

ordinary incidents of human life, and the common law, which embodies the common sense of the nation, proceeds upon common sense assumptions. I do not think it is any answer to tell people who complain of the establishment of sewage works in their neighbourhood that if, and when, the sewage works become a nuisance, in the real and proper sense of that word, such works can be restrained by injunction. Land is certainly more marketable when it is free from works of that character than when such works are established, although the neighbours may have the ordinary rights of citizens to engage in litigation against such works when they become a nuisance."

NEGLIGENCE—CONTRACT BY SERVANT TO DO DANGEROUS WORK ON THIRD PERSON'S PREMISES—CONTRACTOR—MAXIM "VOLENTI NON FIT INJURIA."

The case of *Membery v. Great Western Railway Co.*, 14 App.Cas. 179, was an action brought by the plaintiff to recover damages for injuries sustained by him under the following circumstances: The defendant company had agreed with the master of the plaintiff that the latter should shunt the defendants' trucks upon their line, and should supply horses and men for that purpose, the defendants to provide boys to assist in the shunting when they had boys, and when they had not the shunting was to be done without boys. For several years the plaintiff as a servant of the contractor shunted trucks on the defendants' track, sometimes with, and sometimes without, boys. The operation of shunting was, as the defendant knew, dangerous to any man performing it without assistance. The plaintiff on one occasion asked the defendant's foreman for a boy, but as the company could not provide one, proceeded to shunt trucks, and without any negligence on his part was injured by a truck running over him. At the trial a too sympathetic jury gave the plaintiff a verdict for £50. The Divisional Court (Mathew and A. L. Smith, JJ.) refused to set aside the verdict, because they were of opinion that there was evidence of negligence on the defendants' part, and that under *Thomas v. Quartermaine*, 18 Q.B.D. 685, and *Yarmouth v. France*, 19 Q.B.D. 647, it was a question for the jury whether the plaintiff was *volens* within the meaning of the maxim *volenti non fit injuria*, and that there was evidence that the plaintiff did not act voluntarily. But on appeal to the Court of Appeal the verdict was set aside, and the action dismissed, on the ground that even if there was evidence of negligence on the part of the defendants, the plaintiff had acted voluntarily and with full knowledge of the danger he ran. This decision the House of Lords now sustains, both on the ground last mentioned, and also on the ground that there was no evidence of any negligence or breach of duty on the part of the defendants towards the plaintiff, and therefore he had no cause of action. On the much discussed question of the applicability of the maxim *volenti non fit injuria*, Lord Bramwell offers some pithy observations, holding in effect that whenever a man is not physically constrained, and he can at his option do a thing or not, and he does it, the maxim applies, and evidently regards the two cases above mentioned as establishing a "novel doctrine." Lord Herschell, however, is careful not to commit himself to any opinion as to the correctness of those decisions. The unsubstantial character of the plaintiff's case is thus neatly put by Lord Halsbury: