It is well settled that a man is not liable in an action of trespass on the case, for an unintentional consequential injury resulting from a lawful act, where neither negligence nor folly can be imputed to him; and there is no reason for a different rule where the injury is immediate and direct, and the action trespass.

Where a person in lawful self-defence fires a pistol at an assailant, and, missing him, wounds an innocent by-stander, he is not liable for the injury, if guilty of no negligence.

While this is the result of the application of well settled legal principles, it is questionable whether, in view of the too general practice of carrying firearms, and the danger to innocent persons from their use, there should not be some legislation changing the rule of law in such a case, or otherwise protecting the public.

It is not the proper course for a judge to lay down the general principles applicable to a case, and leave the jury to apply them, but it is his duty to inform the jury what the law is as applicable to the facts of the case.

The facts of a case are to be found by the jury, unless admitted, and the judge can only regard them as claimed, for the purpose of applying the law to them contingently, if found; and he cannot properly refuse to charge upon the facts claimed on the ground that in his opinion they are not proved.

Trespass for an assault. Verdict for plaintiff, and motion for a new trial.

Kellogg, for the motion.

H. B. Munson and *Doolittle*, contra.

The opinion of the court was delivered by

Butler, J.—Upon a careful examination of the important questions presented upon this record, I do not see how the omission of the court to charge as requested on the first point, or the charge actually given on the second, can be vindicated, and the verdict sustained.

1. It appears from the evidence offered on the trial that the defendant wounded the plaintiff in two places by two shots fired from a pistol; and from the nature of the weapon, and the other concealed circumstances, the jury were authorized to find, and doubtless did find, that the wounds were inflicted with a design to take the life of the plaintiff. It was incumbent on the defendant to justify or excuse their infliction. He in the first place attempted to justify them, and the obvious attempt to take life which aggravated them, by offering evidence to prove that he was assailed by the plaintiff and others in a manner which indicated a design to take his life, and "that he was in great bodily peril and in danger of losing his life by means of the attack," and that he fired the pistol "to protect his life and his body from extreme bodily injury." If these facts were proved and found true, they fully justified the attempt of the defendant to take the life of the plaintiff as matter of law, and entitled the defendant to a verdict in his favor. And so the court were bound to tell the jury, if properly requested to do so by the defendant.

The motion further shows that the defendant did in substance request the court to charge, that if they found the fact proved as claimed, he would be justified in self-defence in using the pistol as he did—that the rule of law is "that a man may lawfully take the life of another who is unlawfully assailing him, if in imminent peril of losing his life or suffering extreme bodily harm, &c." What a man may lawfully do, he may lawfully attempt to do; and that request embodied in substance, and with sufficient distinctness, a well settled specific rule of law, applicable alike in criminal prosecutions and civil suits, and to the facts of the case as claimed.

The court did not conform to the request. The charge as given informed the jury what "the great principle" of the law of self-defence is, and correctly; but that was not all to which the defendant was entitled. It is not for juries to apply "great principles" to the particular state of facts claimed and found, and thus make the law of the case. When the facts are admitted, or proved and found, it is for the court to say what the law as applicable to them is, and whether or not they furnish a defence to the action, or a justification for the injury, if that be the issue. And so where evidence is offered by either party to prove a certain state of facts, and the claim is made that they are proved, and the court is requested to charge the jury what the law is as applicable to them, and what verdict to render if they find them proved, the court must comply. This is not only the common law rule, but it is carefully and explicitly declared in this State by statute, that "it shall be the duty of the court to decide all questions of law arising in the trial of a cause, and in committing the cause to the jury to direct them to find accordingly." Rev. Stat. tit. 1, sec. 144. Here the rule of law applicable to the facts claimed is as well-settled and specific as any rule of law in the books, and it was the duty of the court to give it to the jury as requested, and direct them if they found the facts as claimed to find a verdict accordingly. And if it were otherwise, and a specific rule settled by authoritative adjudications, in which the great principle had been applied to a similar state of facts, did not exist, it would still have been the duty of the court to apply the principle to the facts, and to tell the jury whether or not they furnished a justification in law to the defendant, for that, in the language of the statute, was "a question of law arising in the case."

The first request of the defendant which we are considering involved the finding of two principal facts, viz., first, whether the plaintiff was one of the assailants, and, second, whether the assault was made with the design to take the life of the defendant or inflict upon him extreme bodily harm. But the jury might find upon the evidence that the plaintiff was one of the assailants, and fail to find the design to take life imputed to him. To meet such a contingency the defendant added to his request, that the court should charge the jury, "that when, from the nature of the attack, there is a reasonable ground to believe that there is a design to destroy his life or commit any felony upon his person, the killing of his assailant will be excusable homicide, though it should afterwards appear that no felony was intended;" but the court did not so charge, because, as the motion states, the court did not consider that the facts of the case required such instructions.

The facts of a case are to be found by the jury unless admitted, and the court can only regard them as claimed for the purpose of applying the law to them contingently if found. When, therefore, the motion states that the court did not think the facts of the case required the instruction claimed, as the material facts were in dispute, it must be intended that the court was of opinion that there was not any such law as claimed, applicable to the facts as claimed.

(*To be continued.*)