y. 660; Craig *v.* Sedalia, 63 Mo. 417.

[6] Hyams *v.* Webster, L. R. 2 Q. B. 264; affirmed in Exch. Ch. L. R. 4 Q. B. 138. For suits under Connecticut statute against municipal corporations, for negligence in management and repair of road, see Bill *v.* City of Norwich, 39 Conn. 222; Young *v.* City of New Haven, 39 Conn. 435. See Pendlebury *v.* Greenhalgh, L. R. 1 Q. B. D. 36.

[7] Supra, §§ 181, 193, 259, 818.

[8] Supra, §§ 818–9; Newlin *v.* Davis, 77 Penn. St. 317; Mahoney *v.* Scholly, 4 Weekly Notes, 134. See supra, § 259.

[9] See, as to Massachusetts statute, supra, § 958.

[10] Rapho *v.* Moore, 68 Pa. St. 404.

Thus in Vermont it has been ruled[1] that when a sudden and unforeseen defect occurs in a highway, without fault on the part of the town, such town is not chargeable for the damages resulting from such defect, unless it has been in default in respect to getting seasonable knowledge of the defect, or unless, having such knowledge, it was reasonably practicable to have repaired the defect, or put up a warning or barrier to avoid it, before the happening of the accident.[2]

See, however, McCarthy *v.* Mayor of Syr. 36 N. Y. (1 Sick.) 194; Requa *v.* City of Rochester, 45 N. Y. (6 Hand) 129.

[1] Ozier *v.* Hinesburg, 44 Vt. 220.

[2] In Doulon *v.* The City of Clinton, 33 Iowa, 399, the cases are thus recapitulated by Miller, J.: . . . . "Before the defendant can be held guilty of negligence, on account of defects in the sidewalks (not arising from their original construction), or from an obstruction placed thereon by a wrong-doer, either express notice of the existence of the defect or obstruction must be brought home to it, or they must be so notorious as to be observable by all. Mayor, &c. of N. Y. *v.* Sheffield, 4 Wall. 189; Griffin *v.* Mayor of N. Y. 9 N. Y. 456; Vandyke *v.* Cincinnati, 1 Disney, 532; How *v.* Plainfield, 41 N. H. 135; Bardwell *v.* Jamaica, 15 Vt. 438; Prindle *v.* Fletcher, 39 Vt. 255; Lobdell *v.* New Bedford, 1 Mass. 153; Reed *v.* Northfield, 13 Pick. 94; Bigelow *v.* Weston, 3 Pick. 267; Manchester *v.* Hartford, 30 Conn. 118; McGinity *v.* Mayor, &c. of N. Y. 5 Duer, 674; Dewey *v.* Detroit, 15 Mich. 307; Montgomery *v.* Gilmar, 33 Ala. N. S. 116; Hart *v.* Brooklyn, 36 Barb. 226; Shearman & Redfield on Negligence, §§ 146, 407, 408; Hutson *v.* The Mayor, &c. of N. Y. 9 N. Y. 163; Mayor, &c. of N. Y. *v.* Furze, 3 Hill, 612; Goodnough *v.* Oshkosh, 24 Wis. 549."

In Pennsylvania, however, in a case where the plaintiff, whilst loading his cart, was injured by the falling of a pole in the street, erected by citizens years before, the pole having become rotten, it was held that it was the duty of the town to have had the pole removed, and they were liable for the injury to the plaintiff, whether the neglect was wilful or not. It was further held, that it was not necessary that the town should have had notice of the condition of the pole; and that it was not material that the pole was in such part of the road as not to obstruct the travel. Norristown *v.* Moyer, 67 Pa. St. 355.

In a late Connecticut case, "a passage-way from a sidewalk in a city into the basement of a building was protected by a removable iron grating covered with boards, the iron work being fitted to the opening in such a way that it could not be made insecure except by gross carelessness. It had been kept in this condition for forty years, during which time it had never been known to be left out of its place; a few minutes before the accident, the passage-way was used by a stranger, who did not replace the grating properly, and the plaintiff, who was passing on the sidewalk, stepped upon it, and it gave way, and she was injured." It was held that the city was not liable. Littlefield *v.* Norwich, 40 Conn. 406.

In Pennsylvania it has been inti-

§ 963. Nor are the municipal authorities bound to remove defects caused by accident or by third parties, except upon notice actual or constructive. This rests on the same principles as the point last stated. There must be notice, and a reasonable time to remedy, to impose liability.[1] Lapse of time, however, at common law, supplies such notice, for, after a reasonable time has elapsed, it is negligence on the part of the corporation not to know of the defect when patent; and for such negligence suit lies.[2] But no mere incidental notice to a citizen is sufficient. Thus it has been correctly ruled that a city is not liable for damages to an individual for injuries caused by an opening in a sidewalk, made by an owner of the soil, or of the adjacent land, without proof of notice to the city

And so as to removal of obstacles.

mated that a city is not liable for damages resulting from the acts of a licensee, in making a trench for private purposes in a public street. West Chester *v.* Apple, 35 Penn. St. 284. This is undoubtedly correct as to the immediate effect of the work. Supra, § 259. But the better opinion is that there is liability for the damage as soon as the town has actual or constructive notice of the defect. Newlin *v.* Davis, 57 Penn. St. 317; Mahoney *v.* Scholley, 4 Weekly Notes, 134.

That a town's liability is not limited to defects which are open and visible, see Burt *v.* Boston, 122 Mass. 223.

[1] See Palmer *v.* Portsmouth, 43 N. H. 265; Hardy *v.* Keene, 52 N. H. 370; Cofran *v.* Sanbornton, 56 N. H. 12; Rapho *v.* Moore, 68 Penn. St. 404; Rowell *v.* Williams, 29 Iowa, 210; Atchison *v.* King, 9 Kansas, 550; Fahey *v.* Howard, 62 Ill. 28; Centralia *v.* Krouse, 64 Ill. 19; Chicago *v.* McCarthy, 75 Ill. 602; Chicago *v.* Robbins, 2 Black, 418; *S. C.* 4 Wall. 651.

[2] Chicago *v.* Robbins, 2 Black, 418; *S. C.* 4 Wall. 657; Holt *v.* Penobscot, 56 Me. 15; Colley *v.* Westbrook, 57 Me. 181; Howe *v.* Plainfield, 41 N. H. 135; Prindle *v.* Fletcher, 39 Vt. 255; Reed *v.* Northfield, 13 Pick. 94; Manchester *v.* Hartford, 30 Conn. 110; Bell *v.* Norwich, 39 Conn. 222; Cusick *v.* Norwich, 40 Conn. 375; Boucher *v.* New Haven, 40 Conn. 456; Hover *v.* Barkhoof, 44 N. Y. 113; Requa *v.* City of Rochester, 45 N. Y. 129; Hume *v.* Mayor of N. Y. 47 N. Y. (2 Sick.) 639; McLaughlin *v.* Corry, 77 Penn. St. 109; Birmingham *v.* Dorer, 3 Brewst. 69; Moore *v.* Minneapolis, 19 Minn. 300; Chicago *v.* Langless, 66 Ill. 34.

Thus in Mayor *v.* Sheffield, 4 Wall. 189, the evidence was that the city of New York, in converting a portion of a park into a street, had cut down a tree and left the stump standing from six to eight inches above the surface, and from fourteen to eighteen inches inside the curbstone on the sidewalk. This was done in 1847, and the stump thus left by the city authorities, who had cut down the tree, remained in this condition until the plaintiff was injured upon it in 1857. These facts were uncontradicted, and the court, Mr. Justice Miller, said, that "stronger proof of notice could not be given."

of the insufficiency or defect and neglect to have it remedied.[1] And it is also settled that the notice to the public authorities of such nuisance or defect must be express, unless it should appear that the nuisance or defect was so conspicuous and permanent as to involve constructive notice to the municipal corporation.[2]

§ 964. In Vermont, towns are liable for injuries from insufficiencies of highways caused by sudden freshets if the highway surveyor of the district had time after notice of the defect to repair it before the accident with the means in his control, considering as well his means by virtue of his official statute authority as the means in his hands individually. It has been ruled that no lack of diligence can be charged upon the town until notice to the proper officers of the insufficiency, in a case where it is not claimed that the freshet was itself so extraordinary as to amount to a notice that the road would need repairs, or that the dangerous condition of the road had existed long enough to charge the town officers with fault in not having discovered its condition without notice. It has also been properly ruled that there may be circumstances which would warrant the surveyor in delaying, after notice, the repair of a sudden injury to the road. It may be necessary to delay, in order to make preparations for commencing work, the road being in the mean time securely fenced to protect travel; but the mere fact that the repairs could not be completed on the day notice is given, would not alone be enough to justify the surveyor in waiting until the following day to commence that which the statute requires to be done forthwith.[3]

§ 965. At the same time it must be again remembered that if the defect was, at the time of the injury, palpable, dangerous, and in a public place, and had existed for a considerable period of time, knowledge on the part of the corporation may be presumed. And while notice to a citizen is not, as matter of law, notice to the city, but may be considered as evidence tending to

[1] Fort Wayne *v.* De Witt, 47 Ind. 391.

[2] Donaldson *v.* Boston, 13 Gray, 508; Dewey *v.* City of Detroit, 15 Mich. 307; Doulon *v.* Clinton, 33 Iowa, 397; Cramer *v.* Burlington, 39 Iowa, 512. See Howe *v.* Plainfield, 41 N. H. 135; McGinity *v.* Mayor, 5 Duer, 674; Griffin *v.* Mayor, 9 N. Y. 456; City *v.* Blood, 40 Ind. 62; and see, *contra*, Mason *v.* Ellsworth, 32 Me. 374.

[3] Clark *v.* Corinth, 41 Vt. 449.

show such notice, yet if many citizens had knowledge of the defect, so that it had become notorious, the evidence that the city authorities had notice would become very strong.[1]

§ 966. Under the Massachusetts statute, to recover against a town for an injury sustained by a traveller on a highway by reason of the neglect of the town to keep it in repair, the defect which was the proximate cause of the injury must have existed for twenty-four hours, or been brought to the notice of the town, or been such that, with due care, the town might have known of its existence, before the time of the injury; and it is not enough that another defect, which occasioned the defect that was the proximate cause of the injury, had then existed more than twenty-four hours.[2] But where a town, through its water committee, agreed with a contractor that he should make all trenches needed for laying water-pipes in such streets as the committee might from time to time direct, and that he should guard and light the trenches by night for the protection of travellers, it was held that the town was liable for an injury to a traveller on the highway caused by negligence in guarding the trenches, although the defect had not existed twenty-four hours and the town had no notice thereof.[3]

§ 967. That the agents of a corporation may be deemed its representatives, through whom it may receive notice of defects,[4] is a necessary incident of corporations which can only act through agents. We advance a step further, however, when we take up the case of an officer of the corporation by whom a defect is caused. And the very causing of such defect by the corporation's officer is to be viewed as notice of it to the corporation.[5]

Agents may receive notice.

§ 968. As a general rule, "although a town is bound to erect barriers or railings where a dangerous place is in such close proximity to the highway as to make travelling on it unsafe, it is not bound to do so where there is no such close proximity to a dangerous place, merely to

Defects out of the beaten track of the road.

[1] Bill *v.* Norwich, 39 Conn. 222.

[2] Ryerson *v.* Abington, 102 Mass. 526; Winn *v.* Lowell, 1 Allen, 177; Crocker *v.* Springfield, 110 Mass. 135.

[3] Brooks *v.* Somerville, 106 Mass. 271.

[4] See supra, § 267; Deyoe *v.* Saratoga, 3 N. Y. Sup. Ct. 504; Bush *v.* Trustees, Ibid. 409.

[5] Hardy *v.* Keene, 52 N. H. 370.

prevent travellers from straying from the highway."[1] It is otherwise when a dangerous place is in close proximity.[2] In Wisconsin, it is true, under a statute which gives damages in case of "insufficiency or want of repair," it has been ruled[3] that towns are not bound to keep county highways in a suitable condition for travel in their whole width; and their liability is limited primarily to damages caused by defects in the travelled track, and such portion of the road as is needed for the full use of the same. Hence it is said that if a traveller, without necessity, or for his own pleasure or convenience, deviates from the travelled track (which is in good condition), and in so doing meets with an accident outside of such track, the town will not be liable for resulting damages.[4] On the other hand, it is declared that if the travelled portion of the highway is obstructed or dangerous, making it necessary for a traveller to deviate therefrom, and in so doing he uses ordinary care, the town will be liable for damages accruing to him from an accident caused by any defect or obstruction in that portion of the highway over which he is thus necessarily passing. And this rule generally obtains.[5]

[1] Warner *v.* Holyoke, 112 Mass. 367. See Adams *v.* Natick, 13 Allen, 429; Murphy *v.* Gloucester, 105 Mass. 470; Marshall *v.* Ipswich, 110 Mass. 522; Lower M. Township *v.* Merkhoffer, 71 Penn. St. 276; Perry *v.* John, 79 Penn. St. 412; Green *v.* Bridge Creek, 38 Wis. 450. Infra, § 974.

[2] Infra, § 976; Alger *v.* Lowell, 3 Allen, 398; Hey *v.* Phil. 81 Penn. St. 48.

[3] Wheeler *v.* Westport, 30 Wis. 393; Kelley *v.* Fond du Lac, 31 Wis. 180. See supra, § 105, note 5.

[4] See Doyle *v.* Vinalhaven, 66 Me. 348; Cassedy *v.* Stockbridge, 21 Vt. 391; Morse *v.* Richmond, 41 Vt. 435.

[5] See cases cited supra, § 401. See, also, Barton *v.* Montpelier, 30 Vt. 650; and, particularly, opinion of Dixon, C. J., in Wheeler *v.* Westport, 30 Wis. 393.

In a late case in Maine, Hall *v.* Unity, 57 Me. 529, the evidence was that, from a well-wrought, safe, and convenient travelled path on a highway, a passage-way, not made by the town, led by a slightly circuitous course to a watering-trough, erected without authority of the town, within the limits of the highway, for the purpose of enabling travellers to water their animals, and thence turned into the main track again, several rods from the point of departure. The plaintiff with his wife travelling along the highway, with a horse and carriage, drove out to the trough and watered his horse; and, while leaving the trough, the wheel of his carriage was drawn upon a rock lying in its natural bed in the passage-way, ten feet from the usually travelled track, and thereby the plaintiff's wife was thrown from the carriage upon the trough and injured. It was held, by Cutting, Walton, Dickerson, and Tapley, JJ., that the actual condition of

If one side of a street is made dangerous by a recent fire, the defects being such that sufficient reasonable time has not yet elapsed for their repair, the proper course for travellers is to take the other side of the street, and it is negligence for them to omit to do so.[1]

Railroad crossings and interferences.

§ 969. Where a street in an incorporated town has been opened and graded by the town authorities and under their jurisdiction, although a portion of it may have been conceded as an easement to a railroad, the authorities are not relieved from the obligation to remove dangerous nuisances.[2] The town continues liable, notwithstanding the liability of the railroad company for the defects it causes.[3] And the town is required to see that a railroad crossing, which is part of a highway, is safe.[4]

Nuisances. Crowds of idlers.

§ 970. Crowds of idlers, collecting in public highways, may constitute a nuisance which it may be negligence in municipal corporations not to remove.[5] It should be remembered, however, that nuisances of this class are not "defects" in highways for which, under the statutes, towns are liable. Hence a town is not, under these statutes, liable

the passage-way being, in fact, such as it appeared to be, and containing nothing to allure, deceive, or ensnare travellers into concealed or unperceived danger or difficulty, the town was not liable. See, to same point, Cobb *v.* Standish, 14 Me. 198. On the other hand, the liability of the town was affirmed by Appleton, C. J., Kent, Barrows, and Danforth, JJ. See, also, Whitney *v.* Cumberland, 64 Me. 541; Sykes *v.* Pawlet, 43 Vt. 446; Ozier *v.* Hinesburg, 44 Vt. 220.

Whether the part of the road kept in order is wide enough, and safe enough, is for the jury. Johnson *v.* Whitefield, 18 Me. 286; Savage *v.* Bangor, 40 Me. 176; Aldrich *v.* Pelham, 1 Gray, 510; Dowd *v.* Chicopee, 116 Mass. 93.

If the town permits a turn-out from the travelled part of its highway to a private road, such turn-out having the marks of a highway, the town is liable for defects in the turn-out. Stark *v.* Lancaster, 57 N. H. 88.

[1] Centralia *v.* Krouse, 64 Ill. 19.

[2] Norristown *v.* Moyer, 67 Penn. St. 355.

[3] Ibid.; Wellcome *v.* Leeds, 51 Me. 313; State *v.* Gorham, 37 Me. 451; Willard *v.* Newbury, 22 Vt. 458; Batty *v.* Duxbury, 24 Vt. 155; Davis *v.* Leominster, 1 Allen, 182; Hutson *v.* N. Y. 9 N. Y. 163.

[4] Willard *v.* Newbury, 22 Vt. 458; Batty *v.* Duxbury, 24 Vt. 155; Barber *v.* Essex, 27 Vt. 62; State *v.* Gorham, 37 Me. 451; Jones *v.* Waltham, 4 Cush. 299; Vinal *v.* Dorchester, 7 Gray, 423.

[5] Norristown *v.* Moyer, 67 Penn. St. 355. See Fairbanks *v.* Kerr, 70 Penn. St. 86.

for nuisances arising from annoying noises, spectacles, and smells.[1]

Coasting on sleds. Wagon on road.

§ 971. Towns are also not liable for injuries to travellers inflicted by persons coasting on sleds in highways. This is not an insufficiency of a highway, within the meaning of the statute, which renders towns liable for injuries by reason of insufficiencies, though the selectmen neglected to forbid coasting.[2] And so as to wagons temporarily standing with their driver and horses on the road.[3]

Unskilful grading.

§ 972. The municipal authorities, as we have seen, though not liable for omission to exercise a discretion, are liable for negligence in such exercise.[4] Hence they are liable for injury from defective or unskilful grading[5] on road or sidewalk.

Defective lights.

§ 973. When cities or towns are under no statutory obligations to light highways, they are not liable for the results of failure in this respect.[6] But if in repairing the road, holes or other defects are left, notice must be given by lights at night.[7]

Guards or railings.

§ 974. The absence of any guard or railing at the side of a bridge forming part of a highway is a fact from which the jury may find that the bridge was defective within the meaning of the statute rendering towns liable for injuries resulting from defective highways.[8] So, when in repairing a road defects are left temporarily in it, the town or corporation

[1] See Hixon *v.* Lowell, 13 Gray, 59.

[2] Hutchinson *v.* Concord, 41 Vt. 271; Ray *v.* Manchester, 46 N. H. 59.

[3] Davis *v.* Bangor, 42 Me. 522; Snow *v.* Adams, 1 Cush. 443.

[4] Supra, § 263 *et seq.*; Smith *v.* N. Y. 66 N. Y. 295.

[5] Infra, § 988. Ellis *v.* Iowa City, 29 Iowa, 229; City *v.* Noble, 8 Kans. 446; Cook *v.* Milwaukee, 27 Wis. 191; Allentown *v.* Kramer, 73 Penn. St. 406; Higert *v.* Greencastle, 43 Ind. 574.

[6] Sparhawk *v.* Salem, 1 Allen, 30; Macomber *v.* Taunton, 100 Mass. 255; Randall *v.* R. R. 106 Mass. 276.

[7] Brooks *v.* Somerville, 106 Mass. 271; Storrs *v.* Utica, 17 N. Y. 104; Milwaukee *v.* Davis, 6 Wis. 377; Silvers *v.* Nerdlinger, 30 Ind. 53; Morton *v.* Inhab. 55 Me. 46; infra, § 978; Com. *v.* Cent. Bridge, 12 Cushing, 242.

[8] Houfe *v.* Fulton, 29 Wis. 296; Woodman *v.* Nottingham, 49 N. H. 387. But it is not necessary that such bridges should be strong enough for travellers to rest on. Stickney *v.* Salem, 3 Allen, 374.

should guard or fence it so as to protect travellers.[1] But the defect, to impose liability, must be so near the highway as to endanger travellers.[2]

Railing to keep travellers off from dangerous bridge or tunnel.

§ 975. Where a bridge is in a dangerous condition it is the duty of the town to give notice to travellers by a barrier across the road, or in some other reasonable way.[3] Nor is the erection of such a barrier sufficient unless the town uses reasonable care to keep it up so long as the bridge is in a dangerous condition.[4] To leave a drawbridge open without guards or watchmen, *a fortiori* brings liability.[5] The same precautions are to be taken in respect to a tunnel which has become dilapidated and dangerous.[6]

Negligence in fencing roads.

§ 976. The true test as to negligence in fencing roads is "whether there is such a risk of a traveller using ordinary care, in passing along a street, being thrown or falling into the dangerous place (adjoining the highway) that a railing is requisite to make the way itself safe and convenient."[7] Hence a municipal corporation, charged with building and repairing roads, is guilty of negligence in constructing a passage-way by the side of a hill without sufficient guards to protect travellers.[8] But when there are no such dangers, a town is not bound to fence a road to keep passengers from straying.[9] Nor is a fence made to lean against; and hence the town is not liable for its inadequacy for that purpose.[10]

[1] See supra, § 973; infra, § 978; Chicago *v.* Brophy, 79 Ill. 277.

[2] Supra, § 968; infra, § 981.

[3] Private notice to a traveller will not relieve the corporation from the consequences of negligence in this respect. Humphreys *v.* Armstrong, 56 Penn. St. 204.

[4] Thorp *v.* Brookfield, 36 Conn. 320. As to distinctive provisions in Iowa, see Davis *v.* Allamakee, 40 Iowa, 217; Taylor *v.* Davis, 40 Iowa, 295; Moreland *v.* Mitchell, 40 Iowa, 394.

[5] Chicago *v.* Wright, 68 Ill. 586.

[6] Chicago *v.* Hislop, 61 Ill. 86.

[7] Com. *v.* Wilmington, 105 Mass. 599. See, also, Adams *v.* Natick, 13 Allen, 429. Hoar, J., in Alger *v.* Lowell, 3 Allen, 402, adopted Murphy *v.* Gloucester, 105 Mass. 472; Woodward *v.* Nottingham, 49 N. H. 387.

[8] Alger *v.* Lowell, 3 Allen, 398; Norris *v.* Litchfield, 35 N. H. 271; M. T. *v.* Merkhoffer, 71 Penn. St. 276; Hey *v.* Phil. cited fully supra, § 105; Joliet *v.* Verley, 35 Ill. 58; Hyatt *v.* Roundout, 44 Barb. 385.

[9] Sparhawk *v.* Salem, 1 Allen, 30. See Bartrett *v.* Vaughan, 6 Vt. 243. See, also, Palmer *v.* Andover, 2 Cush. 600; Jones *v.* Waltham, 4 Cush. 299; Koester *v.* Ottumwa, 34 Iowa, 41; Stinson *v.* Gardiner, 42 Me. 248; Williams *v.* Clinton, 28 Conn. 264; Nebraska City *v.* Campbell, 2 Black, 590.

[10] Orcutt *v.* Bridge Co. 53 Me. 500; Stickney *v.* Salem, 3 Allen, 374.

§ 977. It has been held in Pennsylvania,[1] that when a bridge has stood for the time timbers are expected to last, and it may be reasonably expected that decay has set in, it is negligence to omit all proper precautions to ascertain its condition. In such case appearances will not excuse the neglect, but it is the duty of supervisors to call to their assistance those whose skill will enable them to ascertain the state of the structure.[2] But a town is not liable for injuries caused by an unexpected freshet, when there has not been time enough for repair.[3]

Negligent decay of bridge.

§ 978. Towns are not liable for injuries caused by such excavations or obstructions as are necessarily created in highways in order to repair them, provided reasonable notice of the danger is given to travellers.[4] But the guarding must be adequate for the purpose.[5] Liability for neglect in not sufficiently guarding an excavation in a sidewalk cannot be avoided by showing that the guards put up were such as are customary with builders. The question is, was due diligence shown; the diligence a good business man in such specialty is accustomed to use.[6] In an action to recover for personal injuries alleged to have been caused by negligence of the defendants in guarding a trench, they objected to the admission of testimony as to the guarding on Friday, upon the ground that the evidence tended to show that the accident was on Saturday; but the judge admitted the testimony, on the ground that the witnesses might be mistaken as to the day of the week they were testifying about, or there might be a mistake as to the day of the accident. It was afterwards conceded that the accident happened on Saturday, and the judge instructed the jury not to regard the testimony as to the guarding on Friday, unless they were satisfied that the witnesses who gave it were mistaken as to the day,

Defective guarding trench.

[1] Rapho *v.* Moore, 68 Penn. St. 404.

[2] Agnew, J.: . . . . "That a municipal corporation, though bound to the duty of maintenance and repair, is not absolutely bound for the soundness of the structures it erects as parts of a public highway, must be admitted. . . . . It is not an insurer against all defects latent as well as patent, but is liable only for *negligence* in the performance of its duties." See Rockford *v.* Hildebrand, 61 Ill. 155.

[3] Jaquish *v.* Ithaca, 36 Wis. 108.

[4] Morton *v.* Inhab. 55 Me. 46.

[5] Myers *v.* Springfield, 112 Mass. 489.

[6] Storrs *v.* Utica, 17 N. Y. 104;

and were in fact testifying as to what they saw on the day of the accident. It was ruled by the supreme court that the defendants had no ground of exception.[1] The trench, it should be added, should be near enough to the highway to imperil travellers.[2]

§ 979. A derrick within or upon the margin of a highway, or derrick ropes extending over and across the highway, may be an obstruction, a defect, or an insufficiency of the highway, if the derrick or the ropes be insecurely or improperly placed or fastened.[3] Derrick on road.

§ 980. "The mere fact that a highway, of no unusual scope or construction, is slippery by reason of a smooth coating of ice, does not constitute a defect or want of repair, for which a city or town is liable, under the highway act."[4] But "a way may be defective by being so improperly constructed as to induce a special or constant deposit of ice in a particular locality. It may be built at such an angle, and so exposed to the formation of ice, as to make passing over it in winter especially and usually dangerous. In all of these cases it Ice and snow.

Milwaukee *v.* Davis, 6 Wis. 377; Silvers *v.* Nerdlinger, 30 Ind. 53. See supra, §§ 973–4. See Koester *v.* City of Ottumwa, 34 Iowa, 41.

[1] Brooks *v.* Somerville, 106 Mass. 271.

[2] Supra, § 968.

[3] Hardy *v.* Keene, 52 N. H. 370. In this case, Foster, J., said: . . . . "The case is governed by the principles applied in Hubbard *v.* Concord, 35 N. H. 52; Johnson *v.* Haverhill, 35 N. H. 74; Hall *v.* Manchester, 40 N. H. 410; Clark *v.* Barrington, 41 N. H. 44; Howe *v.* Plainfield, 41 N. H. 135; Palmer *v.* Portsmouth, 43 N. H. 265; and Ray *v.* Manchester, 46 N. H. 59, with which decisions in this respect we are entirely satisfied.

"In Hubbard *v.* Concord, the principle applied was, that if the defect was caused by the recent action of natural causes, the town were not liable, unless, under the circumstances of the case, they ought to have repaired the defect before the accident happened, and had reasonable opportunity to do so.

"And in Johnson *v.* Haverhill, and most, if not all the other cases above cited, the same principle was applied in the case of defects caused by human agency, whether with or without fault, provided the fault of the immediate agent was one for which blame could not be imputed, either to the plaintiff or the defendant."

[4] Gray, J., Pinkham *v.* Topsfield, 104 Mass. 83, citing Stanton *v.* Springfield, 12 Allen, 566; Nason *v.* Boston, 14 Allen, 508; Stone *v.* Hubbardston, 100 Mass. 49; Gilbert *v.* Roxbury, 100 Mass. 185; Billings *v.* Worcester, 102 Mass. 329; and see Fitzgerald *v.* Woburn, 109 Mass. 204; Rockford *v.* Hildebrand, 61 Ill. 156; Bush *v.* Geneva, 3 N. Y. Sup. Ct. 409; Perkins *v.* Fond du Lac, S. C. Wis. 1876; Crocker *v.* Springfield, 110 Mass. 135.

will be for the jury, under proper instructions, to decide, as a question of fact, whether the way is properly made and is in good repair."[1] So, "if ice, by reason of constant or repeated flowing of water, trampling of passengers, or any other cause, assumes such a shape as to form an obstacle to travel, the fact that it is slippery does not make it the less a defect in the highway."[2] And in an action against a town for injuries occasioned to a traveller in a street, by her falling on an icy ridge while crossing the sidewalk from the carriage-way to a shop, the refusal of the judge to instruct the jury that on a well constructed sidewalk, ten or twelve feet wide, and having a sufficient width free from ice or hard snow for the safe passage of travellers along it, a ridge of ice or hard snow extending two and a half feet from the curbstone, from four to six inches high, and sloping both ways, is not a defect for which the town is liable, affords the defendants no ground of exception. It was further ruled that in such an action against a town for injuries occasioned to a traveller by an icy ridge which was a defect in the highway, the fact that the accident would not have happened, except for a light snow which was falling at the time and concealed the defective place, is no defence.[3] At the same time the

[1] Hoar J., Stanton *v.* Springfield, 12 Allen, 570, adopted in Pinkham *v.* Topsfield, 104 Mass. 83. See Salisbury *v.* Herchenroder, 106 Mass. 458; Landolt *v.* Norwich, 37 Conn. 615; Savage *v.* Bangor, 40 Me. 176; City *v.* King, 9 Kans. 550. Supra, § 86.

[2] Gray J., in Stone *v.* Hubbardston, 100 Mass. 57, citing Hutchins *v.* Boston, 12 Allen, 571, note; Johnson *v.* Lowell, 12 Allen, 572, note; Nason *v.* Boston, 14 Allen, 508; Luther *v.* Worcester, 97 Mass. 268. See Tripp *v.* Lyman, 37 Me. 250; Savage *v.* Bangor, 40 Me. 176; Hall *v.* Manchester, 40 N. H. 410; Providence *v.* Clapp, 17 How. (U. S.) 161; Green *v.* Danby, 12 Vt. 338; Darkin *v.* Troy, 61 Barb. 637; Mosey *v.* Troy, 61 Barb. 580; Todd *v.* Troy, 61 N. Y. 506.

In McLaughlin *v.* Corry, 77 Penn. St. 109, the supreme court of Pennsylvania laid down the rule that "A municipality cannot prevent the general slipperiness of its streets, caused by the snow and ice during the winter; but it can prevent such accumulations thereof, in the shape of ridges and hills, as render the passage dangerous." See *S. C.* in second trial, 2 Weekly Notes, 102.

[3] Street *v.* Holyoke, 105 Mass. 82. Colt, J.: . . . . "The court rightly refused the other instructions asked for. It would have been clearly erroneous to have defined, as matter of law, within what limits of extent and elevation an icy ridge accumulated upon a sidewalk could exist and not be a defect. Luther *v.* Worcester, 97 Mass. 268, 271. And the fact that a light snow was falling at the time, which concealed the defect, and made it more dangerous, had legitimate

circumstance that in consequence of the permitted pumping of water upon a city street by a fire-engine, ice formed upon the street and sidewalk, and that plaintiff was injured by slipping thereon, would not render the city liable, it not appearing that the engine was not being used for a lawful purpose.[1]

Snow, when falling in heavy masses, may be so beaten down as to cease to be such an obstacle as imposes liability on the town. As to pathways in cities, greater diligence in removal is required.[2]

Negligence in permitting excavations in side of road.

§ 981. We have already seen that it is the duty of the proper authorities to fence off from a road dangerous places into which a horse, in the ordinary aberrations of travel, might fall.[3] The same rule applies to excavations on the side of a road. In a case in Pennsylvania[4] the evidence was that miners had excavated into the side of a road, making a precipitous bank; no guard was put up; a wagoner in driving along the road broke the bank; and his wagon and team fell over and were injured. This was held to be negligence by the supervisors, for which the township was liable.[5]

Snow falling from roof; signs, awnings.

§ 982. Under the Massachusetts statute, while the town is liable for negligence causing injuries to be received through ropes, awnings, or transparencies supported on poles or otherwise over a side-path,[6] it is not liable for injuries caused by the falling of snow from a roof,[7] nor

bearing only upon the question of the plaintiff's care. The icy ridge was the defect complained of, not the falling snow; and although the injury would not have happened but for the snow, yet the town is not thereby relieved of its responsibility. Day *v.* Milford, 5 Allen, 98." See, to same effect, Morse *v.* Boston, 109 Mass. 446.

[1] Cook *v.* Milwaukee, 27 Wis. 191. See, also, Balt. *v.* Marriott, 9 Md. 160; Ward *v.* Jefferson, 24 Wis. 342.

[2] Providence *v.* Clapp, 17 How. U. S. 161.

[3] Supra, § 968.

[4] Lower M. T. *v.* Merkhoffer, 71 Pa. St. 276. See supra, § 968.

[5] *Per Curiam.* "We have considered the bills of exception in this case, and find them free of error. That the township was answerable in its corporate capacity for the injury complained of in this case, in the absence of satisfying proof of negligence on part of the plaintiff, is a well settled rule in this state." See, also, Allentown *v.* Kramer, 73 Penn. St. 406; Sterling *v.* Thomas, 60 Ill. 264. Supra, § 835.

[6] French *v.* Brunswick, 21 Me. 29; Drake *v.* Lowell, 13 Met. 292; Day *v.* Milford, 5 Allen, 98; West *v.* Lynn, 110 Mass. 514. See supra, § 789.

[7] Hixon *v.* Lowell, 13 Gray, 59. Supra, § 789.

by the falling of a sign which the proprietor of an adjoining building had suspended over the sidewalk on an iron rod, insecurely fastened to the building, although the city had notice of the position and insecurity of the sign and its fastening.[1] So in Connecticut, a city was held not to be liable for the falling of an iron weight attached to a flag which was suspended across the street by third persons,[2] nor for the falling of a dead limb from a tree in a public square.[3] But it has been held in Indiana that a city, after notice, may be made liable for damages to a traveller from the falling of the cornice of a building which projects over a sidewalk in a city, and which is constructed in such a manner as to be dangerous to persons using the sidewalk.[4] And liability has been held to be imposed by injuries from a falling limb from an overhanging tree,[5] and from the falling of a "liberty" pole.[6]

Objects calculated to frighten horses.

§ 983. It is the duty of the town to remove from a public road objects likely to frighten horses, and it is liable for injuries caused by its negligence in so doing;[7] and for this reason liability has been held to attach to negligence in leaving a dead horse on the street, by which a traveller's horse was frightened.[8] No doubt the rule is of difficult

[1] Jones *v.* Boston, 104 Mass. 75.

For suits against individuals for permitting ice, &c., to fall from roof, see supra, § 843.

[2] Hewison *v.* New Haven, 34 Conn. 136. The Connecticut statute does not require roads to be *safe*. See Norristown *v.* Moyer, supra, § 962, *contra*.

[3] Jones *v.* New Haven, 34 Conn. 1. See Salisbury *v.* Herchenroder, 106 Mass. 458.

[4] Grove *v.* Fort Wayne, 45 Ind. 429.

[5] Jones *v.* New Haven, 34 Conn. 1.

[6] Norristown *v.* Moyer, 67 Penn. St. 355. See Parker *v.* Mayer, 3 Ga. 725.

[7] Supra, §§ 104–7; Willey *v.* Belfast, 61 Me. 469; Clark *v.* Lebanon, 63 Me. 393; Chamberlain *v.* Enfield, 43 N. H. 358; Winship *v.* Enfield, 42 N. H. 199; Lund *v.* Tyngsboro, 11 Cush. 563; Foshay *v.* Glen Haven, 25 Wis. 288; Dimock *v.* Suffield, 30 Conn. 129; Hewison *v.* N. Haven, 34 Conn. 136; Kelley *v.* Fond du Lac, 31 Wis. 180; Morse *v.* Richmond, 41 Vt. 435.

As to liability of individuals, see supra, §§ 107, 835.

A town has been held liable for injuries resulting from fright at the noise of pigs in a pig-sty intruding on the road; Bartlett *v.* Hooksett, 48 N. H. 18; and at burning hay. Morse *v.* Richmond, 41 Vt. 435. See supra, § 835, and other cases supra, § 107.

But the object of fright must be *per se* a defect in the road. Card *v.* Ellsworth, 65 Me. 547. And this a wagon, left on the side of the road, out of the beaten track, is not. Nichols *v.* Athens, 66 Me. 402.

[8] Chicago *v.* Hoy, 75 Ill. 530.

application, and even the modes of its enunciation have given cause to much conflict of opinion. But where such objects are ordinarily calculated to alarm road-worthy horses, then, on principle, they must be regarded as defects for which the authorities permitting them are liable.[1] It is conceded that if a road-worthy horse is frightened, to an extent not unusual among road-worthy horses, and then strikes an obstruction or defect in the road, the town is liable for the damage produced.[2]

A more difficult question arises when a horse, frightened at a defect or obstruction in the road for which the town would have been liable, had the horse or wagon struck it, runs away, becoming subsequently injured, though without coming into contact with any defect or obstruction for which the town is responsible. The weight of authority is that the town is in such case liable.[3] In Massachusetts a contrary conclusion is reached.[4] It has been

[1] See supra, § 107; Clark *v.* Lebanon, 63 Me. 396; and see review of the authorities by Steele, J., in Morse *v.* Richmond, 41 Vt. 435.

[2] Thus in Stone *v.* Hubbardston, 100 Mass. 50, it was held that if a horse driven with due care by a traveller on a highway, without escaping from his control, is caused to step out of the travelled track by an object within the limits of the way, which would cause an ordinary, gentle, and well-broken horse to do so, whereby the traveller is brought into contact with a defect in the surface of the way, or a place on the side of the way defective for want of a railing, and so is injured, the town is liable in damages; but not so if the shying of the horse is caused by a vicious habit, and is at an object which would not startle a horse ordinarily gentle and well-broken.

See Titus *v.* Northbridge, 97 Mass. 288; Brooks *v.* Rector, 117 Mass. 204, to the effect that the town is not liable for injuries received by a horse, when he is out of his driver's control, such loss of control not being imputable to the town. See supra, §§ 103–107.

[3] Card *v.* Ellsworth, 65 Me. 547; Bartlett *v.* Hooksett, 48 N. H. 18; Morse *v.* Richmond, 41 Vt. 435; Hodge *v.* Bennington, 43 Vt. 451; Dimock *v.* Suffield, 30 Conn. 129; Ayer *v.* Norwich, 39 Conn. 376; Chicago *v.* Hoy, 75 Ill. 530; Foshay *v.* Glen Haven, 25 Wis. 288; Angell on Highways, 261.

[4] The Massachusetts cases are thus reviewed by Peters, J., in Card *v.* Ellsworth, *ut supra*: —

"The inclination of the Massachusetts courts, as exhibited in the earlier cases, was apparently favorable to the same view. In Howard *v.* North Bridgewater, 16 Pick. 189, the court say: 'But there may be such obstructions out of the travelled path as will render the road unsafe; such, for instance, as would frighten horses.' But, in the later cases, the opinion of that court upon the exact question presented here, as well as upon other questions more or less like it, has been most unequivocally the other way. In Keith *v.* Easton, 2 Allen, 552, it was decided that an incumbrance 'upon the side of a way' was not a defect in the way, merely because it exposes

further held in Massachusetts that an object on a highway with which a traveller could not come in collision, and which is not an obstruction to travel, is not to be deemed a defect, for the reason that its bright appearance causes a horse to take fright, in consequence of which he escapes from the control of his driver.[1]

Horse injuring his master.

§ 983 *a*. A town is held liable for injuries sustained by a traveller when endeavoring to extricate his horse from a defect in the road.[2]

Unaccountable fright in road-worthy horses.

§ 984. Supposing, however, that road-worthy horses take fright unaccountably, and without blame to any one, and then strike an obstruction on the beaten track of the road, are the public authorities liable? On the principle that where *casus* and negligence combine in a disaster, the party guilty of the negligence is liable, we would hold, were the case at common law, the affirmative.[3] But we must remember that the duties imposed upon New England towns in such cases are statutory, and are limited to the statutory terms. As a result of the cases, we may hold that when there is a hole or other defect in the road against which a runaway carriage is wrecked, it is no defence that the horses were frightened and beyond control, if the obstruction is one which

the traveller's horse to become frightened by the sight of it, or by sounds or smells issuing from it. In Kingsbury *v.* Dedham, 13 Allen, 186, the application of the same doctrine was extended to a case where the object at which the horse took fright was in the travelled way, and was of a nature calculated to frighten horses, but was not *per se* an actual defect or incumbrance in the way of travel. In Cook *v.* Charlestown, 98 Mass. 80, it was held that the town was not liable, even though the incumbrance at which the horse became frightened was in the travelled part of the way, and was of itself an obstruction and defect therein. There was in that case no collision with the obstruction itself, and the accident occurred at a point in the road where there was no defect. Cook *v.* Montague, 115 Mass. 571, is to the same effect. Still, individuals who leave or maintain upon the highways obstructions which caused fright in horses, are held, in Massachusetts, responsible to travellers for injuries occasioned thereby. Barnes *v.* Chapin, 4 Allen, 444; Jones *v.* R. R. 107 Mass. 261. And in the same state it has been held that a town may be answerable for damages where an injury is caused by a horse shying at one defect, and the carriage hitting the same or some other defect upon the highway. Bigelow *v.* Weston, 3 Pick. 267; Bly *v.* Haverhill, 110 Mass. 520; Woods *v.* Groton, 111 Mass. 357."

[1] Cook *v.* Montague, 115 Mass. 571; and see Brooks *v.* Acton, 117 Mass. 204.

[2] Supra, § 104.

[3] See supra, §§ 104, 921.

would impose liability had the horses not run away.[1] Various shades of opinion are elsewhere, as has been seen, expressed; but the true issue is, is the road adequate for the ordinary wear of travel. If so, the public authorities cannot be made liable for the *casus*.[2]

[1] Hey *v.* Philadelphia, cited supra, § 105; Lacon *v.* Page, 48 Ill. 499; Chicago *v.* Gallagher, 44 Ill. 295; Joliet *v.* Verley, 35 Ill. 58; Springfield *v.* Le Claire, 49 Ill. 476; Champaign *v.* Patterson, 50 Ill. 61. See supra, §§ 104, 105.

[2] See this discussed at large, supra, §§ 103–105, and in Babson *v.* Rockport, 101 Mass. 93, which was a trial of an action against a town for injuries alleged to have been caused to a traveller by a defect in the highway on which he was driving with a horse and carriage, the jury were instructed that, for the plaintiff to recover, the defect must have been the sole cause of the accident which resulted in the injury; that if the plaintiff's horse became uncontrollable, and was so when the accident occurred, the plaintiff could not recover; but that if there was only a momentary loss of control, and the control would have been instantly regained if the plaintiff's carriage had not come in contact with the place where the way was defective, then the plaintiff could recover. It was held that these instructions were correct.

Chapman, C. J., said: "In order to render a town or city liable on account of an accident happening on a highway, it must happen to a traveller, and the defect of the way must be the sole cause of the injury. Rowell *v.* Lowell, 7 Gray, 100; Stickney *v.* Salem, 3 Allen, 374. If a horse gets loose and runs upon the highway, the town is not liable. Richards *v.* Enfield, 13 Gray, 344; in Davis *v.* Dudley, 4 Allen, 557, this principle was applied to a case where the horse escaped from his driver while travelling on the way. In Titus *v.* Northbridge, 97 Mass. 258, and Horton *v.* Taunton, Ibid. 266, it was applied to cases where the horse had not escaped from the driver, but had got entirely beyond his control. In those cases there was no evidence sufficient in law to establish the fact that the driver was exercising any control over his horse, or that the defect in the highway was the sole cause of the injury." . . . .

See, also, Willey *v.* Belfast, 61 Me. 569, where it was held that if a defect in a highway causes such a breaking and derangement of a safe and proper vehicle, that the direct and natural consequence is the frightening of a kind, safe, and well-broken horse beyond the control of a reasonably skilful and careful driver, and the horse while violently running down a steep hill falls, and the plaintiff is thrown out and injured, it is competent for the jury to find the defect to be the sole cause of the accident. See, also, Baldwin *v.* Turnpike Co. 40 Conn. 238. The fall of such a horse, under such circumstances, is not to be reckoned a contributory cause, but a part of the accident, like the fall of the plaintiff from the carriage.

Whether switching the tail over reins is *casus*, see supra, § 106.

In Massachusetts a town has been held not to be liable to A. for damages sustained by him through the running away of B.'s horse, which running away was caused by fright at a defect in a road the town was bound to repair. Marble *v.* Worcester, 4 Gray, 395.

Liability for runaway horse starting outside of road.

§ 984 *a*. Where a horse, taking fright in an adjacent field or road, dashes upon the road and is there injured by striking on a defect, in such case, as the fright originated from circumstances for which the town is not responsible, it has been held not liable for the injury. To attach liability, the horse must enter on the road in a condition fit to travel.[1] It is otherwise, however, as to frights received by a horse from objects against which the town should have guarded.[2]

Unfitness of horse.

§ 985. This brings us to the question of the fitness of horses for travel. We must remember that no horse is perfectly fit for travel; no horse is utterly free from all vices, tricks, or timidities; and to make a town liable only for defects causing damage to a perfect horse would exonerate it in all cases in which a horse is concerned. The true rule is that already in principle indicated,[3] that such viciousness or inadequacy as is among the ordinary incidents of travel is no defence; but that it is a good defence that the horse was, to the plaintiff's knowledge (express or implied), unfit, either from viciousness or other incapacity, for the ordinary strain of a road.[4]

When the plaintiff is injured by jumping out of a carriage in fright.

§ 986. If a defect in a highway which a town is bound to keep in repair causes the horse to fall and the carriage to break, with which a person is travelling thereon with due care, and while the horse is struggling to rise, and every reasonable effort is being made to control it, the traveller, in the exercise of proper care, and to avoid apparently imminent danger from the position into which he has been brought by the defect in the way, leaps from the carriage, and is injured in doing so, the town is liable for the injury.[5]

[1] Young *v.* Phil. 2 Weekly Notes, 369; Jackson *v.* Bellevieu, 30 Wis. 257. See infra, § 991.

[2] Supra, §§ 104–106.

[3] Supra, §§ 73, 100, 104.

[4] See Dennett *v.* Wellington, 15 Me. 27; Bliss *v.* Wilbraham, 8 Allen, 564; Murdoch *v.* Warwick, 4 Gray, 178.

[5] Sears *v.* Dennis, 105 Mass. 310. Gray, J.: "The liability of towns for defects in a highway is not limited to injuries suffered by reason of a traveller, or his horse, or carriage, coming into immediate contact with the defect, but extends to injuries to the horse while under the immediate impulse or impetus received from the defect, or during reasonable efforts to relieve him from the position into which he has been thrown by coming into contact with the defect; or to the traveller by voluntarily leaping from the carriage, in the exercise of ordi-

§ 987. It has been more than once held that where a wagon is broken by a defect in a road the plaintiff is entitled to recover for the injury, provided the accident happened through the insufficiency of the road and without any lack of ordinary care on the part of the plaintiff in the mode of driving and in discovering any imperfection in the vehicle, although it was unsafe and its defects contributed to the accident.[1] The view just stated is virtually accepted in New Hampshire and Illinois,[2] but rejected in Maine,[3] where it is held that the plaintiff cannot in such case recover, though ignorant of the defects. In Massachusetts the tendency now is to regard the traveller as taking upon himself the risk of a defective wagon.[4] But are there any wagons so free from defects that they can escape the consequences of violent shocks? Are not all wagons in this sense more or less defective; and would not the establishment of the rule, that a defective wagon bars recovery, bar recovery in all cases of violent shocks? The true rule is that when, in the ordinary course of things, the wagon was so defective that it was not road-worthy, then the plaintiff, who ought to have acquainted himself with this fact, cannot recover.[5] If, however, it is road-worthy, then the fact that it has defects which the defects of the road make dangerous is no defence.[6]

Latent defectiveness of wagon or harness.

§ 988. As to the general structure of the road it is sufficient to state that, in conformity with the principles heretofore noticed,[7] the parties bound to the maintenance

Road to be constructed on the

nary care and prudence, to avoid apparently imminent danger from being brought into contact with the defect, or from impending consequences resulting therefrom. Stevens *v.* Boxford, 10 Allen, 25; Babson *v.* Rockport, 101 Mass. 93; Tuttle *v.* Holyoke, 6 Gray, 447; Lund *v.* Tyngsborough, 11 Cush. 563." See fully, supra, §§ 93, 94. And see Williams *v.* Leyden, 119 Mass. 237.

[1] Supra, § 99; Baldwin *v.* Turnpike Co. 40 Conn. 238. See Fletcher *v.* Barnet, 43 Vt. 192; Palmer *v.* Andover, 2 Cush. 601. See, also, Hunt *v.* Pownal, 9 Vt. 418; Shepherd *v.* Chelsea, 4 Allen, 113; Fogg *v.* Nahant, 106 Mass. 278; remarks of Redfield, J., in Hodge *v.* Bennington, 43 Vt. 458; Wheeler *v.* Townshend, 42 Vt. 15; Whitcomb *v.* Barre, 37 Vt. 148.

[2] Winship *v.* Enfield, 42 N. H. 197; Lacon *v.* Page, 48 Ill. 499; Aurora *v.* Pulfer, 56 Ill. 270.

[3] Moore *v.* Abbot, 32 Me. 46; Moulton *v.* Sanford, 51 Me. 127.

[4] Murdock *v.* Warwick, 4 Gray, 178; though see Palmer *v.* Andover, 2 Cush. 600.

[5] Supra, § 404; Hammond *v.* Mukwa, 40 Wis. 35.

[6] See supra, § 99.

[7] Supra, §§ 48, 50, 635.

best practicable plan.

of the road, while required to exercise the diligence that would be exercised by good engineers and road-makers under the same circumstances, are not to be held to the adoption of improvements which, though shown to be valuable, are not such as are applied to roads built in the situation and under the conditions of that under investigation.[1] And the opinion of competent engineers and other experts will be a protection to the municipal authorities by whom the road is built.[2] Wherever, however, a road so constructed is patently defective, the liability of the municipal authorities attaches; nor does the capacity of the engineers then continue to be a defence.[3]

"Safety" and "conveniency" questions of law and fact.

§ 989. "Safety and conveniency" of a road are mixed questions of law and fact. The statutes of several states, it has been seen, require the roads to be safe and convenient. What constitutes safety and convenience in each particular case is for the jury under direction of the court.[4]

Burden of proof.

§ 990. As in other cases of collision,[5] the burden is on the plaintiff to prove the defect, and to show that the defect was the cause of the damage sustained by him. Yet it must be remembered that the evidence in both these issues must be generally circumstantial, and may be made up of presumptions.[6]

[1] Hull *v.* Richmond, 2 Wood. & M. 337; Church *v.* Cherryfield, 33 Me. 460; Fitz *v.* Boston, 4 Cush. 365; Howard *v.* N. Bridgewater, 16 Pick. 189; Rochester White Lead Co. *v.* Rochester, 3 N. Y. 463; Conrad *v.* Ithaca, 16 N. Y. 159; Barton *v.* Syracuse, 36 N. Y. 54; Diviney *v.* Elmira, 51 N. Y. 506; Clemence *v.* Auburn, 66 N. Y. 334; Rapho *v.* Moore, 68 Penn. St. 404; Koester *v.* City, 34 Iowa, 41. See, particularly, remarks of Woodbury, J., in Hull *v.* Richmond, as to the relations of the geography of the country and the kind of travel to the perfection required in the road.

[2] Wilson *v.* N. Y. 1 Denio, 595; Waggoner *v.* Jermaine, 7 Hill, 357; 3 Denio, 306; Rochester Lead Co. *v.* Rochester, 3 N. Y. 463; Milwaukee *v.* Davis, 6 Wis. 377. Supra, § 260.

[3] Weightman *v.* Washington, 1 Black, U. S. 39.

[4] Merrill *v.* Hampden, 26 Me. 234; Tripp *v.* Lyman, 87 Me. 250; Lawrence *v.* Mt. Vernon, 35 Me. 100; Savage *v.* Bangor, 40 Me. 176; Winship *v.* Enfield, 42 N. H. 197; Green *v.* Danby, 12 Vt. 338; Rice *v.* Montpelier, 19 Vt. 470; Cassedy *v.* Stockbridge, 21 Vt. 391; Hutchinson *v.* Concord, 41 Vt. 271; Fitz *v.* Boston, 4 Cush. 365; Aldrich *v.* Pelham, 1 Gray, 510; Billings *v.* Worcester, 102 Mass. 329; City *v.* Clapp, 17 How. U. S. 161; Sterling *v.* Thomas, 60 Ill. 264. Supra, § 420.

[5] See supra, § 421.

[6] Libbey *v.* Greenbush, 20 Me. 47;

§ 991. The statutes do not apply to persons not travelling, but suffering damage to their property adjacent to the road.[1] Thus the necessary excavations by a town on a roadside, causing damage to an adjoining house, are not the ground of action, unless negligently done,[2] nor is such damage caused by the lawful laying of a railroad track in the street.[3] The term "traveller" has been held to apply exclusively to persons "travelling" on a road, and to exclude cases where the plaintiff's horse and wagon started without a driver from his inclosure.[4] It has been held, also, the statutes do not apply to children playing in the street;[5] nor to a person idling, and not travelling, on the highway;[6] nor to a person simply making use of the highway to go from one part to another part of his own premises;[7] nor to the sailor of a vessel passing through an open draw, who leaves the vessel, to aid her passage, and mounts on the leaf of the draw.[8] But an elephant properly driven may be a "traveller."[9]

"Travellers" alone are under statutes.

Church *v.* Cherryfield, 33 Me. 460; Lester *v.* Pittsford, 7 Vt. 158; Green *v.* Danby, 12 Vt. 338; Collins *v.* Dorchester, 6 Cush. 396; Billings *v.* Worcester, 102 Mass. 329; City *v.* Clapp, 17 How. U. S. 161. See supra, § 984. As to contributory negligence, the question has been already discussed. Supra, § 423. In Massachusetts the burden is on the plaintiff to prove due care; Dowd *v.* Chicopee, 116 Mass. 93; and that "the injury was caused solely by a defect in the way." Devens, J., Whitford *v.* Southbridge, 119 Mass. 573.

Under the Massachusetts statute, evidence that other persons drove at considerable speed, in other vehicles, over the place alleged to be defective, is not admissible to show either that the plaintiff was not in the exercise of due care, or that the place was not defective; nor is it admissible to prove that a like condition existed on roads in the neighborhood, either for the purpose of showing want of due care on the part of the plaintiff or her driver, in the absence of evidence that either of them was familiar with such condition. Schoonmaker *v.* Wilbraham, 110 Mass. 134.

[1] Stinson *v.* Gardiner, 42 Me. 248. That the question is one of fact, see Cummings *v.* Center Harbor, 57 N. H. 17; Ball *v.* Winchester, 32 N. H. 435; Conway *v.* Jefferson, 46 N. H. 521.

[2] Radcliff *v.* Brooklyn, 4 N. Y. 195.

[3] See Adams *v.* R. R. 11 Barbour, 414.

[4] Richards *v.* Enfield, 13 Gray, 344. See Ward *v.* North Haven, 43 Conn. 148, where it was held that it was not a bar to the plaintiff's recovery that his horses, at the time they started off, were hitched on his lot outside the highway.

[5] Stinson *v.* Gardiner, 42 Me. 248.

[6] Blodgett *v.* Boston, 8 Allen, 237.

[7] Leslie *v.* Lewiston, 62 Me. 468.

[8] McDougall *v.* Salem, 110 Mass. 221.

[9] Gregory *v.* Adams, 14 Gray, 242.

§ 992. *Sidewalks* are to be regarded as highways, and when not required by statute to be kept in repair, are at common law such essential parts of the highway, in all cities, that it is incumbent on the municipal government to keep them in a safe condition.[1] Of defects caused by want of repair, or interference of third parties, or *casus*, the municipality must have notice, or have had the opportunity to take notice.[2]

Sidewalks.

§ 993. Is hitching a horse and leaving him hitched an ordinary incident of travel? This question has received various answers; and is in fact dependent on the degree of risk in the particular place, and the character of the horse.[3] In a thronged thoroughfare no liability can be held to attach for damage to a horse who, escaping when hitched, strikes a defect on the road.[4] But it may be otherwise in remote rural districts, where so to hitch and leave horses is among the ordinary incidents of travel.[5]

Horses hitched and breaking loose.

§ 994. The subject of damages is not within the scope of the present volume. It is enough here to say that to entitle the plaintiff to recover for defects in a highway, he must sustain some damage peculiar to himself. That which he suffers in common with the rest of the community will not be sufficient to sustain a suit.[6] But either diversion of customers,[7] or the necessity of taking a circuitous way,[8] is sufficient damage to sustain a suit.

What damage must be sustained.

[1] Supra, § 982; Bacon *v.* Boston, 3 Cush. 174; Shipley *v.* Fifty Associates, 101 Mass. 251; Stockwell *v.* Fitchburg, 110 Mass. 305; Weare *v.* Fitchburg, 110 Mass. 334; Burt *v.* Boston, 122 Mass. 223; Wallace *v.* New York, 2 Hilt. 440; Clemence *v.* Auburn, 66 N. Y. 334; Bloomington *v.* Bay, 42 Ill. 503; Rockford *v.* Hildebrand, 61 Ill. 156; Galesburg *v.* Higley, 61 Ill. 287; Chicago *v.* Langless, 66 Ill. 362. This duty is not dependent upon the fact that such sidewalks were constructed, or caused to be constructed, by the city. Furnell *v.* St. Paul, 20 Minn. 117.

[2] Supra, § 962–3; Littlefield *v.* Norwich, 40 Conn. 406; Fort Wayne *v.* De Witt, 47 Ind. 391.

[3] See supra, § 838.

[4] See Davis *v.* Dudley, 4 Allen, 557.

[5] Verrill *v.* Minot, 31 Me. 299; Tallahassee *v.* Fortune, 3 Fla. 19.

[6] Winterbottom *v.* Lord Derby, Law Rep. 2 Exch. 316; Willard *v.* Cambridge, 3 Allen, 574; Lansing *v.* Smith, 8 Cow. 146; Fort Plain Bridge Co. *v.* Smith, 30 N. Y. 44; Blanc *v.* Klumpke, 29 Cal. 156.

[7] Wilkes *v.* Hungerford, 2 Bing. N. C. 281.

[8] Wiggins *v.* Boddington, 3 C. & P. 544.

§ 994 *a*. Contributory negligence in this relation has been already noticed.[1] The following additional points may be here adverted to. Contributory negligence of plaintiff.

§ 995. That the plaintiff was at the time acting unlawfully, unless the kind of unlawfulness engaged in was the distinctive immediate cause of his injury, cannot be set up as a defence by those by whom he is negligently injured.[2] Thus that a person is on an unlawful errand does not excuse those by whom, unless for the lawful purpose of arresting him in such errand, he is either intentionally or negligently hurt.[3] Hence a person who is hurt when unlawfully travelling on Sunday is not barred by this fact from recovering from the town for the defect causing the hurt.[4] It is otherwise when the plaintiff was at the time of the accident driving a wagon loaded more heavily than the law permits, and when this heaviness caused, in connection with the defect, the breakage,[5] or when the accident came from his driving at an unlawful speed.[6] When plaintiff was violating law.

§ 996. In the natural order of things, infirm and aged persons, with hearing, sight, and strength more or less abated, must travel on the public roads; and it is such travellers, as well as those in full possession of their faculties, whom the road-makers must keep in view in the repair of the roads. Hence when an infirm traveller, whose blindness or lameness is not such as to make it negligence in him to travel unattended, is injured by a defect, it is no defence that this defect would have been perceived and avoided by a person in full possession of sight and strength. In the ordinary course of events injury would follow from such defects; and hence, on the principles heretofore stated, the road-makers are liable for the injury.[7] No person can leave with impunity any obstacle on a highway that may injure travellers, take them as they come, Roads to be fit for the infirm.

[1] Supra, §§ 400–4, 966–8, 993.

[2] See Smith *v.* Conway, 121 Mass. 216; Tuttle *v.* Lawrence, 119 Mass. 276.

[3] Supra, § 335–345.

[4] Supra, §§ 331, 381 *a*, 406; Dutton *v.* Were, 17 N. H. 34; Augusta R. R. *v.* Renz, 55 Ga. 126; *contra*, Jones *v.* Andover, 10 Allen, 18.

[5] See Howe *v.* Castleton, 25 Vt. 162.

[6] Helaud *v.* Lowell, 3 Allen, 407. See supra, §§ 338; 406.

[7] Supra, § 73, 108, 403, 404–5; Frost *v.* Waltham, 12 Allen, 85; Davenport *v.* Ruckman, 37 N. Y. 568; Cox *v.* Westchester Turnp. Co. 33 Barb. 414; Stewart *v.* Ripon, 38 Wis. 584.

either weak or strong, young or old;[1] and *a fortiori* is this the case when the obstacle is left through the negligence of a person specially charged with the duty of removing such obstacles. At the same time, where a person so infirm as to be unfit to travel alone ventures on the road by himself, he must bear the consequences arising from his striking defects which would only endanger those who in the natural course of events are not expected to travel.[2]

No defence that plaintiff might have taken another road.

§ 997. The town or municipal authorities cannot defend themselves, in permitting obstructions or defects in a road, on the ground that there was another available road which the plaintiff could, if he had chosen, have taken.[3] Nor is the plaintiff precluded from recovering by the bare fact that he was cognizant of the defect, where he could not be taxed in negligence in running against it, or where he had reasonable ground to suppose it was remedied.[4]

"Inevitable accident" as a defence.

§ 998. As has already been seen,[5] no liability attaches for a casualty to a road produced by inevitable accident,[6] if on notice the town does its duty as to repairs; though it is no defence, where the town neglects to repair a road, that the road was rendered useless by the destruction of a bridge with which it connects.[7] How far the fright of horses is *casus* is independently discussed.[8]

Intervening negligence of third party.

§ 999. It has been already seen that the negligence of a third party intervening between the defendant's negligence and the damage breaks the causal connection between the two.[9] This doctrine has been not unfrequently applied to the topic before us. There is no road that has

[1] See supra, § 310–5, 389 *a*, 404.

[2] See Renwick *v.* R. R. 36 N. Y. 133; Davenport *v.* Ruckman, 37 N. Y. 568. Supra, § 403.

[3] State *v.* Fryeburg, 15 Me. 405. Supra, § 66, and cases cited supra, § 403; §§ 335–7; Erie *v.* Schwingle, 22 Penn. St. 384; Lower M. Township *v.* Merkhoffer, 71 Penn. St. 276.

[4] Rice *v.* Des Moines, 40 Iowa, 638. Supra, § 403.

[5] Supra, § 953. As to general doctrine, supra, § 114.

[6] See Holman *v.* Townsend, 13 Metc. 297; Prindle *v.* Fletcher, 39 Vt. 255; Chamberlain *v.* Enfield, 43 N. H. 356. The sinking of stones below the surface, caused by frost, is not such *casus*. Tripp *v.* Lyman, 37 Me. 250; Kimball *v.* Bath, 38 Me. 219.

[7] Com. *v.* Deerfield, 6 Allen, 449.

[8] Supra, § 984.

[9] Supra, § 134–145.

not imperfections; and if a traveller is forced against one of these through the negligence of a third party, it is from the latter, and not from the town, that redress must be sought.[1] Where, however, the negligence of the third party is such as the road-maker ought to provide against as a natural and usual occurrence, then the liability for neglect in repairing is not suspended.[2]

III. INDIVIDUAL LIABILITY OF OFFICERS.

§ 1000. As a general rule, wherever "an individual has sustained an injury by the nonfeasance or misfeasance of an officer who acts or omits to act contrary to his duty, the law affords redress by an action of the case adapted to the injury."[3] This principle has been applied to canal superintendents,[4] to canal contractors,[5] and to commissioners of highways.[6] Such officers, however, are not liable, when the work is done by an independent contractor.[7] The point, in the main, depends upon the general liability of public non-judicial officers; a subject examined under another head.[8]

IV. "PROXIMATE CAUSE."

§ 1001. This topic is fully discussed in prior sections.[9] If a defect in the highway is the sole, true, efficient cause of an accident, it is not necessary that the injury should be actually received upon the precise spot where the defect exists.[10]

[1] Moulton *v.* Sanford, 51 Me. 127; Wellcome *v.* Leeds, 51 Me. 313; Shepherd *v.* Chelsea, 4 Allen, 113; Rowell *v.* Lowell, 7 Gray, 100; Richards *v.* Enfield, 13 Gray, 344; Littlefield *v.* Norwich, 40 Conn. 406.

[2] Danville, &c. Co. *v.* Stewart, 2 Metc. (Ky.) 119; Hunt *v.* Pownal, 9 Vt. 411.

[3] Spencer, C. J., Bartlett *v.* Crozier, 15 Johns. 250. Supra, §§ 285, 291.

[4] Adsit *v.* Brady, 4 Hill, 630.

[5] Robinson *v.* Chamberlain, 34 N. Y. 389.

[6] Hover *v.* Barkhoof, 44 N. Y. 113; Rector *v.* Pierce, 3 N. Y. Sup. Ct. 416.

[7] Supra, § 189; Taylor *v.* Greenhalgh, L. R. 9 Q. B. 487.

[8] Supra, §§ 285, 291.

[9] Supra, §§ 102, ,106 107.

[10] Willey *v.* Belfast, 61 Me. 569; Stark *v.* Lancaster, 57 N. H. 88; and cases cited more fully, §§ 983, 984. And see Hey *v.* Phil. 81 Penn. St. 45, cited supra, § 105, where the court say: "Where, then, was the fault? Was it not to be found in this unguarded declivity? But it is said, the running away of the horse was the proximate cause of the injury, and had it not gone over the bank, it would have gone further with the same result in the end. This, however, does not follow as a

probability necessarily to be conceded, for ordinarily a dead horse does not result from a runaway, and hence had there been proper guards at this place the chances were ten to one that the horse at least would have been saved. Granting, however, that the runaway was the immediate cause of the whole disaster, still the question remains, What produced the runaway? In Pittsburg *v.* Grier, 10 Har. 54, the immediate cause of the sinking of the steamer was the striking of some heavy body floating in the stream; nevertheless, as the *causa causans* was some piles of pig metal which were negligently permitted to lie on the public wharf, thus obliging the boat to occupy a position more dangerous than it would otherwise have occupied, the city was held liable. A like case is that of Scott *v.* Hunter, 10 Wright, 194, in which Pittsburg *v.* Grier is approved."

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